I SWEAR! FROM SHOPTALK TO SOCIAL MEDIA: THE TOP TEN NATIONAL LABOR RELATIONS BOARD PROFANITY CASES

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INTRODUCTION

Two waitresses at Hooters got into a swearing match with another waitress who had won a mandatory bikini competition that was rumored to have been rigged in favor of the winner.[1] The two losing waitresses were terminated for yelling obscenities at their winning coworker in front of customers.[2] An off-duty barista at a New York Starbucks repeatedly used profanity in a heated conversation with a manager in the presence of customers, and was fired for his conduct.[3]

Employees at a Manhattan catering service complained to the director of banquet services about the hostile, degrading, and disrespectful treatment they received from managers.[4] The employees filed a representation petition at the National Labor

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[1] Hoot Winc, LLC (*Hooters of Ontario I*), No. 31-CA-104872, slip op. at 13, 2014 WL 2086220 (N.L.R.B. Div. of Judges May 19, 2014), https://www.nlrb.gov/case/31-CA-104872, *aff'd*, 363 N.L.R.B. No. 2, 2015 WL 5143098, at *2 (Sept. 1, 2015) (upholding ALJ on illegality of mandatory arbitration agreement that required employees to waive all class and collective action in all forums, whether arbitral or judicial). As noted in the Board's 2015 *Hooters* opinion, "the parties executed an informal Board settlement agreement and a non-Board settlement agreement resolving all alleged violations other than those pertaining to the maintenance of the arbitration agreement." Hoot Winc, LLC (*Hooters of Ontario II*), 363 N.L.R.B. No. 2, 2015 WL 5143098, at *1 n.1 (Sept. 1, 2015).

[2] *Hooters of Ontario I*, slip op. at 15.

[3] Starbucks Corp. (*Starbucks IV*), 360 N.L.R.B. No. 134, 2014 WL 2736112, at *2 (June 16, 2014).

[4] Pier Sixty, LLC (*Pier Sixty II*), 362 N.L.R.B. No. 59, 2015 WL 1457688, at *1 (Mar. 31, 2015).

Relations Board[5] ("NLRB") and an election resulted in certification of the union's majority status.[6] However, two days before the election, three employees who were serving drinks from trays were repeatedly told by an assistant director to spread out and stop talking.[7] One server took a break and posted profane remarks about the assistant director on his personal Facebook page, and included a plea to vote for the union.[8] The server was terminated for his vulgar Facebook comments.[9]

In the midst of a labor dispute at a tire company, the employer locked out the bargaining unit employees.[10] The union members staffed a peaceful picket line.[11] On an evening when the union sponsored a hog roast at the hall adjacent to the plant entrance and the picket line, some of the locked-out employees engaged in profanity, name-calling, and vulgar gestures such as pointing their middle fingers upwards at the replacement workers who were crossing the picket line in vehicles.[12] The locked-out workers demanded that the replacements "go home" and not steal their jobs.[13] A locked-out employee was terminated for, among other things, yelling out: "Hey, did you bring enough KFC for everyone?" And later, "Hey, anybody smell that? I smell fried chicken and watermelon."[14] Many of the replacement workers were of African-American descent, and the company had a policy prohibiting racial harassment.[15]

These employees were all terminated for their use of profanity aimed at coworkers, managers, and strikebreakers. Should they get their jobs back? The examples above reference facts in recent cases that were brought to the NLRB by

[5] The National Labor Relations Board or NLRB is also referred to as the Board in this Article.

[6] Pier Sixty, LLC (*Pier Sixty I*), No. 2-CA-068612, slip op. at 4, 2013 WL 1702462 (N.L.R.B. Div. of Judges Apr. 18, 2013), https://www.nlrb.gov/case/02-CA-068612, *aff'd*, 362 N.L.R.B. No. 59, 2015 WL 1457688, at *1 (Mar. 31, 2015).

[7] *Pier Sixty II*, 2015 WL 1457688, at *1.

[8] *Id.* at *2.

[9] *Id.*

[10] Cooper Tire & Rubber Co., No. 08-CA-087155, slip op. at 2–3, 2015 WL 3544120 (N.L.R.B. Div. of Judges June 5, 2015), https://www.nlrb.gov/case/08-CA-087155.

[11] *Id.* at 3.

[12] *Id.* at 4–5.

[13] *Id.* at 4.

[14] *Id.* at 4–6.

[15] *Id.* at 3, 6.

employees or their unions against Hooters,[16] Starbucks,[17] Pier Sixty,[18] and Cooper Tire and Rubber Company.[19] In all of these cases, as well as in others, the NLRB or an Administrative Law Judge ("ALJ") ordered reinstatement of the employees because the conduct for which the employees were terminated was protected concerted activity under § 7 of the National Labor Relations Act ("NLRA").[20]

Why is profanity protected under § 7 of the NLRA? Section 7 grants private sector employees who are protected by the Act, whether or not they are members of a union, the right to engage in protected concerted activity, which includes communication regarding: organization, or refraining from such; wages, hours, and working conditions; and other concerted activities for mutual aid or protection, all of which provide employees with a bare bones workplace bill of rights.[21] Employees must be acting in concert and within these defined subject areas for their communication to fall within the umbrella of § 7's protection.[22] The concept of acting in concert generally involves two or more employees acting together, but the concept also includes one employee involving another coworker before acting, or one employee acting on the behalf of others, for the benefit of more than just the acting employee.[23] If employees engage in conduct that is not concerted, or that exceeds the boundaries of protected activity because it is reckless, malicious, or violent, then they are

[16] Hooters of Ontario I, No. 31-CA-104872, 2014 WL 2086220 (N.L.R.B. Div. of Judges May 19, 2014), https://www.nlrb.gov/case/31-CA-104872, *aff'd*, 363 N.L.R.B. No. 2, 2015 WL 5143098 (Sept. 1, 2015).

[17] Starbucks IV, 360 N.L.R.B. No. 134, 2014 WL 2736112 (June 16, 2014).

[18] Pier Sixty II, 362 N.L.R.B. No. 59, 2015 WL 1457688 (Mar. 31, 2015).

[19] *Cooper Tire*, No. 08-CA-087155, 2015 WL 3544120.

[20] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

29 U.S.C. § 157 (2012).

[21] *See* Christine Neylon O'Brien, *Am I Blue or Seeing Red? The NLRB Sees Purple When Employer Communication Policies Unduly Restrict Section 7 Activities*, 66 LAB. L.J. 75, 75–76 (2015); *see also Rights We Protect: Protected Concerted Activity*, NLRB, http://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last visited May 18, 2016).

[22] O'Brien, *supra* note 21.

[23] *Id.* at 75.

not protected by § 7.[24] The concept of protected concerted activity allows for some impulsivity and posturing regarding collective bargaining, grievances, picketing, and strike activity, as such behavior is expected in light of the confrontational nature of these activities.[25] Profanity may be part of the impulsive dialogue between employers and employees as both sides seek to arrive at industrial peace in these contexts.

There are many recent NLRB cases that involve profanity,[26] and this type of conduct—or misconduct, depending upon your point of view—is far from new.[27] After all, swearing is hardly a modern invention.[28] Nonetheless, engaging in profanity at work or with coworkers online is certainly controversial, especially when the profanity is directed at managers or when it harms the company's reputation.[29] It seems that in the early days of the NLRA, some allowance was made for rougher talk among men at work than that which was expected to take place in normal civil

[24] *Id. See* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Gail R. Moran, Acting Reg'l Dir., Region 13, regarding JT's Porch Saloon & Eatery, Ltd., No. 13-CA-46689, 2011 WL 2960964 (July 7, 2011), *available at* https://www.nlrb.gov/case/13-CA-046689 (finding that bartender who was terminated for engaging in profanity and making negative remarks on Facebook to his step-sister about the employer's tipping policy and its customers was not engaged in concerted activity because he did not discuss the policy with fellow employees before or after he wrote the posts).

[25] *See* Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948) (noting debate without censorship inherent in collective bargaining process for employee to be perceived as equal to employer in context of trading and bargaining negotiations, and that employee discharge for engaging in frank exchange of views would discourage membership in the grievance committee).

[26] *See The Hooters Precedent; The NLRB Says You Can Tell Your Boss to @$%#! and Still Keep Your Job*, WALL ST. J. (Sept. 22, 2014), http://www.wsj.com/articles/the-hooters-precedent-1411426971 (discussing an article authored by employment law lawyers that noted a trend in *Hooters*, *Starbucks Corp.*, and other cases where the NLRB sides with employees who insulted their employers, thereby condoning profanity and insubordination).

[27] *See* Katy Steinmetz, *Nine Things You Probably Didn't Know About Swear Words*, TIME (Apr. 10, 2013), http://newsfeed.time.com/2013/04/10/nine-things-you-probably-didnt-know-about-swear-words/ (noting swear words have been around since the time of our forebears' forebears).

[28] *See* Melissa Mohr, *The Modern History of Swearing: Where All the Dirtiest Words Come From*, SALON (May 11, 2013, 8:30 AM), http://www.salon.com/2013/05/11/the_modern_history_of_swearing_where_all_the_dirtiest_words_come_from/ (discussing swearing in the 18th and 19th centuries including the use of the word "bloody").

[29] *See Bettcher Mfg. Corp.*, 76 N.L.R.B. at 526–27, 533 (involving employee fired for implying president/treasurer of company was manipulating the books to evidence a loss, intimating that he was a "crook and a liar").

society.[30] Thus, some swearing at managers was permitted if employees were engaged in what was defined as protected concerted activity under the NLRA.[31] Men were practically expected to swear at work in the context of letting out their thoughts and complaints relating to their jobs.[32] The NLRB seemed to accept that horrible bosses cause employees to swear![33] In light of the underlying purpose of the NLRA—to redress the imbalance of power between employers and employees—uncensored comments were often excused because of the posturing that takes place in the context of collective bargaining, or during the resolution of grievances.[34] While the Board recognized that some of the use of profanity was mere shoptalk, it noted:

> A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' . . . or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service."[35]

Today, both male and female employees may swear,[36] and they may do so in all sorts of contexts: in person, with statements

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[30] *See id.* at 535.

[31] *See* Woodruff & Sons, Inc., 265 N.L.R.B. 345, 347 (1982) (finding employee profanity protected as spontaneous outburst in grievance proceeding or collective bargaining, or if provoked by employer unfair labor practice). *Cf.* Caterpillar Tractor Co., 276 N.L.R.B. 1323, 1324–26 (1985) (upholding discharge of employee because profane cartoon depicting supervisor as razorback pig urinating on workers not protected as it was a vicious personal attack).

[32] *See Bettcher Mfg. Corp.*, 76 N.L.R.B. at 527.

[33] This brings to mind the comedy act by The Jerky Boys, "Hurt at Work." The Jerky Boys, *Hurt at Work*, WN.COM (July 21, 2011), http://wn.com/the_jerky_boys_-_hurt_at_work.

[34] *See Bettcher Mfg. Corp.*, 76 N.L.R.B. at 527 (noting context of protected concerted activities that results in posturing).

[35] *Id.* (quoting NLRB v. Ill. Tool Works, 153 F.2d 811, 815–16 (7th Cir. 1946) (quoting Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941))).

[36] Note that the *Hooters* case involved women swearing at a work-related event. Hooters of Ontario I, No. 31-CA-104872, slip op. at 13, 2014 WL 2086220 (N.L.R.B. Div. of Judges May 19, 2014), https://www.nlrb.gov/case/31-CA-104872, *aff'd*, 363 N.L.R.B. No. 2, 2015 WL 5143098 (Sept. 1, 2015). *See also* Copps Foods, 323 N.L.R.B. 998, 999, 1001 (1997) (upholding termination of female baker who swore at supervisor, saying: "This is f—king bullshit. This is one asshole company to work for").

or designs on apparel or buttons, on informational flyers in an employee breakroom, or via email and social media in the virtual world. So, conversations that include profanity may take place on the shop floor, in a retail setting, in a parking lot, or on social media platforms, such as Facebook, Twitter, and Instagram. How should the NLRB rule with respect to the use of profanity in each of these contexts? Does a retail setting call for completely curtailing employee profanity regardless of the subject matter? Should the relative status of those doing the swearing matter? Should the reach of the communication, in terms of size and composition of the audience, dictate the outcome? Should the conduct and the values of the employer make a difference?

Is it the profanity itself that is so problematic to the employer or is it the disrespect or disloyalty that is reflected in the profanity? Employers and managers do not want to be insulted or lose control of employee behavior.[37] Most employers seek to prevent profanity from harming the image of the company or its brand. Sometimes the employer's concern focuses on how the employee treats the boss, and how this impacts the management of other employees because of an apparent lack of control regarding outbursts. Other times the employer's concern focuses on the negative impact of such language on its customers in, for example, a retail setting. At some point, one wonders just how much profanity the employer is required to tolerate simply because it occurs in the context of employees' protected concerted activity. Is shoptalk in the workplace on nonworking time more or less protected than online talk on social media that takes place on the employees' own time? In the era of social media, the employer's concern with preserving the company's reputation is clearly exacerbated because of the reach and immediacy of online communication, but in some respects, discussion on social media has less impact on an employer's maintenance of production and discipline than workplace discussions that include profanity. How should the NLRB balance the interests of employers with employees' exercise of § 7 rights when it includes profanity?

[37] The Board has long recognized the employer's right to demonstrate special circumstances requiring it to implement rules necessary to maintain production or discipline even if these rules have some restrictive impact upon protected concerted activity. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

The Board has worked to adapt its standards for protected concerted activity from face-to-face communication to electronic communication, including social media.[38] As will be discussed in Part III, the NLRB has recognized in recent cases that some of the factors weighed to determine if an employee's outburst of profanity should lose protection vary depending upon the medium, the context, the provocation, the audience, and the actors.[39]

This Article curates and analyzes ten recent cases where the NLRB decided whether or not § 7 protected employee swearing, with a view toward defining the implications of these decisions for employers and employees in terms of employer rules and discipline, and employee rights and limits thereon.[40] The Article outlines the NLRB's role and perspective in cases where employees are disciplined or discharged for engaging in profanity at work and/or on social media when the conduct in question is otherwise protected concerted activity.[41] The Article summarizes the facts in each case while analyzing the legal framework that the NLRB uses to evaluate whether the conduct is protected, and, even if it is, whether the employee loses the protection of the NLRA because of the egregiousness of the employee's conduct, as it weighs the totality of the employee's conduct objectively.[42] Further, the Article discusses: (1) employer rules relating to profanity that run afoul of the NLRA because they unduly interfere with employee exercise of protected concerted activity, and (2) the Board's ongoing directive to revise such rules as part of its remedy for these employer unfair labor practices.[43] Whether the employee conduct is face-to-face or on social media, the NLRB sets standards on what communication is protected

[38] *See* Michael Z. Green, *The NLRB as an Überagency for the Evolving Workplace*, 64 EMORY L.J. 1621, 1630 (2015) (noting importance of NLRB's action in addressing new forms of digital-age communications); Christine Neylon O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 CHARLESTON L. REV. 411, 413–14 (2014) (discussing NLRB tests on employer social media policies and related rules); Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337, 375 (2013) (noting NLRB was applying same rules for protecting employees' concerted activity to social media cases).

