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The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook

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The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook

Lauren K. Neal*

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I. Introduction

The National Labor Relations Act (NLRA or Act)¹ gives employees the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”² When President Roosevelt signed the Act into law in 1935, few could have imagined the new contexts in which “concerted activities” would arise. The Act’s drafters envisioned a workplace in which employees communicated with each other in person. Employee communication is no longer so limited, however. Facebook and other social networking websites have altered this traditional water cooler model, creating new spaces in which employees interact.

With these new spaces come new questions. Chief among them is how the National Labor Relations Board (NLRB or Board)³ should apply the Act’s concerted activity provision in

1. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)). The Supreme Court upheld the constitutionality of the Act in *NLRB. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

2. 29 U.S.C. § 157.

3. The Board is an independent agency created by the NLRA. *Id.* § 153; see also NLRB, *Who We Are*, <http://www.nlr.gov/who-we-are> (last visited Sept. 27, 2012) (“The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions.”) (on file with the Washington and Lee Law Review). When this Note refers to the Board in Part I and Parts III–VI, it is referring to the agency as a whole. It is not referring to the five-member, quasi-judicial body within the agency, unless

cases involving a virtual water cooler. Do existing standards for defining concerted activity make sense when applied in the social media context, or should the NLRB alter them to better comport with the realities of contemporary interaction? Facebook firing cases—cases in which an employer fires an employee because of a Facebook posting—provide insight.

Adapting the present concerted activity standard for application in Facebook firing cases has presented the Board with numerous challenges. The source of these challenges is the very nature of social media; the forum itself makes it more difficult to distinguish reasonably between activity that is concerted and activity that is not. Furthermore, the forum alters the calculus of interest balancing in which the Board must engage to effectuate the Act's purposes. While the Board has attempted to clarify how social media will fit into existing doctrine, uncertainty remains.

This Note examines why uncertainty remains and offers three temporally based approaches to remedy the uncertainty. Part II of this Note explores the Board's present interpretation of concerted activity. Part III details how entities within the Board have applied the standard in Facebook firing cases. Part IV examines why the application of the standard in Facebook firing cases is problematic. Part V suggests three approaches that the Board should consider: promulgating a model social media policy; identifying factors that tend to indicate concertedness in the social media context; and applying a more stringent loss-of-protection standard to cases involving social media. These approaches are not mutually exclusive and recognize both the unique attributes of the social media context and the interests that the context implicates.

II. The Development of the Present Concerted Activity Standard

A. The Statutory Language

As is often the case, the heart of the issue lies in the ambiguity of statutory language. Section 7 of the NLRA states:

otherwise indicated. See NLRB, *The Board*, <http://www.nlr.gov/who-we-are/board> (last visited Sept. 27, 2012) (describing the five-member board) (on file with the Washington and Lee Law Review).

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection.”⁴ In the list of employee rights, the right “to engage in other concerted activities” provides the most room for interpretation and, consequently, confusion. This confusion is problematic because understanding what constitutes concerted activity is a precondition for employees and employers to understand the scope of their rights and obligations.⁵

Section 7’s language and the placement of the concerted activity phrase within the Section provide some insight into the meaning of concerted activity. First, the use of “other” in the phrase “and to engage in other concerted activities” suggests that the activities enumerated before the phrase—self-organizing; forming, joining, or assisting labor organizations; and bargaining collectively through representatives—are themselves examples of concerted activities.⁶ Second, it appears that Congress intended for some unenumerated activities to fall within Section 7. Otherwise, the phrase would be unnecessary. Thus, Section 7’s language and structure indicate that the activities fitting within the phrase’s scope are similar to, yet different from, those activities that Congress enumerated specifically. Because neither Section 7, nor its legislative history, defines concerted activity explicitly,⁷ the Board has interpreted the Section and divined its own definition, while keeping in mind the Act’s purposes.⁸

4. 29 U.S.C. § 157 (emphasis added). Section 7 of the NLRA corresponds to 29 U.S.C. § 157.

5. Section 8 of the NLRA makes the rights set out in Section 7 enforceable: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157” 29 U.S.C. § 158(a)(1). Section 8 of the NLRA corresponds to 29 U.S.C. § 158.

6. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 n.8 (1984) (“Section 7 lists . . . activities initially and concludes the list with the phrase ‘other concerted activities,’ thereby indicating that the enumerated activities are deemed to be ‘concerted.’”).

7. See *id.* at 830 (stating that the Act does not define concerted activity); see also *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 493 (1984) (stating that the Act’s legislative history does not contain a definition).

8. The Act’s purposes are set forth in its preamble and include “encouraging . . . collective bargaining and . . . protecting the exercise by

B. The Board's Interpretation of the Statutory Language

The present definition of concerted activity originates from *Meyers Industries, Inc. (Meyers I)*.⁹ In *Meyers I*, the Board adopted what it described as “the ‘objective’ standard of concerted activity.”¹⁰ The Board contrasted the objective standard with what it deemed the “per se standard of concerted activity,”¹¹ the standard the Board employed before *Meyers I*. The Board enunciated the per se standard ten years earlier in *Alleluia Cushion Co.*¹² It applied to cases in which “an employee [spoke] up and [sought] to enforce statutory provisions relating to occupational safety designed for the benefit of all employees.”¹³ In those circumstances, the Board stated: “[I]n the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.”¹⁴ Because *Alleluia* did not require an outward manifestation of group involvement or support, the Board later characterized this as the per se standard of concerted activity.¹⁵

Meyers I firmly rejected this standard,¹⁶ defining concerted activity as follows: “[T]o find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of the other employees, and not solely by and on behalf

workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151 (2006).

9. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493 (1984).

10. *Id.* at 496.

11. *See id.* at 493–97 (describing both standards of concerted activity).

12. *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

13. *Id.* at 1000.

14. *Id.*

15. *See Meyers I*, 268 N.L.R.B. 493, 495 (1984) (“Under the *Alleluia* analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and . . . deemed the activity ‘concerted,’ without regard to its form.”).

16. *See id.* at 496 (“[W]e hold that the concept of concerted activity first enunciated in *Alleluia* does not comport with the principles inherent in Section 7 of the Act.”). The Board then overruled *Alleluia*. *Id.* Rather than enunciating an entirely new standard, the Board asserted that it was simply returning to the pre-*Alleluia* standard. *Id.* at 496–97.

of the employee himself.”¹⁷ Determining whether an activity meets this standard requires a highly factual inquiry.¹⁸ Applying this standard to *Meyers I*'s facts, the Board found that a truck driver was not engaged in concerted activity when he (1) complained to his employer and state authorities that his truck was unsafe; (2) contacted the Tennessee Public Service Commission to arrange a vehicle inspection after getting into an accident; and (3) refused to drive the truck after the accident.¹⁹ According to the Board, rather than engaging in concerted activity, the employee was acting alone.²⁰

In *Prill v. NLRB*,²¹ the D.C. Circuit addressed *Meyers I*'s definition of concerted activity.²² Although the court acknowledged the deference due to the Board,²³ it found that “the Board act[ed] pursuant to an erroneous view of the law . . . when it decided that its new definition of ‘concerted activities’ was mandated by the NLRA.”²⁴ In addition, the court found that the Board misread some of its own precedent.²⁵ Consequently, the court remanded the case, instructing the Board to reconsider its *Meyers I* definition because it rested “on a faulty legal premise and [was] without adequate rationale.”²⁶

17. *Id.* at 497. To establish a violation of Section 8 of the NLRA, an employee must also show that “the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action . . . was motivated by the employee’s protected concerted activity.” *Id.*

18. *See id.* (“[T]he question of whether an employee engaged in concerted activity is, at its heart, a factual one . . .”).

19. *Id.* at 498.

20. *See id.* (“Prill [the employee] acted solely on his own behalf.”).

21. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

22. *Id.* at 948–50.

23. *See id.* at 942 (“The Board has been granted broad authority to construe the NLRA in light of its expertise.”). In particular, the D.C. Circuit acknowledged the Supreme Court’s decision in *NLRB v. City Disposal Systems, Inc.*, in which the Court stated that the Board’s interpretation of the Act, if reasonable, “is entitled to considerable deference.” *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984).

24. *Prill*, 755 F.2d at 942. Thus, the D.C. Circuit asserted that the Board “fail[ed] to exercise the discretion delegated to it by Congress.” *Id.*

25. *See id.* at 953–56 (challenging the Board’s assertion that the *Meyers I* definition represented a return to the pre-*Alleluia* definition).

26. *Id.* at 942. The court stressed that it was not suggesting that the *Meyers I* definition was incorrect. *See id.* (“We express no opinion as to the

Nevertheless, in *Meyers Industries, Inc. (Meyers II)*,²⁷ the Board reaffirmed the *Meyers I* standard.²⁸ While addressing the D.C. Circuit's concerns, the Board clarified the standard, offering more insight into what constitutes concerted activity. First, the Board stressed that the standard "requires some linkage to group action."²⁹ Notably, however, the Board emphasized that an individual employee's act can constitute concerted activity.³⁰ While explaining when individual action falls within Section 7, the Board stated: "[O]ur definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."³¹ The Board applied this clarified standard to *Meyers I*'s facts, once again finding that the employee did not engage in concerted activity but instead "acted alone and without an intent to enlist the support of other employees."³² Therefore, the Board affirmed its dismissal of the employee's complaint.³³

III. The Application of the Meyers I Standard in the Social Media Context

The advancement of technology and the growth of employee use of technology have presented—and continue to present—numerous challenges. Technology has required the NLRB to

correct test of 'concerted activities' . . .").

27. *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882 (1986).

28. *See id.* at 889 ("The Board has reconsidered this case . . . and has decided to adhere to the *Meyers I* definition of concerted activity as a reasonable construction of Section 7 of the Act.").

29. *Id.* at 884.

30. *See id.* at 885 ("There is nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Section 7.").

31. *Id.* at 887. In addition, the Board reaffirmed its so-called "*Interboro* doctrine": an individual employee who reasonably and honestly invokes a collective bargaining right is engaged in concerted activity. *Id.* at 884–85; *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 841 (1984) (approving of the *Interboro* doctrine as a reasonable interpretation of the Act).

32. *Meyers II*, 281 N.L.R.B. at 888.

33. *Id.* at 889.

determine how to adapt the NLRA to a modern reality in which employee communication is fundamentally different than it was seventy-five years ago.³⁴ This adaptation process has involved a difficult task: attempting to “maintain[] stability in the law while simultaneously allowing for flexibility to address these new developments.”³⁵ Most recently, social media has presented the Board with an opportunity to consider these competing values—stability and flexibility—for the purpose of balancing the competing interests at stake.³⁶

When confronting new issues, administrative agencies like the NLRB have two tools at their disposal: rulemaking and adjudication. Because agencies often lack ready answers to the questions that emerging issues present, adjudication provides a vehicle to explore those issues, formulate an approach, and develop a rationale. In *SEC v. Chenery Corp. (Chenery II)*,³⁷ the Supreme Court characterized this process as a necessary and valuable supplement to agencies’ rulemaking authority.³⁸ When explaining why an agency could reasonably prefer to address an issue through adjudication, the Court stated: “Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.”³⁹ Thus far, the NLRB has chosen to confront the issues presented by social media through adjudication.

