
The Sword and Shield of Social Networking: Harming Employers' Goodwill Through Concerted Facebook Activity

*“Protected concerted activity usually isn’t viewed as a carte blanche right to free speech, especially in an at-will-employment state. However, if successful, . . . this case may end up being just that.”*¹

I. INTRODUCTION

In early labor and employment law history, employers enjoyed unfettered power under the at-will employment doctrine, which allowed employees to be terminated for any reason, so long as they were not hired for a fixed term.² Seeking to remedy the harsh conditions imposed on working men, Congress altered the employment dynamics by equalizing the previously employer-dominated at-will employment relationship.³ Congress enacted the National Labor Relations Act (NLRA) to safeguard employee rights and prevent abuse by employers who enjoyed greater bargaining power.⁴ Considered the heart of the NLRA, section 7 codifies the protections guaranteed to private sector employees—including the right to engage in *protected concerted activity*.⁵ Congress simultaneously created the National Labor Relations Board (NLRB)

1. Berna Rhodes-Ford & Anthony L. Hall, *Posts, Tags, and Tweets: Protected Concerted Activity Under NLRA?*, NEV. EMP. L. LETTER, Feb. 2011, at 1, 1.

2. See Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 308 (2002) (noting at-will presumption long accepted in American courts).

3. See generally National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006). The NLRA effectively serves as an exception to the doctrine of at-will employment and applies to both unionized and nonunionized employees. See Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 361 (2007) (explaining potential employer liability for violating employment-related statute despite at-will employment).

4. See 29 U.S.C. § 158 (listing rights guaranteed to employees); see also Rhodes-Ford & Hall, *supra* note 1, at 1 (noting congressional motivation behind enactment of NLRA).

5. See *Protecting Employee Rights*, NAT’L LAB. REL. BOARD, http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/nlr_brochure.pdf (last visited Oct. 17, 2013) (characterizing section 7 protections as “heart” of NLRA); see also Rhodes-Ford & Hall, *supra* note 1, at 1 (explaining what constitutes “protected concerted activity”). Protected concerted activity is employee speech or action regarding terms and conditions of employment engaged in by a group of employees, or by an individual employee on behalf of a group. See Katherine M. Scott, iBrief, *When Is Employee Blogging Protected by Section 7 of the NLRA?*, 2006 DUKE L. & TECH. REV. 17, ¶¶ 6-8 (2006), <http://dltr.law.duke.edu/2006/10/04/when-is-employee-blogging-protected-by-section-7-of-the-nlra> (discussing when activities considered “protected,” “concerted,” and for “mutual aid or protection”).

to ensure proper administration and enforcement of the NLRA and to provide employees with a forum to voice alleged violations.⁶

Congress has since amended the NLRA to better clarify the rights of both employers and employees, and to further strengthen the employment relationship.⁷ For example, section 10(c) of the Taft-Hartley Act expressly reserves for employers the right to suspend or discharge employees for just cause, and also announces that the NLRB cannot impose an order of reinstatement or back pay.⁸ The purposes of the NLRA in defining and protecting the rights of employees and employers are: encouraging meaningful bargaining, minimizing disputes, and eliminating harmful practices.⁹ Although the NLRA is remedial (rather than criminal) in nature, increasing awareness about each party's rights and obligations facilitates dispute resolution in the employment relationship because all parties have an incentive to avoid violating the Act from the outset.¹⁰ The NLRB attempts to balance the rights of employers and employees in order to make decisions that further the policy of industrial stability.¹¹

On December 14, 2012, the NLRB sparked unease among employers when it affirmed an administrative law judge's (ALJ) ruling in *Hispanics United of Buffalo, Inc. (Hispanics United)*¹² that employee comments published on Facebook criticizing employment-related matters, could constitute protected concerted activity.¹³ In reaction to a coworker's threat to raise concerns about

6. See Rhodes-Ford & Hall, *supra* note 1, at 1 (describing duties of NLRB). See generally OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., *Basic Guide to the National Labor Relations Act* (1997), <http://nlrb.gov/sites/default/files/documents/224/basicguide.pdf> [hereinafter *Guide to NLRA*] (disclosing main function of NLRB includes preventing unfair labor practices); *The NLRB Process*, NAT'L LAB. REL. BOARD, <http://www.nlrb.gov/nlrb-process> (last visited Oct. 17, 2013) (detailing NLRB's role and process of filing unfair labor practice charge).

7. See *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (discussing purpose of Taft-Hartley Act amending NLRA).

8. See 29 U.S.C. § 160(c). "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.*

9. See *Guide to NLRA*, *supra* note 6.

10. See *id.*

11. See *Local Union No. 1229*, 346 U.S. at 476 (explaining NLRA's declared purpose of enabling "industrial peace and stability"); see also Christine Neylon O'Brien, *The Impact of Employer E-mail Policies on Employee Rights To Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573, 589 (2002) (suggesting NLRA's policies balance employer and employee interests).

12. 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (Dec. 14, 2012).

13. See *id.* at *13; see also *Administrative Law Judge Finds New York Nonprofit Unlawfully Discharged Employees Following Facebook Posts*, NAT'L LAB. REL. BOARD, <http://www.nlrb.gov/news-outreach/news-story/administrative-law-judge-finds-new-york-nonprofit-unlawfully-discharged> (last visited Oct. 17, 2013) [hereinafter *ALJ Findings on Nonprofit*] (discussing outcome of *Hispanics United*). See generally OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BOARD, OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Aug. 18, 2011) [hereinafter REPORT 1] (analyzing recent case developments in context of social media); *Acting General Counsel Releases Report on Social Media Cases*, NAT'L LAB. REL. BOARD, <http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases>

poor job performance to a supervisor, Mariana Cole-Rivera complained about the coworker, by name, on her Facebook page and solicited responses from other coworkers.¹⁴ The employer, Hispanics United of Buffalo, Inc. (HUB), terminated Ms. Cole-Rivera and four employees who responded to the post for harassing their fellow coworker in violation of HUB's policy against harassment.¹⁵ Instead of promoting corrective action that would protect workers from being bullied, the NLRB determined that the employees' discharge amounted to a violation of section 8(a)(1) of the NLRA because the Facebook comments constituted protected concerted activity.¹⁶ The comments received section 7 protection because they contained complaints about terms and conditions of employment, and were concerted because they provoked responses from several coworkers.¹⁷ By qualifying disparaging Facebook comments as concerted activity, the NLRB granted almost complete immunity to public posts made by employees, so long as they provoke feedback from more than one employee.¹⁸ The decision in *Hispanics United* leaves both the bullied employee's and the employer's online reputations unprotected, and further renders employers helpless in preventing exposure of their personal gripes with employees on the Internet.¹⁹

Hispanics United shifts the balance of power in favor of employees at the expense of employers.²⁰ It has long been recognized that employers have a legitimate business interest in maintaining their reputation.²¹ By qualifying

report-social-media-cases (last visited Oct. 17, 2013) [hereinafter *Acting General Counsel Release*] (discussing outcome of *Hispanics United* and investigations into thirteen similar cases).

14. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *31-36 (discussing facts and Facebook posts).

15. See *id.* at *3-6 (explaining employer's actions in response to Facebook posts).

16. See *id.* at *13-15 (affirming ALJ's ruling that *Hispanics United* violated NLRA).

17. See *id.* at *43-45 (finding concerted activity and explaining employees' right to discuss matters relating to employment).

18. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852, at *44-45 (Dec. 14, 2012) (explaining conduct not opprobrious enough to lose protection under section 7); see also *Acting General Counsel Release*, *supra* note 13 (reporting findings of protected concerted activity in four social-media cases). The comment feature available on most social-media websites, including Facebook, makes it easy for public posts to rise to the level of protected concerted activity. See Scott, *supra* note 5, ¶ 15.

19. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *45 (Dec. 14, 2012) (announcing remedy of reinstatement with back pay for discriminatory discharge); see also Eileen M. Johnson, *Use Facebook To Safely Complain About Your Boss*, MD. EMP. L. LETTER, Mar. 2011, at 3, 3 (recognizing employees can "get away with" criticizing supervisors on Facebook during nonworking hours). See generally REPORT 1, *supra* note 13 (detailing recent NLRB social-media decisions).

20. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *3-4 (finding employer unlawfully terminated employees); see also Scott, *supra* note 5, ¶ 1 (implying balance of power in labor-relations context historically favors employers over employees); Bob E. Lype, *Employment Law and New Technologies: Emerging Trends Affecting Employers*, TENN. B.J., May 2011, at 20, 22-23 (describing recent shift in NLRB decisions away from condoning employer policies against disparagement).

21. See *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1629-30 (1956) (interpreting Supreme Court precedent as acknowledging employers' legitimate business interest in protecting reputation); see also *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989) (noting "disloyal" employee conduct violates concerted

disparaging comments as protected concerted activity within the meaning of section 7, the NLRB disregarded employers' interests and stripped them of legal recourse for situations in which their employees publically mistreat or abuse them on Facebook, or through other readily available social-media platforms.²² This Note will begin by discussing the purpose of the NLRA and the policies underlying its enactment.²³ It will then address how *Hispanics United* fits into that statutory framework and will recognize the disastrous impact the decision will have on employer rights in conflicts involving employee conduct on social-media websites.²⁴ Finally, this Note will explore legal avenues employers can pursue to defend their reputation without engaging in behavior that might constitute an unfair labor practice, and will conclude by suggesting a test for the NLRB to use in these types of cases.²⁵

activity protection); Scott R. Grubman, Note, *Think Twice Before You Type: Blogging Your Way to Unemployment*, 42 GA. L. REV. 615, 624 (2008) (observing amount of time and money necessary to build and maintain company's goodwill). *But see* Heisler Food Enters., No. 2-CA-30899, 1999 NLRB LEXIS 889, at *53-55 (Dec. 30, 1999) (admonishing employer for failing to reinstate strikers despite lost business justification).

22. *See* Scott, *supra* note 5, ¶ 4 (noting employers have limited control over employee conduct during nonworking hours). This conclusion is similar to social-media cases in the education sector, in which at least one court has protected student free speech over an individual's right to privacy. *See* J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (en banc) (treating student's creation of fake online profile depicting principal negatively as protected First Amendment speech).

