

SOLIDARITY ON SOCIAL MEDIA

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As with other technical revolutions before it, such as the printing press, radio, and telephone, social media has changed the way in which people communicate. Due to cases involving the use of social media by employees, among other reasons, the often little-known National Labor Relations Board (“NLRB” or “Board”) has become the center of national media attention. In the cases involving social media, the Board simply applies well-established, decades-old legal principles. Yet, employers, business groups, and the media have portrayed the Board as deviating from long-standing precedent, overstepping its role in regulating employment, and misunderstanding the impact of social media. However, no federal Circuit Court, to which Board decisions are appealed, has yet denied enforcement of a Board decision in a case involving social media.

While other scholars have contributed to the buzz surrounding the Board’s decisions by arguing that the Board has been incorrect to apply its precedent to social media because social media differs from prior technology, this Article argues that the Board has properly used its wealth of expertise gained from many decades of enforcing labor management relations to extend its precedent in a flexible manner to this new technology. This Article first summarizes the Board’s decisions and guidance about employees’ use of social media and employer policies regulating the use of social media. It then discusses four simple clarifications that the Board should make in future decisions in order to make its regulation easier for employers and employees to

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understand and follow. First, the Board should clarify that any time more than one employee is involved in a social media discussion, the employees act concertedly. Second, the Board should clarify that employees act for mutual aid and protection when they discuss working conditions, whether or not they explicitly focus on improving those conditions. Third, the Board should clarify how it will determine when employees engaged in otherwise protected concerted activity lose the protection of the National Labor Relations Act due to the egregious nature of their social media use. Finally, the Board should clarify whether provision-specific disclaimers providing concrete examples of what constitutes protected concerted activity will be effective to render a social media policy legal. These clarifications will enhance the likelihood of continued enforcement of Board decisions involving social media by the Circuit Courts. Moreover, these clarifications have not been discussed in articles written by other scholars and, thus, contribute to the growing literature on this topic.

I.	Introduction	305
II.	Board Regulation of Social Media Activity and Policies	310
III.	Concerted Activity	315
IV.	Mutual Aid and Protection	320
V.	Loss of Protection	326
VI.	Disclaimers	333
VII.	Conclusion	335

“Many view social media as the new water cooler,” said Mark G. Pearce, the [National Labor Relations] [B]oard’s chairman, noting that federal law has long protected the right of employees to discuss work-related matters. ‘All we’re doing is applying traditional rules to a new technology.’”¹

“[T]he Board has seen fit to engage in mission creep and attempt to micro-manage employers’ workplaces. It has done this by declaring what can and what cannot be in employer handbooks, even on issues such as social media usage. The Board’s recent actions in this area are creating a labyrinth of rules that few employers will be able to navigate without an army of lawyers. Other benign policies that sound perfectly acceptable to any rational person have been deemed by the Board to be violations of federal law.”²

I. INTRODUCTION

Much of the time the National Labor Relations Board (“NLRB” or “Board”) is a little-known agency; the public has never heard of it, and even attorneys erroneously believe that it deals only with unionized workplaces. But over the past few years the Board has become the center of national media attention for several reasons, including its ruling in the case involving Boeing’s move from a plant in the North to one in the South,³ the finding of an Administrative Law Judge (“ALJ”) that college athletes constitute employees,⁴

¹ Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES (Jan. 21, 2013), http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?_r=1.

² Nathan Mehrens, *Conservative Mandate Puts Focus on NLRB Abuses*, WASH. EXAMINER (Jan. 17, 2015), <http://www.washingtonexaminer.com/conservative-mandate-puts-focus-on-nlrab-abuses/article/2558810> [<https://perma.cc/2LF6-33EY>].

³ Julius G. Getman, *Boeing, the IAM, and the NLRB: Why U.S. Labor Law is Failing*, 98 MINN. L. REV. 1651, 1651 (2014) (describing criticism of NLRB following NLRB complaint alleging Boeing violated the NLRA).

⁴ Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 67 (2014) (discussing media attention of

and the current case regarding whether employees of a McDonald's franchise are also employees of the corporation.⁵

One of the reasons for which the Board has recently garnered the most attention is its rulings involving employees' use of social media. These social media cases arouse the curiosity of the public because they deal with a revolutionary communications technology and have made the public aware that the baseline protections in the National Labor Relations Act ("NLRA" or "Act") apply as equally to non-union workplaces as to unionized ones. As early as 1962, the United States Supreme Court recognized that employees acting in solidarity to protest unsafe working conditions were protected by the Act.⁶ In cases involving social media, the Board simply extends this precedent to protect employees engaging in solidarity on social media.⁷ Yet employers, business groups, and the media have portrayed the Board as deviating from long-standing precedent, overstepping its role in regulating employment, and misunderstanding the impact of social media.⁸ Even

the regional NLRB decision that college athletes with scholarships are employees). The Board ultimately overruled the ALJ's finding, declining to exercise jurisdiction over the Northwestern team. *Nw. Univ.*, 362 N.L.R.B. No. 167, at *19 (Aug. 17, 2015).

⁵ David J. Kaufmann et al., *A Franchisor is Not the Employer of Its Franchisees or Their Employees*, 34 FRANCHISE L.J. 439, 442 (2015) (listing criticism and praise of the NLRB General Counsel's filing of a complaint arguing that the employees of McDonald's franchisees are the employees of the franchisor); *McDonald's USA, LLC*, No. 02-CA-093893 (N.L.R.B. filed Nov. 29, 2012), <https://www.nlr.gov/case/02-CA-093893> [<https://perma.cc/VMY6-33WD>]. The case is still pending in front of an ALJ and is expected to take years to reach a conclusion. Lawrence E. Dubé, *NLRB Election Rules and Major Cases Will Be Closely Watched in 2016*, *Daily Lab. Rep. (BNA)* No. 15, at S-27, S-29 (Jan. 25, 2016).

⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–13 (1962).

⁷ Ariana R. Levinson, *Labor Law Issues: Employer Social Media Policies; Disciplining Employees for Social Media Postings*, in *RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW* (John A. Rothchild ed., forthcoming 2016) (draft on file with author).

⁸ Kevin A. Fritz & Craig B. Simonsen, *NLRB, Social Media, and Employee Handbooks* (Dec. 16, 2015), <http://www.laborandemploymentlawcounsel.com/2015/12/nlr-social-media-and-employee-handbooks/>

Congress recently considered budget cuts to the Board due to what it views as the Board's unwarranted activist role in protecting employees.⁹ However, no federal Circuit Court, to which Board decisions are appealed, has yet denied enforcement of a Board decision in a case involving social media.

Indeed, the Board has done an admirable job of applying well-established, decades-old legal principles designed to protect collective action and level the playing field between employees and employers. While other scholars have contributed to the buzz surrounding the Board's decisions by arguing that the Board has been incorrect to apply its precedent to social media because the technology differs from prior technology,¹⁰ this Article argues that the Board has

[<https://perma.cc/F5NC-T3DK>]; Larry Marquess, *How to Cope with an Aggressive NLRB*, <https://www.nfib.com/webinars/nlr/> [<https://perma.cc/3R5Y-4XHB>]; U.S. CHAMBER OF COMMERCE, THEATER OF THE ABSURD: THE NLRB TAKES ON THE EMPLOYEE HANDBOOK 4, 20 (Dec. 2015), https://www.uschamber.com/sites/default/files/documents/files/nlr_theater_of_the_absurd.pdf [<https://perma.cc/39UZ-U6S8>]; Sarah S. Merkel, *Trials and Tribulations: Second Circuit Upholds NLRB Social Media Ruling*, N.Y. DAILY RECORD (Nov. 4, 2015), <http://nydailyrecord.com/blog/2015/11/04/trials-tribulations-second-circuit-upholds-nlr-social-media-ruling/> [<https://perma.cc/LKR8-Y928>]; Greenhouse, *supra* note 1.

