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UNPROTECTED PROFANITY:

THE EROSION OF AN EMPLOYEE'S RIGHT TO CONVEY GRIEVANCES

LAUREN P. MCDERMOTT¹

“It is the policy of the United States that-- sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining.”²

On June 5, 1935, with Congress' enactment of the National Labor Relations Act³ (“NLRA” or “Act”), came great expectations of employee rights and the hope of equality at the bargaining table.⁴ The NLRA was hailed the “Magna Carta of American Labor,”⁵ guaranteeing employees the right to collectively organize, bargain, and strike without fear of repercussions from employers.⁶ As Senator Robert Wagner stated on the Senate floor, “caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise [the employee] can attain freedom and dignity only by cooperation with [other employees].”⁷ The enactment of

¹ A special thank you to Professor Rodger Hartley for his guidance and contribution.

² The National Labor Relations Act, 29 U.S.C. § 171 (2006).

³ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

⁴ *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753 (1985)(stating that “the NLRA’s declared purpose is to remedy ‘[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.’”(quoting 29 U.S.C. § 151); See 1 James A. Gross, *The Making of the National Labor Relations Board: A Study of Economics, Politics, and the Law*, 144 (1974)(stating that the Act created substantive rights that were thought to be able to produce economic and social progress).

⁵ See Peter E. Millspaugh, *America’s Industrial Relations Experiment: Legal Scholarship Accesses the Wagner Act*, 32 St. Louis. U. L.J. 673, 678 fn 25 (1988)

⁶ 29 U.S.C. § 157; See Millspaugh, *supra* note 5, (stating that an employees’ right “[to enhance economic recovery, industrial relations peace, and industrial democracy” are guaranteed through economic weapons as well as “by a broad statutory prohibition against employer interference, as well as specific prohibitions against enumerated employer anti-union practices, such as discriminatory discharges, company union sponsorship, and refusal to bargain.”)

⁷ 79 Cong. Rec. H7565 (1935)(remarks of Senator Wagner); see also Millspaugh, *supra* note 5 at 679 (noting that proponents of the Wagner Act policy viewed industrial

the Act represented the aspiration to use law in a way that would advance economic and social progress.⁸ The Act was considered crucial for equal opportunity and a balance of power between employers and employees.⁹

However, since the Act was first implemented, it has failed to live up to the expectations for labor rights in America.¹⁰ Rather than the law being a vehicle for social progress and greater equality between labor and management, the law has been used as a mechanism for the slow erosion of its own initial principles: to insure industrial peace through equality in collective bargaining.¹¹

unions as a vehicle to enhance the status of individual workers rather than a catalyst for reorganizing the economy or displacing management.”).

⁸ See Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 Geo. Wash. L. Rev. 199, 218 (1960) (describing Senator Wagner’s envision of the legislation as an “affirmative vehicle” for social progress); see also Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 Lab. Law. 11, 12-13 (1987) (“[T]he Department of Labor has taken a strong position in support of labor-management cooperation as an important prerequisite to America’s return to preeminence in the world marketplace.” Secretary of Labor William E. Brock has said that our country must develop a ‘solid atmosphere of cooperation, based on the concept of worker dignity and equality and grounded in a mutual respect for collective bargaining, [which] enables both unions and management to maintain individual integrity while working for the good of all.’ (quoting the address by W. Brock, Sixteenth Constitutional Convention, AFL-CIO, Anaheim, Calif. (Oct. 30, 1985)).

⁹ 29 U.S.C. § 151; see also John E. Higgins, et al, *The Developing Labor Law*, 28 (5th ed. 2006); James A Gross, *The Broken Promises of the National Labor Relations Act and The Occupational Safety Act and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 Chi.-Kent L. Rev. 351, 352 (1998) (“[F]or Wagner, therefore, the right to organize and bargain collectively was ‘at the bottom of social justice for the worker.’ The Act that bears his name was not neutral as between individual and collective bargaining; it expressly and intentionally encouraged collective bargaining. The Act promised a protected opportunity for workers to challenge the unilateral power of their employers and, through power-sharing, to participate in making the decisions that affect their workplace lives.” (quoting James A Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 Indus. & Lab. Rel. Rev. 7, 10 (1985)).

¹⁰ See Steven Pearlstein, *Workers’ Rights Are Being Rolled Back*, Washington Post, February 24, 2004 at E01 (“Over the years, [the right to form unions and bargain collectively] has been whittled away by legislation, poked with holes by appeals courts and reduced to irrelevancy by a well meaning bureaucracy that has let itself be intimidated by political and legal thuggery”); See also Bruce A. Miller, *Workers’ Free Choice – An Unrealized Promise*, 54 Wayne L. Rev. 869, 871 (2008); Fleming, *supra* note 3 (arguing that the “Act has been twisted into a vehicle to thwart unionization through delay and intimidation.”); See also Gross, *supra* note 7 at 354-55 (arguing that “labor never came close to achieving the system of industrial democracy envisioned by Senator Wagner and the law that bears his name. The national labor policy toward unionism and collective bargaining for most of the last thirty years has shifted from encouragement and support to indifference or hostility.”).

¹¹ See David Brody, *New Strategies, How the Wagner Act became a Management Tool*, New Labor Forum (Spring 2004)(arguing that “the law serves today as a bulwark

The unique culture of industrial life and the high-stakes game of collective bargaining require a distinct set of laws to govern the relationships between employers and employees and ensure equality at the bargaining table.¹² In *Bettcher Manufacturing Corporations*, 76 N.L.R.B. 526 (1948), the National Labor Relations Board (“NLRB” or “Board”), first recognized that employees must be granted significant latitude with regard to their freedom to express grievances, including statements to employers that may be offensive or unflattering, in order preserve the bargaining process and employee participation in negotiations.¹³ For the thirty years immediately following *Bettcher Manufacturing*, nearly all employee speech was protected if it was said while engaging in concerted activity,¹⁴ had a fair nexus to the collective bargaining process, and did not

of the ‘union-free environment’ that describes nine-tenths of our private sector economy”); *see also* Gross, *supra* note 7 at 355 (claiming that since 1970, the decisions of the NLRB “have protected management from union-imposed limits on its freedom to manage and strengthened the managerial authority of employers who already had great power over their employees.”).

¹² *CKS Tool & Eng’g, Inc.*, 332 N.L.R.B. 1578, 1586 (1962)(stating that in the context of labor negotiations, however, employees are generally entitled to use ‘accusatory language’ that is ‘stinging and harsh.’; *Am. Tel. Co. v. N.L.R.B.*, 521 F.2d 1159, 1161 (2nd Cir. 1975)(finding that “a certain amount of salty language and defiance will be tolerated in bargaining sessions with respect to grievances, in recognition . . . ‘that passions run high in labor disputes and that epithets and accusations are common place’”)(quoting *Crown Central Petroleum Corp. v. N.L.R.B.*, 430 F.2d 724, 731 (5th Cir. 1967); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)(recognizing that during labor disputes both the employers and employees speak candidly about their respective positions); *Piper Realty Co.*, 313 N.L.R.B. 1289 (1994)(explaining the unique balance courts seek to achieve between employees rights and the rights of employers to maintain respect and order); *Consol. Diesel Co. v. N.L.R.B.*, 263 F.3d 345 (4th Cir. 2001)(stating “[there] would be nothing left of [the Act’s] rights if every time employees exercised them in a way that was somehow offensive to someone” they could be discharged).

¹³ *Bettcher Manufacturing*, 76 N.L.R.B. 526, 527 (1948).

¹⁴ *Myers Industries*, 268 N.L.R.B. 493, 497 (1984). In order for employee activity to be concerted it must be engaged in with or with the authority of other employees, not by and on behalf of the employee himself. *Id.* Concerted activity includes “circumstances in which individual employees seek to initiate or to induce or to prepare for group action, and activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.” *Holling Press Inc.*, 343 N.L.R.B. 301, 302 (2004)(dismissing the complaint because the charging party’s actions were “individual in nature”). Employees do not have to accept the individual’s call for group action before the invitation itself is considered concerted. *Cibao Meat Products*, 338 N.L.R.B. 934, 934 (2003); *Accord Whittaker Corp.*, 289 N.L.R.B. 933, 934 (1988); *El Gran Combo*, 284 N.L.R.B. 1115, 1117 (1987). “[C]oncertedness . . . can be established even though the individual [speaking] was not ‘specifically authorized’ . . . to act as a group spokesperson for group complaints.” *Herbert F. Darling, Inc.*, 287 N.L.R.B. 1356, 1360

escalate to acts of physical violence.¹⁵ Speech might be offensive, even profane, but it was still protected by the NLRA¹⁶ and employees could not lawfully be disciplined for it.¹⁷

In 1979, there was a significant shift in the scope of legal protection afforded to offensive employee speech.¹⁸ In *Atlantic Steel Company*, the NLRB drew a distinction between the tests used for determining when an employee's remarks are protected based on the type of concerted activity the employee is engaged in when the comments are made.¹⁹ A line was drawn between employees²⁰ engaged in union activities such as grievance handling, bargaining, or other union business, and general concerted activities outside the scope of union business.²¹ Employee speech said while engaged in, or having a close nexus to concerted union activity, remained under the highly-protective umbrella of the *Bettcher Manufacturing* standard.²² However, an employee engaging in general concerted activity now forfeited his or her rights under the Act if the employee's speech failed the new balancing test the NLRB articulated in *Atlantic Steel*.²³ Following the decision in *Atlantic Steel*, the implementation of a balancing test has resulted in an inconsistent application of the law, yielding little predictive value.²⁴ More importantly,

(1988). Concerted activity includes concerns that are a "logical outgrowth" of group concerns. *Salisbury Hotel*, 283 N.L.R.B. 685, 687 (1987); *Accord Compuware Corporation*, 320 N.L.R.B. 101, 103 (1995).