34. See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 62 (2000) (“For six and one-half decades, the National Labor Relations Board and the courts have been developing and refining doctrine under the National Labor Relations Act in the context of traditional physically defined workplaces.”).

35. Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. LAW. 253, 253 (2000).

36. See Malin & Perritt, *supra* note 34, at 62 (“Adapting the NLRA to electronic workplaces will continue a process of balancing employee rights to engage in concerted activities against employer property and entrepreneurial rights.”).

37. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947).

38. See *id.* at 203 (“There is . . . a very definite place for the case-by-case evolution of statutory standards.”).

39. *Id.* at 202.

By late 2011, the Board had reviewed approximately 130 cases involving social media, all existing at varying stages of development.⁴⁰ The Board's involvement in Facebook firing cases, in particular, began on October 27, 2010, when Region 34 of the NLRB issued a complaint against a Connecticut ambulance company in *American Medical Response of Connecticut, Inc.*⁴¹ The complaint alleged, in part, that a company employee who criticized her supervisor on Facebook engaged in concerted activity, and that the company terminated her employment because of her Facebook postings.⁴² Because this case, and many subsequent cases, settled prior to adjudication,⁴³ guidance on how the Board will treat cases involving the intersection of labor law and social media is lacking. In addition, guidance is lacking because many of these cases have not yet progressed past the initial stages of development.⁴⁴

40. U.S. CHAMBER OF COMMERCE, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB (2011), www.uschamber.com/reports/survey-social-media-issues-nlr (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review). This number includes decisions by the five-member board, ALJ decisions, settlement agreements, complaints, memoranda, and charges that contain social media components. *Id.* It includes a broader range of factual circumstances than is the focus of this Note: concerted activity in the context of Facebook.

41. Complaint & Notice of Hearing, Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576 (Region 34 Oct. 27, 2010), <http://documents.jdsupra.com/daf37177-f935-4fe0-be1f-82c65d0f2ac3.pdf>. Typically, a case proceeds through the following stages: First, the employee or the employee's representative files a charge—"a one-page form alleging that an employer or union has committed an unfair labor practice"—with one of the Board's regional offices. U.S. CHAMBER OF COMMERCE, *supra* note 40, at 3. Second, the regional office investigates and "makes a determination as to whether the charge has merit." *Id.* If the regional office finds that the charge has merit, it issues a complaint, and the parties either settle the case, or the case proceeds to adjudication. *Id.* The NLRB has thirty-two regional offices. NLRB, *Regional Offices*, <http://www.nlr.gov/who-we-are/regional-offices> (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review).

42. Complaint & Notice of Hearing, Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576, at 3–4.

43. U.S. CHAMBER OF COMMERCE, *supra* note 40, at 2; see also Press Release, NLRB, *Settlement Reached in Case Involving Discharge for Facebook Comments* (Feb. 8, 2011), <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments> (last visited Sept. 27, 2012) ("A settlement has been reached in a case involving the discharge of a Connecticut ambulance service employee for posting negative comments about a supervisor on her Facebook page.") (on file with the Washington and Lee Law Review).

44. U.S. CHAMBER OF COMMERCE, *supra* note 40, at 1.

Nevertheless, some guidance exists. Of particular importance are two reports: one issued by the Board's Acting General Counsel on August 18, 2011 (First NLRB Report or First Report)⁴⁵ and one issued by the Board's Acting General Counsel on January 24, 2012 (Second NLRB Report or Second Report).⁴⁶ The First Report "presents recent case developments arising in the context of today's social media," including "issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings."⁴⁷ After the Acting General Counsel issued the First Report, Administrative Law Judges (ALJs)⁴⁸ heard the first three Facebook firing cases: *Hispanics United of Buffalo, Inc.*,⁴⁹ *Karl Knauz Motors, Inc.*,⁵⁰ and *Triple Play Sports Bar & Grille*.⁵¹

45. NLRB OFFICE OF THE GEN. COUNCIL, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) [hereinafter FIRST NLRB REPORT], www.nlr.gov/publications/operations-management-memos (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review). The First NLRB Report does not contain page numbers, so they have been assigned: the first page is number one and the last page is number twenty-four. See also NLRB, *The General Counsel*, <http://www.nlr.gov/who-we-are/general-counsel> (last visited Sept. 27, 2012) ("The General Counsel, appointed by the President to a 4-year term, is independent from the [five-member board] and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.") (on file with the Washington and Lee Law Review).

46. NLRB OFFICE OF THE GEN. COUNCIL, MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) [hereinafter SECOND NLRB REPORT], www.nlr.gov/publications/operations-management-memos (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review).

47. FIRST NLRB REPORT, *supra* note 45, at 2.

48. ALJs are Article I judges who are similar to "trial court judges hearing a case without a jury." NLRB, *Administrative Law Judge Decisions*, <http://www.nlr.gov/cases-decisions/case-decisions/administrative-law-judge-decisions> (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review). After a regional office issues a complaint, an ALJ "hears the case and issues a decision and recommendation order." *Id.*

49. *Hispanics United of Buffalo, Inc.*, N.L.R.B. No. 3-CA-27872, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011). See *infra* Part III.C.1.

50. *Karl Knauz Motors, Inc.*, N.L.R.B. No. 13-CA-46452, 2011 WL 4499437 (Div. of Judges Sept. 28, 2011). See *infra* Part III.C.2.

51. *Triple Play Sports Bar & Grille*, N.L.R.B. No. 34-CA-12915, 2012 WL 76862 (Div. of Judges Jan. 3, 2012). See *infra* Part III.C.3. Although the respondent in this case is Three D, LLC d/b/a Triple Play Sports Bar & Grille, this Note will refer to the case as "Triple Play Sports Bar & Grille" or "Triple Play" because it is commonly referred to by those names.

Following these cases, the Acting General Counsel issued the Second Report, which discusses cases containing “emerging issues in the context of social media.”⁵² These two reports, along with the ALJ cases, provide insight into how the Board will treat future Facebook firing cases.⁵³

A. The First NLRB Report

The First NLRB Report contains summaries of fourteen cases involving social media, nine of which pertain to the concerted nature of online postings.⁵⁴ In addition, the First Report discusses whether the General Counsel’s Division of Advice (Division of Advice) found each case meritorious.⁵⁵ Its purpose, as stated by

52. SECOND NLRB REPORT, *supra* note 46, at 2.

53. On May 30, 2012, the Acting General Counsel issued a third report (Third NLRB Report or Third Report) discussing social media cases. *See* NLRB OFFICE OF THE GEN. COUNCIL, MEMORANDUM OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) [hereinafter THIRD NLRB REPORT], www.nlr.gov/publications/operations-management-memos (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review). Unlike the first two reports, the Third NLRB Report focuses solely on social media policies and rules. *Id.* at 2. Although this Note touches on the Board’s role in providing guidance in this area, the Board’s analysis of social media policies and rules is not the focus of this Note. *See* Part V.A (discussing the connection between providing guidance in the area of social media policies and rules and solving the concerted activity problem). Thus, this Note does not discuss the Third Report in-depth.

54. FIRST NLRB REPORT, *supra* note 45 (citing Triple Play Sports Bar & Grille, N.L.R.B. No. 34-CA-12915 (Div. of Advice); Karl Knauz Motors, Inc., N.L.R.B. No. 13-CA-46452 (Div. of Advice); Hispanics United of Buffalo, Inc., N.L.R.B. No. 3-CA-27872 (Div. of Advice); Martin House, N.L.R.B. No. 34-CA-12950, 2011 WL 3223853 (Div. of Advice July 19, 2011); Wal-Mart, N.L.R.B. No. 17-CA-25030, 2011 WL 3223852 (Div. of Advice July 19, 2011); JT’s Porch Saloon & Eatery, Ltd., N.L.R.B. No. 13-CA-46689, 2011 WL 2960964 (Div. of Advice July 7, 2011); Rural Metro, N.L.R.B. No. 25-CA-31802, 2011 WL 2960970 (Div. of Advice June 29, 2011); Lee Enters., Inc. N.L.R.B. No. 28-CA-23267 (Div. of Advice Apr. 21, 2011); Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576 (Div. of Advice Oct. 5, 2010)). One of the nine cases—*Lee Enterprises, Inc.*—involves the concerted nature of Twitter postings and is included in the discussion because it implicates similar issues. The five other cases involve matters beyond the scope of this Note. Furthermore, the First Report does not identify explicitly the cases that it discusses. This was determined independently.

55. *Id.* The First Report states that the cases it discusses “were decided upon a request for advice from a Regional Director.” *Id.* at 2. When a regional

the Board's Acting General Counsel, Lafe Solomon, is to "encourage compliance with the Act and cooperation with Agency personnel" by "keep[ing] the labor-management community fully aware of the activities of [his] office."⁵⁶

1. When Concerted Activity Was Present

The Division of Advice found that concerted activity existed in four of the nine cases. Three of these four cases—*Hispanics United*, *Karl Knauz Motors*, and *Triple Play*—went on to become the first Facebook firing cases heard by an ALJ.⁵⁷ The other case—*American Medical*—settled.⁵⁸ Thus, the First Report and the Advice Memorandum it summarizes contain the only existing analysis of *American Medical*.

In *American Medical*, the Division of Advice found that an employee engaged in concerted activity when she posted negative comments about her supervisor on her Facebook page.⁵⁹ The employee posted the comments after her employer denied her request for a union representative to assist her in the preparation of a written incident report.⁶⁰ Coworkers responded to the postings, and eventually the employee was terminated.⁶¹ Because the employee "discuss[ed] supervisory actions with coworkers in her Facebook post,"⁶² the Division of Advice found that her activity was both protected and concerted.⁶³

office receives a charge, it may request advice from the Division of Advice if the charge presents a difficult or novel legal issue. U.S. CHAMBER OF COMMERCE, *supra* note 40, at 4. The Division of Advice prepares Advice Memoranda, which "evaluate the facts of particular cases and advise the regional office where the charge originated whether it should issue a complaint." *Id.*

56. FIRST NLRB REPORT, *supra* note 45, at 2.

57. *See infra* Part III.C.1–3.

58. *See* Press Release, NLRB, *supra* note 43 (discussing the settlement).

59. FIRST NLRB REPORT, *supra* note 45, at 5–6 (citing Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576 (Div. of Advice Oct. 5, 2010)). For example, she called her supervisor a "scumbag." *Id.* at 5.

