Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech under the NLRA

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ABSTRACT: Section 7 of the National Labor Relations Act ("NLRA") protects employees who engage in concerted activities for purposes of mutual aid and protection. The National Labor Relations Board ("the Board") enforces section 7 by protecting employee speech when the speech is related to concerted activity. The Board, using a broad interpretation of section 7, has extended protection to offensive speech, even hate speech. This Note argues that this broad interpretation of section 7 to protect hate speech is contrary to public policy and does not properly account for employers' interest in not being associated with employees who engage in hate speech. This Note further argues for a reworked approach to cases involving offensive speech. The reworked approach incorporates a categorization of the speech to determine the level of protection. This approach properly considers employers' interests while maintaining the NLRA's purpose—to prevent employer unfair labor practices.

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I. INTRODUCTION

Recent political and ideological division within the United States has renewed the debate about an employee's freedom to express political beliefs.[1] Particularly in wake of the resurgence of the white nationalism movement —most notably the rally in Charlottesville, where a counter-protester was killed[2]—there has been renewed debate about whether an employer can fire

1. *See* David Smith, *Divided States of America: 62% Say Trump is Driving People Apart, Poll Finds*, GUARDIAN (Aug. 24, 2017, 11:00 AM), https://www.theguardian.com/us-news/2017/aug/24/trump-approval-rating-division-poll (discussing American voters' contrasting views on whether or not President Trump is bringing the nation together or polarizing the country).

2. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline.

an employee for his or her speech.[3] This question also permeated a recent controversy at Google, where an employee was fired after he disseminated a memo criticizing Google's diversity initiatives.[4] In the memo, the employee stated that a gender disparity exists in tech jobs because of inherent psychological differences between men and women, notably men have a "higher drive for status."[5] Arguably employers' responses following both Charlottesville and the dissemination of the Google memo involve employers firing employees for engaging in hate speech—insults on the basis of race and gender, respectively. Generally, and for purposes of this Note, hate speech is defined as "speech that attacks, threatens, or insults a person or group on the basis of national origin, ethnicity, color, religion, gender, gender identity, sexual orientation, or disability."[6]

A clear moral argument exists that an employer should be able to fire an employee who engages in hate speech. However, beyond the moral question of whether an employer should fire an employee for their speech, employers should be aware of legal considerations that implicate this issue.[7] "There [is] no sweeping, catch-all rule that answers [the] question"[8] of whether an

3. *See, e.g.*, Yoni Blumberg, *Yes, Your Boss Can Fire You for Being a White Supremacist*, CNBC (Aug. 16, 2017, 11:07 AM), https://www.cnbc.com/2017/08/16/yes-your-boss-can-fire-you-for-being-a-white-supremacist.html (discussing instances of workers being fired for political speech, including protest attendees); Mahita Gajanan, *Can You Be Fired for Being a Racist?*, TIME (Aug. 15, 2017), http://time.com/4901200/fired-racist-charlottesville-white-nationalism (describing firings after the Charlottesville rally as "an issue that has cropped up among employers multiple times this month"); Rebecca Greenfield, *Can You Fire Someone for Being a White Supremacist?*, BLOOMBERG (Aug. 21, 2017, 12:00 PM), https://www.bloomberg.com/news/articles/2017-08-21/can-you-fire-someone-for-being-a-white-supremacist ("It's not entirely clear that employees will always be fired for being an after-hours Nazi."); Gillian B. White, *Is Being a White Supremacist Grounds for Firing?*, ATLANTIC (Aug. 14, 2017), https://www.theatlantic.com/business/archive/2017/08/charlottesville-employment/536838 ("In many cases, firing someone for their political ideas raises few legal issues.").

4. Louise Matsakis, *Google Employee's Anti-Diversity Manifesto Goes 'Internally Viral,'* MOTHERBOARD (Aug. 5, 2017, 1:01 AM), https://motherboard.vice.com/en_us/article/kzbm4a/employees-anti-diversity-manifesto-goes-internally-viral-at-google.

5. JAMES DAMORE, GOOGLE'S IDEOLOGICAL ECHO CHAMBER: HOW BIAS CLOUDS OUR THINKING ABOUT DIVERSITY AND INCLUSION (2017), https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf (claiming women prefer more relationship-based careers, are more prone to anxiety than men, and look for work-life balance while men are more driven for success in their careers).

6. *Hate Speech*, DICTIONARY.COM, http://www.dictionary.com/browse/hate-speech (last visited Sept. 26, 2018). For a discussion on the different definitions of hate speech, compare John T. Bennett, *The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation*, 43 HASTINGS CONST. L.Q. 445, 450–55 (2016), with STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION ix (1996) (defining hate speech as "expression that abuses or degrades others on account of their racial, ethnic, or religious identity").

7. Jessica A. Clarke, *Should Employers Fire Employees Who Attend White Supremacist Rallies?*, HARV. BUS. REV. (Sept. 19, 2017), https://hbr.org/2017/09/should-employers-fire-employees-who-attend-white-supremacist-rallies.