⁹ Dubé, *supra* note 5, at S-27 (noting that appropriation for 2016 passed “without several riders that would have curbed the board’s authority”); Cole Stangler, *In Budget Proposal Riddled With Anti-Union Measures, House Republicans Take Aim at National Labor Relations Board*, INT’L BUS. TIMES (June 25, 2015), <http://www.ibtimes.com/budget-proposal-riddled-anti-union-measures-house-republicans-take-aim-national-labor-1983941> [<https://perma.cc/9QHG-W9AM>]; Connor D. Wolf, *Republicans Have a New Plan to Stop Obama’s Labor Board*, DAILY CALLER (June 17, 2015), <http://www.dailycaller.com/2015/06/17/despite-recent-failures-republicans-have-a-new-plan-to-stop-the-nlr/> [<https://perma.cc/5PKR-RBL2>]; Chris Opfer, *Subcommittees Clear Spending Bills With Labor Policy Riders, Cuts to NLRB*, 29 Lab. Rel. Wk. (BNA), at 1279 (June 23, 2015), http://laborandemploymentlaw.bna.com/lerc/2455/split_display.adp?fedfid=71317507&vname=lrwnotallissues&jd=a0g8r0t4g2&split=0 [<https://perma.cc/ZUH6-MNNS>].

¹⁰ Lauren R. Younkins, *#ihatemyboss: Rethinking the NLRB’s Approach to Social Media Policies*, 8 BROOK. J. CORP. FIN. & COM. L. 222, 224 (2013) (arguing that “the NLRB’s approach fails to recognize the unique nature of conversing over social media”); Regina Robson,

"Friending" the NLRB: The Connection Between Social Media, "Concerted Activities" and Employer Interests, 31 HOFSTRA LAB. & EMP. L.J. 81, 85, 121 (2013) (noting that "social media communications are a shotgun blast directed to broad categories of 'friends' who may include family, co-workers and even supervisors and managers"); Natalie J. Ferrall, Comment, *Concerted Activity and Social Media: Why Facebook Is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1006 (2013) (arguing that NLRB precedent is "inadequate to address the distinct qualities of social media"); Andrew Metcalf, Note, *"Concert" or Solo Gig? Where the NLRB Went Wrong When It Linked in to Social Networks*, 90 WASH. U. L. REV. 1543, 1575 (2013) (arguing that social media posts deserve less protection under the NLRA than other forms of publicly visible concerted activity by employees); David L. Bayer, Note, *Employers are Not Friends with Facebook: How the NLRB is Protecting Employees' Social Media Activity*, 7 BROOK. J. CORP. FIN. & COM. L. 169, 171 (2012) (arguing that "the NLRB misapplies old law to a new and distinct context"); Colin M. Leonard & Tyler T. Hendry, *From Peoria to Peru: NLRB Doctrine in a Social Media World*, 63 SYRACUSE L. REV. 199, 200 (2013) (arguing that the NLRB's application of precedent "fails to appropriately acknowledge the very nature of social media"); Rebecca Stang, Comment, *I Get By with a Little Help from My "Friends": How the National Labor Relations Board Misunderstands Social Media*, 62 DEPAUL L. REV. 621, 623–24, 638 (2013) (arguing that ALJs and general counsel have failed to account for "the differences between social media communications and real-life conversations"); Lauren K. Neal, Note, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1749 (2012) (arguing that the Board has applied the "concerted activity standard" to cases involving social media in a problematic way); Ariana C. Green, Note, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 841 (2012) ("Failing to recognize the differences between online and offline communications has created discordant legal rulings."); Kimberly Bielan, Note, *All A-"Twitter": The Buzz Surrounding Ranting on Social-Networking Sites and Its Ramification on the Employment Relationship*, 46 NEW ENG. L. REV. 155, 155 (2011) (arguing that because of the "unique public nature of social-networking sites" posting expletives about an employer should not constitute protected concerted activity). Cf. Nicholas H. Meza, Comment, *A New Approach for Clarity in the Determination of Protected Concerted Activity Online*, 45 ARIZ. ST. L.J. 329, 366 (2013) (proposing a bright-line rule to deal with the advances in social media to which the NLRA must adapt).

properly used its wealth of expertise gained from many decades of enforcing labor management relations to extend its precedent in a flexible manner to this technology.¹¹

This Article first summarizes the Board's decisions and guidance regarding employees' use of social media and employer policies regulating the use of social media. It then discusses four simple clarifications that the Board should make in future decisions to make its regulation easier for employers and employees to understand and follow. First, the Board should clarify that any time more than one employee is involved in a social media discussion, the employees are acting in concert. Second, the Board should clarify that employees are acting for mutual aid and protection when they discuss working conditions, whether or not they explicitly focus on improving those conditions. Third, the Board should clarify how it will determine when employees engaged in otherwise protected concerted activity lose the protection of the Act due to the egregious nature of their social media use. Finally, the Board should clarify whether provision-specific disclaimers providing concrete examples of what constitutes protected concerted activity will be effective to render a social media policy legal. These clarifications will enhance the likelihood of continued enforcement of Board decisions involving social media by the Circuit Courts. Moreover, these clarifications have not been discussed in articles written by other scholars and, thus, contribute to the growing literature on this topic.¹²

¹¹ Levinson, *supra* note 7. Cf. Michael Z. Green, *The NLRB as an Überagency for the Evolving Workplace*, 64 EMORY L.J. 101 (2015); Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 937 (2015) ("Although electronic communications may be more prone to implicate questions of concertedness, the NLRB's current analysis remains well-equipped to handle these questions.").

¹² Cf. Elizabeth Allen, Note, *You Can't Say That on Facebook: The NLRB's Opprobriousness Standard and Social Media*, 45 WASH. U. J.L. & POL'Y 195, 213 (2014) (arguing that the Board should apply *Atlantic Steel* with certain modifications to determine when an employee loses the protection of the Act); Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 114–15 (2012) (arguing that an

II. BOARD REGULATION OF SOCIAL MEDIA ACTIVITY AND POLICIES

The Board has applied its precedent to find that employees who have posted on social media are protected from discharge and discipline for their activities when they engage in protected concerted activity.¹³ The Board has also applied its precedent to find employer social media policies that chill employees from engaging in protected concerted activity unlawful.¹⁴

The NLRA guarantees employees “the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

individual post where the employee speaks on behalf of other employees, or seeks to gather information from co-workers, should be protected, and that one case incorrectly characterized a discussion on social media as mere griping when it concerned the terms of employment); Stang, *supra* note 10, at 647–48 (arguing that the NLRB “must provide a clear indication of what distinguishes an individual gripe from legitimate concerted activity” and proposing that the NLRB focus on whether the post raises a “global employment issue” or is “just an individual frustration over an embarrassing work moment”); Neal, *supra* note 10, at 1756–57 (proposing factor-based test for concertedness and “a more stringent loss-of-protection standard”); Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 998 (2012) (reasoning that protected concerted activity requires posts related to employment that are an outgrowth of employee’s collective concerns, discussion by employees, and evidence that the posting employee was seeking to induce group action); Green, *supra* note 10, at 838 (citing NLRB’s webpage for the proposition that “an employer cannot fire an employee solely because she discusses topics such as management or salary with fellow employees, even if in a public forum”).

¹³ Levinson, *supra* note 7; Design Technology Group, LLC d/b/a Bettie Page Clothing, 359 N.L.R.B. No. 96, at *1 (Apr. 19, 2013), *aff’d*, 361 N.L.R.B. No. 79 (Oct. 31, 2014); Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, at *2 (Dec. 14, 2012); BaySys Technologies, 357 N.L.R.B. No. 28, at *1–2 (Aug. 2, 2011).

¹⁴ Levinson, *supra* note 7; Alternative Cmty. Living, Inc., 362 N.L.R.B. No. 55, at *1–2 (Mar. 31, 2015); Target Corp., 359 N.L.R.B. No. 103, at *2 n.6 (Apr. 26, 2013); Boch Imports, Inc. d/b/a Boch Honda, 362 N.L.R.B. No. 83, at *10 (Apr. 30, 2015).

or protection.”¹⁵ It is a violation of the Act for an employer to interfere with these Section 7 rights.¹⁶ Under long-standing precedent, employees act concertedly when two or more employees have a discussion or take action together.¹⁷ Under equally well-established precedent, an employee acts concertedly when the employee’s action results from prior collective action, when the employee acts alone but as a representative of other employees, and when an employee acts alone to initiate group action.¹⁸ Collective conduct is for mutual aid or protection when it concerns terms and conditions of employment.¹⁹ However, conduct that is found to be concerted action for mutual aid or protection can nonetheless lose protection under the Act if found to be egregious in nature. The Board has found that threats of violence, insubordination, defamation,²⁰ disloyalty, or disparagement of an employer’s product²¹ constitute reasons that an employee will lose the protection of the Act.

Protection for employees extends to being free from employer policies that restrict the exercise of Section 7 rights. The Board has long held that an employer policy that explicitly restricts Section 7 rights is unlawful.²² Equally

¹⁵ 29 U.S.C. § 157 (2012).

