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## #Fired: The National Labor Relations Act and Employee Outbursts in the Age of Social Media

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# #FIRED: THE NATIONAL LABOR RELATIONS ACT AND EMPLOYEE OUTBURSTS IN THE AGE OF SOCIAL MEDIA

**Abstract:** The National Labor Relations Act (“NLRA”) has long protected employees’ rights to engage in “concerted activity” for their mutual aid or protection. Enacted in 1935, the NLRA could not have foreseen the twenty-first century collision between employment law and social media. When evaluating social media cases, the National Labor Relations Board (“NLRB”) has had difficulty determining when an employee’s social media post is an individual complaint or a protected concerted activity. This Note examines the NLRA and its protection of employees who have faced employment consequences for their social media activities. It argues that the NLRB should modify its approach in social media cases to account for the intent of the employee and the public nature of a social media post.

## INTRODUCTION

Imagine a time before the advent of social media websites.<sup>1</sup> An emergency medical responder has had a long day. Multiple calls, difficult patients, piles of paperwork, and an uncompromising boss have driven her to her wit’s end. She arrives home and shouts to no one in particular, “Leave it to my company to hire a mental patient as a supervisor!” Assuming that the remarks are somehow overheard, the law provides no protection for the medical responder, and she could face discipline from her employer. More likely, however, the words spoken in the privacy of her home go unheard. The medical responder calms down, goes to sleep, and uneventfully returns to work in the morning.

Fast forward to today. That same employee has had the same terrible day. After meeting with her supervisor, she goes home and makes the same exclamation. This time, however, the statement is made on Facebook, and by clicking “post” the employee publishes her remarks for her social network to view. Now, friends and coworkers can view the post, and some might even respond and express their own frustration. The message spreads through the employee’s social network and beyond, eventually landing on the desk of her supervisor.

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<sup>1</sup> See Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Office of the Gen. Counsel, Nat’l Labor Relations Bd., to Jonathan B. Kreisberg, Reg’l Dir., Region 34, Office of the Gen. Counsel, Nat’l Labor Relations Bd. 3 (Oct. 5, 2010), *available at* <http://apps.nlr.gov/link/document.aspx/09031d458055b9c4>, *archived at* <http://perma.cc/MM5T-UTKU>. The following is a hypothetical based on this memorandum. *See id.*

After the supervisor becomes aware of the comment thread, she fires the employee.<sup>2</sup>

The explosion of social media in the early 2000s has led to an unavoidable collision with labor and employment law.<sup>3</sup> Facebook, founded in 2004 by Mark Zuckerberg, is one of the most popular social media platforms.<sup>4</sup> Facebook allows users to find and connect with “friends” by typing their information in a search bar and requesting an online friendship.<sup>5</sup> Friends can then keep in contact by posting comments, videos, or pictures on each other’s profile page.<sup>6</sup> Facebook, along with other similar social media sites,<sup>7</sup> not only shares these posts among friends and other users, but also maintains them, providing a record of comments and conversations.<sup>8</sup>

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<sup>2</sup> See *id.* at 3–4. In each scenario of this hypothetical, the employee voiced work frustrations in the privacy of her own home. See *id.* One of these exclamations likely has no consequences, while the social media post leads to the employee’s termination. See *id.*

<sup>3</sup> See Dorothy M. Bollinger, *Social Media and Employment Law: A Practitioner’s Primer*, 20 TEMP. POL. & CIV. RTS. L. REV. 323, 325 (2011) (articulating the rights of employees to use social media and the rights of employers to protect their businesses conflict); Natalie J. Ferrall, Note, *Concerted Activity and Social Media: Why Facebook Is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1003 (2013) (“All this living on the Internet raises a myriad of issues in the employment context.”). See generally OFFICE OF THE GEN. COUNSEL, NAT’L LABOR RELATIONS BD., OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Jan. 24, 2012) [hereinafter NLRB MEMO OM 12-31], available at <http://apps.nlr.gov/link/document.aspx/09031d45807d6567>, archived at <http://perma.cc/AN5Q-BC3S> (discussing a variety of cases in which employees were fired for their social media activity).

<sup>4</sup> See *Company Info*, FACEBOOK, <https://newsroom.fb.com/company-info/>, archived at <https://perma.cc/9CDX-RUXW> (last visited Apr. 7, 2015). As of December 2014, the site has 1.39 billion active monthly users and 890 million daily users. *Id.*

<sup>5</sup> *Finding Friends*, FACEBOOK, <https://www.facebook.com/help/336320879782850/>, archived at <http://perma.cc/7EMN-LDWB> (last visited Apr. 7, 2015).

<sup>6</sup> *How to Post & Share*, FACEBOOK, <http://www.facebook.com/help/333140160100643/>, archived at <http://perma.cc/HLR5-G2LJ> (last visited Apr. 7, 2015).

<sup>7</sup> *Getting Started with Twitter*, TWITTER, <http://support.twitter.com/articles/215585-getting-started-with-twitter>, archived at <http://perma.cc/QL24-DJGL> (last visited Apr. 7, 2015) (explaining that Twitter is an information network that allows users to “follow” other users and access their “tweets”); *Learn More*, GOOGLE+, <https://www.google.com/+learnmore/>, archived at <https://perma.cc/4AG3-2MQA> (last visited Apr. 7, 2015) (explaining that Google+ allows users to connect in “circles” and “hangouts” where they can share photos, videos, and messages, among other features); *What Is LinkedIn?*, LINKEDIN, [http://www.linkedin.com/static?key=what\\_is\\_linkedin](http://www.linkedin.com/static?key=what_is_linkedin), archived at <http://perma.cc/B3TN-4A4K> (last visited Apr. 7, 2015) (explaining that LinkedIn is an online professional network that allows over 300 million users to build an online profile and connect with colleagues, friends, or employers).

<sup>8</sup> *How to Post & Share*, *supra* note 6; see Ferrall, *supra* note 3, at 1029 (stating that social media activity is permanent because it is archived on profile pages); Ariana C. Green, Note, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 837 (2012) (stating that users share, complain, and respond to each other on social media sites).

The prevalence of social media and the archived record of these posts have created a number of legal issues in the employment context.<sup>9</sup> Employers are put in a particularly difficult position of having to balance the positive and negative impacts that social media might have on their companies.<sup>10</sup> For example, many employers utilize social networking sites to locate and recruit new employees.<sup>11</sup> Social media has also promoted innovative marketing strategies that allow employers to directly reach prospective consumers, unlike traditional print advertising.<sup>12</sup>

With this innovation, however, comes increased exposure to liability for employers, whose frustrated employees may now use social media to voice work complaints.<sup>13</sup> Social media's massive personal and professional networks connect coworkers whose online communications distinctly affect employers, unlike ordinary private communications and complaints.<sup>14</sup> These archived so-

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<sup>9</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 2 (explaining the prevalence of employment disputes arising from social media activity); Erin Allen, *Update on the Twitter Archive at the Library of Congress*, LIBRARY OF CONG. BLOG (Jan. 4, 2013), <http://blogs.loc.gov/loc/2013/01/update-on-the-twitter-archive-at-the-library-of-congress/>, archived at <http://perma.cc/52LR-F36W>. In 2010, Twitter agreed to provide the Library of Congress with all public tweets ever posted. *Id.* Under the agreement, Twitter also agreed to provide all future public tweets to the Library of Congress. *Id.* As of January 2013, the Library of Congress had an archive of over 170 billion tweets and considers the recording of social media posts to be part of their mission to "collect the story of America." *Id.*

<sup>10</sup> Peter J. Pizzi, *Where Cyber and Employment Law Intersect, Risks for Management Abound*, in UNDERSTANDING DEVELOPMENTS IN CYBERSPACE LAW: LEADING LAWYERS EXAMINING PRIVACY ISSUES, ADDRESSING SECURITY CONCERNS, AND RESPONDING TO RECENT IT TRENDS 29, 29 (Sandra A. Jeskie et al. eds. 2011) (stating that social media is both beneficial and problematic for employers). Compare DAVID MEERMAN SCOTT, *THE NEW RULES OF MARKETING & PR: HOW TO USE SOCIAL MEDIA, BLOGS, NEWS RELEASES, ONLINE VIDEO, AND VIRAL MARKETING TO REACH BUYERS DIRECTLY* 231 (2d ed. 2009) (explaining how Facebook has created marketing opportunities for businesses that can now reach customers through social media), with Nicky Woolf, *Coca-Cola Pulls Twitter Campaign After It Was Tricked into Quoting Mein Kampf*, GUARDIAN (Feb. 15, 2015, 10:58 AM), <http://www.theguardian.com/business/2015/feb/05/coca-cola-makeithappy-gakwer-mein-coke-hitler>, archived at <http://perma.cc/X2B9-UYN3> (explaining how Coca-Cola's marketing campaign on Twitter was manipulated to make Coca-Cola tweet large portions of Adolf Hitler's *Mein Kampf*).

<sup>11</sup> See Ferrall, *supra* note 3, at 1003 (explaining that a majority of companies use social media to find and recruit talent). Online networking sites like LinkedIn allow employers and employees to connect through an online professional network. *What is LinkedIn?*, *supra* note 7.

<sup>12</sup> See SCOTT, *supra* note 10, at 231 (explaining how Facebook's decision to make accounts available to non-students has created opportunities for businesses to use the site as a marketing tool); Jeff Elder, *Social Media Fail to Live Up to Early Marketing Hype*, WALL ST. J. (Jun. 23, 2014), <http://www.wsj.com/articles/companies-alter-social-media-strategies-1403499658>, archived at <http://perma.cc/CMB8-PXKT> (describing how companies have altered their social media marketing strategies to target quality connections with consumers instead of trying to get a greater quantity of followers).

<sup>13</sup> Pizzi, *supra* note 10, at 29 (explaining that employees' online complaints may expose employers to liability). See generally NLRB MEMO OM 12-31, *supra* note 3 (explaining cases where employees voiced work complaints on social media).

<sup>14</sup> See Pizzi, *supra* note 10, at 29; see also Jessica Durando, *Young Woman Fired over Twitter Before Starting Job*, USA TODAY (Feb. 10, 2015), <http://www.usatoday.com/story/news/nation-now/2015/02/10/twitter-texas-boss-fired-employee/23180071/>, archived at

cial media communications expose employers to the possibility of defamation claims, improper disclosure of confidential information, and damage to the employer's reputation.<sup>15</sup> With this exposure in mind, some employers have responded to these online communications by terminating employees, implicating the National Labor Relations Act ("NLRA") and its protection of concerted activity.<sup>16</sup>

This Note argues that employee intent should be the standard for determining whether social media posts constitute concerted activity under the NLRA.<sup>17</sup> Part I explains the statutory framework for concerted activity and the National Labor Relation Board's ("NLRB") interpretation of concerted activity.<sup>18</sup> Part II then discusses how the NLRB has applied the concerted activity standard to social media cases.<sup>19</sup> Part III argues that the concerted activity standard creates inconsistencies when applied to social media cases and that the NLRB should alter its interpretation of the standard to account for the realities of the online world.<sup>20</sup> Part III suggests that in defining concerted activity in social media cases, the NLRB and courts should consider employee intent rather than the unpredictable responses online.<sup>21</sup> Part III also suggests that the NLRB should apply a modified test that considers the public nature of social media posts when determining whether an employee's comments should lose the protection of the NLRA.<sup>22</sup>

## I. CONCERTED ACTIVITY: STATUTORY FRAMEWORK AND THE NLRB'S INTERPRETATION

The NLRB and courts have developed a standard for determining what type of employee behavior constitutes concerted activity.<sup>23</sup> This Part explains the concerted activity standard and how it has been applied to social media cases.<sup>24</sup> Section A introduces the statutory framework of the NLRA and the

TDAQ (reporting that a woman was fired before starting work at pizza parlor for tweeting: "Ew I start this (expletive) job tomorrow").