8. David Yamada, *Can an Employer Fire a Publicly-Avowed White Supremacist?*, MINDING WORKPLACE (Aug. 14, 2017), https://newworkplace.wordpress.com/2017/08/13/can-an-employer-fire-a-publicly-avowed-white-supremacist.

employer can lawfully fire an employee for his or her speech, and it depends entirely on the facts and circumstances of each case.[9] One possible area for employee protection is the National Labor Relations Act ("NLRA"). In interpreting this Act, the National Labor Relations Board ("the Board") has, on multiple occasions, protected hate speech because it determined the speech was non-threating and involved "concerted activities for the purpose of . . . mutual aid [and] protection"—explicitly protected under section seven of the NLRA.[10]

This Note argues that the test the Board currently uses to evaluate the protection of offensive speech is overly broad and does not properly balance the interest of the employer in cases involving hate speech. Part II of this Note explores the background of section 7 of the NLRA and how the Board has applied this section to cases involving offensive and hateful speech. Part III argues that the Board's current approach does not properly balance the employer's interest or the speech's harmful effects on the recipient in cases of hate speech. Part IV proposes a new balancing test that accounts for these interests while retaining protective elements to ensure employers do not escape liability from unfair labor practices. The test is then applied to the hate speech cases discussed in Part II, as well as potential cases involving the Charlottesville rally participants and open critics of company affirmative action policy—like the Google employee. This Note concludes that the proposed test should replace the current approach and demonstrates with real world examples that it is workable for the fact specific nature of these types cases.

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9. *See, e.g.*, Blumberg, *supra* note 3 ("Can your political speech get you lawfully fired? . . . [I]t's not always so clear."); Clarke, *supra* note 7 (discussing various considerations taken into account when evaluating the "difficult question" of "[w]hether or not the law forbids" firing these employees); Yamada, *supra* note 8 (noting the "potential exceptions and twists" involved in the "objective, complicated, and nuanced" question of whether an employer can fire an employee for attending a white supremacist rally).

10. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2012). *See generally* Cooper Tire & Rubber Co., Case 08-CA-087155 (N.L.R.B. June 5, 2015) (decision) (holding that an employer violated the National Labor Relations Act by improperly discharging a picketing employee who made racist comments toward replacement workers); Airo Die Casting, Inc., 347 N.L.R.B. 810, 811–12 (2006), 2006 WL 2206844 (holding that a picketing employee's use of a "racial slur" —which did not occur during normal working hours or at his place of employment and "was unaccompanied by threats, coercion, or intimidation"—was not a valid reason for the employer's refusal to reinstate the employee); Detroit Newspaper Agency, 342 N.L.R.B. 223, 269 (2004), 2004 WL 1531758 (finding that even where a picketing employee's language was "clearly offensive and reprehensible under any objective standard, it [did] not constitute grounds for discharge").

II. THE NLRA AND PROTECTED EMPLOYEE SPEECH

A. *THE TRADITIONAL EMPLOYMENT RELATIONSHIP*

Unless specified otherwise, an employment relationship is presumed to be at-will.[11] Under at-will employment, either the employer or the employee may end the employment relationship, through termination or resignation, at any time and for any or no reason.[12] An employer is not required to have just cause for firing an employee. Under the common law rule of at-will employment, an employer is free to impose any condition of employment, terminate an employee for any reason without notice, and go about the discharge in any manner.[13] In response to the common law rule, courts and legislatures have adopted exceptions to the at-will doctrine to protect employees from unfair labor practices.[14] One exception involves an employee's freedom of speech. The First Amendment and, perhaps more importantly, the NLRA offer some protection for employee speech.

B. *COMMON STATUTORY REMEDIES TO EMPLOYEE FREE SPEECH CLAIMS*

Despite being the most well-known form of speech protection, the First Amendment does not protect most employees from being discharged for expressing free speech.[15] The extent to which an employee's speech is protected (if at all) under the First Amendment depends on whether the employer is public or private.[16] Public employees receive limited substantive First Amendment protection.[17] The First Amendment will protect their

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11. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125–26 (1976).

12. Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 8 (1993).

13. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 30 (8th ed. 2015).

14. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012) (defining and prohibiting unfair labor practices for employers); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (prohibiting discrimination of individuals over the age of 40); Family and Medical Leave Act, 29 U.S.C. §§ 2601–54 (providing employees job protection and unpaid leave of absence for qualified medical or family reasons); Uniformed Services Employment and Reemployment Act, 38 U.S.C. §§ 4301–35 (protecting civilian jobs and benefits for veterans); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (prohibiting unlawful employment discrimination); Americans with Disabilities Act, 42 U.S.C. §§ 12101–17 (prohibiting discrimination based on an individual's disability); Workers' Compensation Act, IOWA CODE ANN. §§ 85.1–.63 (2018) (providing insurance from the state of Iowa for employee injured in the course of employment); Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) (establishing a wrongful termination in violation of public policy cause of action in the state of Colorado).

15. *See* David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 22 (1998) (discussing how although the First Amendment is an obvious starting point, it has little success in courts in the employment context).