¹⁶ 29 U.S.C. § 158 (2012) (“It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”).

¹⁷ *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493, 493 (1984), *remanded by Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

¹⁸ *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 886–88 (1986); *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (acknowledging that “it is now well recognized that an individual employee may be engaged in concerted activity when he acts alone” in circumstances that include when a single employee acts to induce group action, as a representative of co-workers, or as a “logical outgrowth” of concerted activity) (citations omitted).

¹⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).

²⁰ *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 64–65 (1966).

²¹ *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 471, 473 (1953).

²² *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 646 (2004).

well-established is the principle that even if a policy does not explicitly restrict Section 7 rights, it will be found unlawful in three circumstances: (1) if the policy is implemented as a response to employees' engaging in protected concerted activity; (2) if the policy is implemented in a manner which prohibits Section 7 activity; or (3) if the policy would be reasonably construed by employees to prohibit them from engaging in some type of protected concerted activity.²³ Because the employer drafts the policy, ambiguities are construed against the employer.²⁴

The Board has extended this long-standing doctrine to the social media forum.²⁵ The Board has found that employees who have discussions on social media, such as Facebook, act in concert with one another.²⁶ It has also found that when an employee posts comments that follow up on prior group employee meetings or protests, such comments are concerted.²⁷ Social media activity is not concerted, however, when the employee simply posts about a work incident, such as an automobile accident at a car dealership event.²⁸

The Board has also found that employees act for mutual aid and protection when the objective intent of their social media comments is to seek better terms and conditions of employment, such as a safer work environment²⁹ or greater commissions.³⁰ Additionally, the Board has held that discussions on social media among employees that concern

²³ *Id.* at 647.

²⁴ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Dorothy L. Moore-Duncan, Reg'l Dir., Region 4 regarding U.S. Security Associates, Inc., No. 4-CA-66069, at 2–3 (Aug. 13, 2012).

²⁵ *See* Levinson, *supra* note 7.

²⁶ Design Technology Group, LLC d/b/a Bettie Page Clothing, 359 N.L.R.B. No. 96, at *1 (Apr. 19, 2013), *aff'd*, 361 N.L.R.B. No. 79, at *1 (Oct. 31, 2014); Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, at *2 (Dec. 14, 2012); BaySys Technologies, 357 N.L.R.B. No. 28, at *1–2 (Aug. 2, 2011).

²⁷ Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, at *1, *10 (Sept. 28, 2012); Pier Sixty, LLC, 362 N.L.R.B. No. 59, at *2 (Mar. 31, 2014).

²⁸ *Karl Knauz*, 358 N.L.R.B. No. 164, at *10–11.

²⁹ *See Bettie Page*, 359 N.L.R.B. No. 96, at *1.

³⁰ *Karl Knauz*, 358 N.L.R.B. No. 164, at *1, *10.

terms and conditions of employment are for mutual aid or protection.³¹

Finally, the Board has held that one instance of employee conduct on social media lost the protection of the Act, while explaining in several other instances why social media conduct was not so egregious as to lose the protection of the Act. Under long-standing precedent, concerted activity for mutual aid and protection loses the protection of the Act only when it “is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.”³² In one social media case, employees lost the protection of the Act because they were advocating insubordination, such as refusing to follow employer rules and “neglecting their duties.”³³ The Board, however, has found that social media comments critical of supervisors do not lose the protection of the Act when they do not go so far as to disparage the employer’s products.³⁴ The Board has also explained that use of profanity on social media generally does not rise to the level of egregiousness necessary to lose the protection of the Act.³⁵ Finally, the Board has explained that when an employee makes statements believed to be true, such as statements about safety violations or failures to provide pay on time, these

³¹ *Hispanics United*, 359 N.L.R.B. No. 37, at *2–3; *BaySys Technologies*, 357 N.L.R.B. No. 28, at *1–2.

³² *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co.*, 282 N.L.R.B. 130, 132 (1986)); *see also* *Stanford New York, LLC*, 344 N.L.R.B. 558, 558 (2005); *Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 212–13 (4th Cir. 2005); *Sullair P.T.O., Inc. v. NLRB*, 641 F.2d 500, 502 (7th Cir. 1981); *NLRB v. White Oak Manor*, 452 F. App’x 374, 382 (4th Cir. 2011).

³³ *Richmond Dist. Neighborhood Ctr.*, 361 N.L.R.B. No. 74, at *2–3 (Oct. 28, 2014).

³⁴ *Three D, LLC, d/b/a Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31, at *5 (Aug. 22, 2014); *N.Y. Party Shuttle, LLC*, 359 N.L.R.B. No. 112, at *2, *5 (May 2, 2013).

³⁵ *Triple Play Sports Bar*, 361 N.L.R.B. No. 31, at *4 n.17; *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, at *4 (Mar. 31, 2015).

communications do not rise to the level of knowing or reckless dishonesty required for proving defamation.³⁶

As to employer social media policies, the Board has also described how its precedent applies.³⁷ Social media policies that are overbroad because employees could reasonably construe them to prohibit protected concerted activity are unlawful.³⁸ The Board has found prohibitions on sharing personnel or confidential information on social media to be unlawful when those policies do not clarify that employees may share wage information and information about other terms and conditions of employment.³⁹ The Board has also found prohibitions on disparagement and defamation to be unlawful when they are not defined precisely enough to clarify that the prohibited conduct does not include statements critical of supervisors or management.⁴⁰ Additionally, the Board has found that a policy requiring employees to identify themselves when posting on social media to be unlawful because employees have a right not to identify themselves when discussing wages and other terms and conditions of employment.⁴¹ Furthermore, a general disclaimer stating that a social media policy does not

³⁶ *N.Y. Party Shuttle*, 359 N.L.R.B. No. 112, at *1–2, *5.

³⁷ See generally Levinson, *supra* note 7 (discussing Board precedent on social media policies).

³⁸ *Alternative Cmty. Living, Inc.*, 362 N.L.R.B. No. 55, at *1, *16 (Mar. 31, 2015); *Target Corp.*, 359 N.L.R.B. No. 103, at *23 (Apr. 26, 2013); *Boch Imports, Inc. d/b/a Boch Honda*, 362 N.L.R.B. No. 83, at *1–2 (Apr. 30, 2015).

³⁹ *Alternative Cmty. Living*, 362 N.L.R.B. No. 55, at *1, *17–18; *Target Corp.*, 359 N.L.R.B. No. 103, at *23.

⁴⁰ *Dish Network Corp.*, 359 N.L.R.B. No. 108, at *1 n.1, *5 (Apr. 30, 2013); see also *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, at *1–2 (Sept. 7, 2012) (holding unlawful a policy prohibiting posts that damage the company), *vacated*, 2014 U.S. App. Lexis 14895 (D.C. Cir. Aug. 1, 2012) (citing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)); *Alternative Cmty. Living*, 362 N.L.R.B. No. 55, at *18 (holding unlawful a policy prohibiting posts that affront others' dignity).

⁴¹ *Boch Honda*, 362 N.L.R.B. No. 83, at *2.

prohibit conduct made lawful by the Act will not suffice to render an otherwise unlawful policy lawful.⁴²

Thus, the application of Board precedent to social media cases is generally straightforward and understandable to employers and employees alike. There are, however, a few items the Board could clarify to improve understanding of its precedent for employers, employees, and the public, and to increase the continued likelihood of enforcement of its social media cases by the Circuit Courts.

III. CONCERTED ACTIVITY

While in most cases addressing social media and other collective action the involvement of more than one employee makes the concerted nature of the activity apparent,⁴³ in some cases only one employee is involved.⁴⁴ When one employee posts to social media, the employee may be doing so as an outgrowth of prior concerted activity, as a representative of other employees, or in order to encourage other employees to speak up or take action.⁴⁵ On the other hand, the employee may not be relating to co-workers at

⁴² *Alternative Cmty. Living*, 362 N.L.R.B. No. 55, at *1, *19.

⁴³ See generally *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493, 493 (1984) (discussing concept of concerted activity), *remanded by* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985); see also *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 540 (6th Cir. 2000) (holding employee's statement concerted because made during conversation with another employee regarding unionization); *Jhirmack Enters.*, 283 N.L.R.B. 609, 609 n.2, 614–15 (1987) (reasoning that employee telling another employee to take action to preserve his job is concerted).

⁴⁴ See generally *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 886–88 (1986) (discussing cases addressing when individual conduct is concerted activity).