[39] *See infra* Part III.A, C.

[40] *See infra* Parts II–III.

[41] *See infra* Parts II–III.

[42] *See infra* Parts II–III.

[43] *See infra* Part VI.

and what is not, depending upon whether the subject matter falls within § 7 and whether the employee crosses the line into behavior that the Board finds does not deserve the protection of the Act.[44] The survey includes NLRB cases involving employees swearing in a face-to-face context using union buttons, and other union materials, and on email and social media.

I. THE TOP TEN NLRB PROFANITY CASES

The following table summarizes information on the top ten recent NLRB profanity cases analyzed in this Article. The categories include the case name and number, and the source of authority—whether a decision of the NLRB itself, or a decision of an ALJ, which has not yet been heard by the NLRB. Next is the date of the latest decision in each case, followed by the outcome of the unfair labor practice ("ULP") charges filed, what remedy was ordered, and the current status of appeal or compliance as noted on the NLRB case pages.[45] In all ten cases, at least one employee was discharged. Commonly, the NLRB orders the respondent-employer that has violated the NLRA to post a notice indicating that it will not commit the ULP again in the future. Thus, in the cases where ULPs were found, this is a routinely ordered remedy.[46] The next column indicates whether there was a union present, whether a union was organizing, or if there was no union at all. Finally, in the context of profanities in the workplace, the cases indicate if it involved face-to-face communication, union buttons or other union insignia, defacing union materials in an employee breakroom, or social media. The cases are organized with the first five involving face-to-face conduct, the next four involving communication on social media, and the last involving materials on a breakroom bulletin board.

[44] *See infra* Part VI.

[45] See the case pages, available at http://www.nlrb.gov/cases-decisions/board-decisions, for the latest information on the status of open cases.

[46] In cases where employers have policies that violate the Act and apply beyond the instant geographic site, the employer is required to revise the policies and post a remedial notice across all of its facilities, including electronic notice where that medium is available and customarily used for communication to employees. J & R Flooring, Inc., 356 N.L.R.B. No. 9, 2010 WL 4318372, at *1 (Oct. 22, 2010) (noting remedial posting should include electronic notice where such notice is customary mode of communication).

Table of Top Ten NLRB Profanity Cases

Top Ten	***Case Name***	***Source of Authority***	***Date***	***Outcome, Remedies, Status***	***Union Presence***	***Context***
1	*Hoot Winc, LLC 31-CA-104872*	NLRB ALJ NLRB	5/19/14 9/1/15	Reinstatement & Backpay Revise Overly Broad Rules; Post Notice No More ULPs; Settlement Agreement Reached 10/22/14; Board Upheld Illegality of Mandatory Arbitration Agreement 9/1/15; Appeal Filed, 9th Cir., Case Nos. 15-72839, 15-72931	No Union	Face-to-Face
2	*Plaza Auto Ctr., Inc. 28-CA-022256*	NLRB	5/28/14	Reinstatement & Backpay; Post Notice No More ULPs; Compliance Closing Letter 11/21/14	No Union	Face-to-Face
3	*Starbucks Corp. 02-CA-037548*	NLRB	6/16/14	Reinstatement & Backpay; Post Notice No More ULPs; Compliance Closing Letter 6/25/15	Union Was Organizing	Face-to-Face
4	*Pac. Bell Tel. Co. 20-CA-080400*	NLRB	6/2/15	Reinstatement & Backpay; Revise Overly Broad Rule re: Union Insignia & Buttons; Post Notice No More ULPs; Appeal Filed, D.C. Cir., Case No. 15-73034	Union	Face-to-Face, Union Buttons & Shirts
5	*Cooper Tire & Rubber Co. 08-CA-087155*	NLRB ALJ	6/5/15	Reinstatement & Backpay; Post Notice No More ULPs; Exceptions to ALJ Decision Filed 7/20/15; Appeal Pending at NLRB	Union	Face-to-Face, Picket Line, Racial Harassment Policy
6	*Triple Play 34-CA-012915*	NLRB	8/22/14 10/21/15	Reinstatement & Backpay; Revise Overly Broad Internet/Blogging Policy; Post Notice No More ULPs; Second Circuit Aff'd 10/21/15 2015 WL 6161477 (2d Cir. Oct. 21, 2015) (Summary Order)	No Union	Facebook
7	*Bettie Page Clothing 20-CA-035511*	NLRB	10/31/14	Reinstatement & Backpay; Revise Rules re: Salary Disclosure, Confidentiality, etc.; Post Notice No More ULPs; Appeal Filed, D.C. Cir., Case No. 14-1232; Oral Argument 1/21/16	No Union	Facebook, Some Face-to-Face
8	*Pier Sixty, LLC 02-CA-068612 & 02-CA-070797*	NLRB	3/31/15	Reinstatement & Backpay; Post Notice No More ULPs; Appeal Filed, 2d Cir., Case Nos. 15-1841, -1962; Oral Argument Scheduled for 4/5/16	Union Organizing Election Pending	Facebook
9	*Tinley Park Hotel & Convention Ctr., LLC 13-CA-141609*	NLRB ALJ	6/16/15	Reinstatement & Backpay; Revise Overly Broad Rules re Disloyalty, Confidentiality, Disrespectful/Disruptive Conduct; Post Notice No More ULPs; Transferred to NLRB 6/16/15; Exceptions to ALJ Decision 7/14/15; Appeal Pending at NLRB	No Union	Facebook
10	*Fresenius USA Mfg., Inc. 02-CA-039518*	NLRB	6/24/15	Dishonesty not Protected; Discharge Upheld but Cease and Desist Prohibiting Employees from Discussing Investigations; Post Notice No More ULPs; Compliance Certification of Posting 7/30/15; Compliance Closing Letter 11/9/15	Union Decertification Election Pending	Employee Defaced Sign in Breakroom; Dishonesty in Investigation of Sexual Harassment Claims

II. FACE-TO-FACE CASES

The following five cases involve employees who engaged in vulgar, profane interactions with coworkers or managers in a face-to-face context. These employees were discharged because of their offensive conduct that took place in the midst of concerted activity. The analysis includes the factual situation, as well as how the NLRB evaluated whether the employees should lose the protection of the NLRA in each case, despite the otherwise protected nature of their concerted conduct that related to terms and conditions of employment, or involved mutual aid or protection under § 7 of the Act.

A. Hooters of Ontario

The Hooters location in Ontario, California held an annual bikini contest.[47] This was an event that drew large numbers of customers and provided publicity for the restaurants and the participants.[48] An NLRB ALJ found that the company violated § 8(a)(1) of the Act when it terminated employee Hanson for engaging in protected concerted activity because she had complained about working conditions, wages, and her belief that the contest was rigged.[49] The employee complained because both the winner's best friend and boyfriend judged the contest that the winner arranged, competed in, and then won.[50] The Vice President for Human Resources asserted that Hanson was discharged because she cursed at the winner, and when Hanson denied the swearing, the V.P. added that the termination was for negative Twitter posts.[51] However, on cross-examination, the V.P. stated that she did not rely on Hanson's tweets as a basis for termination.[52] The ALJ found that Ms. Hanson did not in fact

[47] Hooters of Ontario I, No. 31-CA-104872, slip op. at 8, 2014 WL 2086220 (N.L.R.B. Div. of Judges May 19, 2014), https://www.nlrb.gov/case/31-CA-104872, *aff'd*, 363 N.L.R.B. No. 2, 2015 WL 5143098 (Sept. 1, 2015).

[48] *Id.* at 10.

[49] *Id.* at 28, 40.

[50] *Id.* at 12–13.

[51] *Id.* at 27.

[52] *Id.* at 27 n.7. Another discharged coworker who cursed at the winner in front of customers and coworkers filed a charge with the Board, but her charge was dismissed and she did not appeal. *Id.* at 15–16.

swear at the winner as the employer alleged, and that Hanson's conduct was indeed protected so that she was entitled to reinstatement and backpay.[53]

The ALJ in *Hooters* addressed a number of Hooters' rules that were problematic under the NLRA.[54] First, the company's rule prohibiting discussing tips explicitly restricted § 7 protected activity—namely, discussing wages—and was unlawfully overbroad in that it prohibited discussing the same with guests who were nonemployees.[55] Next, the company's rule against insubordination was unlawful because it prohibited all disrespectful conduct towards others, including managers, fellow employees, and guests, and imposed an inherently subjective standard.[56] Such a rule would have a chilling effect upon the exercise of § 7 rights and had no limitations placed upon its broad terms.[57] Further, the disrespect to guests prohibition was "unlawfully overbroad and unqualified," as was the ban on profanity or negative comments or actions, and "no examples or clarifications [were] provided."[58] In addition, the nondisclosure rule regarding sensitive company materials was unlawfully overbroad because employees could reasonably conclude that it prohibited discussing wages and other employment terms and conditions with nonemployees, including union representatives.[59]

Hooters' rule regarding conduct that the company reasonably believes a threat to its smooth operation, goodwill or profitability was overbroad because employees would reasonably construe it to inhibit protected activity under § 7.[60] The employer's rule regarding off-duty conduct was unlawfully overbroad for similar reasons in that it could reasonably be construed to prohibit discussion of wages and working conditions with coworkers or others.[61] The company's rule against discussing company business or legal affairs outside of the company failed to comply with the NLRA as well, because it would interfere with employee

[53] *Id.* at 27–28, 42, 44.
[54] *Id.* at 34–39.
[55] *Id.* at 36.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 37.
[60] *Id.*
[61] *Id.* at 38.

rights to discuss terms and conditions of employment.[62] The company's rule against posting information about the company on social networking sites was also illegal because of its impact on protected § 7 activity, as was Hooters' ban on disrespecting the company, employees, customers, partners, and competitors, posting offensive language or pictures that can be viewed by coworkers or clients, and posting any information under any circumstances about a coworker or customer.[63] The ALJ was careful to note that no mention was made of permitting conduct protected by § 7 as a limitation on these rules.[64] Last, the company's rules regarding confidential information and nondisclosure were broadly written and clearly prohibited discussion of matters protected by § 7, and thus were unlawful.[65] The ALJ required Hooters to revise many of its rules that unduly restricted § 7 rights, including one that required employees to waive their right to class or collective action in all forums, judicial or arbitral.[66]

B. Plaza Auto Center

In *Plaza Auto Center, Inc.*,[67] Nick Aguirre, a former car salesman, complained about the lack of bathroom facilities at a tent sale, and questioned the employer's compensation policy for

[62] *Id.*

[63] *Id.*

[64] *Id.* at 38–39.

[65] *Id.* at 40.

[66] *Id.* at 41–42. This mandatory individual arbitration rule violated the Board's holding in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012), *enforced in part, rev'd in part sub nom. D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), which, because he was bound by Board precedent, the ALJ found controlling. *Hooters of Ontario I*, slip op. at 30–31. After the filing of exceptions by Hooters, a three-member panel of the NLRB agreed with the ALJ that Hooters' mandatory arbitration agreement "would reasonably be read by employees to prohibit the filing of [ULP] charges with the Board" and thus the policy violated the Act. *See* Hooters of Ontario II, 363 N.L.R.B. No. 2, 2015 WL 5143098, at *1–2 (Sept. 1, 2015) (first citing Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *25 n.98 (Oct. 28, 2014); then citing *D.R. Horton, Inc.*, 2012 WL 36274, at *2); *see also* Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. 75, 76–77 (2015) (analyzing the Board's rule that § 7 ensures an employee's right to proceed collectively and mandatory arbitration agreements that cut off all collective action violate the NLRA).

[67] Plaza Auto Ctr., Inc. (*Plaza Auto III*), 360 N.L.R.B. No. 117, 2014 WL 2213747 (May 28, 2014).

sales.[68] He challenged commission calculations, asserting that the company failed to follow its policies regarding flat list commissions in a sale he made from the "flat list," with the result that he was underpaid for that sale.[69] In addition, Aguirre complained about the employer deducting a portion of the cost of repair for a damaged vehicle equally from all salesmen in the event that no one admitted to causing the damage.[70] Further, Aguirre contacted the state wage and hour agency and advised other employees that they were entitled to the minimum wage as a draw against commissions.[71] Thereafter, one of the sales managers called a meeting attended by the owner, Tony Plaza, as well as another manager and Aguirre.[72] At the meeting, Plaza told Aguirre that he was talking negatively and asking too many questions, that he should not be complaining about pay, and that if he did not trust them, he did not need to work there.[73] Aguirre got upset and called Plaza a "fucking crook," and an "asshole," and he further informed the owner that he was "stupid, nobody liked him, and everyone talked about him behind his back."[74] Aguirre then stood up, pushed his chair aside, and warned Mr. Plaza that if he fired him, he would regret it; whereupon Plaza did fire him.[75]

Clearly, Aguirre's conduct involved NLRA protected activity in that he acted in concert regarding his own as well as others' wages and working conditions.[76] As the Board noted, Aguirre "spoke with his fellow employees and managers about . . . breaks, restroom facilities, and compensation."[77] In *Plaza Auto*,[78] the NLRB reconsidered its earlier decision upon remand from the United States Court of Appeals for the Ninth Circuit which directed the Board to reweigh the NLRB's four-factor *Atlantic*

[68] *Id.* at *1.
[69] *Id.*
[70] *Id.* at *2.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *See id.* at *20 (Member Johnson, dissenting) (stating, "[i]t is undisputed that Aguirre was engaged in protected concerted activity when voicing his complaints").
[77] *Id.* at *1 (majority opinion).
[78] *Id.*

Steel test.[79] While the appellate court agreed with the Board that three of the four factors weighed in favor of protecting the employee's conduct, the court required the Board to reassess the fourth "nature of the outburst" factor to see if this should result in Aguirre's conduct losing the Act's protection.[80] The Ninth Circuit noted that the ALJ had found that despite the protected activity involved, the salesman's obscene remarks and personal attacks on the owner resulted in a loss of the protection of the Act.[81] In contrast to the ALJ's finding, the Board initially found that the conduct was not so severe as to result in the loss of the Act's protection.[82] Upon remand to the NLRB from the appellate court, the Board once again found that the employer violated the Act when it discharged the salesman and that the employee did not lose the protection of the Act because of his outburst.[83]

Following the appellate court's direction to reweigh the "nature of the outburst" factor, the Board held that the employee's outburst "solely involved obscene and denigrating remarks that constituted insubordination" and did not involve "menacing, physically aggressive, or belligerent conduct."[84] In addition, the Board found that the other three factors "compellingly favor[ed] Aguirre's retaining protection."[85] The Board looked to the precedent of *Kiewit Power Constructors Co. v. NLRB*,[86] a case involving employee language to a supervisor that warned of unfavorable outcomes for the employer if it disciplined or discharged employees for their conduct.[87] As noted in *Plaza Auto*, the Kiewit employees' statements were deemed not physically threatening, and the D.C. Circuit enforced the Board's *Kiewit* decision.[88] Moreover, the Board, invoking *Kiewit*,

[79] *See* Green, *supra* note 38, at 1639 (discussing the NLRB's 2014 *Plaza Auto* decision and its interpretation of *Atlantic Steel*). The four factors from *Atlantic Steel Co.* are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's [ULP]." 245 N.L.R.B. 814, 816 (1979).