23. *See infra* Part II.B (discussing provisions of NLRA). *See generally* *Guide to NLRA*, *supra* note 6 (describing purpose of NLRA).

24. *See* Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 549 (N.J. 2000) (recognizing conduct occurring outside of work "has . . . tendency to permeate . . . workplace"); *see also* Scott, *supra* note 5, ¶ 15 (noting concern over employees' ability to get messages to public as issue of "rising importance"). *See generally* *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (Dec. 14, 2012) (finding Facebook comments protected activity); *Acting General Counsel Release*, *supra* note 13 (discussing investigations and outcomes of fourteen recent NLRB social-media cases).

25. *See* Robert H. Bernstein, *On the Horizon: Employer Liability for Employee Social Media Communications and Conduct*, ASPATORE, Feb. 2011, at *1, available at 2011 WL 601170 (advocating for enacting policies to avoid disputes over social-media conduct); Rhodes-Ford & Hall, *supra* note 1, at 2-3 (discussing need for "carefully crafted code of conduct" to avoid damaged reputation by dissatisfied employees); *see also* James O. Castagnera et al., *NLRB Takes Aggressive Stance Against Employers Disciplining Employees for Facebook Postings*, TERMINATION EMP. BULL., July 2011, at 1, 3 (explaining policy must balance legitimate business interests with employees' right to communicate). *But see* Lype, *supra* note 20, at 22-23 (discussing how NLRB formerly permitted social-media policies but now takes contrary position). Common sense dictates that employers must have viable means to protect their online reputation from disgruntled employees. *See* Donna Ballman, *Social Media and Employment Law: Six Things You Need To Know*, MONSTERTHINKING (Mar. 2, 2011), <http://www.monsterthinking.com/2011/03/02/social-media-and-employment-law> (stating NLRB case does not give employees right to insult their employers online); Suzanne Lucas, *Yes, You Should Be Fired for That Facebook Post. (No Matter What the Feds Say Next Week)*, CBS MONEYWATCH (Jan. 21, 2011, 6:15 AM), http://www.cbsnews.com/8301-505125_162-44941595.html (reminding employees free speech is not free-from-consequences speech).

II. HISTORY

A. *Development of National Labor Law*

Historically, American employment law was premised on the at-will employment doctrine, which permitted any party to terminate the employment relationship at any time, and for any reason.²⁶ Employment at will in the United State is traceable as far back as the industrial period, when courts revered the constitutional freedom to contract, and respected the employer's and employee's rights to contract for certain terms and conditions of employment.²⁷ The blanket application of the at-will doctrine permitted employers to control and exploit their employees by imposing unreasonable terms at their unregulated discretion, and by terminating employees without just cause.²⁸ As a result, employees were unable to request improved wages or working conditions, and were often forced to accept oppressive employment terms and conditions.²⁹

Prior to the enactment of any national labor regulations, the desires of financially superior employers controlled employment relationships by dictating terms and conditions of employment and abusing the at-will employment doctrine.³⁰ When employees combined their bargaining power and collaborated with one another to demand satisfactory working conditions, the government often indicted them under criminal and civil conspiracy theories.³¹ Both courts and employers became increasingly hostile towards labor organization, and for a period of time, authorities considered men who joined together to increase the quality of their working conditions to necessarily be involved in illegal activity.³²

26. See KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 31-32 (2009) (discussing "American Rule" of "employment-at-will").

27. See Rudy, *supra* note 2, at 308 (noting acceptance dating back to 1800s); see also DAU-SCHMIDT ET AL., *supra* note 26, at 32 (discussing courts invalidating statutes regulating employment conditions intending to preserve public health and safety).

28. See *Stiles v. Am. Gen. Life Ins. Co.*, 516 S.E.2d 449, 450 (S.C. 1999) (accepting at-will rule for morally wrong termination when not employed for fixed period); see also DAU-SCHMIDT ET AL., *supra* note 26, at 32 (recognizing employers often unilaterally changed terms and conditions suddenly).

29. See Rudy, *supra* note 2, at 309 (acknowledging employers discharge employees for improper personal motives). Critics of the presumption admonish the rule for inviting "powerful employers to take advantage of the economically disadvantaged employees who lack the ability to adequately defend themselves." *Id.* But see Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 111 (1997) (justifying rule because freedom of contract permits parties to act in their own interest).

30. See DAU-SCHMIDT ET AL., *supra* note 26, at 31-32 (recognizing individual employment contracts negotiated on employer's terms).

31. See *Vegeahn v. Guntner*, 44 N.E. 1077, 1077-78 (Mass. 1896) (holding communal effort to secure better wages unlawful); see also DAU-SCHMIDT ET AL., *supra* note 26, at 17-18 (noting employee's attempt at strength-in-numbers approach subjected them to criminal and civil liability).

32. See *Commonwealth v. Pullis (The Philadelphia Cordwainers' Case)* (Phila. Mayor's Ct. 1806), reprinted in 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 233 (John R. Commons et al.

The need for national labor reform became apparent in light of societal animosity towards organized labor, and, accordingly, in 1932 Congress passed the Norris-LaGuardia Act.³³ Through the Act, Congress sought to foster a laissez-faire system of labor relations that freed unions from excessive injunctions, and provided employees with more power in the employment relationship.³⁴ The Norris-LaGuardia Act bars courts from issuing injunctions or restraining orders arising from labor disputes, which are defined broadly to include all controversies regarding terms and conditions of employment.³⁵ Most notably, based on public policy grounds, the provisions outlawed so-called “yellow-dog contracts” that conditioned employment on an employee’s agreement not to unionize, thereby signaling a drastic shift from previous jurisprudence upholding the validity of such contracts as an exercise of the employee’s freedom to contract.³⁶ The Norris-LaGuardia Act marked the first major step towards protecting employee rights within national labor law.³⁷

Congress enacted the NLRA in 1935 to further prevent employer domination, strengthen employee rights, and equalize bargaining power within the employment relationship.³⁸ Serving as “the worker’s law,” the NLRA defines and protects the rights of employees, employers, and labor organizations in order to eliminate harmful employment practices that are detrimental to society and injurious to a stable economy.³⁹ Regardless of

eds., 1910) (“A combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both.”). See generally Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931) (discussing *The Philadelphia Cordwainers’ Case*). In *The Philadelphia Cordwainers’ Case*, the state indicted strike leaders for criminal conspiracy after employees joined together to get a raise. See *id.* at 167-68. Collective bargaining was illegal and against public interest, as it was an unnatural way to achieve improved terms and conditions of employment. See DAU-SCHMIDT ET AL., *supra* note 26, at 17 (explaining historical application of conspiracy doctrines as judicial response to collective action).

33. See Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2006); see also DAU-SCHMIDT ET AL., *supra* note 26, at 43-48 (discussing enactment of Norris-LaGuardia Act).

34. See DAU-SCHMIDT ET AL., *supra* note 26, at 44 (discussing courts’ mediation of labor relations through issuing injunctions in favor of employers). The Norris-LaGuardia Act neither fostered nor hindered labor relations. See *id.*; see also *id.* at 35-38 (referencing injunction history).

35. See 29 U.S.C. § 101 (containing anti-injunction language); *id.* § 113(c) (defining “labor dispute”); see also DAU-SCHMIDT ET AL., *supra* note 26, at 46-47 (recognizing labor dispute definition broad enough to cover political protests and economic disputes). Despite these limitations, courts have jurisdiction to issue restraining orders and injunctions when circumstances conform to the provisions of the Norris-LaGuardia Act. See 29 U.S.C. § 101 (prohibiting restraining orders and injunctions unless in conformity with provisions of Norris-LaGuardia Act); *id.* § 107 (restricting issuance of restraining orders to remedy violence or fraud); *id.* § 109 (requiring terms of restraining orders and injunctions to be narrowly tailored); *id.* § 110 (providing expedited appeals if labor injunction issued).

36. See 29 U.S.C. § 103 (declaring yellow-dog contracts unenforceable); see also DAU-SCHMIDT ET AL., *supra* note 26, at 45 (stating yellow-dog contracts typical contractual provision prior to Norris-LaGuardia Act).

37. See DAU-SCHMIDT ET AL., *supra* note 26, at 44 (discussing events prompting Norris-LaGuardia Act).

38. See Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 230 (2005) (recognizing NLRA’s vision of promoting fairness).

39. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006) (providing employee protection against harmful employment practices); see also *Guide to NLRA*, *supra* note 6 (providing purpose of NLRA);

whether they are affiliated with a labor union, employees are protected so long as their employer is subject to the NLRA and does not otherwise fall within a narrow class of exceptions.⁴⁰ To ensure employee protection, employers are barred from chilling, interfering, or prohibiting employees from exercising their rights, and thus cannot fire, demote, or take other adverse action against employees engaged in protected activity.⁴¹

Congress also created the NLRB, a quasi-judicial federal agency, to enforce the NLRA.⁴² The NLRB is composed of five members who are appointed by the President with the consent of the Senate, and hold staggered terms in their positions to ensure that the Board is not completely subject to political persuasion.⁴³ The NLRB promotes an employee's right to organize by determining whether employees have freely elected to secure union representation.⁴⁴ The NLRB also promotes the peaceful resolution of labor disputes by enforcing the provisions of the NLRA and correcting unfair labor practices committed by both private-sector employers and unions.⁴⁵ Once the NLRB determines that an employer violated the NLRA by committing an unfair labor practice, the NLRB may force the employer to remedy its conduct by ordering it to: cease and desist, post notice advising other employees of the improper conduct, reinstate the terminated employee, and issue the employee back pay.⁴⁶

National Labor Relations Act, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/national-labor-relations-act> (last visited Oct. 17, 2013) (introducing NLRA along with reason for enactment). The Taft-Hartley Act amended the NLRA in 1947, clarified that employees are free to refrain from joining unions, and explained that labor organizations may also be charged with unfair labor practices. See Dannin, *supra* note 38, at 244.

40. See *Employee Rights*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/rights-we-protect/employee-rights> (last visited Oct. 17, 2013) (clarifying NLRA also applies to activity outside of unions). Employees excluded from coverage under the NLRA include: individuals employed by the government or an employer subject to the Railway Labor Act, independent contractors, agricultural laborers, and supervisors. See 29 U.S.C. § 152(3) (defining whom NLRA protects as employee); see also *Employee Rights*, *supra* (noting most private sector employees covered and enumerating those excluded).