⁴⁵ See *id.*; see also *Fotomat Corp.*, 207 N.L.R.B. 461, 463 (1973) (holding that a single employee was participating in concerted activity when, in her role as union spokesperson, she voiced her own complaints and those of other employees to a supervisor), *enforced*, 497 F.2d 901 (6th Cir. 1974); *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 189–90 (2d Cir. 2001) (holding that a single employee's actions were concerted where she spoke out at a company meeting about a new break policy by questioning and challenging the policy with comments designed to induce group action), *enforcing* 331 N.L.R.B. 858 (2000).

all.⁴⁶ In these instances, the Board must draw a line between individual action and collective action.

The line can sometimes be blurry, and in social media cases, different Board members have different thoughts about what constitutes concerted activity.⁴⁷ Recognizing someone is aggrieved is a necessary predicate to taking collective action. Conferring with other co-workers, or having a discussion with them, is also a necessary predicate to taking any collective action to improve one's working conditions. Thus, the Board recognizes that when employees discuss terms and conditions of work, even when they may be critical and complaining, they act in concert with each other.⁴⁸ The Board should clarify that any discussion between employees is necessarily collective and concerted.⁴⁹

⁴⁶ See *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 166 (D.C. Cir. 2006) (holding that an individual employee picketing to have union represent only herself was not engaged in concerted activity).

⁴⁷ *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at *4–5 (Dec. 14, 2012) (Hayes, Member, dissenting) (arguing that employees who defended their quality of work on Facebook were not engaged in mutual aid or protection but in “mere griping”).

⁴⁸ See *id.* at *2; *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (finding that employee's statements to co-workers regarding an investigation of the union president resulting from employee's prior complaints were concerted and not “mere griping” because they were attempts to have the co-workers join the employee in opposing the union president).

⁴⁹ *Rinke Pontiac Co.*, 216 N.L.R.B. 239, 242 (1975) (holding that an employee's complaints to insurance representative that he was receiving less compensation under a new incentive program were concerted activity raising shared concerns of all the salesmen and were not simply voicing a personal gripe); *Lou's Transp., Inc.*, 361 N.L.R.B. No. 158, at *1–2, *11 (Dec. 16, 2014) (rejecting the argument that discussion about working conditions was mere gripe or expression of personal discontent); *Ellison Media Co.*, 344 N.L.R.B. 1112, 1113 (2005) (holding conversation between two employees about reporting supervisor's offensive comment to management was concerted). *Contra* *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 684–85 (3d Cir. 1964) (stating that where one employee advises another, who listens, with the motive only to advise as to what can individually be done to protect the other's working status, then that is more likely “mere griping” and not preliminary discussions that might result in group action); *Adelphi Inst., Inc.*, 287 N.L.R.B. 1073, 1073 (1988)

Of course, by its very nature, social media is social and not intended to work as a private diary. For this reason, most employees are linked to at least some co-workers, and it will not often occur that an employee using social media is not acting in concert with other employees through social media. However, if the post is not visible to co-workers and is only visible to other family and friends, who may be customers or clients of the employer, then the post might be a mere gripe, such as a worker who posts, “Manager acting like a jerk again today.”

The term “mere griping” is sometimes used by the Board to describe individual action.⁵⁰ “Mere griping” connotes an individual who is complaining about something at work to blow off steam but is not engaging co-workers in a conversation. In social media cases, different Board members have different thoughts about what constitutes mere griping.⁵¹ The Board should clarify that “mere griping” can happen only where one employee acts alone.⁵² The Board’s

(holding that one employee asking another employee if he had ever been placed on probation was not concerted activity because it was a “purely personal” inquiry); *Parke Care of Finneytown, Inc. d/b/a Daly Park Nursing Home*, 287 N.L.R.B. 710, 710–11 (1987) (holding that speaking to co-workers about discharge of another employee not protected concerted activity because no “group action of any kind [was] intended, contemplated, or even referred to” (quoting *Mushroom Transp.*, 330 F.2d at 685)); *Asheville Sch., Inc.*, 347 N.L.R.B. 877, 881 (2006) (reasoning that employee who disclosed co-workers’ wage rates to other employees was engaged in mere griping).

⁵⁰ See, e.g., *Meurer, Serafini & Meurer, Inc.*, 224 N.L.R.B. 1373, 1378 (1976) (noting that employee did not enlist or seek support of co-workers before sending a letter to his employer seeking higher wages); *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 841 (2d Cir. 1953) (holding that “mere griping,” without more, did not constitute protected concerted activity, the first instance of a court utilizing the term “mere griping”).

⁵¹ See, e.g., *Hispanics United*, 359 N.L.R.B. No. 37, at *4–5 (Hayes, Member, dissenting) (arguing that employees who defended their quality of work on Facebook were not engaged in mutual aid or protection but in “mere griping”).

⁵² *Rinke Pontiac*, 216 N.L.R.B. at 242 (holding that employee’s complaints to insurance representative that he was receiving less compensation under a new incentive program was engaged in concerted activity raising shared concerns of all the salesmen and was not simply

earliest cases mentioned griping synonymously with complaining and did not use the terminology “mere griping” to deprive employees speaking to each other of the protection of the Act.⁵³ In fact, in *Washington Aluminum Co.*, the Supreme Court rejected an employer’s argument that employee complaints about a lack of heat were mere griping and thus unprotected.⁵⁴ The Circuit Courts, rather than the Board, first introduced the concept of “mere griping” as being insufficient to constitute concerted activity. Unfortunately, several Circuit Court opinions implied that conversations

voicing a personal gripe); *Lou’s Transp.*, 361 N.L.R.B. No. 158, at *1–2, *11 (rejecting argument that discussion about working conditions was mere gripe or expression of personal discontent); *Ellison Media*, 344 N.L.R.B. at 1113 (holding that conversation between two employees about reporting supervisor’s offensive comment to management was concerted); *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. 442, 453 (1987) (“In short concerted activity for the purpose of mutual aid or protection has to start somewhere, and for the protection of the Act to mean anything such activity must be protected at the start . . .”). *Contra Mushroom Transp.*, 330 F.2d at 684–85 (stating that where one employee advises another, who listens, with the motive only to advise as to what can individually be done to protect the other’s working status, then that is more likely “mere griping” and not preliminary discussions that might result in group action); *Adelphi Inst.*, 287 N.L.R.B. at 1073 (finding that one employee who was placed on probation asking another employee if he had ever been placed on probation was not concerted activity because it was a “purely personal” inquiry); *Daly Park Nursing Home*, 287 N.L.R.B. at 710–11 (holding that speaking to co-workers about discharge of another employee not protected concerted activity because no “group action of any kind [was] intended, contemplated, or even referred to” (quoting *Mushroom Transp.*, 330 F.2d at 685)); *Asheville Sch.*, 347 N.L.R.B. at 881 (reasoning that employee who disclosed co-workers’ wage rates to other employees was engaged in mere griping).

⁵³ See, e.g., *Interlake, Inc.*, 218 N.L.R.B. 1043, 1052 (1975) (“Section 7 confers the right to ‘gripe’ to a labor organization even if the gripe be an individual one.”); *Block-Friedman Co.*, 20 N.L.R.B. 625, 631–33 (1940) (rejecting employer’s argument that employee was terminated because the employee was always griping, and instead finding employee’s activity to be protected union activity).

⁵⁴ *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14–15 (1962) (rejecting company’s contention that repeated complaints about cold working conditions prior to a walk-out were “the same sort of gripes as the gripes made about the heat in the summertime”).

among employees were not concerted if the employees were merely griping.⁵⁵ These decisions were not adopted by the Board on remand. The Board in *Meyers II* does in dicta affirmatively mention *Mushroom Transportation*, a Third Circuit case, stating that when one employee speaks and another only listens, something more than mere griping is required to constitute concerted activity.⁵⁶ *Meyers II*, however, focuses on a situation where one employee complained on his own to an outside agency about an unsafe truck he had to drive. There were no facts raising the issue of whether discussion among employees is concerted.⁵⁷

Furthermore, even in a circumstance where one employee complains to non-co-workers, the employee may be engaging in concerted activity. For instance, while not linked to co-workers on social media, the employee might post to complain to a government official, a union representative, or the media.⁵⁸ Imagine an employee who has many friends and family who are union organizers and representatives and

⁵⁵ *Mushroom Transp.*, 330 F.2d at 685; *Office Towel Supply Co.*, 201 F.2d at 841.

⁵⁶ *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986) (citing *Mushroom Transp.*, 330 F.2d at 683).