[80] Plaza Auto Ctr., Inc. v. NLRB (*Plaza Auto II*), 664 F.3d 286, 296 (9th Cir. 2011).

[81] *Id.* at 291.

[82] *Id.*; *see* Plaza Auto Ctr., Inc. (*Plaza Auto I*), 355 N.L.R.B. 493 (2010).

[83] *Plaza Auto III*, 2014 WL 2213747, at *1.

[84] *Id.* at *4.

[85] *Id.*

[86] Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22 (D.C. Cir. 2011).

[87] *Id.* at 24, 29 n.2.

[88] *See Plaza Auto III*, 2014 WL 2213747, at *5–6.

emphasized in *Plaza Auto* that employee statements must be weighed objectively rather than subjectively.[89] Thus, when viewed objectively in the Board's view, the fact that Aguirre rose from his chair and pushed it aside was insufficient to find that his conduct was menacing, physically aggressive, or belligerent.[90] In addition, Plaza testified that he fired Aguirre for his verbal abuse and would not have fired him otherwise.[91]

Even though the Board agreed with the Ninth Circuit that the "nature of the outburst" factor from *Atlantic Steel* weighed against protection of Aguirre's conduct, finding his remarks repeatedly profane and insulting in a face-to-face encounter, the Board found that this did not require it to find that Aguirre lost the Act's protection.[92] Rather, the Board found that the other three factors weighed in favor of protection, and outweighed the one factor that worked against Aguirre.[93] Thus, the subject matter surrounding the encounter weighed in favor of protected conduct because it involved concerted complaints regarding terms and conditions of employment, and also because it occurred in a private meeting, as opposed to on a public work floor where other workers could hear.[94] Also, the employer provoked Aguirre's outburst by telling him he could quit if he did not like the employer's policies, and by implying that continuing to engage in § 7 protected activity was incompatible with remaining employed.[95] Tony Plaza essentially refused to deal with Aguirre's complaints and indicated hostility to his conduct, conduct that was protected by the Act.[96] The timing of Aguirre's outburst, which occurred immediately after Plaza's refusal to deal with the substance of Aguirre's complaints, and the implicit threat of discharge if Aguirre continued to complain, all provoked the outburst, which the Board concluded would not have occurred absent the provocation.[97] The Board provided a reasoned

[89] *Id.*
[90] *Id.* at *5.
[91] *Id.* at *9.
[92] *Id.* at *10.
[93] *Id.* at *11.
[94] *Id.*
[95] *Id.* at *12.
[96] *Id.*
[97] *Id.* at *13. The Board also noted that Aguirre had not used such profanity before, that his disciplinary record was spotless, and that he had not previously engaged in violent or threatening behavior. *Id.*

explanation, keeping with applicable law in light of assessing Aguirre's outburst for menace, aggressiveness, or belligerence by an objective standard.[98] The Board rejected the ALJ's belligerence finding, and ordered Aguirre's reinstatement with backpay and other benefits intact, expungement of any negative information in his files regarding the discharge, and posting of appropriate notices.[99]

Board Member Johnson dissented from the majority's decision, finding that Aguirre's discharge was clearly justified because his conduct lost the Act's protection.[100] Johnson stated that protected concerted activity should not shield employees who "curse, denigrate, and defy their managers" just because the audience is small, there is provocation, and there are no "overt physical threats."[101] Johnson focused on the Ninth Circuit's remand instructions, particularly with respect to the "nature of the outburst" factor from *Atlantic Steel*.[102] He viewed the majority opinion as not giving "full effect" to the ALJ's "factual finding that Aguirre engaged in physically aggressive, menacing, or belligerent behavior."[103] Johnson rejected the majority's reweighing of the other three factors that favored protection against the one that did not.[104] He objected to the majority's presumption that profanity is a reality of industrial life, finding that, in contrast to a "Scorsese film,"[105] an expectation of civility at work is both reasonable and necessary.[106] Johnson drew distinctions based upon the cultural context of the business, including the size of the enterprise and the values of the owners, as well as what was accepted behavior at the particular workplace.[107] Johnson would not excuse a "profane and

[98] *Id.* at *15–16.

[99] *Id.* at *16.

[100] *Id.* at *19 (Member Johnson, dissenting).

[101] *Id.*

[102] *Id.* at *20 (citing Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979)).

[103] *Id.* at *21.

[104] *Id.* at *22.

[105] *Id.* at *23 & n.16 (referencing the film "The Wolf of Wall Street," which was reported to set a record high with 560 uses of the "f-word" in a film).

[106] *Id.* at *23.

[107] *Id.* This last factor seems particularly important in that an employer can hardly complain about an employee using the same language that it uses, unless of course such language would undermine the employer's ability to supervise and discipline. Still, one cannot help but think that what is good for the employee might

demeaning personal attack on Plaza" simply because it took place in a private room away from the main area or shop floor.[108] He then noted that employers have a duty based upon other employment laws to monitor profanity that may "be viewed as harassing, bullying, creating a hostile work environment, or a warning sign of workplace violence."[109] Johnson warned that "[t]he Board is not an 'überagency' authorized to ignore those laws in its efforts to protect . . . § 7 rights."[110] Johnson viewed the Board's protection of misconduct as working against " 'industrial peace' and labor relations stability," both goals of the NLRA.[111] Johnson would have preferred that Aguirre continue to pursue redress on the wage issue through government agencies rather than launching into "a profane, personally abusive rant."[112]

It is interesting that neither the majority nor the dissenting opinion in *Plaza Auto* noted that there were three members of management versus one employee, Aguirre, in the small room where the disciplinary meeting, Aguirre's outburst, and his discharge took place. Based upon numbers alone, management certainly had more physical power than one lone employee, and the facts indicate that when Aguirre stood up and pushed his chair away to get out of the room, two managers also stood up.[113] Historically, the Board has long recognized the importance of an employee being able to request a union representative to accompany the employee on an investigatory interview that reasonably could lead to discipline, but, in *Plaza Auto*, there was neither a union present nor such a request.[114]

be good for the employer as well, especially under a statute such as the NLRA that was intended to equalize bargaining power between employers and employees.

[108] *Id.* at *24.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at *8 n.6 (majority opinion).

[114] The right to request a union representative in this context is often referred to as a "*Weingarten* right." In *NLRB v. J. Weingarten, Inc.*, the Supreme Court upheld the NLRB's decision that, based upon § 7 of the NLRA, an employee has the right to request that a union representative be present at an investigatory interview that the employee reasonably fears might lead to discipline. 420 U.S. 251, 267–68 (1975); *see also* Christine Neylon O'Brien, *The NLRB Waffling on* Weingarten *Rights*, 37 LOY. U. CHI. L.J. 111, 114 (2005) (detailing the NLRB's changing position on *Weingarten* rights in the non-union context).

C. Starbucks

In *Starbucks Corp.*,[115] the NLRB reconsidered a case involving face-to-face profanity upon remand from the Second Circuit.[116] When the case was previously decided, the Board, applying the *Atlantic Steel* test, upheld an ALJ's finding that the employer violated § 8(a)(1) and (3) of the Act by terminating employee Joseph Agins for his union support.[117] The district manager of the store where Agins worked prohibited employees from wearing union pins, and on the day prior to the incident in question, the manager ordered employees to remove union pins or be sent home.[118] The next day, while off duty, Agins was engaged in union activity when he swore at Yablon, an off-duty assistant manager from another Starbucks store, in front of customers at the Starbucks store where Agins worked.[119] The ALJ found that Yablon asked Agins about Agins's father's support of the union, and that Agins then brought up Yablon's earlier derogatory remarks to Agins's father, which had occurred at an event where Agins and his father were distributing union promotional materials.[120] Thereafter, the conversation grew into an argument with both men speaking loudly and using obscenities and vulgar hand gestures.[121] Agins told Yablon: "You can go fuck yourself, if you want to fuck me up, go ahead, I'm here."[122] Friends of Agins calmed him down, and the assistant manager in the store told Yablon to "leave it alone," whereupon Yablon "chuckled" and left the store.[123] Agins did not swear at or threaten the assistant store manager who was on duty; instead, he listened and remained seated while being admonished after the incident.[124]

[115] Starbucks IV, 360 N.L.R.B. No. 134, 2014 WL 2736112 (June 16, 2014).

[116] *Id.* at *1; *see generally* NLRB v. Starbucks Corp. (*Starbucks III*), 679 F.3d 70 (2d Cir. 2012).

[117] *See* Starbucks Corp. (*Starbucks II*), 355 N.L.R.B. 636 (2010); *see also* Starbucks Corp. (*Starbucks I*), 354 N.L.R.B. 876 (2009).

[118] *Starbucks IV*, 2014 WL 2736112, at *2.

[119] *Id.* at *1–2.

[120] *Id.* at *2 & n.6.

[121] *Id.* at *2.

[122] *Id.*

[123] *Id.*

[124] *Id.*

Agins had been involved in an incident six months earlier, where he asked Tanya James, the same assistant manager who intervened with Yablon, for help, but there was a delay, and when she arrived to help, he said "about damn time" and angrily put a blender in the sink; Agins then said "this is bullshit" and told James to "do everything your damn self."[125] Agins was suspended for several days over this misbehavior, and he apologized upon his return.[126] The employer testified that it prepared a written warning that Agins would be terminated if he repeated this behavior, but interestingly, the ALJ credited Agins's testimony that he never received the alleged written warning.[127]

Agins was terminated several weeks after the latter incident with Yablon, and the discharge memorandum indicated that he was not eligible for rehire because he "was insubordinate and threatened the store manager" and because he "strongly support[ed] the IWW union."[128] The Board's General Counsel argued that Agins's discharge was unlawful, applying analysis from both *Atlantic Steel* and *Wright Line*.[129] The Second Circuit agreed with the Board's findings of interference with protected activity regarding, among other things: the employer prohibiting employees discussing the union while off duty; rules preventing talking about terms and conditions of employment; a discriminatory prohibition regarding use of the bulletin board for non-work items, including union materials; and discriminatory work assignments.[130] However, the court made clear that the four-factor *Atlantic Steel* analysis was inappropriate in a case where an employee outburst occurs in front of customers because the employer has a legitimate concern to prevent such a public outburst from happening.[131] Rather, the court noted that the *Atlantic Steel* test is geared to an outburst on the factory floor or a back room.[132] The first factor from *Atlantic Steel* is the place of the outburst, but the concern in *Atlantic Steel* was whether other

[125] *Id.* at *1.
[126] *Id.*
[127] *Id.*
[128] *Id.* at *2.
[129] *Id.* (first citing Atl. Steel Co., 245 N.L.R.B. 814 (1979); then citing Wright Line, 251 N.L.R.B. 1083 (1980)).
[130] *See id.* at *3 n.8.
[131] *See id.* at *3.
[132] *See id.*

employees were present such that the outburst would impair employer discipline, as well as whether the outburst occurred during a grievance proceeding or contract negotiations.[133] Upon remand, the court instructed the Board to determine "what standard should apply when an employee, 'while discussing employment issues, utters obscenities in the presence of customers.' "[134]

The Board on remand in *Starbucks* accepted the Second Circuit's ruling regarding the inappropriateness of the *Atlantic Steel* analysis to the instant case.[135] The majority of the panel then simply assumed that Agins lost the protection of the Act when he engaged in the obscene outburst in front of customers, but nonetheless managed to find protection for Agins in a *Wright Line* analysis.[136] Under *Wright Line*, the "direct, documentary evidence of unlawful motivation" was provided by the antiunion animus that appeared in the employer's written record of the discharge decision, where the reasons cited for firing Agins concluded with the fact that he strongly supported the union.[137] As the Board noted, the General Counsel must establish, "by a preponderance of the evidence, that an employee's union activities were a motivating factor in the employer's decision to take adverse action against the employee."[138] The three elements needed to prove an employer's unlawful motive are: union activity by the employee, the employer's knowledge of such, and antiunion animus.[139] All of these elements were readily present on the facts in the *Starbucks* case, and thus the General Counsel met its burden.[140]

Once the General Counsel met its burden under the *Wright Line* test, the burden then shifted to the employer to establish by a preponderance of the evidence that it would have taken the same action absent Agins's protected activities.[141] The employer

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[133] *See id.*

[134] *Id.* (quoting Starbucks III, 679 F.3d 70, 80 (2d Cir. 2012)).

[135] *Id.*

[136] *Id.*

[137] *Id.* at *3–5. It is not all that common to see such blatant evidence of antiunion animus in written documentation of an adverse employment decision, and it was clear that this language was critical to the Board's decision.