<sup>15</sup> See Pizzi, *supra* note 10, at 29.

<sup>16</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 2 (describing cases where employees were fired for their social media activity); see also National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012); *id.* § 157 (granting employees right to engage in concerted activities for their mutual aid or protection).

<sup>17</sup> See *infra* notes 155-240 and accompanying text.

<sup>18</sup> See *infra* notes 23-92 and accompanying text.

<sup>19</sup> See *infra* notes 93-154 and accompanying text.

<sup>20</sup> See *infra* notes 155-240 and accompanying text.

<sup>21</sup> See *infra* notes 210-222 and accompanying text.

<sup>22</sup> See *infra* notes 223-240 and accompanying text.

<sup>23</sup> See generally NLRB MEMO OM 12-31, *supra* note 3 (applying the concerted activity analysis to new cases arising in social media contexts).

<sup>24</sup> See *infra* notes 27-92 and accompanying text.

relevant statutory language pertaining to concerted activities.<sup>25</sup> Section B then explains the NLRB's interpretation of concerted activities by highlighting several landmark cases that predate the emergence of social media.<sup>26</sup>

#### A. Concerted Activity: Section 7 and Section 8(a)(1) of the NLRA

In 1935, Congress enacted the NLRA to promote labor peace and protect employees from unfair labor practices that harm the general welfare of workers and the economy.<sup>27</sup> After some early amendments, the text of the NLRA has remained largely unchanged.<sup>28</sup> One important part of the NLRA is section 7, which protects employees' right to formally organize into unions.<sup>29</sup> Additionally, section 7 protects employees' rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."<sup>30</sup> Section 8(a)(1) makes it an unlawful labor practice for an employer to interfere with these concerted activities.<sup>31</sup> Thus, employees who engage in concerted activities are protected from retaliatory employment action.<sup>32</sup>

Although the language protecting concerted activity has been included in the NLRA since 1935, the NLRB has only recently applied it to employee pro-

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<sup>25</sup> See *infra* notes 27–38 and accompanying text.

<sup>26</sup> See *infra* notes 39–92 and accompanying text.

<sup>27</sup> National Labor Relations Act (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)). Specifically, the NLRA declares that its policy is to protect workers "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.* § 151. The NLRB and its General Counsel enforce the NLRA. *Id.* § 153; see also *What We Do*, NLRB, <http://www.nlr.gov/what-we-do>, archived at <http://perma.cc/36QH-T8PT> (last visited Apr. 7, 2015). The General Counsel and their regional offices are responsible for the investigation and prosecution of unfair labor practices that are brought before the NLRB and its Administrative Law Judges for adjudication. *Who We Are*, NLRB, <http://www.nlr.gov/who-we-are>, archived at <http://perma.cc/S638-D5VK> (last visited Apr. 7, 2015). Moreover, it is the General Counsel and the NLRB who are responsible for effectuating the policies of the NLRA and, more generally, protecting national labor and employment policies. See *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

<sup>28</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–33 (2002) ("The text has remained virtually untouched since 1959."); Ferrall, *supra* note 3, at 1007 (noting that the NLRA's current version incorporates the original 1935 Act, with amendments from 1947 and 1959).

<sup>29</sup> 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . .").

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

<sup>31</sup> *Id.* § 158.

<sup>32</sup> See *id.* §§ 157, 158; Ferrall, *supra* note 3, at 1008 (explaining that employees engaged in concerted activities are protected against adverse employment actions by their employers). The most important employee protection under section 7 is that an employee may not be discharged for his or her concerted activities. Calvin William Sharpe, "By Any Means Necessary"—*Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203, 206 (1999).

tection in online activity.<sup>33</sup> The NLRA does not explicitly define concerted activities, but does provide some insight as to the meaning of the term.<sup>34</sup> The NLRA's use of the word "other" in the phrase that protects "other concerted activities" suggests that the preceding activities—self-organization, joining a labor organization, and collectively bargaining—are concerted activities themselves.<sup>35</sup> Congress's inclusion of the "other concerted activities" language, however, implies that there are concerted activities, not enumerated in the statute, which warrant section 7 protection.<sup>36</sup> The statutory language suggests that these other concerted activities are similar in nature to the activities specifically enumerated at the beginning of section 7.<sup>37</sup> Nevertheless, without an express statutory definition, the NLRB and federal courts have had to grapple with the meaning of concerted activities.<sup>38</sup>

### *B. Group Action and Exceptions: Landmark Cases and Their Influence on the NLRB's Framework for Defining Concerted Activity*

The NLRB's development of the concerted activity analysis provides the framework for analyzing employee activities in social media cases.<sup>39</sup> The NLRB has stated that concerted activities are actions "engaged in with or on the authority of other employees" to advance group employee interests concerning the terms and conditions of employment.<sup>40</sup> The NLRB has clarified that individual employees who "seek to initiate or to induce or to prepare for

<sup>33</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 2; Green, *supra* note 8, at 837.

<sup>34</sup> 29 U.S.C. § 157 (2012); NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 831 n.8 (1984) ("Section 7 lists these and other activities initially and concludes the list with the phrase 'other concerted activities,' thereby indicating that the enumerated activities are deemed to be 'concerted.'"); see Lauren K. Neal, Note, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1718 (2012) (explaining that "other" concerted activities are similar to those enumerated in section 7).

<sup>35</sup> Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 377 (1983) (explaining that Congress's use of the word "other" suggests that concerted activities share characteristics with the enumerated protected activities in the statute); Neal, *supra* note 34, at 1718 (explaining that the placement of section 7's "concerted activity" language sheds light on the meaning of the phrase).

<sup>36</sup> See 29 U.S.C. § 157; Smith & Parr, *supra* note 35, at 377; Neal, *supra* note 34, at 1718.

<sup>37</sup> See 29 U.S.C. § 157; Smith & Parr, *supra* note 35, at 377; Neal, *supra* note 34, at 1718.

<sup>38</sup> See 29 U.S.C. § 157; Smith & Parr, *supra* note 35, at 377; Neal, *supra* note 34, at 1718. After the NLRB renders a final decision in a labor or employment case, any person aggrieved may seek appellate review in an appropriate U.S. appellate court. 29 U.S.C. § 160(f); *Appellate Court Briefs and Motions*, NLRB, <http://www.nlr.gov/cases-decisions/appellate-court-briefs-and-motions>, archived at <http://perma.cc/32K3-UAQR> (last visited Apr. 7, 2015).

<sup>39</sup> See generally NLRB MEMO OM 12-31, *supra* note 3 (applying the *Meyers* concerted activity analysis to new cases arising in social media contexts).

<sup>40</sup> *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984).

group action” are protected under the concerted activities standard.<sup>41</sup> On the other hand, employee’s activities are not concerted and will not receive the protection of the NLRA if they are engaged in “solely by and on behalf of the employee himself,” even if those actions are related to the terms and conditions of employment.<sup>42</sup>

Additionally, the NLRB and courts hold that employees might lose the protection of the NLRA if their conduct falls within one of three exceptions.<sup>43</sup> First, the activity must not be so inappropriate to be considered “opprobrious.”<sup>44</sup> This opprobrious determination hinges on the location and subject matter of the discussion, the nature of an employee’s outburst, and whether the outburst was, in any way, provoked by an employer’s unfair labor practice.<sup>45</sup> Second, employees’ concerted activity might fall outside the NLRA’s protection if they violate their duty of loyalty by publicly disparaging their employer’s services.<sup>46</sup> Third, “mere griping” without having an objective to take action is not considered concerted activity.<sup>47</sup>

The remainder of this Section explores how courts determine whether to classify employee conduct as concerted activity.<sup>48</sup> First, Subsection 1 discusses how concerted activity requires group action to merit protection under the NLRA.<sup>49</sup> Then, Subsection 2 details exceptions to the group action requirement and how employees can lose the NLRA’s protections.<sup>50</sup>

## 1. The *Meyers* Cases and the NLRB’s Requirement of Group Action

Between 1984 and 1987, the NLRB decided four related cases which determined that an individual employee’s activity was protected under the NLRA

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<sup>41</sup> See *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986). *Meyers II* also held that “individual employees bringing truly group complaints” to management are engaged in concerted activities. See *id.*

<sup>42</sup> *Meyers I*, 268 N.L.R.B. at 497.

<sup>43</sup> See *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 473 (1953); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

<sup>44</sup> *Atl. Steel*, 245 N.L.R.B. at 816; *Hawaiian Hauling Serv., Ltd.*, 219 N.L.R.B. 765, 766 (1975) (recognizing employees may engage in conduct “so opprobrious as to be unprotected”); see *Care Initiatives, Inc.*, 321 N.L.R.B. 144, 151 (1996) (stating that behavior that could lose protection of the NLRA includes obscene language directed at supervisor, violent communications, or insulting personal attacks).

<sup>45</sup> *Atl. Steel*, 245 N.L.R.B. at 816.

<sup>46</sup> See *Jefferson Standard*, 346 U.S. at 473, 476; see also *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1241 (2000) (finding that publically distributing a flyer that disparages employer’s products is beyond the protection of the NLRA).

<sup>47</sup> See *Mushroom Transp.*, 330 F.2d at 685.

<sup>48</sup> See *infra* notes 51–92 and accompanying text.

<sup>49</sup> See *infra* notes 51–63 and accompanying text.

<sup>50</sup> See *infra* notes 64–92 and accompanying text.



only if the activity was connected to other employees' activities.<sup>51</sup> This family of cases is collectively referred to as *Meyers*.<sup>52</sup> In 1984, in *Meyers Industries, Inc. (Meyers I)*, an employer terminated a truck driver employed to haul boats from the Meyers facility in Michigan to dealers around the country.<sup>53</sup> When the employee had an accident in Tennessee caused by a brake failure, he called the Tennessee Public Service Commission, which found the vehicle unsafe for operation and issued the employer a citation.<sup>54</sup> After the employee refused to drive the truck back to the facility, Meyers terminated him.<sup>55</sup>

The NLRB found that Meyers did not violate section 8(a)(1) of the NLRA when it discharged its employee for contacting state authorities and refusing to drive his truck after the accident.<sup>56</sup> In its decision, the NLRB articulated a new definition of concerted activity, finding that an employee's activity must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>57</sup> The court found that because the employee acted on his own behalf, section 7 did not protect him from adverse employment action.<sup>58</sup>

The D.C. Circuit later affirmed the NLRB's interpretation of concerted activity in *Meyers*.<sup>59</sup> In 1987, in *Meyers Industries, Inc. (Meyers II)*, the U.S. Court of Appeals for the District of Columbia specifically endorsed the NLRB's explanation that concerted activity includes individual employees seeking to "initiate or to induce or to prepare for group action," as well as em-

<sup>51</sup> *Prill v. NLRB (Prill II)*, 835 F.2d 1481, 1485 (D.C. Cir. 1987) (affirming that an employee who acted alone by complaining to a supervisor was not engaged in concerted activity); *Prill v. NLRB (Prill I)*, 755 F.2d 941, 957 (D.C. Cir. 1985) (remanding to the NLRB to reconsider the scope of concerted activities); *Meyers II*, 281 N.L.R.B. at 887 (finding that concerted activity requires employee to initiate, induce, or prepare for group action); *Meyers I*, 268 N.L.R.B. at 499 (finding that an employee's individual activity was not concerted activity).

<sup>52</sup> See *Prill II*, 835 F.2d at 1481; *Prill I*, 755 F.2d at 941; *Meyers II*, 281 N.L.R.B. at 887; *Meyers I*, 268 N.L.R.B. at 499; see also Ferrall, *supra* note 3, at 1010 (referring to these four cases collectively as the "Meyers line of cases").