41. See *Protected Concerted Activity*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/node/132> (last visited Oct. 17, 2013) (prohibiting adverse action toward employees who act with coworkers for mutual aid and protection).

42. See *Guide to NLRA*, *supra* note 6 (explaining enforcement of NLRA). The NLRB administers and enforces the NLRA by conducting and certifying the results of representation elections and by preventing unfair labor practices committed by unions or employers. See *id.*

43. See *The Board*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/board> (last visited Oct. 17, 2013) (introducing the Board and its role).

44. See *What We Do*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/what-we-do> (last visited Oct. 17, 2013) (describing NLRB functions).

45. See *id.* (recognizing unfair labor practices apply to employers and unions).

46. See *The NLRB Process*, *supra* note 6 (depicting steps taken in unfair labor practice process). Once a party brings an unfair labor practice charge against an employer, the regional director conducts an investigation to determine whether to conduct a hearing. See *Frequently Asked Questions*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/resources/faq/nlr> (last visited Oct. 17, 2013) (explaining filing of unfair labor practice charges). Following a hearing, the regional director recommends a decision and remedial order that is either reviewed by the NLRB or adopted as its order, depending on whether the decision is appealed. See *Investigate Charges*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/what-we-do/investigate-charges> (last visited Oct. 17,

The Taft-Hartley amendments to the NLRA addressed employer concerns that emerged following its enactment.⁴⁷ The amendments specifically affirmed an employee's right to refrain from organizing, and codified several employer rights, including the ability to engage in free speech without fear of such expression constituting evidence of an unfair labor practice.⁴⁸ Section 10(c) of the Taft-Hartley Act confirms that employers may terminate employees for just cause, and thus bars the NLRB from reinstating employees who were justly discharged.⁴⁹ While the at-will employment doctrine still exists, the NLRA provides an exception to the rule by enumerating protected activities that cannot legally constitute grounds for discharge.⁵⁰ An employer may therefore terminate an employee for any reason, including his social-media activity, provided the employee was not exercising rights guaranteed by the NLRA.⁵¹

B. NLRA Provisions

To conserve resources, the NLRB set jurisdictional requirements that must be met for employers to be subject to the NLRA.⁵² While most private-sector employers are forced to comply with the NLRA, small employers who employ few workers and generate little revenue may be exempt.⁵³ Government entities

2013). Given the remedial nature of the NLRA, employers are generally ordered to cease and desist from their behavior and take affirmative action to right their wrong by, for example, reinstating a discharged employee with back pay. *See Guide to NLRA, supra* note 6.

47. *See* DAU-SCHMIDT ET AL., *supra* note 26, at 67 (noting business community sought repeal or amendment of NLRA to increase its favor to employers).

48. *See* 29 U.S.C. § 157 (2006).

49. *See id.* § 160(c).

50. *See, e.g.,* Luethans v. Wash. Univ., 838 S.W.2d 117, 119-20 (Mo. Ct. App. 1992) (recognizing Missouri's termination at-will doctrine); *Martin v. Sears, Roebuck & Co.*, 899 P.2d 551, 553-54 (Nev. 1995) (stating Nevada's at-will employment rule); *Stiles v. Am. Gen. Life Ins. Co.*, 516 S.E.2d 449, 451 (S.C. 1999) (applying South Carolina's at-will employment doctrine); *see also* Sprague, *supra* note 3, at 359-60, 364-65 (noting all states, except Montana, follow doctrine of at-will employment). Courts apply the presumption of at-will employment when employees are hired for an undefined term, subject to state statutory exceptions and other recognized exemptions. *See* Grubman, *supra* note 21, at 627-30 (explaining common law and state statutory exceptions); William C. Martucci et al., *Hiring and Firing in the Facebook Age (with Sample Provisions)*, PRAC. LAW, Oct. 2010, at 19, 22 (explaining doctrine eroded by NLRA and other employment laws). The Taft-Hartley Act essentially codifies employers' common-law right to terminate employees. *See* NLRB v. Local Union No. 1229 (*Jefferson Standard*), 346 U.S. 464, 472 (1953) (stating section 10(c) prevents NLRB from awarding back pay or reinstating suspended or discharged-for-cause employees); *see also* DAU-SCHMIDT ET AL., *supra* note 26, at 67-73 (discussing legislative history and provisions of Taft-Hartley amendments to NLRA).

51. *See* Martucci et al., *supra* note 50, at 24 (noting NLRA applicability hinges on whether activity rose to concerted level).

52. *See* 29 U.S.C. § 164(c)(1) (granting authority to set standards determining when labor disputes have substantial effect on commerce); *see also* *Jurisdictional Standards*, NAT'L LAB. REL. BOARD, [http://nlrb.gov/rights-we-protect/ jurisdictional-standards](http://nlrb.gov/rights-we-protect/jurisdictional-standards) (last visited Oct. 17, 2013) (describing requisite jurisdictional thresholds).

53. *See* 29 U.S.C. § 164(c)(1); *Jurisdictional Standards, supra* note 52 (permitting NLRB to set gross annual volumes, and input and output requirements).

and political subdivisions are also specifically exempt from employer status.⁵⁴ The term “employer” is generally interpreted expansively to include agents of the employer, including supervisors, who are specifically excluded from the NLRA’s definition of employee.⁵⁵

Employees do not have to be employed by a particular employer or be affiliated with a union to be protected by the NLRA.⁵⁶ In fact, the term “employee” is broadly defined, excluding only six types of workers from its protection, such as agricultural or domestic workers and independent contractors.⁵⁷ Workers may also be excluded from coverage under the NLRA if their interests align more closely with management than their fellow coworkers.⁵⁸

C. Protections Under the NLRA

Labor law promotes communal rights and encourages the banding together of individual workers who alone are too weak to protect themselves.⁵⁹ Section 7 of the NLRA guarantees employees the rights to form or join a union and bargain collectively with their employer.⁶⁰ To further facilitate negotiation between employees, employers, and labor unions, the NLRA imposes a mutual duty on employers and labor representatives to bargain in good faith.⁶¹ Section 7 also permits employees to engage in activity with fellow coworkers for mutual aid and protection, so long as it concerns hours, wages, or other terms and conditions of employment.⁶² These provisions encourage group action and thus demonstrate a marked change from the past practice of indicting workers for conspiracy.⁶³

54. See 29 U.S.C. § 152(2) (2006).

55. See *id.* (including among employers individuals who act either directly or indirectly as employer’s agents).

56. See *Employee Rights*, *supra* note 40.

57. See 29 U.S.C. § 152(3) (defining term “employee” under NLRA); see also *Employee Rights*, *supra* note 40 (explaining NLRA covers most private sector employees, unless specifically excluded).

58. See 29 U.S.C. § 152(3) (excluding individuals employed as supervisors). Due to their authority and decision-making responsibilities, supervisors and certain other professional employees are considered agents of the employer in order to avoid a conflict of interest. See *DAU-SCHMIDT ET AL.*, *supra* note 26, at 183 (recognizing supervisory, managerial, and confidential employees align too closely with employer to enjoy NLRA protection).

59. See Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984) (opining labor movement based on communal values where “an injury to one is an injury to all”).

60. 29 U.S.C. § 157 (2006).

61. See *id.* § 158(d). Although the NLRA imposes a duty to bargain on both employer and employee representatives, the obligation does not compel parties to make concessions or agree to unfavorable proposals. *Id.*

62. See *id.* § 157 (providing right to engage in concerted activities for mutual aid or protection); see also *Employee Rights*, *supra* note 40 (describing employees’ right to engage in concerted activity); *Protected Concerted Activity*, *supra* note 41 (discussing rights of employees protected by NLRA); *Protecting Employee Rights*, *supra* note 5 (characterizing section 7 as “heart” of NLRA).

63. Compare *DAU-SCHMIDT ET AL.*, *supra* note 26, at 17-18 (describing criminal and civil conspiracy

Section 7 grants employees the right to engage in concerted activities for mutual aid or protection, regardless of their union affiliation.⁶⁴ Activity is *concerted* when an employee acts with other employees or on behalf of a group of employees.⁶⁵ Even if activity is concerted, to receive protection under the NLRA, it must also be for “mutual aid or protection,” in the pursuit of improving terms or conditions of employment.⁶⁶

Statements reflecting individual complaints, criticizing management, or using inflammatory language usually remain protected under the NLRA, especially when the communication indicates a relation to an ongoing labor dispute.⁶⁷ The NLRA covers unpleasant or unfavorable comments uttered during the course of otherwise protected concerted activity when such comments are nonthreatening or particularly egregious.⁶⁸ Per section 8(a)(1) of the NLRA, employers commit an unfair labor practice if their employee’s activity is protected by the Act, the employer knows the employee’s activity is concerted, and the employer acts adversely towards the employee in response to the activity.⁶⁹

The fact that concerted activity is generally protected does not mean that employees have free reign to speak out against their employer.⁷⁰ Individual remarks may lose protection if they are not made on behalf of other

doctrines applied to collective action), with *Protecting Employee Rights*, *supra* note 5 (deeming section 7 “heart” of NLRA).

64. See 29 U.S.C. § 157 (listing rights of employees).

65. See Rhodes-Ford & Hall, *supra* note 1, at 1 (describing what constitutes protected concerted activity); *Employee Rights*, *supra* note 40 (defining “concerted activity” as two or more employees or single employee acting with group authorization); see also Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986) (holding concerted action includes employee seeking to initiate, induce, or prepare for group action), *aff’d sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987); Scott, *supra* note 5, ¶ 7 (stating concerted activity includes individual action aimed at inducing or preparing for group action).

66. See 29 U.S.C. § 157 (2006); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569-70 (1978) (characterizing distribution of literature regarding minimum wage increase as activity for mutual aid or protection); Scott, *supra* note 5, ¶ 8 (considering employee motives beyond mere “self-interested economic objective[s]” such as improved hours or pay); see also Rhodes-Ford & Hall, *supra* note 1, at 1 (explaining protection extends to more than employee’s involvement in union activities). But see William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 282 (2002) (arguing *Eastex* standard fails to give courts much guidance).