[138] *Id.* at *3.

[139] *Id.*

[140] *Id.* at *4.

[141] *Id.*

alleged that Agins was discharged in accordance with the final warning sent to him in May, and that the employer was following valid rules in discharging him, but the Board found that the record did not support that version of events.[142] Rather, the Board found that the employer treated other employees less harshly, even when their misconduct was worse.[143] The Board noted that Agins's misconduct was provoked by a supervisor who engaged in the same profanity, and yet the supervisor was not disciplined.[144] Equally damning to the employer's defense was its incomplete evidence as to the source of the decision to discharge Agins, as well as its "exaggerated version" of Agins's conduct and interpersonal issues, all of which the ALJ discredited.[145] The ALJ so noted, and the Board agreed, that the assertion of false reasons for the employment action created an inference that the real reason was unlawful.[146] Moreover, the Board took into account the fact that the ALJ credited Agins's testimony that he never received the final written warning after the May incident.[147] Finally, the Board emphasized that despite the earlier May incident for which Agins was disciplined, six months had passed, and the direct evidence of unlawful motivation in his discharge record made it difficult to believe that Agins would have been discharged even if he had not engaged in protected activity.[148] Thus, the Board ruled that even if it assumed Agins's November 21 actions—cursing at Yablon in public—exceeded the Act's protection, his discharge was unlawful under a *Wright Line* analysis.[149] In effect, the Board ordered his reinstatement with backpay, the removal of adverse information in his employment record, and notice posting to not commit ULPs in the future.[150]

Board Member Miscimarra concurred in the *Starbucks* decision, agreeing that the record supported the finding that Agins's discharge violated the NLRA in accordance with the *Wright Line* analysis.[151] However, Miscimarra objected to the

[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at *5.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at *5–6.
[151] *Id.* at *8 (Member Miscimarra, concurring).

majority's failure to create a standard for retail employees who engage in misconduct in front of customers because, in his view, that was what the Second Circuit requested of the Board when it remanded the case.[152] In Miscimarra's view, the appellate court specifically outlined the inappropriateness of the *Atlantic Steel* test to the retail setting, where employers have a legitimate concern that employee outbursts *not* contain obscenities in front of customers.[153] Miscimarra also expressed concern because the court noted that Agins was off duty, but on the employer's premises, at the time of his outburst, and while the court directed the Board to address this specific situation, the majority failed to do so.[154] Miscimarra recommended adopting the standard that the Board used in its earlier *Restaurant Horikawa* decision,[155] which provides that "retail employees lose the Act's protection if their conduct causes disruption of or interference with the business."[156] Further, Miscimarra would apply the rule that retail employees who are off duty but inside the store, and who engage in disruptive conduct in the presence of customers, lose the protection of the Act.[157] He noted that the Act does not permit employees who are either on or off duty to occupy, disrupt or interfere with normal operations.[158] Miscimarra found that Agins's conduct met this standard and thus lost the Act's protection; he noted that the ALJ also found that Agins's actions were disruptive, and that the argument could have resulted in a disruption of business.[159]

The Board's decision in *Starbucks* was limited to its unique facts—facts that weighed against the employer in light of its confused managerial decision making, as well as the damning direct evidence of antiunion animus in Agins's discharge paperwork. Thus, the majority opinion in *Starbucks* left some questions remaining regarding the general standard that the

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[152] *Id.*

[153] *Id.*

[154] *Id.* at *9.

[155] *Id.* at *9 (citing G.T.A. Enters., Inc. (*Restaurant Horikawa*), 260 N.L.R.B. 197 (1982)).

[156] *Id.* at *9; *see also Restaurant Horikawa*, 260 N.L.R.B. at 198.

[157] *Starbucks IV*, 2014 WL 2736112, at *10 (Member Miscimarra, concurring).

[158] *Id.*

[159] *Id.* at *10–11.

Board will apply to profanity in the retail store context—as opposed to on the shop floor—in the absence of direct evidence of unlawful motivation.

D. Pacific Bell Telephone Company*: A Case of Double Entendre on Union Buttons*

In *Pacific Bell Telephone Co.*,[160] the Board considered a case that arose in the context of negotiating a new collective bargaining agreement ("CBA").[161] The prior CBA contained a Branded Apparel Program ("BAP") provision in the appendix for dress code that included branded shirts for professional appearance.[162] During the bargaining, the parties agreed to display initials for both the company and the union on the BAP shirts, but mention of the latter was not included in the CBA appendix.[163] Upon expiration of the 2009-2012 CBA, the union distributed buttons that said, among other things: "WTF, Where's The Fairness," "FTW Fight To Win," and "CUT the CRAP! Not My Healthcare."[164] The technicians who wore and refused to remove these dual-meaning union pins and stickers were not dispatched into the field, and instead were sent home without pay.[165] The Board found that these buttons and stickers were "not so vulgar and offensive as to cause employees wearing them to lose the protection of the Act."[166] The fact that the acronyms contained a nonprofane, nonoffensive interpretation on the face of the buttons and stickers alleviated the concern that they were inherently inflammatory.[167] The Board also found that the "CUT the CRAP! Not My Healthcare" slogan was neither so vulgar nor so obscene as to lose the Act's protection.[168]

The Board noted that § 7 encompasses the right of employees to wear union insignia and buttons at work.[169] The burden is on the employer to establish special circumstances that would

[160] 362 N.L.R.B. No. 105, 2015 WL 3492100 (June 2, 2015).
[161] *Id.* at *1.
[162] *Id.*
[163] *Id.*
[164] *Id.* at *2.
[165] *Id.*
[166] *Id.* at *3.
[167] *Id.*
[168] *Id.* at *4.
[169] *Id.* (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801–03 (1945)).

outweigh this right and justify a restriction.[170] Merely wearing a uniform is insufficient justification, as is customer exposure to the union insignia.[171] The NLRB found that the employer did not demonstrate special circumstances, that the union did not waive its right to bargain about the issue of appearance, and that the employer inconsistently enforced its BAP, having allowed many non-BAP buttons, stickers, and caps that were both union-affiliated and not.[172] In addition, the employer's ban included all union insignia, not just those that it deemed offensive as overtly vulgar or obscene.[173]

It is interesting to compare the *Pacific Bell* case with a few other recent Board and court rulings in cases also involving pins and insignia. In another such case involving pins and insignia but not profanity, the NLRB found that car dealer Boch Honda violated the Act with its overbroad social media policy, which included, among other things, a prohibition on using the employer's logos in any manner, and its dress code, which banned use of pins, insignias, and message clothing for employees in contact with the public.[174] The Board majority determined that these policies interfered with employee engagement in protected concerted activities, and noted that the dress code prohibition on employees' right to wear union insignia was overly broad and not justified by special circumstances.[175]

In an earlier telephone company apparel case not involving profanity, shirts donned in support of a union in its negotiations with AT&T Connecticut read "Inmate #" on the front and "Prisoner of AT$T" on the back.[176] The D.C. Circuit ruled in favor of AT&T, refusing to enforce the NLRB's order that it was an ULP for the company to insist that employees visiting customer

[170] *Id.* (citing Komatsu Am. Corp., 342 N.L.R.B. 649, 650 (2004)).

[171] *Id.* (first citing P.S.K. Supermarkets, Inc., 349 N.L.R.B. 34, 35 (2007); then citing Meijer, Inc., 318 N.L.R.B. 50, 50 (1995); and then citing United Parcel Serv., 312 N.L.R.B. 596, 596–98 (1993)).

[172] *Id.* at *5.

[173] *Id.* The employer's ban included buttons saying "No on Prop 32," a controversial political position that the employer did not want customers assuming it endorsed. *Id.* at *6. The Board, however, found that the wearing of such buttons was also protected by § 7 of the NLRA. *Id.*

[174] Boch Imps., Inc. (*Boch Honda*), 362 N.L.R.B. No. 83, 2015 WL 1956199, at *1–2 (Apr. 30, 2015).

[175] *Id.* at *3.

[176] S. New Eng. Tel. Co., 356 N.L.R.B. No. 118, 2011 WL 1090112, at *1 (Mar. 24, 2011).

homes or working in public remove the shirts or be suspended.[177] The court discussed making a decision based upon common sense, noting that customers could believe that the employees were prisoners, and customers in Connecticut could be concerned in light of a local triple murder resulting from a home invasion.[178] The court looked to the "special circumstances" exception in *Republic Aviation* before it stated: "The ultimate question for the Board in any individual case is whether the employer has shown a reasonable belief that the particular apparel may harm the employer's relationship with its customers or its public image."[179]

Last, in its *NLRB v. Starbucks Corp.*[180] decision, the Court of Appeals for the Second Circuit found that the Board went too far in invalidating Starbucks' one-button limit for employees in light of the company's legitimate managerial interest in its public image and the fact that it permitted one union button.[181] Clearly, appellate courts seem reluctant to adopt the Board's broad stance in support of § 7 protected expression when doing so comes at the expense of the employer's reputation or image. Nonetheless, the Board and ALJs continue to adopt the view that employer policies on logos and insignias must not be overly broad absent special circumstances that justify the restriction on employees' right to wear union insignia.[182]

[177] S. New Eng. Tel. Co. v. NLRB, 793 F.3d 93, 94 (D.C. Cir. 2015).

[178] *Id.* at 95.

[179] *Id.* at 97; *see* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801–03 (1945).

[180] 679 F.3d 70 (2012).

[181] *Id.* at 78.

[182] *See, e.g.*, Wal-Mart Stores, Inc., 13-CA-114222, slip op. at 9–11, 2015 WL 3526139 (N.L.R.B. Div. of Judges June 4, 2015), https://www.nlrb.gov/case/13-CA-114222 (finding Wal-Mart dress code while on duty was overly broad and not justified by special circumstances in that it required such items as logos to be small and not distracting). The policy provided: "Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted[.]" *Id.* at 1. The employer revised the policy in 2014 to provide that small logos were to be "no larger than the size of your associate name badge[.]" *Id.* at 3. The ALJ in *Wal-Mart* cited the Board's *Boch Honda* decision in support of his opinion. *Id.* at 7 (citing Boch Imps., Inc. (*Boch Honda*), 362 N.L.R.B. No. 83, 2015 WL 1956199 (Apr. 30, 2015)).

E. Cooper Tire

In *Cooper Tire & Rubber Co.*,[183] the company had a longstanding collective bargaining relationship with the union that represented more than a thousand production and maintenance workers at its Findlay facility.[184] During a brief period when a prior collective bargaining agreement had expired, and after the company made its last, best, final offer, the union members voted not to ratify the agreement, and the company locked out the bargaining unit employees.[185] The company continued to operate with supervisors, managers, and replacement workers, as the parties continued to bargain while the locked-out employees maintained peaceful picket lines.[186] On the evening of a hog roast sponsored by the union at the union hall adjacent to the picket line, a number of attendees joined the picket line.[187] Tempers flared, and the locked-out employees exhibited profanity and vulgar gestures towards the "scabs" who were taking their jobs, as evidenced on security video.[188] When a locked-out employee, Runion, denigrated a replacement worker's diet as consisting of Kentucky Fried Chicken and watermelon, his remark led to his discharge in light of the company's policy against racial harassment.[189]

The union filed a grievance alleging that Runion's discharge was not for "just cause."[190] The arbitrator, however, upheld the discharge in light of the employer's racial harassment policy, finding that the misconduct was serious, especially in the context of the picket line where comments could escalate into violence.[191] The NLRB refused to defer to the arbitration award, and issued a complaint against Cooper Tire.[192] The Board's General Counsel

[183] No. 08-CA-087155, 2015 WL 3544120 (N.L.R.B. Div. of Judges June 5, 2015), *available at* https://www.nlrb.gov/case/08-CA-087155.

[184] *Id.* at 2.

[185] *Id*. at 2–3.

[186] *Id*.

[187] *Id*. at 3.

[188] *Id.* at 3–5.

[189] *Id.* at 6. The policy prohibited harassment based upon race including unwelcome comments or conduct relating to race "which fails to respect the dignity and feelings of any Cooper employee." *Id.* The policy provided that "Cooper employees found to be harassing others will be subject to disciplinary action, up to and including discharge." *Id.*

[190] *Id.* at 6–7.

[191] *Id.* at 7.

[192] *Id.*

raised the issue that the arbitrator did not consider whether the conduct was protected under the NLRA and whether the award was repugnant to the Act.[193] The General Counsel noted that an African-American employee who called his supervisor a "dumb white hillbilly asshole" was merely suspended and not discharged as Runion was, thus arguing that Runion's punishment for a racial remark was too severe.[194]

As the ALJ noted in *Cooper Tire*, picketing is protected by § 7 of the Act, and personal confrontation is a necessary part of picketing to accomplish the union's cause.[195] Thus, the critical question was whether Runion's conduct exceeded the Act's protection.[196] Runion's comments were unaccompanied by threats or acts of violence, and "did not tend to coerce or intimidate employees in the exercise of their rights under the Act, nor did they raise a reasonable likelihood of an imminent physical confrontation."[197] This was so because even though they were "racist, offensive, and reprehensible . . . they were not violent in character, and they did not contain any overt or implied threats to replacement workers or their property."[198] The ALJ outlined Board precedent to support his findings, illustrating examples of far worse "obscene, insulting[,] and indecent" statements that involved sexual and racial slurs yet remained protected by the Act.[199]

The Board distinguishes between conduct in the workplace and that on the picket line, with more leeway afforded to conduct in the latter context as it is outside the workplace and not on working time.[200] In addition, the ALJ in *Cooper Tire* noted that the four-factor *Atlantic Steel* test was inappropriate since that test applies to workplace conduct.[201] The judge noted that the Board reinforced this concept in *Triple Play*, where it ruled that the *Atlantic Steel* test applies to balancing employee rights

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[193] *Id.* at 8.

[194] *Id.*

[195] *Id.* at 10.

[196] *Id.*

[197] *Id.* at 11 (citing Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), *enforced sub nom. Clear Pine Mouldings, Inc. v. NLRB*, 765 F.2d 148 (9th Cir. 1985)).

[198] *Id.* at 12.

[199] *Id.* at 12–13 (internal quotation marks omitted).

[200] *Id.* at 14.