<sup>53</sup> 268 N.L.R.B. at 497. The driver had been experiencing difficulty with the brakes and steering. *Id.* On a number of occasions, he made complaints to his employer concerning the malfunctions of this company owned truck. *Id.* The employer did not properly address the problem, as the driver's brakes continued to malfunction, even after a company mechanic tried to fix the breaks. *Id.*

<sup>54</sup> *Id.* The employee called the Tennessee Public Service Commission on his own volition and arranged for an official inspection. *Id.* After the accident, he first called his employer, who instructed him to take the truck to a mechanic and get it home to Michigan as soon as he could. *Id.*

<sup>55</sup> *Id.* at 498. The driver's employer specifically stated to him, "[W]e can't have you calling the cops like this all the time." *Id.*

<sup>56</sup> *Id.* (finding that the employee was not engaged in concerted activity).

<sup>57</sup> *Id.* at 497. The court held that the employee did not engage in the activity with or on behalf of other employees. *Id.* at 498. It acknowledged that another driver had driven the employee's truck, and even that the employee had overheard this driver's complaints about the malfunctioning brakes. *Id.* The court found, however, that these facts failed to establish that the employee had acted on anyone else's behalf. *Id.*

<sup>58</sup> See *id.*

<sup>59</sup> *Prill II*, 835 F.2d at 1484.

ployees bringing group complaints to the attention of management.<sup>60</sup> The court's explanation drew a fine line for the concerted activity analysis, reasoning that the employee would have received the NLRA's protection if he had simply gathered with his coworkers instead of acting on his own.<sup>61</sup> The court's reasoning, coupled with the NLRB's explanation in *Meyers I*, suggested that a finding of concerted activity depends heavily on the facts of each situation.<sup>62</sup> Today, the NLRB's decisions regarding concerted activity are still guided by the *Meyers* group activity standard.<sup>63</sup>

## 2. Losing Protection of the NLRA Through Opprobrious Conduct, Public Disparagement, or Mere Gripping

Although the *Meyers* cases supply the general framework for the concerted activity analysis, the NLRB has limited the scope of section 7's concerted activity protections to employees.<sup>64</sup> For example, in 1979, in *Atlantic Steel Co.*, the NLRB found that an employee engaged in protected concerted activity would lose the protection of the NLRA through "opprobrious" conduct.<sup>65</sup> In that case, an employee confronted a supervisor regarding the distribution of overtime hours.<sup>66</sup> After an argument, the employee was suspended and eventually fired for insubordination.<sup>67</sup>

Pursuant to the arbitrator's conclusion, the NLRB determined that the employee had engaged in concerted activity by bringing a legitimate grievance to the foreman that concerned his fellow employees.<sup>68</sup> Although this would ordinarily constitute concerted activity under the NLRA, the NLRB reasoned that the employee's conduct was opprobrious because he had acted in an "obscene fashion without provocation" and such conduct should not be tolerated

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<sup>60</sup> See 281 N.L.R.B. at 887; see also *Prill II*, 835 F.2d at 1484.

<sup>61</sup> *Prill II*, 835 F.2d at 1485.

<sup>62</sup> *Meyers I*, 268 N.L.R.B. at 497 ("[T]he question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence."); see *Prill II*, 835 F.2d at 1485 (stating that the case hinged on the fact that the employee had not gathered with his coworkers to discuss his complaints).

<sup>63</sup> See *Meyers I*, 268 N.L.R.B. at 497; NLRB MEMO OM 12-31, *supra* note 3, at 4-5 (explaining that the NLRB applies the *Meyers* standard when examining concerted activity).

<sup>64</sup> See *Jefferson Standard*, 346 U.S. at 476 (finding that an employee can lose protection of the NLRA by publicly disparaging the employer's goods or services); *Mushroom Transp.*, 330 F.2d at 685 (finding that mere griping that does not look toward group action is not concerted activity); *Atl. Steel*, 245 N.L.R.B. at 816 (explaining that an employee may lose protection of the NLRA by engaging in opprobrious conduct).

<sup>65</sup> See 245 N.L.R.B. at 816.

<sup>66</sup> *Id.* at 814. The employee was concerned that the supervisor had assigned overtime hours to a probationary employee, against the standard practice of assigning hours based on seniority. *Id.*

<sup>67</sup> *Id.* The supervisor told the employee that all employees were working overtime, after which, according to witness testimony, the employee "called the foreman a 'lying son of a bitch' or stated that the foreman told a 'm— f— lie' (or was a 'm— f— liar')." *Id.*

<sup>68</sup> See *id.* at 816-17.

in the workplace.<sup>69</sup> In deciding when conduct qualifies as opprobrious and therefore loses the NLRA's protection, the NLRB outlined four factors for consideration: "(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."<sup>70</sup> The NLRB reasoned that allowing an offhand complaint to shield an employee from otherwise unacceptable conduct was not consistent with the purpose of the NLRA.<sup>71</sup>

In addition to the *Atlantic Steel* opprobrious conduct exception, the U.S. Supreme Court has developed another exception for losing the NLRA's protection based on principles of loyalty.<sup>72</sup> In 1953, in *NLRB v. Local Union No. 1229, International Brotherhood of Electric Workers* ("*Jefferson Standard*"), the Supreme Court held that protections for concerted activity do not obviate the duties of loyalty that exist between employers and employees.<sup>73</sup> Moreover, the Court explained that protected concerted activity is separable from unprotected activities that fall outside the purview of the NLRA's protection.<sup>74</sup> In *Jefferson Standard*, unionized employees of a broadcasting company began picketing outside their workplace after labor negotiations with their employer broke down.<sup>75</sup> Several weeks later, a number of technicians printed handbills that "launched a vitriolic attack on the quality of the company's television broadcasts."<sup>76</sup> The handbills were distributed among the picket line, on the public square located a few blocks from the employer's premises, and in bars, restaurants, and busses.<sup>77</sup> The handbill distribution continued until

<sup>69</sup> *Id.* at 817.

<sup>70</sup> *See id.* at 816.

<sup>71</sup> *Id.* at 817. The NLRB does not go so far as to suggest that any sort of obscenity would constitute opprobrious conduct. *See id.* Instead, the NLRB seemed to suggest that the location of the outburst in the workplace, during work hours, weighed heavily in the employer's favor when balancing the four factors. *See id.*; cf. *Thor Power Tool Co.*, 148 N.L.R.B. 1379, 1380 (1964) (finding that an employee's use of an obscenity in a grievance meeting in his employer's office was still protected under the NLRA).

<sup>72</sup> *See Jefferson Standard*, 346 U.S. at 473. The case is known as *Jefferson Standard* after the name of the employer engaged in the union dispute. *See* NLRB MEMO OM 12-31, *supra* note 3, at 24; Ferrall, *supra* note 3, at 1014.

<sup>73</sup> *See* 346 U.S. at 473.

<sup>74</sup> *Id.* at 476.

<sup>75</sup> *Id.* at 467. The union picketed after work hours and focused their picketing on the company's refusal to renew the arbitration provisions in their new employment agreement. *Id.*

<sup>76</sup> *Id.* at 467-68. The technicians printed 5,000 handbills that made no reference to the union, the labor controversy, or to collective bargaining at all. *Id.* at 468. Instead, the handbills criticized the *Jefferson Standard* Broadcasting Company's television programs, negatively comparing the programs to those from companies in other major cities. *Id.* The technicians criticized the company for airing old programs, failing to show certain sporting events, and failing to provide any local programs. *Id.* The handbills concluded that the *Jefferson Standard* Broadcasting Company must have considered Charlotte to be a second-class community. *Id.*

<sup>77</sup> *Id.* at 468.

the company discharged the ten technicians responsible for the attack.<sup>78</sup> The NLRB found that nine of the ten discharged employees had sponsored or distributed the handbill and upheld their termination.<sup>79</sup>

On appeal, the Supreme Court found that the handbills were not related to the ongoing labor dispute, and that “[t]he fortuity of the coexistence of the labor dispute” did not afford the technicians a defense.<sup>80</sup> The Court found that the handbills were “a concerted separable attack” that deprived the technicians of the NLRA’s protection.<sup>81</sup> Although it did not articulate an explicit standard for losing the NLRA’s protection, the Supreme Court focused on the public disparagement of the employer’s services and generally held that concerted activities are separable from non-protected activities and should not weaken the underlying loyalties of the employment relationship.<sup>82</sup>

Finally, the third type of activity that does not fall within the NLRA’s protection is behavior that qualifies as an employee’s “mere griping.”<sup>83</sup> In 1964, in *Mushroom Transportation Co. v. NLRB*, the U.S. Court of Appeals for the Third Circuit determined that if activity consists of only talking, the “talk” must look toward group action to warrant the NLRA protection’s.<sup>84</sup> In that case, a part-time driver regularly talked with and advised other employees on their rights.<sup>85</sup> When the company discovered this, it removed the driver from the “extra list” and gave him no further work.<sup>86</sup> The NLRB found that these conversations and the employee’s activities in general were directly related to

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

<sup>79</sup> *See id.* at 475–76.

<sup>80</sup> *See id.* at 476.

<sup>81</sup> *Id.* at 477. The Court explained that reinstatement of the technicians responsible for the handbills would contradict the purposes of the NLRA, namely fostering peaceful labor practices. *Id.* at 476.

<sup>82</sup> *See id.* at 473, 476; *see also* Ferrall, *supra* note 3, at 1015–16 (explaining that the employees’ handbills attack was separable from the labor controversy, and that even if distribution of handbills was concerted activity, its disparaging nature barred employees from the NLRA’s protection). The Court focused on separable conduct, emphasizing the importance of balancing workplace loyalty with the right to engage in concerted activities. *See Jefferson Standard*, 346 U.S. at 474–75, 477. In light of these loyalty concerns, the Court noted that it is equally important to enforce discharges for causes *separate* from concerted activity, as it is to protect those employees who are actually engaged in concerted activity. *See id.* at 474–75. The reasoning suggests that the NLRB should consider the duty of loyalty in determining whether conduct is separable from concerted activities and therefore whether that conduct should lose the NLRA’s protection. *See id.* at 473, 476.

<sup>83</sup> *See Mushroom Transp.*, 330 F.2d at 685 (internal quotations omitted).

<sup>84</sup> *Id.* (“Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.”). This suggests that a complaint is only concerted activity if it is actually *intended* to initiate group action. *See id.*

<sup>85</sup> *See id.* at 684. The subject of these conversations typically focused on holiday pay, vacation time, and the company’s occasional practice of employing drivers from other companies for trips.

<sup>86</sup> *Id.* at 685. A union contract protected jobs of regular drivers. *Id.* As an “extra man,” the employee was a non-regular driver for the company. *See id.* By removing him from the extra list, the company effectively terminated the employee. *See id.*

the terms and condition of employment.<sup>87</sup> Thus, it determined that the driver's conversations were protected as concerted activities.<sup>88</sup> On appeal, however, the Third Circuit refused to enforce the NLRB's order, holding that the driver's conversations with other employees did not "initiate or promote any concerted action" that would actually improve the relevant conditions of employment.<sup>89</sup> Instead, the conversations were "mere griping" insufficient to trigger the NLRA's protection.<sup>90</sup>

In sum, the *Meyers* standard suggests that an individual employee's activity is concerted, and thus protected by the NLRA, when the employee seeks to initiate or prepare for group action.<sup>91</sup> Nevertheless, employee activity might not be protected by the NLRA if it falls within one of three exceptions: opprobrious conduct, separable public disparagement, or mere griping.<sup>92</sup>

## II. THE NLRB'S APPROACH TO CONCERTED ACTIVITY IN THE SOCIAL MEDIA CONTEXT: APPLYING OLD LAW TO NEW TECHNOLOGY

On January 24, 2012, the National Labor Relations Board's ("NLRB") Office of the General Counsel issued Memorandum OM 12-31 ("NLRB Memo OM 12-31"), a report concerning the NLRB's recent social media cases.<sup>93</sup> The NLRB Memo OM 12-31 was intended to provide guidance on the NLRB's approach to the concerted nature of employees' social media postings.<sup>94</sup> Specifically, NLRB Memo OM 12-31 detailed a number of cases in which the NLRB has applied the concerted activity framework to social media cases.<sup>95</sup> In deciding these cases under the existing concerted activity framework, the NLRB has applied the old concerted activity standards to circumstances arising under new social media technology.<sup>96</sup>

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<sup>87</sup> *Id.* at 684.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 684–85.