67. See, e.g., *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217-20 (9th Cir. 1989) (protecting statements to third parties when related to dispute and made to improve working conditions); *Heisler Food Enters.*, No. 2-CA-30899, 1999 NLRB LEXIS 889, at *62-66 (Dec. 20, 1999) (protecting statements because substantially accurate and not maliciously untrue); *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248-49 (1997) (stating unpleasantries, such as flippant language, do not strip NLRA protection); see also Sprague, *supra* note 3, at 366 (acknowledging remarks such as mere complaints retain protection if not malicious).

68. See *Timekeeping Sys., Inc.*, 323 N.L.R.B. at 248-49 (protecting unpleasantries accompanying statements constituting otherwise permissible concerted activity).

69. See 29 U.S.C. § 158(a)(1) (prohibiting employers from interfering, restraining, or coercing employees exercising their section 7 rights); Martucci et al., *supra* note 50, at 24 (listing elements of section 8(a)(1) violation involving protected concerted activity).

70. See Rhodes-Ford & Hall, *supra* note 1, at 1 (“Protected concerted activity . . . isn’t viewed as a *carte blanche* right to free speech.”)

employees.⁷¹ Activity may also be unprotected if it is not intended to improve the working conditions of a group of employees.⁷² Certain employee speech may further lose protection for policy reasons—even if it is both concerted and for mutual aid or protection—if it breaches confidentiality or is evidence of insubordination.⁷³ The NLRB has also refused to protect remarks that are malicious, disloyal, publically disparaging, or intentionally untruthful.⁷⁴ Employers have adequate cause to discharge disloyal employees who engage in unprotected speech, and section 10(c) divests the NLRB of the power to reinstate employees discharged for cause.⁷⁵

D. The NLRA Changed Employer Common-Law Property Rights

The law has long acknowledged that the property rights of owners, including employers, are superior to the rights of all others with respect to that property—especially against the rights of those who have not demonstrated a legitimate need to use the property.⁷⁶ A business’s reputation, known as “goodwill,” is considered marketable intangible property.⁷⁷ Goodwill is recognized as a

71. *Cf. Timekeeping Sys., Inc.*, 323 N.L.R.B. at 248 (recognizing correcting vacation policy furthered collective interests). Personal gripes would not be considered protected speech because the protesting employee would be acting in his own self interest. *See id.* (finding concerted activity only when employees seek to elicit mutual aid).

72. *See* Richard Michael Fischl, *Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 795-98 (1989) (recognizing section 7 does not protect petitions motivated by concern for only one employee).

 Labor law . . . puts a curious twist on the Golden Rule. Workers may do unto others as they would have others do unto them, but—to receive legal protection against employer interference with their protest—they must do so in a manner that will permit the Labor Board and the courts to pretend plausibly that what they are “really” up to is doing for themselves.

Id. at 798.

73. *See* DAU-SCHMIDT ET AL., *supra* note 26, at 246-49 (discussing unprotected conduct).

74. *See* NLRB v. Local Union No. 1229 (*Jefferson Standard*), 346 U.S. 464, 468-70 (1953) (rejecting protection after employees attacked quality of company’s television broadcasts); *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1630 (1956) (holding strikers forfeited protection because handbill publicly discredited paint quality and failed to acknowledge dispute); *see also* Sprague, *supra* note 3, at 365-67 (discussing instances when statements lose section 7 protection). Offensive comments must be particularly egregious to lose protection. *Cf. Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77, 85 (D.P.R. 2010) (indicating hostile work environment claim requires both objectively and subjectively offensive conduct).

75. *See* *Local Union No. 1229*, 346 U.S. at 476 (recognizing disloyalty unprotected to further NLRA’s purpose of promoting industrial peace and stability); DAU-SCHMIDT ET AL., *supra* note 26, at 594-97 (noting disloyalty carved out from section 7 protection); *see also* Scott, *supra* note 5, ¶¶ 9-13 (noting scope of disparagement exception remains unclear).

76. *Cf. Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992) (recognizing employers may exclude nonemployee organizers unless employees beyond union’s reasonable means of communication); *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971) (noting property rights, including right to exclude, not absolute, but circumscribed in case of necessity).

77. *See* BLACK’S LAW DICTIONARY 763-64 (9th ed. 2009) (defining “goodwill”); Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions*, 30 DEL. J. CORP. L. 1, 1 (2005) (describing business goodwill as marketable property).

property interest distinct from the business itself, and is often purchased by buyers for additional consideration.⁷⁸ Because property owners have a generally recognized bundle of rights that accompanies their property interest—including the right to exclude others—it follows that employers have a right to prevent others from abusing their goodwill.⁷⁹

As part of their right to exclude, employers, as property owners, have the ability to decide both whom to allow on their property and what a visitor or employee could do once they were permitted entry.⁸⁰ The NLRA altered traditional property rights and regulated employer behavior by imposing “laboratory conditions.”⁸¹ Such conditions mandate the preservation of a noncoercive environment during a union organizing campaign so that employees can develop and express their true desires regarding representation without employer interference.⁸² The NLRA also limited employers’ ability to control who may access their property.⁸³ Employers may subject themselves to

78. See Ibrahim, *supra* note 77, at 5 (noting goodwill may be bought and sold ancillary to sale of business).

79. See Adams v. Henderson, 168 U.S. 573, 580 (1897) (acknowledging owner’s right to exercise absolute and exclusive control over property against all others); Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998) (recognizing property owner’s right to consume, transfer, and exclude others from property). An employer’s right to exclude others from using their goodwill underlies the premise of noncompete agreements, which are often imposed on employees to prevent them from using the employer’s reputation to steal clients or trade secrets. See Boisen v. Petersen Flying Serv., Inc., 383 N.W.2d 29, 33 (Neb. 1986) (observing employer’s legitimate need to protect its goodwill from employees); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1225 (N.Y. 1999) (promoting use of anti-competitive agreements to prevent employees from “exploiting or appropriating” goodwill). Social media is potentially hazardous to employers’ goodwill and, as property owners, employers have the right to protect their goodwill from the exploitation of others—particularly their employees. See Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger’s Identity Before Service of Process Is Effected*, 2006 DUKE L. & TECH. REV. 2, ¶ 9 (2006), <http://dltr.law.duke.edu/2006/01/17/anti-employer-blogging-employee-breach-of-the-duty-of-loyalty-and-the-procedure-for-allowing-discovery-of-a-blogger-s-identity-before-service-of-process-is-effected> (discussing harmful implications for employer’s goodwill when employees abuse social media); see also Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1245 (2007) (noting owner’s property rights include ability to protect one’s possessions and business).

80. See DAU-SCHMIDT ET AL., *supra* note 26, at 297 (reiterating access without invitation constitutes trespass and property owners may restrict scope of license granted).

81. See *id.* at 298 (discussing NLRA’s alterations to common law property rights). Laboratory conditions are defined as “[t]he ideal conditions for a union election, in which the employees may exercise free choice without interference from the employer, the union, or anyone else.” See BLACK’S LAW DICTIONARY 952 (9th ed. 2009).

82. See DAU-SCHMIDT ET AL., *supra* note 26, at 298. Laboratory conditions restrict employer conduct because the employer cannot act in a way that may impact their employees’ exercise of free choice. See *id.*

83. See *id.* at 299 (noting employers can no longer exclude individuals from their property for any reason). Whether an employer may interfere with union organizing activity depends on whether the individuals engaged in such activity are employees or nonemployees. See Jeffrey M. Hirsch, *Taking State Property Rights out of Federal Labor Law*, 47 B.C. L. REV. 891, 902-04 (2006) (conditioning employer interference on employment status of organizer). While employers may regulate conduct of nonemployee union organizers, they cannot regulate the conduct of employees who engage in organizing activity. See *id.* (recognizing almost all employee activity shielded from employer interference).

liability if they encourage or discourage union membership, or if they interfere with or restrain their employees' exercise of section 7 rights.⁸⁴ Therefore, if employers restrict use of, or access to, their property in violation of these provisions, they may be susceptible to an unfair labor practice charge.⁸⁵

Unless a contrary rule is uniformly enforced, off-duty employees are entitled to access the nonwork areas of their employer's property to engage in or solicit protected activity with their coworkers.⁸⁶ To be upheld, a policy prohibiting employee use must be justified by a legitimate business need that is essential to maintain production or discipline in the workplace.⁸⁷ As applied to employees, rules prohibiting union-related solicitation are presumed impermissible unless the employer rebuts the presumption with evidence of special circumstances warranting the prohibition.⁸⁸ To determine whether employees may access and use employer property to engage in union-organizing activities, the NLRB balances the employee's right to receive self-organization information from coworkers during nonworking time on employer's property against the employer's right to control the use of his property.⁸⁹ The NLRB considers the competing interests of the employer—who holds the ultimate property interest—and employees.⁹⁰ Employees hold a right of use granted by the property owner (their employer) because the NLRA modifies property rights

84. See 29 U.S.C. § 158(a)(1) (2006) (prohibiting employers from interfering, restraining, or coercing employees); *id.* § 158(a)(3) (barring employers from discriminating in order to encourage or discourage union membership); see also DAU-SCHMIDT ET AL., *supra* note 26, at 299 (stating NLRA provisions regulate employer's ability to control property access).

85. See 29 U.S.C. § 158(a) (enumerating provisions for which violation merits unfair labor practice charge).

86. See *New York New York Hotel, LLC*, 334 N.L.R.B. 762, 763 (2001) (recognizing employees entitled to use nonwork areas of employer's property); see also Hirsch, *supra* note 83, at 896-97 (clarifying limitations on employer's property rights only apply to employee conduct). The NLRB grants employee conduct greater protection because employees have a direct right granted to them by the NLRA to engage in self-organization at their workplace. See Hirsch, *supra* note 83, at 895-96. Nonemployee union organizers, however, merely have a "derivative right to discuss unionization with employees." *Id.* at 897.

87. See *New York New York Hotel, LLC*, 334 N.L.R.B. at 763 (announcing employer must show prohibition necessary to maintain production and discipline).

88. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801, 804 (1945) (presuming prohibitions against solicitations illegal); see also *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962) (criticizing employer's concern regarding litter as justifying distribution ban).

89. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (distinguishing between rights granted to employee organizers and those of nonemployee organizers). Employee organizers are granted a wider range of latitude, and are completely insulated from employer interference, because their conduct is expressly protected by the NLRA. See Hirsch, *supra* note 83, at 896-904. Conversely, nonemployee organizers are subject to employer interference, and other limitations, because they merely exercise a derivative right to engage workers in union organizing activities. See *id.*

90. See *Babcock & Wilcox Co.*, 351 U.S. at 113 (accommodating both employer and employee interests). Regardless of the area of law, when two competing legal interests are at stake, a balancing test is often applied to achieve a just result. *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (recognizing both state's interest in potential life and mother's interest in choosing pregnancy); RESTATEMENT (SECOND) OF TORTS § 826 (1979) (stating public and private nuisance require weighing utility of conduct against interference with public right).

and forbids the employer from confining the use of its property when the restriction limits the exercise of employees' statutory rights.⁹¹

The NLRB is not permitted to engage in the same balancing approach when nonemployees attempt to gain access to, and use of, the employer's property, even in the context of employee organization.⁹² Conduct that is protected if engaged in by employees is sometimes unprotected if committed by nonemployees.⁹³ Therefore, employers are justified in denying nonemployees access to their property, regardless of whether a legal justification exists for banning employees from using their property for similar activities.⁹⁴ Employers are only required to accommodate nonemployee organizers in situations where employees are beyond the reach of reasonable communication due to their living situation or other extraordinary circumstances.⁹⁵ Even in light of this narrow exception, employer property rights rarely succumb to the rights of nonemployee organizers, irrespective of their section 7 activities.⁹⁶

To ensure protection of employee rights, employers are forbidden from discriminating against employees who invoke the privileges guaranteed by the NLRA.⁹⁷ Therefore, employers may exclude all use of, or access to, their property, provided they do not discriminatorily grant selective access for certain protected activities.⁹⁸ While section 7 grants employees the right to

91. See generally *Babcock & Wilcox Co.*, 351 U.S. 105 (recognizing right to organize depends partly on employees' opportunity to learn advantages from others).

92. See *id.* at 112-13. When nonemployee organizers seek access to employers' property, the analysis is premised on "whether an employer has a state private property right entitling it to exclude nonemployee labor organizers." Hirsch, *supra* note 83, at 895; see *id.* at 905 (noting automatic violation of section 8(a)(1) of NLRA if employer lacks such right).

93. Cf. *Babcock & Wilcox Co.*, 351 U.S. at 113 (noting distinction "one of substance").

94. See generally *id.* An employer may deny nonemployee organizers access to their property if the union can reach employees through other reasonable modes of communication, so long as the employer does not discriminate against the union by permitting other distribution. See Hirsch, *supra* note 83, at 897. Appropriate modes of communication include contacting employees through phone calls, meetings, and mailings. See *id.* at 898.

95. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992) (recognizing narrow exception when reasonable attempts to communicate with employees through usual channels fail); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (describing inaccessibility exception); see also *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999) (applying inaccessibility exception when employees lived on employer's property).

96. See *Tech. Serv. Solutions*, 332 N.L.R.B. 1096, 1100 (2000) (refusing to apply exception because prior methods of communications were not attempted or proved futile), *order modified on reconsideration*, 334 N.L.R.B. 116 (2001).

97. See *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1117-18 (2007) (discussing how discrimination involves unequal treatment of equals), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009). Employers are legally permitted to prohibit union email activity if they simultaneously ban communication by other outside organizations. See Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-Mail*, 88 OR. L. REV. 195, 197 (2009). Because discrimination involves the unequal treatment of equals, employers may permissibly ban solicitations from organizations—both union and nonunion—while permitting personal messages. See *id.* (noting employers may ban outside organizations while permitting office chitchat.)

98. See *Register-Guard*, 351 N.L.R.B. at 1118 (noting employers may restrict section 7 activity if

engage in protected concerted activity, it does not mandate the form through which they can exercise this right.⁹⁹ For example, employees have no statutory right to use their employer's email system for section 7 activities, unless the employer has allowed other section 7 communications or permitted its use by outside organizations, while prohibiting its use by labor unions.¹⁰⁰ Employers may be liable for committing an unfair labor practice if they arbitrarily prohibit only certain types of activity and cannot demonstrate a valid reason for the disparate treatment that is unrelated to section 7.¹⁰¹

E. Emerging Social-Media Decisions

Outside of the employment context, social media has become an increasingly prominent issue within U.S. public schools.¹⁰² Like the protections granted to employees by the NLRA, the First Amendment insulates students' free speech, even if their comments are rude, reprehensible, or unfavorably depict school officials.¹⁰³ Similar to employees' section 7 rights,

limitation is nondiscriminatory). Employers impermissibly discriminate when they screen communications based on their coverage under section 7, and therefore disparately treat similar types of activities "based upon the presence of union content or conduct." See O'Brien, *supra* note 97, at 206. It is critical that unlawful discrimination only encompass disparate treatment, as only overt employer conduct can constitute a violation. See *id.* at 211. Disparate impact, which is facially neutral but effectually adverse to a protected group or activity, is not expressly proscribed, even if motivated by anti-union animus. See *id.*

99. See *Register-Guard*, 351 N.L.R.B. at 1114-16 (explaining section 7 remains silent regarding means through which employees may exercise their rights); see also Nicole Lindquist, Note, *You Can Send This but Not That: Creating and Enforcing Employer Email Policies Under Sections 7 and 8 of the National Labor Relations Act After Register Guard*, 5 SHIDLER J.L. COM. & TECH. 15, ¶ 8 (2009), http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/429/vol5_no4_art15.pdf?sequence=1 (recognizing "employers may limit employee modes and methods of communication"). Employers have the right to regulate their property and may limit employee use thereof—including bulletin boards, telephones, and email systems. See Lindquist, *supra*, ¶ 8. The employer's right to control property, however, is subject to whether alternative forms of communication are available. See *id.* ¶ 10. For example, employers' rights to control may be limited when employee face-to-face communication is scarce, especially when employees "rarely . . . see each other in person or . . . communicate with each other solely by electronic means." See *Register-Guard*, 351 N.L.R.B. at 1116.

100. See *Register-Guard*, 351 N.L.R.B. at 1114 (clarifying no statutory right to use employer's equipment or media for section 7 activity).

101. See *id.* at 1118. Employers may distinguish between "solicitations that are charitable and noncharitable, personal and commercial, business and nonbusiness, and organizational or not," because such characteristics are unrelated to section 7 activity. See O'Brien, *supra* note 97, at 210.

102. See generally Philip T.K. Daniel & Scott Greytak, *A Need To Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21 (2011) (discussing large social media presence in schools and cyberbullying issues).

103. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932-33 (3d Cir. 2011) (holding student's speech remained protected because speech occurred at home during nonschool hours); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding student's offensive conduct remained protected by First Amendment). In both cases, students created fake MySpace pages depicting their principals and used sexually explicit and defamatory language. See *Snyder*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207-08. The Third Circuit recognized the online profiles were offensive, but held that they did not disrupt the school environment enough to lose First Amendment protection. See *Snyder*, 650 F.3d at 932-33; *Layshock*, 650 F.3d at 219.

students' First Amendment freedoms may only be encroached upon in extraordinarily limited circumstances.¹⁰⁴ Not surprisingly, school officials, like employers, struggle with whether they may permissibly discipline students for offensive conduct, or whether they must tolerate constitutionally protected bad behavior.¹⁰⁵ Presently, courts appear willing to protect speech that is lewd, profane, and offensive, so long as it does not threaten the lives of others or unduly disrupt the school environment.¹⁰⁶

The NLRB aspires to strike a balance between employer and employee rights, especially in the face of new technology, including the Internet, email, and social-media platforms, such as the social-networking website Facebook.¹⁰⁷ Originally, the NLRB respected employers' legitimate business interests in maintaining their online reputation and affirmed employee terminations issued for impermissible public online speech.¹⁰⁸ The NLRB also upheld social-media

104. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (recognizing excessively lewd and vulgar student speech punishable if conducted on school property).

105. See *Snyder*, 650 F.3d at 932 (describing school's inability to punish students for speech conducted outside school despite offensive nature); *Layshock*, 650 F.3d at 209.

106. See, e.g., *Fraser*, 478 U.S. at 685 (citing landmark case permitting schools to punish vulgar speech when conducted on school property); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36, 39-40 (2d Cir. 2007) (upholding punishment after student created image of teacher covered in blood and saying "Kill Mr. VanderMolen"); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (permitting school punishment of student after he created online image explaining why teacher should die).

107. See *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman, Member, dissenting) (recognizing need for national labor policy response to enormous technological changes), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009). Social media, an expanding collection of Internet resources, is defined by some as: "Tools and platforms people use to publish, converse, and share content online. The tools include blogs, wikis, podcasts and sites to share photos and bookmarks." ANDY GIBSON ET AL., SOCIAL BY SOCIAL: A PRACTICAL GUIDE TO USING NEW TECHNOLOGIES TO DELIVER SOCIAL IMPACT 155 (2009); see Robert B. Fitzpatrick, *Social Media and Privacy in the Workplace*, in 2 ALI-ABA COURSEBOOK, CURRENT DEVELOPMENTS IN EMPLOYMENT LAW: THE OBAMA YEARS AT MID-TERM 2209-14 (2011), available at WESTLAW ST001 ALI-ABA 2123 (defining blogs, Facebook, LinkedIn, Myspace, Twitter, and other social-media outlets); see also Lou Dubois, *How To Avoid a Social Media Lawsuit*, INC., <http://www.inc.com/guides/201102/how-to-avoid-a-social-media-lawsuit.html> (last updated Feb. 24, 2011) (observing nearly impossible for business to avoid involvement with social media). For example, Facebook, a popular social-media website, recently surpassed Google in usage rates. See Dubois, *supra* (noting rise in number of Facebook users, and Twitter's and LinkedIn's continued growth). Facebook permits users to "comment" on or "like" content on the pages of individual users and businesses. See *If I Post or Comment on a Facebook page, Who Can See It?*, FACEBOOK, <https://www.facebook.com/help/147311228675465?sr=1&sid=0QelfqsdV7zEsOtKb> (last visited Sept. 30, 2013) (explaining who sees comments published to Facebook pages); see also *What Does It Mean To "Like" Something?*, FACEBOOK, <https://www.facebook.com/help/110920455663362?sr=1&sid=0ppdB4dvzZAXitvA1> (last visited Sept. 30, 2013) (describing like feature as alternative to commenting).