[201] *Id.* at 14–15 & n.15 (citing Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979)).

against the employer's interest in maintaining control over the workplace, a concern that generally arises in cases involving face-to-face communications, as opposed to Facebook comments.[202] The ALJ in *Cooper Tire* found that under the relevant precedent regarding picket line activity, Runion's conduct was protected so that his discharge violated the Act, and deferral to the arbitration award was inappropriate.[203] The ALJ reasoned that the arbitrator did not consider Runion's rights under the NLRA, nor did he apply well-established Board precedent, instead applying a standard providing for *less* leeway on a picket line than in the workplace, which was "palpably wrong" and thus clearly repugnant to the Act.[204] The arbitrator's limited consideration of the cause for discharge to the context of the collective bargaining agreement and the company's policy against racial harassment did not encompass whether the cause was "imposed for a reason that is prohibited by the Act," such as engaging in protected concerted activity.[205] The fact that Runion made two racist statements was insufficient to remove his picketing activity from the protection of the Act, and the ALJ ordered him reinstated with backpay.[206]

III. SOCIAL MEDIA CASES

The next four cases involved employer actions regarding employee communications on social media, as well as employer rules and discipline that unduly infringed upon employees' § 7 rights.

A. Triple Play Sports Bar and Grille

In *Triple Play*,[207] the Board ruled that the employer violated the NLRA by discharging two employees for their protected concerted activity on Facebook.[208] The social media exchange involved the employees' complaints regarding their boss—the

[202] *Id.* at 15 (citing Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705, at *4 (Aug. 22, 2014)).

[203] *Id.* at 16.

[204] *Id.* at 17 (internal quotation marks omitted) (citation omitted).

[205] *Id.* at 18–19 (quoting Anheuser-Busch, Inc., 351 N.L.R.B. 644, 647 (2007)).

[206] *Id.* at 19.

[207] Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705 (Aug. 22, 2014), *aff'd sub nom.* Three D, LLC v. NLRB, 629 F. App'x 33 (2d Cir. 2015).

[208] *Id.* at *1.

company's co-owner—and his incorrect handling of payroll, which included making inaccurate tax deductions such that employees owed money on their taxes.[209] The Board found that the employer violated the NLRA by threatening legal action against employees for engaging in protected activity on social media and by maintaining its overly restrictive "Internet/Blogging" policy.[210] The Facebook communication of the employees was clearly concerted and fell under the "mutual aid or protection" prong of § 7 of the Act.[211] Thus, the Board limited its inquiry to whether the activity lost the protection of the Act in light of the employer's legitimate interests.[212]

The employees communicated on Facebook between themselves and with customers, complaining that because the owners of Triple Play were unable to do the tax paperwork correctly, the employees owed money; a complaint they expressed by posting exclamations such as "Wtf!!!!" and "I FUCKING OWE MONEY TOO!"[213] One employee wrote that she was "calling the labor board to look into it [because a co-owner of Triple Play] still owes me about 2000 in paychecks."[214] The Facebook posts described the Triple Play co-owner as "a shady little man . . . [who probably] pocketed it all from all our paychecks."[215] The two employees involved in the Facebook exchange were discharged, and one was told "she was not loyal enough" to be working for the company in light of her Facebook comment.[216] The second employee was terminated after interrogation regarding his Facebook "Like" selection with respect to the employees' online discussion because he "liked the disparaging and defamatory comments."[217] He was told that company lawyers advised termination because the Facebook conversation was defamatory and that he would be hearing from these lawyers, but the employer and its lawyers did not pursue the matter.[218]

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[209] *Id.* at *1–2.
[210] *Id.* at *1.
[211] *Id.* at *1.
[212] *Id.*
[213] *Id.* at *2.
[214] *Id.*
[215] *Id.*
[216] *Id.* at *3.
[217] *Id.*
[218] *Id.*

The employer argued that the terminated employees' Facebook activity lost the protection of the Act because they adopted defamatory and disparaging comments on a public forum that was accessible to employees and customers and damaged the company's public image.[219] The NLRB found that the four-part test announced in *Atlantic Steel* was "not well suited to address issues that arise in cases like this one involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties."[220] This was true because *Atlantic Steel*'s four-part analysis begins with the place of discussion, which typically involves face-to-face communication in the workplace between an employee and a supervisor or manager.[221] The Board found that the "place of discussion" factor from *Atlantic Steel* was clearly inapplicable to the facts of the social media discussion in *Triple Play* because that discussion did not involve confrontation with a manager or supervisor in the workplace.[222] The NLRB noted that it has not applied *Atlantic Steel* to communications by employees with third parties.[223] Instead, the Board tested the social media conduct under its rulings in *Jefferson Standard* and *Linn*, and found that the comments were protected and the discharges unlawful under the *Wright Line* analysis.[224]

The Board assessed employee Sanzone's comment—"I owe too. Such an asshole."—as well as employee Spinella's indication that he "liked" employee LaFrance's update—"Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!"—as protected, and refused to include comments posted by others in the Facebook exchange.[225] These comments were qualitatively different in the Board's view from

[219] *Id.* at *4.

[220] *Id.*

[221] *Id.* at *4–5.

[222] *Id.* at *4–5 & n.14 (citing Starbucks I, 354 N.L.R.B. 876, 877–78 (2009) (noting that the Board applied the *Atlantic Steel* test to confrontation between manager and employee in the workplace)).

[223] *Id.* at *4.

[224] *Id. (*citing NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 471–72 (1953); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 65–66 (1966); Wright Line, 251 N.L.R.B. 1083, 1089 (1980)).

[225] *Id.* at *6.

the disparaging communications in *Jefferson Standard*.[226] The mention of a labor dispute as required for protection in *Jefferson Standard* was evidenced in *Triple Play* by the tax withholding reference, and the comments were not directed at the general public, nor were they so disloyal or disparaging that they lost the protection of the Act, as did the communications in *Jefferson Standard*.[227] The purpose of the Facebook comments was mutual support rather than disparagement of the employer's products or services.[228] The comments were not defamatory because they were not maliciously untrue; at most, they expressed a negative personal opinion of the co-owner of Triple Play.[229]

The Board found that the discharge of the two employees for their protected activity violated the NLRA, and that the Internet/Blogging policy in the Triple Play handbook was unlawfully overbroad, and thus also violated the Act, because employees would reasonably construe the policy as prohibiting protected activity.[230] The policy restricted communication about confidential and proprietary information as well as inappropriate discussions about the company, management, and co-workers.[231] The use of the word "inappropriate" was "sufficiently imprecise" in the Board's view, especially in light of the paucity of illustrative examples of prohibited conduct.[232] This was particularly true in the context of the employer's termination of two employees for their protected activity on Facebook.[233] The Board found that the general savings clause that attempted to alleviate any illegal impact of the policy did not save it from being unlawful.[234]

Board Member Miscimarra joined in most of the panel's opinion in *Triple Play* but dissented in part regarding the Internet/Blogging policy, finding it lawful.[235] Miscimarra

[226] *Id.*
[227] *Id.* at *6–7.
[228] *Id.* at *7.
[229] *Id.*
[230] *Id.* at *8.
[231] *Id.*
[232] *Id.* at *9 (citing First Transit, Inc., 360 N.L.R.B. No. 72, 2014 WL 1321108, at *3 (Apr. 2, 2014)).
[233] *Id.*
[234] *Id.*
[235] *Id.* at *11 & n.3 (Member Miscimarra, dissenting in part) (noting he "would reexamine this standard in an appropriate future case").

disagreed with the standard applied by the majority, particularly the majority's application of the first prong of the test in *Lutheran Heritage Village-Livonia*.[236] That prong would find an employer's policy unlawful if employees would reasonably construe the language to prohibit § 7 activity.[237] He interpreted Triple Play's policy as being legitimately aimed at preventing the revelation of proprietary information about the company.[238] The dissent also noted that the employer did not refer to the policy when it discharged the employees in question, instead saying that the "disloyal and defamatory" Facebook comments were the basis for termination.[239] The United States Court of Appeals for the Second Circuit affirmed the NLRB's decision in a brief, unpublished summary order.[240]

The most significant pronouncement the Board made in *Triple Play* is that it would not apply the *Atlantic Steel* four-factor test when evaluating whether employee concerted activity on social media should retain the protection of the Act.[241] Because the "place of discussion" factor in social media situations is not analogous to a workplace confrontation with an employer, the Board found that Sanzone's use of a single expletive to describe her manager on a social media website accessible to other offsite, off-duty employees and customers should not give rise to an *Atlantic Steel* analysis.[242]

B. Bettie Page Clothing

The NLRB reconsidered and essentially affirmed a vacated decision and order that the Board incorporated by reference in *Bettie Page Clothing*.[243] This action was necessary because of the

[236] *Id.* at *11 (citing Martin Luther Mem'l Home, Inc. (*Lutheran Heritage Vill.-Livonia*), 343 N.L.R.B. 646, 646–47 (2004)).

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] Three D, LLC v. NLRB, 629 F. App'x 33, 38 (2d Cir. 2015). The NLRB argued for publication of the Second Circuit's decision in order to give the ruling precedential authority in the area of employees' online speech rights. *See* Steven Trader, *2nd Circ. Order on Facebook 'Likes' Not Precedent, Bar Says*, LAW 360, Oct. 26, 2015, http://www.law360.com/articles/718813/2nd-circ-order-on-facebook-likes-not-precedent-bar-says.

[241] *Triple Play*, 2014 WL 4182705, at *4.

[242] *Id.* at *5.

[243] Design Tech. Grp., LLC (*Bettie Page Clothing II*), 361 N.L.R.B. No. 79, 2014 WL 5524147, at *1 (Oct. 31, 2014) (Chairman Pearce and Members Hirozawa and

Supreme Court's decision in *NLRB v. Noel Canning*, a decision that, in holding challenged appointments to the NLRB invalid, effectively undermined the authority of deciding members behind the Board's earlier decision in the case.[244] The *Bettie Page Clothing* case involved a clothing store in the Haight-Ashbury district of San Francisco, California, where employees raised safety and other concerns regarding working conditions to their supervisor and the store owner, both in person and on Facebook, and were terminated as a result.[245] One terminated employee, Vanessa Morris, referenced the California Worker's Rights Handbook on Facebook and, noting that her mother worked for a law firm specializing in labor law, stated, "BOY will you be surprised by all the crap that's going on that's in violation."[246]

The ALJ in *Bettie Page Clothing* did not credit the supervisor's testimony that another one of the terminated employees called her a "bitch."[247] The NLRB ruled that the employees had engaged in protected concerted activity because they had raised concerns regarding terms and conditions of employment as well as mutual aid and protection, and thus were entitled to reinstatement, backpay, and rescission of the employer's unlawful handbook rules.[248] The company sought review of the Board's order; briefs have been filed and oral arguments have been heard by the D.C. Circuit.[249]

Schiffer) (affirming the rationale of the vacated decision and order in *Design Tech. Grp., LLC* (*Bettie Page Clothing I*), 359 N.L.R.B. No. 96, 2013 WL 1753561 (Apr. 19, 2013) (Chairman Pearce and Members Griffin and Block)). The appointments of Members Griffin and Block were deemed invalid in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[244] *Noel Canning*, 134 S. Ct. at 2578.

[245] *Bettie Page Clothing I*, 2013 WL 1753561, at *8–11.

[246] *Id.* at *11.

[247] *Id.* at *12.

[248] *Id.* at *1–3.

[249] *See* Design Tech. Grp. LLC Docket Activity, https://www.nlrb.gov/case/20-CA-035511 (last visited June 6, 2016), for access to the company's Petition for Review by the D.C. Circuit (Nov. 7, 2014), as well as the final Brief for the NLRB (May 8, 2015). The parties argued the appeal before the circuit court on January 1, 2016. *Id.*

C. Pier Sixty

In *Pier Sixty, LLC*,[250] the NLRB found in favor of a banquet server who was discharged for engaging in § 7 protected activity on Facebook, despite the profanities he expressed against his immediate boss.[251] The employees of a Manhattan catering company began organizing a union in part because of the degrading, disrespectful, and undignified treatment they purportedly were receiving from their immediate managers.[252] The employees brought complaints to the director of banquet services.[253] Later, just two days before the scheduled union election, servers were harassed for talking together at a function; they were told by the Assistant Director of Banquets, Robert McSweeney, not to talk and to spread out.[254] A server named Perez took a break and used his iPhone to post the following on his Facebook page: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[255] The post remained up until the day after the election.[256] When management became aware of the post, they asked McSweeney about the night of the posting, and he maintained that nothing out of the ordinary had occurred.[257] Perez was terminated for his comments.[258] The ALJ found that vulgarity and profanity were rampant at the employer's workplace among both employees and managers and that such conduct did not result in discipline for others.[259] The Board agreed with the ALJ that Perez's Facebook comments constituted protected concerted activity because they related to mistreatment of employees and sought to improve matters by supporting the

[250] Pier Sixty II, 362 N.L.R.B. No. 59, 2015 WL 1457688 (Mar. 31, 2015).
[251] *Id.* at *5.
[252] *Id.* at *1.
[253] *Id.*
[254] *Id.*
[255] *Id.* at *2.
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*

union in the upcoming election.[260] The NLRB also agreed with the ALJ that Perez's comments were not so egregious that he lost the protection of the Act.[261]

The Board in *Pier Sixty* evaluated the posting under the totality of the circumstances and considered the following factors in the record: (1) evidence of antiunion animus on the employer's part; (2) whether the employer provoked Perez; (3) whether the conduct was impulsive or deliberate; (4) the location, subject matter, and nature of the post; (5) whether the employer considered the language offensive; (6) whether it had a rule against such language; and (7) whether the discipline imposed was equivalent to that imposed on others for like conduct.[262] The Board noted that the employer did show hostility towards union activity as evidenced by ULPs in the period before the election, noting in particular the disparate enforcement of the employer's "no talk" rule.[263] The Board's assessment of the factors supported its finding that Perez was provoked; his postings were an impulsive reaction to McSweeney's commands and the stress created by months of protesting disrespectful treatment of servers.[264] In addition, the Board noted that the employer tolerated profane language, which was widespread at the catering company, and that Perez's reference to McSweeney's family was designed merely to intensify the insult, just as other managers had done to employees.[265] The location and subject matter of the posting weighed in favor of retaining protection of the Act since Perez was standing alone outside on break and was not disrupting the work environment or customers, and his comments only referenced previous complaints and encouraged union support.[266]