⁵⁷ *Id.* at 885–87 (attempting to define when the act of a single employee is or is not “concerted” and emphasizing that the employee at issue in the case did not “at any relevant time or in any manner” join “forces with any other employee”).

⁵⁸ *Kinder-Care Learning Ctrs., Inc.*, 299 N.L.R.B. 1171, 1171 (1990) (“[T]he Board has found employees’ communications about their working conditions to be protected when directed to other employees, an employer’s customers, its advertisers, its parent company, a news reporter, and the public in general.”) (citations omitted). *M.V.M., Inc.*, 352 N.L.R.B. 1165, 1172 (2008) (holding that security officer’s complaint about working conditions to government official in charge of court marshal services was protected); *Every Woman’s Place, Inc.*, 282 N.L.R.B. 413, 413, 420 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (finding social worker’s call to Labor Department concerted because other employees had questioned the employer’s holiday pay practices); *Salisbury Hotel, Inc.*, 283 N.L.R.B. 685, 687 (1987) (finding employee’s call to the U.S. Department of Labor concerted, even though employees had not explicitly agreed to act together, because they had agreed they did not like a new lunch policy and should approach management about the policy).

who posts on Facebook: “looking more and more like we need to do some organizing at my workplace.” That type of post may be an individual acting as a representative of co-workers or may result from a logical outgrowth of prior discussions among co-workers, and the Board would have to examine the factual circumstances to make the determination.

The Board should more clearly enunciate these principles underlying its determinations about when social media activity is concerted. The fact that posts to social media are intended to be shared by others including co-workers is the underlying rationale for finding that “liking” a co-worker’s post is concerted activity.⁵⁹ It sets the groundwork for potential future action by raising awareness about the issue and by discussing it, both preliminary to any collective action.

Adding to the confusion about what is concerted and what is “mere griping” is that the Board sometimes attaches the inquiry to whether an activity is for mutual aid and protection, rather than to whether it is concerted.⁶⁰ As the next Part discusses, clarifying that the relevant inquiry for whether conduct is for mutual aid and protection focuses on whether it relates to terms and conditions of employment, and not whether it is intended to improve conditions of work or is instead mere griping, will alleviate this confusion that has arisen in social media cases.

IV. MUTUAL AID AND PROTECTION

In many cases involving communications between employees on social media, it will be apparent that the employees are acting to improve their working conditions,

⁵⁹ See *Three D, LLC, d/b/a Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31, at *3 (Aug. 22, 2014) (finding no contest to ALJ’s finding that employee who liked Facebook post by a co-worker engaged in concerted activity).

⁶⁰ See, e.g., *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at *4–5 (Dec. 14, 2012) (Hayes, Member, dissenting) (arguing that employees who defended their quality of work on Facebook were not engaged in mutual aid or protection but in “mere griping”).

and thus engaged in mutual aid or protection. In some cases, however, the link between the communications and a goal of improved working conditions may be less clear. To dispose of these types of cases more easily and to provide guidance for employers and employees about these types of cases, the Board can clarify its test for “mutual aid or protection” by explaining that communications about terms and conditions of employment are for mutual aid and protection.

The landmark Supreme Court case regarding the test for mutual aid and protection, *Eastex*, was decided in 1978.⁶¹ The issue in that case was whether employees who distributed a union newsletter that advocated taking action, such as letter-writing and voting, on legislative matters concerning employment, such as “right to work” and minimum wage laws, were engaged in concerted activity for mutual aid or protection. In its discussion of the issue, the Supreme Court held that such conduct was for mutual aid and protection and that the Act specifically used the terminology “for mutual aid and protection,” rather than only the terms “collective bargaining” and “grievance settlement,” so that a wide range of conduct related to terms and conditions of employment would be protected.⁶² The Court focused on the idea that a broad range of conduct “outside the immediate employee-employer relationship” intended to improve terms and conditions of employment, such as by means of administrative and judicial forums and by lobbying the legislature, were for mutual aid and protection.⁶³ The Court acknowledged that “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity.”⁶⁴ The Court, however, left the determination to the Board as to when concerted activity had such a weak link to terms and conditions of employment as to no longer constitute acting for mutual aid and protection.⁶⁵

⁶¹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–67 (1978).

⁶² *Id.* at 565–67.

⁶³ *Id.* at 565.

⁶⁴ *Id.* at 567.

⁶⁵ *Id.* at 570 n.20.

Often, the Board does not separately analyze whether an employee's conduct is for mutual aid and protection or whether it is concerted.⁶⁶ When it does analyze these issues separately, the Board has at times stated the tests for activity constituting mutual aid and protection differently. The Board has asserted that concerted activity is for mutual aid and protection when the objective goal is to improve the terms and conditions of employment.⁶⁷ On the other hand, the Board has asserted, even in the same case, that there need only be "a link between the activity and matters concerning the workplace or employees' interests as employees."⁶⁸ The latter interpretation is supported by the Board's reason for rarely addressing mutual aid and protection separately. The Board explains that employees rarely complain to their employer about matters not related to terms and conditions of employment and employers rarely discipline employees for complaints unrelated to employment.⁶⁹ The Board has explained that employees who express disapproval of supervisors for reasons related to working conditions, training, safety, and discipline do so for mutual aid and protection, while employees who criticize the ultimate direction of the business and related managerial decisions do not.⁷⁰ For example, when employees threatened to strike unless a newly appointed acting director was replaced, the Board held that they acted for mutual aid and protection. The employees needed quality supervision to ensure that funding for their positions was not lost.⁷¹

The Board has also held that employees who distribute "purely political" leaflets do not do so for mutual aid and

⁶⁶ See, e.g., *Wynn Las Vegas, LLC*, 358 N.L.R.B. No. 81, at *1 (July 3, 2012); *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248 (1997).

⁶⁷ See *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. No. 12, at *3 (Aug. 11, 2014).

⁶⁸ *Id.*

⁶⁹ See *Senior Citizens Coordinating Council of Riverbay Cmty. Inc.*, 330 N.L.R.B. 1100, 1103 (2000) (quoting *Lutheran Soc. Serv. of Minn.*, 250 N.L.R.B. 35, 41 (1980)).

⁷⁰ *Id.*

⁷¹ *Id.* at 1104.

protection.⁷² In *Firestone Steel Products Co.*, union-represented employees were distributing leaflets that evaluated candidates for the Michigan Supreme Court and the U.S. Senate. Because the leaflets did not relate to concerns about the workplace, the concerted activity was not for mutual aid or protection.⁷³ The Board has clearly stated, however, that when concerted activity does pertain to terms and conditions of employment, the activity is for mutual aid and protection, even where one employee solicited the help of other employees who acted only as witnesses and were not similarly affected by the offending working condition.⁷⁴ In order for the “solidarity principle” underlying the protections of Section 7 to work, the Board recognizes that “solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because ‘next time it could be one of them that is the victim.’”⁷⁵

Like the Board, the Circuit Courts have also stated slightly different tests for whether concerted activity is for

⁷² *Firestone Steel Prods. Co.*, 244 N.L.R.B. 826, 826 (1979). In another case, the Board held that concerted activity was not for mutual aid and protection where employees proposed a stock option plan to purchase the employer’s parent corporation. *Harrah’s Lake Tahoe Resort Casino*, 307 N.L.R.B. 182, 182 (1992), *modified*, 325 N.L.R.B. 1244 (1992). The Board held the proposal did not relate to “employees’ interests as employees.” *Id.* The Board held it related to who managed the business rather than to their terms and conditions of employment. Perhaps in a case where employees were proposing to purchase the employer company rather than a parent corporation, the Board will recognize how directly issues involving ownership and employee management affect terms and conditions of employment. Certainly the connection is more direct than that of lobbying the legislature regarding employment statutes recognized as protected concerted activity in *Eastex*. See *supra* notes 61–65 and accompanying text.

⁷³ See *Firestone Steel*, 244 N.L.R.B. at 826–27.

⁷⁴ *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. No. 12, at *5 (Aug. 11, 2014).