108. See *Sprague*, *supra* note 3, at 357-58 (detailing instances where employers fired bloggers for their posted comments). Although employers violate the NLRA by either engaging in, or creating the feeling of, surveillance of employees involved in section 7 protected activity, employers generally do not commit an unfair labor practice merely by monitoring public activity. See Scott, *supra* note 5, ¶¶ 19-23 (suggesting employer visits to public blogs not evidence of unfair labor practice). This rationale is justified because employees have no expectation of privacy when engaged in public activity. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2625, 2630 (2010) (dismissing argument that computer usage policy covering text messages on city-owned phone disclaimed privacy expectation).

policies as permissible ways for employers to limit the contours of appropriate online statements.¹⁰⁹

The NLRB recently changed course, however, by calling for employers to revise their policies to avoid overly broad rules that improperly restrict employees from engaging in section 7 activity.¹¹⁰ A series of cases submitted by regional offices across the country to the NLRB's Division of Advice indicated a trend towards favoring coverage of employee complaints published on Facebook, provided their coworkers commented on the post.¹¹¹ These

109. See OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., NO. 18-CA-19081, ADVICE MEMORANDUM: SEARS HOLDINGS (ROEBUCKS), 2009 WL 5593880, at *2-3 (Dec. 4, 2009) [hereinafter SEARS HOLDINGS] (upholding social-media policy because unable to construe chilling effect on section 7 activity). The Regional Director viewed the policy as a whole and noted that most of the prohibited activity covered conduct unprotected by the NLRA, and as explained by the preamble, was designed to protect the employer. See *id.* at *3. Similarly, the NLRB allowed employers to promulgate policies prohibiting the use of email for nonjob-related solicitations, provided they were not enforced discriminately to thwart section 7 activities. See generally *Register-Guard*, 351 N.L.R.B. 1110 (upholding policy allowing some personal emails but not those soliciting support for organizations).

110. See Carolyn Elefant, *The "Power" of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 18 (2011) (noting evolution from reliance on employment at will to NLRA in protecting comments on Internet); Lype, *supra* note 20, at 22-23 (discussing NLRB's recent stance against social-media policies). See generally OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., NO. 34-CA-12576, ADVICE MEMORANDUM: AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC. (Oct. 5, 2010) [hereinafter AMERICAN MEDICAL RESPONSE] (recommending termination for violating policy unlawful as overbroad terms covered discussions of employment conditions); *Settlement Reached in Case Involving Discharge for Facebook Comments*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/news-outreach/news-story/settlement-reached-case-involving-discharge-facebook-comments> (last visited Oct. 17, 2013) (discussing company agreement to revise policy and protect employees against discipline for protected speech). A series of reports published by the NLRB provide further evidence of a trend towards protecting employee Facebook activity under the NLRA. See generally REPORT 1, *supra* note 13 (detailing five cases where social-media policies found unlawfully overbroad); 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 REPORT 2], available at <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-issues-second-social-media-report> (indicating trend toward striking employer social media policies and protecting employee Facebook activity); OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (May 30, 2012) [hereinafter REPORT 3], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd> (concluding savings clause excluding protected activity from social-media policy does not cure overbroad policies).

111. See *Chicago Car Dealership Wrongfully Discharged Employee for Facebook Posts, Complaint Alleges*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/news-outreach/news-story/chicago-car-dealership-wrongfully-discharged-employee-facebook-posts> (last visited Oct. 17, 2013) (reporting on complaint alleging employee's Facebook posting amounted to protected concerted activity); *Regional News: Build.com Settles Charge of Unlawful Discharge for Comments Posted on Facebook with NLRB Agreement in San Francisco*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/news-outreach/news-story/regional-news-buildcom-settles-charge-unlawful-discharge-comments-posted> (last visited Oct. 17, 2013) (disclosing other recent cases involving employee conduct on social-media websites); see also *Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees Following Facebook Posts*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/news-outreach/news-story/complaint-issued-against-new-york-nonprofit-unlawfully-discharging> (last visited Oct. 17, 2013) (announcing complaint issued against HUB alleging Facebook discussion constituted protected concerted activity). See generally REPORT 1, *supra* note 13 (detailing outcomes of fourteen social-media cases and indicating four considered protected activity under section 7);

developments have generated commentary admonishing the windfall of rights created by promoting the public expression of unmeritorious employee opinions.¹¹²

The buzz surrounding employee use of social media climaxed with *Hispanics United* when the NLRB decided, as a matter of first impression, that Facebook posts discussing working conditions qualified as protected concerted activity.¹¹³ The NLRB reached this conclusion despite the fact that the employees' conversation reached far beyond suggestions of how to improve their wages, hours, or terms of employment.¹¹⁴ Ultimately, the NLRB's decision protected public, group harassment of an employee who planned to speak with her supervisor about the poor work performance of her coworkers.¹¹⁵ While Congress enacted the NLRA to embolden the employees' right to bargain successfully with their employer, *Hispanics United* effectively silenced the voice of a concerned employee, and constrained employers in their ability to both guard their online public image and protect their employees from harassment.¹¹⁶ Employers may narrowly escape the NLRB's recent precedent if the United States Supreme Court ultimately declares President Barack Obama's recess appointments invalid, and renders the NLRB's decision in *Hispanics United* void for procedural reasons.¹¹⁷ Notwithstanding the fate of

REPORT 2, *supra* note 110 (reinstating employees in five cases and striking employer policies in five out of fourteen cases); REPORT 3, *supra* note 110 (striking social-media policies in six out of seven cases); *Acting General Counsel Release*, *supra* note 13 (announcing release of social-media cases).

112. See Johnson, *supra* note 19 (remarking that recent settlements allow employees to "get away with" criticizing management on Facebook). The NLRB's position in American Medical Response of Connecticut (AMR) sparked a slew of conversation about protected activity and social-media policies in the labor and employment law community. See *id.*; AMERICAN MEDICAL RESPONSE, *supra* note 110, see also Peter J. Pizzi, *Where Cyber and Employment Law Intersect, Risks for Management Abound*, ASPATORE, July, 2011, at *2, available at 2011 WL 3020563 (admonishing NLRB's qualification of "expletive laced derogatory comments about the supervisor" as "water cooler talk" (internal quotation marks omitted)).

113. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852, at *13-15, *43-44 (Dec. 14, 2012) (ruling employer unlawfully discharged five employees for discussing workload and staffing issues on Facebook); see also *ALJ Findings on Nonprofit*, *supra* note 13 (announcing decision as "first ruling of its kind").

114. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *31-33 (reciting Facebook comments bashing employee for complaining about author's and other coworker's work performances).

115. See *id.* at *13-15 (clarifying employees were terminated for harassment, quoting coworkers publicly identifying harassed worker); see also Teresa Thompson & Norah Olson Bluvshstein, *NLRB Finds Employees' Facebook Posts Venting About Coworker Are Protected*, NETWORKED (Jan. 4, 2013), <http://www.networkedlawyers.com/nlr-b-finds-employees'-facebook-posts-venting-about-coworker-are-protected> (discussing implications of *Hispanics United* case).

116. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *31-33 (transcribing Facebook comment mocking employer's clients); see also *id.* at *14-15 (announcing employer engaged in unfair labor practice for terminating employees engaged in protected concerted activity). See generally Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES, Jan. 21, 2013, http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=0 (discussing how NLRB's "new legal theories" are "causing concern and confusion").

117. See *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) (vacating NLRB's order), *cert.*

President Obama's recess appointments, however, the NLRB's position on social-media activity has altered the climate of labor law in favor of employees, and has employers reasonably concerned about how to proceed.¹¹⁸

III. ANALYSIS

A. Characterizing Facebook Comments as Protected Concerted Activity Disproportionally Shifts the Balance in Favor of Employees

While Congress intended the NLRA to accommodate both the employer's interest in securing economically efficient terms and the employee's interest in achieving improved working conditions, the classification of Facebook comments as protected concerted activity disproportionately shifts the balance in favor of employees.¹¹⁹ By admonishing the employer in *Hispanics United* for terminating employees who publicly ridiculed a coworker and aired their complaints on the Internet for all to see, the NLRB extinguished the employer's right to redress.¹²⁰ Because employers may not terminate employees for engaging in section 7 activities, the NLRB essentially granted employees a "carte blanche right to free speech" on Facebook, provided a fellow colleague comments on or "likes" their post.¹²¹ Ultimately the NLRB's holding

granted 133 S. Ct. 2861 (2013). On January 25, 2013, the Court of Appeals for the D.C. Circuit ruled that President Obama's three recess appointments to the NLRB in January 2012 were unconstitutional, and therefore, invalid. *See id.* at 506-07. The court determined President Obama was precluded from invoking the Recess Appointment Clause in Article II, Section 2 of the U.S. Constitution because the Senate was not in recess on January 4, 2012, the date when the President made the appointments. *See id.* at 507. In order to have proper authority, the NLRB is required to have a quorum of three members. *See id.* at 499. The court held that since the appointments of the last three members of the NLRB were invalid, the NLRB only had two validly appointed members, and thus lacked a quorum on the date Noel Canning's case was before the NLRB. *See id.* As a result, the court declared the NLRB's order void, as it lacked the authority to order a valid, binding decision. *See id.* at 515. The *Noel Canning* decision calls into question the validity of all cases decided by the NLRB since January 2012. *See* David R. Broderdorf et al., *D.C. Circuit Rules NLRB Recess Appointments Unconstitutional*, MONDAQ, <http://www.mondaq.com/unitedstates/x/219268/employment+litigation+tribunals/DC+Circuit+Rules+NLRB+Recess+Appointments+Unconstitutional> (last updated Feb. 10, 2013) (discussing court's decision regarding constitutionality of recess appointments). Likely due to the potentially far-reaching effects of the *Noel Canning* decision, the United States Supreme Court has granted certiorari. *See* *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (2013). Currently, at least fifteen other cases are awaiting the opportunity to contest the NLRB's authority in federal appellate courts across the country. *See* Jim Martin, *Uncertainty from the D.C. Circuit's NLRB Decision Continues as Litigation Over the Validity of Recess Appointments Proliferates*, FORBES (Feb. 11, 2013, 4:36 PM), <http://www.forbes.com/sites/theemploymentbeat/2013/02/11/uncertainty-from-the-dc-circuits-nlr-b-decision-continues-as-litigation-over-the-validity-of-recess-appointments-proliferates>.