¹⁵ See discussion *infra* notes 45-55 and accompanying text.

¹⁶ See *Thor Power Tool*, 148 N.L.R.B. 1379, 1380 (1964), *enfd.* 351 F.2d 584 (7th Cir. 1965)(finding an employee's characterization of his superintendent as a "horse's ass," immediately after a contentious grievance meeting, was part of the *res gestate* of the meeting and was therefore protected under the Act).

¹⁷ *Id.*

¹⁸ *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979)(creating a new test for determining when employee speech is protected).

¹⁹ *Id.*

²⁰ *Marico Enterprises, Inc.*, 283 N.L.R.B. 726, 731 (1987)(recognizing the protective standard applies to either shop stewards or others who are both union officials and employees of the company engaged in union activities).

²¹ *Id.*

²² *Id.*; see also *Hawaiian Hauling Services*, 219 N.L.R.B. 765, 765 (1975)(articulating the standard "governing employer conduct when dealing with employees during collective bargaining").

²³ *Atlantic Steel*, 245 N.L.R.B. at 816 (stating "[t]he decision as to whether the employee has crossed the line depends on several factors: (1) the place of discussion; (2) the subject matter of discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.").

²⁴ *Cf. Waste Mgmt. of Ariz.*, 345 N.L.R.B. 1339, 1340, 1353-54 (2005)(finding no protection under the Act, even when the discussion was about unfair wage alterations, because the employee engaged in an unprovoked tirade, used repeated profanity in front of witnesses, would not comply with the employer's request to move the

the courts seem increasingly less apt to protect speech, perceived as offensive by the employer, even in the privacy of an office, away from the production floor, or when provoked by an employer's own unfair labor practice.²⁵

Recently, in *Media General Operations, Inc. v. N.L.R.B.*, 560 F.3d 181 (4th Cir. 2009), the Fourth Circuit blurred the line between the *Bettcher* and *Atlantic Steel* tests, bringing the *Atlantic Steel* impatience with profanity into a true *Bettcher* context.²⁶ Applying the *Atlantic Steel* balancing test, the court overturned the NLRB's decision, to protect employee speech, by concluding that an employer did not violate the NLRA²⁷ when it discharged an employee who, while engaged in concerted activity related to collective bargaining, referred to the Vice President of the Company, as a "stupid fucking Moron."²⁸ By rejecting the NLRB's decision, the court chose not to give the Board's decision the broad deference normally afforded to such determinations and improperly applied the *Atlantic Steel* balancing test.²⁹

discussion into an office, and made threats toward a supervisor); *Daimler-Chrysler Corp.*, 344 N.L.R.B. 1324 1328-30 (2005)(finding no protection, though the discussion concerned scheduling a grievance meeting, where cursed repeatedly calling his supervisor an "asshole" in front of fellow employee's and approached his supervisor in an intimidating manner); *N. Am. Refractories Co.*, 331 N.L.R.B. 1640, 1642-43 (2000)(finding no protection even though an employee was engaged in concerted activity when he called his supervisor a "stupid mother fucker" in front of ten other employees) with *Severance Tool Indus., Inc.*, 301 N.L.R.B. 1166, 1170(1991)(holding that rude, vulgar, and disruptive language was protected when the remarks were made in response to threats against the union); *Alco, Inc.*, 352 N.L.R.B. 1222, 2008 WL 4056272 *1226 (N.L.R.B. Aug. 29, 2008)(concluding that an employee was protected by the Act when he referred to his supervisor as a "egotistical fucker" because it was a single outburst).

²⁵ See discussion *infra* notes 127-28 and accompanying text.

²⁶ See discussion *infra* note 117 and accompanying text.

²⁷ *Media Gen. Operations, Inc. v. N.L.R.B.*, 560 F.3d 181, 189 (4th Cir. 2009).

²⁸ *Id.* (King J., dissenting).

²⁹ See *N.L.R.B. v. Truck Drivers Union*, 353 U.S. 87, 96 (1957)(noting "[t]he function of striking [a] balance [between the conflicting interests of employers and employees] to effectuate national labor policy is often a difficult and delicate responsibility which Congress committed primarily to the [Board], subject to limited judicial review."); See, e.g., *Auciello Iron Works v. N.L.R.B.*, 517 U.S. 781, 787-88 (1996)(concluding that reviewing courts must give "considerable deference" to the Board "by virtue of its charge to develop national labor policy"); *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980)(observing that "we accord great respect to the expertise of the Board when its conclusions are . . . consistent with the Act"); *Smithfield Packing Co. v. N.L.R.B.*, 510 F.3d 507, 515 (4th Cir. 2007)(finding an obligation to defer to Board decisions "where it has chosen 'between two fairly conflicting views, even [if we] would justifiably have made a different choice had the

This Note will examine the potential impact of the Fourth Circuit's decision in *Media General*. Part I of this Note will first analyze the NLRB's decision in *Bettcher Manufacturing*. Specifically focusing on the purposefully protective standard adopted in that case for evaluating whether the Act safeguards an employee's use of accusatory language, while the employee is engaged in concerted activities related to collective bargaining. Part I will continue by evaluating the cases decided during thirty years between *Bettcher Manufacturing* and *Atlantic Steel*. These cases will demonstrate that the NLRB and the courts afforded employees considerable latitude with regard to their use of profanity during the collective bargaining or grievance handling process. Next, Part I will examine *Atlantic Steel* and illuminate how the decision drew a distinction between when the highly-protective *Bettcher* test is applied versus the newly articulated balancing test, based on the type of concerted activity. This distinction provides the opportunity for the NLRB and the courts to begin finding employee speech unprotected. Part I will conclude with a study of how the balancing test has been applied in the thirty years following the *Atlantic Steel* decision, demonstrating the court's increasing unwillingness to protect profanity. Part II of this Note will show how the *Media General* case constitutes a blurring of the line drawn in *Atlantic Steel*, by applying the balancing test to profanity said while engaged in concerted activity, having a close nexus to collective bargaining. Finally, Part III of this Note concludes that the Fourth Circuit's application of the *Atlantic Steel* balancing test to a *Bettcher*-type case sets a worrisome precedent that threatens to undermine the fundamental principles of the NLRA. The Note ultimately argues that the court's misuse of the *Atlantic Steel* balancing test in a true *Bettcher* context will, if widely adopted, lead to a diminution in the protection afforded to employee speech said during collective bargaining. This has the potential to undermine the bargaining process by escalating the power inequality between employers and employees during bargaining and concomitantly depriving bargaining unit employees the zealous representation the Act contemplates.

I. THE RIGHTS OF EMPLOYEES FREELY TO EXPRESS GRIEVANCES

A. Employee Rights under the National Labor Relations Act

The NLRA sets standards to ensure that employees who participate in collective action in the workplace do not suffer unwarranted

matter been before [us] de novo.”)(quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)).

discrimination.³⁰ At a minimum, employers may not interfere with, or retaliate against, an employee engaged in concerted activity protected by Section 7 of the Act.³¹ The Act provides a process for enforcement.³²

Section 7 of the NLRA guarantees employees the right to self-organize and protects employees engaged in activities in the furtherance of collective bargaining.³³ Section 8 of the NLRA describes certain proscribed employer conduct, defining it as an unfair labor practice, and provides for judicial enforcement and remedy.³⁴ Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer to “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”³⁵ Section 8(a)(3) of the Act states that it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or

³⁰ The National Labor Relations Act, 29 U.S.C. § 151 (recognizing that “[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”)

³¹ 29 U.S.C. § 158. (Stating that “[i]t shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.”

³² *Id.*; see Millsbaugh, *supra* note 5 at 678-79 (describing the National Labor Relations Board “as the permanent central administrative agency for implementing the terms and policies of the Act.”)