⁷⁵ *Id.* at *6 (citation omitted), *overruling* *Holling Press, Inc.*, 343 N.L.R.B. 301, 303–04 (2004) (holding that a lone sexual harassment victim did not act for mutual aid and protection when seeking support of a co-worker).

mutual aid and protection. The D.C. Circuit, to which all Board decisions may be appealed, has focused on the relationship between the activity and matters regarding employment.⁷⁶ The Fourth Circuit, on the other hand, has focused on whether the concerted activity is geared at improving terms and conditions of employment.⁷⁷ Because of this focus, the Fourth Circuit has held that complaints about management are not for mutual aid and protection. For example, in one case the employer had provided ice cream to employees in celebration of a new contract with a supplier.⁷⁸ When several employees criticized this manner of expressing appreciation for employees, the Fourth Circuit held they were not acting for mutual aid or protection because they did not seek to improve working conditions.⁷⁹

The Board's failure to state a clear test for mutual aid and protection has created confusion and has resulted in a focus on whether online activities are geared towards improving working conditions rather than on whether they relate to terms and conditions of employment. The Board can make the rules clearer, which will aid employers and employees in their understanding of when social media posts are for mutual aid and protection. The Board should clarify that *Eastex* and subsequent Board precedent recognize conduct as being for mutual aid and protection when it relates to terms and conditions of employment, even if not stating an explicit goal to improve working conditions. The rationale is that some discussion is a prerequisite to actually discussing and taking action precisely aimed at improving working conditions. For instance, employee discussions regarding wages are well established as concerted activity for mutual aid and protection.⁸⁰ On the other hand, some

⁷⁶ See *Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51, 55–56 (D.C. Cir. 2012); *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 606–07 (D.C. Cir. 2007).

⁷⁷ See *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991).

⁷⁸ *Id.* at 1292.

⁷⁹ *Id.* at 1295.

⁸⁰ *Int'l Bus. Mach. Corp.*, 265 N.L.R.B. 638, 638 (1982).

topics, such as political campaigning unrelated to workplace objectives, bear only a remote relationship to terms and conditions of employment, and, thus, discussions on those topics are not for mutual aid and protection.

One way to support the Board's interpretation that mutual aid or protection includes discussion of terms and conditions of employment rather than requiring some higher level of demonstrated intent to act together is through expert testimony of psychologists, sociologists, and other social scientists. Social science suggests that current employees are reluctant to testify against their employer in favor of another employee, particularly if that employee has been terminated.⁸¹ The Board, however, is prohibited by the NLRA from hiring economists and has interpreted this prohibition to apply to all social scientists.⁸² Were the Board to modify its interpretation of this statutory prohibition to permit the hiring of psychologists and other non-

⁸¹ John D. Sloan, Jr. & John Graves, *Age Discrimination: A Trial Lawyer's Guide for Bringing Suit (Employment Law)*, TRIAL, Mar. 1995, at 48, 50 (“[P]eople who still work for the defendant may be reluctant to tell all they know because they may fear losing their jobs.”); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1028 (1999); NOAH J. GOLDSTEIN ET AL., YES!: 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE 105–06 (2008) (“[I]t’s too often the case that employees are reluctant to disagree with their managers, nurses are hesitant to question their supervising doctors, and first officers defer to their aircraft’s captains.”); HUGH S. HANNA, BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULLETIN NO. 211, LABOR LAWS AND THEIR ADMINISTRATION IN THE PACIFIC STATES 51–52 (1917) (discussing how employees in antitrust cases are frequently “unwilling to testify in court against their employers”); Kara L. Haberbush, Note, *Limiting the Government’s Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime*, 30 PUB. CONT. L.J. 97, 113 (2000) (“Past employees may also be reluctant to testify for fear of being blackballed if they are still working in the industry.”). Cf. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 92, 123, 141–42 (Harper Perennial 2009) (1974) (describing a shock experiment demonstrating people’s willingness to obey authority figures).

⁸² National Labor Relations Act, 29 U.S.C. § 154(a) (2012); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2078–79 (2009).

economists,⁸³ the Board would be able to include social science's perspective in its decisions, and in its memoranda, including guidance for employers and employees. Expert opinions in the Board's guidance would make it easier for employers and employees to understand the rules. Including expert opinions in decisions would clarify these decisions⁸⁴ and help provide rationale to the Circuit Courts that review the Board's decisions.

V. LOSS OF PROTECTION

Another topic that warrants further explanation by the Board is which test it will use to determine when an employee's social media conduct is so egregious that it loses the protection of the Act. The Board has stated several times that it will not apply its *Atlantic Steel* test to social media posts because they do not involve face-to-face conversations with a supervisor or manager.⁸⁵ *Atlantic Steel* is a four-factor test that the Board has historically applied to situations where an employee gets upset while speaking with a

⁸³ Fisk & Malamud, *supra* note 82, at 2078–79 (arguing the Board should modify its interpretation and be prepared to defend the modification in court and congressional oversight hearings); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FLA. INT'L UNIV. L. REV. 361, 373 n.41 (2010) (arguing that Section 4(a) does not prohibit the Board hiring “individuals with statistical expertise . . . to help it conduct regulatory compliance reviews”).

⁸⁴ *Cf.* 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 176 (1974) (discussing how during the 1930s the NLRB's Economics Division “carried on two interrelated types of work: it gathered economic material as evidence for use by the board in particular cases and it made general studies of labor relations problems to guide the board in its formulation of policy”); JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 265 (1981) (discussing how the lack of empirical evidence to support decisions undermines the legitimacy of NLRB decisions).

⁸⁵ *Three D, LLC, d/b/a Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31, at *4 (Aug. 22, 2014), *enforced*, *Three D, LLC v. NLRB*, 2015 U.S. App. LEXIS 18493, at *3 (2d Cir. 2015); *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, at *2 (Mar. 31, 2015).

supervisor, or when an employee denigrates a supervisor to other employees while within earshot of a supervisor.⁸⁶ The Board considers (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice.⁸⁷ Because the employee is speaking about a supervisor, the Board considers whether or not the statement was made in private and whether the communications would disrupt production or undermine shop discipline.⁸⁸ For instance, in one case, an employee of an automobile dealer became angry while meeting with supervisors in a manager's office. The employee swore at the manager and pushed away a chair. The employee also threatened the manager that the manager would regret firing him. The Board applied the *Atlantic Steel* factors to determine that the employee's behavior was not so egregious as to lose the protection of the Act.⁸⁹ In another case, the Board applied these same factors to determine that the employee's conduct was egregious enough to lose protection.⁹⁰ In this case, the employee described a supervisor to another employee as "that bitch" and told another employee to show a union organizing e-mail to her "fucking supervisors." The Board reasoned that because the employees were working in cubicles in "close proximity to each other occupied by both supervisory and nonsupervisory personnel," the employee's statements tended to undermine "the authority of the supervisor[s] subject to his vituperative attack[s]." ⁹¹

⁸⁶ *Triple Play Sports Bar*, 361 N.L.R.B. No. 31, at *4.

⁸⁷ *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

⁸⁸ NLRB OFFICE OF GEN. COUNSEL, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, MEMORANDUM OM 11-74, at 5–6, 12 (Aug. 18, 2011) [hereinafter AUGUST MEMORANDUM]; *Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001).

⁸⁹ *Plaza Auto Ctr., Inc.*, 360 N.L.R.B. No. 117, at *2–3 (May 28, 2014).

⁹⁰ *Cellco P'ship d/b/a Verizon Wireless*, 349 N.L.R.B. No. 62, at *3–4 (Mar. 28, 2007).

⁹¹ *Id.* (alterations in original) (quoting *DaimlerChrysler Corp.*, 344 N.L.R.B. 1324 (2005)).

The Board should clarify whether *Atlantic Steel* will be applied when a social media post is intended for a supervisor or manager. For instance, imagine a situation where an employee posts a statement about his boss, “Bruce, you can just fuck off. I am defriending you,” after a work dispute has arisen. While similar to a face-to-face situation, the comment may or may not be seen by co-workers. Furthermore, the situation is different because it is not face-to-face, and thus is less likely to interfere with production and discipline. A social media post is also less likely to be perceived as a physical threat.⁹² The Board should clarify whether a social media post will be evaluated under the *Atlantic Steel* test when the post is specifically directed to a supervisor, and, if not, which other standard might apply.

When *Atlantic Steel* does not apply to social media, there are four other potential standards the Board may use to determine whether the activity has lost the protection of the Act. In previous cases, the Board has applied the *Jefferson Standard* test, the *Linn* test, and a totality-of-the-circumstances test.⁹³ Additionally, one Board member has suggested adopting a test mirroring the baseline issue of whether the employee’s conduct was “so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.”⁹⁴

⁹² *But see* *Felix Indus. v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001) (rejecting the Board’s holding that the nature of the outburst only balances toward losing the protection of the Act when the employee’s outburst is “flagrant, violent, or extreme” and stating that “denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms” weighs against protection).