118. *See* *Greenhouse*, *supra* note 116 (acknowledging NLRB's recent positions "causing concern and confusion" among employers).

119. *See* *Scott*, *supra* note 5, ¶ 1 (recognizing social media's ability to shift balance of power in favor of employees); *Guide to NLRA*, *supra* note 6 (setting forth NLRA's purpose).

120. *See* *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852, at *45 (Dec. 14, 2012) (ordering employer to reinstate discharged employees with back pay and post notice).

121. *See* *Rhodes-Ford & Hall*, *supra* note 1, at 1 (equating section 7 protection with "carte blanche right to free speech"). *But see* *Ballman*, *supra* note 25 (stating employees have no right to insult employer online);

characterizing employees' social-networking posts as protected activity thwarts the NLRA's purpose because employers are left helpless to protect their legitimate business interest in their goodwill.¹²²

Under the NLRA, as interpreted by *Hispanics United*, employers may not discipline or terminate employees for outbursts on Facebook without committing an unfair labor practice if the speech rises to the level of concerted activity.¹²³ Employers may still attempt to protect their online image and regulate their employees' online conduct by imposing a social-media policy.¹²⁴ The NLRB will ratify these policies only if they are promulgated for legitimate reasons, and if the purpose is clearly articulated and unrelated to the exercise of employees' section 7 rights.¹²⁵ The NLRB, however, has recently suggested that even these legitimate policies will not be upheld if they have the potential to chill section 7 activities.¹²⁶ In light of the apparent trend favoring unqualified protection of concerted activity, there is virtually nothing employers can do to effectively protect their online reputation from the damaging public comments of irate employees, unless such comments are either threatening or outrageously egregious.¹²⁷

Hispanics United fosters poor public policy because it encourages employees to engage in public outbursts rather than settling conflicts with management internally.¹²⁸ Given the prevalence of social-media websites and

Lucas, *supra* note 25 (recognizing free speech is not free-from-consequences speech in employment context). If Facebook comments constitute protected concerted activity, it follows that employees could similarly be engaged in protected concerted activity if they lend support by simply liking a coworker's Facebook activity. See *What Does It Mean To "Like" Something?*, *supra* note 107 (describing Facebook's like feature).

122. See Rhodes-Ford & Hall, *supra* note 1, at 1 (noting employers attempts to prevent damage to reputation by disgruntled employees); Martucci et al., *supra* note 50, at 20 (recognizing damage social networking could potentially cause for employers).

123. See *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *41-45 (ordering employees reinstated with back pay).

124. See SEARS HOLDINGS, *supra* note 109, at 1 (concluding employer's social-media policy does not violate section 8(a)(1) of NLRA). But see AMERICAN MEDICAL RESPONSE, *supra* note 110, at 13-14 (finding blogging and Internet policy overbroad and thus unlawfully restrictive of section 7 rights).

125. See SEARS HOLDINGS, *supra* note 109, at 1 (permitting social-media policy not chilling of section 7 activity).

126. See *Acting General Counsel Release*, *supra* note 13 (articulating NLRB found social-media policies unlawfully overbroad in five recent cases). See generally REPORT 1, *supra* note 13 (noting overbroad social-media policies unlawfully chill section 7 rights); REPORT 2, *supra* note 110 (dismissing use of savings clause to exempt protected activity from social-media policies).

127. See AMERICAN MEDICAL RESPONSE, *supra* note 110, at 13-14 (rejecting blogging and Internet policy but recognizing egregious statements lose protection of NLRA); see also Greenhouse, *supra* note 116 ("Even when you review the N.L.R.B. rules and think you're following the mandates, . . . there's still a good deal of uncertainty."). See generally REPORT 1, *supra* note 13; REPORT 2, *supra* note 110; REPORT 3, *supra* note 110 (collectively reviewing thirty-five cases and noting overbroad policies unlawfully chill section 7 rights).

128. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852, at *43-45 (Dec. 14, 2012) (emboldening employees' public criticism of their employment and coworker); see also Thompson & Bluvshstein, *supra* note 115 (calling *Hispanics United* "a stretch" as employees never criticized supervisor nor engaged in group action).

the popularity of Facebook, employers are essentially forced to embrace the phenomenon.¹²⁹ Qualifying Facebook comments as protected concerted activity handicaps employers and breeds resentment by depriving them of the ability to enact enforceable social-networking policies and fire unruly employees.¹³⁰ The NLRB's recent decisions deprive employers of a right to recourse by failing to uphold the Board's goal of facilitating peaceful resolutions of labor disputes, and neglecting to account for the legitimate interests of both parties.¹³¹

The categorization of Facebook comments as protected concerted activity is unsurprising given that such activity is considered protected free speech under the First Amendment in the public school setting.¹³² In analogous cases, where students abused social-media websites to denigrate school officials, the Supreme Court endorsed speech that rose to near-defamatory levels, and admonished schools for disciplining students who engaged in such speech.¹³³ Through its decision in *Hispanics United*, the NLRB, like the Supreme Court, emboldens bullies—not victims—by protecting disparaging remarks as if they contain something of value.¹³⁴ Educational institutions and workplaces are the foundations of society, and it appears that the Supreme Court and the NLRB are advancing the value of free will rather than those of respect and peaceful dispute resolution.¹³⁵

*B. The NLRB Failed to Adequately Account for Employers' Rights
Before Extending Section 7 Protection to Employee Speech*

In *Hispanics United*, the NLRB failed to account for the employer's property interest in its goodwill.¹³⁶ As property owners, employers have a legitimate business interest and fundamental right in protecting and maintaining

129. See Dubois, *supra* note 107 (recognizing businesses cannot avoid involvement in social media); Martucci et al., *supra* note 50, at 26 (considering social media "powerful medium" provided employers learn to harness it). See generally Elefant, *supra* note 110 (discussing utility of social media).

130. See REPORT 1, *supra* note 13 (summarizing facts and holdings of recent social-media cases); *Acting General Counsel Release*, *supra* note 13 (identifying four cases where employees' activities protected and five where employers' policies were overbroad).

131. Cf. Lucas, *supra* note 25 (advocating for employer's right to fire employees who refuse to keep their griping private). "If you lack the critical thinking skills to say, 'Hmmm, if I post that my boss is a jerk, my boss just might find out about it,' then you probably lack the critical thinking skills to do your job." *Id.*

132. See *supra* notes 102-05 and accompanying text (discussing social-media activity as it relates to student First Amendment free speech).

133. See *supra* note 103 (presenting recent cases holding schools may not punish First Amendment speech).

134. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852, at *13-14 (Dec. 14, 2012) (protecting criticism of coworker on Facebook as section 7 activity because related to employment).

135. See Dannin, *supra* note 38, at 251 (stating formal institutions of family, school, and work teach democracy).

136. See Ibrahim, *supra* note 77, at 1 (recognizing goodwill as property).

their established names.¹³⁷ By deeming employee Facebook comments protected concerted activity, the NLRB has deprived employers of the rights to control the use of their goodwill and exclude others from exploiting it—both of which are fundamental rights accompanying property interests.¹³⁸ Employers' rights to control their tangible property cannot be disregarded in an attempt to accommodate employees, or anyone else, unless necessity has been demonstrated.¹³⁹ Intangible property, such as goodwill, should be no exception.¹⁴⁰ *Hispanics United* represents a marked departure from the general rule of property ownership because the decision accommodates the interests of nonowners through the protection of employee Facebook comments, without regard for the employer's goodwill.¹⁴¹

Not only are employers entitled to control their goodwill as a matter of property law, but given the prevalence of online communication through social-networking websites, and the pervasive impact it has on business and marketing strategies, employers necessarily have the right to take affirmative action to preserve their online image.¹⁴² Under the NLRB's recent decisions, if employers discover public online damaging statements made by two or more disgruntled employees, they cannot terminate or discipline those employees without engaging in unfair labor practice, even though those employees are abusing the company's property—that is, the business's goodwill.¹⁴³ This exemplifies a significant imposition on the bundle of property rights, and wrongfully elevates employees' section 7 rights above employers' property

137. See Merrill, *supra* note 79, at 730 (describing property owners' "bundle of rights" including right to consume, transfer, and exclude others).

138. See *Adams v. Henderson*, 168 U.S. 573, 580 (1897) (stating common-law rule preserving owners' right to exclusively control property against all others); see also Lee, *supra* note 79, ¶ 9 (noting how easily online comments damage goodwill).

139. See also *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113-14 (1956) (permitting exclusion of union organizers because circumstances did not place employees beyond reasonable reach); *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971) (recognizing right to exclude may succumb if it deprives another individual of his rights); cf. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992) (recognizing employees' right to information may trump employers' right to exclude based on necessity).

140. See Lee, *supra* note 79, ¶ 9 (discussing dangers social media presents to employer goodwill).

141. Cf. *Shack*, 277 A.2d at 374-75 (circumscribing owner's right to exclude, and accommodating interests of nonowners when necessity requires). See generally *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (Dec. 14, 2012) (failing to mention employer's property right in its goodwill).

142. See Lee, *supra* note 79, ¶ 9 (recognizing anti-employer comments may negatively impact important business relationships and stock value); Martucci et al., *supra* note 50, at 19 (stating "[t]echnology connects—and exposes—us like never before"). As property owners, employers should have the right to protect their goodwill from online abuse by grousing employees. See Underkuffler, *supra* note 79, at 1245 (recognizing right to property means protecting one's possessions and business). Some authorities contend that employers should be permitted to discipline employees for unfavorable online behavior. See Lucas, *supra* note 25 (explaining why employers should have authority to terminate employees).

