Ohio Northern University Law Review

Volume 47 | Issue 2 Article 4

The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hole

Jeff Williams

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review

Part of the Law Commons

Recommended Citation
Williams, Jeff () "The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hole," *Ohio Northern University Law Review*: Vol. 47: Iss. 2, Article 4.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

The NLRB's Social Media Jurisprudence: A Square Peg in A Round Hole

JEFF WILLIAMS*

INTRODUCTION.

Social media has become a major part of everyday life with Facebook, Twitter, YouTube, Instagram, and others competing for the free time of Americans.[1] From children to adults, the time spent accessing social media has greatly increased over the years as we use the platforms to interact with friends, neighbors, relatives, and co-workers.[2] The time spent accessing social media has spilled over into the workplace giving rise to interesting and complicated legal issues.[3]

Further, social media has taken group discussions, face to face encounters, and other employee related discussions between coworkers outside of the workplace.[4] In addition to discussing workplace issues with coworkers in the breakroom or waiting to vent frustration at home, employees often take to social media to air their grievances.[5] Coworkers, friends, and family members are able to comment, like, and share these posts, and there is always the possibility of the post gaining traction to go viral.[6] This means that a post intended to complain about something at work can morph into something bigger.[7] For example, a Google employee recently posted a memo titled "I'm Not Returning to Google After Maternity Leave, and Here is Why," to an internal message board.[8] It was reposted to other internal messaging boards within the organization and from there went viral.[9] The

* Jeff Williams, JD, 2020, Ohio Northern University, Pettit College of Law.

1. See Kenneth Olmstead, Cliff Lampe, and Nicole B. Ellison, *Social Media and the Workplace*, PEW RESEARCH CENTER 2 (June 22, 2015).

2. Dave Chaffey, *Global Social Media Research Summary August 2020*, SMART INSIGHTS (Aug. 3, 2020), https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/.

3. Olmstead, *supra* note 1, at 2.

4. Nicholas H. Meza, Comment: *A New Approach for Clarity in the Determination of Protected Concerted Activity Online*, 45 ARIZ. ST. L.J. 329 (2013).

5. *Id*.

6. *See* Jane Williams, *What "Going Viral" Means on Facebook*, SMALL BUSINESS CHRON, https://smallbusiness.chron.com/going-viral-means-facebook-72380.html (last visited Feb. 25, 2021).

7. *Id*.

8. Valerie Bolden-Barrett, *'I'm Not Returning to Google After Maternity Leave': Internal Memo Goes Viral at Google*, HR DRIVE (Aug. 7, 2019), https://www.hrdive.com/news/im-not-returning-to-google-after-maternity-leave-internal-memo-goes-vir/560398/ (last visited Feb. 25, 2021).

9. *Id.*

Published by DigitalCommons@ONU,

memo alleged that Google discriminated and retaliated against her for being pregnant.[10] By posting the memo internally, the woman likely did not intend for it to be seen externally.[11] Nonetheless, the complaint picked up traction, made its way externally, and went viral.[12]

Social media posts and comments have influenced employers to terminate and discipline employees for what they have posted.[13] In some of these instances, employees sometimes respond by filing unfair labor practice charges with the National Labor Relations Board (NLRB).[14] Since 2010, the NLRB has struggled with how to decide cases involving social media disputes within the workplace.[15] For example, in *Desert Cab, Inc.*,[16] the NLRB considered whether an employer was justified in firing an employee for posting comments to his Facebook page, while at work, where he criticized one of his employer's new policies.[17] In *Novelis Corp.*,[18] the Board assessed whether an employer could rightfully demote an employee for posting vulgar comments severely reprimanding his fellow coworkers, calling them "F*#KTARDS" and telling them to "eat $hit," for not voting in favor of union representation in an election.[19] Furthermore, in *North West Rural Electric Cooperative*,[20] the Board considered whether an employer could terminate an electrical worker for posting complaints to a Facebook forum about management not responding to safety concerns, lack of discipline within the crews he worked with, and the lack of training many linemen received.[21]

---

10. *Id.*

11. *Here's the Memo Currently Going Viral at Google*, MOTHERBOARD TECH: VICE (Aug. 5, 2019), https://www.vice.com/en/article/mbmqxq/heres-the-memo-currently-going-viral-at-google.

12. *Id*.

13. Meza, *supra* note 4.

14. *Id*.

15. *The NLRB and Social Media*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/rights-we-protect/rights/nlrb-and-social-media (last visited Sept. 9, 2019) (discussing how in 2010, the NLRB began receiving charges in its regional offices related to employer social media policies and to specific instances of discipline for Facebook postings).

16. Desert Cab, Inc. d/b/a ODS Chauffeured Trans. and Paul Lyons, 367 NLRB No. 87 (Feb. 8, 2019).

17. *Id.* at 27-29 (The employee posted photos to his Facebook page of limos parked at the customers parking lot waiting for customers with a commentary saying: "Hanging out at the Morgue. We are sent her to sit around for three hours for no reason," and further that same night posted a photo/commentary showing the front of the customer's building with his comment: "When its [sic] truly a crappy day at work and there is nothing you can do about it.").

18. Novelis Corp., 364 NLRB No. 101 (Aug. 26, 2016).

19. *Id.* at 158 (The employee's post read as follows: "As I look at my pay stub for the 36 hour check we get twice a month, One worse than the other. I would just like to thank all the F*#KTARDS out there that voted 'NO' and that they wanted to give them another chance. . .! The chance they gave them was to screw us more and not get back the things we lost. . .! Eat $hit 'No' voters. . ..").

20. North West Rural Electric Cooperative, 366 NLRB No. 132 (July 19, 2018).

21. *Id.* at 30-31 (The exact comments the employee posted to the Facebook forum are as follows: "I agree with most comments been in the trade 11 years started with iou and got my ticket was trained by

In each of these cases, the NLRB concluded the employer violated the National Labor Relations Act (NLRA).[22] While these outcomes were questionable in their own regard, more troubling was the reasoning the Board employed in deciding the cases.[23] Applying a 1935 law to a twenty-first century phenomenon, the NLRB has tried to fit a square peg through a round hole by using ineffective tests to decide cases for which new standards are clearly warranted.[24] This Comment argues the Board's approach to social media disputes is inadequate and inconsistent, which has created confusion for employers and employees alike.[25] This Comment further proposes for the NLRB to fully utilize a modified framework that utilizes elements of established NLRB precedent along with other hard line rules that would resolve many social media disputes in the beginning of an employment dispute, give clarity to an otherwise confusing analysis, and provide more balance for employers in an employee favored framework.[26]

This Comment consists of four parts.[27] Part I explains the background of the NLRB and the NLRA and the definitions and test utilized within the Act to help decide social media disputes.[28] Part II discusses the NLRB's application of the NLRA to recent cases, the clarification and advice the NLRB has given to employers, and the modified tests developed by courts that the NLRB has ignored.[29] Part III analyzes the Board's existing framework and highlights the problems with this approach.[30] First, the definition of "concerted activity" the NLRB has used in the social medial context has led to inconsistent decisions.[31] Second, the location factor, where

---

the 'old' guys that brought me up they were the real deal the brotherhood that was compared to me at 31 being the oldest jl of our 6 man crew and I use 6 man crew loosely most it's 3 out doing all work a jl or two and apprentice sometimes lead man one man in the air all the time I have brought everyone through there apprenticeship except my lead lineman who's 3 years younger I was In the Air all the time look down not a one would be looking up not even apprentice then I would get lip back when I would talk about it told management all the time these new guys need time in the air I can count on my damn hand how many times I have seen them do hot work. Again brought it up they agree nothing gets done biggest apart now days is lack of experience one man in the air it all drove me out I got sick of fighting he guys took a staking job. Just last month. Lack of discipline, and having to care about others feelings Is why people get hurt I used probably the least amount of cover and like others have said it teaches you to keep your shit in a row and pay attention. Not to just go slopping around. That's my 2 cents. [E]very accident I have heard of is one man in the air and maybe one on the ground on maybe they are a few spans down stupid.").

22. *See Desert Cab*, 367 NLRB at 90; *Novelis Corp*., 364 NLRB at 236-37; *North West*, 366 NLRB at 120.

23. *See generally* James Long, *#Fired: The National Labor Relations Act And Employee Outbursts In The Age Of Social Media*, 56 B.C. L. REV. 1217, 1235 (2015).

24. *See generally id*.

25. *See infra* Part III.

26. *See infra* Part IV.

27. *See infra* Parts I-IV.

28. *See infra* Part I.

29. *See infra* Part II.

30. *See infra* Part III.

31. *See infra* Part III.A.

the social media post occurred, has and still poses problems for the Board's analysis because more employees are accessing social media at the workplace than at home.[32] This Part further asserts that many of the decisions by the NLRB and courts ignore and bypass the rights of the employer to maintain their goodwill, and to be able to discipline employees that access social media during working hours.[33] Lastly, Part IV suggests three ways the NLRB could amend or alter its analytical framework to reduce inconsistencies and generate better decisions.[34] The first suggestion is the NLRB needs to make the location factor a bright line rule, meaning that if the comment was posted while the employee was "on the clock" at work then it will not be protected under the NLRA.[35] Second, the intent of the employee needs to be taken into consideration to determine if the posting is protected, by not doing so has led to legitimate employment concerns from being protected.[36] Finally, the Board needs to put more emphasis on employer's rights, focusing more on the damage that a social media post has caused to its goodwill and reputation.[37] This would make the current analysis more in-line with the purpose of the NLRA, which is to protect both the employer and employee.[38]

I: Background of the NLRA and Concerted Activity

Congress enacted the NLRA in 1935[39] in response to harsh conditions imposed on the working class.[40] The purpose of the Act was to safeguard employee rights and prevent employers from taking advantage of their employees with restrictive workplace conditions because they held the greater bargaining power.[41] The NLRA defines its purpose of protecting the rights of employees and employers as ". . . encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the

32. *See infra* Part III.B.
33. *See infra* Part III.C.
34. *See infra* Part IV.
35. *See infra* Part IV(A)(1).
36. *See infra* Part IV(A)(2).
37. *See infra* Part IV(A)(3).
38. *See infra* Part IV.
39. Stephanie M. Merabet, Note*: The Sword And Shield Of Social Networking: Harming Employer's Goodwill Through Concerted Facebook Activity*, 46 SUFFOLK U. L. REV. 1161, 1166 (2013) (discussing the development and history of the NLRA and the subsequent creation of the NLRB).
40. *See* 29 U.S.C. § 158 (1974).
41. *See generally What We Do*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/what-we-do (last visited August 28, 2019) (discussing how "[t]he National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative.").

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

terms and conditions of their employment or other mutual aid or protection."[42]

At the same time, Congress created the NLRB to enforce and administer the NLRA.[43] As the forum where employees could voice alleged violations,[44] the NLRB has protected the rights of private sector employees to join together to improve their wages and working conditions through the NLRA.[45] Private sector employees who are terminated or demoted for their social media activity turn to the NLRB for help and protection.[46] Private sector employees do not have the same protections afforded to them as public employees do with their First and Fourteenth Amendment rights.[47] Therefore, the NLRB has been tasked with helping private sector employees secure protection from unlawful workplace practices.[48]

The NLRA safeguards employees' actions to organize, dispute, and come together to discuss job-related concerns as "protected concerted activity."[49] In addition to employment disputes over wages, hours, safety, and other workplace conditions, the NLRB also addresses issues concerning employees' rights to picket and strike, if within a union, as generally being described as "concerted activity."[50]

---

42. *See* 29 U.S.C. § 151 (1947) (purpose of the NLRA is to provide protection for employees against harmful practices by employers).

43. *Id.* § 153.

44. *The NLRB Process*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/resources/nlrb-process (last visited Feb. 25, 2021) (Explaining how "[t]he NLRB is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative" and outlines a flowchart detailing the steps in the unfair labor practice process and another chart detailing the steps in the representation election process).

45. *Protected Concerted Activity*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity (last visited Feb. 25, 2021) (Describing that by enforcing the NLRA, the Board ". . . gives employees the right to act together to try to improve their pay and working conditions, with or without a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away.").

46. *The NLRB and Social Media*, *supra* note 15.

47. *Retaliation – Public Employees and First Amendment Rights*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/retaliation-public-employees (last visited Feb. 25, 2021); *Rights We Protect*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/rights-we-protec (last visited Feb. 25, 2021) (discussing that the NLRB protects the rights of most private sector employees).

48. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2018) (the general purpose of the act is to protect both the employer's and employees' rights in workplace disputes, the act was developed with respect to unlawful employment practices occurring at the time of enactment).

49. *Employee Rights*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights (last visited Feb. 25, 2021) (stating the NLRA applies to activity outside of unions and employees excluded from coverage under the Act include: individuals employed by the government or an employer subject to the. Railway Labor Act, independent contractors, agricultural laborers, and supervisors); *see also* 29 U.S.C. § 152(3) (defining whom the NLRA protects as an employee).

50. *NLRA and the Right to Strike*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/nlra-and-the-right-to-strike (last visited Feb. 25, 2021) (Discussing how Section 7 of the NLRA states that "[e]mployees have the right. . ." to do all that is listed in the Act).

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

A. Defining Concerted Activity and the Analytical Framework used under the NLRA

Under Section 7 of the NLRA, employees have the right to self-organize, ". . . form, join, or assist labor organizations, . . ." bargain through representatives, and engage in concerted activities.[51] Numerous courts have interpreted this language and held that for an employee's action to be "concerted," the employee must act with, or authorized, by other employees, not solely acting by and on behalf of themselves.[52] NLRB rulings have inferred that concerted activity will include situations where the employee implies, but does not expressly state, a request for other employees to act.[53]

Even if the activity is deemed concerted, to receive protection under the NLRA it must also be for "mutual aid and protection," in the pursuit of improving terms or conditions of employment.[54] "Mutual aid" and "protection" means incorporating a self-interested economic objective with a group action involving improved pay, working hours, and workload.[55] By contrast, an employee or group of employees will not be protected under Section 7 when they are only making a personal gripe or complaining about their job, current employment situation, or airing "dirty laundry."[56]

1. The Analytical Framework used by the NLRB

The framework established by the NLRB in deciding whether an employee engaged in protected concerted activity involves three steps.[57] The first step is to determine whether the employee acted in concert with other employees, determining if their activity was concerted as defined in the preceding section.[58] To make that determination the NLRB relies on the

51. 29 U.S.C. § 157 (2018); *see also* Cressinda "Chris" D. Schlag, *The NLRB's Social Media Guidelines A Lose-Lose: Why The NLRB's Stance On Social Media Fails To Fully Address Employer's Concerns And Dilutes Employee Protections*, 5 AM. U. LABOR & EMP. L.F. 89, 99 (2015) (discussing the background of the NLRA and the rights that employees have under the Act).

52. Meza, *supra* note 4, at 334-35 (Discussing protected concerted activity, how it is defined and the current problems with defining concerted activity and when the protected activity loses protection under the act).

53. Timekeeping Sys., Inc., 323 NLRB 244, 247-48 (1997) (holding that an employee's email to coworkers about the employer's vacation policy was concerted activity on the basis that the employee was trying to gain support for his opposition to the policy).

54. *See* 29 U.S.C. § 157; *see e.g.* Eastex Inc., v. NLRB, 437 U.S. 556, 569-70 (1978) (holding that employees who sought to distribute a union newsletter in nonworking areas of the employer's property during nonworking time that urged employees to support the union was protected as concerted activity. The Court held that the employees' appeal to legislation to protect their interests as employees was within the scope of the "mutual aid and protection clause.").

55. *See e.g.* Compuware Corp. v. NLRB, 134 F.3d 1285, 1288 (6th Cir. 1998) (asking the relevant question of whether the employee acted with the purpose of furthering group goals).

56. *NLRA and the Right to Strike*, *supra* note 50.

57. Meza, *supra* note 4, at 357, 361, 363.

58. *Id*. (discussing the analytical framework adopted by the NLRB memo).

https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4

Meyers line of cases, commonly known as *Meyers I*,[59] and *Meyers II*,[60] where the NLRB established that for an action to be concerted an employee must be engaged with or on authority of other employees, and not solely for their own benefit.[61] The second step is to determine whether the concerted activity referred to or ". . . implicate[d] terms of employment or conditions in the workplace."[62] In other words, it must be determined if the act was done for the "mutual aid and protection."[63] The third step is whether the concerted activity was ". . . so opprobrious as to lose the protection of the [NLRA]."[64] The NLRB and courts have held that concerted activity will lose protection if it is opprobrious, breaches an implied duty of loyalty, or constitutes a mere gripe.[65]

In *Atlantic Steel*, the NLRB introduced a balancing test for determining whether the employee acted opprobriously, meaning the action was so egregious as to lose protection.[66] The test includes four factors: ". . . (1) the place of discussion [known as the location factor]; (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."[67] If it is determined that the employees' conduct crossed the line from

59. Meyers Indus. Inc., 268 N.L.R.B. 493, 497 (1984) [hereinafter *Meyers I*].

60. Meyers II, 281 NLRB 882, 885 (1986).

61. *Meyers I*, 268 NLRB at 497; *Meyers II*, 281 NLRB at 885. (The Meyers test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."); *see also Meyers II*, 281 NLRB at 887 (concerned activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action," and where individual employees bring "truly group complaints" to management's attention).

62. Meza, *supra* note 4, at 361 (discussing the different steps within the analytical framework that the NLRB follows in deciding workplace disputes).

63. 29 U.S.C. § 157 ("Employees shall have the right . . . to engage in other concerted activity for the purpose of . . . mutual aid or protection.").

64. Meza, *supra* note 4, at 363 (discussing step three in the analytical framework).

65. *See* Nat'l Labor Relations Bd. v. Local Union No. 1229, Int'l Bhd. Of Elec. Workers, 346 U.S. 464, 476 (1953) [hereinafter *Jefferson Standard*] (holding that when union employees that were picketing publicly distributed flyers that disparaged the employer their action was beyond the protection of the NLRA); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 684-85 (3d Cir. 1964) (determining that an employee's comments advising other coworkers of their rights to be "mere griping" because they did not "initiate or promote any concerted action" that would improve the conditions of employment); Atl. Steel Co., 245 NLRB. 814, 816 (1979) (recognizing that employees may engage in conduct "so opprobrious" that causes their concerted activity to be unprotected); *see* Care Initiatives, Inc., 321 NLRB 144, 151 (1996) (listing behavior that could lose protection under the NLRA to include obscene language directed at a supervisor, violent communications, or insulting personal attacks); *see also* James Long, *supra* note 23, at 1223 (discussing all the elements of when protected concerted activity loses protection under the NLRA).

66. *Atl. Steel Co.*, 245 N.L.R.B. at 816 (explaining that the ALJ failed to apply the factors for when an employee who is engaged in protected activity can lose protection of the Act when the conduct is opprobrious).

67. *Id.* (The Board then laid out all four factors that need to be considered in determining if the employee's concerted activity loses protection).

"protected activity" to "opprobrious conduct" the employee loses the protection of the NLRA.[68]

In determining whether an employee breached its duty of loyalty, such that the conduct is not protected, the Board applies the *Jefferson Standard*.[69] Under this standard, activity is not protected when an employee made public disparaging attacks upon the quality of the company's product and business in a manner reasonably calculated to harm the company's reputation and reduce its income.[70] The *Jefferson Standard* mainly focuses on the effects an employee's complaint against the employer has on third parties and the potential or actual damage that the action has on the employer.[71]

In *Mushroom Transp. Co. v. NLRB*, the court held that mere griping will lose protection under the Act when the talk does not look toward group action.[72] The determination is ". . . when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to."[73] A conversation that only advises another individual what to do, or only pertains to the speaker, without involving coworkers to protect or improve the working conditions will be considered to be an individual, and not concerted, activity, and, therefore, just a "mere gripe."[74]

---

68. *Id.* (citing Hawaiian Hauling Serv., Ltd., 219 NLRB 765, 766 (were the Board recognized that an employee may engage in conduct during a grievance meeting which is so opprobrious as to be unprotected)).

69. Tara R. Flomenhoft, *Balancing Employer and Employee Interests in Social Media Disputes*, 6 AM. U. LAB. & EMP. L.F. 1, 12 (2016).

70. *Jefferson Standard*, 346 U.S. at 476-77.

71. Flomenhoft, *supra* note 69, at 12-13 (discussing the *Jefferson Standard*, its application and when an employee can lose protection under the Act by having their conduct be so disloyal, reckless, or untrue) (citing Am. Golf Corp., 330 N.L.R.B. 1238, 1240 (2000) (discussing that an employee handbill that was distributed was not protected under that standard because the handbill made no reference to a labor controversy or to collective bargaining but similar to the issue in *Jefferson Standard* "made a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income").

72. Mushroom Transp. Co., 330 F.2d at 685.

73. *See id.* (The court noted a conversation may constitute concerted activity even when it involves only a speaker and a listener, but to qualify for protection the conversation at the very least must be for initiating, inducing or preparing for group action or have some relation to group action in the interest of the employees. Further the court noted that preliminary discussions are not automatically disqualified as concerted activities merely because they have not resulted in organized action or presenting demands but recognized that any concerted activity for mutual aid and protection had to start somewhere, and it would nullifying the rights guaranteed by Section 7 of the Act if such communications were denied protection because of lack of fruition, but noted "that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.").

74. *See id.* (The Third Circuit overturned a NLRB decision and held that an employee's conversation was a "mere gripe." The court stated in full "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'").

B. The Totality of Circumstances Test: A Change to Precedent Just for Social Media

Over the years the NLRB has concluded that the *Atlantic Steel* test is more ". . . 'tailored to workplace confrontations with the employer' and is 'not well suited to address issues that arise in situations involving employees' off duty, offsite use of social media . . . .'"[75] Instead the Board has tried to adopt a more modern totality of the circumstances test to deal specifically with social media cases.[76]

The test includes aspects of both the *Atlantic Steel* test and the *Jefferson Standard*, which contain nine points for evaluating an employee's use of social media:

(1) any evidence of antiunion hostility; (2) whether the conduct was provoked; (3) whether the conduct was impulsive or deliberate; (4) the location of the conduct; (5) the subject matter of the conduct; (6) the nature of the content; (7) whether the employer considered similar content to be offensive; (8) whether the employer maintained a specific rule prohibiting the content at issue; and (9) whether the discipline imposed was typical for similar violations or proportionate to the offense.[77]

The totality of the circumstances test has been used for many years but not in the social media context.[78] The need for a modified test was first discussed between 2012 and 2014 when both the Board and court decisions recognized the "place of discussion," or location factor in *Atlantic Steel* did not work within the social media context.[79] The Board and various court

---

75. *North West*, 366 NLRB at 77 (The NLRB was trying to decide whether an employees' off duty, offsite comments to a Facebook forum were sufficiently egregious to lose protection under the NLRA).

76. *Id.* at 77.

77. NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123 (2nd Cir. Apr. 21, 2017).

78. *See Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972) (while negotiations for a new contract were in progress, unit employees appeared at work wearing sweatshirts displaying the slogan "Ma Bell is a Cheap Mother." The employer asked the employees to leave the premises or cease displaying the slogan. The General Counsel alleged that the employees' conduct was protected and that the employer's direction to leave or cease displaying the slogan violated the Act. The judge found that the slogan printed on the sweatshirts was obscene and that the employer's request that employees cease displaying the slogan or leave the premises did not violate the Act. In reaching this conclusion, the judge relied on several factors. First, the judge observed that the parties had stipulated that the language could be (and was) construed as obscene and offensive. Second, the manner in which the offensive language was used–"worn on shirts to be exposed to employees and management all hours of the day"–did not constitute "impulsive behavior." Third, the employer had not threatened reprisal, but had simply requested employees to cease displaying the offensive slogan. Fourth, there was no evidence that the company was an antiunion employer or that the company had exhibited any union hostility in conjunction with the request to cease displaying the slogan. Fifth, no one was discharged, and the only adverse consequence was that individuals who elected to leave the premises were not paid for the time they did not work. Finally, employees could, and without company objection did, use other means to pursue their Section 7 rights.).