While the employer had a policy regarding "Other Forms of Harassment," which it cited in its discharge of Perez, the policy did not reference use of vulgar or offensive language in general; rather, the policy addressed such language when directed at protected classifications or statuses, none of which applied to

[260] *Id.* at *3.
[261] *Id.*
[262] *Id.*
[263] *Id.* at *4.
[264] *Id.*
[265] *Id.*
[266] *Id.*

Perez's comments about McSweeney.[267] Further, the employer had issued five written warnings to other employees for use of obscene language since 2005, yet no discharges resulted, even in cases where the employee was also insubordinate to a supervisor, which the Board did not find occurred in Perez's case.[268] Thus, the discharge of Perez exceeded the discipline meted out to others, and the employer violated § 8(a)(1) and (3) of the Act.[269]

Board Member Johnson dissented in part in *Pier Sixty*, finding that Perez's Facebook comments were both vulgar and obscene, that they lost the Act's protection, and that his discharge was not an ULP.[270] He agreed with the ALJ that the "no talk" rule was disparately enforced, violating § 8(a)(1).[271] However, Johnson determined that under the "totality of the circumstances," the employer was entitled to discipline Perez for his "offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family," and which Johnson categorized as "outrageous, individualized griping" that was "blatantly uncivil and opprobrious behavior."[272] Johnson noted that the posting was in fact publicly available.[273] Applying the totality of the circumstances analysis, Johnson found that the comments were not made impulsively, but rather deliberately; that they were left up for three days so that they could reach a broader audience of nonemployee friends; and that they contained an obscene, personal, and vicious attack on McSweeney and his family that was "qualitatively different" from other obscenity that the employer tolerated in the workplace.[274] The dissent criticized the Board panel's analysis of the totality of the circumstances as "an *Atlantic Steel* test on steroids that is even more susceptible to manipulation based upon 'agency whim' than the 4-factor *Atlantic Steel* test."[275] Johnson found that Perez's posting contained "a level of animus and aggression" toward McSweeney

[267] *Id.*
[268] *Id.*
[269] *Id.* at *5.
[270] *Id.* (Member Johnson, dissenting in part).
[271] *Id.* at *5 & n.2.
[272] *Id.* at *5.
[273] *Id.* at *5 & n.3.
[274] *Id.* at *5.
[275] *Id.* (footnote omitted).

that exceeded other statements that were tolerated.[276] He saw no merit in allowing employees to post statements that "cause irreparable damage to working relationships" simply because the behavior "happens to overlap with protected activity."[277]

The panel opinion in *Pier Sixty* once again reflects the Board's departure from the *Atlantic Steel* test in social media cases, with reference to its decision in *Triple Play*.[278] The Board adopts the ALJ's alternative test in *Pier Sixty*, namely "the totality of the circumstances."[279] The Board then incorporates a checklist of relevant factors in assessing whether a social media post that is otherwise protected by the Act should retain protection.[280] These factors include the presence of antiunion animus and provocation, as well as whether the conduct at issue was tolerated by the employer and whether the discipline was disproportionate to that meted out to others who had not engaged in protected concerted activity.[281]

D. Tinley Park Hotel & Convention Center

In yet another banquet server case, an NLRB ALJ found that the employer violated the NLRA by terminating a server named Santiago for her Facebook posts that violated the employer's handbook rule prohibiting disloyalty.[282] The ALJ ruled that the employer's disloyalty rule was overbroad and thus unlawful, and that three other rules were separate violations as they were facially unlawful.[283] The ALJ determined that Santiago's actions did not interfere with the work of others or the employer's operations.[284] The employer's handbook policies outlined prohibited conduct such as "[d]isloyalty, including disparaging or denigrating the food, beverages, or services of the company, its

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[276] *Id.*

[277] *Id.*

[278] *Id.* at *3 (majority opinion) (citing Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705, at *3 (Aug. 22, 2014)).

[279] *Id.* (citing Richmond Dist. Neighborhood Ctr., 361 N.L.R.B. No. 74, 2014 WL 5465462, at *2 & n.6 (Oct. 28, 2014) (examining the egregiousness of the conduct under all the circumstances)).

[280] *Id.* at *3.

[281] *Id.*

[282] Tinley Park Hotel & Convention Ctr., LLC, No. 13-CA-141609, slip op. at 1 (N.L.R.B. Div. of Judges June 16, 2015), https://www.nlrb.gov/case/13-CA-141609.

[283] *Id.* at 1–2, 8–10.

[284] *Id.* at 1.

guests, associates, or supervisors by making or publishing false or malicious statements."[285] Further, the employer prohibited unauthorized use of a telephone or frequent, unnecessary use of a telephone for personal business, or cell phone use during work hours, except for breaks.[286] The employer had employees sign a standard operating procedure where they agreed to restrictions on cell phone use.[287]

In *Tinley Park Hotel*, while on break during her shift, Santiago used her cell phone and allowed others to use it to take photos and post them on Facebook along with commentary, including remarks that she was working like a slave, all of which violated company policy.[288] Santiago denied such use when interviewed by her supervisors because she was fearful of losing her job.[289] Nonetheless, the ALJ ruled that the hotel and convention center operator ran afoul of the NLRA when it fired Santiago for violating company policy and damaging the reputation of the business; the ALJ also ruled that the employer had unlawfully maintained three other rules that unduly restricted protected concerted activity.[290] The ALJ noted that "an employer does not escape liability for an unlawful discharge because it asserts other, lawful reasons for the same disciplinary action."[291] The employer's assertion that it discharged Santiago for violating its lawful cell phone rule did not obviate the fact that she was also discharged for violating an unlawful rule—namely, violating the employer's disloyalty rule by posting photos with derogatory comments that depicted the company in an unfavorable light.[292] Limited exceptions were filed to the ALJ's decision by the General Counsel's office, exceptions seeking

[285] *Id.* at 2.
[286] *Id.* at 3.
[287] *Id.*
[288] *Id.* at 3–5.
[289] *Id.* at 5.
[290] *See id.* at 8–10; Jeff Zalesin, *Hotel Worker Wrongly Fired over Posting Selfies, NLRB Says*, LAW 360, June 17, 2015, http://www.law360.com/articles/669067/hotel-worker-wrongly-fired-over-posting-selfies-nlrb-says.
[291] *Tinley Park*, slip op. at 7 (citing A.T. & S.F. Mem'l Hosps., Inc., 234 N.L.R.B. 436, 436 (1978)).
[292] *Id.*

reimbursement for the complainant's work search expenses and requiring the employer to notify employees of rescinded unlawful rules in accordance with the Board's decision in *Purple Communications, Inc*.[293]

IV. PROFANITY ON UNION MATERIALS ON BREAKROOM WALL—OH WHAT A TANGLED WEB HE WEAVES . . .

The final case in the top ten involves employee dishonesty in response to an employer investigation prompted by employee complaints regarding sexual harassment that related to profane words and drawings.

In *Fresenius USA Manufacturing, Inc.*,[294] decided in 2015, the NLRB ruled that employee Grosso, who lied at an investigation about scribbling "vulgar, offensive, and . . . arguably threatening statements" on union materials relating to a decertification election, had initially engaged in protected activity, but his employer was justified in discharging him in light of his subsequent dishonesty.[295] The Board found that the company investigation was a good faith response to complaints from female employees about the comments.[296] The Board had issued a 2012 decision in the case that found that Grosso's discharge *violated* the Act, but the appointments of two of the three deciding Board members were later deemed invalid in *NLRB v. Noel Canning*,[297] thus requiring the Board to review de novo the ALJ's decision, the record, exceptions, and briefs.[298] Interestingly, prior to the Board's 2012 decision, an ALJ found that the employer had *not* violated the NLRA by discharging Grosso.[299]

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[293] *See* General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and Arguments in Support of the Exceptions at 1–2, Tinley Park Hotel & Convention Ctr., LLC, No. 13-CA-141609 (N.L.R.B. Div. of Judges June 16, 2015) (citing Purple Commc'ns, Inc., 361 N.L.R.B. No. 43, 2014 WL 4764786, at *6 (Sept. 24, 2014)), *available at* https://www.nlrb.gov/case/13-CA-141609.

[294] 362 N.L.R.B. No. 130 (*Fresenius II*), 2015 WL 3932160 (June 24, 2015).

[295] *Id.* at *1.

[296] *Id.*

[297] 134 S. Ct. 2550, 2578 (2014).

[298] *Fresenius II*, 2015 WL 3932160, at *1.

[299] *See* Fresenius USA Mfg., Inc. (*Fresenius I*), 358 N.L.R.B. No. 138, 2012 WL 4165822, at *34 (Sept. 19, 2012) (incorporating the ALJ's decision where ALJ found only one ULP occurred, namely, the employer instructing employee Grosso not to discuss the investigation with other employees).

On the facts as outlined in the Board's 2012 decision, Grosso, a union supporter, was concerned about an upcoming NLRB election where he feared that the union would be voted out.[300] Grosso feared this election result because, after the union had won an earlier election to represent two bargaining units of drivers and warehouse workers at Fresenius's Chester, New York manufacturing facility, the parties were unsuccessful in negotiating a collective bargaining agreement.[301] Grosso wrote the following statements on union newsletters in the employee breakroom: "Dear Pussies, Please Read!" "Hey cat food lovers, how's your income doing?" and "Warehouse workers, RIP."[302] When several female warehouse workers complained to management, one noted that she recognized the handwriting and produced driver logs for comparison.[303] Based upon this evidence, the Vice President and a senior director interviewed Grosso, who denied writing the remarks.[304] The next day Grosso mistakenly dialed the Vice President of the company; he thought he had dialed a union representative.[305] During the call, Grosso admitted writing the remarks on the newsletters, and the Vice President identified himself and ordered Grosso in to work where he suspended him.[306] He admonished Grosso not to discuss the investigation with others.[307] The human resources manager decided to discharge Grosso after reviewing the information, including the written complaints, basing the termination decision upon Grosso's comments on the newsletters as well as his dishonesty.[308]

In the trial before the ALJ, Grosso attempted to justify his comments as indicating that the warehouse workers were "spineless," that they needed to "man up," and that the "RIP" referred to the fact that they were headed towards loss of their

[300] *Id.* at *1.

[301] *Id.* Fresenius is a manufacturer and distributor of disposable items for dialysis. *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at *2. There was no mention of Grosso requesting the assistance of a union representative at this interview, and in both of its decisions the Board found that the interview was properly conducted by the employer. *Id.* at *4; Fresenius II, 362 N.L.R.B. No. 130, 2015 WL 3932160, at *2 (June 24, 2015).

[305] *Fresenius I*, 2012 WL 4165822, at *2.

[306] *Id.*

[307] *Id.*

[308] *Id.*

souls.[309] The judge noted that sanctions for profanity at Fresenius were usually minor reprimands.[310] Nonetheless, under the *Atlantic Steel* analysis, the ALJ found that Grosso lost the protection of the Act because of the location and nature of his comments and the lack of employer provocation.[311] The 2012 Board, however, found that Grosso did *not* lose the protection of the Act because the location, subject matter, and nature of his comments favored continued protection even though the provocation factor was "neutral."[312] In its 2012 decision, the NLRB found that the ALJ had conflated the location of the comments—the breakroom—with their nature—their anonymity and threatening quality—and had thus incorrectly found that the location and manner weighed against retaining the Act's protection.[313]

In contrast to the ALJ's opinion, the 2012 Board found that the subject matter of the comments was an exercise of § 7 rights; that the nature of the outburst was impulsive; and that, while the outburst was vulgar and could be deemed "demeaning to women," it nonetheless was not so egregious when evaluated in the context of a workplace where profanity was common and not subject to heavy sanctions.[314] Similarly, the 2012 Board decision found the "RIP" comment to contain ambiguity such that, in context, it was not so threatening as to lose protection.[315] Even though the comments were anonymous, the Board felt that because they were not anonymous for long, as another employee identified the handwriting and passed her insight on to management, and because their author had no record of violence, the comments were not all that disruptive and therefore remained protected.[316]

Thus, even though there was no showing of provocation, the 2012 Board found that the balance of the *Atlantic Steel* factors weighed in favor of protection for Grosso's comments.[317] In its 2012 *Fresenius* decision, the Board looked at the totality of the

[309] *Id.*
[310] *Id.* at *3.
[311] *Id.* at *5.
[312] *Id.*
[313] *Id.* at *6.
[314] *Id.* at *6–7.
[315] *Id.* at *8.
[316] *Id.* at *8–9.
[317] *Id.* at *9.

circumstances, including, among others, the *Atlantic Steel* factors.[318] The decision also considered the fact that another incident that did not involve protected activity but did involve profanity—an employee pasted a "DON'T BE A DICK" sticker on a piece of equipment that employees and customers could see—had resulted in only minor discipline, all of which led to a determination that Grosso's comments should remain protected.[319] Board Member Hayes dissented in part to the 2012 decision, finding that Grosso's comments should lose the Act's protection because remarks that coworkers reasonably deem "harassing and sexually insulting" are disruptive to productivity, and an employee who lies in an investigation relating to sexually harassing remarks should not be protected by the NLRA simply because he wants to "conceal [his] participation in union activity."[320]

The Board's 2015 decision in the *Fresenius* case noted that Grosso engaged in two acts of dishonesty: He denied authoring the comments during the company's investigation, and he sought to conceal his identity after mistakenly confessing his participation to the Vice President.[321] The 2015 panel was divided in its view of the protection afforded the handwritten statements with Board Member Johnson finding that the statements were not protected.[322] However, in light of the Board's assumption that even if the comments were otherwise protected they lost protection because of Grosso's dishonesty, the Board was united in its decision that Fresenius did not violate the Act by discharging Grosso.[323]

The Board found that Fresenius had a legitimate interest in investigating the harassing and threatening comments because doing so related to the company's ability to effectively operate its business, to follow its antiharassment policy, and to comply with federal and state antidiscrimination laws.[324] Additionally, the Board found that the employer carried out the investigation in a lawful manner that was "reasonably tailored" and "consistent

[318] *Id.* at *10.
[319] *Id.*
[320] *Id.* at *13 & n.1 (Member Hayes, dissenting in part).
[321] Fresenius II, 362 N.L.R.B. No. 130, 2015 WL 3932160, at *1 (June 24, 2015).
[322] *Id.* at *1 n.2.
[323] *Id.* at *1.
[324] *Id.* at *2.