³³ 29 U.S.C. § 157. (Stating “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).”)

³⁴ See generally 29 U.S.C. § 160(e)&(f) (according the Board exclusive jurisdiction over unfair labor practices, and setting forth the procedure of the NLRB, including the review and enforcement of Board orders).

³⁵ 29 U.S.C. § 158(a)(1)(2006).

any term or condition of employment to encourage or discourage membership in any labor organization.”³⁶

B. The Establishment of an Open Exchange between Employers and Employees

In the years following the enactment of the NLRA, the NLRB was faced with the challenge of interpreting the broad language of the Act³⁷ in order to create laws that balanced the legitimate interests of both employers and employees, to facilitate employee organization and collective bargaining.³⁸

In 1948, the NLRB issued a seminal decision protecting an open exchange of views between employers and employees while participating in the collective bargaining process.³⁹ In *Bettcher Manufacturing* the NLRB affirmed the Trial Examiner’s finding that a Company’s discharge of an employee, based on remarks made at the bargaining table, was unlawful and in violation of Section 8(a)(3) and (1) of the Act.⁴⁰

In this case, a group of employees organized a grievance committee in order to help lobby for an increase in wages.⁴¹ At a bargaining conference, the president of the Company offered to increase wages by seven-cents per hour, claiming that the Company could not offer more because of financial trouble.⁴² In response to this offer, one employee at the bargaining session publicly accused the president of lying about company finances.⁴³

³⁶ 29 U.S.C § 158(a)(3).

³⁷ See Julius G. Getman, *The National Labor Relations Act: What Went Wrong: Can We Fix It?* 45 B.C. LAW REV. 125, 126 (2003)(Stating that shortly after the enactment of the NLRA it “became obvious that the Board was performing the function of an adjudicatory body—applying or interpreting general language, developing doctrine, and finding facts”).

³⁸ See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B 615, 619-20 (1962)(balancing the employers’ interest in maintaining order and avoiding hazards with the employees’ interest in distributing written literature finding that employer rules that prohibit distribution of literature in working areas are valid while those that prohibit oral solicitation during non-work time are invalid); *Supreme Optical Co. Inc.*, 235 N.L.R.B. 1432, 1433, fn. 9 (1978)(noting “a balancing of the employee interest in protecting each other against the employer’s interest in efficiently operating his business is required”); See also Calvin M. Sharpe, “*By Any Means Necessary*”-- *Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 Berkley J. Em. & Lab. L. 203, 253 (1999)(stating that statutory rights “operated on a delicate balance between legitimate employer concerns and statutory protection”).

³⁹ *Bettcher Manufacturing Corp.*, 76 N.L.R.B. 526, 527 (1948).

⁴⁰ *Id.* at 526.

⁴¹ *Id.* at 532.

⁴² *Id.* The employees held their meetings at a tavern, there is evidence that they were drinking and acting in a disorderly fashion. *Id.*

⁴³ *Id.* at 533. After the employee meeting, the petitioner and the President met again where the President scolded the petitioner for his remarks after which the respondent

Although the trial court was unsure of the exact language used by the petitioner, the trial examiner found that the petitioner “stated in substance that he did not believe that the respondent was losing money as [the President] asserted, because [he] had a habit of taking expensive vacation trips.”⁴⁴ A week later the petitioner was called into the President’s office and discharged for “calling him a ‘crook and a liar.’”⁴⁵ The discharged employee subsequently filed an unfair labor practice charge, arguing his remarks were made while he was engaged in a concerted activity related to collective bargaining and, therefore, was discharged in violation of Section 8 of the NLRA.⁴⁶

The Board held that the Company violated Section 8(a)(3) of the Act by discouraging membership in the grievance committee,⁴⁷ along with Section 8(a)(1) by interfering, restraining, or coercing an employee in the exercise of his Section 7 rights.⁴⁸ The Board referenced the unique culture of industrial life,⁴⁹ reasoning that for the process of collective bargaining to be successful, a candid exchange between employers and employees is required.⁵⁰ In its decision the NLRB stated, “[t]he negotiators must be free not only to put forth demands and counter-demands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question.”⁵¹ The Board, however, clarified that these broad protections do not give an employee ultimate freedom to say or do anything while engaged in the bargaining process without fear of repercussions.⁵² Specifically, the Board drew a distinction between employees engaged in concerted activity who spontaneously exceed the bounds of lawful conduct and those flagrant cases in which the misconduct is so violent or of such

stood by his previous comments stating “that books could be manipulated to show loss.”

⁴⁴ *Id.*

⁴⁵ *Id.* (testifying that “[the petitioner’s] employment was terminated purely and simply because he intimated that I was a liar and that I manipulated my books and for no other reason.”).

⁴⁶ *Id.* at 530.

⁴⁷ *Id.* at 528.

⁴⁸ *Id.*

⁴⁹ *Id.* at 527.

⁵⁰ *Id.* (stating “a frank, and not always complimentary, exchange of views must be expected and permitted . . . if collective bargaining is to be natural rather than stilted.”); See also Alexander R. Heron, “Collective Bargaining in Action: An Employer’s View,” Bureau of National Affairs Inc., *Collective Bargaining Negotiations and Contracts*, 10:101 (referring to the process of negotiation as a way to establish employer-employee relationships).

⁵¹ *Id.* at 537.

⁵² *Id.* at 527.

serious nature as to render the employee unfit for further service.⁵³

There were two underlying policy rationales that led the Board to its decision in *Bettcher Manufacturing*. First, if an employer were free to discharge employees whenever they found a comment or action to be offensive, employers would have a disproportional influence in the bargaining process.⁵⁴ Second, there is the potential for the bargaining process as a whole to breakdown because employees would fear that, if they get directly involved in negotiations, they might be terminated because of what they say during the bargaining process.⁵⁵ This decision was a turning point for employee rights in the collective bargaining process.⁵⁶ *Bettcher Manufacturing* in essence, prevented employers from using the threat of termination for an employee's use of accusatory language as a mechanism to thwart the collective bargaining process.⁵⁷ Only "flagrant cases," in which the misconduct is "so violent and of such a serious nature as to render the employee unfit for further service,"⁵⁸ fall outside *Bettcher Manufacturing's* broad protections.

C. The Thirty-Year Protection of Profanity

After *Bettcher Manufacturing* the applicability of NLRA protections was determined almost exclusively by inquiring into whether the employee's questionable conduct took place in the context of concerted activity related to collective bargaining.⁵⁹ If employees were engaged in such concerted activity, they were protected by the Act as long as their conduct did not reach the violent, flagrant nature articulated in *Bettcher Manufacturing*.⁶⁰

⁵³ *Id.* at 527 (quoting *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815 (C. C. A. 7 1946)); see *Gross*, *supra* note 7 at 355 (stating that "[t]he Act promised a protected opportunity for workers to challenge the unilateral power of their employers and, through power-sharing, to participate in making the decisions that affect their workplace lives.").

⁵⁴ *Id.* at 527 (finding that employees would be left with no equivalent "method of retaliation").

⁵⁵ *Id.*

⁵⁶ See discussion *infra* notes 69 & 70 and accompanying text.

⁵⁷ *Id.*

⁵⁸ *Bettcher Mfg.*, 76 N.L.R.B. at 527.

⁵⁹ See *Thor Power Tool Co.*, 148 N.L.R.B. at 1380, *enfd.* 351 F.2d 584 (7th Cir. 1965) (finding that a union committeeman was protected by the Act when he called the plant superintendent a "horses's ass" during the discussion of an employee's grievance, because the activity was "part of the *res gestae* of the grievance discussion"); *but see Calmos Combining Co.*, 184 N.L.R.B. 914 (1970) (holding that a shop steward who shouted "I don't give a damn what you say, ill shout all I want to" after a grievance discussion had been completed, was not protected because his "continued intransigence [sic] was not a part of the *res gestae* of the grievance discussion") (citing *Thor*, *supra*).

⁶⁰ See *Allied Aviation Fueling of Dallas*, 347 N.L.R.B. 248, 253 (2006) (stating that "for an employee to forfeit the protection of the Act while processing a grievance, 'the

The NLRB and the courts seldom found the disputed conduct was so “flagrant.”⁶¹

The NLRB articulated the distinction between actual concerted activity and the mere assertion of protected conduct.⁶² *Bettcher*-type protection requires a close nexus between the employee’s unflattering conduct and union activities, such as the bargaining and grievance handling process.⁶³ In *Golden Nugget, Inc.*, the NLRB rejected the notion that the simple “assertion of protected activity”⁶⁴ guarantees an employee protection.⁶⁵ There, the NLRB found that an employee was lawfully discharged after four incidents of “flagrant insubordination.”⁶⁶ The employee argued that he was discharged based on his activity in the union, claiming it stemmed from a letter he posted attacking new work rules,⁶⁷ and referring to the director as being a “bullshitter and treacherous.”⁶⁸ The NLRB reasoned that in order to preserve discipline and order in the workplace, employee protection must be based on more than “scant evidence and repeated inference[s]” as to a connection with concerted activity related to collective bargaining or grievance handling.⁶⁹

Despite the evidentiary burden employees must overcome, once

employee's behavior must be so violent, or of such an obnoxious character, as to render him wholly unfit for further service.”) (quoting Clara Barton Terrace Convalescent Center, 225 N.L.R.B. 1020, 1034 (1976)).