<sup>90</sup> *Id.* at 685 (internal quotations omitted). Critical to the court's decision was the fact that the employees' conversations never involved any effort to promote concerted action to actually do anything about the matters discussed. *See id.* 684–85. The court explained that if it were to consider the employee's conversations concerted activity, then "any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees." *Id.* at 685. Here, the court established that a conversation's relation to a legitimate interest of other employees is insufficient for a finding of concerted activity. *See id.* There must be an actual effort to initiate concerted action. *See id.* Otherwise, the discussions are "mere griping." *See id.* (internal quotations omitted).

<sup>91</sup> *Meyers II*, 281 N.L.R.B. at 887.

<sup>92</sup> *See Jefferson Standard*, 346 U.S. at 477; *Mushroom Transp.*, 330 F.2d at 685; *Atl. Steel*, 245 N.L.R.B. at 816.

<sup>93</sup> *See* NLRB MEMO OM 12-31, *supra* note 3, at 2 (applying the concerted activity analysis to new cases arising in social media contexts).

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

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

Although NLRB Memo OM 12-31 did not give specific case citations, it provided specific facts for each case and a detailed explanation of the NLRB's analysis.<sup>97</sup> This Part discusses the application of the concerted activity standard to these social media cases.<sup>98</sup> Section A discusses *Collections Agency* and *Trucking Co.* to illustrate when the NLRB construes a social media post as constituting group activity.<sup>99</sup> Section B then discusses *Popcorn Packaging* and *Hospital* to explain how the NLRB has applied exceptions to the group action requirement in social media cases.<sup>100</sup>

#### A. Does Anybody Else Care?: Concerted Activity and Coworker Responses

In *Collections Agency*, the NLRB found that the employer unlawfully terminated an employee for a comment that she posted on her Facebook page, which initiated a group discussion about possible class action.<sup>101</sup> Initially, the employee was transferred to a new position that effectively served as a demotion.<sup>102</sup> She approached her supervisor to discuss the transfer and to communicate her frustration.<sup>103</sup> After returning home, the employee made a work-related, expletive-filled post to her Facebook page.<sup>104</sup> The employee was Facebook friends with numerous coworkers, many of whom commented on her post.<sup>105</sup> The comments were specific responses to the employee's post and contained detailed references to the employment dispute.<sup>106</sup> When the employee returned to work, the employer fired her, showing her a copy of her Facebook post and the subsequent comments on the post.<sup>107</sup>

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<sup>97</sup> See *id.* This Note refers to the cases as *Collections Agency*, *Trucking Co.*, *Popcorn Packaging*, and *Hospital*. See *id.* at 3, 22, 26, 32; see also Ferrall, *supra* note 3, at 1022 (referring to the NLRB MEMO OM 12-31 cases by the descriptive names given in the memorandum).

<sup>98</sup> See *infra* notes 101–154 and accompanying text.

<sup>99</sup> See *infra* notes 101–123 and accompanying text.

<sup>100</sup> See *infra* notes 124–154 and accompanying text.

<sup>101</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 3–4.

<sup>102</sup> *Id.* at 3. The employee worked in the inbound calls group at one of the employer's offices. *Id.* Her employer transferred her to outbound calls. *Id.* By way of the compensation setup, the inbound calls group was able to consistently earn more commission than the outbound group. *Id.* The employee had consistently ranked as a top performer in the inbound calls group. *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.* Specifically, the employee stated that her employer had “messed up and that she was done with being a good employee.” *Id.*

<sup>105</sup> *Id.* at 4.

<sup>106</sup> See *id.* One coworker commented that she was angry and “right behind” the employee. *Id.* Another stated that only bad behavior was rewarded and that the employer was willing to replace higher-paid, smarter workers with cheap alternatives. *Id.* A former employee went so far as to call for filing a class action lawsuit, suggesting that there were enough disgruntled employees to form a class. See *id.*

<sup>107</sup> *Id.* The employer explicitly told the employee that she was being fired due to her Facebook activity. *Id.*

Applying the *Meyers* group activity standard, the NLRB found that the employer had violated section 8(a)(1) of the National Labor Relations Act (“NLRA”) because the employee’s post and her coworkers’ responses were concerted activity.<sup>108</sup> The NLRB found that the responses to the employee’s post were related to working conditions and represented the frustrations of many coworkers about how the employer treated its employees.<sup>109</sup> Based on the responses of the employee’s coworkers, the NLRB held that the discussion was an employee initiating group action, falling neatly into the definition of concerted group activity in *Meyers*.<sup>110</sup>

Conversely, in *Trucking Co.*, the NLRB found that an employee who had posted complaints on Facebook did not engage in concerted activity because no coworkers responded.<sup>111</sup> The employee was a truck driver traveling across multiple states to make a delivery.<sup>112</sup> When the employee arrived near his drop-off destination, he learned that roads were closed due to snow.<sup>113</sup> He attempted to reach the company’s on-call dispatcher several times, but was forwarded to the office phone where there was also no answer.<sup>114</sup> The employee spoke to other drivers and discussed his inability to reach the on-call dispatcher.<sup>115</sup> He then posted a series of comments on his Facebook page, stating that roads were closed, that no one had answered his phone call, and that if any drivers were late with their deliveries, it would be the employer’s fault.<sup>116</sup> He also complained that the employer would lose all of its experienced, hard-working drivers.<sup>117</sup> None of the employee’s coworkers responded to his post.<sup>118</sup> The employee eventually resigned as a result of the incident.<sup>119</sup>

<sup>108</sup> See *id.* at 5. As concerted activity, the employee’s Facebook activity was protected by section 7 of the NLRA. 29 U.S.C. § 157 (2012). Her employer’s interference with those activities was found to be a violation of section 8(a)(1). *Id.* § 158.

<sup>109</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 5. The particular comment that suggested filing a class action lawsuit seemed to make this a relatively easy case for the NLRB. See *id.* (emphasizing that “one former coworker suggested taking concerted activity through the filing of a class action lawsuit”). NLRB Memo OM 12-31 goes on to say that the Facebook discussion “clearly fell within the Board’s definition of concerted activity . . . .” See *id.*

<sup>110</sup> See *id.* NLRB Memo OM 12-31 seems to suggest that the NLRB did not engage in any analysis regarding whether the employee’s conduct should lose the protection of the NLRA. See *id.* The NLRB’s termination analysis instead only focused on the group activity standard articulated in *Meyers*. See *id.*; see also *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986); *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984).

<sup>111</sup> See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* The driver was making a delivery on New Year’s Eve. *Id.* With no dispatcher on call for the holiday, his calls were forwarded to the office, which was also empty due to the holiday. See *id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.*

Applying the *Meyers* group activity standard, the NLRB found that there was no evidence of concerted activity because the employee did not specifically discuss the Facebook posts with any fellow employees, nor did any of his coworkers respond to his online complaints.<sup>120</sup> Due to the lack of responses, the NLRB reasoned that the employee was not attempting to initiate, induce, or prepare for group action.<sup>121</sup> Instead, the NLRB isolated the employee's Facebook posts and viewed them as expressions of the employee's individual frustrations.<sup>122</sup> The NLRB concluded that the employee was simply "gripping" and expressing irritation and boredom while stranded, activity that is not protected by the NLRA.<sup>123</sup>

### *B. Does It Go Too Far?: Applying Loss of Protection Standards to Social Media Cases*

In addition to explaining the NLRB's concerted activity analysis, NLRB Memo OM 12-31 also discusses cases that illustrate the NLRB's analysis for how an employee might lose the protections of the NLRA.<sup>124</sup> For example, in *Popcorn Packaging*, the NLRB found that an employee's Facebook comments were concerted activity and that the employee had not engaged in conduct that would lose protection of the NLRA.<sup>125</sup> There, one employee's Facebook post discussed all of the "drama in the plant."<sup>126</sup> Another employee responded to the

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<sup>119</sup> See *id.* at 33. The employee in *Trucking Co.* was not actually terminated by his employer. *Id.* After the employee posted his complaints on Facebook, the employer's operations manager made a critical response to the posts. *Id.* at 32. Among other things, the operations manager stated that she heard another company was hiring. *Id.* at 33. The employer stripped the employee of his status as a leader operator and reduced his pay, citing the employee's Facebook comments as the reason for the discipline. *Id.* The employee was ostracized by his coworkers, and quickly resigned. See *id.*

<sup>120</sup> *Id.* The NLRB conceded that the employee did in fact discuss his work complaints with other drivers when he was unable to reach the on-call dispatcher. See *id.* at 32. Nevertheless, the NLRB determined that there was insufficient evidence to suggest that his Facebook post was any sort of continuation of collective concerns. See *id.* at 33.

<sup>121</sup> See *id.* at 33. But cf. *Meyers II*, 281 N.L.R.B. at 887 (finding that concerted activity includes an individual employee seeking "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") (emphasis added).

<sup>122</sup> See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 33.

<sup>123</sup> *Id.*; see *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Although the NLRB's reference to gripping alludes to the *Mushroom Transportation* "mere gripping" standard, NLRB Memo OM 12-31 does not specifically reference the case. See *Mushroom Transp.*, 330 F.2d at 685; *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32. The NLRB seems to focus more on a perceived lack of preparation for group action, rather than a *Mushroom Transportation* mere gripping analysis, in concluding that the employee did not engage in concerted activity. See *Mushroom Transp.*, 330 F.2d at 685; *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 33.

<sup>124</sup> See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 26; *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 22.

<sup>125</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>126</sup> *Id.* at 22.



post with multiple comments that her employer found unacceptable.<sup>127</sup> The employer terminated the responding employee for her Facebook comments about work and the operations manager.<sup>128</sup>

After finding that the employee had engaged in protected concerted activity, the NLRB considered whether the employee's comments should lose protection of the NLRA.<sup>129</sup> To determine if the concerted activity exceptions applied to the behavior in question, the NLRB looked to both the public disparagement and the opprobrious conduct standards.<sup>130</sup> The NLRB reasoned that the Facebook thread was distinguishable from the 1953 U.S. Supreme Court decision in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* (“*Jefferson Standard*”) because that case dealt with communications that directly appealed to third parties.<sup>131</sup> Instead, the NLRB compared the Facebook thread to a situation where communications were only overheard by third parties.<sup>132</sup> The NLRB recognized, however, that the situation was also not a clean fit for the opprobrious conduct analysis outlined by the NLRB in 1979 in *Atlantic Steel Co.*, because *Atlantic Steel* focused on workplace outbursts that could undermine employee discipline.<sup>133</sup> The NLRB, therefore, applied a “modified *Atlantic Steel*” analysis that considered the workplace discipline factors of *Atlantic Steel* and the public disparagement concerns of *Jefferson Standard*.<sup>134</sup>

Applying the *Atlantic Steel* opprobrious conduct factors, the NLRB stated that the location of the conversation and the nature of the outburst weighed in favor of the NLRA protection's.<sup>135</sup> The NLRB interpreted the *Atlantic Steel*

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<sup>127</sup> *Id.* at 23. Specifically, the employee stated that she “hated” the facility and that she could not wait to “get out of there.” *Id.* She also stated that the employer's operations manager was the source for many of the plant's problems. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 24.