with the purpose of [the] investigation."[325] The employer did not ask Grosso about his union activities or the union brochures, focusing instead on the handwritten comments that were purportedly vulgar, harassing, threatening, and offensive.[326] In the Board's view, there was no evidence of antiunion animus on the employer's part, notwithstanding the fact that the employer infringed § 7 rights when it admonished Grosso not to discuss the investigation with others.[327] The Board found that Fresenius met its *Wright Line* burden of showing that it would have discharged Grosso for dishonesty, even absent his protected activity, in light of the employer's past record of discharging two other employees who were dishonest concerning a kickback investigation.[328]

V. COMPARING AND ANALYZING NLRB CASES INVOLVING PROFANITY PLUS DISHONESTY

One apparent inconsistency among the NLRB profanity cases appears to be that the NLRB has protected employees who engaged in dishonesty during investigations in some cases, but not in others. In *Cooper Tire*,[329] managers perceived that racial harassment occurred on the picket line, and even though the employee denied the conduct, the ALJ concluded that he was responsible for the harassing remarks, and yet found that the conduct remained protected activity and ordered the employee reinstated.[330] In contrast, the Board found that sexually harassing conduct took the employee outside the Act's protection in *Fresenius* because the employee lied during the investigation of materials defaced in the employee breakroom.[331] The fact that the offensive material in *Fresenius* was actually placed in the workplace in the employee breakroom is important when compared to the off-duty remarks of a locked-out employee on a picket line that were made to replacement workers as in *Cooper Tire*. This is because the context in *Fresenius* was the workplace and work hours, whereas the context in *Cooper Tire* was outside

[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.* at *3 (citing Wright Line, 251 N.L.R.B. 1083 (1980)).
[329] Cooper Tire & Rubber Co., No. 08-CA-087155, 2015 WL 3544120 (N.L.R.B. Div. of Judges June 5, 2015), https://www.nlrb.gov/case/08-CA-087155.
[330] *Id.* at 20.
[331] *Fresenius II*, 2015 WL 3932160, at *3.

work and off duty. The ALJ noted in *Cooper Tire* that picketing activity is evaluated by a different standard than workplace activity, and deemed the employee's conduct protected because it was not violent or threatening, nor did it tend to coerce or intimidate employees in the exercise of their § 7 rights.[332] Clearly, in the midst of a lock out, employees on the picket line are not expected to be as civil to those who are crossing the picket line to work what they perceive to be their jobs as would be the expectation of civility amongst co-workers who are at work. Thus, the ALJ in *Cooper Tire* found that even though the employee denied making the racist remarks while on the picket line, his conduct remained protected by the Act.[333] Another ameliorating fact was that the locked-out employee's comments in *Cooper Tire* were not considered to be all that profane or offensive; rather, they involved cultural stereotypes regarding diet.[334] In *Cooper Tire*, it was critical that the arbitrator did not understand that picket line activity, rather than activity in the workplace itself, allows for *more* impulsive and profane conduct, so that the arbitrator mistakenly held the locked-out employee to a higher standard than if he was at work rather than a lower standard as should have been the case.[335] Thus, the ALJ noted that the arbitration award was repugnant to the Act, and under the well-established rules of labor law, the Board will not defer to an arbitrator's award in such a case.[336]

In contrast, the fact that the employee in *Fresenius* lied during the employer's investigation into workplace misconduct, and then confessed to the conduct to a managerial employee in a case of mistaken identity, showed that he was responsible for the harassing material, and was dishonest in the face of the investigation, which was targeted at conduct that the employer was legally bound to investigate.[337] Thus, the vulgar, offensive, and threatening handwritten statements in *Fresenius* were not protected activity even though the employee aimed to support the union with his comments and depictions on the union materials

[332] *Cooper Tire*, slip op. at 15–16.
[333] *Id.* at 5, 20.
[334] *Id.* at 4–5, 20.
[335] *Id.* at 15–16.
[336] *Id.* at 16–20.
[337] Fresenius I, 358 N.L.R.B. No. 138, 2012 WL 4165822, at *1–2 (Sept. 19, 2012).

in the breakroom.[338] In addition, the subject matter in *Fresenius* involved sexual harassment where employees complained to management about material that was in the employee breakroom. The Board strengthened its stance on complaining about sexual harassment to co-workers as amounting to concerted activity for purposes of mutual aid or protection under § 7 when it specifically overturned its *Holling Press, Inc.* decision in *Fresh & Easy Neighborhood Market, Inc.*[339] In *Holling Press*, the NLRB had refused to find that conduct of an employee seeking help in pursuing a sexual harassment claim constituted concerted activity within the meaning of § 7 of the Act.[340] In *Fresh & Easy*, the Board found that the conduct of an employee who sought the assistance of others in documenting a sexually harassing and profane comment/picture on a whiteboard in the breakroom *was* engaged in protected concerted activity for mutual aid or protection.[341] When the Board overturned *Holling Press* in *Fresh & Easy*, it highlighted the importance of employers having the responsibility to investigate and remediate instances of sexual harassment in the workplace, and thus placed these investigations in a class where employers are obligated to act.[342] Notably, the location of the offensive material in both *Fresh & Easy* and *Fresenius* was the employee breakroom.

In another of the top ten profanity cases, *Bettie Page Clothing*,[343] an employee lied to her supervisor. There, the employee lied when she denied sending a letter to the supervisor's boss, and yet the conduct remained protected by the NLRA because the employee merely feared admitting to her supervisor that she had complained about her and the working conditions in the letter, which the Board found was a clear example of conduct protected by § 7.[344] It is important that the lie in *Bettie Page* was not aimed at covering up a violation of other lawful employer rules regarding harassment as in

[338] *Id.* at *4.

[339] Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. No. 12, 2014 WL 3919910, at *1 (Aug. 11, 2014).

[340] 343 N.L.R.B. 301, 301 (2004).

[341] *Fresh & Easy*, 2014 WL 3919910, at *1–4.

[342] *Id.* at *11.

[343] Bettie Page Clothing II, 361 N.L.R.B. No. 79, 2014 WL 5524147 (Oct. 31, 2014) (reaffirming the Board's decision in Bettie Page Clothing I, 359 N.L.R.B. No. 96, 2013 WL 1753561 (Apr. 19, 2013)).

[344] *Bettie Page Clothing I*, 2013 WL 1753561, at *1–2, *9.

Fresenius. A similar situation arose in *Tinley Park* where the ALJ found that the banquet server denied using her cell phone and posting pictures and comments on Facebook during work hours because she was afraid of losing her job.[345] But again, her conduct was deemed protected by the Act because her conduct related to terms and conditions of employment, the employer's rules were overbroad, and the employee did not otherwise engage in illegal behavior.[346] Thus, there were clear distinctions on the facts in these cases involving dishonesty. Where the dishonesty involved investigation of an employee's illegal conduct at the workplace, it was not protected, but where the dishonesty did not involve illegal conduct, it was protected. And clearly, employee action that takes place in the workplace is held to a higher standard of civility than conduct taking place outside the workplace, especially conduct on a picket line.

VI. THE TAKEAWAY FROM THE TOP TEN NLRB PROFANITY CASES: ANALYSIS AND RECOMMENDATIONS

In each of the top ten cases, certain factors were critical to the outcomes. The critical factors included: the location of the misconduct; the presence of employer rules that violated the NLRA because they were overbroad and unduly interfered with concerted activity that was protected by § 7; provocation of employee(s) brought on by employer ULPs; the employer's general tolerance of profanity in the workplace; the inequality of treatment amongst employees who engaged in similar profanity but who were not engaged in protected concerted activity, with the latter receiving more favorable treatment; whether or not the employee presented as violent or overly aggressive in the context of the profane outburst; and whether or not there was an employee complaint of harassment that legally required the employer to investigate and remedy harassment.

The outcome in profanity cases involving employee dishonesty in the context of an employer investigation depends upon the particularized fact pattern in each case. It is more likely that the employee will lose the protection of the NLRA if

[345] Tinley Park Hotel & Convention Ctr., No. 13-CA-141609, slip op. at 5, 2015 WL 3759559 (N.L.R.B. Div. of Judges June 16, 2015), https://www.nlrb.gov/case/13-CA-141609.

[346] *Id.* at 7, 10–11.

the misconduct occurred in the workplace and involves illegal conduct. Where an employer is legally obligated to conduct an investigation in light of employee complaints of illegal workplace harassment, there is no employer ULP as long as the investigation is conducted appropriately, that is, within the bounds of its purpose, and the discipline meted out is consistent with other cases of dishonesty that did not involve the exercise of § 7 rights.

Remedies ordered in the top ten cases include: reinstatement of the complainants with backpay; posting a notice to not commit future ULPs; and requiring that the employer revise any illegal rules. The critical factors in each case are briefly summarized in the next section, and the lessons learned from the cases are outlined with recommendations for employers and employees to manage workplace and social media profanity within the basic tenets and legal parameters of the NLRA.

A. Face-to-Face Cases

In *Hooters*,[347] the employer had many rules that violated § 8 (a)(1) of the Act, and the ALJ did not find that Hanson, the employee in question, engaged in the profanity that took place at an employer sponsored competition—profanity that the employer asserted as the basis for her termination.[348] Thus, Hanson was entitled to reinstatement with backpay, and the employer was required to revise its many overbroad rules that interfered with employees' § 7 rights and post notices.[349]

In *Plaza Auto,*[350] the Board looked to the four-factor *Atlantic Steel* test, finding: (1) the place of discussion was in the manager's office, where other employees were unlikely to hear it, and where it was unlikely to result in disruption; (2) the subject matter was protected because it involved terms and conditions of employment, including compensation; and (3) the employee was provoked by the employer's ULPs, including the remark that implied that if the employee did not trust them, he did not need

[347] Hooters of Ontario I, No. 31-CA-104872, 2014 WL 2086220 (N.L.R.B. Div. of Judges May 19, 2014), https://www.nlrb.gov/case/31-CA-104872, *aff'd*, 363 N.L.R.B. No. 2, 2015 WL 5143098 (Sept. 1, 2015).

[348] *Id.* at 15, 27–28.

[349] *Id.* at 42–43.

[350] Plaza Auto III, 360 N.L.R.B. No. 117, 2014 WL 2213747 (May 28, 2014).

to work there.[351] Only the "nature of the outburst" factor from *Atlantic Steel* weighed against employee Aguirre, which was because his conduct involved obscene and denigrating remarks that were insubordinate to the owner.[352] Nonetheless, the Board found that the other three factors that favored Aguirre retaining the protection of the Act outweighed the one that did not, and so Aguirre's reinstatement was ordered with backpay, in addition to posting a notice.[353]

In *Starbucks*,[354] employee Agins's profanity was provoked by a manager who expressed antiunion animus.[355] The manager also engaged in profanity in the same interaction but was not disciplined, unlike Agins who was discharged.[356] The Board looked to the employer's written memorandum of discharge, which indicated that the employee was not eligible for rehire for three reasons.[357] One of those reasons was that he supported the union, which the Board found to be clear record evidence of antiunion animus against Agins, thus preventing the employer from meeting its burden of proving that the employee would have been fired anyway under the *Wright Line* standard.[358] Like Hooters, Starbucks had rules that interfered with employees engaging in protected concerted activity when off duty; these were deemed to violate the NLRA, and the NLRB ordered the rules revised.[359] The Board ordered reinstatement of Agins with backpay, removal of negative references in his employment file, and posting a notice.[360] The company's clear statement that Agins's union support was a reason not to rehire him was, in all likelihood, the most critical factor in this Board decision and illustrates just how important it is that managers are aware of what is an illegal reason for termination under the NLRA.[361]

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[351] *Id.* at *11–13.

[352] *Id.* at *9.

[353] *Id.* at *16.

[354] Starbucks IV, 360 N.L.R.B. No. 134, 2014 WL 2736112 (June 16, 2014).

[355] *Id.* at *1–3.

[356] *Id.* at *4.

[357] *Id.*

[358] *Id.*

[359] *Id.* at *3 & n.8 (noting the United States Court of Appeals for the Second Circuit enforced the Board's findings about these ULPs).

[360] *Id.* at *6.

[361] *Id.* at *4.

In *Pacific Bell Telephone Co.*,[362] the union buttons that the employer objected to employees wearing in front of customers contained acronyms that could be read to infer profanity were it not for the spelled-out reference to the full words, which were not profane and were indicated right on the face of the pins.[363] One pin included a vulgar word but it simply was not that bad in the Board's view.[364] The Board focused on the transparency of the pins, the right to wear the pins unless there are special circumstances, which was not established in the case at bar, and that the employer ban on union insignia was overbroad.[365] The takeaway from this case is that an employer should be careful not to presume that a potential double meaning of an acronym is problematic if followed by an alternate innocent phrase. Moreover, a "light" swear does not necessarily make a union button something that can be prohibited absent a showing of special circumstances by the employer, such as a business necessity. The employer should weigh such prohibitions carefully, especially when it has bargained with a union and agreed to the use of branded apparel that includes the use of a union logo. In addition, employees and unions should avoid exceeding the limited protection for profanity outlined in this case.

In *Cooper Tire*,[366] an ALJ weighed a locked-out employee's racially stereotypical comments and gestures targeting those crossing a picket line with the employer's policy against racial harassment, and still found in favor of the employee because he was treated more harshly than another employee who had called his supervisor a racially-charged and vulgar name but was only suspended.[367] The judge determined that the conduct of employee Runion was neither threatening nor violent, and noted that the *Atlantic Steel* factors were inapposite because they apply in the workplace and not on a picket line.[368] Thus, the ALJ in *Cooper Tire* ordered Runion reinstated with backpay.[369] The

[362] 362 N.L.R.B. No. 105, 2015 WL 3492100 (June 2, 2015).

[363] *Id.* at *2–3.

[364] *Id.* at *3–4 (noting word "crap" was not all that bad).

[365] *Id.* at *3–5.

[366] No. 08-CA-087155, 2015 WL 3544120 (N.L.R.B. Div. of Judges June 5, 2015), https://www.nlrb.gov/case/08-CA-087155.

[367] *Id.* at 8.

[368] *Id.* at 14–16.