⁶¹ See *Am. Tel. Co.*, 211 N.L.R.B. 782, 783 (1974) (stating “we have long recognized that the disagreements which arise in the collective-bargaining setting sometimes tend to provoke commentary which may be less than mannerly, and that the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases.”); see also *S. Bell Tel. Co.*, 260 N.L.R.B. 237, 240 (1982) (recognizing that employees who have been elected or selected by the union to represent the resolution of grievances are protected for “conduct, attitudes, and statements which might not otherwise be protected” unless so flagrant as to interfere with an employer’s ability to maintain order).

⁶² See *Golden Nugget, Inc.*, 215 N.L.R.B. 50, 53 (1974) (finding that extended organizing activities by an employee does not shield him from all discharge).

⁶³ See *Marico Enterprises*, 283 N.L.R.B. at 731-32.

⁶⁴ *Golden Nugget, Inc.*, 215 N.L.R.B. at 52.

⁶⁵ *Id.* at 52. (stating that just because an employee is pro-union does not automatically mean their discharge is unlawfully discriminatory).

⁶⁶ *Id.* at 51 (including refusing to properly deal cards, and not completing what was required of him as a “stick man” on a dice table).

⁶⁷ *Id.*

⁶⁸ *Id.* However, it is undisputed that the President of the Company was unaware of the letter at the time of the employee’s discharge. *Id.*

⁶⁹ *Id.* at 53 (quoting *N.L.R.B. v. Blue Bell, Inc.*, 219 F.2d 796, 798 (C.A. 5, 1955)); see also *N.L.R.B. v. Fibers Int’l Corp.*, 439 F. 2d 1311 (1971), denying enforcement in part 181 N.L.R.B. 731.

employees were successful in demonstrating that they were engaged in concerted activity closely related to collective bargaining, a court applying *Bettcher Manufacturing* invariably found any accusatory or offensive statements not to be “flagrant” and, thus, protected.⁷⁰ For example, in *Ryder Truck Lines Inc.*, the NLRB stated “while employees are engaged in collective bargaining, including the presentation of grievances, they are essentially insulated from discipline for statements made to management representatives which, if made in other contexts, would constitute insubordination.”⁷¹ The Board’s continued to stress that this highly-protective standard is necessary to preserve an equal balance of power during the entire collective bargaining process, even in informal grievance resolutions.⁷²

D. Atlantic Steel Co.: A Line is Drawn

After thirty years of a unitary, highly-protective rule, the NLRB drew a distinction between the protection afforded to employee speech based on the context of the employee’s concerted activity.⁷³ In *Atlantic Steel* the Board distinguished between two types of concerted activity: (1) offensive employee speech said during or having a close nexus to union activity and (2) general concerted activity outside the realm of union business.⁷⁴ This distinction narrowed the protection afforded to employee speech not closely related to the bargaining or grievance handling process. Specifically, the Board articulated a new balancing test⁷⁵ for determining when employee speech – not closely related to bargaining or grievance

⁷⁰ See *Hawaiian Hauling Service*, 219 N.L.R.B. at 766 (stating that the standard set forth in *Bettcher Manufacturing* has “since been uniformly followed by the Board.”).

⁷¹ *Ryder Truck Lines, Inc.*, 239 N.L.R.B. 1009, 1011 (1978).

⁷² *Id.* (emphasizing the importance of extending protection in informal grievance settings, stating “[u]nless employees are assured that they will be treated as equals when engaged in the informal resolution stage and that they will be free from discipline for freely speaking their minds, they will be discouraged from seeking informal resolutions”); see *Crown Cent. Petroleum Corp.*, 177 N.L.R.B. at 323, fn 6 (1976) (enfd, 430 F.2d 724 (1970)) (holding “[t]he relationship at a grievance meeting is not a “master-servant” relationship but a relationship between company advocates on one side and union advocates on the other side, engaged as equal opposing parties in litigation. To permit an employer to exercise the power of discharge, where the union has no parallel method of retaliation, solely on the basis that a steward in the employer’s view is not telling the truth, would destroy that essential relationship.”).

⁷³ See *Sam’s Club, A Division of Wal-Mart Stores, Inc.*, 349 N.L.R.B. 1007, 1009 (2007) (distinguishing the protective standard used when employee remarks are made during or immediately preceding a grievance meeting, from that used when comments are not directly related to the grievance itself).

⁷⁴ *Id.*

⁷⁵ *Atlantic Steel*, 245 N.L.R.B. at 816.

handling – is so egregious that it no longer is protected by the NLRA.⁷⁶

In *Atlantic Steel* an employee was discharged for “unwarranted insubordination.”⁷⁷ While on the production floor during normal business hours, the employee asked his supervisor about the assignment of overtime hours to a probationary employee.⁷⁸ The supervisor answered the employee’s question.⁷⁹ While the supervisor was walking away, the employee referred to the supervisor as a “lying son of a bitch”⁸⁰ to a fellow employee.⁸¹ Overhearing this statement, the supervisor called the employee into his office and suspended him pending discharge.⁸² After the employee was discharged, he filed an unfair labor practice charge with the Board, and the Regional director issued a complaint.⁸³

In its decision, the NLRB agreed with the Administrative Law Judge’s (“ALJ”)⁸⁴ finding that the employee’s comments were made in relationship to overtime hours - a condition of employment – and, as such, constituted general concerted activity.⁸⁵ Although the Board conceded that the subject matter of discussion could be sufficient to establish the employee was engaged in concerted activity,⁸⁶ it found that the place in which the comments were made were particularly disruptive to the workplace.⁸⁷ Specifically, the Board held that employee comments made on the production floor⁸⁸ would not be per se protected as would be an impulsive outburst during the heat of a grievance proceeding or contract negotiations.⁸⁹ The NLRB went on to caution, “even an employee who is

⁷⁶ See *Marco Enterprises*, 283 N.L.R.B. at 731-32.

⁷⁷ *Atlantic Steel*, 245 N.L.R.B. at 814.

⁷⁸ *Id.* at 818. The employee was concerned that a probationary employee was given overtime hours before he was, even though he had seniority status. *Id.* at 814.

⁷⁹ *Id.* at 818.

⁸⁰ *Id.* at 814. There is a question about whether the employee called the supervisor a “lying son of a bitch” or a “lying mother-fucker”. *Id.*

⁸¹ *Id.*

⁸² *Id.* The employee argued that the supervisor was consistently harassing him for passing out information about benefits and taking too much time in the restroom. *Id.*

⁸³ *Id.* at 818.

⁸⁴ After an unfair labor practice complaint is filed, the case is heard by and ALJ who issues an opinion. If a party does not agree with the decision, it may appeal to the Board by filing exceptions to the ALJ’s award. *Higgins*, *supra* note 9 at 2655.

⁸⁵ *Atlantic Steel*, 245 N.L.R.B. at 816.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (observing that it had never before encountered a case where the employee’s comments were made on the production floor).

⁸⁹ *Id.*; but see *Huttig Sash & Door Co., Inc.*, 154 N.L.R.B. 1567, 1571 (1965) (finding an employer’s discharge of an employee who told a supervisor that he wasn’t “worth a shit” was unlawful, when the remarks were made on the manufacturing floor because they were with regards to a grievance of the Company’s unfair labor practice).

engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.”⁹⁰ The Board then established a four-factor balancing test to determine when an employee loses protection of the NLRA due to offensive speech: (1) the place of discussion; (2) the subject matter of discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an employer’s unfair labor practice.⁹¹ Balancing these four factors, the NLRB found that the employee in *Atlantic Steel* lost the protection of the Act when he “reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated.”⁹²

An analysis of the *Atlantic Steel* case would be incomplete without noting that it did not involve collective bargaining or a union representative’s effort to resolve a represented employee’s grievance.⁹³ In other words, it was not a *Bettcher*-type case.⁹⁴ However, the Board did not explicitly limit the four-part *Atlantic Steel* test to non-*Bettcher* cases.⁹⁵ Indeed, by adding factor two—the subject matter of discussion—*Atlantic Steel* seemed to anticipate that the test would apply to *Bettcher*-type cases, providing an opportunity for the NLRB and courts to find *Bettcher*-type speech unprotected.⁹⁶

E. The Balancing Act: When NLRA Protection is Lost

After the creation of the *Atlantic Steel* balancing test, there has been little consistency concerning what constitutes behavior so egregious as to forfeit the protection of the Act.⁹⁷ The ultimate decision turns on how the courts choose to weigh each of the four factors.⁹⁸ This inconsistency leaves employees uncertain as to what activities will be afforded the Act’s protection, and what activities will leave them vulnerable to retribution by their employer.⁹⁹ Following *Atlantic Steel*, courts seem increasingly less willing to permit profanity, in the context of general concerted activity, even when it takes place in the privacy of an office, away from the

⁹⁰ *Atlantic Steel*, 245 N.L.R.B. at 816.