60. *Id.* The incident report concerned a customer complaint. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

2. When Concerted Activity Was Not Present

The Division of Advice found that there was no concerted activity in five of the nine cases. For example, in *Lee Enterprises, Inc.*,⁶⁴ the Division of Advice found that an employee's Twitter postings did not constitute concerted activity.⁶⁵ The case involved a newspaper reporter who created a Twitter account after his employer, a newspaper company, encouraged him to do so.⁶⁶ After creating the account, he posted tweets criticizing his copy editors and a local television station.⁶⁷ In addition, he posted tweets concerning local homicides and others containing sexual content.⁶⁸ In finding that his eventual termination did not violate the Act, the Division of Advice stated that the employee's "conduct was not protected and concerted: it did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment."⁶⁹

Likewise, in *JT's Porch Saloon & Eatery, Ltd.*,⁷⁰ the Division of Advice found that an employee's Facebook posting did not constitute concerted activity.⁷¹ In response to a question posed by his stepsister, the employee, a bartender, expressed frustration with his employer's tipping policy.⁷² Although the employee had previously discussed his concerns about the tipping policy with a coworker, the Division of Advice found that the posting was not concerted because the employee "did not discuss the *posting* with his coworkers, and none of them responded to the posting."⁷³

64. *Id.* at 12–14 (citing *Lee Enters., Inc.*, N.L.R.B. No. 28-CA-23267 (Div. of Advice Apr. 21, 2011)).

65. *Id.* at 13.

66. *See id.* at 12 ("[T]he [e]mployer encouraged employees . . . to use social media to get news stories out . . .").

67. *Id.* at 12–13.

68. *Id.* at 13.

69. *Id.*

70. *Id.* at 14–15 (citing *JT's Porch Saloon & Eatery, Ltd.*, N.L.R.B. No. 13-CA-46689, 2011 WL 2960964 (Div. of Advice July 7, 2011)).

71. *Id.*

72. *Id.* at 14. The employee's sister responded in agreement, saying that the policy "sucked." *Id.*

73. *Id.* at 15 (emphasis added).

In *Rural Metro*,⁷⁴ the Division of Advice found that a person's Facebook posting on a United States Senator's Facebook page did not constitute concerted activity.⁷⁵ After the Senator made a Facebook posting concerning federal grants to fire departments, the person, who worked for a company that contracted with fire departments, responded by complaining about her wages and the way that the state handled emergency medical services.⁷⁶ Although the employee "had discussed wages with other employees after [her] [e]mployer had announced a wage cap," the Division of Advice found that the posting was not concerted, emphasizing the fact that "she did not discuss her *posting* with any other employee."⁷⁷

In *Martin House*,⁷⁸ the Division of Advice found that an employee of a nonprofit facility for homeless people was not engaged in concerted activity when she posted comments about the facility's mentally disabled clients on her Facebook page.⁷⁹ Because the employee "did not discuss her Facebook *posts* with any of her fellow employees" and "none of her coworkers responded to the posts," the activity was not concerted.⁸⁰

Finally, in *Wal-Mart*,⁸¹ the Division of Advice found that a Wal-Mart employee who posted comments critical of the store's management was not engaged in concerted activity, even though several coworkers responded to the postings.⁸² The Division of Advice emphasized that the postings were "expression[s] of an individual gripe."⁸³ The coworkers' responses did not make the

74. *Id.* at 15–16 (citing *Rural Metro*, N.L.R.B. No. 25-CA-31802, 2011 WL 2960970 (Div. of Advice June 29, 2011)).

75. *Id.* at 16.

76. *Id.* at 15.

77. *Id.* at 15–16 (emphasis added).

78. *Id.* at 16–17 (citing *Martin House*, N.L.R.B. No. 34-CA-12950, 2011 WL 3223853 (Div. of Advice July 19, 2011)).

79. *Id.* For example, the employee "stated that it was spooky being alone overnight in a mental institution, that one client was cracking her up, and that [she] did not know whether the client was laughing at her, with her, or at the client's own voices." *Id.*

80. *Id.* (emphasis added).

81. *Id.* 17–18 (citing *Wal-Mart*, N.L.R.B. No. 17-CA-25030, 2011 WL 3223852 (Div. of Advice July 19, 2011)).

82. *Id.*

83. *Id.*

Facebook activity concerted because the responses “merely indicated that [the coworkers] had found the employee’s first posting humorous, asked why the employee was so ‘wound up,’ or offered emotional support.”⁸⁴

3. *What the Cases in the First Report Tell Us*

Although the General Counsel did not identify explicitly the factors that the Division of Advice considered when evaluating concertedness in the social media context, the Division of Advice considered certain factors regularly in its analysis. Such factors include: (1) whether the posting grew out of prior non-Facebook group activity,⁸⁵ (2) whether the posting contemplated future non-Facebook group activity,⁸⁶ (3) whether coworkers responded to the posting,⁸⁷ (4) whether the employee who made the posting discussed the posting itself with coworkers,⁸⁸ (5) the intent of the

84. *Id.*

85. See *Martin House*, N.L.R.B. No. 34-CA-12950, 2011 WL 3223853, at *2 (Div. of Advice July 19, 2011) (“[H]er activity was not an outgrowth of the employees’ collective concerns.”); *Wal-Mart*, N.L.R.B. No. 17-CA-25030, 2011 WL 3223852, at *2 (Div. of Advice July 19, 2011) (finding no “evidence that establishes that the Charging Party’s postings were the logical outgrowth of prior group activity”); *JT’s Porch Saloon & Eatery, Ltd.*, N.L.R.B. No. 13-CA-46689, 2011 WL 2960964, at *2 (Div. of Advice July 7, 2011) (“[T]his internet ‘conversation’ did not grow out [of] his prior conversation with a fellow bartender months earlier about the tipping policy.”).

86. See *Martin House*, 2011 WL 3223853, at *2 (“[T]he Charging Party was not seeking to induce or prepare for group action”); *Wal-Mart*, 2011 WL 3223852, at *2 (“They [the postings] contain no language suggesting the Charging Party sought to initiate or induce coworkers to engage in group action”).

87. See *Martin House*, 2011 WL 3223853, at *2 (“[N]one of her coworkers responded to the posts.”); *JT’s Porch*, 2011 WL 2960964, at *2 (“[N]one of his coworkers responded to the posting.”); *Am. Med. Response of Conn., Inc.*, N.L.R.B. No. 34-CA-12576, at 9 (Div. of Advice Oct. 5, 2010) (characterizing the Facebook activity as a “discussion” because coworkers responded to the employee’s postings).

88. See *Martin House*, 2011 WL 3223853, at *2 (“The Charging Party did not discuss her Facebook posts with any of her fellow employees”); *JT’s Porch*, 2011 WL 2960964, at *2 (“[H]e did not discuss his Facebook posting with any of his fellow employees either before or after he wrote it”); *Rural Metro*, N.L.R.B. No. 25-CA-31802, 2011 WL 2960970, at *2 (Div. of Advice June 29, 2011) (“The Charging Party did not discuss her Facebook posting with any other employee . . . either before or immediately thereafter.”).

employee who made the posting, as reflected by the language and context of the posting,⁸⁹ and (6) how coworkers interpreted the posting, as reflected by their responses.⁹⁰

Factors one and two relate closely to the standard developed in *Meyers I* and its progeny: if individual action grows out of prior group action or prepares for future group action, it is likely concerted.⁹¹ One question unique to the social media context is whether the Facebook activity in question must be an outgrowth of, or preparation for, in-person group activity, or whether it can be an outgrowth of, or preparation for, additional online group activity. The Division of Advice's analysis suggests that a lack of connection to in-person group activity will weigh against finding that Facebook activity is concerted.⁹²

As factors three and four indicate, the Division of Advice focused not only on the original posting and the person who made it, but also on whether coworkers became involved in the posting. The Division of Advice examined two forms of involvement: whether coworkers responded to the posting online and whether the posting itself became a topic of in-person conversation.⁹³ Typically, the Division of Advice focused on the absence of these

89. See *Martin House*, 2011 WL 3223853, at *2 (finding the postings revealed the employee's intent to "communicat[e] with her personal friends about what was happening on her shift"); *Wal-Mart*, 2011 WL 3223852, at *2 (finding the postings revealed the employee's intent to "express . . . his frustration regarding his individual dispute with the Assistant Manager"); *JT's Porch*, 2011 WL 2960964, at *2 (finding the postings revealed the employee's intent to "respond[] to a question from his step-sister about how his evening at work went"); *Rural Metro*, 2011 WL 2960970, at *2 (finding the postings revealed the employee's intent "to make a public official aware of the state of emergency medical services in Indiana").

90. See, e.g., *Wal-Mart*, 2011 WL 3223852, at *2 (finding that coworkers' responses were reactions to an individual gripe rather than the beginning of group action). For example, the Division of Advice characterized a coworker's "hang in there"-type comment" as suggesting that the coworker viewed the employee's "postings to be a plea for emotional support." *Id.*

91. See *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (stating that individual action may be concerted when it is a "logical outgrowth" of prior concerted activity"); see also *Meyers II*, 281 N.L.R.B. 882, 887 (1986) (stating that "individual employees seek[ing] to initiate or to induce or to prepare for group action" may be involved in concerted activity).

92. See *supra* notes 85–86.

93. See *supra* notes 87–88. Discussion of a posting can occur within a conversation about common concerns, or it can provide a means of entering into a conversation about common concerns.

factors, which are objective in nature, when finding that Facebook activity was not concerted.⁹⁴ In contrast, when the Division of Advice found that Facebook activity was concerted, it put less of an emphasis on whether coworkers discussed the posting itself with each other in person. Perhaps this is because in the cases in which the Division of Advice found concertedness, coworkers usually responded to the original posting by making postings of their own.⁹⁵ Thus, their responses reflected knowledge of the original posting, and an examination of whether the original posting was a topic of in-person conversation became unnecessary. Even so, when finding concerted activity, the Division of Advice tended to address the significance of coworker responses only implicitly—by characterizing the Facebook activity as a “discussion” or “conversation” when coworkers responded—rather than stating clearly that coworker responses indicated concertedness.⁹⁶

Factors five and six represent an implicit focus in the Division of Advice’s analysis on the subjective intent of those involved in the Facebook activity. In each case, the Division of Advice analyzed what the person who made the posting was “seeking to” or “trying to” do.⁹⁷ Likewise, it looked at coworkers’ responses to discern how they interpreted the posting: whether their responses reflected an intent to participate in group action or simply conveyed, for example, that they found the posting amusing.⁹⁸

94. See, e.g., *Martin House*, N.L.R.B. No. 34-CA-12950, 2011 WL 3223853, at *2 (Div. of Advice July 19, 2011) (finding that the Facebook activity was not concerted in part because “[t]he Charging Party did not discuss her Facebook posts with any of her fellow employees, and none of her coworkers responded to the posts”).

95. See, e.g., *Am. Med. Response of Conn., Inc.*, N.L.R.B. No. 34-CA-12576, at 3–4 (Div. of Advice Oct. 5, 2010) (listing coworker responses).

96. See, e.g., *id.* at 9 (characterizing the online activity as a “discussion” of supervisory actions).

97. See, e.g., *Wal-Mart*, N.L.R.B. No. 17-CA-25030, 2011 WL 3223852, at *2 (Div. of Advice July 19, 2011) (“They [the postings] contain no language suggesting the Charging Party *sought to* initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute”) (emphasis added).