16. ROTHSTEIN ET AL., *supra* note 13, at 642.

17. *Id.* ("Employment with the state is considered to be a type of governmental benefit. While the government may deny an individual the benefit for many reasons, it may not deny them

speech if it addresses a "matter[] of public concern,"[18] and the government employer lacked "adequate justification for treating the employee differently from any other member of the general public."[19] However, Constitutional free speech safeguards do not constrain private sector employers because the First Amendment only limits the *government's* ability to restrict speech.[20] While courts have traditionally recognized political speech as a type of speech given the highest protection under the First Amendment, a private sector employee is left largely without a Constitutional cause of action if fired for political speech.[21]

Some state legislatures, recognizing the lack of federal protection for employee free speech, have enacted statutes to prohibit employers from firing employees over their beliefs or speech.[22] The breadth of speech protected by these statutes varies from state to state[23]:

> [F]ive states (California, Colorado, Montana, New York, and North Dakota) prohibit employers from punishing employees for legal off-duty activities that do not conflict with the employer's business-related interests. Nine additional states more narrowly protect employees who engage in political activities and five states similarly protect individuals who sign initiative, referendum, recall, or candidate petitions.[24]

"on a basis that infringes his constitutionally protected . . . freedom of speech."); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

18. Pickering v. Bd. of Ed., 391 U.S. 563, 574 (1968); *see also* Garcetti v. Ceballos, 547 U.S. 410, 417–18 (2006) ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

19. *Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."); *see also* Rankin v. McPherson, 483 U.S. 378, 384, 388 (1987) (employing a test balancing the employee's interest in making the statement and the government employer's interest in "promoting the efficiency of the public services it performs through its employees" (quoting *Pickering*, 391 U.S. at 568)); *Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

20. *See* Yamada, *supra* note 15, at 23.

21. Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 343 (1994).

22. Braden Campbell, *How to Handle Workforce Hate After Charlottesville*, LAW360 (Aug. 15, 2017, 9:25 PM), https://www.law360.com/articles/954553/how-to-handle-workforce-hate-after-charlottesville.

23. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 302 (2012).

24. Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, 15 INSIGHTS ON L. & POL'Y (2015), https://www.americanbar.org/publications/insights_on_law_andsociety/15/winter-2015/chill-around-the-water-cooler.html. California, for example, has prohibited employment discrimination based on an employee's political activities. Clarke, *supra* note 7. This could offer protection to Californian employees who attend a white nationalist rally, like the one in Charlottesville. *Id.*

About one-half of the U.S. population living in the remaining 31 states have little-to-no protection under state law for an adverse employment action from their practice of free speech.[25] However, employees in these states are not entirely without recourse. Employees may turn to the National Labor Relations Act ("NLRA"), discussed in Sections C and D, which may offer —albeit under somewhat narrow circumstances—protection for employee speech.[26]

C. THE NLRA AND ITS GENERAL PROTECTIONS

The purpose of the NLRA is to protect workers' rights to self-organize and openly discuss their conditions of employment without fear of retaliation from their employers. Congress enacted the NLRA in 1935 to settle decades of labor unrest.[27] Since its enactment, the NLRA has shaped modern labor and employment law by supporting a "complex mix of bargaining and regulation."[28] The NLRA's stated purpose is to "encourag[e] the practice and procedure of collective bargaining and . . . protect[] 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 terms and conditions of their employment or other mutual aid or protection."[29] Essentially, the NLRA protects employees by prohibiting adverse employment action by the employer when employees join together to seek improvements in working conditions or pay.[30]

The NLRA created the National Labor Relations Board ("the Board") to administer and enforce the NLRA.[31] The Board is an independent agency made up of five members who are appointed by the President.[32] The Board's responsibilities include providing the legal framework for employees to hold union elections, investigating charges of NLRA violations, facilitating settlements, adjudicating cases, and enforcing the Board's decisions.[33] Forty administrative law judges carry out the Board's adjudication function, and the five-member Board may review their decisions.[34] The U.S. Circuit Courts also

25. *See* Cox, *supra* note 24. *See generally* Volokh, *supra* note 23 (describing statutes in each state that protect or hinder employee speech).

26. Jessica Lissette Zamora, Free Speech and the Workplace: The Propriety of Employers' Regulating Unionized Employees' Off Site Speech 8 (2014) (on file with the Seton Hall University EREPOSITORY), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1611&context=student_scholarship.

27. ROTHSTEIN ET AL., *supra* note 13, at 42.

28. *Id.*

29. National Labor Relations Act § 1, 29 U.S.C. § 151 (2012).

30. NAT'L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 2 (1997).

31. National Labor Relations Act § 3.

32. *Id.*; *What We Do*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/what-we-do (last visited Sept. 26, 2018).

33. *What We Do*, *supra* note 32.

34. *See id.*

have jurisdiction to review the Board's decisions.[35] On appeal, the Board's decisions are entitled to *Chevron* deference,[36] meaning the Board's decision regarding an ambiguous provision of the NLRA will be upheld if it "is based on a permissible [interpretation] of the statute."[37]

The NLRA applies to most private-sector employees, regardless of whether the workplace is unionized.[38] Specifically excluded from NLRA coverage are public employees, supervisors, agricultural laborers, domestic workers, individuals employed by a parent or spouse, or employees covered by the Railway Labor Act.[39] Although the NLRA is the only federal law governing the relationship between private sector employers and employees, most employers and employees are unaware of the existence of the NLRA and the protections it provides.[40] In part, this obliviousness could be due to the NLRA's categorization as a labor law, leaving the non-unionized employee to presume it is not applicable in his or her workplace.[41] As union membership declines,[42] the NLRA's importance to non-union employees is increasingly relevant because it provides employees protection against unlawful employment actions, a role traditionally filled by unions.[43] Section 7 of the NLRA is especially important when considering the rights of workers.