⁹³ *Three D, LLC, d/b/a Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31, at *4–5 (Aug. 22, 2014) (applying the *Jefferson Standard* test for disloyalty and disparagement and the *Linn* test for defamation); *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, at *2–3, *27 (Mar. 31, 2015) (applying the nine-factor totality-of-the-circumstances test).

⁹⁴ *Richmond Dist. Neighborhood Ctr.*, 361 N.L.R.B. No. 74, at *2 n.6 (citing *Triple Play Sports Bar*, 361 N.L.R.B. No. 31, at *11 n.1 (Miscimarra, Member, dissenting)).

Jefferson Standard is a test normally applied when employees make statements to third parties.⁹⁵ It determines whether an employee has been disloyal or disparaged an employer's product to an extent that the employee loses the protection of the Act, even if engaged in otherwise protected concerted activity.⁹⁶ The Ninth Circuit summarized the inquiry as "at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances."⁹⁷ "Product disparagement unconnected" to a labor dispute, "breach of important confidences, and threats of violence" are generally deemed unreasonable.⁹⁸ On the other hand, statements "that a company's treatment of its employees may have an effect upon the quality of the company's products" or "the company's own viability" are not generally unreasonable.⁹⁹ For instance, in one case, the Board adopted the ALJ's decision that employees did not lose the protection of the Act by sending a letter to their newspaper employer's advertisers "seeking support" during collective bargaining.¹⁰⁰ The ALJ reasoned that asserting circulation was plummeting was

⁹⁵ AUGUST MEMORANDUM, *supra* note 88, at 8.

⁹⁶ NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 473 (1953).

⁹⁷ *Sierra Pub'g Co. v. NLRB*, 889 F.2d 210, 220 (9th Cir. 1989). *See also* *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 54 (1st Cir. 2008) (finding that letters to a school district that contracted with bus company where employees had been employed "were reasonably necessary to carry out their lawful aim of safeguarding their then-current employment conditions"). *Cf.* *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (finding that employee who wrote newspaper concerning layoffs and was then warned not to disparage the company but posted comments on the paper's website was unprotected when his comment had made "a sharp, public, disparaging attack upon the quality of the company's product and its business policies at a critical time for the company").

⁹⁸ *Sierra Pub'g*, 889 F.2d at 220.

⁹⁹ *Id.*

¹⁰⁰ *Sierra Pub'g Co.*, 291 N.L.R.B. 540, 541 (1988), *enforced*, 889 F.2d at 220.

mere hyperbole; questioning the continued viability of the newspaper did not render the communication unprotected.¹⁰¹

The Board applied the *Jefferson Standard* test to a social media case where employees posted comments critical of their manager on Facebook.¹⁰² In *Triple Play Sports Bar*, the Board determined that employees were not disloyal when they referred to a manager as an “asshole” and “liked” a former employee’s statement about the manager making an accounting error resulting in the employee owing state tax.¹⁰³ Consistent with long-standing use of *Jefferson Standard*, the Board emphasized that the comments, which related to an ongoing labor dispute about the taxes, were not directed at the public, did not mention or disparage the employer’s product, and were similar to comments a customer could overhear.¹⁰⁴

Linn is the standard used to determine whether statements are defamatory when a labor dispute is involved.¹⁰⁵ It uses the heightened standard normally associated with proving defamation of a public figure or celebrity. Under the *Linn* standard, merely making a false statement is not sufficient to prove defamation; rather, an employee’s statement will be defamatory only when it is made with malice, meaning the statement was uttered “with knowledge of its falsity, or with reckless disregard of whether it was true or false.”¹⁰⁶ Only when a statement is made with malice will the employee lose the protection of the Act. The Board applied the *Linn* standard in a social media case where an employee posted statements complaining that

¹⁰¹ *Id.* at 549.

¹⁰² Three D, LLC, d/b/a Triple Play Sports Bar & Grille, 361 N.L.R.B. No. 31, at *6–7 (Aug. 22, 2014).

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also N.Y. Party Shuttle, LLC, 359 N.L.R.B. No. 112, at *5 (May 2, 2013) (holding that even if statements about lack of benefits were “slightly off,” they disparaged only working conditions and not the employer’s product).

¹⁰⁵ *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 64–65 (1966).

¹⁰⁶ *Id.* at 61.

the employer had not issued paychecks in a timely fashion and did not provide specified benefits.¹⁰⁷ The ALJ, whose decision was adopted by the Board, reasoned first that the statements were true, and that even if the statement about the benefits was not precisely accurate, it did not rise to the level of being intentionally false and misleading.¹⁰⁸ Thus, the employee retained the protection of the Act in making the statements.

The third test used by the Board in social media cases is a totality-of-the-circumstances test.¹⁰⁹ For this test, the Board assesses nine different factors:

- (1) whether the record contained any evidence of the [employer's] antiunion hostility; (2) whether the [employer] provoked [the employee's] conduct; (3) whether [the employee's] conduct was impulsive or deliberate; (4) the location of [the employee's] Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the [employer] considered language similar to that used by [the employee] to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon [the employee] was typical of that imposed for similar violations or disproportionate to [the] offense.¹¹⁰

The Board applied this test to a social media case involving an employee who used profanity in reference to his manager and urged co-workers to vote to join a union.¹¹¹ In *Pier Sixty*, the Board held that all nine factors suggested

¹⁰⁷ *N.Y. Party Shuttle*, 359 N.L.R.B. No. 112, at *5; see also *Triple Play Sports Bar*, 361 N.L.R.B. No. 31, at *6 (holding that employees' social media comments were either opinions or statements of fact that were not maliciously untrue).

¹⁰⁸ *N.Y. Party Shuttle*, 359 N.L.R.B. No. 112, at *5.

¹⁰⁹ A search for these factors in the Board decisions disclosed no case where this nine-factor test was applied prior to *Pier Sixty*.

¹¹⁰ *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, at *2 (Mar. 31, 2015).

¹¹¹ *Id.* at *2–4.

that the social media comment had not lost the protection of the Act.¹¹²

The dissenting member in *Pier Sixty* advocated for application of the *Atlantic Steel* test rather than the nine-factor totality test, arguing that the nine-factor test is more malleable and leaves more room for members' biases to affect the outcome.¹¹³ The Board majority, however, emphasized that *Atlantic Steel's* factors focus on a situation where an employee speaks directly with a supervisor and are not suited to address comments made to other employees in non-work settings.¹¹⁴

The Board should clarify whether all three tests can be applied to the same social media activity to make determinations of whether such activity loses protection of the Act for three different reasons, such as disloyalty, defamation, and overall egregious conduct, or whether the totality-of-the-circumstances test supersedes the *Linn* and *Jefferson Standard* tests. Perhaps the totality-of-the-circumstances test should be applied when neither disloyalty nor defamation is found, in which case it should be used consistently in every social media case where the employer argues that protection of the Act was lost because of the employee's egregious conduct.

Finally, at least one Board member has endorsed a fourth test: whether the employee's conduct was "so egregious as to take it outside the protection of the Act, or of such a character as to render the employee[s] unfit for further service."¹¹⁵ It is unclear if this is the overall conclusion based on a totality-of-the-circumstances test, such as the nine-factor test, or a different test that simply inquires as to the

¹¹² *Id.*

¹¹³ *Id.* at *5 (Johnson, Member, dissenting).

¹¹⁴ *Id.* at *2.

¹¹⁵ Richmond Dist. Neighborhood Ctr., 361 N.L.R.B. No. 74, at *2 (Oct. 28, 2014) (alteration in original) (citing Neff-Perkins Co., 315 N.L.R.B. 1229, 1229 n.2, 1233–34 (1994)); Three D, LLC, d/b/a Triple Play Sports Bar & Grille, 361 N.L.R.B. No. 31, at *9 n.1 (Aug. 22, 2014) (Miscimarra, Member, dissenting).

bottom-line issue.¹¹⁶ In some cases, the Board has applied this “so egregious” test without further elaboration.¹¹⁷ In others, the Board has looked at the totality of the circumstances to determine whether the employee’s conduct was so egregious as to lose the protection of the Act.¹¹⁸ The Board should clarify that for social media cases it is not using the “so egregious” test as a bottom-line test without further guidance. Rather, a conclusion about whether the employee’s conduct was so egregious as to render the conduct unprotected should be based on the totality of the circumstances, as evaluated using the nine-factor test or other factors, which should be enumerated.