98. See, e.g., *id.* (“Employee 1 merely indicated that he found Charging Party’s first Facebook posting humorous”).

Although it is possible to identify factors that the Division of Advice considered regularly, it is difficult to discern the weight that the Division of Advice attributed to each factor. The Division of Advice neither attributed a uniform weight to each factor nor indicated which factor(s) it considered more heavily than the others.

B. The Second NLRB Report

Like the First Report, the Second NLRB Report contains summaries of cases involving social media, ten of which include a discussion of the concerted nature of Facebook postings.⁹⁹ Because, as the Board's Acting General Counsel acknowledged, the issues raised by these cases "continue to be a 'hot topic' among practitioners, human resource professionals, the media, and the public," the Second Report's purpose is to continue "to provide guidance as this area of law develops."¹⁰⁰

1. When Concerted Activity Was Present

The Division of Advice found that concerted activity existed in five of the ten cases. For example, in *Case A*,¹⁰¹ the Division of Advice found that an employee engaged in concerted activity when she posted a status update on her Facebook page about her employer.¹⁰² The employee made the posting after her employer

99. SECOND NLRB REPORT, *supra* note 46 (citing Children's Nat'l Med. Ctr., N.L.R.B. No. 05-CA-36658 (Div. of Advice Nov. 14, 2011); Frito-Lay, Inc., N.L.R.B. No. 36-CA-10882 (Div. of Advice Sept. 19, 2011); Buel, Inc., N.L.R.B. No. 11-CA-22936 (Div. of Advice July 28, 2011); *Case A*; *Case B*; *Case C*; *Case D*; *Case E*; *Case F*; *Case G*). The NLRB does not release all Advice Memoranda to the public. See NLRB, *Advice Memos* <http://www.nlr.gov/cases-decisions/advice-memos> (last visited Sept. 27, 2012) ("Two categories of advice memoranda are released to the public: memoranda directing dismissal of the charge . . . and memoranda in closed cases that . . . are released in the General Counsel's discretion.") (on file with the Washington and Lee Law Review). Moreover, the Second Report does not contain case names. Unless the name of a case discussed in the Second Report was found independently, the case was assigned a letter, and this Note refers to it by the letter throughout.

100. SECOND NLRB REPORT, *supra* note 46, at 2.

101. *Id.* at 3–6 (citing *Case A*).

102. *Id.* at 5. "Using expletives, she stated the Employer had messed up and

transferred her to a less lucrative position.¹⁰³ Coworkers and former coworkers responded, expressing support, anger, and frustration, and one former coworker suggested that the employees initiate a class action lawsuit against the employer.¹⁰⁴ A few days after making the posting, the employee was terminated.¹⁰⁵ In supporting its finding of concerted activity, the Division of Advice stated: “[T]he Charging Party’s initial Facebook statement, and the discussion it generated, . . . clearly fell within the Board’s definition of concerted activity, which encompasses employee initiation of group action through the discussion of complaints with fellow employees.”¹⁰⁶

In *Case B*,¹⁰⁷ the Division of Advice found that an employee was engaged in concerted activity when she posted several comments on her Facebook page.¹⁰⁸ The employee posted the first comment after a company manager made a sexist remark.¹⁰⁹ A coworker who was with the employee when the manager made the remark responded to the posting.¹¹⁰ The employee later made a second series of postings after a coworker was fired, and the company’s president reprimanded her for getting involved in coworkers’ work-related problems.¹¹¹ Subsequently, the employee was terminated—a termination that the Division of Advice concluded was due to her “engag[ement] in discussions with her coworkers about working conditions.”¹¹²

Similarly, the Division of Advice found that an employee’s Facebook activity was concerted in *Case C*.¹¹³ After a coworker

that she was done with being a good employee.” *Id.* at 3.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 5. A Charging Party is an employee who files a charge against his or her employer, alleging that the employer committed an unfair labor practice.

107. *Id.* at 18–20 (citing *Case B*).

108. *Id.* at 20.

109. *Id.* at 18. The employee sent an email about the remark to her supervisor and a human resources assistant but did not receive responses. *Id.*

110. *Id.*

111. *Id.* at 19.

112. *Id.* at 20. The Division of Advice characterized the termination as a “pre-emptive strike’ because of the [e]mployer’s fear of what those discussions might lead to.” *Id.*

113. *Id.* at 20–22 (citing *Case C*).

was promoted, the employee had separate discussions with two other coworkers about her disagreement with the promotion.¹¹⁴ She made a Facebook posting reflecting her frustration, and three coworkers responded in agreement.¹¹⁵ The employer terminated the employee who made the posting, along with one of the coworkers who responded, and the employer disciplined the two other coworkers who responded.¹¹⁶ The activity was concerted, the Division of Advice reasoned, because the employee's posting "sparked a collective dialogue that elicited responses from three of her coworkers."¹¹⁷ The Division of Advice noted: "While the concerted actions expressed in the posts were of a preliminary nature . . . the movement toward concerted action was halted by the [e]mployer's pre-emptive discharge and discipline of all the employees involved."¹¹⁸

In *Case D*,¹¹⁹ the Division of Advice found that an employee's Facebook posting constituted concerted activity.¹²⁰ Before making the posting, the employee participated in discussions with coworkers about a superior's negative attitude and brought the concern to management's attention.¹²¹ A coworker posted on her Facebook page "that there had been so much drama" at work, and an online conversation with coworkers ensued.¹²² The employee—who was eventually discharged—responded by stating that "she hated [her workplace] and couldn't wait to get out of there" because of the negative work environment.¹²³ The Division of Advice concluded that the Facebook activity was concerted "because it was a continuation of the earlier group action that included complaints to management . . . and because it was part of a discussion of employees' shared concerns."¹²⁴

114. *Id.* at 20.

115. *Id.* at 20–21.

116. *Id.* at 21.

117. *Id.* at 22.

118. *Id.*

119. *Id.* at 22–25 (citing *Case D*).

120. *Id.* at 23.

121. *Id.* at 22.

122. *Id.* at 22–23.

123. *Id.* at 23.

124. *Id.*

Finally, in *Case E*,¹²⁵ the Division of Advice found that an employee's Facebook postings made during a seven-month period constituted concerted activity.¹²⁶ Tension between the employee, a nurse, and his employer, a hospital, arose after "a recently discharged hospital employee killed one supervisor and critically wounded another."¹²⁷ After the incident, the employee criticized his employer publicly—by writing letters to a local newspaper, for example.¹²⁸ In addition, the employee made numerous Facebook postings that referenced an on-going labor dispute, commented negatively on the employer's management style, and discussed management's mistreatment of employees.¹²⁹ The postings received comments from coworkers expressing support.¹³⁰ The employer disciplined the employee and later discharged him.¹³¹ In concluding that the postings constituted concerted activity, the Division of Advice stated that they "were the logical outgrowth of other employees' collective concerns or were made with or on the authority of other employees."¹³²

2. When Concerted Activity Was Not Present

The Division of Advice found that concerted activity was not present in the five other cases. In *Case F*,¹³³ for example, the Division of Advice found that an employee's two Facebook postings did not constitute concerted activity.¹³⁴ After the employee's "supervisor reprimanded her in front of the Regional Manager for failing to perform a task that she had never been instructed to perform," she made a Facebook posting "that consisted of an expletive and the name of the [e]mployer's

125. *Id.* at 26–30 (citing *Case E*).

126. *Id.* at 28.

127. *Id.* at 26.

128. *Id.*

129. *Id.* at 26–27.

130. *Id.* at 28–29.

131. *Id.* at 26–27.

132. *Id.* at 28.

133. *Id.* at 6–8 (citing *Case F*).

134. *Id.* at 7.

store.”¹³⁵ One coworker responded by “Liking” the posting.¹³⁶ Then, the employee made a second posting stating that her “employer did not appreciate its employees,” to which coworkers did not respond.¹³⁷ In the following days, the employee discussed the incident with her coworkers, and she was fired.¹³⁸ In concluding that the Facebook activity was not concerted, the Division of Advice characterized the postings as “merely an expression of an individual gripe.”¹³⁹

In *Case G*,¹⁴⁰ the Division of Advice determined that an employee did not engage in concerted activity when she “posted angry profane comments on her Facebook wall” about her coworkers and employer.¹⁴¹ One coworker responded with empathy, saying “that she had gone through the same thing.”¹⁴² Subsequently, the employer fired the employee.¹⁴³ The Division of Advice reasoned that the postings were not concerted because they “expressed [the employee’s] personal anger with coworkers and the [e]mployer, were made solely on her own behalf, and did not involve the sharing of common concerns.”¹⁴⁴

Similarly, in *Children’s National Medical Center*,¹⁴⁵ the Division of Advice found that two Facebook postings did not constitute concerted activity.¹⁴⁶ The first posting expressed the employee’s frustration with the way that a doctor had treated the employee, a respiratory therapist, and the second posting

135. *Id.* at 6.

136. *Id.*; see also Facebook, *Like*, <http://www.facebook.com/help/like> (last visited Sept. 27, 2012) (“Clicking Like under something you or a friend posts on Facebook is an easy way to let someone know that you enjoy it, without leaving a comment.”) (on file with the Washington and Lee Law Review).

137. SECOND NLRB REPORT, *supra* note 46, at 6 (citing *Case F*).

138. *Id.* at 6–7.

139. *Id.* at 7.

140. *Id.* at 11–13 (citing *Case G*).

141. *Id.* at 11. The employee “had a history of conflict with several coworkers.” *Id.*

142. *Id.* at 12.

143. *Id.*

144. *Id.* The Division of Advice characterized the postings as “rants” and “general profanities.” *Id.*

145. *Id.* at 30–32 (citing Children’s Nat’l Med. Ctr., N.L.R.B. No. 05-CA-36658 (Div. of Advice Nov. 14, 2011)).

146. *Id.* at 32.

expressed the employee's irritation with a coworker who was sucking his teeth at work.¹⁴⁷ The Division of Advice's analysis of concertedness was brief because it found that the content of the postings was not protected.¹⁴⁸ Nevertheless, the Division of Advice stated that even if the first posting were protected, it was not concerted because it "was merely a personal complaint."¹⁴⁹

In *Buel, Inc.*,¹⁵⁰ the Division of Advice found that an employee's Facebook activity was not concerted.¹⁵¹ The employee, a truck driver, discovered that roads were closed because of the weather.¹⁵² He attempted, unsuccessfully, to reach his employer's on-call dispatcher and discussed his inability to reach the dispatcher with other drivers.¹⁵³ He also made several Facebook postings, commenting on the situation.¹⁵⁴ One of the employee's "Facebook friends," the employer's operations manager, responded critically, and a conversation ensued.¹⁵⁵ Following, the employer revoked the employee's "status as a leader operator," and the employee resigned, claiming he was forced to do so.¹⁵⁶ Despite the discussion that the employee had with other drivers before posting on Facebook, the Division of Advice found that "there [was] insufficient evidence that his Facebook activity was a continuation of any collective concerns."¹⁵⁷ Rather, the employee "was simply expressing his own frustration and boredom about his inability to reach the on-call dispatcher."¹⁵⁸

Finally, in *Frito-Lay, Inc.*,¹⁵⁹ the Division of Advice found that an employee was not engaging in concerted activity when he

147. *Id.* at 30–31.