1. Employees' Rights Under Section 7

The rights that the NLRA protects, including the right to strike and form a union, are laid out in section 7.[44] Section 7 states, in pertinent part, "[e]mployees shall have the right to self-organization, to form, join, or assist

35. National Labor Relations Act § 10(e).

36. *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing a two-part test to review an agency's interpretation of the statute it administers).

37. Lechmere, Inc. v. NLRB, 502 U.S. 527, 545 (1992) (citing Chevron when describing the Court's deference to the Board's interpretations of the NLRA); *see also* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 121–22 (2d Cir. 2017) ("[W]e will accept the NLRB's factual findings 'if they are supported by substantial evidence in light of the record as a whole.' Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (first quoting NLRB v. Starbucks, Corp., 679 F.3d 70, 77 (2d Cir. 2012), then quoting Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419, 1427 (2d Cir. 1996))).

38. *Rights We Protect*, NAT'L LAB. REL. BD., https://www.nlrb.gov/rights-we-protect (last visited Sept. 26, 2018).

39. National Labor Relations Act § 2(3).

40. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675 (1989).

41. *See* Dave Jamieson, *Walmart Broke Labor Law and Retaliated Against Workers, NLRB Charges*, HUFFPOST (Nov. 19, 2013, 5:45 PM), http://www.huffingtonpost.com/2013/11/18/walmart-nlrb_n_4298387.html (referring to a violation of the NLRA as violating U.S. labor law).

42. Union membership has dropped from 20.1% in 1983 to just 10.7% of the workplace in 2017. *Union Members Summary*, BUREAU LAB. STAT. (Jan. 19, 2018), https://www.bls.gov/news.release/union2.nro.htm. Notably, the private sector only makes up 6.5% of total union membership. *Id.*

43. *See* Morris, *supra* note 40, at 1676.

44. *See* National Labor Relations Act § 7.

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[45] This means that if an employer takes an adverse employment action (e.g., termination, demotion, salary decrease) against an employee who engaged in one of these protected activities, the employee has a cause of action against the employer.[46] If the Board determines the employer engaged in unlawful employment practices, it typically awards damages in the form of a cease and desist of the unlawful practices or reinstatement with back pay, but the Board also has discretion to award other damages if doing so would best effectuate the NLRA's purpose.[47]

In deciding section 7 cases, Courts will resolve any ambiguities with a broad interpretation.[48] Examples of ambiguities that are most commonly litigated are the terms "concerted activities" and "mutual aid or protection"; the NLRA does not define either phrase.[49] The determination of whether an employee's activities are covered by these definitions is a question of fact and will depend on the specific circumstances of the case.[50] Courts have generally interpreted "mutual aid or protection" broadly so that employees are invariably able to show that their action qualifies.[51] Generally, "concerted activity" is considered to be "two or more employees acting together to improve wages or working conditions."[52] However, the Board, in broadly construing "concerted activity," recognizes that an individual's actions may fall under section 7 protection in certain circumstances, like when an employee involves others before acting or acts on behalf of co-workers.[53] While the definition remains broad, the requirement that such activity be "for the purpose of collective bargaining or other mutual aid or protection," confines the scope of the NLRA protection to acts related to or in response to

45. *Id.*

46. *See id.*

47. *See id.* § 10.

48. Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016) (discussing section 7's "intentionally broad sweep"), *rev'd*, 138 S. Ct. 1612 (2018).

49. *See* National Labor Relations Act § 7; *Lewis*, 823 F.3d at 1153. For a discussion of concerted activities regarding employee speech, see *infra* Section II.D.

50. *Protected Concerted Activity*, NAT'L LAB. REL. BD., https://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last visited Sept. 26, 2018).

51. Rita Gail Smith & Richard A. Parr II, Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 374 (1983).

52. *Protected Concerted Activity*, *supra* note 50.

53. Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986), 1986 WL 54414 ("[Concerted activity] encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."); Smith & Parr, *supra* note 51, at 370; *Protected Concerted Activity*, *supra* note 50.

working conditions, such as compensation, hours, and employees' safety.[54] While section 7 is a critical part of the NLRA, it would be meaningless if it could not be enforced.

2. Enforcement Under Section 8

Section 8 is the enforcement provision, which states that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157."[55] Essentially, section 7 gives employees certain rights, while section 8 makes it an "unfair labor practice" for an employer to interfere with those rights.[56] Generally, the employer's motive is irrelevant; the Board will consider "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA]."[57]

3. Unprotected Conduct Under Section 7

Although sections 7 and 8 provide protection for a wide range of conduct, certain employee actions that are contrary to the NLRA's purpose will not be protected, even if they would otherwise constitute protected group action.[58] "Violence, threats, insubordination, and disloyalty" from employees may result in their actions not being protected, and thus, employees who engage in this conduct can be fired for cause without employer liability.[59] For example, in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, in the midst of a labor dispute, employees handed out flyers disparaging the employer's services.[60] The Supreme Court affirmed the Board's decision that the employees' speech was not protected under section

54. *See* National Labor Relations Act § 7; N. PETER LAREAU, 1 NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE § 4.01 (Matthew Bender ed., 2d ed. 2018); *Protected Concerted Activity*, *supra* note 50 ("Does [the concerted activity] seek to benefit other employees? Will the improvements sought—whether in pay, hours, safety, workload, or other terms of employment—benefit more than just the employee taking action? Or is the action more along the lines of a personal gripe, which is not protected?").