⁹¹ *Id.*

⁹² *Id.* at 817.

⁹³ *Id.* at 816.

⁹⁴ *Bettcher Mfg.*, 76 N.L.R.B. at 526.

⁹⁵ *Atlantic Steel*, 245 N.L.R.B. at 816.

⁹⁶ See *U.S. Postal Service*, 251 N.L.R.B. 252, 259 (1980), *enfd* 652 F.2d 409 (5th Cir. 1981) (stating that “in a recent decision, the Board held that it would examine four factors in determining whether an employee’s conduct at a grievance meeting would result in the loss of protection of the Act.”) (citing *Atlantic Steel*, 245 N.L.R.B. 814 (1979)).

⁹⁷ See *supra* note 15 and accompany text.

⁹⁸ *Id.*

⁹⁹ *Id.*

production floor, or when provoked by and employer's own unfair labor practice.¹⁰⁰

For example, in *Trus Joist MacMillan*,¹⁰¹ the Board found that the respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employee, Roger Harris, in response to his "offensive outburst" during a meeting with his plant manager.¹⁰² Harris worked as a "quality assurance technician" under the supervision of Dane Moore.¹⁰³ Preceding the meeting in which Harris's "offensive outburst" took place, he learned that Moore had been discharged for refusing to give Harris an unwarranted evaluation downgrade because of Harris's prominent union activities.¹⁰⁴

Upset by this, Harris requested a meeting with the plant manager to ask for an explanation about Moore's discharge,¹⁰⁵ planning on calling him a "liar" if he declined to give Harris a reason.¹⁰⁶ During the meeting the plant manager refused to give an explanation because of "confidentiality concerns."¹⁰⁷ Harris called the plant manager a "a liar, a lying bastard, and a prostitute."¹⁰⁸ Shortly after, Harris was terminated for insubordination.¹⁰⁹

The Board held that, although Trus Joist MacMillan violated Section 8(a)(1) of the Act for discharging Moore under the in ordinary circumstance, Harris forfeited the protection of the Act through his egregious conduct.¹¹⁰ Using the *Atlantic Steel* balancing test, the Board subjectively weighed the four factors and found that Harris's behavior lost protection of the Act.¹¹¹

With respect to the first *Atlantic Steel* factor - the place of discussion - the Board generally finds remarks made in private settings are less disruptive to workplace discipline than those made in the presence of other employees and are, therefore, more likely to be protected.¹¹² Even though

¹⁰⁰ See discussion *infra* notes 126-28 and accompanying text.

¹⁰¹ 341 N.L.R.B. 369 (2004).

¹⁰² *Id.* at 369 (2004).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 370.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Although Harris denies it, there was testimony that during the meeting Harris also purposely grabbed his crotch saying "something to the effect of, I have your manhood hanging right here." *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 369.

¹¹¹ *Id.* at 370.

¹¹² Compare *Nobel Metal Processing*, 346 N.L.R.B. 795, 800 (2006) (finding place of discussion weighs in favor of protection where the outburst occurred away from employees' work area and did not disrupt the work process) with *Waste Management of Arizona, Inc.*, 345 N.L.R.B. 1339, 1340 (2005) (finding no protection when an

the incident in *Trus Joist MacMillan* took place in the human resource manager's office away from the plant floor, the Board found that this factor neither weighed in favor of nor against Harris.¹¹³ The NLRB reasoned that the fact that the incident had occurred in front of multiple managers "exacerbate[d] the disruptive effect of Harris' outburst."¹¹⁴

The Board went on to analyze the other three factors.¹¹⁵ Reasoning that the official purpose of the meeting was to complain about Moore's discharge, the Board determined that the subject matter "involved a the matter of the right of employees to engage in protected union activity and the unlawful removal of a supervisor who refused to violate this right."¹¹⁶ It found, therefore, and that the second *Atlantic Steel* factor weighed in favor of affording NLRA protection to Harris' statements.¹¹⁷

On the other hand, the Board found that third *Atlantic Steel* factor - the nature of the outburst - weighed heavily against affording Harris's statements the NLRA's protection.¹¹⁸ Although, Harris's remarks were not threatening and were contained to a single spontaneous outburst¹¹⁹, the Board held that Harris's "vituperative personal attack, with foul language and obscene gestures"¹²⁰ was outside of what an employer can be expected to tolerate.¹²¹

Finally, the Board held that the fourth factor - provocation by an

employee cursed repeatedly before other employees, refusing his supervisor's request to move the conversation into his private office).

¹¹³ *Trus Joist MacMillan*, 341 N.L.R.B. at 370 (stating "[i]n one respect the locus of Harris' outburst was one that would have a less disruptive effect than it would have if it had occurred on the plant floor, in the presence of employees. However, in another respect, the locus accentuated and exacerbated the insubordinate nature of Harris' offensive outbursts.")

¹¹⁴ *Id.* (noting that it was Harris's intent to embarrass the plant manager).

¹¹⁵ *Id.* at 370-71.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 371.

¹¹⁹ *See Diamler-Chrysler Corp.*, 344 N.L.R.B. at 1640, 1642-43 (2000)(asserting protection was lost when the profanity involved more than a spontaneous outburst, and the employee approached his supervisor in an aggressive manner calling him a "stupid mother fucker"). Generally, precedent indicates that employees should only lose protection of the Act in serious situations, such as in-your-face confrontation, or prolonged displays of inappropriate conduct. *See Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (noting that "[e]mployers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum. Disorder can have a detrimental impact on morale, productivity, and discipline."); *But see* *Stanford N.Y., LLC*, 344 N.L.R.B. 558, 558 (2005)(finding that "[t]he relatively secluded room" where the unfavorable conduct happened weighs in favor of the Act's protection).

employer's unfair labor practice - to be neutral.¹²² Usually, if the employee's offensive comments are made in response to an employer's unlawful behavior, the employee retains the protection of the Act.¹²³ However, the Board held that Harris's conduct was was "not a spontaneous or reflexive reaction to the news,"¹²⁴ regardless of the fact that it was in response to the Respondent's unlawful discharge of his supervisor. After weighing the *Atlantic Steel* factors, the Board determined Harris's actions to be outside the scope of the NLRA's protection.¹²⁵

The Board has acknowledged that some leeway must be given to impulsive behavior by employees engaged in concerted activity, but still maintained that this leeway must be balanced with an employer's right to maintain discipline in the workplace.¹²⁶ Applying the four-part *Atlantic Steel* test has allowed the Board and courts to subjectively give weight to one factor over another, tipping the scales against the protection of employee speech said while engaged in general concerted activity.¹²⁷ *Trus Joist MacMillan* is a classic *Atlantic Steel*-type case, which demonstrates the courts seemingly increasing impatience with profanity.¹²⁸

II. THE FOURTH CIRCUIT'S ROLE IN THE EROSION OF EMPLOYEE PROTECTION

In 2009, the Fourth Circuit applied the *Atlantic Steel* balancing test to overturn the NLRB decision in *Media General Operations v. N.L.R.B.*¹²⁹ The court found that the NLRB erred as a matter of law,¹³⁰ and held that an employer did not violate the Act by discharging an employee who, while

¹²² *Trus Joist MacMillan*, 341 N.L.R.B. at 371.

¹²³ See *Care Initiatives*, 321 N.L.R.B. 144, 152 (1996) (stating "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee") (quoting *N.L.R.B. v. South West Bell Telephone Co.*, 694 F.2d 974, 978 (5th Cir. 1982)); see also *Stanford New York*, 344 N.L.R.B. at 559 (holding profanity was protected when it was in direct response to unlawful threats by a supervisor).

¹²⁴ *Trus Joist MacMillan*, 341 N.L.R.B. at 371.

¹²⁵ *Id.* at 372.

¹²⁶ See discussion *supra* note 73 and accompanying text.

¹²⁷ *Trus Joist MacMillan*, 341 N.L.R.B. at 370.