<sup>130</sup> *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 476 (1953) (establishing the loss of protection standard for public disparagement); *Atl. Steel Co.*, 245 N.L.R.B. 814, 816–17 (1979) (establishing the loss of protection standard for opprobrious conduct); *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>131</sup> *Compare Jefferson Standard*, 346 U.S. at 476 (finding that a handbill campaign was a public attack disparaging employer's services), with *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (concluding that Facebook conversations do not directly appeal to third parties).

<sup>132</sup> *See Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>133</sup> *Compare Atl. Steel*, 245 N.L.R.B. at 816–17 (stating that an employee lost the protection of the NLRA because of his obscene behavior and language at work), with *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (noting that an employee's Facebook activity did not necessarily undermine workplace discipline).

<sup>134</sup> *See Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>135</sup> *Id.* at 25. Recall that the four opprobrious conduct factors are the place of the discussion, its subject matter, the nature of the employee's outburst, and whether the outburst was provoked by an unfair labor practice. *See Atl. Steel*, 245 N.L.R.B. at 816. The NLRB found that the outburst was not provoked by an unfair labor practice and suggested that this factor favored losing protection of the NLRA. *See Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 25. Nevertheless, with the

location factor literally, stating that the employee's Facebook comments occurred at home.<sup>136</sup> Additionally, in light of "the inherent differences between a Facebook discussion and a workplace outburst," the NLRB considered the impact of the employee's post on the employer's business and reputation and whether it was disparaging.<sup>137</sup> After finding that the comment was not disparaging, the NLRB concluded that the modified *Atlantic Steel* test indicated that the employee's comments on Facebook did not lose the NLRA's protection.<sup>138</sup>

NLRB Memo OM 12-31 also discusses the NLRB's decision in *Hospital*, where the NLRB found that an employee's online activity, often intended for public, third-party audiences, was concerted activity and did not lose protection of the NLRA.<sup>139</sup> In *Hospital*, the employee made a presentation to an assembly that was investigating the hospital's employment practices.<sup>140</sup> The employee suggested through his presentation that the hospital CEO's lack of leadership had led to unfair labor practices, unfair firings, harassment, bullying, and a murder-suicide.<sup>141</sup> He posted the text of the presentation to his Facebook page and as a comment to an online, local newspaper article.<sup>142</sup> The hospital

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other factors weighing in favor of the employee, the NLRB found that this one factor alone was not enough to cause the employee to lose the NLRA's protection. *See id.*

<sup>136</sup> *See Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>137</sup> *See id.* Although the NLRB does not explicitly state it, it seems that this additional inquiry into whether the comment was disparaging is what ties in the *Jefferson Standard* public disparagement analysis to create the "modified" *Atlantic Steel* analysis. *See Jefferson Standard*, 346 U.S. at 477–78 (holding that the disparaging nature of the employees' attack deprives them of the NLRA's protection); *Atl. Steel*, 245 NLRB at 816 (listing factors to consider in determining whether an employee's outburst is so opprobrious that it should lose the protection of the NLRA); *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>138</sup> *See Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 25.

<sup>139</sup> *See Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 26.

<sup>140</sup> *See id.* at 27. Two years prior to the employee's termination, a former employee of the hospital shot and killed a supervisor, critically wounded another, and committed suicide. *Id.* at 26–27. The employee in *Hospital* publicly criticized the hospital, often suggesting that the employer's conduct had contributed to the shooting incident. *See id.* at 26. Although the employee made a number of comments across a variety of public platforms, one repeated theme was a reference to this murder-suicide and whether the employer was to blame. *See id.* at 26, 27, 29.

<sup>141</sup> *Id.* at 27.

<sup>142</sup> *See id.* 26–27. Although the employer gave the employee's Facebook post as its reason for dismissing the employee, it was only one of many public comments made by the employee. *See id.* The timeline of the employee's public comments spanned from February 2009 to October 2010. *See id.* In February of 2009, the employee wrote a letter to the local newspaper, discussing the employer's abuse of its workers. *See id.* at 26. In October 2009, the employee was quoted in a newspaper ad and contributed to the passage of a nurses' resolution intended to stop workplace bullying in healthcare. *See id.* In March 2010, the local newspaper posted a letter online, written by the employee, which described more unfair labor practices at the hospital. *Id.* The employee also posted a comment on the webpage where the letter was published. *Id.* The employee posted another letter online on June 21, 2010, which referenced the hospital's corporate abuse. *Id.* A third letter written by the employee and posted on July 20, 2010 led to a conversation in the webpage's comment section. *Id.* at 27. The employee wrote that the hospital's management bullied employees and used personal information to attack and destroy those employees who stood up for themselves. *Id.* at 27.

terminated the employee for posting the presentation, claiming that the post was untrue and was intended to discredit the hospital's management.<sup>143</sup>

In light of these facts, the NLRB first applied the *Meyers* group activity standard, finding that the comments and statements made by the employee were concerted activity and therefore protected under the NLRA.<sup>144</sup> Then, in determining whether the employee should lose protection of the NLRA, the NLRB applied the public disparagement test of *Jefferson Standard*, focusing on disparagement of the employer's product and business policies.<sup>145</sup> The NLRB emphasized the importance of distinguishing "sensitive issues" from disparagement.<sup>146</sup> It concluded that the employee's comments were general criticisms of the employer's management and treatment of its workers and that all of the comments were in the context of ongoing labor disputes.<sup>147</sup> Most important to the *Jefferson Standard* public disparagement analysis, the NLRB concluded that the criticisms did not negatively comment on the employer's product: healthcare.<sup>148</sup> The employee's concerted activity, therefore, did not lose protection of the NLRA.<sup>149</sup>

NLRB Memo OM 12-31 illustrates the NLRB's rigid application of the *Meyers* group activity standard to circumstances that arise in the social media age.<sup>150</sup> Despite language in *Meyers II* stating that concerted activity includes employees bringing group complaints to management, the NLRB has required

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<sup>143</sup> *Id.* The hospital also claimed that the employee had violated conditions of his previous discipline, as he had been reprimanded and suspended for two of the letters he had previously posted online. *See id.*

<sup>144</sup> *Id.* at 28. The NLRB held that the employee's statements were the "logical outgrowth" of collective concerns and that they were "made with or on the authority of other employees." *Id.*

<sup>145</sup> *See Jefferson Standard*, 346 U.S. at 376; *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29.

<sup>146</sup> *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29.

<sup>147</sup> *See id.* This contextual analysis is what appears to have led the NLRB to conclude, under *Jefferson Standard*'s public disparagement test, that the employee should not lose protection of the NLRA. *See id.* Recall that in *Jefferson Standard*, the employees lost protection of the NLRA because their handbills were not related to the actual labor dispute but instead attacked their employer's services. 346 U.S. at 476.

<sup>148</sup> *See Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29. To support this proposition, NLRB Memo OM 12-31 references language in *Jefferson Standard* that suggests protection could be lost for a "sharp, public, disparaging attack upon the quality of the company's product and its business policies." *See id.* (citing *Jefferson Standard*, 346 U.S. at 471). The NLRB seems to focus on the word "product," determining that the employee's comments did not disparage the hospital's ability to administer healthcare. *See id.* NLRB Memo OM 12-31 did not address whether the comments were publicly disparaging to the hospital's other "business policies." *See id.*

<sup>149</sup> *See id.*

<sup>150</sup> *See Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 5 (finding that an individual employee's complaints were concerted activity due to coworkers' supportive responses); *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (finding that an individual employee's complaints were not concerted activity due to a lack of coworker response).

group interaction in social media cases.<sup>151</sup> This rigid application has resulted in inconsistent consequences for employees who have engaged in similar conduct.<sup>152</sup> Additionally, the NLRB's has inconsistently applied loss of protection standards to employees engaging in public and potentially opprobrious conduct.<sup>153</sup> A comparison of the NLRB Memo OM 12-31 cases illustrates these inconsistencies and calls for a more nuanced approach to concerted activity in social media cases.<sup>154</sup>

### III. OLD LAW PRODUCES SHAKY RESULTS FOR NEW TECHNOLOGY: A NEW APPROACH TO CONCERTED ACTIVITY IN THE SOCIAL MEDIA AGE

Although the National Labor Relations Board ("NLRB") has developed case law about what constitutes concerted activity within the meaning of section 7 of the National Labor Relations Act ("NLRA"), the current framework does not fit the realities of today's online world.<sup>155</sup> This Part highlights the inconsistent results produced from applying the existing framework to social media cases and suggests a better approach going forward.<sup>156</sup> Section A shows

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<sup>151</sup> *Meyers II*, 281 N.L.R.B. at 887 (finding that concerted activity includes circumstances where individual employees seek to initiate group action, or bring truly group complaints to management); *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (refusing to find concerted activity when an employee brought a possible group complaint to management's attention, because no coworkers responded to the employee's online post).

<sup>152</sup> *Compare Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 5 (finding that an employee voicing individual complaints on Facebook was protected by the NLRA because she was engaged in concerted activity), *with Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (finding that a truck driver voicing group concerns about road conditions on Facebook was not engaged in concerted activity).

<sup>153</sup> *Compare Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29 (applying the *Jefferson Standard* public disparagement test to an employee's online conduct to determine whether the employee should lose the protection of the NLRA), *with Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (applying a modified *Atlantic Steel* test to an employee's online conduct to determine whether the employee should lose the protection of the NLRA).

<sup>154</sup> *See Ferrall*, *supra* note 3, at 1033 (arguing that the "uniqueness" of social media requires a different approach from the traditional concerted activity analysis). *Compare Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 5 (finding that an individual employee's complaints were concerted activity due to their coworkers' supportive responses), *with Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (finding that an individual employee's complaints were not concerted activity due to the lack of coworker responses); *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29 (applying the *Jefferson Standard* public disparagement test to an employee's online conduct to determine whether the employee should lose the protection of the NLRA), *with Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (applying a modified *Atlantic Steel* test to an employee's online conduct to determine whether the employee should lose the protection of the NLRA).

<sup>155</sup> *See NLRB MEMO OM 12-31*, *supra* note 3, at 26, 32; *Ferrall*, *supra* note 3, at 1026 (arguing that the NLRB's adherence to outdated precedent has created problems in applying the concerted activity standard to social media contexts); *Green*, *supra* note 8, at 867 (stating that judges have struggled applying old law to social media cases); *Neal*, *supra* note 34, at 1752 (arguing that social media cases do not fit within the current concerted activity standard).

<sup>156</sup> *See infra* notes 160–240 and accompanying text.

how applying the *Meyers* group activity standard to social media cases has led to inconsistent protection under the NLRA for employee's engaging in similar conduct.<sup>157</sup> Section B then explains how the NLRB has inconsistently applied preexisting law for when concerted activity loses protection of the NLRA.<sup>158</sup> Finally, Section C proposes solutions for both the concerted activity standard and the loss of protection standard that effectively account for the realities of the social media age.<sup>159</sup>

### *A. Same Posts, Different Outcomes: Inconsistency in Finding Concerted Activity*

By applying a narrow interpretation of the *Meyers* group activity standard, and ignoring the inherently paradoxical nature of social media, the NLRB has been unable to strike the right balance in evaluating whether a particular activity on social media constitutes concerted activity.<sup>160</sup> The characteristics of social media that distinguish online communication from workplace communication also create difficulty in applying the preexisting concerted activity standard to new technology.<sup>161</sup> As articulated by the courts and the NLRB in the *Meyers* cases, concerted activity requires comments that seek to “initiate or to induce or to prepare for group action.”<sup>162</sup> In contrast, comments that are not made in preparation for group action, or those that amount to “mere griping,” are not concerted.<sup>163</sup>

This divide poses problems in the social media context, where almost any communication can be viewed, commented on, or ignored by any number of friends and coworkers.<sup>164</sup> Thus, on one hand, any social media post could be

<sup>157</sup> See *infra* notes 160–184 and accompanying text.