55. National Labor Relations Act § 8(a)(1). Section 8 further defines acts by employers that may be unlawful labor practices, but the scope of this Note is limited to section 8(a)(1). *See id.* § 8(a)(2)–(g).

56. *See id.* §§ 7–8.

57. Am. Freightways Co., Inc., 124 N.L.R.B. 146, 147 (1959), 1959 WL 14646 (citing NLRB v. Illinois Tool Works, 153 F.2d 811, 814 (7th Cir. 1946)). *But see* Meijer, Inc. v. NLRB, 463 F.3d 534, 542 (6th Cir. 2006) ("[A]n employer's knowledge is an element of a § 8(a)(1) violation.").

58. *Protected Concerted Activity*, *supra* note 50 ("Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause concerted activity to lose its protection.").

59. ROTHSTEIN ET AL., *supra* note 13, at 42; *see also* National Labor Relations Act § 10(c) (providing that an employer may "discharge[] for cause" as long as it has not engaged in "unfair labor practice[s]").

60. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 467–68 (1953).

7 because the flyers disparaged the employer without referencing the labor issue.[61] From this case emerged an important exception to the otherwise broad interpretation of section 7—an employee's otherwise protected conduct may be so outrageous, or unrelated to a labor issue, that it is not afforded NLRA protection.[62] However, because each case is a very fact specific determination, the standard for losing protection is difficult to discern. Generally, the Board "balance[s] employee rights under section 7 against an employer's right 'to maintain order and respect' in the conduct of its business."[63] There are small variations to the standard depending on the type of employee action—disparaging an employer's product to customers, such as in *Local Union 1229*, versus directing obscenities toward an employer, as discussed in Section D—but as a general rule, the Board will consider the nature of the conduct when determining whether the employee can feasibly continue to work for the employer:

> [W]hen an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the [NLRA], or of such a character as to render the employee unfit for further service.[64]

D. THE BOARD'S INTERPRETATION OF PROTECTED SPEECH

In the context of employee speech, an employee's use of offensive language (e.g., obscenities, sexually explicit terms, or racial epithets) may be "so 'offensive, vulgar, defamatory, or opprobrious' that it los[es] its protected status."[65] Similar to other ambiguities in the NLRA, whether the act protects an employee's speech is a very fact specific determination. Looking at the Board's developing case law, common factors have emerged to begin to develop a standard that, although vague, can help employers make employment decisions without running afoul of the NLRA.[66] The cases that

61. *Id.* at 476–77.

62. LAREAU, *supra* note 54, § 4.04.

63. *See* ROTHSTEIN ET AL., *supra* note 13, at 42.

64. Consumers Power Co., 282 N.L.R.B. 130, 132 (1986), 1986 WL 54230 (emphasis added).

65. Reef Indus., Inc. v. NLRB, 952 F.2d 830, 835 (5th Cir. 1991).

66. *See generally* Christine Neylon O'Brien, *I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHN'S L. REV. 53 (2016) (analyzing ten representative NLRB cases involving profanity and protected speech). O'Brien found the following factors that were determinative to their outcomes:

> [T]he location of the misconduct; the presence of employer rules that violated the NLRA because they were overbroad and unduly interfered with concerted activity that was protected by § 7; provocation of employee(s) brought on by employer ULPs; the employer's general tolerance of profanity in the workplace; the inequality of treatment amongst employees who engaged in similar profanity but who were not engaged in protected concerted activity, with the latter receiving more favorable treatment; whether or not the employee presented as violent or overly aggressive in

follow discuss the standards the Board uses to evaluate instances of both offensive speech and hate speech.

1. The General Framework for Evaluating Whether Offensive Speech is Protected

In *NLRB v. Pier Sixty, LLC*, an employee was discharged after using profanity to disparage his boss on social media.[67] The Facebook post and firing occurred in the middle of a tense organizing campaign that ultimately resulted in the employees voting to unionize.[68] Two days before the election, a Pier Sixty supervisor upset an employee by delivering instructions in a "harsh tone."[69] During his break, the employee used his phone to post the following message about his boss, named Bob, to his publicly accessible Facebook account: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people! ! ! ! ! ! Fuck his mother and his entire fucking family! ! ! ! What a LOSER! ! ! ! Vote YES for the UNION! ! ! ! ! ! !"[70] After the post came to the attention of management, the employee was fired.[71] The question before the Board, and later on appeal to the Second Circuit, was whether the post was so derogatory and offensive as to lose NLRA protection.[72]

Reviewing the Board's decision that Pier Sixty committed an unfair labor practice by firing the employee, the Second Circuit started with a balancing test commonly used in offensive behavior NLRA cases, the *Atlantic Steel* 4-part test[73]: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[74] The court, expanding on the four Atlantic Steel factors, also used a

> totality of the circumstances test for evaluating an employee's use of social media [based on] the following factors: (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

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> the context of the profane outburst; and whether or not there was an employee complaint of harassment that legally required the employer to investigate and remedy harassment.

Id. at 98.

67. NLRB v. Pier Sixty, LLC, 855 F.3d 115, 118 (2d Cir. 2017).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 121.

73. *See generally* O'Brien, *supra* note 66 (analyzing ten profanity-based NLRA cases and commonly noting the use of the *Atlantic Steel* test).

74. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979), 1979 WL 10011; *Pier Sixty, LLC*, 855 F.3d at 122.

> 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.[75]

Applying the facts drawn from using these nine factors, the court placed special importance that Pier Sixty, in the past, had consistently tolerated the use of profanity among its employees.[76] It also reasoned that even though customers may have been able to see the message (relevant to the location factor of the test which disapproves of "public outbursts" in front of customers), Facebook is an online forum for employees to communicate and organize.[77] The court also noted that although the message was inappropriate, it addressed workplace concerns.[78] It ultimately concluded that the employee's Facebook post was "concerted activity" for "purposes of mutual aid and protect"—falling under section 7 protection—but was not so outrageous as to lose NLRA protection.[79]

When analyzing the "nature of the outburst" under the *Atlantic Steel* test or "nature of the content" under the totality of the circumstances test, courts will consider whether the conduct was violent or likely to coerce violence in reaction.[80] In *Plaza Auto Center*, an employer fired an employee after the employee made an explicative-laced outburst,[81] as well as a threat that if his employer fired him, the employer would regret it.[82] The employee made the statements during a meeting called to discuss the complaints that the employee previously submitted about inadequate bathroom breaks and allegedly unlawful compensation practices; he often shared these same concerns with his co-workers.[83] With three of the four *Atlantic Steel* factors in the employee's favor, the Board focused on the "nature of the outburst"

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75. *See Pier Sixty, LLC*, 855 F.3d at 123 n.38 (citing Pier Sixty, LLC, 362 N.L.R.B. No. 59, *3 (N.L.R.B. Mar. 31, 2015), 2015 WL 1457688) (noting that the *Atlantic Steel* test had recently come under fire and may not adequately consider the employer's interests).

76. *Id.* at 124.

77. *Id.* at 125.

78. *Id.* at 124.

79. *Id.* at 125–26.

80. *Compare* Cooper Tire & Rubber Co., Case 08-CA-087155, at 11–12 (N.L.R.B. June 5, 2015) (decision), Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 975–76 (2014), 2014 WL 2213747, *and* O'Brien, *supra* note 66, at 66, *with* Michael W. McConnell, *You Can't Say That: 'The Harm in Hate Speech,' by Jeremy Waldron*, N.Y. TIMES (June 22, 2012), https://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html ("In the American constitutional tradition . . . even detestable speech is permitted so long as the speaker does not threaten violence or incite others to it.").

81. *Plaza Auto Ctr.*, 360 N.L.R.B. at 973 (detailing the meeting in which the employee (Aguirre) called his employer (Plaza) "a 'fucking mother fucking,' a 'fucking crook,' and an 'asshole'"). "Aguirre also told Plaza that he was stupid, nobody liked him, and everyone talked about him behind his back." *Id.*

82. *Id.* ("During the outburst, Aguirre stood up in the small office, pushed his chair aside, and told Plaza that if Plaza fired him, Plaza would regret it.").

83. *Id.* at 972–73.

factor.[84] Under this factor, the Board considers whether the conduct "solely involved obscene and denigrating remarks that constituted insubordination," in which case it would be protected, or "whether it also was menacing, physically aggressive, or belligerent," and thus lose protection.[85] The Board gave considerable weight to the nature of the "obscene and denigrating remarks," noting that the employer had historically not tolerated profanity and finding that the "nature of the outburst" factor weighed against protection.[86] But, using an objective standard, the Board held that a reasonable person would not have found the conduct to be threatening and was afforded protection "because the other three [*Atlantic Steel*] factors weigh[ed] heavily in his favor."[87] The dissent argued that this behavior should not have been protected because the employer would have taken the same action in the absence of protected activity, and an employer should not have to refrain from acting when it involves such activity.[88]

2. How the Board has Applied the Offensive Speech Framework in Cases Involving Hate Speech

In *Detroit Newspaper Agency*, the Board addressed the issue of racial epithets in protected speech and went so far as to say that explicit threats —laced with sexual and racial slurs—were protected speech.[89] In the case, the employer discharged a picketer employee after he blocked a co-worker's exit, repeatedly used the N-word, referred to the co-worker as a whore, and said that he hoped her children died.[90] The Board noted that "use of even the most vile language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat."[91] Here, the employee's statements of "I hope your children die" and your "children should die" did not constitute a threat that the employee would

84. *Id.* at 973. The Ninth Circuit agreed with the Board that the following three factors were in favor of the employee: the place of the discussion; the subject matter of the discussion; and whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* The action discussed here was on remand from the Ninth Circuit for the Board to rebalance the *Atlantic Steel* factors "to properly consider whether the nature of Aguirre's outburst caused him to forfeit [the NLRA's] protection." *Id.* (quoting Plaza Auto Ctr., Inc. v. NLRB, 664 F.3d 286, 294 (9th Cir. 2011)).

85. *Id.* at 974.

86. *Id.* at 977–78.

87. *Id.* at 977 (first alteration in original) (quoting Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22, 27 n.1 (D.C. Cir. 2011)) ("[T]he fact that the nature-of-the-outburst factor weighs against protection does not require us to find that Aguirre lost the protection of the Act.").

88. *Id.* at 983, 986 (Member Johnson, dissenting) (noting that it is reasonable and necessary for employers to expect civility at work).