¹²⁸ *Atlantic Steel*, 245 N.L.R.B. at 816. Although calling a plant manager "a liar, a lying bastard, and a prostitute" is not flattering behavior, Harris used this profane and offensive language during a closed-door meeting, where his intention was to express a grievance about the Respondent's unlawful firing of his direct supervisor. *Trus Joist MacMillan*, 341 N.L.R.B. at 371.

¹²⁹ *Media General*, 560 F.3d at 182.

¹³⁰ *Id.*

engaged in concerted activity related to collective bargaining,¹³¹ used obscene language when talking to two of his supervisors in the privacy of their office.¹³²

Media General involved an employee who filed a grievance challenging his dismissal as a violation of his rights under 8(a)(1) and (3) of the NLRA.¹³³ At the time of the employee's termination, the collective bargaining agreement between the company, The Tampa Tribune, and the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180 ("the Union") had recently expired.¹³⁴ The Company and Union were going through the rigorous process of renegotiating their contract.¹³⁵ While the negotiations were in progress, the Vice President of the Company circulated a series of six letters to the employees describing the progress of the negotiations from his perspective.¹³⁶ In the letters, the Vice President blamed the Union for the delay in negotiating the new contract.¹³⁷

Gregg McMillen, the employee who was later discharged, was one of many employees who voiced his frustration about the content of the Vice President's letters.¹³⁸ A day after the sixth letter was sent, a visibly upset McMillen went to the office of two of his supervisors and expressed his concerns about the letters the Vice President had sent.¹³⁹ After complaining about the progress of the negotiations, he stated, "I hope that [stupid] fucking [moron] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out

¹³¹ *Id.* at 182-83. Deciding whether an employee's actions are concerted is always the first step of determining if they are protected under the act. *Id.* at 183. Since the employee's comments in *Media General* were "part of an ongoing collective dialogue between [the Vice President] and the unit employees about the substance and the process of contract negotiations," they considered concerted by the ALJ, the Board, and the Fourth Circuit. *Media General Operations, Inc.*, No.12-CA-24770, at *395, 2007 WL 601571 (N.L.R.B. Feb. 22, 2007).

¹³² *Media General* 560 F.3d at 182 (4th Cir. 2009).

¹³³ *Id.* at 183.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* There was no dispute about the legality of the letters, Section 8(a)(2) protects employer speech. *Id.* at 184.

¹³⁷ *Id.* at 184. The first letter stated that the negotiations would could have gone quickly if it was not for the Union representative. *Id.* at 190 (King, J., dissenting). The second and third letter asserted that the Union Representative was acting in an unprofessional manner and that there could be negative consequences to his actions. *Id.* The fourth and fifth letter complained about the slow bargaining process, and the alleged unavailability of the Representatives. *Id.* Finally, the sixth letter was a response to a letter sent by union employees. *Id.* at 191.

¹³⁸ *Id.* at 191 (King, J., dissenting).

¹³⁹ *Id.* at 183.

on stress.”¹⁴⁰ Despite McMillen’s apologies,¹⁴¹ the Employer fired McMillen for “a violation of Pressroom Office Rule 9” a few days later.¹⁴²

Shortly thereafter, McMillen filed charges with the General Counsel of the NLRB.¹⁴³ The General Counsel issued a complaint alleging that the Company violated Sections 8(a)(1) and 8(a)(3) of the NLRA by “terminating McMillen as a result of protected concerted activities.”¹⁴⁴ This case originally came before the NLRB division of judges, and Administrative Law Judge (“ALJ”), Joel P. Biblowitz, heard the case.¹⁴⁵ In his opinion, ALJ Biblowitz, balanced the *Atlantic Steel* factors, holding that “McMillen’s dismissal was lawful because his statement was so profane and offensive that it was not protected by the Act.”¹⁴⁶

The General Counsel filed exceptions and the Respondent filed cross-exceptions with the NLRB to enforce the decision of the ALJ.¹⁴⁷ The NLRB unanimously reversed the decision of the ALJ,¹⁴⁸ holding that the Company’s dismissal of McMillen violated the NLRA.¹⁴⁹ The Board explained that, although McMillen’s comments were regrettable, they were not so opprobrious as to lose the Act’s protection.¹⁵⁰ Agreeing with the ALJ, the NLRB concluded that the first two factors of *Atlantic Steel* - place and subject matter - weighed in favor of affording McMillen NLRA protections.¹⁵¹ However, the fourth factor - employer provocation - went against McMillen, as there was insufficient evidence that Media General unlawfully provoked him.¹⁵² Disagreeing with the ALJ, the Board held that the third factor - egregiousness of the language used - “only weighed moderately against McMillen retaining the Act’s protection”¹⁵³ because the remarks were not made directly to the Vice President and were not confrontational in nature.¹⁵⁴

¹⁴⁰ *Id.* at 192. (King, J., dissenting).

¹⁴¹ *Id.* at 184.

¹⁴² *Id.* Pressroom rule 9 makes it a violation to use “[t]hreatening, abusive, or harassing language... disorderly conduct... and all disturbances interfering with employees at work anywhere in the building.” *Id.* at 199.

¹⁴³ *Id.* at 183.

¹⁴⁴ *Id.* at 182.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Media General*, 351 N.L.R.B. 1324, 1324 (2007).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1325.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1326.

¹⁵³ *Id.* (noting his remarks were not made directly to the Vice President and were not confrontational in nature).

¹⁵⁴ *Id.*

The Company petitioned the United States Court of Appeals to review of the NLRB decision,¹⁵⁵ and McMillen filed a cross-petition to enforce the order.¹⁵⁶ In a two-one decision, the Fourth Circuit, refused to enforce the NLRB's decision.¹⁵⁷ The Court found that the Board "erred as a matter of law [by] concluding that the law protects McMillen's use of profanity regarding his employer."¹⁵⁸ When addressing the *Atlantic Steel* factors, the court found that the first factor — the place of discussion — weighed in favor of McMillen, because derogatory remarks were made in a private office away from other pressroom employees.¹⁵⁹ Likewise, the Court found that the second factor — the subject matter of discussion — weighed in favor of protection since the obscene language was said in the context the ongoing contract negotiations.¹⁶⁰ Next, the court affirmed the finding of the ALJ on the third factor — nature of the outburst — stating that the "lack of concurrence between [] the letter and McMillen's comment particularly disfavors protection."¹⁶¹ Finally, the Fourth Circuit held that the fourth factor — provocation by an employer's unfair labor practice — weighed more than slightly against McMillen.¹⁶² The court observed the significance of the fact that the employer's distribution of the letter was a lawful act, distinguishing it from other cases where employee outbursts were in response to unlawful employer actions.¹⁶³

Essentially the Fourth Circuit states that if it were to uphold the NLRB's decision, it would be expanding the *Atlantic Steel* test, "creat[ing] a buffer around employee conduct that would travel with the employee wherever he goes and for as long as some form of collective bargaining can be said to be taking place."¹⁶⁴ The court concluded that such a finding would expand the protection past what the law previously provided and what the Act intended.¹⁶⁵

Judge King dissented,¹⁶⁶ arguing that the Court should have affirmed the NLRB's decision¹⁶⁷ and afforded it the deference required under the law.¹⁶⁸

¹⁵⁵ *Media General*, 560 F.3d at 181.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 182.

¹⁵⁹ *Id.* at 187.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (noting the fact that McMillen had not actually read the last letter although he had been told about its contents).

¹⁶² *Media General Operations*, 560 F.3d. at 181, 188 (distinguishing its decision from that of the ALJ and the board).

¹⁶³ *Id.* at 188. See also discussion *supra* note 123 and accompanying text.

¹⁶⁴ *Media General Operations*, 560 F.3d. at 189.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 189 (King, J., dissenting).

¹⁶⁷ *Id.* at 189-190.

¹⁶⁸ *Id.*

Judge King agreed with the NLRB's application of the *Atlantic Steel* balancing test, stating that the NLRB's conclusions were supported by "substantial evidence on the record considered as a whole."¹⁶⁹ Judge King further criticizes the weight the court gave to the fact that the employer's actions were lawful, stating that the court offers no authority to support their assertion that this factor should weigh "more than slightly against the Act's protection."¹⁷⁰ More importantly, Judge Kings states, "the majority ignores precedent reflecting that, even where the employee responded to legal employer activity, the Board can indeed account for the nature of the employer activity in assessing factor four."¹⁷¹ Judge King concludes that the Board's decision did not expand the protection afforded under *Atlantic Steel*, but followed current law.¹⁷²

III. EMPLOYEE FREE SPEECH: DENIGRATION OR ELIMINATION

For the past 30 years, since the *Atlantic Steel* decision, *Bettcher*-type cases remained highly protected.¹⁷³ On the other hand, courts have been increasingly less willing to protect speech related to general concerted activity.¹⁷⁴ The Fourth Circuit's *Media General* decision represents a blurring of the line drawn in *Atlantic Steel*, bringing non-*Bettcher* impatience into a true *Bettcher* context.¹⁷⁵ Although one case does not demonstrate a trend, if courts choose to follow *Media General*, the employee protections guaranteed by *Bettcher Manufacturing* will be eroded. As a result, employees will have diminished power in the bargaining process because they will not be able to express their grievances

¹⁶⁹ *Id.* at 190 (stating "put simply, the panel majority today has embarked on an unjustifiable reach-making de novo findings and conclusions in this case-and substituted its judgment for a decision reserved by law to the Board. I strongly disagree and therefore dissent").