79. *See* NLRB v. Starbucks Corp., 679 F.3d 70, 80 (2nd Cir., May 10, 2012) (first calling into question the effectiveness of the *Atlantic Steel* test and advising the NLRB that the *Atlantic Steel* four-factor test is not applicable to determining section 7 protection for an employee who, while discussing

decisions started to recognize the "place of discussion," or location factor in *Atlantic Steel* was tailored to better handle workplace confrontations with the employer.[80] The Board started to utilize the totality of circumstances test to try and resolve social media disputes, but the Board has not utilized the test in every decision.[81]

As will be discussed in Part II, the NLRB released memorandums to give guidance and direction to employers about social media disputes within the workplace.[82] Within those memos, the Board analyzed many cases and found that there was a need to modify the traditional framework established under *Atlantic Steel* and *Jefferson Standard* for determining whether an employee's social media posting constituted protected concerted activity.[83] Curiously, although the NLRB suggested several modifications, it never really used them to resolve disputes and instead reverted to the *Atlantic Steel* test and the *Jefferson Standard*.[84] After several years, the Board and courts realized that the traditional standards were not the best analysis to use in certain social media disputes and developed the totality of the circumstances test discussed above.[85] However, the test is still not fully utilized and is missing elements that were suggested from the memos that would make it a more adequate framework to decide social media disputes.[86]

---

employment issues, utters obscenities in the presence of customers, "we think the Board should have the opportunity in the first instance to consider what standard it will apply in that context"); *see also* Triple Play Sports Bar and Grille, 361 NLRB 308, 311 (2014) (The Board recognized that the *Atlantic Steel* place of discussion factor is tailored to workplace confrontations with the employer and further suggested that employees' off-duty, offsite use of social media can never implicate an employer's interest in maintaining workplace discipline and order in the same manner that a face-to-face workplace confrontation with a manager or supervisor does.).

80. *Employee Rights*, *supra* note 49.

81. *See Pier Sixty LLC.*, 362 NLRB No. 59 (2014) (The ALJ analyzed the employee's Facebook posting utilizing the *Atlantic Steel* factors first and concluded that the post did not lose protection, but further noted that the NLRB has used a totality of circumstances test to evaluate statements made by one employee to another. The judge proceeded to list all the factors in the test and determined that the employee did not lose protection under the Act.); *see Desert Cab*, 367 NLRB No. 87 (using the *Jefferson Standard* with no mention of the *Atlantic Steel* standard or the totality of circumstances test); *Novelis*, 2016 NLRB LEXIS at 206, 364 NLRB No. 101 (mentioning the Board has noted that the *Atlantic Steel* test is inadequate for the facts and then turning to analyze under the *Jefferson Standard*, with no mention of the totality of circumstances test); *North West*, 366 NLRB No. 132 (mentioning the *Atlantic Steel* standard is inadequate and then turned to use the totality of circumstances test by looking at all nine factors).

82. *See infra* Part II.

83. *See infra* Part II.

84. Office Of Gen. Counsel, Nat'l Labor Relations Bd., OM 12-31, Report Of The Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012) [hereinafter NLRB MEMO OM 12-31], https://www.nlrb.gov/rights-we-protect/rights/nlrb-and-social-media (follow "second report" hyperlink).

85. *See infra* Part II.

86. *The NLRB and Social Media*, *supra* note 15.

II: Application of the NLRA to social media cases

The Board started issuing decisions in late 2010, and employers, in response to those decisions, demanded guidance as the area of law was developing and many employers felt the NLRA was not equipped to deal with social media disputes.[87] In response, the NLRB General Counsel released memorandums attempting to detail and clarify the results of several social media decisions decided between 2011 and 2012.[88]

The most relevant NLRB memorandum to this comment is the one issued on January 24, 2012 where the Board recognized there are "inherent differences" between exercising Section 7 rights over social media versus a face-to-face discussion.[89] The Board discussed recent social media cases and asserted that it understood the traditional framework analysis needed to be adapted to function with social media disputes within the workplace.[90] The NLRB explained that under the *Atlantic Steel* test, it usually only assessed whether an employee's social media posts caused a disruption in the workplace and did not consider the disparaging impact the comments made on third parties, which was a factor traditionally evaluated by the *Jefferson Standard*.[91] The Board promised to modify the *Atlantic Steel* test by incorporating the disparaging impact factor from the *Jefferson Standard* to create a more suitable framework applicable to social media disputes.[92]

The Board further recognized that other prongs of *Atlantic Steel* required modification when applied to social media disputes–noting the location and nature of the outburst prongs needed to reflect the "inherent difference

87. *Id.* ("To ensure consistent enforcement actions, and in response to requests from employers for guidance in this developing area, Acting General Counsel Lafe Solomon released three memos in 2011 and 2012 detailing the results of investigations in dozens of social media cases").

88. Meza, *supra* note 4 (The first memo described cases involving employees' use of Facebook, which were found to be engaging "protected concerted activity" and other cases where the activity was found to be unprotected. The second memo also looked at cases involving questions about employer social media policies. The second memo underscored one main point that an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees. The third memo examined more employer policies governing the use of social media by employees).

89. *The NLRB and Social Media, supra* note 15 (The second memorandum released by the NLRB); NLRB MEMO OM 12-31, *supra* note 84.

90. NLRB MEMO OM 12-31, *supra* note 84, at 24. (The report discussed fourteen recent Board decisions that "present[ed] emerging issues in the social media context.").

91. *Id.* at 24-25.

92. *Id.* at 22, 24-25. (Discussing what is referred to herein as the *Popcorn Packaging* case the Board recognized that a Facebook posting does not exactly mirror the situation in an *Atlantic Steel* analysis, which typically focused on whether the communications would disrupt or undermine workplace discipline. The Board also noted that the *Atlantic Steel* analysis did not consider the impact of disparaging comments made to third parties. Thus, the Board decided that a modified *Atlantic Steel* analysis that considered not only disruption to workplace discipline, but that also borrowed from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech).

between a Facebook conversation and a workplace outburst."[93] This suggested the Board realized the differences between a workplace discussion or outburst and a social media post. Therefore, the NLRB indicated it would modify the location factor analysis of *Atlantic Steel* to depend on whether the social media post occurred during workplace hours.[94] Additionally, the Board indicated that it would modify the nature of the outburst factor to include whether the social media post was so disruptive to the workplace discipline as to cause it to lose protection under the NLRA.[95] Finally, the NLRB noted it was best to make these modifications to the traditional frameworks to account for the impact social media posts could have on third parties and their employers.[96]

The memos were intended to provide guidance on the NLRB's approach to the concerted nature of employees' social media posts.[97] Instead the memos failed to provide clear guidance for employers and employees, and further, the NLRB failed to adhere to its own guidance.[98] Despite the assertions in the memos, the Board began releasing decisions in late 2012 only applying the traditional standards to social media disputes and without the modifications it previously suggested.[99]

93. *Id.* at 25. (The Board decided that the remaining *Atlantic Steel* factors-the location of the conversation and the nature of the outburst—must be adapted to reflect the inherent differences between a Facebook discussion and a workplace outburst. The Board exclaimed that the "nature of the outburst" and "location" inquiries of *Atlantic Steel* needed to merge to require consideration of the impact the of the fact that the discussion could be viewed by third parties).

94. *See* Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29, 48 (2011) (discussing the first application of *Atlantic Steel* to social media); *see also* Lafe E. Solomon, *First Report*, NAT'L LABOR RELATIONS BD. (Aug. 18, 2011), https://www.nlrb.gov/rights-we-protect/rights/nlrb-and-social-media (discussing the application of the standard for the first time, but identifies the case anonymously) (follow "first report" hyperlink).

95. NLRB MEMO OM 12-31, *supra* note 84, at 25 (see note 91 for explanation).

96. *Id.*

97. *Id.* at 25 (Applying the concerted activity analysis to new cases arising in social media contexts).

98. Meza, *supra* note 4, at 339 (arguing the NLRB memo illustrates a wide range of complex legal analysis dealing with social media disputes and that it provided a helpful summary of the numerous cases and decisions but failed to provide clear guidance for employers and employees because the memo lacked coherent guidance and a clear rule to advise employers).

99. Flomenhoft, *supra* note 69, at 15-16 (discussing the modified suggestions alluded to in the memorandums by the NLRB and how despite the suggestions the Board did not decided cases based on those suggestions).

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

Karl Knauz Motors[100] and *Hispanics United of Buffalo*[101] were the first two cases issued by the NLRB after the memorandums.[102] In *Karl Knauz*, a car salesman's Facebook posts were found to be concerted when he posted pictures of the food his employer was serving at a big sales event.[103] A few days prior to the event, the employee and several other coworkers voiced their disproval over the food choices.[104] The hope was that a large sales event would bring big commissions for the sales staff, and the dispute was that other car dealers provided higher quality food when hosting similar events.[105] The employer fired the employee for his Facebook posts.[106]

The NLRB held the photos posted by the employer were concerted activity and reasoned, using the *Meyers* standard, that the posts were connected to the earlier conversations with the employer about the food choices.[107] The Board further explained that it was concerted activity because the food choices could affect the employee's commissions.[108] Later in its analysis the Board found that the mocking tone used in the photos was not disparaging enough to lose protection under the Act.[109]

The NLRB utilized the traditional *Meyer* standard for defining concerted activity and the *Jefferson Standard* to figure out if the posts lost protection.[110] At no time, and with no explanation, did the Board use the suggested

100. *See, e.g.*, Karl Knauz Motors, Inc., 358 NLRB No. 164, 1 (2012) (The NLRB held that an employee's pictures posted to Facebook about food choices the employer was going to offer at an upcoming sale were protected concerted activity because they were an outgrowth of previous conversations with the employer and dealt with compensation).

101. Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012) (The NLRB held that reinstatement of five employees was proper because the comments they posted to Facebook were protected concerted activity because the comments were for the purpose of mutual aid or protection).

102. *Karl Knauz Motors*, 358 NLRB No. 164; *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37.

103. *Karl Knauz Motors*, 358 NLRB No. 164, at 11 (The employer brought in a hot dog stand for the sales event. The employee took pictures of the food at the event and shared them on his Facebook page with various sarcastic comments criticizing the food choices of his employer. One of his comments read, "[n]o that's not champagne or wine, it's an 8oz. water. Pop or soda would be out of the question. In this photo, [my coworker is] . . . coveting the rare vintages of water that were available to our guests.").

104. *Id.* at 2 (The employees complained to the manager that other car dealerships provided better quality food and expressed their concern that by not having better food it could hurt their commissions).

105. *Id.* at 10, 16. (The concern for the employee was that similar car dealerships provided higher quality food and not a hot dog stand, but the employer did not agree and decided to use the hot dog stand despite the concerns of several employees).

106. *Id.* at 1. (The employee also posted pictures of an accident that happened at his employer's other dealership, where a young boy had driven a vehicle into an adjacent pond with a salesman sitting in the passenger seat. The employer stated that they fired the employee for his pictures of the car accident and not the hot dog photos).

107. *Id.* at 16.

108. *Karl Knauz Motors,* 358 NLRB No. 164 at 16 (The NLB explained that this was not an "obvious" situation of concerted activity but since it was "possible" the food choice could have affected the sales commissions, though still not likely, it was concerted activity).

109. *Id.* at 17 (While the board did find the hot dog posts to be concerted activity and protected under the Act it held that the photos of the car accident were not protected because they had no connection to employment conditions, therefore, his termination was held to be lawful).

110. *Id.* at 1; NLRB MEMO OM 12-31, *supra* note 84, at 24-25.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

modified framework from the memos. If the Board had utilized the suggested modified framework, the location factor would have been used, and the posted photos would have been deemed not protected because the employee posted while at work.[111]

In *Hispanic United of Buffalo*, five employees were fired for posting and commenting on Facebook about a coworker who planned to complain to management about unsatisfactory departments.[112] The supervisor claimed the employees were fired because the comments constituted bullying and harassment.[113] The terminated employees filed a charge in which the NLRB concluded, under the *Meyers* standard, that the terminated employees were exercising their Section 7 rights and therefore the Facebook posts were concerted activity.[114] The Board mandated reinstatement of the terminated employees.[115]

The Board only applied its traditional framework and failed to consider the suggested modified framework found in the memos.[116] If it had applied the modified framework focusing on the nature of the outburst and whether it was so disruptive to the workplace, the decision may have turned out differently. The employees' comments could have been determined to be harassment and bullying, which is a disruption to the workplace. By focusing on whether the comments were for the purpose of mutual aid or protection instead of the nature of the outburst, as suggested in the memos, the NLRB makes it hard for an employer to discipline its employees that are bullying and harassing a fellow coworker.[117]

In these two decisions the NLRB does not recognize or mention any differences between the traditional framework and social media disputes and

---

111. NLRB MEMO OM 12-31, *supra* note 84, at 25.

112. *Hispanics United of Buffalo*, 359 NLRB No. 37, at 1 (The dispute started when the coworker that was going to complain told one employee that she was going to go to management about departments that were not performing well. The employee became upset because one of the departments that the coworker was going to complain about was one that she worked in. The employee then posted to Facebook writing, "[coworker] feels that we don't help our clients enough at work. I about had it! My fellow coworkers how do u feel?" Four coworkers responded and objected to the one coworker stating she was going to go to management. The coworker that originally was going to complain went to management, but instead of complaining about substandard work, she claimed that the Facebook posts defamed her).