89. Detroit Newspaper Agency, 342 N.L.R.B. 223, 267–68 (2004), 2004 WL 1531758.

90. *Id.* at 268. ("He said things like: 'You fuckin' bitch, nigger lovin' whore. It's your fault that white America lost their jobs. Your family is going to die. I hope you tell your children before they die that its [sic] your fault and its [sic] because you gave our jobs away.'").

91. *Id.* at 269.

harm the employee's children, and thus the comments did not constitute legal grounds for discharge.[92]

Similar to *Detroit Newspaper Agency*, in *Airo Die Casting*, a picketer employee "was discharged for harassing an African-American" because it was conduct that went "against the policies of the Company."[93] The incident involved speech on a picket line that included use of the N-word.[94] The Board found this speech was nevertheless protected because it was not "accompanied by any threats or any coercion, or any intimidating conduct."[95] The Board cited the *Detroit Newspaper Agency* decision in holding that although the speech was "clearly repulsive and offensive, in particular the racial epithet," it was protected.[96] The Board in *Airo Die Casting*, however, did indicate that speech may lose its protection by use of the N-word "even in the absence of violence or explicit threats of violence" in situations where "the word itself may be so incendiary as to constitute an implied threat or an incitement to violence."[97] The Board failed to elaborate further on this hypothetical, meaning it is likely that future decisions will continue to follow the very broad interpretation of protected speech that includes hate speech.[98]

The Board's broad view of protected speech took an even more expansive role in *Cooper Tire* where the Board again held that hate speech was protected.[99] The incident at issue occurred during a lockout in the midst of negotiations for a collective bargaining agreement.[100] It involved an exchange between a picketer employee and mostly African-American replacement workers who were crossing the picket lines.[101] The picketer employee shouted that he hoped the replacements brought enough Kentucky Fried Chicken for everyone; the picketer employee also made a statement implying that the replacement workers smelled of fried chicken and watermelon.[102] The employer discharged the picketer employee because his statements violated the employer's policy against racial harassment.[103]

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92. *Id.*

93. Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006), 2006 WL 2206844.

94. *Id.* ("[H]e proceeded by flipping me with both of his middle fingers and derogatorily calling out 'fuck you nigger.'").

95. *Id.* at 812.

96. *Id.*

97. *Id.* at 810 n.3.

98. *See id.*; Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act* 11 (Tex. A&M Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 17–27, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946349.

99. Cooper Tire & Rubber Co., Case 08-CA-087155 (N.L.R.B. June 5, 2015) (decision).

100. *Id.* at 3.

101. *Id.*

102. *Id.* at 4.

103. *Id.* at 6.

The Board, in holding that the employee's conduct was protected, noted that a certain degree of confrontation is a "necessary element of picketing."[104] The Board reasoned that conduct in a picket line or other strike setting is given greater leeway than conduct in the workplace during working hours.[105] In an attempt to draw a line between protected offensive speech and unprotected speech, the Board used an objective test under which the conduct is unprotected if the "statements raised a reasonable likelihood of an imminent physical confrontation."[106] With these facts, the Board held that although the "'KFC' and 'fried chicken and watermelon' statements most certainly were racist, offensive, and reprehensible, . . . they were not violent in character and they did not contain any overt or implied threats to replacement workers or their property."[107]

Although NLRA's aim to protect workers' rights to band together for mutual aid and protection is an admirable purpose, recent cases protecting offensive speech have frustrated the employer's ability to maintain a peaceful work environment and overreach the purpose of the statute. Part III analyzes the pitfalls for employers inherent in this line of cases. Part IV further explores Board decisions and their underlying logic and argues that different degrees of profanity should not be treated under the same "imminent threat of physical confrontation" standard; specifically, hate speech should be presumptively treated as unprotected.

III. THE HARMFUL EFFECTS OF RETAINING EMPLOYEES WHO ENGAGE IN HATE SPEECH

The current test for evaluating the protected nature of offensive speech under the NLRA is unnecessarily broad. Under the Board's interpretation of section 7, an employee's use of offensive language that denigrates someone based on that person's race, gender, religion, national origin, etc. may be protected if the speech is related to concerted protected activities.[108] Essentially, the Board interprets section 7 to protect speech that is, arguably, hate speech.[109] Hate speech differs from other forms of offensive speech, such as personal insults or profanity, because it conveys a message of exclusion, defamation, and intimidation to a blanket group, rather than addressing a

104. *Id.* at 10.

105. *Id.*; O'Brien, *supra* note 66, at 79.

106. *Cooper Tire & Rubber Co.*, Case 08-CA-087155, at 11.

107. *Id.* at 11–12.

108. *See generally id.* (holding that the employer violated the NLRA even though the employer claimed that it fired the employee for a lawful purpose, namely engaging in hate speech).

109. *See, e.g.*, *id.* (holding that speech which included references to derogatory racial stereotypes was protected by the NLRA); Airo Die Casting, Inc., 347 N.L.R.B. 810, 812 (2006), 2006 WL 2206844 (holding that use of a racial epithet was protected speech); Detroit Newspaper Agency, 342 N.L.R.B. 223, 267–68 (2004), 2004 WL 1531758 (noting that sexist and racist speech was not threatening and did not lose protection).

particular grievance in the workplace.[110] The inflammatory effect, and greater likelihood of a violent response, further differentiate hate speech from other offensive speech.[111] An interpretation of section 7 that equates hate speech with other forms of offensive speech is contrary to public policy, as evidenced by federal law,[112] and does not adequately consider the employers' interests. An employer who retains an employee who engages in this form of hate speech may find itself exposed to various business and litigation risks.[113]

This Part discusses these risks and public policy considerations in light of the Board's broad interpretation of protected speech. Section A explores the negative impact hate speech and discriminatory behavior can have on other employees and how these actions hurt the employer. Section B discusses the conflicting doctrines of anti-discrimination and the current section 7 interpretation, and employers' unavoidable resulting litigation risk. Section C further discusses the risk of financial harm to the employer in the form of consumer backlash.