¹⁷⁰ *Id.* at 188.

¹⁷¹ *Id.* at 195.

¹⁷² *Id.* at 198.

¹⁷³ See *Postal Service*, 250 N.L.R.B. 4, 4 (1980) (finding while discussing a possible grievance, an employee acting as union steward who called a supervisor a "stupid ass" was protected because the remark occurred during the course of protected activity, and was part of the *res gestae* of that activity); see also *Success Village Apartments*, 347 N.L.R.B. 1065, 1069 (2006) (holding a union shop chairperson's use of crude language toward management during a meeting to discuss an employee warning was not "uncharacteristic of the occasionally intemperate conduct engaged in by both management and union representatives" during such discussions and was thus protected).

¹⁷⁴ See discussion *supra* notes 126-28 and accompanying text.

¹⁷⁵ See discussion *infra* notes 176-78 and accompanying text.

without fear of retaliation.¹⁷⁶

A. Tipping the Scales of Power Between Labor and Management

Equal bargaining power is essential during the collective bargaining process.¹⁷⁷ The *Media General* decision seriously erodes that equality in favor of management by giving employers a potent leverage over employees during negotiations.¹⁷⁸ The company in *Media General* was permitted to discharge McMillen for a one-time use of profanity in the privacy of his supervisor's office while engaged in concerted activity related to ongoing collective bargaining.¹⁷⁹ There was no threat to production or discipline,¹⁸⁰ the Vice-President referred to was not even present,¹⁸¹ and no employees overheard McMillen.¹⁸² The bargaining

¹⁷⁶ See *Aladdin Hotel & Casino*, 273 N.L.R.B. 270, 273 (1984) (demonstrating an example of employer retaliation); see also Terry A. Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and Board*, 59 Ind. L.J. 583, 613 (1984) (emphasizing that in the context of activity related to concerted activity “[t]he Board’s primary concern should be protecting employee activity from employer retaliation, not safeguarding employers from embarrassment or protecting other nonexistent management interests”).

¹⁷⁷ See Carol A. Glick, *Labor-Management Cooperative Programs: Do they Foster or Frustrate National Labor Policy?* 7 Hof. L.L. J. 219, 224 (1989) (stating that “collective bargaining, the keystone of the NLRA is premised on an equilibrium between labor and management”); see also Wagner Act, Pub.L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1983)) (envisioning a balance of bargaining power to ensure industrial peace stating: “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries”).

¹⁷⁸ See discussion *infra* notes 199-201 and accompanying text; see also Clyde W. Summers, *Industrial Democracy: America’s Unfulfilled Promise*, 28 Clev. St. L. Rev. 29, 29 (1979) (arguing that “democratic principles demand that workers have a voice in the decisions that control their lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions”).

¹⁷⁹ *Media General*, 560 F.3d at 189 (holding that the board erred as a matter of law when it found McMillen’s conduct to be protected by the Act); See also discussion *supra* notes 157-58 and accompanying text.

¹⁸⁰ See *Noble Metal Processing*, 346 N.L.R.B. at 800 (finding that profanity used in private settings are not disruptive to the work process); See also *Plaza Auto Center, Inc.*, No. 28-CA-22256, 2009 WL 2191957, at *1 (N.L.R.B. Division of Judges, July 21, 2009) (holding that an employee who made offensive remarks in the presence of only management, secluded from other workers, did not have an impact on workplace discipline).

¹⁸¹ *Media General*, 560 F. 3d at 184.

process in *Media General* ceased to be between equals when the employer was permitted to discharge McMillen.¹⁸³ Employees have no “parallel method of retaliation,”¹⁸⁴ and are therefore at a marked disadvantage to their employers.¹⁸⁵

1. Media General: Limiting Employee Speech Directly Related to Collective Bargaining

The court in *Media General* argues that if it protects statements like those made by McMillen, the *Atlantic Steel* factors would be expanded, effectively creating a buffer around employee conduct so long as it can be said that there is any connection to collective bargaining.¹⁸⁶ However this argument is contrary to the facts of *Media General* and case precedent. *Bettcher Manufacturing* established a “buffer” for employee speech that is protected by the Act.¹⁸⁷ This employee protection does not “travel with the employee *wherever* he goes (emphasis added),”¹⁸⁸ but rather only follows an employee to places considered less disruptive to the workplace¹⁸⁹ and

¹⁸² *Id.* Indeed, it is unclear how this outburst even violated the plant rule, which was limited to speech that “interfer[ed] with employees at work.” *Id.* at fn. 2; *see also* Plaza Auto Center, No. 28-CA-22256, 2009 WL 219157 at fn. 26 (noting that outbursts secluded from other employees as a mitigating factor); *Nobel Metal Processing*, 346 N.L.R.B. at 800 (2006) (recognizing place of discussion as weighing in favor of affording an employee the Act’s protection when his conduct took place away from other employees); *Waste Management of Arizona*, 345 N.L.R.B. at 1340 (finding no protection when an employee cursed repeatedly before other employees).

¹⁸³ *See* discussion *infra* notes 199-201 and accompanying text; *see also* Glick, *supra* note 177 at 224 (emphasizing the importance of maintaining equality between labor and management during collective bargaining negotiations).

¹⁸⁴ *Bettcher Manufacturing Corp.*, 76 N.L.R.B. at 527.

¹⁸⁵ *Id.*; *see* John Nivala, *The Steward’s Legislative Role in Workplace Government: A Proposal for Immunity from Employer Discipline* 8 Indus. Rel. L.J. 186, 205 (1986) (quoting *Bettcher Manufacturing*, reiterating that when employers have the advantage of freely discharging employees there are two consequences: (1) inequality in bargaining and (2) that employees will be reluctant to participate directly in negotiations); *see also* Glick, *supra* note 177 at 224 (addressing equality at the bargaining table).

¹⁸⁶ *Media General*, 560 F. 3d at 189.

¹⁸⁷ *Bettcher Manufacturing*, 76 N.L.R.B. at 526-27; *see Hawaiian Hauling Service*, 219 N.L.R.B. at 766 (stating that the standard set forth in *Bettcher Manufacturing* has been uniformly followed); *see also* 2 Guide to Employment Law and Regulations § 17:172 (2010) (stating “Employee opposition to an employer’s policies is protected when policies are related to labor relations”).

¹⁸⁸ *Media General*, 560 F.3d at 189.

¹⁸⁹ *see supra* note 112 and accompanying text; *see also* U.S. Postal Service v. N.L.R.B. 652 F.2d 409, 411 (5th Cir. 1981) (characterizing the employee’s behavior as not disruptive among other employees stating: (T)his is not a case where employees

only speech having a fair nexus to an ongoing collective bargaining controversy.¹⁹⁰

In the case of *Media General*, McMillen's statements were made behind closed doors and away from other employees.¹⁹¹ Plus, the protection McMillen deserves did not arise simply from the fact that "some form of collective bargaining can be said to be taking place,"¹⁹² but rather because McMillen was provoked during ongoing contract negotiations.¹⁹³ The facts demonstrate a close nexus between the Vice-President's circulation of letters accusing the Union of delaying contract negotiations and McMillen's criticism of the Vice-President.¹⁹⁴ Such an accusation might

adamantly refused to leave the meeting room when asked to pursue their grievance later and to return to work. Nor is this a case in which the employees tried to impede others who sought to leave. Here, the two employees followed the two supervisors back to the workroom floor. At least to this point their only "insubordination," if it can be called such, was in continuing to talk about their grievance as they walked along. When the employees and the supervisors reached the timeclock, Supervisor Love turned and said, "I am giving you a direct order. I want you to go back to work now." After what was by all accounts a momentary hesitation, and apparently before Love had to repeat the order, the two employees complied with it).

¹⁹⁰ See *U.S. Postal Service* at 411 (noting that the *Bettcher Manufacturing* standard applies to "conflict typically aris[ing] in cases where an employee has been disciplined for conduct that occurred during the course of the grievance meeting."); *Kysor Industrial Corp.*, 309 N.L.R.B. 237, 238, fn. 3 (1992) (holding that the extent to which employee activity is protected depends on its nexus to legitimate employee concerns); See also *Allied Aviation Service*, 248 N.L.R.B. 229, 230-31 (1980) (finding "employee communications to third parties seeking assistance in an ongoing labor dispute to be protected where the communications emphasized and focused upon issues cognate to the ongoing labor dispute").