113. *Id.* at 2.

114. *Id.* (The NLRB emphasized that the actions by the terminated employees were clearly concerted actions because the comments made by the employees on social media were for the purpose of mutual aid or protection which is lawful. Additionally, the Board reasoned that the employee who initially shared the Facebook post was altering, or in another sense, initiating action and the responses by the other four employees was in connection to the original posts, making it concerted activity).

115. *Id.* at 15 (This was the first case dealing with social media that the NLRB mandated reinstatement of terminated employees).

116. *See*, *id.* at 1.

117. *See*, *Hispanics United of Buffalo*, 359 NLRB No. 37, at 2, 5.

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

instead reverts to applying its traditional standard.[118] The Board did not provide any reason why it did not adhere to its own suggestion to utilize the modified framework, and only noted in these decisions that they were using "longstanding precedent."[119] If the NLRB had utilized the modified framework suggested in the memos, *Karl Knauz* would have been more straightforward because of the location factor, and *Hispanics United* would likely have been a different outcome. By not utilizing the modified framework the NLRB decided these social media disputes incorrectly.

A. Recent Applications of the Traditional Framework

After nearly ten years, the NLRB still ignores its own suggestions to modify the traditional framework when it decides cases.[120] Several recent Board decisions show how the traditional framework produces questionable results and leaves some employees protected and others not protected when the opposite should happen.[121]

I. Novelis Corp.

In *Novelis*,[122] the NLRB followed its traditional framework and applied the inconsistent *Meyers* standard in trying to define concerted activity.[123] Novelis operated a facility which manufactured rolled aluminum products.[124] Novelis announced that employees would no longer be receiving Sunday premium pay and that holiday and vacation days would not count towards overtime eligibility.[125] In response, an employee met with the local union president to initiate an organizing campaign.[126] Throughout the organizing campaign, approximately twenty-five other employees helped obtain signed union authorization cards from many of the employees.[127] In response to the

118. *Karl Knauz Motors,* 358 NLRB No. 164 at 1; *See*, *Hispanics United of Buffalo*, 359 NLRB No. 37, at 1.

119. *See generally id.* at 16; *see also Hispanics United of Buffalo*, 359 NLRB 37, at 1, 15 (Neither case mentions a modified framework that was discussed in the NLRB memos and each utilizes the traditional standards found in *Meyers* and *Jefferson Standard*).

120. *See infra* Parts II.A.1., II.A.2.

121. *See infra* Parts II.A.1., II.A.2.

122. 364 NLRB No. 101.

123. *Id.* at 59.

124. *Id.* at 14.

125. *Id.* at 22. ("In May 2013, the Company sent employees an email announcing proposed changes to wages and benefits. Crew leaders criticized the proposed changes, however, and their implementation was delayed indefinitely. The Company revisited the issue in November when it announced that, effective January 1, work in excess of 40 hours would be considered overtime and Sunday work would no longer apply toward overtime calculations. . . The Company also announced changes to medical coverage benefits. The changes became a reality at a mandatory employee annual wage and benefit meeting").

126. *Id.* at 21.

127. *Novelis*, 364 NLRB No. 101, at 23.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

union organization efforts, management restored the Sunday and holiday pay.[128]

Novelis prevailed in the union vote that was held in an attempt to unionize the company.[129] The employee that started the unionization campaign posted vulgar remarks to his Facebook account following the election and castigated his fellow coworkers who voted against unionization, which resulted in his demotion by Novelis.[130] The Administrative Law Judge (ALJ) determined the post constituted concerted activity because eleven Novelis employees had liked or commented on it, further stating that concerted activity amounts to initiating or inducing group action.[131]

Following the ALJ's decision, Novelis filed exceptions with the NLRB.[132] The Board adopted the ALJ's findings without expanding or doing its own analysis and concluded Novelis violated Section 8 of the NLRA by its post-election demotion of the employee.[133] Novelis then petitioned the Second Circuit for relief, but to no avail.[134] The appellate court upheld the ALJ's decision, noting an employee's speech is "concerted" if it is engaged in with the object of initiating or inducing group action.[135] The court affirmed that because eleven other employees had liked or commented on the post it constituted concerted activity.[136]

---

128. *Id.* at 31. (The decision to restore the Sunday and holiday pay was done after the union requested to be recognized by Novelis. The company put forth literature at the same time explaining to the employees that is was no longer contemplating the changes to the compensation which caused some employees to request the return of the union authorization cards they had signed).

129. *Id.* at 45.(The Board noted how tumultuous the campaign was to try and unionize Novelis which ended close and was decided by a razor thin margin of 14 votes out of 571 ballots cast. The vote tally was 273 in favor of the Union, 287 opposed to the Union. One ballot was voided and 10 ballots were challenged, but were not sufficient in number to affect the results of the election).

130. *Id.* at 158-59 (As noted in the introduction the employee called his fellow coworkers that did not vote for the union "F*#KTARDS" and told them to "Eat $hit").

131. *Id.* at 59. (The ALJ stated that "[the employee's] post was viewed by at least 11 employees, each of whom indicated his approval by a 'Like' response to the post. Several of these Facebook 'Friends' also commented on the post. [Employee's] post made direct reference to the election, a quintessential concerted activity. Further, [employee's] post made direct reference to wages, a basic term and condition of employment. [Employee's] post, corroborated by the "likes" of coworkers, clearly constituted concerted activity.").

132. *Novelis*, 364 NLRB No. 101, at 2.

133. *Id.* at 3-4. (The Board never went into detail as to what basis they were upholding the ALJ's decision that the employee's Facebook post was protected. The Board just mentioned that they were affirming the numerous unfair labor practice findings by the judge. The main analysis of the Board's analysis dealt with the procurement of union authorization cards, not the Facebook posting of the employee).

134. Novelis Corp. v. NLRB, 885 F.3d 100, 111 (2nd Cir. 2018).

135. *Id.* at 108.

136. *Id.* (Novelis argued that the Board erred in finding that eleven employees had "liked" or commented on the post, and consequently characterized the post as protected concerted activity. The Second Circuit concluded that the Board's finding was grounded in substantial evidence and the employee's testimony and screenshot of the Facebook post).

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

The Second Circuit only spent two paragraphs on determining whether the social media post by the employee was concerted.[137] There was no mention of what standard was used but asserted that the Board found because eleven employees had "liked" or commented on the post it amounted to concerted activity, suggesting that the ALJ and NLRB applied the traditional framework to their analysis.[138]

II. Desert Cab, Inc.

In *Desert Cab, Inc.* the ALJ determined the employer violated Section 8 when it terminated its employee for two Facebook posts.[139] The ALJ concluded the posts constituted concerted activity applying the traditional framework established by the NLRB.[140] Desert Cab Inc. employs between 150-200 drivers for its charter and limo walk-up services in the Las Vegas area.[141] It had staging rights at different hotels and resorts within the Las Vegas Strip as well as contracts to stage at various businesses throughout the area.[142] Desert Cab provided a shuttling service for Sundance Helicopters where its drivers would shuttle tourists to and from Sundance from the hotels along the Las Vegas Strip.[143]

Desert Cab instituted a new staging policy for the drivers who were assigned to shuttle for Sundance.[144] This new staging policy caused many Desert Cab drivers to complain to management where the drivers argued by not allowing them to stage at the local hotels between shuttle runs for Sundance their pay was being lowered because of the loss in potential tips.[145]

---

137. *Id.*

138. *Id.* (The court rejected all of the arguments put forth by Novelis and ended its brief analysis by stating, "[i]n sum, we are satisfied that the record adequately supports the ALJ's findings, accepted by the Board, of unfair labor practices.").

139. *Desert Cab*, 367 NLRB No. 87 at 55 (The Board applied the traditional standard under *Meyers* and *Jefferson Standard*).

140. *Id.* at 89.

141. *Id.* at 10.

142. *Id.* at 11-12 (Staging rights are when a driver takes their vehicle to a pre-assigned hotel, usually one that the employer has a contract with and parks the car at the hotel ready to pick up hotel guests or people walking the Las Vegas Strip. Doing so allows the employer to put its limousines in the front of the hotel for guests or walk-up passengers).

143. *Id.* at 12 (Sundance was one of the employer's non-hotel clients the operated helicopter tours that varied in length "from a quick 30-minute trip up and down the [Las Vegas] Strip" or up to four hours if the tour went to the Grand Canyon).

144. *Desert Cab*, 367 NLRB No. 87, at 22 (Instead of being able to stage at any of the local hotels on the Las Vegas strip while they waited for the helicopter tours to return drivers were now required to sit and wait at Sundance, sometimes for hours).

145. *Id.* at 19 (The difference in pay was a result of the types of passengers, the shuttle drivers were paid per passenger plus tips while the limo drivers were paid a lower per passenger rate, but the passengers tipped better than the helicopter customers).

Published by DigitalCommons@ONU,

An employee, who was a former supervisor for Desert Cab, was one of the loudest advocates against the new staging policy.[146] On a night while being assigned to shuttle for Sundance the employee texted two of his managers pictures of seven to eight limo drivers sitting idle waiting for tourists to return and expressed his frustration about the new staging policy.[147] The managers did not reply to his text.[148] Feeling more frustrated the employee made two private posts on his friends-only Facebook page.[149] Each post was made while he was at work and resembled the earlier text messages he sent to his managers.[150] Both Facebook posts received comments from his friends, several of which were coworkers.[151] The employee's Facebook posts resulted in his termination.[152]

The ALJ determined Desert Cab violated Section 8 when it terminated the employee because the Facebook posts were concerted activity.[153] The ALJ followed the traditional framework established by the NLRB in *Meyer I* noting that the posts were not solely for the employee's benefit but were on behalf of the other employees.[154] The ALJ went on to state that the Facebook posts were for the mutual aid and protection under Section 7 because the employee was trying to improve the wage and working conditions.[155] Additionally, the ALJ applied the *Jefferson Standard* and noted that the Facebook post did not lose protection because it did not amount to disloyalty

146. *Id.* at 25.

147. *Id.* (The employee sent the tests to two managers that were virtually identical informing them that the driver staged at Sundance had a problem with the new no staging policy).

148. *Id.*

149. *Desert Cab*, 367 NLRB No. 87, at 26-28 (The employee's Facebook posts were made to his friends-only group with the commentary saying: "[h]anging out at the Morgue. We are sent here to sit around for three hours for no reason" and the other "[w]hen its truly a crappy day at work and there is nothing you can do about it.").

150. *Id.* at 26-29 (The employee's first Facebook post occurred around 5 pm and the second post occurred around 11 pm. The two text messages that the employee sent a few weeks earlier contained a photo taken at Sundance with 7-8 limos sitting idle in the parking lot with the following statement and question: "it's a limousine convention at Sundance Helicopters. We are sitting here for 3 hours on a Friday night (on a fight weekend) before we do anything. Can we get a little common sense here?").

151. *Id.* at 28. (The employee's friends only group included coworkers which consisted of three to four other drivers, a couple of dispatchers, other non-managerial employees, former employees, and one manager).

152. *Id.* at 32-33 ("[The Desert Cab] management team decided to terminate [the employee] for making two derogatory comments publicly about [its] client Sundance").

153. *Id.* at 89.

154. *Desert Cab*, 367 NLRB No. 87, at 58 (The ALJ quoted directly from *Meyers I* and stated that concerted activity is defined as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.").