<sup>158</sup> See *infra* notes 185–206 and accompanying text.

<sup>159</sup> See *infra* notes 207–240 and accompanying text.

<sup>160</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 3, 32; Ferrall, *supra* note 3, at 1026 (arguing that the concerted activity standard does not fit the social media context); Green, *supra* note 8, at 867 (stating that judges have struggled applying old law to social media cases); Neal, *supra* note 34, at 1752 (arguing that the concerted activity standard does not fit in cases involving social media).

<sup>161</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 4, 32 (finding concerted activity in *Collections Agency* because coworkers supportively responded to the employee's Facebook post, but not in *Trucking Co.* when no coworkers responded to the truck driver's post); Neal, *supra* note 34, at 1751–52 (explaining that determining concerted activity on social media is difficult because all online posts involve a speaker and listeners).

<sup>162</sup> See *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986).

<sup>163</sup> See *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Meyers II*, 281 N.L.R.B. at 887; Neal, *supra* note 34, at 1750 (arguing that “‘mere griping’ is the antithesis of concerted activity”).

<sup>164</sup> See Neal, *supra* note 34, at 1751–52. In 2014, over half of all adult Facebook users had more than 200 friends, and thirty-five percent had over 250. Aaron Smith, *6 New Facts About Facebook*, PEW RESEARCH CTR. (Feb. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/>, archived at <http://perma.cc/3Q8F-ZFTG>. Twenty-seven percent of users under the age of thirty have more than 500 friends. *Id.*

seen as an attempt to prepare for group action, because the comment is posted in an inherently social and public forum.<sup>165</sup> On the other hand, social media pages can be used as a vehicle for expressing personal and professional frustration.<sup>166</sup> In that regard, an employer could argue that anything posted on a social networking page constitutes “mere griping.”<sup>167</sup> Social media is a difficult paradox for the concerted activity standard, since a website like Facebook both promotes concerted activity and can serve as a platform for personal complaints.<sup>168</sup>

In light of this paradox, the NLRB has applied a narrow interpretation of the *Meyers* group activity standard to the social media context.<sup>169</sup> The NLRB has essentially found that the fact that a comment is posted online does not affect the concerted activity analysis.<sup>170</sup> Rather, the NLRB only finds concerted activity when a social media post clearly initiates or induces group action.<sup>171</sup> As to when a social media post initiates or induces group action, the NLRB has taken a reactive approach, focusing on coworkers’ responses to the original post.<sup>172</sup>

The NLRB’s consideration of online comments in recent social media cases demonstrates this reactive approach.<sup>173</sup> In *Collections Agency*, where the

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<sup>165</sup> See Neal, *supra* note 34, at 1751.

<sup>166</sup> See *id.* at 1752 (stating that social media is platform for airing personal and work-related complaints and gripes). The most commonly cited complaint among Facebook users is other users sharing too much information about themselves, or “oversharing.” Smith, *supra* note 164.

<sup>167</sup> See Neal, *supra* note 34, at 1751.

<sup>168</sup> See *id.* at 1751–52.

<sup>169</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 4, 32 (finding concerted activity in *Collections Agency* because coworkers supportively responded to the employee’s Facebook post, but not in *Trucking Co.* when no coworkers responded to the employee’s post).

<sup>170</sup> See Ferrall, *supra* note 3, at 1026 (arguing that the NLRB is “misguided when it broadly asserts that communication over the Internet does nothing to alter a finding of protected activity”); see also OFFICE OF THE GEN. COUNSEL, NAT’L LABOR RELATIONS BD., OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 4 (Aug. 18, 2011), available at <http://apps.nlr.gov/link/document.aspx/09031d458056e743>, archived at <http://perma.cc/7XKM-YDCY> (using Facebook communication as a model example of concerted activity “even though it transpired on a social network platform”).

<sup>171</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 4, 32 (finding concerted activity in *Collections Agency* because coworkers supportively responded to the employee’s Facebook post, but not in *Trucking Co.* when no coworkers responded to the employee’s post).

<sup>172</sup> See Green, *supra* note 8, at 867 (arguing that the NLRB has relied too heavily on the actual responses from Facebook friends when determining whether online activity is concerted); see also Neal, *supra* note 34, at 1749–50 (arguing that the “root of the difficulty” in social media cases is determining when individual activity becomes concerted activity). Compare *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (finding that there was concerted activity when coworkers responded to the employee’s post with support and suggested legal action), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (refusing to find concerted activity when an employee posted complaints on Facebook and no coworkers responded).

<sup>173</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 4, 32 (finding concerted activity only in cases where coworkers responded to the employee’s original social media complaint).

employee's transfer was an effective demotion, the employee posted a series of individual complaints, saying that her employer "messed up and that she was done with being a good employee."<sup>174</sup> Later posts by coworkers voiced support for the employee's complaints and one even suggested filing a lawsuit.<sup>175</sup> In contrast, in *Trucking Co.*, although the employee posted that roads were closed, no dispatcher had answered his calls, and that it would be his employer's fault if any of the drivers were late, none of his coworkers responded.<sup>176</sup>

Although the communications by the respective employees are similar, the NLRB found concerted activity in *Collections Agency*, but not in *Trucking Co.*<sup>177</sup> One reason for this difference was the NLRB's focus on the unpredictable responses of the employees' coworkers.<sup>178</sup> In *Collections Agency*, multiple coworkers commented on the employee's post, lending supportive words, and even suggesting a class action lawsuit.<sup>179</sup> According to the NLRB, these coworker responses turned the employee's individual concerns into group activity that warranted protection under the NLRA.<sup>180</sup> Alternatively, the NLRB found there was no concerted activity in *Trucking Co.* simply because no one responded to the employee's post.<sup>181</sup>

Comparing these two cases, this distinction seems arbitrary, as there are a number of reasons why coworkers might or might not comment on another employee's post.<sup>182</sup> Unpredictable online responses should not turn "mere grip-

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<sup>174</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 3; see also *Mushroom Transp.*, 330 F.2d at 685 (finding that "mere griping" that did not attempt to actually improve the relevant conditions of employment was not concerted activity).

<sup>175</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (recounting various supportive messages of coworkers online, one of whom suggested class action).

<sup>176</sup> *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32. The employee also commented that the employer was running off hard-working drivers. *Id.*

<sup>177</sup> Compare *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (finding concerted activity), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (refusing to find concerted activity). In comparison, the employee in *Collections Agency* arguably voiced a more individual concern, complaining about an individual demotion and a personal lack of motivation to work hard. See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 3. In contrast, in *Trucking Co.*, the employee posted information and complaints that could have been useful for other company drivers whose deliveries were delayed by snow. See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32.

<sup>178</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (finding concerted activity when coworkers responded to a Facebook post that originally expressed an individual complaint).

<sup>179</sup> See *id.* The NLRB found the post suggesting a class action suit especially compelling to the concerted activity analysis. See *id.*

<sup>180</sup> See *id.* at 5.

<sup>181</sup> Compare *id.* at 3 (posting that her employer had made a mistake by demoting her and that she was done being good employee), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (posting that roads were closed and that if any drivers were late it would be company's fault).

<sup>182</sup> See Green, *supra* note 8, at 867–68 (suggesting that online responses depend mostly on unpredictable factors). For example, in *Trucking Co.*, instead of assuming that the Facebook post was not a group concern, one might attribute the lack of responses to the fact that the employee posted the comments on New Year's Eve. See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32;

ing” into concerted activity; nor should online silence turn a possible group complaint into “mere griping.”<sup>183</sup> The two cases demonstrate how fortuitous a finding of concerted activity can be and highlights the importance of striking a different balance.<sup>184</sup>

### *B. Losing Protection for Otherwise Concerted Activity: Inconsistencies in Deciding When Conduct Should Lose the NLRA’s Protection*

The NLRB’s analysis for deciding when an employee loses the protection of the NLRA has also led to unpredictable results in the social media context.<sup>185</sup> In 1953, in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* (“*Jefferson Standard*”), the U.S. Supreme Court established an exception to the concerted activity analysis on the basis of the duty of loyalty in the employment context.<sup>186</sup> Specifically, the Supreme Court held that employee conduct can be separable and that activities unrelated to a labor dispute, especially public disparagement, might fall outside the protection of the NLRA.<sup>187</sup> The NLRB established another exception in 1979 in *Atlantic Steel Co.*, finding that an employee could lose protection of the NLRA if their behavior was opprobrious.<sup>188</sup>

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Green, *supra* note 8, at 867–68. It is also possible that the manager’s critical response could have dissuaded other coworkers from responding. See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32; Green, *supra* note 8, at 867–68.

<sup>183</sup> See Green, *supra* note 8, at 867–68 (“Whether or not colleagues reply to Facebook threads may depend mostly on the time of the posting or other matters that seem too dependent on contingency . . . .”); see also Ferrall, *supra* note 3, at 1033 (arguing that identities of online responders should not be key factor for determining concerted activity).

<sup>184</sup> Compare *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (finding concerted activity when coworkers responded to the employee’s post), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (refusing to find concerted activity when an employee posted his New Year’s Eve complaints on Facebook and no coworkers responded).

<sup>185</sup> Compare *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 26 (employing a traditional *Jefferson Standard* public disparagement analysis without considering *Atlantic Steel* opprobrious conduct factors), with *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (applying a “modified *Atlantic Steel* analysis” to an employee’s Facebook activity).

<sup>186</sup> See *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 473 (1953). The court held that a labor dispute did not eliminate the loyalties of the employment relationship. See *id.*

<sup>187</sup> See *id.* at 476–77. The Court held that the employee’s disparaging handbill campaign, which attacked the quality of the employer’s broadcasting product, was separable from the underlying labor dispute. See *id.* at 476. Thus, despite the employee’s other concerted activities, they lost the NLRA’s protection. See *id.* at 477–78.

<sup>188</sup> See *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979). Recall that the factors the NLRB uses to determine whether conduct is opprobrious are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an unfair labor practice. *Id.*



The inherent characteristics of social media create difficulty in neatly applying these “loss of protection” standards.<sup>189</sup> Prior to social media, under *Jefferson Standard*, the NLRB could determine when an employee had engaged in separable public disparagement by examining whether the employee had communicated with the public about matters unrelated to the employment dispute.<sup>190</sup> Today, when an employee posts on social media, it is not always clear whether he or she means to communicate with anyone in particular, their whole network, or no one at all.<sup>191</sup>

Social media can also complicate the *Atlantic Steel* opprobrious conduct analysis, especially with respect to the location factor.<sup>192</sup> The NLRB has counted this factor in favor of employees, finding that online communications occur at home, and thus are less likely to disrupt the workplace.<sup>193</sup> It is not entirely clear, however, whether an employee’s comment on social media takes place at *home*, or if by posting online, the employee is actually communicating *everywhere*.<sup>194</sup> Confusion over the communication’s location has proven difficult for the NLRB, which has attempted to categorize social media cases as either *Jefferson Standard* public disparagement cases or *Atlantic Steel* opprobrious conduct cases.<sup>195</sup>

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<sup>189</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 24, 29; see also Neal, *supra* note 34, at 1751–52 (arguing that social media presents difficulties for concerted activity analysis because it is inherently social, but also is also used as a platform for personal griping).