143. See Lee, *supra* note 79, ¶ 9 (stating employers search Internet to discover damage done to their online reputation by disgruntled employees).

rights.¹⁴⁴

Generally, when two parties have conflicting legal rights that warrant protection, the interests are balanced against each other to achieve a just result.¹⁴⁵ For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴⁶ the Supreme Court weighed the state's interest in protecting potential life against the individual's right to abort a fetus, in order to determine if the latter party faced an undue burden.¹⁴⁷ Similarly, under tort law, when determining whether to impose liability for an alleged private or public nuisance, courts weigh the utility of the actor's conduct against that conduct's interference with another's right to use and enjoy the land to determine if the invasion is sufficiently unreasonable.¹⁴⁸ The NLRB should have recognized the employer's right to protect its goodwill—instead of only observing the employees' section 7 right—and applied a test that would accommodate both competing interests, instead of granting unfettered protection to one at the expense of the other.¹⁴⁹

Hispanics United departs from the NLRB's past practice of employing a balancing test to accommodate both employees' section 7 rights and employers' property rights.¹⁵⁰ In cases where employee organizers seek to engage in section 7 activities and provide their coworkers with information relating to unionization or terms and conditions of employment, they are entitled to access the nonwork areas of their employer's property, unless the employer can show a legitimate business need that justifies restriction.¹⁵¹ Therefore, when the NLRB is faced with the competing legal rights of employees and employers, it weighs the employees' right to engage in section 7 activity against the employer's right to control the use of his property.¹⁵² Similar to cases involving employee organizers, *Hispanics United* required the

144. *Cf. Adams v. Henderson*, 168 U.S. 573, 580 (1897) (recognizing general rule of ownership enables owner to exercise exclusive control over property against others).

145. *See State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971) (encroaching on property owner's right when it interferes with another individual's right); RESTATEMENT (SECOND) OF TORTS § 826 (1979) (determining if actor's conduct causes unreasonable interference with public or individual's right to enjoy property); *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (reconciling state's interest with woman's constitutional right).

146. 505 U.S. 833 (1992).

147. *See id.* at 876 (holding undue burden standard weighs state's interest against woman's constitutional right to bodily integrity).

148. *See* RESTATEMENT (SECOND) OF TORTS § 826 (noting both public nuisance and private nuisance measure gravity of harm against utility of actor's conduct).

149. *See generally* *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (Dec. 14, 2012) (recognizing only employees' section 7 rights).

150. *See supra* notes 86-90 and accompanying text (discussing NLRB balance of employees' rights to organize against employers' right to control property).

151. *See* *New York New York Hotel, LLC*, 334 N.L.R.B. 762, 763 (2001) (justifying restriction when employer needs to maintain production and discipline).

152. *See supra* notes 89-91 and accompanying text (discussing NLRB's approach to competing legal interests and recognizing consistency with other areas of law).

NLRB to reconcile employees' section 7 rights with the employer's right to control and exclude others from using its property.¹⁵³ The NLRB, however, failed to even acknowledge the employer's property right, as evidenced by its silence on the issue in its decision.¹⁵⁴

*C. The NLRB Must Balance Employers' Rights to Cultivate Goodwill
Against Employees' Rights to Engage in Protected Concerted Activity
in Cases Involving Facebook and Other Social Media Websites*

There is no such thing as an absolute right, and the statutory right to engage in protected concerted activity is no exception.¹⁵⁵ Instead of analyzing public comments published on social-media websites under the pretext of protected concerted activity, the NLRB should employ the same balancing test applied to employee organizers.¹⁵⁶ Accordingly, the appropriate test for Facebook comments and other social-media activity should be whether the employer's right to protect and police its online reputation is outweighed by the employee's right to engage in protected concerted activity.¹⁵⁷ If the employer can demonstrate that public disparagement, under the guise of section 7 activity, could harm their goodwill, its interest may outweigh the employee's protected concerted activity.¹⁵⁸ When weighing these competing interests, the NLRB should consider factors such as: where the speech took place; whether customers, clients, or competitors could access the comments; how the speech related to the terms and conditions of employment; and potential damage to the employer's goodwill and online reputation.¹⁵⁹ This balancing test would continue to protect employees' section 7 rights as well as properly account for

153. See *supra* notes 86-91 and accompanying text (noting NLRB's accommodation of employer and employee rights under appropriate circumstances).

154. See generally *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852 (omitting employer's property right in goodwill from analysis).

155. See DAU-SCHMIDT ET AL., *supra* note 26, at 211 (discussing rights of workers in labor law). "The right of workers to organize collectively and independently is at the heart of the statute, but certainly is not absolutely protected. Throughout the statute, the protection of worker voice and collectivization is offset by competing employer interests in property and efficiency." *Id.*; see *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971) (recognizing no absolute right in owner's real property).

156. Cf. *Rhodes-Ford & Hall*, *supra* note 1 (arguing posts may not qualify as protected concerted activity because employer cannot correct those complaints).

157. See *supra* notes 86-91 and accompanying text (discussing weighing of employer's business justification against employees' section 7 rights); see also *New York New York Hotel, LLC*, 334 N.L.R.B. 762, 763 (2001) (discussing employer's opportunity to show solicitation ban necessary to maintain production and discipline).

158. See *New York New York Hotel, LLC*, 334 N.L.R.B. at 763 (requiring employer to justify restriction on employees' rights).

159. Cf. Scott, *supra* note 5, ¶ 15 (arguing in favor of requiring coworkers as intended audience for protection). "The presence of a comment feature on most blogs arguably implicitly invites others to participate in the discussion, but to find a blog protected, a court should have to find that the blog at least implies that co-employees are the intended audience." *Id.*

the employer's property interest in maintaining its goodwill.¹⁶⁰

A balancing test is appropriate because there are two competing, legally cognizable rights at issue—the employee's section 7 right to engage in concerted activity and the employer's property right in its goodwill.¹⁶¹ The interplay of rights in the employment relationship justifies a different approach to social-media cases than in the public school setting.¹⁶² In schools, the only protected right at issue is the student-speaker's First Amendment right, because there is no competing interest protecting individuals from unfavorable comments.¹⁶³ By applying a balancing test to employees' Facebook comments and other social-media activity, the NLRB can accommodate the interests of both employees and their employers, while measuring the potential harm to the employer against the utility of permitting unfettered public employee discussion, regardless of such discussion's status as protected concerted activity.¹⁶⁴

Additionally, by applying a balancing test under these circumstances, the NLRB would avoid contradicting past precedent.¹⁶⁵ The NLRB previously clarified that while the NLRA codifies employees' rights to engage in protected activity, it does not permit employees to use any form of expression they choose to exercise that right.¹⁶⁶ Therefore, even if the employees' Facebook comments were protected by the NLRA, employees have no statutory right to use their employer's property, tangible or intangible, to engage in such activity.¹⁶⁷ Because *Hispanics United* did not give credence to the employer's property right in its goodwill, the NLRB departed from its previous position by permitting employees to use their employer's property to engage in protected concerted activity without regard to its potential impact.¹⁶⁸ Unless the NLRB adopts this balancing approach, the NLRB will continue to contradict itself by holding that employees have no statutory right to use their employer's property,

160. See Sprague, *supra* note 3, at 366-67 (reflecting employees' statements should concern primarily working conditions and "avoid needlessly tarnishing the employer's image").

161. See *supra* Part III.B (reconciling employer's property interest in goodwill with employees' section 7 rights under NLRA).

162. See Ballman, *supra* note 25 (explaining First Amendment does not protect employees at work).

163. See Lucas, *supra* note 25 (reminding only government-conducted suppression of speech illegal).

164. See Sprague, *supra* note 3, at 365-67 (implying balancing of interests necessary to reconcile section 7 activity with preserving employer's image).

165. See generally *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007) (holding employees have no statutory right to use employer's property to engage in protected activity), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

166. See *id.* at 1115. While employers must "yield [their] property interests to the extent necessary" to permit employees to engage in protected communications, the NLRA "does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications." *Id.*

167. See *id.* (providing limits to means of conducting workplace communications).

168. See generally *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (Dec. 14, 2012) (overlooking employees' potential use of employer's goodwill).

but may abuse it when engaging in protected concerted activity.¹⁶⁹

Finally, a balancing approach promotes good policy.¹⁷⁰ Congress enacted the NLRA to facilitate the peaceful resolution of labor disputes, and reconciling the conflicting interests of labor and management promotes that purpose.¹⁷¹ Adequately protecting both employer and employee interests, instead of elevating one interest over the other, would further equalize the employment relationship, which is another NLRA objective.¹⁷² The NLRB must apply a balancing test to employees' social-media activities to advance the objectives of the NLRA and act consistently with congressional intent.¹⁷³

IV. CONCLUSION

The growing prevalence of social-networking websites and their role in facilitating communication among coworkers and management makes *Hispanics United* undoubtedly influential. By extending section 7 protection to Facebook comments, the NLRB handicaps the employer's right to protect its business interests and regulate its online reputation. Instead of promoting dispute resolution, one of the underlying functions of the NLRA, the NLRB's current policy strains the employment relationship by encouraging disgruntled employees to publically air their grievances online instead of voicing concerns and complaints directly to their employer. The courts must correct this decision on appeal to avoid the damaging effect *Hispanics United* has on employer rights, especially in light of the increasing prevalence of social media. Unless the NLRB applies a balancing test to accommodate both employer and employee interests, instead of protecting concerted employee speech without limitation, the purposes underlying the NLRA will not be maintained.

Stephanie M. Merabet

169. Compare *Hispanics United of Buffalo, Inc.*, 2012 NLRB LEXIS 852, at *13-14 (permitting employees to disparage their coworker, employment, and ultimately their employer's goodwill), with *Register-Guard*, 351 N.L.R.B. at 1115 (announcing employees' lack statutory right to use employer's property).

170. See Castagnera et al., *supra* note 25, at 3 (acknowledging need to balance employer's legitimate business needs and employee's right to communicate); see also Sprague, *supra* note 3, at 366-67 (recognizing "critical" to achieve balance between employer and employee rights).

171. See *Guide to NLRA*, *supra* note 6 (stating purpose behind NLRA's enactment and its objectives).

172. See *id.* (providing equal relationship as one NLRA objective).

173. See *id.* (summarizing NLRA objectives).