155. *Id.* at 66-67 (The ALJ found that the two Facebook posts "were for the purpose of mutual aid or protection under Section 7 of the Act because [the employee] and other drivers tried to improve wage conditions at work and complained about the No Staging at Sundance Policy which meant sitting idle for much time and earning less revenue for the employer and the drivers").

nor did it disparage the company.[156] Therefore, the ALJ found that Desert Cab unlawfully discharged the employee and ordered that the employer must offer the employee reinstatement, and make him whole for any lost earnings.[157]

These two recent cases show that the NLRB still applies the traditional framework utilizing *Jefferson Standard* and components of *Atlantic Steel*.[158] Neither case acknowledged the memos that were released several years ago and neither acknowledged the totality of the circumstances test, instead each relied on the traditional standards to resolve the social media disputes.[159]

III: Problems with the Board's Analysis

The NLRB recognized in its memo that there were differences between the traditional analytical framework for regular employment disputes and those dealing with social media gave hope to employers and employees.[160] However, since the memorandums, the NLRB did an about-face returning to its traditional framework, which has resulted in disputes being decided incorrectly.[161]

Several commentators have documented the problems with the NLRB's framework and have demonstrated how the application of the analysis has produced inconsistent results.[162] Some of the notable problems with the analysis have been the difficulty in determining whether the social media posts rose to the level of concerted activity, whether the location of the post removed it from protection, and whether the NLRB completely ignored the rights or interests of the employer by forgetting about the employer's goodwill or property interests involved.[163]

---

156. *Id.* at 71-72, 74, 79 (The NLRB noted that the reasons they found the comments did not disparage or were disloyal were because the Facebook posts were to a friend-only page, therefore not public. The Board also noted that the comments did not attack the employer's business practices or product and were a continuation of the ongoing dispute about wages).

157. *Id.* at 90-91 (Desert Cab was tasked with compensating the employee for his search-for-work and interim employment expenses regardless if they exceeded his interim earnings. Desert Cab was further tasked with compensating the employee for any adverse tax consequences when he received a lump-sum backpay award. Additionally, Desert Cab was to expunge the employee's file of any and all references to the discharge).

158. *Id.* at 71; *Novelis Corp*., 885 F.3d at 108.

159. *Desert Cab*, 367 NLRB No. 87, at 71; *Novelis Corp*., 885 F.3d at 108.

160. NLRB MEMO OM 12-31, *supra* note 84, at 25.

161. Flomenhoft, *supra* note 69, at 25 (discussing how the NLRB returned to the traditional standards making it unclear which standard applies to social media cases).

162. *See*, *id.* at 15-16; Merabet, *supra* note 39, at 1179-80; Long, *supra* note 23, at 1223.

163. *See*, Flomenhoft, *supra* note 69 at 24; Merabet, *supra* note 39, at 1179-80; Long, *supra* note 23, at 1223.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

A. Concerted Activity Based on the Popularity of a Social Media Post

The first issue with the traditional analysis is defining what constitutes concerted activity.[164] Early cases such as *Collections Agency* and *Trucking Co.* defined concerted activity based on whether the social media post had any response from fellow employees.[165] In *Collections Agency*, an employee was terminated for her expletive-filled post because she was transferred to a new position that effectively served as a demotion.[166] Applying the *Meyer* group activity standard, whether the comments were for the mutual aid or protection of the employees, the NLRB found that the employer unlawfully terminated the employee because her social media post initiated a group discussion between coworkers, and amounted to concerted activity.[167]

By contrast, in *Trucking Co.*, an employee posted comments on Facebook about the way his company handled truck driver deliveries and the problems he had with contacting an on-call dispatcher that never answered.[168] None of the employee's coworkers responded or commented on his post but an Operations Manager for the employer posted a critical comment.[169] As a

---

164. Long, *supra* note 23, at 1221-23.

165. *Id.* at 1238 (Long discusses the second memo released by the NLRB and notates that the memo does not have case citations, therefore, he calls the case by these names based on the employer's business, this comment will utilize the same case names that Long utilized); *see generally* NLRB MEMO OM 12-31, *supra* note 84, at 5-6 (discussing social media cases where employees' posts were protected and not protected concerted activity).

166. *See* NLRB MEMO OM 12-31, *supra* note 84, at 3-4 ("[the employee]'s supervisors informed her that due to low call volume in the inbound calls group, she was being moved to one of the outbound calls groups. The following day, the [employee] approached her supervisor and expressed her frustration with the transfer decision, arguing that given her high performance level, it did not make sense to transfer her." As a result, the employee posted a status update on her Facebook page by using expletives, where she stated "the [e]mployer had messed up and that she was done with being a good employee." Upon returning to work a few days later she was terminated because of her Facebook post.).

167. *Id.* at 5. (The Board held the employee initiated the Facebook discussion because the employer transferred her to a less lucrative position and in response, coworkers and former coworkers responded. The Board noted some of the comments echoed the employee's frustrations with the Employer's treatment of employees, and one former coworker suggested taking concerted activity through the filing of a class action lawsuit. The Board concluded "the [employee]'s initial Facebook statement, and the discussion it generated, clearly involved complaints about working conditions and the [e]mployer's treatment of its employees which clearly fell within the Board's definition of concerted activity.").

168. *See id.* at 32. ("The [employee] – a truck driver – traveled from Kansas to Wyoming to make a delivery. When he reached Wyoming, he learned that the roads were closed due to snow. He called the [e]mployer's on-call dispatcher several times to report that the roads were closed, but his calls were automatically forwarded to the office phone and then unanswered because of a holiday. [The employee] eventually reached another dispatcher and informed him that the roads were closed and that the on-call dispatcher was unreachable. . .[The employee] made several posts to his Facebook page indicating that the road was closed, that no dispatcher was there when he called, and that if he or anyone was late, it would be their own fault. He stated that his company was running off all the good hard-working drivers.").

169. *Id.* at 32-33 (A dialogue ensued between the employee and Operations Managers where "the [employee] expressed his concern for what he had posted and feared that he could lose his job. The Operations Managers told the employee that he wouldn't need to worry but had heard that another company was hiring.").

result of his post, the driver was not assigned delivery routes and eventually resigned.[170] The NLRB found there was no evidence of concerted activity and reasoned because the lack of responses from employees the social media post was not an attempt to initiate, induce, or prepare for group action, and simply was attributed to the employee griping and expressing irritation about his company.[171]

These two results have created a paradox in what constitutes concerted activity. *Collection Agency* and *Trucking Co.* are not reconcilable because they both show how the NLRB has improperly applied the *Meyer* standard when each post was essentially the same, both can be construed as a gripe, but one was defined as concerted activity and the other was left unprotected.[172] Defining concerted activity in the social media context has boiled down to whether an employee has friends or not, whether they can garner attention to their post.[173] The problem with this is that a true employment concern may go unprotected because there is no reaction, while a true expletive-filled rant is considered concerted activity because it generates several likes or comments.[174]

The NLRB's rigid adherence to the *Meyer* standard effectively defines concerted activity by whether an employee's social media post garners posts, likes, or comments.[175] The divide created by these two cases creates a slew of problems in the social media context, as any post or communication can be viewed, ignored, commented on, or ignored by anyone, friends, or

170. *Id.* at 33.(Upon returning to the employer, the employee was informed that "he was being stripped of his status as a leader operator because of his Facebook comments and unprofessionalism," which deducted an additional $100 per month from his pay. The employee was not given any routes to drive and a few weeks later resigned claiming that he was forced to because of the way the office personnel acted towards him.).

171. NLRB MEMO OM 12-31, *supra* note 84, at 33 (The Board "found no evidence of concerted activity under the *Meyers* cases because the [employee] did not discuss his Facebook posts with any of his fellow employees, and none of his coworkers responded to his complaints about work-related matters." The court noted that the employee did make several phone calls to other coworkers about the on-call dispatcher not being reachable but concluded there was insufficient evidence the Facebook activity was a continuation of any collective concerns. The Board further noted "the [employee] was not seeking to induce or prepare for group action [and] [i]nstead was simply expressing his own frustration by being stranded by the weather," essentially it was a mere gripe and not concerted activity).

172. Long, *supra* note 23, at 1238-39 (comparing the two cases together and discussing how unpredictable online responses can be).

173. *Id.* at 1239.

174. *Id.*

175. *Id.* at 1235 (discussing *Meyers II* which found that concerted activity included circumstances where individual employees seek to initiate group action); *see also* NLRB MEMO OM 12-31, *supra* note 84, at 32-33 (discussing *Trucking Co.* where the NLRB refused to find concerted activity when an employee brought a possible group complaint to management's attention, because no coworkers responded to the online post).

coworkers.[176] Any post can either be regarded as concerted activity or not based on how lazy or zealous a person is in liking or commenting on a post.[177]

Novelis Corp. shows that the NLRB still adheres to the problematic *Meyer* standard in trying to define concerted activity.[178] The Facebook post by the employee in *Novelis* is comparable to the posts in *Collection Agency* and *Trucker Co.* in that it can be likened to a gripe.[179] The Facebook post was made after the union election, not to initiate or induce group action.[180] It was a vulgar response toward fellow employees that did not share his own idea about union representation.[181] The NLRB ignored the fact that the post was made after the election, not to initiate union organizing.[182] Further, the main reason given for finding the post was concerted was because eleven coworkers commented on it.[183]

This decision by the NLRB evidences that it still adheres to the notion that concerted activity is based on whether a social media post gets responses or not.[184] While this may seem like a consistent application by the Board in finding concerted activity based on likes or not, it misses the point that a true employment concern may go unprotected while a gripe gets the protection under the Act. Employers essentially must guess at whether an employee's social media posts constituted concerted activity, or a mere gripe, based on if it receives any attention.[185] Additionally, employers may not be able to tell if a post has generated comments or likes if the employee has the settings turned to private. Employee discipline now depends on the popularity of a

---

176. *See*, *id.*; NLRB MEMO OM 12-31, *supra* note 84, at 32-33.

177. *See Hispanics United of Buffalo*, 359 NLRB No. 37; Am. Med. Response of Conn. Inc., NLRB Gen. Couns. Mem. 34-CA-12576, 3-4 (Oct. 5, 2010); OFFICE OF GEN. COUNSEL, NAT'L LABOR RELATIONS BD., OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Aug. 18, 2011), https://www.nlrb.gov/rights-we-protect/rights/nlrb-and-social-media (known as the *Income Tax Case*) (all the employees in the cases had the good fortune of having coworkers respond to their initial social media posts – even when those posts may not have been directed at coworkers) (follow "first report" hyperlink); *Compare* JT's Porch Saloon & Eatery, NLRB Adv. Mem., No. 13-CA-46689, 3-4 (July 7, 2011) *with* Rural Metro, NLRB Adv. Mem., No. 25-CA-31802, 2 (June 29, 2011) (where no coworkers responded to the posts and the NLRB determined that the posts were not made in concert with other employees); *see also* Meza, *supra* note 4, at 359-60 (discussing several other cases that show the same conflict as with *Collections Agency* and *Trucking Co.* with determining concerted activity based on the attention a social media posts garners because some are given protection and others are not based on coworker responses).

178. *Novelis*, 364 NLRB No. 101 at 203.

179. *See*, *id.* at 204; Long, *supra* note 23, at 1238-39.

180. *Novelis*, 364 NLRB No. 101, at 204.

181. *Id.*

182. *See*, *id.* at 204-5.

183. *Id.* (The last sentence of the ALJ's analysis for concerted activity reiterated that the employee's post was "liked" by coworkers, which clearly "constituted concerted activity.").

184. *Novelis*, 364 NLRB No. 101, at 205.

185. *See Hispanics United of Buffalo*, 359 NLRB No. 37; Am. Med. Response of Conn. Inc., *supra* note 177; OM 11-74, *supra* note 177; *Compare* JT's Porch Saloon & Eatery, *supra* note 177, at 3-4; and Rural Metro, *supra* note 177, at 2; *see also* Meza, *supra* note 4, at 359-60.

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

social media post, not a clear-cut rule that guides employers when making decisions.[186] This is bad for employees as well because one can be disciplined for a legitimate employment concern while another coworker skates by because they were able to garner likes to their post.[187]

B. Atlantic Steel's Location Factor Fails to Consider Other Possible Locations

Once the NLRB has determined that the social media post qualifies as concerted activity the Board looks to see if the activity was so opprobrious that it loses protection under the NLRA.[188] The problem arises in the *Atlantic Steel* phase with respect to the location factor–the place the social media post occurred, at work, home, or elsewhere.[189] The traditional approach for the location factor in *Atlantic Steel* only looked at where the post occurred and the NLRB has typically found in favor of employees with regards to this factor, noting that online communications typically occurred at home.[190] Over the last decade the more modern usage of social media has complicated this analysis because a post can occur anywhere and at any time because most workers can access their social media from their cellphones, they do not have to wait until they get home to make a post about work-related issues.[191] Further, the NLRB has ignored its own advice by not adhering to the modified framework it described in its second memorandum, which suggested that the location factor of *Atlantic Steel* should include an analysis of the disruption factor of the *Jefferson Standard* because of the differences between a Facebook discussion and a workplace outburst–suggesting that a social media post that occurred at home is not so disruptive to the workplace as a workplace outburst to lose protection under the Act, meaning a social media post done at work could be considered a workplace outburst.[192] This issue has left the NLRB to essentially ignore the location factor within the *Atlantic Steel* analysis.[193]

Another problem with the analysis is employees commenting or posting to social media while at work are effectively stealing time from their

186. Meza, *supra* note 4, at 359-60.

187. *See*, Meza, *supra* note 4, at 359-60.