<sup>190</sup> See *Jefferson Standard*, 346 U.S. at 476. The Court upheld the NLRB’s finding that the disparagement of the employer’s product might have been justified if it was communicated in a “conventional appeal” for union support. See *id.* at 477. The fact that the communication was a separable attack on the employer’s product that was communicated to the public changed the Court’s analysis and ultimately pushed the conduct outside the purview of the NLRA’s protection. See *id.*

<sup>191</sup> See Ferrall, *supra* note 3, at 1027 (arguing that the “omnipresent public audience” of a social media post creates difficulty in applying the concerted activity and loss of protection standards to social media cases). Compare *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 3 (describing an employee’s individual work concerns which generated coworker response), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (describing an employee’s potentially group concerns which did not generate any responses from coworkers).

<sup>192</sup> See Ferrall, *supra* note 3, at 1033 (arguing that the NLRB’s treatment of the location factor does not reflect differences between social media posts and traditional work communication).

<sup>193</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 25 (finding that Facebook discussion occurred at home and thus was not disruptive of workplace discipline).

<sup>194</sup> See Ferrall, *supra* note 3, at 1033; see also Mark A. Cloutier, Note, *Opening the Schoolhouse Gate: Why the Supreme Court Should Adopt the Standard Announced in Tatro v. University of Minnesota to Permit the Regulation of Certain Non-Curricular Student Speech in Professional Programs*, 55 B.C. L. REV. 1659, 1666 (2014) (explaining difficulty in determining “where” online speech occurs).

<sup>195</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 29 (categorizing loss of protection analysis as analogous to either *Atlantic Steel* or *Jefferson Standard*). One could see how, prior to social media, the NLRB could more easily decide whether to apply *Jefferson Standard* or *Atlantic Steel*. See *Jefferson Standard*, 346 U.S. at 468, 476 (concerning distributed handbills to the public denouncing the employer during a strike); *Atl. Steel*, 245 N.L.R.B. at 814 (concerning an employee’s outburst during a work shift). The *Jefferson Standard* analysis would not apply to a workplace outburst, any more than

The NLRB has inconsistently applied the two standards to deal with the problems presented by social media.<sup>196</sup> Although the “modified *Atlantic Steel*” test is not explicitly articulated, *Popcorn Packaging* represents an effort by the NLRB to adapt its older standards to the social media context.<sup>197</sup> Acknowledging the “inherent differences between a Facebook discussion and a workplace outburst,” the NLRB also considered the impact that the employee’s public comments could have on the employer’s business.<sup>198</sup> Nevertheless, applying the “modified” test, the NLRB found that the employee’s mild comments did not lose protection of the NLRA.<sup>199</sup>

Despite *Popcorn Packaging*’s use of the modified *Atlantic Steel* test, in *Hospital*, the NLRB chose to employ a traditional *Jefferson Standard* public disparagement analysis.<sup>200</sup> The NLRB focused entirely on the “disparagement” aspect of *Jefferson Standard* and found that, although the employee raised “sensitive issues,” he did not disparage the employer.<sup>201</sup> The NLRB did not acknowledge the impact these sensitive posts could have on the employer’s business once the public viewed them.<sup>202</sup> To ignore the public aspect of the communications is to selectively apply *Jefferson Standard*, which focused on “disparagement,” but did so in the context of a separable, public attack.<sup>203</sup> The NLRB’s selective application of *Jefferson Standard*, disregarding the public

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the *Atlantic Steel* analysis would apply to an appeal to the public. See *Jefferson Standard*, 346 U.S. at 468; *Atl. Steel* 245, N.L.R.B. at 814.

<sup>196</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 24, 29 (employing a “modified *Atlantic Steel*” analysis in *Popcorn Packaging*, but a traditional *Jefferson Standard* analysis in *Hospital*).

<sup>197</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24. Recall that the modified analysis incorporated the *Atlantic Steel* opprobrious conduct factors, but borrowed from *Jefferson Standard* by analyzing the employee’s alleged disparagement of the employer’s products or services. See *supra* notes 129–134 and accompanying text (explaining the modified *Atlantic Steel* standard used in *Popcorn Packaging*). Nevertheless, it is not clear how much the NLRB “borrows” from *Jefferson Standard*, since the NLRB seemed to ignore the “separable” conduct aspect of the exception. See *Jefferson Standard*, 346 U.S. at 477 (holding that a concerted separable attack on the employer’s services did not receive protection under the NLRA); *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24–25.

<sup>198</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 25.

<sup>199</sup> See *id.*

<sup>200</sup> See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29.

<sup>201</sup> See *id.* In *Hospital*, the employee was terminated for repeatedly posting letters, presentations, and comments online, stating that the employer routinely engaged in unfair labor practices and contributed to a murder-suicide. See *id.* at 26–27.

<sup>202</sup> See *id.* at 29. The “sensitive issues” were the employee’s repeated insinuations that management’s leadership was to blame for a murder-suicide at the hospital. See *id.* at 26.

<sup>203</sup> See *Jefferson Standard*, 346 U.S. at 476–77. The NLRB focused on whether the employee’s criticisms disparaged the hospital’s product, which was defined as providing healthcare. See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29. It made no reference to how repeated public mention of a murder-suicide could affect the hospital’s general reputation. See *id.*

and separable nature of a social media post, deviates from the “modified *Atlantic Steel*” standard adopted in *Popcorn Packaging*.<sup>204</sup>

*Hospital* and *Popcorn Packaging* demonstrate the NLRB’s inconsistency in determining whether employee conduct should lose the protection of the NLRA.<sup>205</sup> Altogether, the NLRB’s narrow interpretation of the *Meyers* group activity requirement, as well as its inconsistency in determining when conduct should lose the NLRA’s protection, has created results in concerted activity cases that do not reflect the characteristics of today’s online world.<sup>206</sup>

### C. Social Media Standards We Can “Like”: Proposals for a More Current and Effective Approach in Finding Concerted Activity

To better reflect the reality of today’s online world, the NLRB should make changes to both the concerted activity standard and the loss of protection standard for employee activity on social media sites.<sup>207</sup> Subsection 1 first argues that the NLRB should consider employee intent when deciding whether an online post should be considered concerted activity.<sup>208</sup> Subsection 2 then suggests a more clearly articulated “modified *Atlantic Steel*” test that the NLRB should adopt consistently when evaluating whether an employee’s conduct should lose the protection of the NLRA.<sup>209</sup>

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<sup>204</sup> See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29 (choosing not to use the modified *Atlantic Steel* standard, instead focusing on the disparagement portion of the *Jefferson Standard* analysis, without considering the public nature of the online communications or the possibility that these communications could be separable from the labor dispute); *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (using a modified *Atlantic Steel* test for loss of protection analysis).

<sup>205</sup> Compare *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29 (choosing not to use the modified *Atlantic Steel* standard), with *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (using a modified *Atlantic Steel* test for loss of protection analysis). Although this Note seeks to only illustrate the NLRB’s inconsistent approach in the social media context, it is also worth questioning what exactly an employee must do to lose the protection of the NLRA. See generally NLRB MEMO OM 12-31, *supra* note 3 (explaining cases that the NLRB considered to lose the protection of the NLRA). It is difficult to determine today, as there are no cases detailed in NLRB Memo OM 12-31 where an employee loses the protection of the NLRA. See generally *id.* (explaining multiple cases in which the NLRB considered whether an employee should lose protection of the NLRA, but never noting an instance where protection was actually lost).

<sup>206</sup> Compare *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 4 (finding concerted activity when coworkers responded to the employee’s post), with *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (refusing to find concerted activity when an employee posted complaints on New Year’s Eve on Facebook and no coworkers responded); *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 26 (employing a traditional *Jefferson Standard* public disparagement analysis without considering *Atlantic Steel*’s opprobrious conduct factors), with *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24 (employing a “modified *Atlantic Steel* analysis” for an employee’s Facebook activity).

<sup>207</sup> See *Ferrall*, *supra* note 3, at 1033 (arguing that the “uniqueness” of social media requires the NLRB to adopt a specific approach for dealing with social media cases).

<sup>208</sup> See *infra* notes 210–222 and accompanying text.

<sup>209</sup> See *infra* notes 223–240 and accompanying text.

## 1. Employee Intent Should Weigh More Than Coworker Responses When Deciding Concerted Activity

The NLRB should reconsider the way it has applied the *Meyers* group activity standard to social media cases by focusing on whether the social media poster intended to induce, initiate, or prepare for group action.<sup>210</sup> The NLRB's current approach of focusing on the unpredictable responses of coworker friends does not comport with the purpose of section 7 of the NLRA, which is to allow employees to informally band together for their mutual aid and protection.<sup>211</sup> By analyzing concerted activity based simply on coworker responses, the NLRB has found group activity where an employee's original post may have otherwise been considered to be "mere griping."<sup>212</sup> Likewise, a Facebook post which raised a genuine group concern was labeled an expression of "boredom" simply because no coworker responded.<sup>213</sup>

If a social media post can simultaneously speak to everyone or no one at all, the NLRB should, on a case-by-case basis, try to ascertain the employee's intent behind the post.<sup>214</sup> The key inquiry ought to be whether the employee's social media post intended to reach coworkers and possibly prepare for group action.<sup>215</sup> The arbitrary responses, or even silence, of coworkers should only be considered in the particular circumstances of each case.<sup>216</sup> An employee who

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<sup>210</sup> See Ferrall, *supra* note 3, at 1033 (arguing that the NLRB "should focus more closely on the employee's intent when he posts an online statement"); Green, *supra* note 8, at 867–68 (arguing that the intent of the speaker should outweigh coworker responses in concerted activity analysis).

<sup>211</sup> See 29 U.S.C. § 157 (2012); see also Ferrall, *supra* note 3, at 1033 (arguing that employee intent should be the most important factor for determining whether an action should be considered a concerted activity); Green, *supra* note 8, at 867–68 (arguing that coworker responses are too unpredictable and that the NLRB should instead focus on the intent of the speaker for finding concerted activity).

<sup>212</sup> See *Collections Agency*, NLRB MEMO OM 12-31, *supra* note 3, at 3–4 (involving an employment dispute where the employee's original Facebook post resembled an individual complaint, but became concerted activity when coworkers responded and suggested legal action).

<sup>213</sup> See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 33 (involving an employment dispute where the employee posted that all roads were closed, no dispatchers were answering calls, and that if drivers were late it would not be their fault).

<sup>214</sup> See Ferrall, *supra* note 3, at 1033; Green, *supra* note 8, at 867–68. After all, in the 1984 decision *Meyers Industries, Inc. (Meyers I)*, the NLRB emphasized that "concerted activity is, at its heart, a factual once, the fate of a particular case rising or falling on the record evidence." See 268 N.L.R.B. 493, 497 (1984).

<sup>215</sup> See Ferrall, *supra* note 3, at 1033 (arguing that the NLRB should focus on employee intent when determining whether an online post is concerted activity); Green, *supra* note 8, at 867–68 (arguing that the NLRB should focus on employee intent for its concerted activity analysis).