148. *Id.* at 31–32.

149. *Id.* at 32. The Division of Advice characterized the second posting in similar terms. *Id.* at 31–32.

150. *Id.* at 32–34 (citing *Buel, Inc.*, N.L.R.B. No. 11-CA-22936 (Div. of Advice July 28, 2011)).

151. *Id.* at 32.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 32–33.

156. *Id.* at 33.

157. *Id.*

158. *Id.*

159. *Id.* at 34–35 (citing *Frito-Lay, Inc.*, N.L.R.B. No. 36-CA-10882 (Div. of Advice Sept. 19, 2011)).

posted on Facebook but was “just venting.”¹⁶⁰ The employee, who was feeling sick, talked to his supervisor about leaving work early.¹⁶¹ The supervisor told the employee that he could leave early but would forfeit an attendance point.¹⁶² Because the employee did not want to lose an attendance point, he completed his shift.¹⁶³ After his shift, the employee made a Facebook posting, for which he was later discharged, “indicating that it was too bad when your boss doesn’t care about your health.”¹⁶⁴ The Division of Advice concluded that the Facebook activity was not concerted; it was not an outgrowth of prior group action, did not attempt to initiate group action, and did not receive responses from coworkers.¹⁶⁵

3. What the Cases in the Second Report Tell Us

The factors that the Division of Advice considered regularly in its analysis of the First Report’s cases also appeared in its analysis of the Second Report’s cases. Frequently, the Division of Advice considered: (1) whether the posting grew out of prior non-Facebook group activity,¹⁶⁶ (2) whether the posting contemplated future non-Facebook group activity,¹⁶⁷ (3) whether coworkers responded to the

160. *Id.* at 35.

161. *Id.* at 34.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 35.

166. *See id.* at 35 (citing Frito-Lay, Inc., N.L.R.B. No. 36-CA-10882, at 4 (Div. of Advice Sept. 19, 2011)) (finding that the postings were not “an outgrowth of prior employee meetings”); *Id.* at 33 (citing Buel, Inc., N.L.R.B. No. 11-CA-22936, at 4 (Div. of Advice July 28, 2011)) (“Although he had discussed with other drivers the fact that the on-call dispatcher was not reachable, there is insufficient evidence that his Facebook activity was a continuation of any collective concerns.”); *Id.* at 21 (citing *Case C*) (“[P]rior to her Facebook postings, the Charging Party spoke to two coworkers”); *Id.* at 23 (citing *Case D*) (describing the postings as “a continuation of . . . earlier group action that included employee complaints to management about the Employer’s Operations Manager”); *Id.* at 28 (citing *Case E*) (describing the postings as a “logical outgrowth” of prior concerted activity); *Id.* at 7 (citing *Case F*) (“[T]he post did not grow out of a prior discussion . . . with her coworkers.”).

167. *See id.* at 32 (citing Children’s Nat’l Med. Ctr., N.L.R.B. No. 05-CA-36658, at 3 (Div. of Advice Nov. 14, 2011)) (“The Charging Party was not seeking to induce or prepare for group action”); *Id.* at 35 (citing Frito-Lay, Inc.,

posting,¹⁶⁸ (4) whether the employee who made the posting discussed the posting itself with coworkers,¹⁶⁹ (5) the intent of the employee who made the posting, as reflected by the language and context of the posting,¹⁷⁰ and (6) how coworkers interpreted the posting, as reflected by their responses.¹⁷¹

Furthermore, the Division of Advice considered an additional factor that it did not consider in the cases discussed

N.L.R.B. No. 36-CA-10882, at 3–4 (Div. of Advice Sept. 19, 2011) (same); *Id.* at 33 (citing Buel, Inc., N.L.R.B. No. 11-CA-22936, at 4 (Div. of Advice July 28, 2011) (same); *Id.* at 7 (citing *Case F*) (“[T]he post contained no language suggesting that she sought to initiate or induce coworkers to engage in group action”); *Id.* at 12 (citing *Case G*) (same).

168. *See id.* at 32 (citing Children’s Nat’l Med. Ctr., N.L.R.B. No. 05-CA-36658, at 3 (Div. of Advice Nov. 14, 2011)) (“[N]one of her coworkers responded.”); *Id.* at 35 (citing Frito-Lay, Inc. N.L.R.B. No. 36-CA-10882, at 3 (Div. of Advice Sept. 19 2011)) (“[N]one of his coworkers responded to the postings with similar concerns.”); *Id.* at 33 (citing Buel, Inc., N.L.R.B. No. 11-CA-22936, at 4–5 (Div. of Advice July 28, 2011)) (“[N]one of his coworkers responded to his complaints about work-related matters.”); *Id.* at 5 (citing *Case A*) (“[C]oworkers and former coworkers responded.”); *Id.* at 22 (citing *Case C*) (“The Charging Party’s Facebook post sparked a collective dialogue that elicited responses from three of her coworkers”).

169. *See id.* at 32 (citing Children’s Nat’l Med. Ctr., N.L.R.B. No. 05-CA-36658, at 3 (Div. of Advice Nov. 14, 2011)) (“The Charging Party did not discuss her Facebook post with any of her fellow employees”); *Id.* at 33 (citing Buel, Inc., N.L.R.B. No. 11-CA- 22936, at 3 (Div. of Advice July 28, 2011)) (“The Charging Party did not discuss his Facebook posts with any of his fellow employees”).

170. *See id.* at 32 (citing Children’s Nat’l Med. Ctr., N.L.R.B. No. 05-CA-36658, at 3 (Div. of Advice Nov. 14, 2011)) (finding the postings revealed the employee’s intent to express “a personal complaint about something that had happened on her shift”); *Id.* at 35 (citing Frito-Lay, Inc., N.L.R.B. No. 36-CA-10882, at 4 (Div. of Advice Sept. 19, 2011)) (finding the postings revealed the employee’s intent to “vent”); *Id.* at 33 (citing Buel, Inc., N.L.R.B. No. 11-CA-22936, at 4 (Div. of Advice July 28, 2011)) (finding the postings revealed the employee’s intent to “express[] his own frustration and boredom while stranded by the weather”); *Id.* at 7 (citing *Case F*) (finding the postings revealed the employee’s intent to express “an individual gripe”); *Id.* at 12 (citing *Case G*) (finding the postings revealed the employee’s intent to “express[] her personal anger with coworkers and the Employer”).

171. *See id.* at 29 (citing *Case E*) (“[F]ellow employees posted many messages of support for the Charging Party’s statements and general encouragement for his activity on his Facebook page”); *Id.* at 7 (citing *Case F*) (“Although one of her coworkers offered her sympathy and indicated some general dissatisfaction with her job, [the coworker] did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party.”).

by the First Report: whether the firing that resulted from the employee's Facebook activity constituted a "pre-emptive" strike. In other words, sometimes Facebook activity itself does not quite rise to the level of concerted activity or is concerted only in a preliminary sense. Nevertheless, the Division of Advice indicated that it would consider the activity concerted under the Act if it represented a movement towards concerted activity that could never occur because of the firing. For example, when explaining the Division of Advice's findings in *Case C*, the Acting General Counsel stated:

While the concerted actions expressed in the posts were of a preliminary nature, we concluded that the movement toward concerted action was halted by the Employer's pre-emptive discharge and discipline of all the employees involved in the Facebook posts. Thus, we concluded that the Employer unlawfully prevented the fruition of the employees' protected concerted activity.¹⁷²

This "pre-emptive strike" concept relates closely to the second factor identified in Part III.A.3: whether the posting contemplated future non-Facebook group activity. The language, however, is unique to the Second Report and the cases contained therein, indicating that perhaps the concept is slightly different.

C. The ALJ Cases

1. Hispanics United of Buffalo, Inc.

Until September 2011, an ALJ did not have occasion to apply the *Meyers I* standard in a case involving a Facebook firing.¹⁷³ Other than the First NLRB Report and the Advice Memoranda summarized therein, little guidance existed on how the standard

172. *Id.* at 22 (citing *Case C*); see also *id.* at 20 (citing *Case B*) ("We therefore concluded that Charging Party was discharged . . . as a 'pre-emptive strike' because of the Employer's fear of what those discussions might lead to.").

173. One reason was choice—the NLRB did not begin issuing Facebook firing complaints until October 2010. See Complaint & Notice of Hearing, Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576 (Region 34 Oct. 27, 2010) (first Facebook firing complaint). Another reason was opportunity—many Facebook firing cases settled prior to adjudication. U.S. CHAMBER OF COMMERCE, *supra* note 40, at 5.

would apply in the social media context.¹⁷⁴ This changed when an ALJ issued the first decision of its kind in *Hispanics United*.

Hispanics United held that employees' Facebook postings constituted protected concerted activity, making their termination unlawful under the NLRA.¹⁷⁵ Hispanics United of Buffalo, Inc. (HUB) employed Lydia Cruz-Moore as a domestic violence social worker.¹⁷⁶ Cruz-Moore was often critical of other HUB employees' job performance and communicated this criticism through text messages and in-person conversations.¹⁷⁷ In particular, she told one HUB employee, Mariana Cole-Rivera, of her plans to raise her concerns with HUB's Executive Director, Lourdes Iglesias.¹⁷⁸ Following this conversation, Cole-Rivera posted a message on her Facebook page: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?"¹⁷⁹ Several HUB employees responded by posting comments.¹⁸⁰ After Cruz-Moore complained to Iglesias about the Facebook activity, he met individually with five of the employees involved in the Facebook activity and fired each of them.¹⁸¹

The ALJ—faced with the issue of whether the HUB employees' Facebook postings constituted protected concerted activity—applied the standard of *Meyers I* and its progeny.¹⁸² The ALJ asserted that the employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."¹⁸³ Thus, the Facebook postings

174. The Acting General Counsel did not issue the Second Report until after the three ALJ cases discussed in this Note had been decided.

175. *Hispanics United of Buffalo, Inc.*, N.L.R.B. No. 3-CA-27872, at 7–9, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011). The case is on appeal before the five-member board.

176. *Hispanics United*, N.L.R.B. No. 3-CA-27872, at 4.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 4–6. Cole-Rivera responded to some of the comments. *Id.* at 5–6. In addition, Cruz-Moore posted: "Marianna stop with ur lies about me I'll b at HUB Tuesday." *Id.* at 6.

181. *Id.*

182. *Id.* at 7–8.