188. Natalie J. Ferrall, *Concerted Activity and Social Media: Why Facebook Is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1013 (2013).

189. *Id.* at 1003-06 (discussing how Facebook has changed where workplace discussions take place).

190. NLRB MEMO OM 12-31, *supra* note 84, at 25 (discussing the *Popcorn Packaging* case where the NLRB found that Facebook discussions occurred at home and thus were not disruptive to workplace discipline).

191. Ferrall *supra* note 188, at 1026-27.

192. *See supra* notes 90-91.

193. NLRB MEMO OM 12-31, *supra* note 84, at 5, 24-25.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

employer.[194] The NLRB ignores this fact in its analysis and focuses on the content of the post and whether it loses protection.[195] Early precedent determined that social media posts likely occurred at home, therefore, the post did not disrupt the workplace or harm the employer from running efficiently.[196] Social media posts made while "on the clock", not on a break, steals time from the employer costing the company efficiency and disrupts the workplace. The NLRB should not ignore this fact in its analysis, and if it had adopted the modified framework by including place with the disruption factor, many social media disputes would be settled at the very beginning.

In *Desert Cab Inc.*, the NLRB ignored this factor and found that an employee's comments through text and social media were concerted activity and protected under the NLRA.[197] At no time during the analysis of the case did the NLRB appear to consider the employee making the Facebook posts while on the clock, or where he posted the comments.[198] It was clear based on the times the posts occurred and where they were posted that the employee was working when he made the posts.[199]

However, the NLRB did not even use the *Atlantic Steel* analysis but chose instead to use the *Jefferson Standard*, focusing on whether the comments would lose protection for disparaging the company and not for being egregious.[200] The Board never considered the modified framework proposed in the second memorandum.[201] If it had, the outcome would have been different because the NLRB would have considered the location factor into its analysis–leaving the employee's comments in *Desert Cab* unprotected and up holding his termination.[202] By not doing so, the decision opened the door for employees to take advantage of their employers by posting content to their social media while on the clock and not have to fear discipline as long as it can be deemed a concerted activity. The NLRB, in applying the *Jefferson*

---

194. *See*, *id.* at 25.

195. *See*, *id.*

196. *Id.* at 24-25. (The memo, in a discussion of a case, stated that social media posts occurred at home during non-work hours, and thus were not so disruptive of workplace discipline as to weigh in favor of losing protection under a traditional Atlantic Steel analysis).

197. *Desert* Cab, 367 NLRB No. 87, at 61.

198. *Id.* at 58.

199. *Id.* at 28-30 (Recall that the employee posted two separate Facebook posts criticizing the staging policy by commenting that it was like being "at the morgue" with other phrases as "[w]e are sent here to sit around for three hours for no reason." Additionally, the employee took pictures of the customer's sign and posted his comments complaining about being staged at their lot instead of on the Las Vegas strip hotels. The posts showed that he was working at the time they were posted).

200. *Id.* at 71-72 (the Board discussed how it has long recognized an employer had a legitimate interest in preventing disparaging comments and protecting its reputation and balanced those interests by using the *Jefferson Standard*. It did not take into consideration the location factor in *Atlantic Steel*).

201. *See*, NLRB MEMO OM 12-31, *supra* note 84, at 24-25; *Desert* Cab, 367 NLRB No. 87, at 56-58.

202. NLRB MEMO OM 12-31, *supra* note 84, at 24-25; *Desert* Cab, 367 NLRB No. 87 , at 56-58.

https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4

Standard, found that the employee's Facebook posts did not lose protection because they were not so disloyal or recklessly disparaging toward the employer.[203] They also found because his posts were made to his friends-only Facebook page, and not readily accessible by the general public, that was a deciding factor for not arising to the level of disparaging that would lose protection of the NLRA.[204]

By not applying the modified framework the NLRB allowed the employee to have his social media posts deemed concerted activity and continued the precedent favoring employees' social media posts over employer's rights to control and maintain effective and efficient workplaces.[205] Utilizing the traditional *Jefferson Standard* does not allow for the consideration of disloyalty in the context of location and being on the clock.[206] The result produces an inconsistency with the purpose of the NLRA, which is to protect both employer and employee–by not factoring in an employer's rights to control workplace efficiency; how is that protection for the employer?[207] Further, the result produces confusion for all involved, employer and employee.

Comparing *Desert Cab* to earlier cases demonstrates the NLRB still adheres to the traditional framework which produces inconsistent results. For example, in *Popcorn Packaging*, the NLRB applied the modified framework suggested in the second memo by acknowledging the differences between a social media post and a workplace outburst.[208] The Board considered the impact the public comments could have on the employer's business but found the employee's comments did not lose protection of the NLRA because it held the employee's Facebook comments were concerted activity and did not engage in conduct that warranted losing protection.[209] Another employee

203. *Desert Cab*, 367 NLRB No. 87 at 73-74 (finding that the comments were part of an ongoing labor dispute and also concluding that the comments were sarcastic jokes that were not so disloyal and reckless to lose protection under the Act).

204. *Id.* at 72 (finding that the employee's comments were not maliciously untrue or made with reckless disregard of whether they were true or false and were made out of frustration and to make his fellow coworkers aware that he was disgruntled about the new staging policy).

205. *Id.* at 60-62.

206. *Id.* at 71-72.

207. *See* 29 U.S.C. § 151.

208. *See* NLRB MEMO OM 12-31, *supra* note 84, at 22 (The memo does not cite to the decision but makes it clear that the employer is in the business of packaging popcorn, therefore, it will be referred hereto as *Popcorn Packaging*); *see also* Long, *supra* note 23, at 1229 (noting that the memos did not give specific case citations but provided specific facts for each case and a detailed discussion on the NLRB analysis. Long also referred to this case as *Popcorn Packaging*).

209. NLRB MEMO OM 12-31, *supra* note 84, at 25 ("The discussion occurred at home during non-work hours, and thus was not so disruptive of workplace discipline as to weigh in favor of losing protection under a traditional *Atlantic Steel* analysis.").

responded to the posts by making comments about working conditions and the managers, which resulted in her termination.[210]

The NLRB determined the employee's comments were protected concerted activity and turned its attention to determine if the comments would lose protection because they were "opprobrious."[211] The Board recognized the posts were not a neat fit for either the *Atlantic Steel* or the *Jefferson Standard* and instead applied a semblance of the modified framework before it was suggested in the memos.[212] The NLRB stated the location factor and the nature of the outburst weighed in favor of protection.[213] It observed the social media posts occurred at home and the comments were not so disparaging as to have an impact on the employer's business.[214] Therefore, the NLRB concluded the modified framework indicated the employee's comments did not lose protection.[215]

Comparing *Desert Cab* to *Popcorn Packaging* reveals that applying the modified framework allows for a better analysis and recognizes there are inherent differences with social media disputes, and the traditional framework is not appropriate to utilize.[216] The traditional standards offer a narrow application that provides inconsistent results, while the modified framework allows for a more broad application to social media disputes.[217]

---

210. *Id.* at 23 (The employee discharged was the third employee to comment on the initial Facebook post and made comments that she "hated the place and couldn't wait to get out of there." The employee also stated that "the Operations Manager brought on a lot of the drama and that it was the Operations Manager who made it so bad.").

211. *Id.* at 23-24.

212. *Id.* at 24 (discussing how the *Jefferson Standard* and *Atlantic Steel* standard did not fit the current situation. It noted that the Facebook discussion was more analogous to a conversation among employees that is overheard by third parties than to an intentional dissemination of employer information to the public seeking their support and that the *Jefferson Standard* would not be a suitable framework. It concluded that *Atlantic Steel* would be a more appropriate test which typically focuses on whether the communications would disrupt or undermine shop discipline. The Board also noted that the *Atlantic Steel* analysis does not usually consider the impact of disparaging comments made to third parties. Thus, it decided that a modified *Atlantic Steel* analysis that considered not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech).

213. *Id.* at 25.

214. NLRB MEMO OM 12-31, *supra* note 84, at 25.

215. *Id.* at 24 (Noting that the subject matter of the posting weighed in favor of protection as it involved a complaint about the employer's operations manager and her effect on the workplace).

216. *Compare Desert Cab*, 367 NLRB No. 87, at 72-73 *with* NLRB MEMO OM 12-31, *supra* note 84, at 25.

217. *See generally*, *Desert Cab*, 367 NLRB No. 87, at 72-73; NLRB MEMO OM 12-31, *supra* note 84, at 25.

C. The NLRB Analysis Fails to Take into Consideration the Employer's Interests

The NLRB stated in *Desert Cab* the "Board has long recognized that an employer has a legitimate interest in preventing the disparaging of its products or services and relatedly, in protecting its reputation from defamation and reckless disparagement."[218] It further stated that in keeping with longstanding precedent it balances the Section 7 rights against the employer's interests, if and when they are implicated.[219] But does the Board keep to the long held precedent and balance accordingly?

Goodwill is a fundamental property interest all employers have a right to control and protect.[220] Given the prevalence of social media in society and its impact on businesses, employers "necessarily have the right to take affirmative action to preserve their online image."[221] The actual precedent put forth by the NLRB in ignoring the goodwill of employers has created a system which encourages employees to engage in public outbursts rather than settling conflicts with management internally.[222] While employees have an argument that by taking their complaint public via social media it is an effective way to get the employer's attention, and essentially, the precedent established by the NLRB incentivizes employees to go to social media instead of trying to resolve the dispute internally.[223] While social media may be an effective way to get the attention of the employer, less damaging ways exist such as face-to-face discussions and internal group meetings between management and employees. Employees may feel that social media may be the last resort, however, the incentivized precedent established helps to damage an employer's goodwill and reputation which goes against the purpose of the NLRA–to protect both employer and employee.[224] Additionally, this trend favoring concerted activity has stymied employers to what can be done to effectively protect their online reputation from the damaging social media posts of their employees.[225]

---

218. *Desert Cab*, 367 NLRB No. 87 at 71.

219. *Id.*

220. Merabet, *supra* note 39, at 1182 (discussing the history of goodwill and how it is a property interest that is ignored many times by courts).

221. *Id.* (Discussing that employers, as property owners, should have the right to protect their goodwill from online abuse).

222. *See Hispanics United of Buffalo*, 359 NLRB No. 368 at 43-45 (emboldening employees' public criticism of their employment and coworker).

223. *See generally*, *Hispanics United of Buffalo*, 359 NLRB No. 37, at 43-45.

224. *See*, 29 U.S.C. § 151.

225. Merabet, *supra* note 39, at 1179-1180 (arguing that the NLRA was established to accommodate both employee's and employer's interests but the trend by the NLRB in granting employees protection based on likes or comments to their posts has shifted that balance in favor of employees, essentially "thwarts" the purpose of the NLRA and makes it difficult for employers and leaving them helpless to protect their business interests. Further discussing that even when employers follow all the mandates put

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

Moreover, the use of social media by an employee while on the clock has an impact on the employer's interest that is seldom taken into consideration, lost time and theft of wages.[226] It is well documented that social media use can affect the workplace considering the fact more than half of employees access Facebook during working hours and undoubtedly a higher majority access other social platforms while at work.[227] Therefore, an employer has an interest in whether an employee is accessing social media while on the clock and the impact it can have on its business.

Furthermore, an employer has a vital interest in protecting its goodwill and reputation by being able to limit what an employee posts to social media. When an employee posts to social media about workplace issues and conditions, it usually has an impact on third parties, the customers.[228] A customer typically will not be exposed to an employee workplace issue in the classic face-to-face situations, but when the issue is shared over social media it is more likely to reach third parties.[229] The social media posts about the workplace will have an impact on a third party's relationship, positively or negatively, with the employer and based on that impact the customer may choose to take their business elsewhere or even influence others in a negative fashion.[230] Therefore, the employer has more at stake in the social media usage by its employees because it is so easily viewable by the public and the impact it can have on their goodwill, reputation, and operations.[231]

While it is certainly true an employer cannot readily control the message its employees convey when they are picketing, social media posts are different in that many are done by non-unionized employees who are not in the middle of a contract negotiation or employment strike.[232] While an employer's goodwill is affected by picketing, the incentive to protect their

---

forth by the NLRB there is still a good deal of uncertainty on what can effectively be done. Additionally, all the memos put forth by the NLRB reviewed thirty-five cases and noted that overbroad employer social media policies unlawfully chilled Section 7 rights of employees).