VI. DISCLAIMERS

The Board has made clear, both in the context of social media and other policies, that a disclaimer that merely states that the policy does not deprive employees of their rights under federal law or the National Labor Relations Act will not suffice.¹¹⁹ The Board affirmed an ALJ’s reasoning

¹¹⁶ See *Pier Sixty*, 362 N.L.R.B. No. 59, at *2 (adopting the ALJ’s use of a totality-of-the-circumstances test and applying nine-factor totality test). The *Pier Sixty* panel also cites to *Richmond District*, 361 N.L.R.B. No. 74, at *2 n.6, as a case where “the Board, without deciding the appropriateness of the judge’s test for analyzing private Facebook conversations, examined the egregiousness of the conduct under all the circumstances.” *Id.*

¹¹⁷ See, e.g., *Allied Aviation Fueling of Dall., LP*, 347 N.L.R.B. 248, 248 n.2 (2006) (concluding that employee’s action of signing another employee’s name, without authorization, on a grievance form was not so egregious as to lose the protection of the Act); *Hahner, Foreman & Harness, Inc.*, 343 N.L.R.B. 1423, 1424–25, 1428–29 (2004) (reasoning that an impulsive remark to supervisor about slowing down in reaction to reduced wages was not so egregious as to lose the protection of the Act).

¹¹⁸ See, e.g., *Roemer Indus., Inc.*, 362 N.L.R.B. No. 96, at *9 (May 28, 2015) (looking at the totality of the circumstances but noting that Board precedent is unclear as to whether *Atlantic Steel* or a totality-of-the-circumstances test should apply in particular types of cases).

¹¹⁹ *Alternative Cmty. Living, Inc.*, 362 N.L.R.B. No. 55, at *1, *19 (Mar. 31, 2015) (analyzing disclaimers in the social media context). See also *Tower Industries Inc. d/b/a Allied Mech.*, 349 N.L.R.B. 1077, 1077 n.1 (2007); *Ingram Book Co.*, 315 N.L.R.B. 515, 516 (1994).

that with such a disclaimer, employees will not know what their rights are under the Act, and that they should not have to risk punishment for running afoul of an employer's policy to find out.¹²⁰

The Board has suggested that savings clauses that are more explicit, limited to clarifying a particular provision, and that affirmatively notify employees of the "panoply of rights" guaranteed to them by Section 7, may be effective.¹²¹ For instance, in one case finding a disclaimer ineffective, the Board acknowledged that "an employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule."¹²² However, the Board has not yet actually ruled that a particular affirmative disclaimer of this type has been effective in rendering lawful an otherwise unlawful and overly broad employer policy.¹²³

The NLRB General Counsel's office also has indicated that an affirmative disclaimer will be effective to make an otherwise overbroad provision in a social media policy lawful.¹²⁴ In a March 2015 memorandum, the General Counsel found lawful a prohibition in a social media policy that prohibited making recordings of work areas, given that an adjacent disclaimer clarified that "[a]n exception . . . would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of

¹²⁰ *Alternative Cmty. Living*, 362 N.L.R.B. No. 55, at *2, *19.

¹²¹ See *First Transit, Inc.*, 360 N.L.R.B. No. 72, at *3–4 (Apr. 2, 2014) (finding savings clause ineffective where it mentioned only freedom to vote for or against a union without employer interference and was not integrated with the unlawful overbroad employer policies contained in the employer handbook ten pages earlier).

¹²² *Id.* at *3.

¹²³ An extensive search, including shepardizing both *Ingram Book Co.* and *First Transit, Inc.*, discloses no such case.

¹²⁴ NLRB OFFICE OF GEN. COUNSEL, REPORT OF THE GENERAL COUNSEL CONCERNING EMPLOYER RULES, MEMORANDUM GC 15-04, at 8, 20–21, 27 (Mar. 18, 2015).

strike, protest and work-related issues and/or other protected concerted activities.”¹²⁵

If the General Counsel’s office is not pursuing charges that claim a social media policy with an affirmative disclaimer is unlawful, then such a case will not reach the Board easily. For employers who wish to use savings clauses, it would be helpful to have additional guidance from the Board itself as to the requirements for an effective disclaimer in various clauses of a social media policy. It would be helpful for the Board to explicitly address this issue in the next case in which it is raised, rather than simply adopting the ALJ’s decision as it sometimes does.

VII.CONCLUSION

For decades, the NLRB has applied its precedent to protect employees’ demonstrations of solidarity regarding their working conditions. The NLRB has faithfully applied this long-standing precedent to cases involving the use of social media. Contrary to widely publicized assertions, the resultant rulings are easy enough for employees and employers to comply with and understand.

Employers cannot discipline employees for engaging in protected concerted activity on social media. When employees discuss terms and conditions of employment via social media they are protected by the NLRA. Likewise, when one employee posts comments to social media that follow up on opinions about terms and conditions of employment that were previously voiced in group meetings, the NLRA protects that employee.

Employees’ posts remain protected even if they are critical of supervisors, as long as they do not disparage their employer’s products. They also generally remain protected even when involving profanity. Moreover, comments on social media about terms and conditions of employment that employees believe are truthful are also protected and do not rise to the level of unprotected defamation. Posts directly advocating acts of insubordination, such as refusal to follow

¹²⁵ *Id.* at 27.

lawful employer policies and neglect of duties, however, will lose the protection of the Act.

As for adopting a lawful social media policy, employers should ensure that the policy cannot be reasonably construed by employees to prohibit protected concerted activity. Prohibitions on sharing personnel or confidential information are unlawful if they do not clarify that employees may share information about wages and other terms and conditions of employment. Social media policies must define any prohibition on disparagement and defamation precisely enough to clarify that such conduct does not include statements critical of supervisors or management. Additionally, social media policies must permit employees to post anonymously when discussing wages and other terms and conditions of employment.

By following these relatively straightforward rules, employers can ensure that they are not interfering with employees' right to act in concert over terms and conditions of employment. A few clarifications about how the long-standing precedent applies to social media cases will make the NLRB's regulation of employee behavior and employer social media policies even easier to understand.

The Board should clarify that any social media discussion among employees is necessarily concerted and that "mere griping" can happen only when one employee acts alone. Even when an employee acts alone, however, by posting to social media not visible to co-workers, a line must be drawn between a mere gripe, such as "manager acting like a jerk again today," and concerted activity. When an employee posts a statement for third parties and is representing other employees, following up on group employee activity, or seeking to induce future group employee activity, the post remains protected.

The Board should also clarify its test for "mutual aid or protection" to explain that social media communications about terms and conditions of employment are for mutual aid and protection. Only when communications are about topics remotely linked to working conditions, such as criticism of the ultimate direction of a business unrelated to

any dispute over working conditions or solicitation to support a political candidate unrelated to workplace objectives, are they no longer for mutual aid and protection. Because discussion is a prerequisite to taking actual action aimed at improving working conditions, even social media comments not explicitly advocating improvement are for mutual aid and protection. If the Board would modify its interpretation of the statutory prohibition on hiring economists to permit the hiring of psychologists and other non-economists, these experts could attest to the importance of discussion and solidarity as a prerequisite to future action.

The Board should further explain which tests it uses in which circumstances to determine whether an employee's conduct on social media is so egregious as to render it unprotected. The Board should clarify that it will not use *Atlantic Steel* in any situation involving social media posts, even where the communication is specifically directed to a supervisor, and further explain the underlying rationale about why social media posts are different from face-to-face conversation. The Board should also clarify in which circumstances it will use the *Jefferson Standard* test, which is normally used when an employee makes disparaging or disloyal comments to a third party, the *Linn* test, which is normally applied to defamatory statements, and the nine-factor test, which was applied in *Pier Sixty*, a recent case involving an employee who posted profane statements about his manager on social media in the course of urging co-workers to vote for a union.

Finally, the Board should clarify its policy on disclaimers in social media policies. The Board has made clear that a general disclaimer in a social media policy that states that the policy is not intended to deprive employees of their rights under the NLRA will not render an otherwise unlawful policy lawful. The Board should further clarify whether a specific provision within a social media policy may be lawful due to a disclaimer. Employers and employees would benefit from clarification as to whether an explicit disclaimer, limited to clarifying a particular provision of a social media policy and affirmatively notifying employees that they have

the right to discuss terms and conditions of employment, renders an otherwise overbroad provision lawful.

If the Board makes these explicit clarifications, the Circuit Courts likely will continue to enforce the Board's decisions in cases involving social media. The Board will thus continue to assure protection for employees' demonstrations of solidarity regarding their working conditions, whether by face-to-face communication, social media, or some means of communication resulting from future technological revolutions.