183. *Id.* at 8–9.

constituted concerted activity.¹⁸⁴ Because the ALJ found that the other elements of a Section 8 violation were present, he asserted that HUB had terminated its employees in violation of the Act.¹⁸⁵

Although the Board asserted in *Meyers I* that whether an activity is concerted is a separate inquiry from whether an activity is protected,¹⁸⁶ the ALJ in *Hispanics United* fused both inquiries together and reversed the analysis. The ALJ first determined that the activity was protected, and then he determined that the activity was concerted.¹⁸⁷ As a consequence, the ALJ did not provide a thorough rationale for his determination that the Facebook postings constituted concerted activity. Interestingly, the ALJ did not address the unique context in which the activity arose, likely because HUB “concede[d] that regardless of whether the comments and actions of the five terminated employees took place on Facebook or ‘around the water cooler’ the result would be the same.”¹⁸⁸

184. *Id.* Before progressing to the ALJ stage, the Division of Advice issued a memorandum, advising the regional office to issue a complaint. The Division of Advice, as noted by the Acting General Counsel in the First Report, found that the activity involved was concerted: “[T]he Facebook discussion here was a textbook example of concerted activity, even though it transpired on a social network platform.” FIRST NLRB REPORT, *supra* note 45, at 4.

185. *Hispanics United of Buffalo, Inc.*, N.L.R.B. No. 3-CA-27872, at 10, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011). First, the ALJ determined that HUB knew of the concerted nature of employees’ activity. *See id.* at 9 (“[T]he fact that [HUB] lumped the discriminates together in terminating them, establishes that [HUB] viewed the five as a group and that their activity was concerted.”). Second, the ALJ determined that the activity was protected. *See id.* at 8 (“I conclude that their Facebook communications with each other, in reaction to a co-worker’s criticisms of the manner in which HUB employees performed their jobs, are protected.”). Finally, the ALJ noted HUB’s concession that the Facebook postings motivated the firings. *Id.*

186. *See Meyers I*, 268 N.L.R.B. 493, 497 (1984) (“Once an activity is found to be concerted, an 8(a)(1) violation will be found if, *in addition*, . . . the concerted activity was protected by the Act . . .”) (emphasis added).

187. This is problematic because whether an activity is concerted concerns the *character* of the activity, while whether an activity is protected concerns the *content* of the activity.

188. *Hispanics United*, N.L.R.B. No. 3-CA-27872, at 8. It is unclear why HUB made this concession.

2. Karl Knauz Motors, Inc.

A few weeks after the *Hispanics United* decision, another ALJ issued the second Facebook firing decision. *Karl Knauz Motors* held that an employee's Facebook posting on one topic constituted protected concerted activity,¹⁸⁹ while the employee's posting on a different topic did not constitute protected concerted activity.¹⁹⁰ Because the ALJ determined that the latter posting caused the employee's termination, the ALJ found that the discharge did not violate the NLRA.¹⁹¹

The dispute involved Karl Knauz Motors, Inc. (Karl Knauz) and its employee, Robert Becker, a car salesman at its BMW dealership.¹⁹² The dealership was organizing an "Ultimate Driving Event" at which it planned to introduce a redesigned BMW 5 Series automobile.¹⁹³ Prior to the event, Becker's supervisor, Phillip Ceraulo, held a meeting at which he informed the salespeople of the dealership's plan to have a hot dog cart at the event.¹⁹⁴ Both during and after the meeting, Becker and other salespeople allegedly commented on the disconnect between the hot dog cart and BMW's status as a luxury brand and the effect that the disconnect could have on their commissions.¹⁹⁵ While at the event, Becker took pictures of the food, including pictures of salespeople holding hot dogs.¹⁹⁶ He later posted those pictures with descriptions on his Facebook page, and some of Becker's Facebook friends posted comments, to which Becker responded.¹⁹⁷

Several days after the event, an accident occurred at a Land Rover dealership, also owned by Karl Knauz, that was located adjacent to the BMW dealership.¹⁹⁸ Becker took pictures of the accident and posted pictures, along with comments, on his

189. Karl Knauz Motors, Inc., N.L.R.B. No. 13-CA-46452, at 8, 2011 WL 4499437 (Div. of Judges Sept. 28, 2011).

190. *Id.* at 9.

191. *Id.* The case is on appeal before the five-member board.

192. *Id.* at 1–2.

193. *Id.* at 2.

194. *Id.*

195. *Id.*

196. *Id.* at 3.

197. *Id.* at 3–4.

198. *See id.* at 3 (describing the accident).

Facebook page.¹⁹⁹ Some of Becker's Facebook friends, including other Karl Knauz employees, posted comments, to which Becker responded.²⁰⁰ After Karl Knauz discovered the postings of the event and the accident, it terminated Becker's employment.²⁰¹

Thus, the ALJ had to determine whether Becker's Facebook postings of (1) the Ultimate Driving Event (event posting), or (2) the accident at the Land Rover dealership (accident posting), or (3) both constituted protected concerted activity, making Becker's termination unlawful under the NLRA.²⁰² In applying the standard of *Meyers I* and its progeny, the ALJ found that Becker's event posting constituted concerted activity:

As both Larsen [another salesperson] and Becker spoke up at the meeting commenting on what they considered to be the inadequacies of the food being offered at the event, and the subject was further discussed by the salespersons after the meeting, even though only Becker complained further about it on his Facebook pages without any further input from any other salesperson, other than the Facebook pictures of [two other salespeople], I find that it was concerted activities²⁰³

Because Becker's individual action was a "logical outgrowth of prior concerted activity,"²⁰⁴ his individual action was concerted.

In contrast, the ALJ found that Becker's accident posting did not constitute concerted activity.²⁰⁵ Supporting his conclusion, the ALJ emphasized that "[i]t was posted solely by Becker,

199. *Id.* at 4.

200. *Id.*

201. *Id.* at 5–6

202. *Id.* at 7.

203. *Id.* at 8. In addition, the ALJ determined that the activity was protected. *See id.* ("[I]t was protected . . . as it could have had an effect upon [Becker's] compensation."). Before progressing to the ALJ stage, the Division of Advice issued a memorandum, advising the regional office to issue a complaint. The Division of Advice, as noted by the Acting General Counsel in the First Report, found that the activity involved was concerted: "The Facebook activity was a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management." FIRST NLRB REPORT, *supra* note 45, at 8.

204. Karl Knauz Motors, Inc., N.L.R.B. No. 13-CA-46452, at 8, 2011 WL 4499437 (Div. of Judges Sept. 28, 2011) (quoting *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995)).

205. *Id.* at 9.

apparently as a lark, without any discussion with any other employee.”²⁰⁶ Because the ALJ found that Becker’s accident posting, rather than his event posting, motivated his discharge, the ALJ found that Karl Knauz did not terminate Becker in violation of Section 8 of the Act.²⁰⁷

3. Triple Play Sports Bar & Grille

The first ALJ Facebook firing decision of 2012—the third decision overall—was issued on January 3, 2012. *Triple Play* held that two employees engaged in concerted activity when they responded to a Facebook posting by a former coworker about their employer’s tax withholding practices.²⁰⁸ Triple Play Sports Bar and Grille (Triple Play) employed Jillian Sanzone as a waitress and bartender and Vincent Spinella as a cook.²⁰⁹ When Sanzone filed her tax returns, she realized that she owed taxes to the state.²¹⁰ She talked about the tax issue with coworkers, and her supervisors arranged a staff meeting to discuss the issue.²¹¹

Before the staff meeting took place, a former employee of Triple Play made the following Facebook posting: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!”²¹² The posting received a number of responses from customers and former coworkers, including Sanzone.²¹³ In addition, the former employee who made the original posting replied to some of the responses.²¹⁴ After eleven responses had been made to the original posting, all expressing frustration with owing taxes, Sanzone stated: “I owe too. Such an

206. *Id.* In addition, the ALJ determined that the activity was not protected. *See id.* (“It is so obviously unprotected . . .”).

207. *Id.*

208. Triple Play Sports Bar & Grille, N.L.R.B. No. 34-CA-12915, at 8–9, 2012 WL 76862 (Div. of Judges Jan. 3, 2012). The case is on appeal before the five-member board.

209. *Triple Play*, N.L.R.B. No. 34-CA-12915, at 2.

210. *Id.* at 3.

211. *Id.*

212. *Id.*

213. *Id.* at 3–4.

214. *Id.*

asshole.”²¹⁵ Although Spinella did not respond with a textual comment, he clicked the “Like” button under the initial posting.²¹⁶ After two supervisors learned of the Facebook posting and the responses, they fired both Sanzone and Spinella.²¹⁷

Consequently, the ALJ had to determine whether the two employees’ Facebook postings constituted protected concerted activity, making their termination unlawful under the NLRA.²¹⁸ In answering this question, the ALJ focused on the fact that the Facebook postings were “part of an ongoing sequence of events” involving the tax issue.²¹⁹ Employees of Triple Play had discussed the matter before the Facebook activity,²²⁰ and a meeting was scheduled to discuss the matter in the near future.²²¹ In addition, the ALJ notably asserted: “The specific medium in which the discussion takes place is irrelevant to its protected nature.”²²² Therefore, the ALJ concluded that the Facebook activity constituted concerted activity.²²³

215. *Id.*

216. *Id.* at 4. After clicking “Like,” the text “Vincent VinnyCenz Spinella and Chelsea Molloy like this” appeared automatically below the original posting. *Id.* Spinella testified that he clicked “Like” after the fifth response had been made, a comment by the person who made the original posting: “It’s all Ralph’s [one of the supervisor’s] fault. He didn’t do the paperwork right. I’m calling the labor board to look into it because he still owes me about 2000 in paychecks.” *Id.*

217. *Id.* at 4–5.

218. *Id.* at 8–9.

219. *Id.* at 8.

220. *Id.* Thus, the Facebook activity was a “logical outgrowth” of prior concerted activity. *See id.* (“[T]he Facebook discussion was part of a sequence of events, including other, face-to-face employee conversations . . .”).

221. *Id.* Thus, the Facebook activity related to the preparation of group action. *See id.* (“The employees who posted comments . . . specifically discussed the issues they intended to raise at [the] upcoming meeting and avenues for possible complaints to government entities.”).

222. *Id.* The ALJ’s use of the phrase “protected nature” appears to encompass both whether the activity is protected and whether the activity is concerted.

223. *Id.* Before progressing to the ALJ stage, the Division of Advice issued a memorandum, advising the regional office to issue a complaint. The Division of Advice, as noted by the Acting General Counsel in the First Report, found that the activity involved was concerted: “[T]he conversation that transpired on Facebook not only embodied ‘truly group complaints’ but also contemplated future group activity.” FIRST NLRB REPORT, *supra* note 45, at 10.

Perhaps the most interesting part of the ALJ's discussion came when she discussed the implications of Spinella clicking "Like," rather than responding in text form. The ALJ stated that clicking the "Like" button "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity."²²⁴ Because the ALJ determined that the other elements of a Section 8 violation were present and that the Facebook activity did not lose the protection of the Act, she found that Triple Play had terminated both employees in violation of the Act.²²⁵

4. What the ALJ Cases Tell Us

In deciding the previous three cases, the ALJs considered some of the same factors that the Acting General Counsel and Division of Advice considered in the two reports and the Advice Memoranda cited therein. For example, the ALJs in both *Triple Play* and *Karl Knauz Motors* afforded weight to the fact that the postings grew out of prior non-Facebook activity—factor one.²²⁶ In addition, the ALJs in both *Triple Play* and *Hispanics United* found that the postings contemplated future non-Facebook activity—factor two.²²⁷

224. *Triple Play Sports Bar & Grille*, N.L.R.B. No. 34-CA-12915, at 8–9, 2012 WL 76862 (Div. of Judges Jan. 3, 2012). The ALJ emphasized that "the Board has never parsed the participation of individual employees in otherwise concerted conversations, or deemed the protections of Section 7 to be contingent upon their level of engagement or enthusiasm." *Id.* at 9.