226. Mark Fahey, *Time Wasted on Facebook Could be Costing Us Trillions*, NBC NEWS (Feb. 4, 2016, 3:07 PM) https://www.nbcnews.com/tech/social-media/time-wasted-facebook-could-be-costing-us-trillions-lost-productivity-n511421.

227. Patricia Sanchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First Century Employee*, 49 AM. BUS. L. J. 63, 105 (2012) (discussing the impact that social media has on the workplace and its prevalence throughout because nearly half of office employees access Facebook during work hours).

228. Flomenhoft, *supra* note 69, at 57.

229. *Id.* (discussing the differences between workplace discussions that happen face-to-face versus discussions over social media and the impact they have on third parties).

230. *Id.* (Discussing the effects that social media postings about a workplace may have on third parties because typically a third party will not be exposed to workplace issue but when shared on social media the workplace issue is more than likely to reach third parties and influence them).

231. *Id.* at 64 (Because the NLRB reverted back to the traditional standards to analyze social media disputes, it has ignored the interests that an employer has in social media discussions because they are so easily viewable by the public).

232. *Id.* at 13.

goodwill pushes them to settle the workplace disputes before that happens.[233] An employee's social media posts are often done without foreknowledge by the employer and often are an unplanned reaction to certain workplace situations, making it difficult for an employer to prevent anticipated damage like a strike produces.[234] Giving employers more of a stake in protecting their goodwill will reverse the roles–like an employer has an incentive to settle a dispute before a strike–an employee will be incentivized to seek out management for a face-to-face discussion in an attempt to resolve the issue before they post to social media knowing that they could be held liable to the damage the post may cause.

D. Even the NLRB and Courts Acknowledge the Framework is Inadequate

In the past decade, the NLRB has taken the reins on deciding social media disputes by fashioning precedent with this new emerging issue out of old law, figuratively, trying to fit a square peg in a round hole. The NLRB attempted to resolve some of the confusion and clarify the law by issuing guidelines,[235] but cases such as *Desert Cab* and *Novelis* make clear the Board has ignored its own guidance.[236]

The *Atlantic Steel* test has come under pressure in recent years.[237] In *NLRB v. Starbucks*, the Second Circuit determined that the *Atlantic Steel* test gave insufficient weight to employers' interests in preventing an employee's outburst in a public place in the presence of customers and suggested the Board come up with a more appropriate test for determining opprobrious conduct.[238] About the same time, the NLRB Office of General Counsel began to develop new guidelines for evaluating an employee's use of social media that were built upon the distinction between activity outside the workplace and activity in the immediate presence of coworkers and customers.[239] The

233. Flomenhoft, *supra* note 69, at 13.

234. *Id.*

235. *See generally* NLRB MEMO OM 12-31, *supra* note 84. (The NLRB Office of General Counsel official memorandum number two discussing social medial cases to give guidance and clarification).

236. *See* discussion *infra* Introduction.

237. *See* NLRB v. Pier Sixty, LLC., 855 F.3d 115, 121-23 (2nd Cir. 2017) (discussing how they decided in *NLRB v. Starbucks* that the *Atlantic Steel* test does not give sufficient weight to an employer's interests in preventing an employee's outburst in the presence of third parties and suggested a more balanced standard for determining "opprobrious" conduct in that context).

238. *Starbucks Corp.*, 679 F.3d at 79-80 (discussing the insufficiency of the *Atlantic Steel* test).

239. *Pier Sixty*, 855 F.3d at 123 (The court discussed the NLRB memos and noting its belief that the Board went in a more employee-friendly direction that limited the ability of employers to issue rules regarding use of social media, even where employees were posting public criticisms of their employers and workplace and in light of the General Counsel's new guidance, the Board has utilized the nine-factor "totality of the circumstances" test in recent social media cases. The court further noted that "totality of the circumstances" test is not the exclusive framework through which the Board evaluates whether employee conduct is entitled to NLRA protection).

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

new guidelines created the totality of the circumstances test.[240] However, the Second Circuit was not convinced the totality of the circumstances test adequately balanced an employer's interests.[241] The court agreed with a dissenting member of the Board who expressed reservations that the more factors to consider meant more opportunity for manipulation by the NLRB.[242] Furthermore, in *North West Rural Electric Cooperative*, the ALJ commented that even the NLRB had found *Atlantic Steel* to not be well suited to address issues that arise in cases involving an employee's off-duty, offsite use of social media to communicate with other employees or with third parties.[243]

These are just a few examples where the NLRB, and the courts, understand the precedent established does not adequately deal with the social media issues within the workplace. Therefore, employers, employees, and courts will have to struggle to fit the square peg into the round hole until either Congress steps in or the NLRB revamps its guidelines and then chooses to adhere to them.

IV: A Modified Framework for dealing with social media disputes

Many commentators have suggested changes and modifications to the various tests in an effort to establish a more consistent framework.[244] While all the suggestions have pros and cons, a blending of a few of them together within the current precedent would make for a more consistent and reliable framework. The *Atlantic Steel* test and the *Jefferson Standard* both need to fall by the wayside and allow a modified totality of the circumstances test to emerge that blends *Atlantic Steel* and *Jefferson Standard* together with the totality of the circumstances test–focusing on the following factors of the test: (1) the location factor needs to be dispositive, especially if the employee

---

240. *Id.* at 123 (The totality of circumstances test was a result of courts and the NLRB noticing that the traditional framework of *Atlantic Steel* and *Jefferson Standard* did not work in certain situations and a ore complete analysis was needed).

241. *Id.* at 123.

242. *Id.* at 123-24, fn. 39 (agreeing with Board member Johnson, who dissented in part, stated "[m]y colleagues convert this ['totality of the circumstances'] analysis into what is, in effect, an *Atlantic Steel* test on steroids that is even more susceptible to manipulation based on 'agency whim' than the 4-factor Atlantic Steel test." The Court noted that since Pier Sixty did not object to the use of the test that they did not need to address the validity of the test.).

243. *North West*, 366 NLRB No. at 77-78 ("I note that the Board has found the *Atlantic Steel* framework discussed above is 'tailored to workplace confrontations with the employer,' and is 'not well suited to address issues that arise in cases. . .involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties.'").

244. *See* Long, *supra* note 23, at 1243 (advocating that the intent of the employee should be taken into consideration within the analysis to help effectively apply the *Meyer* activity tests to social media cases); Meza, *supra* note 4, at 364 (discussing that the location factor within the analysis needs to be dispositive to provide clarity to both employer and employee as to when such a comment can be made); Merabet, *supra* note 39, at 1181-82 (discussing that employers have property rights that get ignored by the NLRB in social media cases and more emphasis should be given to those property rights in the analysis).

https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4

posted while on the clock for the employer; (2) concerted activity should not depend on how many likes or comments the post received but needs to focus on the intent of the employee; and (3) more emphasis needs to be placed on the damage done to an employer's goodwill and reputation by examining any impact the comments have had on the employer.[245]

A. A New Totality of Circumstances Test for Social Media Disputes.

A new or modified analysis would have advantages the current NLRB framework does not have. Making the location factor dispositive would establish a concrete rule–any employee that posted comments to social media while "on the clock" would lose protection under the Act.[246] This rule would provide more clarity for employer and employee and promote better workplace efficiency for both. Focusing on the intent of the social media post would reign in the adherence on whether post garnered likes or comments and allow a true employment concern which would go unprotected because it did not get any likes or comments to receive protection, while the expletive-filled rant would then not be protected.[247]

Disseminating the intent of an employee's post would be harder than determining concerted activity based on "likes," but a harder approach is better because true employment concerns that have been left unprotected under the current framework would now be protected and the mere gripes that were given protection would not.[248] Giving more emphasis, by having a balance test within the framework that weighs the employees' right to engage in Section 7 activity against the employer's right to control the use of its property, to employer's goodwill and reputation would give more protection to employers that are not consistently given to them.[249] These advantages would allow for the NLRB to bring the current precedent more in line with the purpose of the NLRA–to protect both employer and employee rights within the workplace.[250]

---

245. *See generally* Flomenhoft, *supra* note 69, at 72-73.

246. *See*, *id.*

247. *Compare*, Long, *supra* note 23, at 1243 *with Novelis*, 364 NLRB No. 101, at 158-59.

248. Long, *supra* note 23, at 1243.

249. *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (accommodating both employer and employee interests); *see also* Merabet, *supra* note 39, at 1182-1186 (discussing a balance test that weights both competing interest of the employer and employee. Further noting that regardless of the area of law, when two competing legal interests are at state, a balancing test is often applied to achieve a just result); *Cf. e.g Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (recognizing both state's interest in potential life and mother's interest in choosing pregnancy); Restatement (Second) of Torts § 826 (1979) (stating public and private nuisance require weighing utility of conduct against interference with public right).

250. *See* 29 U.S.C. § 151.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

1. A Dispositive Location Factor

The location factor within the proposed totality of the circumstances test needs to be a dispositive factor.[251] Nicholas Meza proposed having the location factor be dispositive because it would provide clarity and consistency to the muddled framework.[252] Courts have ignored the location factor too often when one purpose of the factor was to help promote workplace efficiency and help employers control disruptions.[253] By making the location factor dispositive it would resolve many social media disputes in the early stages, making it easier for employer and employee to know if the posting was protected.[254]

"Thus, no matter the content of the communication, and no matter the status of activity as concerted, if an employee has posted a disparaging comment against their employer while on company time, the employer may take adverse action against the employee . . . ."[255] While this may seem a harsh rule, an employee should not be rewarded for taking up company time to post to social media.[256] This rule would provide clarity and consistency to the analytical framework by allowing employers and employees to know when such comments can be made and if they would be protected.[257] As Meza noted, "such a rigid rule should only apply to communications in the social media context and only during work hours when the employee is on the clock," and any adverse action taken against an employee for posting during a lunch or break should be invalid.[258]

Applying the dispositive location factor to *Desert Cab* the employee's activity would not be protected by the Act.[259] The employee made the Facebook post while on company time staged at a customer's parking lot

---

251. Meza, *supra* note 4, at 364.

252. *See Id.* (discussing that the clarity that would be provided would make it so that both employer and employee would know when social media posts could be made and get protection under the Act).

253. *See supra* Part III.B (discussing the problems with the location factor of the *Atlantic Steel* test).

254. Meza, *supra* note 4, at 364.

255. *Id.* at 354, fn. 296 (taking that line of reasoning from Republic Aviation Corp., v. NLRB, 324 U.S. 793, 803 n.10 (1945) (inferring the maxim that "working time is for work")).

256. *Id.* at 364.

257. *Id.* (discussing that employers social media policies that prohibit employees from accessing social media during work hours and not effective because of the increased internet accessibility attributed to smartphones, therefore, a rigid rule would provide clarity for employees that they could not access social media during work hours because concerted activity would not be protected and would strengthen employer's social media policies).

258. *Id.* (Meza goes on to explain that other communications, verbal or otherwise, should not be barred and should be analyzed via the traditional *Atlantic Steel* standard. Further noting that the reasons for the distinction is to protect the employer's interest in workplace efficiency and that the rigid rule would create clear guidance to employers and employees and promote productivity).

259. *See*, *Desert Cab*, 367 NLRB No. 87 at 29.