<sup>216</sup> See *Meyers I*, 268 N.L.R.B. at 497 (stating that the question of concerted activity is inherently factual, with "the fate of a particular case rising or falling on the record evidence"); see also Ferrall, *supra* note 3, at 1033 (arguing that intent of employee is more indicative of concerted activity than coworkers reactions); Green, *supra* note 8, at 867–68 (arguing that coworker responses are too dependent on circumstances to be the focus of a proper concerted activity analysis).

intended to initiate or prepare for group action should be protected, consistent with the purposes of the NLRA, even if no coworkers respond.<sup>217</sup>

The *Meyers* group activity standard, however, is not altogether improper for the social media context.<sup>218</sup> Instead, the NLRB should just interpret the *Meyers* group activity standard more broadly to cover all situations in which an employee might have sought “to initiate or to induce or to prepare for group action.”<sup>219</sup> By looking at the employee’s intent, the NLRB could find instances where an employee has prepared for group action without necessarily inducing it or initiating it right then and there online.<sup>220</sup> This interpretation affords broader protections to employees by finding concerted activity not only in instances where a comment actually induces a group response like in *Collections Agency*, but also in cases where a post containing a group concern goes unnoticed or unanswered.<sup>221</sup> Focusing on employee intent would allow the NLRB

<sup>217</sup> See Ferrall, *supra* note 3, at 1033 (arguing that employee intent should be focus in deciding whether social media post is concerted activity); Green, *supra* note 8, at 867–68 (arguing that employee intent is more important than coworker responses for determining concerted activity). *But cf. Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (finding no concerted activity when a truck driver’s potentially group concerns did not generate response from coworkers). Such an interpretation could likely afford protection to a situation like *Trucking Co.*, where an employee might raise a genuine group concern that goes unnoticed, or is not responded to, on Facebook. See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32.

<sup>218</sup> See Neal, *supra* note 34, at 1757 (arguing that the NLRB can continue to use the *Meyers* group activity standard for social media cases). *But see* Ferrall, *supra* note 3, at 1032 (arguing that since “*Meyers* does not address the distinct nature of employees’ social media communication, the [NLRB] should not rely on it in determining whether the activity is protected concerted activity under the NLRA”).

<sup>219</sup> See *Meyers II*, 281 N.L.R.B. at 887.

<sup>220</sup> See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32; Ferrall, *supra* note 3, at 1033. The distinction is a small one, but the NLRB’s current focus on coworker responses seems to suggest that it looks only to whether a social media post “initiates” or “induces” group action, while the language from *Meyers II* also protects an employee who “prepares” for group action. See *Meyers II*, 281 N.L.R.B. at 887 (finding that concerted activity includes “those circumstances where individual employees seek to initiate or to induce or to prepare for group action”) (emphasis added); NLRB MEMO OM 12-31, *supra* note 3, at 3, 32 (finding concerted activity where an employee initiates a group response, but not where an employee’s preparations for group action fail to initiate a group response). The NLRB’s focus on coworker reactions does not account for the possibility that an employee’s post could be intended to prepare for group action. See *Trucking Co.*, NLRB MEMO OM 12-31, *supra* note 3, at 32 (finding that an employee’s Facebook posts did not induce or initiate group action and thus were not concerted activity).

<sup>221</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 3, 32. Moreover, by shifting its focus to employee intent, the NLRB can more effectively protect employees under the *Meyers* group activity standard, which also accounts for individual employees bringing group complaints to the attention of management. See *Meyers II*, 281 N.L.R.B. at 887 (finding that concerted activity includes an individual employee seeking 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”) (emphasis added).

to more effectively apply the *Meyers* group activity test to social media cases.<sup>222</sup>

## 2. Needing a More Clearly Defined “Modified *Atlantic Steel*” Test

If the NLRB is to employ a broader interpretation for concerted activities in the social media context, it should also consider the public nature of online communications in determining whether employee conduct should lose the protection of the NLRA.<sup>223</sup> Specifically, the NLRB should adopt a more clearly defined modified *Atlantic Steel* test for all social media cases.<sup>224</sup> The NLRB’s attempt to categorize social media cases as either *Jefferson Standard* public disparagement cases or *Atlantic Steel* opprobrious conduct cases does not acknowledge the inherent differences between a social media conversation and a workplace conversation.<sup>225</sup> By applying a modified *Atlantic Steel* test, the NLRB can analyze whether an employee’s conduct was so opprobrious as to lose protection of the NLRA while considering the public element to each and every social media post.<sup>226</sup> Such a modified test recognizes the inherent difficulty in categorizing social media cases as either *Atlantic Steel* or *Jefferson Standard* cases.<sup>227</sup>

Furthermore, the NLRB should tweak its modified *Atlantic Steel* test to better account for the public impact of statements made on social media.<sup>228</sup> To start, the NLRB should articulate that *Jefferson Standard*’s contribution to the modified test is the consideration that social media posts are inherently public and that these public posts can hurt an employer’s business or reputation.<sup>229</sup> In

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<sup>222</sup> See Ferrall, *supra* note 3, at 1033 (arguing that the “uniqueness” of social media requires a concerted activity approach that focuses on employee intent).

<sup>223</sup> See *id.* at 1027; Neal, *supra* note 34, at 1757. This Note acknowledges that by focusing on both employee intent and coworker responses, the likelihood of finding concerted activity increases dramatically. See Neal, *supra* note 34, at 1757 (suggesting that the broader group activity standard, without a strict loss of protection standard, could overprotect employee activity). A clearer standard for losing protection of the NLRA, however, can counteract this effect. See *id.* (arguing that “[i]f the Board construes the *Meyers* / standard broadly . . . it may be appropriate . . . to apply a more stringent loss-of-protection standard subsequently” to promote the policies of the NLRA).

<sup>224</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 24.

<sup>225</sup> See *id.* at 25; Neal, *supra* note 34, at 1751–52.

<sup>226</sup> See *Jefferson Standard*, 346 U.S. at 477 (finding that employees can lose protection under the NLRA through separable public disparagement of employer); *Atl. Steel*, 245 N.L.R.B. at 816 (finding that employees can lose protection of the NLRA through opprobrious conduct).

<sup>227</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 24 (explaining the need for a modified loss of protection standard in light of the difficulty of categorizing social media cases as either *Atlantic Steel* or *Jefferson Standard* cases).

<sup>228</sup> See *id.* (stating that the modified test considers a *Jefferson Standard* disparagement analysis); Neal, *supra* note 34, at 1751–52 (arguing that the public nature of social media requires a modified analysis).

<sup>229</sup> See NLRB MEMO OM 12-31, *supra* note 3, at 24. The NLRB treads carefully around this by distinguishing appealing to the public from being “overheard” by the public. See *id.* The distinction is

that vein, when balancing the factors of the *Atlantic Steel* opprobrious conduct analysis for social media cases, the first factor—location—should always weigh toward losing protection of the NLRA.<sup>230</sup> When applying the opprobrious conduct analysis, the NLRB has found that social media posts occur at home, counting that factor in employees' favor for the NLRA's protection.<sup>231</sup> The NLRB has reasoned that since the social media posts occur at home, there is little chance that the communications will disrupt workplace discipline.<sup>232</sup> This interpretation does not account for the fact that social media posts that "occur" at home can be viewed by anyone, anywhere.<sup>233</sup> The public nature of these posts suggests the location factor should weigh in favor of the employer and loss of protection.<sup>234</sup>

Finally, the NLRB should include more of the *Jefferson Standard* public disparagement analysis in its modified test—specifically, that employee conduct can be separable.<sup>235</sup> There are employee actions that relate to an employment dispute and actions that are unrelated to any dispute.<sup>236</sup> By ignoring the separability aspect of the *Jefferson Standard* analysis, the NLRB has allowed employees to post just about anything online, so long as there is a labor dispute in the background.<sup>237</sup> *Jefferson Standard* explicitly cautioned against such al-

semantic, and the NLRB should acknowledge the possibility of public disparagement any time a comment is made on a social media site. See Ferrall, *supra* note 3, at 1027.

<sup>230</sup> See Ferrall, *supra* note 3, at 1030 (arguing that when third parties can view an employee's online discussion, the location factor should favor the employer and loss of protection of the NLRA). But see NLRB MEMO OM 12-31, *supra* note 3, at 25 (stating that since an online discussion took place "at home," the location factor favored the employee).

<sup>231</sup> See *Popcorn Packaging*, NLRB MEMO OM 12-31, *supra* note 3, at 25 (finding that an employee's Facebook post occurred at home, counting that factor in favor of employee).

<sup>232</sup> See *id.* According to the NLRB, "home" communications are less likely to disrupt workplace discipline and are therefore less likely to be considered so opprobrious as to lose the protection of the NLRA. See *Atl. Steel*, 245 N.L.R.B. at 816–17.

<sup>233</sup> See Ferrall, *supra* note 3, at 1027–28 (arguing that social media's "omnipresent public audience" makes online posts different from traditional workplace comments); see also Cloutier, *supra* note 194, at 1666 (explaining the difficulty in determining "where" online speech occurs).

<sup>234</sup> See Ferrall, *supra* note 3, at 1030 (arguing that the location factor in *Atlantic Steel*'s loss of protection standard should always favor employers in social media cases).

<sup>235</sup> See *Jefferson Standard*, 346 U.S. at 477 (establishing a loss of protection standard for public disparagement of employer's goods or services and emphasizing that an employees' actions may be separable from an ongoing labor dispute).

<sup>236</sup> See *id.* at 476.

<sup>237</sup> See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 26–27. In *Hospital*, an employee in a long-term labor dispute repeatedly insinuated that his employer's lack of leadership was responsible for a murder-suicide at the hospital. See *id.* at 26. The NLRB seemed to focus on whether or not these allegations amounted to defamation. See *id.* at 29. It concluded that the employee's remarks were not disparaging because they did not insult the hospital's product, namely healthcare. *Id.* The NLRB could have instead considered the impact these public remarks could have on the hospital's reputation in the community. See *id.*; Ferrall, *supra* note 3, at 1030. Such public remarks, although perhaps not rising to the level of defamation, could still be considered disparaging when viewed in their public context. See *Hospital*, NLRB MEMO OM 12-31, *supra* note 3, at 29; Ferrall, *supra* note 3, at 1030 (arguing that

lowances, stating that “[t]he fortuity of the coexistence of a labor dispute affords [employees] no substantial defense.”<sup>238</sup> Employees who make disparaging remarks that are separable and unrelated to any labor dispute should not be afforded the protection of the NLRA.<sup>239</sup> By employing a modified test that draws on both *Jefferson Standard* and *Atlantic Steel*, the NLRB can more consistently and more fairly determine when an employee’s concerted activity should lose the protection of the NLRA.<sup>240</sup>

## CONCLUSION

Social media sites like Facebook and Twitter have changed the way employees communicate. Break room conversations about conditions of employment have been supplanted by angry online posts and heated comment threads. The NLRB has been slow in adjusting to this change, applying decades-old law to new technology that simply does not resemble the type of networking and communication envisioned by the NLRA. By broadening the concerted activity standard to include online communications that intend to initiate group action, the NLRB can account for today’s employees seeking to avail themselves of the NLRA’s protection. By moving away from a reactive approach, the NLRB can achieve more consistent results that better advance the policies of the NLRA.

A broader interpretation of concerted activity, however, calls for a stricter and more consistent loss of protection standard. The NLRB could achieve this balance by adopting the modified *Atlantic Steel* test. This test accounts for the inherently public nature of social media and the reality that employee’s online communications have real implications for business’s reputations. In the age of “likes” and “tweets,” the #NLRB must adapt to our new online reality.

JAMES LONG

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employees who publically disparage their employers on social media should be treated like *Jefferson Standard* employees and lose protection under the NLRA).

<sup>238</sup> See *Jefferson Standard*, 346 U.S. at 476.

<sup>239</sup> See *id.* at 477.

<sup>240</sup> See 29 U.S.C. § 157 (2012) (granting employees the right to engage in concerted activities for their mutual aid or protection); NLRB MEMO OM 12-31, *supra* note 3, at 24, 29 (applying a modified *Atlantic Steel* test to some social media cases but not others); Ferrall, *supra* note 3, at 1029 (arguing that the NLRB has misapplied both the *Atlantic Steel* and *Jefferson Standard* loss of protection standards).