225. *Id.* at 22. In addition to finding that the activity was concerted, the ALJ determined that the activity was protected. *See id.* 8 ("It is beyond question that issues related to wages, including the tax treatment of earnings, are directly related to the employment relationship and may form the basis for protected concerted activity . . ."). The ALJ also found that Triple Play knew that its employees were engaged in protected concerted activity and that Facebook activity motivated the firings. *Id.* at 14–15.

226. *See id.* at 8 (discussing the in-person conversations between employees that had taken place before the Facebook posting); *Karl Knauz Motors, Inc.*, N.L.R.B. No. 13-CA-46452, at 8, 2011 WL 4499437 (Div. of Judges Sept. 28, 2011) (same).

227. *See Triple Play*, N.L.R.B. No. 34-CA-12915, at 8 ("The employees who posted comments . . . specifically discussed the issues they intended to raise at [an] upcoming meeting . . ."); *Hispanics United of Buffalo, Inc.*, N.L.R.B. No. 3-CA-27872, at 9, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011) (finding the employees' postings represented "a first step towards taking group action to

Furthermore, at least implicitly, the ALJs focused on the intent of those involved—factors four and five. For example, in *Hispanics United*, the ALJ indicated that the original poster and the coworkers who responded intended “to defend themselves against . . . accusations.”²²⁸ The *Hispanics United* decision suggests that if the intent of an employee who makes a Facebook posting aligns with the intent of the coworkers who respond, the Facebook activity is likely concerted. In both *Triple Play* and *Karl Knauz Motors*—cases that presented different factual circumstances than *Hispanics United*²²⁹—the ALJs focused on the intent of the parties to continue a discussion that had begun previously or to prepare for a future discussion that was planned before the commencement of the Facebook activity.²³⁰

The ALJs, however, did not afford nearly as much significance to two of the factors identified in Part III.A.3—factors three and four. Although the ALJs in all three cases mentioned whether coworkers responded to the initial posting, they did not emphasize coworker responses as essential to their analysis. In fact, in *Karl Knauz Motors*, the ALJ found that the posting to which coworkers did respond—the accident posting—was not concerted,²³¹ while the posting to which coworkers did not respond—the event posting—was concerted.²³² Moreover, none of

defend themselves against the accusations they could reasonably believe [their coworker] was going to make to management”).

228. *Hispanics United*, N.L.R.B. No. 3-CA-27872, at 8–9.

229. In *Triple Play*, the person who made the original posting was not a current employee of the company charged with an unfair labor practice, but a former one. *Triple Play*, N.L.R.B. No. 34-CA-12915, at 3. In *Karl Knauz Motors*, the posting that the ALJ found was concerted received no coworker responses. *Karl Knauz Motors*, N.L.R.B. No. 13-CA-46452, at 8.

230. See *Triple Play*, N.L.R.B. No. 34-CA-12915, at 8 (finding that the employees’ responses to the original posting indicated an intent to “discuss[] the issues they intended to raise at [the] upcoming meeting and avenues for possible complaints to government entitles”); *Karl Knauz*, N.L.R.B. No. 13-CA-46452, at 8 (finding that the event posting reflected an intent to continue expressing complaints about management’s choice of food expressed previously at a meeting).

231. See *Karl Knauz Motors*, N.L.R.B. No. 13-CA-46452, at 3 (stating that multiple coworkers responded to the accident posting).

232. See *id.* at 7 (“[E]ven though only Becker complained further about it on his Facebook pages without any further input from any other salesperson . . . I find that it was concerted . . .”).

the ALJs considered whether the person who made the original posting discussed the posting itself with coworkers.

Finally, although the ALJs did not use the “pre-emptive strike” terminology that the Division of Advice employed,²³³ the ALJ in *Hispanics United* invoked the concept by stating: “By discharging the discriminatees . . . [the employer] prevented them [from] taking any further group action.”²³⁴

IV. Why the Concerted Activity Standard Is Problematic in the Social Media Context

Many have accused the Board of playing politics, arguing that the Board’s decision to enter into the social media realm is part of a larger pro-union effort to expand its role.²³⁵ Still, others have argued that the Board’s role in enforcing the NLRA has never been more important, given the decline in union membership that has occurred over the past few decades.²³⁶ Politics aside, however, there are problems with the way that the Board has applied the traditional concerted activity standard in the emerging context of social media.

A. Where the Board Draws the Line

The root of the difficulty in applying the standard is the same in the social media context as it is in other contexts: determining

233. See *supra* note 172 and accompanying text.

234. *Hispanics United of Buffalo, Inc.*, N.L.R.B. No. 3-CA-27872, at 9, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011).

235. See Dave Jamieson, *Wilma Liebman, Outgoing NLRB Chair, Finds ‘Silver Lining’ in Political Rancor*, HUFFINGTON POST (Sept. 5, 2011, 9:09 AM), http://www.huffingtonpost.com/2011/09/05/wilma-liebman-nlr-chairwoman-interview_n_947258.html (last visited Sept. 27, 2012) (“Corporations and their allies have decried the board as ‘out of control’ during Liebman’s tenure as chairwoman.”) (on file with the Washington and Lee Law Review). Those who argue that the Board is “out of control” point to other recent Board actions, in conjunction with those related to social media. *Id.*

236. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 267 (2002) (“As union representation continues to decline, particularly in the private sector, a broad interpretation and application of section 7 in the nonunion workplace is even more important today than it was ten or twenty years ago.”).

the point at which individual activity transforms into concerted activity. As the Supreme Court noted in *NLRB v. City Disposal Systems, Inc.*,²³⁷ challenging issues often arise concerning “the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees”²³⁸ in order for the individual action to be concerted. On the one hand, if the Board interprets and applies the *Meyers I* standard too broadly, the standard will lose all meaning. On the other hand, if the Board interprets and applies the standard too narrowly, the Board will fail to effectuate the Act’s purposes. To avoid these undesirable alternatives, the Board has attempted to draw a line between individually initiated activity that is concerted and that which is not.

In drawing this line, the Board distinguishes between situations in which an individual acts with the “intent[] to enlist the support of other employees in a common endeavor”²³⁹ and situations in which that intent is lacking.²⁴⁰ In *Mushroom Transportation Co.*,²⁴¹ an oft-cited opinion, the Third Circuit explained that “a conversation may constitute concerted activity although it involves only a speaker and a listener.”²⁴² However, this speaker-listener concept has limits:

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more than likely to be mere “griping.”²⁴³

Thus, “mere griping” is the antithesis of concerted activity and is not protected by the Act.²⁴⁴ The Board has used this concerted

237. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984).

238. *Id.* at 831.

239. *Meyers II*, 281 N.L.R.B. 882, 888 (1986).

240. *See id.* at 885 (stating that “an employee’s activities engaged in ‘solely by and on behalf of the employee himself,’” do not constitute concerted activity).

241. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

242. *Id.* at 685.

243. *Id.*

244. *See* Robert A. Gorman & Matthew W. Finkin, *The Individual and the*

activity—mere griping dichotomy to guide its analysis of Facebook firing cases. In a press release accompanying the Second Report, the Board emphasized: “An employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.”²⁴⁵

B. Why the Board’s Line Drawing Is Problematic

Stating that “mere griping” does not constitute concerted activity is nothing new.²⁴⁶ The social media forum, however, presents new challenges to those attempting to distinguish between concerted activity and mere griping. First, social media is, as its name suggests, social. Because it necessarily involves interaction to varying degrees, almost any individual action in a social media forum could be considered concerted.²⁴⁷ Therefore, in cases involving social media, it is easier to establish the “linkage to group action”²⁴⁸ that the Board requires. After all, employees are often Facebook friends with coworkers. If an employee makes a Facebook posting, coworkers can read the posting without responding, “Like” the posting, or respond in text form. If

Requirement of Concert Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 290 (1981) (“[W]hen an individual employee protests alone, without any consultation with and authorization by fellow employees, his legal rights under section 7 may be drastically curtailed, even when he purports to voice the concerns of others but especially when he is speaking only for himself . . .”).

245. Press Release, NLRB, *Acting General Counsel Issues Second Social Media Report* (Jan. 25, 2012), <http://www.nlr.gov/news/acting-general-counsel-issues-second-social-media-report> (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review).

246. See Gorman & Finkin, *supra* note 244, at 290 (“The prevailing principle of law—endorsed both by the courts of appeals and the NLRB—is that section 7 does not protect ‘personal gripes’ by individual employees.”).

247. See John Hyman, *Is the NLRB Backing Off Its Position on Social Media as Protected, Concerted Activity?*, LEXISNEXIS COMMUNITIES: LABOR & EMPLOYMENT COMMUNITY (Jan. 10, 2012, 10:00 PM), <http://www.lexisnexis.com/community/labor-employment-law/blogs/labor-employment-commentary/archive/2012/01/10/is-the-nlr-backing-off-its-position-on-social-media-as-protected-concerted-activity.aspx> (last visited Sept. 27, 2012) (“One of my key concerns about the NLRB’s foray into regulating workplace social media is that, by its very nature, social media is concerted . . .”) (on file with the Washington and Lee Law Review).

248. *Meyers II*, 281 N.L.R.B. 882, 884 (1986).

concerted activity need only involve “a speaker and a listener”²⁴⁹ and an intent on the speaker’s part to initiate group action, it becomes difficult to imagine when Facebook activity concerning working conditions would not fit within the current definition of concerted activity. This is especially true given that the Board has indicated neither the degree of linkage to group action that it requires, nor how it determines employee intent, in the social media context.

At the same time, social media lends itself to griping. As anyone with a Facebook page knows, many Facebook users employ their page as a platform to air personal complaints—both work-related and otherwise. Facebook friends can respond to such complaints—offering sympathy or humor—with informality and ease. Consequently, Facebook does not fit into the present concerted activity standard easily because the forum is inherently concerted, yet it fosters activity that is the opposite of concerted: griping.

V. Possible Approaches

When thinking about how the Board can increase certainty in this area of law, it is important to be realistic. First, the NLRA is likely here to stay.²⁵⁰ Second, it is unlikely that the Board will completely re-constitute Section 7 of the Act.²⁵¹ Its current

249. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

250. *See Corbett, supra* note 236, at 264 (“While there may be a need to substantially overhaul the body of law regulating the employment relationship in the United States, it is doubtful that such a project will be undertaken by lawmakers absent an economic catastrophe.”). One could argue that the United States has experienced an economic catastrophe in the past few years. However, lawmakers’ response to the current economic crisis will likely be different from lawmakers’ response to the Great Depression—out of which the NLRA was born—because of the recent political controversies surrounding the Board’s use of power. Instead of overhauling the NLRA completely, lawmakers will likely continue the trend of enacting more individual employment rights laws, if they legislate in this area at all. *Id.*

251. 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, 33 (2011) (“At the moment, it seems as though the current NLRB is poised to adapt existing legal doctrines to craft new rules and remedies regarding employer rules and restrictions concerning employee use of . . . social

construction of the Section, as reflected by the *Meyers I* standard, endured a challenge by the D.C. Circuit²⁵² and has remained for over twenty-five years. Consequently, the three approaches that I suggest all work within the Board's current framework.