[369] *Id.* at 20–21.

outcome in this case is particularly interesting when contrasted with the NLRB's 2015 decision in *Fresenius*[370] because there, the Board found that profane writing and drawings amounting to sexual harassment on a bulletin board in a breakroom was *not* protected in light of the employee's dishonesty regarding the ensuing investigation.[371] In *Cooper Tire*, employee Runion, like the Fresenius employee, denied his conduct, but here, the ALJ ordered Runion reinstated even after determining from the security video that Runion made the racially-charged statements at issue.

The *Cooper Tire* decision is presently under appeal based upon exceptions to the ALJ's decision, but in the meantime, it is important to note what the key differences are in these cases.[372] *Cooper Tire* involved only one instance of dishonesty, as opposed to the two acts of dishonesty in *Fresenius*, and in *Cooper Tire*, the conduct took place in the midst of a picket line, where heightened tempers are expected and where the standard for conduct is different from that in the workplace, as in *Fresenius*.[373] In addition, the comments in *Cooper* involved stereotypical expectations regarding diet based upon race, whereas in *Fresenius* the scribbling was "vulgar, offensive, and . . . arguably threatening" to women employees who complained to management, thereby prompting the carefully tailored investigation.[374]

B. Social Media Cases

In *Triple Play*,[375] employees who complained on Facebook about their boss's inability to handle their payroll deductions for tax purposes and other managerial matters were deemed protected under the Act, even though the employee comments were profane.[376] The most important lesson learned from *Triple Play* is that the Board will not apply the *Atlantic Steel* test to cases involving social media, in light of the fact that the place of

[370] Fresenius II, 362 N.L.R.B. No. 130, 2015 WL 3932160 (June 24, 2015).
[371] *Id.* at *1.
[372] *See Cooper Tire*, slip op. at 5.
[373] *See id.* at 3–5; *see generally Fresenius II*, 2015 WL 3932160.
[374] *Cooper Tire*, slip op. at 3–5; *Fresenius II*, 2015 WL 3932160, at *1.
[375] Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705 (Aug. 22, 2014).
[376] *Id.* at *7.

discussion in such cases is the Internet and not face-to-face in the workplace.[377] Thus, the employees' comments in *Triple Play* remained protected under the *Jefferson Standard* test because the statements were not so disloyal or defamatory as to lose protection, nor were they maliciously untrue.[378] In addition, the employer's social media policy was found to be overly restrictive of protected concerted activity, and its savings clause did not save the policy from illegality.[379] Thus, the employees were entitled to reinstatement and backpay, and the Board required revisions to the company's Internet/Blogging policy as well as the posting of a notice.[380]

In *Bettie Page Clothing*,[381] the Board ordered reinstatement and backpay to employees who were terminated for engaging in protected concerted activity on social media, and it required Bettie Page to revise its handbook confidentiality rule, which forbade employees from disclosing wages and compensation to each other or to third parties.[382] The Board also ordered Bettie Page to physically post at all of its stores and to distribute electronically throughout the company a notice referencing the ULPs and its intention not to commit the same again.[383]

In *Pier Sixty*,[384] the profane social media posting that led to employee Perez's termination was inextricably linked to protected concerted activity, including his clear support of the union prior to an imminent NLRB election.[385] The key takeaway from the Board's decision was that the posting was evaluated under the "totality of the circumstances" with specific reference to the following: the evidence of antiunion animus at the company; the employer's tolerance and managerial use of profanity; its provocation of the employee and his impulsive response; its rules against discussion; and its disproportionate

[377] *Id.* at *4.

[378] *Id.* at *7.

[379] *Id.* at *1, *8–9.

[380] *Id.* at *10–11.

[381] Bettie Page Clothing II, 361 N.L.R.B. No. 79, 2014 WL 5524147 (Oct. 31, 2014).

[382] *Id.* at *1–2.

[383] *Id.* at *2. The Board noted that it relied upon *Guardsmark, LLC*, 344 N.L.R.B. 809 (2005) and *Laurus Technical Institute*, 360 N.L.R.B. No. 133, 2014 WL 2705207 (June 13, 2014) for its order to post the notice regarding the handbook rule violation companywide. *Bettie Page Clothing II*, 2014 WL 5524147, at *1 n.2.

[384] Pier Sixty II, 362 N.L.R.B. No. 59, 2015 WL 1457688 (Mar. 31, 2015).

[385] *Id.* at *1–3.

imposition of discipline on Perez.[386] The three-member panel in *Pier Sixty* cited *Triple Play* for the proposition that the *Atlantic Steel* framework is generally inapplicable to social media cases, preferring to evaluate the total circumstances to determine the egregiousness of the comments—an approach that led the Board to deem Perez's conduct protected, resulting in reinstatement, backpay, rule revision, and notice posting.[387]

In *Tinley Park*,[388] the ALJ found that the employer violated the NLRA by terminating banquet server Santiago for her violation of its personal conduct and work rules, and for violations of its standard operating procedure on cell phone usage.[389] The conduct leading up to Santiago's discharge involved employees taking pictures of each other as well as selfies with Santiago's phone and posting the pictures with sarcastic comments on Santiago's Facebook page, including one that referenced the "no phones at work" policy that the employees were in the process of violating.[390] Santiago posted a picture of the employees congregated in a hallway, quipping, "That's how we work at TPCC"; other comments referenced the amount of work employees were doing, or not, as the case may be.[391] The pictures posted on Facebook and the comments depicting the company in an unfavorable light were cited as reasons for Santiago's discharge.[392] While the comments posted were not truly profane, they did poke fun at the company, and Santiago posted that she was "working like an [sic] slave."[393] In the company's view, all of Santiago's posts were derogatory, including the pictures that compromised public perception of the convention center and its hospitality.[394] In *Tinley Park*, the ALJ focused on four unlawful work rules, finding that they chilled

[386] *Id.* at *3.

[387] *Id.* at *3, *5–6 (citing Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705, at *4 (Aug. 22, 2014)).

[388] Tinley Park Hotel & Convention Ctr., No. 13-CA-141609, 2015 WL 3759559 (N.L.R.B. Div. of Judges June 16, 2015), https://www.nlrb.gov/case/13-CA-141609.

[389] *Id.* at 1–2.

[390] *Id.* at 3–4.

[391] *Id.* at 4.

[392] *Id.* at 4–5.

[393] *Id.*

[394] *Id.*

employees in exercising their § 7 rights.[395] The takeaway from this decision is that an employer must be careful of overbroad rules that prohibit disloyalty or disparagement, discussion of wage and salary information, discourteous or disrespectful conduct, or disruptive conduct, and it must not discipline or discharge employees for violating such overbroad rules that interfere with protected concerted activities.

C. Profanity on the Breakroom Wall and Dishonesty

The Board's 2015 *Fresenius*[396] decision focused on employee Grosso's dishonesty in the face of a properly run investigation into offensive, profane, and arguably threatening comments and drawings about which several female employees complained.[397] The employer discharged Grosso for his comments and his dishonesty and the Board upheld the discharge, noting that the employer met its *Wright Line* burden that it would have terminated Grosso for his dishonesty anyway even absent his support of the union.[398] The employer had discharged two other employees solely for dishonesty in another investigation, and thus the discipline of Grosso was not more severe due to his exercise of § 7 rights.[399] The critical takeaway from *Fresenius* is that an employee who lies in an investigation into workplace sexual harassment will be held accountable and will likely not be reinstated, as such conduct is not protected activity under the NLRA. Similarly, an employer who conducts a legitimate inquiry into sexual harassment in the workplace is protected in doing so as long as it does not exceed the boundaries of the legitimate purpose of the investigation.

D. Takeaway from NLRB Profanity Cases

The takeaway from the top ten NLRB profanity cases is that employers need to be very careful when enacting policies that unduly restrict employee discussion of wages, hours, working conditions, matters of mutual aid or protection under § 7 of the

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[395] *Id.* at 5, 10 (citing Martin Luther Mem'l Home, Inc. (*Lutheran Heritage Vill.-Livonia*), 343 N.L.R.B. 646, 646–47 (2004); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998)).

[396] Fresenius II, 362 N.L.R.B. No. 130, 2015 WL 3932160 (June 24, 2015).

[397] *Id.* at *1–2.

[398] *Id.* at *3 (citing Wright Line, 251 N.L.R.B. 1083, 1087 (1980)).

[399] *See id.*

Act, and when disciplining employees for violating such rules. The NLRB deems discipline and discharge of employees for violations of unduly restrictive employer rules illegal unless an employer establishes special circumstances relating to its business that justify restriction of § 7 rights, or unless the employer can prove that there is a separate basis that would have caused the employer to mete out the same discipline anyway. The differences between face-to-face and virtual communication on email and social media primarily relate to the place of the discussion.

The NLRB's current approach on face-to-face workplace profanity cases is to apply the test from *Atlantic Steel*.[400] The four factors from *Atlantic Steel* are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[401] In social media profanity cases, the Board currently uses a totality of the circumstances test that invokes some of the factors from *Atlantic Steel*, but not the first factor—the place of discussion—because the discussion does not occur in the workplace.[402] Under the totality test, the Board considers all relevant factors that reflect both the business interests of the employer in light of the far-reaching virtual context and factors impacting the employee and the exercise of § 7 rights.[403] The employer is entitled to prove special circumstances that require it to restrict activities that interfere with its legitimate business interests; such interests may allow for restrictions on employee use of profanity, particularly in a retail context.[404]

The employer's own use of profanity, the professed moral values of those running the business, and the image of the company projected through its actions and advertising may all be considered when weighing the legality of employer rules that

[400] 245 N.L.R.B. 814 (1979).

[401] *Id.* at 816.

[402] The Board first noted this in *Three D, LLC* (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705, at *4 (Aug. 22, 2014), and reiterated the point in its decision in *Pier Sixty II*, 362 N.L.R.B. No. 59, 2015 WL 1457688, at *3 (Mar. 31, 2015).

[403] *Pier Sixty II*, 2015 WL 1457688, at *3.

[404] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945); *see also supra* notes 148–56 and accompanying text (discussing Member Miscimarra's concurrence in the *Starbucks* case regarding recommended limits of protection on employee concerted activity in retail settings).

restrict employee communication, including profanity.[405] Managers who use profanity themselves or allow its use by other employees may not single out an employee who is engaged in protected concerted activity and discipline him or her for use of profanity.[406] That kind of managerial action constitutes unequal treatment based upon the exercise of § 7 rights and is thus an ULP.

The factors that the Board considers under the totality of the circumstances test include the following: employer wrongdoing, including evidence of antiunion animus; provocation of the employee by the employer; disproportionate punishment for those engaging in protected concerted activities; and any history of employer ULPs.[407] The totality of the circumstances test also weighs: the time of the employee posting, that is, whether on non-work time, break time, or work time; the impact of the employee's posting on the employer's legitimate business interests; and whether, under the *Wright Line* test, the employer has shown that the employee would have been disciplined or discharged anyway, even without engaging in protected concerted activity.[408] The Board has also looked to what employer rules relating to profanity have routinely proved problematic under the Act. The resulting decisions outline an expectation that employer rules relating to employee profanity must be carefully drawn to allow employees to exercise § 7 rights, and the rules should provide specific examples of prohibited conduct to avoid ambiguity that leads employees to fear exercising their statutory rights.[409] Rules that reasonably tend to chill employees in the exercise of their § 7 rights or those that explicitly restrict activities protected by § 7 are unlawful absent a showing of special circumstances.[410]

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[405] *Pier Sixty II*, 2015 WL 1457688, at *3.

[406] *Id.* at *4.

[407] *Id.* at *3.

[408] *See generally* Wright Line, 251 N.L.R.B. 1083 (1980).

[409] *See generally* Memorandum from Richard F. Griffin, Jr., Gen. Counsel, NLRB, to All Reg'l Directors, Officers-in-Charge, and Resident Officers regarding the Report of the Gen. Counsel Concerning Employer Rules, GC 15-04 (Mar. 18, 2015) (detailing recent employer rule cases with examples of lawful and unlawful rules on confidentiality, courtesy, employee conduct and communications, social media policies, cell phone use, and profanity).

[410] *See* Three D, LLC (*Triple Play*), 361 N.L.R.B. No. 31, 2014 WL 4182705, at *8 nn.22–23 (first citing Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998); then

CONCLUSION

The ten NLRB cases involving profanity illustrate the limits that the NLRA presently places upon managers with respect to discipline of employees who engage in conduct that is protected by § 7 of the Act. Employee conduct may be vulgar, profane, and offensive and yet remain protected, or it may not be protected if the conduct is so egregious, dishonest, threatening, violent or insubordinate that it exceeds the Act's protection.[411] Employer rules relating to employee communication must not unduly restrict employees' exercise of their § 7 rights. If they do, the NLRB will require the employer to revise the rules. As Board Member Johnson's term recently ended,[412] the changing composition of the NLRB may result in even more protection for employee profanity in the future, as Johnson has been more inclined than most Board members to find that offensive, profane language loses the protection of the Act.[413]

citing Martin Luther Mem'l Home, Inc. (*Lutheran Heritage Vill.-Livonia*), 343 N.L.R.B. 646, 646 (2004)).

[411] *See* Richmond Dist. Neighborhood Ctr., 361 N.L.R.B. No. 74, 2014 WL 5465462, at *3 (Oct. 28, 2014) (finding Facebook exchange of student employees at teen center was insubordinate misconduct and not protected by the Act).

[412] *See Harry I. Johnson, III*, NLRB, https://www.nlrb.gov/who-we-are/board/harry-i-johnson-iii (last visited May 19, 2016). Member Johnson's term ended August 27, 2015. *Id.*

[413] *See* Pier Sixty II, 362 N.L.R.B. No. 59, 2015 WL 1457688, at *5 (Mar. 31, 2015) (Member Johnson, dissenting in part); Plaza Auto III, 360 N.L.R.B. No. 117, 2014 WL 2213747, at *19 (May 28, 2014) (Member Johnson, dissenting); Fresenius II, 362 N.L.R.B. No. 130, 2015 WL 3932160, at *1 n.2 (June 24, 2015) (noting that Member Johnson would not find that the handwritten statements of the complainant were protected). *Cf.* Starbucks IV, 360 N.L.R.B. No. 134, 2014 WL 2736112, at *10 (June 16, 2014) (Member Miscimarra, concurring) (noting that he would find that a retail employee such as Agins, who causes disruption or interference with the business, even when off duty, loses the protection of the Act).