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

waiting for passengers.[260] While it can be determined the social media posts were concerted activity and for the mutual aid and protection of other employees, the comments would lose protection of the Act because they were posted while he was on the clock.[261] Alternatively, an employee who makes posts while off the clock, either on break or lunch, or at home, would not be automatically barred from the Act's protection.[262]

It can be argued posting critical comments to social media during working hours is the same as an employee making disparaging comments to a coworker while working, as both can be seen as theft of time.[263] Therefore, it is important to note that such a concrete rule should only apply to social media communications that took place during working hours–when the employee was on the clock.[264] Other types of communications should not be barred and should be analyzed via the whole context–totality of the circumstances–where location is but one factor to consider and not dispositive.[265] The basis for the distinction is to protect the employer's interest in workplace efficiency. Arguably, an employee posting to social media is not performing work at that moment, but an employee that is talking to a fellow coworker can be considered to be working because posting to social media uses the hands and focus of the employee, while talking to a coworker does not usually take the focus of the employee off the work being performed.[266]

2. Defining Concerted Activity by Employee Intent

Elements of the totality of the circumstances test do consider the intent of the employee's social media posts.[267] Certain factors consider whether the employee was provoked into making the comments, whether the employee's comments were deliberate or impulsive, and consider the subject matter of the comments.[268] Determining the subject matter of a social media post has proven difficult because many courts find that as long as the post receives attention from fellow coworkers it will be considered protected concerted

260. *Id.* (Recall that the employee was under the new "No Staging" policy and had to stay at the customers parking lot waiting for customers to return instead of staging at the local Las Vegas hotels were he could get tips in the between time).

261. Meza, *supra* note 4, at 364.

262. *Id.*

263. *Id.*

264. *Id.* (discussing the problems that such a rigid rule has, and it should only apply when the employee is on the clock and at work, not on a break or lunch).

265. *Id.* at 364-65 (arguing that other communications should not be barred but be analyzed under the *Atlantic Steel* standard).

266. Meza, *supra* note 4, at 365.

267. *Pier Sixty*, 855 F. 3d at 123.

268. *Id.*

Published by DigitalCommons@ONU,

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

activity.[269] This has proven to be an ineffective way to define concerted activity.[270] The NLRB should focus on the intent element in each factor of the test, doing so would provide a more straightforward approach and would decrease the inconsistencies and ineffectiveness.

Determining the intent of the employee's social media posts might seem hard. The NLRB should take into consideration factors such as: language used, timing of social media posts compared to the employment activity that caused the post, and subject matter of the posts.[271] These factors would allow for the Board to more easily determine the intent of the employee's social media post.[272] A post that is filled with expletives and derogatory remarks indicates it was likely a mere gripe rather than a workplace concern. Timing of the social media comment to the employment activity can confirm the post was reactionary and not about an on-going employment concern. For example, an employee is reprimanded for being tardy and while on their break that same day decide to post to Facebook complaining about workplace rules. While some rules could be a legitimate employment concern, the above intent by the employee was to complain about the employer's policies because they were upset, not to voice concerns over unfair workplace policies. Finally, the subject matter of the post can help determine the intent because a workplace concern would be central to the post, while a mere gripe would not focus on employment matters.[273]

The NLRB should consider whether the employee intended to induce, initiate, or prepare his coworkers for group action.[274] The inconsistent reliance by the NLRB on whether a social media post garnered attention from coworkers is inconsistent with the purpose of the NLRA, which is to allow employees to informally band together for their mutual aid and protection.[275] Focusing on comments by coworkers the NLRB has found group activity where an employee's post should have been considered a mere gripe.[276] The focus should be on the employee's intended reach of the social media post,

---

269. *See supra* Part III.A. (discussing the problems with the current framework in defining concerted activity and the cases *Collection Agency* and *Trucking Co.*).

270. *See* discussion *supra* Part III.A.

271. *See supra* Part I.A.1.

272. Ferrall, *supra* note 188, at 1033.

273. *Id.* at 1032-33.

274. *See id.* at 1033 (arguing that the NLRB should focus more closely on the employee's intent when they post to social media).

275. *See* 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, 867-68 (2012) (arguing that coworker responses are too unpredictable and that the NLRB should instead focus on the intent of the speaker for finding concerted activity).

276. *See supra* Part III (discussing the problems in defining concerted activity where the NLRB essentially basis it on the relevance of the social media posts).

https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4

Williams: The NLRB's Social Media Jurisprudence: A Square Peg in ARound Hol

and not the responses, or even silence, of coworkers.[277] An employee who intended to initiate or prepare for group action should be protected, even if no one responds or comments.[278]

Applying the intent factor to the *Novelis* cases, the employee's comments would not be protected under the Act.[279] The employee posted to Facebook after the election results.[280] He did it out of frustration and only did it to cuss out his fellow coworkers who did not have the same representation ideals as him.[281] He did not do it to initiate or prepare for group action–the election had already taken place.[282] However, the NLRB found his activity to be concerted and protected.[283] By not applying the intent factors to whether his post was provoked, deliberate, or impulsive led to an inconsistent and erroneous determination by the NLRB. Conversely, applying the intent factor to *Desert Cab* the employee's Facebook post would be considered protected under the Act.[284] While the comments should not be protected because he posted them while on the clock, if the employee made them from home or on a break, his intention would be clear–he was initiating or preparing his fellow coworkers for group action regarding the staging policy.

James Long argued that focusing on the intent factor more heavily would afford broader protections to employees by finding concerted activity not only in situations where a social media post received attention, but also in cases where no one responds.[285] It would eliminate the need for the NLRB to focus on whether the social media posts garnered attention.[286] The process has proven to be inconsistently applied and ineffective by rewarding gripes and not protecting true workplace concerns.[287]

Focusing on the intent of the employee will afford broader protections for employees as Long notes, but more importantly, this author believes the focus would make the analysis more effective because it would get rid of the inconsistent results by relying on the popularity of the social media post. True employment concerns that do not get protection because a coworker did not

277. Ferrall, *supra* note 188, at 1033.

278. *Id.* (arguing that employee intent should be the focus); Green, *supra* note 275, at 867-68 (arguing that employee intent is more important that coworker responses to social media).

279. *See*, *Novelis*, 885 F.3d at 108.

280. *Id.* at 103-104.

281. *Id.*

282. *Id.* at 108.

283. *Id.*

284. *See*, *Desert Cab*, 367 NLRB No. 87 at 24-27.

285. Long, *supra* note 23, at 1243-44 (arguing that the "key inquiry ought to be whether the employee's social-media post intended to reach coworkers and possibly prepare for group action," because the arbitrary responses or even silence, or coworkers may change the outcome of whether an employee is protected or not).

286. *Id.* at 1244.

287. *See* discussion *supra* Part II.

comment or like the post would now gain protection, and the real gripes would go unprotected.[288] Further, this author believes by focusing on the intent of the employee the analysis will further the purpose of the NLRA by protecting employees that deserve protection, and not the employees that are hiding behind the ability to get likes and comments.

3. Accountability for Damage Caused to the Employer

The NLRB has often ignored an employer's goodwill in analyzing social media cases which has created a tipped scale in favor of the employee.[289] Employees that have their social media post determined to be concerted activity usually do so to the detriment to the employer's goodwill and reputation.[290] Therefore, the NLRB should put an emphasis on the nature of the employee posts and what damage has been caused.[291]

Stephanie Merabet suggested a balancing test that would weigh the employer's goodwill versus the employee's social media posts.[292] The test would balance whether the employer's right to protect and police its online reputation and goodwill against the employee's right to engage in protected concerned activity.[293] Employers would have to demonstrate the public disparagement caused by the employee's social media posts harmed their goodwill substantially, and if they were able to prove it, their interests may outweigh the employee's protected concerted activity.[294] This author believes the test to be a step in the right direction and suggests several factors the NLRB should consider in balancing the rights of both employer and employee. Those factors are how accessible the comments were to the public, the reactions from customers, clients or even competitors, economic losses as a result of the comments, and whether or not the employer can show damage to their goodwill and reputation by other means.[295]

While the balance test is a step in the right direction, this author believes it may seem a difficult task for the NLRB to determine, albeit a necessary one, because the purpose of the NLRA is to protect both the employer and employee. The trend in favoring employee social media comments as

288. *See* Long, *supra* note 23, at 1244.

289. Merabet, *supra* note 39, at 1184-85.

290. *Id.*

291. *Id.*

292. *Id.* at 1184 (Suggesting that "the appropriate test for Facebook comments and other social media activity should be whether the employer's right to protect and police its online reputation is outweighed by the employee's right to engage in protected concerted activity.").

293. *Id.* (Merabet suggested that the NLRB in balancing the interests should consider factors such as: "where the speech took place; whether customers, clients, or competitors could access the comments; how the speech related to the terms and conditions of employment; and potential damage to the employer's goodwill and online reputation.").

294. Merabet, *supra* note 39, at 1185-86.

295. *Id.*

protected activity over an employer's right to protect their goodwill and reputation has diminished the purpose of the Act.[296] Arguably, other areas of the law require a balancing test to achieve just results, it should be no different in the social media dispute context.[297] Employees and employers each have rights, employees under Section 7 and employer's under property law, therefore, a proper balancing test would be the best solution to achieving a just result.[298]

Another purpose for focusing on protecting an employer's goodwill and reputation would be to make employees aware that not all comments posted to social media will be protected when they cause significant damage to an employer, even if the comments are considered concerted activity.[299] While the *Jefferson Standard* does take into consideration disparaging comments, along with *Atlantic Steel*, they have been inconsistently applied and focus more on other factors and not the goodwill of the employer.[300] Having a goodwill factor prominently featured in the test would give employers protection that seems to currently not be afforded to them.[301]

Applying a goodwill test to *Desert Cab*, the employee's social media posts would be deemed to not have damaged the employer's goodwill.[302] Desert Cab would have to show economic loss as a result of the social media posts, which would be hard to do since they were posted to his friends-only page and not available to the general public.[303] Furthermore, Desert Cab would have to show by posting a picture of its customer's building sign how the post damaged its reputation and goodwill.[304]

Under the balance test it would be difficult for an employer to meet its burden, but it would give the company an option to protect its goodwill and reputation.[305] Under the current framework utilized by the NLRB an employer is left with little to no remedy to protect their goodwill and

296. *See*. 29 U.S.C. § 151.

297. Merabet, *supra* note 39, at 1183 (Giving the example how in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) "the Supreme Court weighed the state's interest in protecting potential life against the individual's right to abort a fetus. . .Similarly, under tort law in determining liability for public or private nuisance courts will weigh the utility of the actor's conduct against that conduct's interference with another's right to use and enjoy the land to determine if the invasion is sufficiently unreasonable.").

298. *Id.* at 1184-85.

299. *Id.*

300. *See e.g.*, 245 NLRB. 814, 816.

301. *Desert Cab*, 367 NLRB No. 87 at 24-27, 90.

302. *See*, *id.* at 26.

303. *Id.* at 29.

304. *Id.* at 32.

305. Merabet, *supra* note 39, at 1184.

Ohio Northern University Law Review, Vol. 47 [], Iss. 2, Art. 4

reputation.[306] The goodwill test would not be used in all situations as many of the social media posts do not rise to the level of disparaging, but when they do, an employer that can show damage should have an available remedy.[307] The employer's rights to control its property interest cannot be disregarded in an attempt to accommodate employee's right to concerted activity.[308]

V: Conclusion

Social media disputes in the workplace are here to stay and the precedent established by the NLRB is inadequate to resolve them.[309] The traditional framework is ineffective and provides unsatisfactory results. This Comment proposes that the NLRB needs to adhere to a modified framework that makes the location factor dispositive.[310] In doing so, many employee's social media posts would not be protected when posted on company time.[311] The NLRB additionally should place greater emphasis on the intent of the employee–doing so would eliminate reliance on whether the social media posts received comments–ensuring a true employment concern would not go unprotected because of no reaction.[312] Finally, the NLRB needs to add a balance test within the analytical framework that allows employers to protect their property interests, their goodwill and reputation, by allowing them to show damage.[313] If an employer can do so then their property interest should outweigh the employee's right to engage in protected concerted activity.[314]

This would produce more consistent results in social media employment disputes and would allow protection for both the employee and employer alike. While at times, the NLRB's application of the NLRA to social media disputes has felt akin to trying to fit a square peg in a round hole, the modified proposals would provide a far better fit.

306. *Id.* at 1182-83 (discussing how under the current NLRB's framework employers are left at a disadvantage because the precedence has "elevate[d] an employee's Section 7 rights above that of an employer's property rights").

307. *Id.* at 1185.

308. *Id.* at 1182 (arguing that "[n]ot only are employers entitled to control their goodwill as a matter of property law, but given the prevalence of online communications through social-networking websites, and the pervasive impact it has on business and marketing strategies, employers necessarily have the right to take affirmative action to preserve their online image.") .

309. *See supra* Part II.

310. *See supra* Part III.

311. *See* discussion *supra* Part IV.

312. *See supra* Part IV.A.2.

313. *See supra* Part IV.A.3.

314. Merabet, *supra* note 39, at 1185.

https://digitalcommons.onu.edu/onu_law_review/vol47/iss2/4