A. Addressing the Problem at the Front-End

In addition to resolving the concerted activity issue in Facebook firing cases, the Board often determines the legality of employers' social media policies and other rules in employers' handbooks.²⁵³ As the Board stated in *Lafayette Park Hotel*,²⁵⁴ if an employer maintains rules that "are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."²⁵⁵ To determine whether a rule has an impermissible chilling effect, the Board examines whether "(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."²⁵⁶

The ALJs in both *Triple Play* and *Karl Knauz Motors* examined employer rules in light of the above factors. In *Triple Play*, the ALJ analyzed the employer's social media policy and concluded that the policy did not violate the Act.²⁵⁷ In contrast, the ALJ in *Karl Knauz Motors* found that rules in the employer's handbook did violate the Act.²⁵⁸ Interestingly, the ALJ addressed

media sites.").

252. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

253. *See, e.g.*, *Triple Play Sports Bar & Grille*, N.L.R.B. No. 34-CA-12915, at 20–22, 2011 WL 76862 (Div. of Judges Jan. 3, 2012) (analyzing the employer's social media policy); *Karl Knauz Motors, Inc.*, N.L.R.B. No. 13-CA-46452, at 9–11, 2011 WL 4499437 (Div. of Judges Sept. 28, 2011) (analyzing provisions in the employer's handbook).

254. *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998).

255. *Id.* at 825.

256. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004). This inquiry is appropriate when a "rule does not explicitly restrict activity protected by Section 7." *Id.* If a rule restricts Section 7 activity explicitly, the Board will find a violation of the Act without further inquiry. *Id.* at 646.

257. *Triple Play Sports Bar & Grille*, N.L.R.B. No. 34-CA-12915, at 22.

258. *Karl Knauz Motors*, N.L.R.B. No. 13-CA-46452, at 11. The ALJ found

the lawfulness of the rules even after finding that the employer did not discharge the employee because of the event posting—the posting that the ALJ found constituted protected concerted activity.²⁵⁹

One approach that the Board could take is to promulgate a model social media policy through its rulemaking process.²⁶⁰ Ideally, the promulgation of a model policy would lead to less Facebook firing complaints and subsequent adjudication because it would increase certainty for both employers and employees. When an employer became aware of employee Facebook activity that concerned the employer, he or she could analyze the activity in terms of how it fit within the contours of the model policy. The employer could then take action, or refrain from taking action, based on his or her determination of whether the employee activity violated the model policy. Because the employer's determination would be based on a lawful model policy that would guide the employer's decisionmaking, less adjudication of the lawfulness of employee discipline or discharge would likely result. The promulgation of a model policy would also benefit employees by informing their judgment when they use social media.

This approach would address the concerted activity problem at the front-end. The model policy would be preventative, in that it would hopefully lead to fewer unfair labor practice disputes in the first place. As a consequence, the Board would be called on less often to construe the concerted activity provision of Section 7 in the social media context.

the following rules unlawful: (1) a rule prohibiting employees from “be[ing] disrespectful or use[ing] profanity or any other language which injures the reputation of the dealership” and (2) rules “prohibit[ing] employees from participating in interviews with, or answering inquiries concerning employees from, practically anybody.” *Id.* at 9.

259. *Id.* at 9 (finding that the accident posting, which did not constitute protected concerted activity, caused the discharge). Moreover, the ALJ addressed the rules even though the employer rescinded them voluntarily prior to the hearing. *Id.* at 11.

260. In its Third Report, the Board analyzed seven social media policies. THIRD NLRB REPORT, *supra* note 53. Perhaps the NLRB could use the one policy that it deemed lawful in its entirety as a starting point to formulate a model policy. *See id.* at 19–24 (explaining why the policy was lawful and providing a copy of the policy).

This approach is not without problems, however. First, the model policy would not eliminate disputes altogether because employers and employees could misinterpret or misapply the policy, and the Board would have to resolve those disputes. Second, the Board tends to favor adjudication over rulemaking,²⁶¹ a preference that has a persuasive rationale in certain circumstances.²⁶² Finally, given the controversy surrounding the Board's recent actions,²⁶³ the Board may not be willing to risk the possibility of more backlash that may result from a visible use of power.

B. Addressing the Problem Head-On

Most likely, the Board will continue to address the problem head-on, by attempting to clarify through adjudication how the Act's concerted activity provision—as interpreted by the Board in *Meyers I* and *Meyers II*—applies in cases involving social media. The Board's present attempts at clarification, however, have not provided the guidance that employers and employees need. While the Board provided details of social media cases in its reports,²⁶⁴ it neither identified nor explained the commonalities among the cases that it found significant. Likewise, the Board did not distinguish the cases from each other to show how the presence

261. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2017 (2009) (stating that the Board “eschews notice-and-comment rulemaking”). However, the Board has engaged in rulemaking recently. See Steven Greenhouse, *Labor Board Adopts Rules to Speed Unionization Votes*, N.Y. TIMES, Dec. 22, 2011, at B5 (describing new rules adopted by the NLRB that “speed up unionization elections”).

262. See *Chenery II*, 332 U.S. 194, 202 (1947) (stating that an “agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.”).

263. See Kathleen Furey McDonough, *Labor: Political Controversy Surrounds the NLRB*, INSIDE COUNSEL (Jan. 9, 2012), <http://www.insidecounsel.com/2012/01/09/labor-political-controversy-surrounds-the-nlr> (last visited Sept. 27, 2012) (“In a political environment mired in controversy, the National Labor Relations Board . . . is one of the federal agencies receiving more than the usual dose of criticism.”) (on file with the Washington and Lee Law Review).

264. See FIRST NLRB REPORT, *supra* note 45; SECOND NLRB REPORT, *supra* note 46.

or absence of a certain fact affected its analysis of concerted activity.

Because the evaluation of Facebook firing cases is fact-specific,²⁶⁵ identifying factors unique to the social media context that tend to indicate concertedness, or lack thereof, could help remedy the uncertainty. This Note identifies factors that the Board seemed to consider significant to its analysis of concerted activity in Facebook firing cases.²⁶⁶ A similar identification of factors by the Board could help organize and guide the Board's analysis in future cases and provide clarity for both employers and employees.

C. Addressing the Problem at the Back-End

Even if the Board finds that an employee's Facebook activity constitutes protected concerted activity, the employee may nevertheless lose the protection of the Act under one of the Board's several loss-of-protection standards. For example, in *Atlantic Steel Co.*,²⁶⁷ the Board asserted: "[E]ven an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act."²⁶⁸ Moreover, statements that constitute protected concerted activity but are disloyal can lose the protection of the Act if "they are made 'at a critical time in the initiation of the company's' business and . . . constitute 'a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.'"²⁶⁹

265. See Melanie Trottman, *For Angry Employees, Legal Cover for Rants*, WALL ST. J. (Dec. 2, 2011), <http://online.wsj.com/article/SB10001424052970203710704577049822809710332.html> (last visited Sept. 27, 2012) (quoting the Board's Acting General Counsel who "stress[ed] that each of these cases is very factual") (on file with the Washington and Lee Law Review).

266. See *supra* Parts III.A.3, III.B.3, and III.C.4.

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

268. *Id.* at 816. "The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.*

269. *Valley Hosp. Med. Ctr., Inc.*, 351 N.L.R.B. 1250, 1252 (2007) (quoting

Perhaps the Board could address the concerted activity problem by applying existing loss-of-protection standards more strictly to employee activity in the social media context or by developing a social media specific loss-of-protection standard. If the Board construes the *Meyers I* standard broadly when applying it in cases involving social media,²⁷⁰ it may be appropriate for the Board to apply a more stringent loss-of-protection standard subsequently to ensure that the activity in question is activity that Congress intended for the NLRA to protect. Social media cases warrant such a stringent application because social media alters the mix of employer and employee interests involved.²⁷¹ In addition, the Board's notice posting rule²⁷² will lessen the long-standing concern that many, if not most, non-unionized employees are unaware of their rights under the NLRA.²⁷³ Because the rule alleviates this concern, it is reasonable to require employees to conform their actions more closely to what the Act requires in order to obtain the Act's protection.

NLRB v. Elec. Workers Local 1229 (*Jefferson Standard*), 346 U.S. 464, 472 (1953)).

270. This broad construction could be intentional or unintentional. As explained previously, it is difficult to apply the *Meyers I* standard in the social media context because social media inherently involves some degree of interaction yet fosters griping. See *supra* Part IV.B.

271. See O'Brien, *supra* note 251, at 47 n.83 (“[E]mployee use of social media to vent discontent is more likely to extend beyond the workplace and damage a company’s reputation than an on-site verbal confrontation.”); Trotman, *supra* note 265 (discussing the reputational concerns that online postings implicate).

272. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011). The rule requires “most private-sector employers . . . to post a notice advising employees of their rights under the National Labor Relations Act.” NLRB, *Employee Rights Notice Posting*, <http://www.nlr.gov/poster> (last visited Sept. 27, 2012) (on file with the Washington and Lee Law Review).

273. See Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433 (1995) (“American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights.”).

VI. Conclusion

When introducing the bill that eventually became the NLRA, the bill's sponsor, Senator Robert F. Wagner, stated: "When employees are denied the freedom to act in concert even when they desire to do so, they cannot exercise a restraining influence upon the wayward members of their own groups, and they cannot participate in our national endeavor to coordinate production and purchasing power."²⁷⁴ While emphasizing the importance of providing employees with an enforceable right to engage in concerted activity, Senator Wagner nevertheless acknowledged: "[E]mployers are tremendously handicapped when it is impossible to determine exactly what their rights are. Everybody needs a law that is precise and certain."²⁷⁵

The need for precision and certainty is as great today as it was then. Precision and certainty in the Act's application benefits both employees and employers and creates confidence in the Board. Because the Board's foray into Facebook firing cases is recent, it would be unrealistic to expect the Board to have a ready-made solution to the issues that the social media context presents. Still, the Board must begin to acknowledge the differences that exist between the virtual water cooler and the traditional water cooler, and it must devise an approach. This Note presents three approaches—approaches that the Board can implement individually or in concert—formulated with an understanding of the interests involved and the context's distinct attributes.

274. 79 CONG. REC. 2371, 2371 (1935) (statement of Sen. Robert F. Wagner).

275. *Id.* The act that preceded the NLRA, the National Industrial Recovery Act, conferred on employees similar rights to engage in concerted activities, but it did not contain an enforcement mechanism. *Id.*