¹⁹¹ *Media General*, 560 F.3d at 184; see also *supra* note 190 and accompanying text.

¹⁹² *Id.* at 189.

¹⁹³ *Id.* at 196 (King, J., dissenting); see Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act* 115 U. Pa. L. Rev. 1195, 1231 fn. 150 (1967) (noting "[e]ven where the employer's conduct is blameless, the Board may conclude that minor non-violent misconduct which occurred as a part of a general course of protected activity did not make an employee liable to discharge."); cf. Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign* 73 B.U. L. Rev. 291, 329 fn 181 (1993) (recognizing that section 7 "must allow for some minor excesses" when an employee exercises their rights especially "when an employer's violation of the law provoked an employee's conduct."); *Bettcher Manufacturing*, 76 N.L.R.B. at 526-27 (concluding that collective bargaining is plainly a Section 7 right, and to preserve the bargaining process there must be an open exchange between employers and employees); see also *Crown Central Petroleum*, 430 F.2d at 729 (stating that "the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by Section 7").

¹⁹⁴ *Id.*; see *Allied Aviation Service*, 248 N.L.R.B. at 230-31 (emphasizing the close relationship between the employee's outburst and the ongoing dispute); *Kysor Industrial Corp.*, 309 N.L.R.B. at 237, fn. 3 (recognizing the importance of the nexus between the Act's protection and legitimate employee concerns).

reasonably be understood as alleging that the Union was not bargaining in good faith.¹⁹⁵ Even though it is lawful to make such an accusation, it was the accusation that provoked McMillen's response.¹⁹⁶ That is a far cry from just "some form of collective bargaining . . . taking place."¹⁹⁷ This is in fact exactly the kind of speech Congress intended to protect when it enacted the NLRA,¹⁹⁸ and refusing to recognize it as such demonstrates a failure to fully appreciate the facts and circumstances of this case.

Conversely, the Fourth Circuit's decision to uphold McMillin's discharge narrows employee rights by essentially providing a "buffer" of power around management. Reduced to its essentials, *Media General* holds that whenever an employer acts in an objectively lawful manner, regardless of whether its actions would provoke an employee, weight is placed on employer's side of the scale and a virtually insurmountable burden shifts to the employee to overcome in order to benefit from the NLRA's protections.¹⁹⁹ This is not the protection that *Bettcher*

¹⁹⁵ See 29 U.S.C. § 158 (d) (requiring that the parties in collective bargaining "meet at reasonable times and confer in good faith"). An essential element of bargaining in good faith is "the serious intent to adjust differences and to reach an acceptable common ground." *White Cap, Inc.*, 325 N.L.R.B. 1166, 1169 (1998). Therefore when the Vice-President accuses the Union of conduct inconsistent with the desire to reach an agreement they are accusing them of violating the Act. *Id.*

¹⁹⁶ *Media General*, 560 F.3d at 196 (King, J., dissenting); see eg Getman, *supra* note 193 at 1251 fn. 150 (stating that an employee may not be liable to discharge even when an employer is blameless); Branscomb, *supra* note 193 at 291 fn. 181 (finding that section 7 is particularly protective of employee speech when provoked by an employer's unlawful acts).

¹⁹⁷ *Media General*, 560 F.3d at 189.

¹⁹⁸ *Bettcher Manufacturing*, 76 N.L.R.B. at 526-27 (concluding that collective bargaining is plainly a Section 7 right, and to preserve the bargaining process there must be an open exchange between employers and employees); see also *Teamsters v. Lucas Floor Co.*, 369 U.S. 95, 103-04 (1962) (finding that "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (holding intended "that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel"); *Crown Central Petroleum*, 430 F.2d at 729 (stating that "the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by Section 7"); Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 LAB. L. 11, 18-19 and n.25 (1987) (quoting address by T. Schneider, "Quality of Working Life and the Law," Harmen Lecture Series, Kennedy School of Government and Public Policy, Cambridge, Mass.) (Nov. 19, 1981) (stating that NLRA was intended to promote industrial peace by promoting equal bargaining power between labor and management).

¹⁹⁹ *Media General*, 560 F.3d at 188.

Manufacturing, or the NLRA, guarantees.²⁰⁰ In *Bettcher Manufacturing* the employer's provocation was a lawful act²⁰¹, yet the Board held that employee speech is protected unless so "flagrant that it can be said that the employee no longer is 'fit' to continue"²⁰² in the employer's employment.²⁰³

2. *Media General* Runs Afoul to Congressional Intent

The *Media General* majority asserts that affording McMillen NLRA protection would conflict with Congressional intent.²⁰⁴ In particular, the Fourth Circuit states that this ruling would expand the current law beyond the language of the Act.²⁰⁵ However, the NLRA was enacted with the intention of "restoring equality of bargaining power between employers and employees."²⁰⁶ The majority's decision is contrary to the purpose of the NLRA because it provides employers with an advantage in bargaining not given to employees.²⁰⁷ Management has almost carte blanche to say

²⁰⁰ See *supra* note 198 and accompanying text.

²⁰¹ *cf. Care Initiatives*, 321 N.L.R.B. at 152 (stating "an employer may not rely on employee conduct that is unlawfully provoked as a basis for disciplining an employee." (quoting *S.W. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982)); *Stanford N.Y.*, 344 N.L.R.B. at 559 (finding that profanity was protected where it was a "direct and temporally immediate response" to unlawful threats by a supervisor).

²⁰² *Bettcher Manufacturing*, 76 N.L.R.B. at 527.

²⁰³ *Id.*

²⁰⁴ *Media General*, 560 F.3d at 189; see *Office and Professional Employees Intern. Union, AFL-CIO, CLC v. N.L.R.B.*, 981 F.2d 76, 81 (2nd Cir. 1992) (stating that the court "will decline to enforce an interpretation which is 'fundamentally inconsistent with the structure of the Act' and which usurps 'major policy decisions properly made by Congress.' (quoting *American Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 318 (1965)).

²⁰⁵ *Id.*

²⁰⁶ 29 USC § 151; Section 1 in relevant part proclaims: The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. See *also supra* note 198 and accompanying text.

²⁰⁷ See *Jones & Laughlin*, 301 U.S. at 24 (emphasizing the purpose of the NLRA was to insure equality at in the bargaining process); see *also* Remarks of Rep. Hartley, reprinted in 1 N.L.R.B. Legislative History of the Labor Management Relations Act, 1947, at 617 (1948) (remarking that the purpose of Section 7 of the act is primarily to "write equity into the law, to make the relationship between labor and management equitable, to place them on an equal basis."); Subcommittee on Labor-Management Relations of the Committee on Education and Labor, *Failure of Labor Law – A Betrayal of American Workers*, H.R. Rep. No. 98 98th Cong., 2d Sess. 4-11 (1984); see

whatever it wants during negotiations because employees do not possess the equivalent power to discharge.²⁰⁸ This is inherently against the policy of the NLRA.²⁰⁹ After *Media General*, in *Bettcher*-type cases, the employer earns “points” in the balancing test by its provocative acts being legal and the employee is left to wonder how sensitive a reviewing Judge will be to a private use of the “F” word, “SOB,” or one of several other words not used in polite society but not uncommonly deployed. *Media General* might not stand for the proposition that collective bargaining must now be conducted by employees pursuant to the “Marquess of Queensbury rules” but it certainly leaves in great doubt what protection of offensive speech is left when it is provoked by lawful employer behavior - which is the typical case.

IV. CONCLUSION

The continued trend away from employee protection is a slippery slope for the bargaining process as a whole. If the law continues to move in this direction the bargaining process will reflect exactly the flawed system *Bettcher Manufacturing* warned against 60 years ago, namely bargaining will cease to be between equals and employees will be discouraged from directly participating in the process.

also Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 Vt. L. Rev. at 350 (1987) (noting that the Board through its decisions “sought to redress what it perceived as an imbalance in the parties’ bargaining power by keeping a tight rein on the employer’s ability to resort to economic self-help”).

²⁰⁸ *Bettcher Manufacturing*, 76 N.L.R.B. at 527; 29 U.S.C. § 151; see also Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 Yale L.J. 1415, 1422 (1983) (noting that “the goal of unions was to redress an imbalance of power; here, the imbalance that exists [is] between an individual employee and the entity for which he or she works.”); Gross, *supra* note 7 at 351 (arguing the Wagner Act sought for “industrial democracy [] to replace employers’ unilateral determination of matters affecting wages, hours, and working conditions.”)

²⁰⁹ 29 U.S.C. § 151; see Gross, *supra* note 1 at 351 (stating that the Act “enabled a major redistribution of power from the powerful to the powerless at U.S. workplaces covered by the statute”).