A. A HOSTILE WORK ENVIRONMENT STIFLES EMPLOYEES AND DAMAGES WORK MORALE

Employers have a legitimate interest in disassociating from employees who express views that the employer finds abhorrent.[114] "[E]mployees are hired to advance the employer's interests, not to undermine it. When an employee's speech or political activity sufficiently alienates coworkers [or] customers . . . an employer may reasonably claim a right to sever his connection to the employee."[115] Removing an employee who uses hateful language is in the best interest of both employers and employees.

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110. *See* Jeremy Waldron, *The Harm of Hate Speech*, FREE SPEECH DEBATE (Mar. 20, 2012), http://freespeechdebate.com/discuss/the-harm-of-hate-speech.

111. Randall L. Kennedy, *The David C. Baum Lecture: "Nigger!" as a Problem in the Law*, 2001 U. ILL. L. REV. 935, 937 ("Any person in the United States should be aware of the N-word. Ignorance could be very costly. Failing to recognize it as the signal of danger that it often is could well lead to injury, just as using it unaware of its effects and consequences could well cost a person his reputation, his job, or even his life.").

112. Title VII of the Civil Rights Act of 1964 requires employers to provide its employees a workplace free from harassment on the basis of race, color, sex, religion, or national origin. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); *see also* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 946–47 (1993) ("Liability would be imposed when the employer failed to comply with the standard of care established by the statutory prohibition on discrimination, either by failing to establish a harassment-free workplace, or by failing to respond appropriately when harassment occurred. Viewing the employers' obligations in this manner leads to the conclusion that racial harassment is a wrong prohibited by Title VII even in the absence of a specific employment decision, such as a termination. To be harassed because of race is to be deprived of the right to a harassment-free workplace.")

113. Clarke, *supra* note 7.

114. Volokh, *supra* note 23, at 301.

115. *Id.*

Further, hate speech should not be protected because of the uniquely detrimental effects it can have on the recipients.[116] In the employment context, hate speech, and other forms of speech which Title VII serves to protect against, can have a "clear deleterious and demoralizing effect[] on employees."[117] Hate speech attacks a person, not because of what they have done, but because of who they are. It results in subordination of not only that person, but of an entire group, and perpetuates discrimination. "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet" in the workplace.[118]

Studies show that harassment or discrimination in the workplace has a measurable psychological effect on employees, including depression, increased stress, and decreased productivity.[119] According to one study, "the risk of common mental disorders was twice as high among those exposed to racist insults."[120] Women who are exposed to harassing language experience similar negative effects.[121] Exposure to racist speech can have negative physical and mental effects such as "cigarette smoking, high blood pressure, anxiety, depression and post-traumatic stress disorder, and . . . also diminishes academic performance."[122] Retaining employees who engage in such harassing and discriminatory speech can foster a hostile work environment.[123]

By retaining employees who disparage co-workers on the basis of class identity, companies create hostile work environments that frustrate development of diversity and negatively affect work performance and employee morale. A hostile work environment, due to discrimination or harassment, invariably harms both employers and employees by decreasing diversity.[124] Recruiting and retaining diverse employees in a workplace that tolerates hate speech will inevitably be difficult, if not impossible, and even if

116. Laura Beth Nielsen, Opinion, *The Case for Restricting Hate Speech*, L.A. TIMES (June 21, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-nielsen-free-speech-hate-20170621-story.html.

117. Kerri Lynn Stone, *Decoding Civility*, 28 BERKELEY J. GENDER L. & JUST. 185, 213 (2013).

118. Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) (citation omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

119. Kamaldeep Bhui et al., *Racial/Ethnic Discrimination and Common Mental Disorders Among Workers: Findings from the EMPIRIC Study of Ethnic Minority Groups in the United Kingdom*, 95 AM. J. PUB. HEALTH 496, 496, 498–500 (2005) (studying "specific effects of racial discrimination on the mental health of the United Kingdom's multiethnic workforce"); Wizdom Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBS. 19, 25–26 (2010) (examining the effects of racial bias and discrimination in a hospital working environment).

120. Bhui et al., *supra* note 119, at 499.

121. Stone, *supra* note 117, at 214.

122. Nielsen, *supra* note 116.

123. *See supra* notes 117–18 and accompanying text.

124. Christopher Mims, *What the Google Controversy Misses: The Business Case for Diversity*, WALL ST. J. (Aug. 13, 2017, 8:00 AM), https://www.wsj.com/articles/what-the-google-controversy-misses-the-business-case-for-diversity-1502625603.

diverse employees remain in the hostile work environment, their job performance and job satisfaction will likely suffer.[125]

B. FAILURE TO ACT AGAINST HATE SPEECH DAMAGES COMPANIES' REPUTATIONS

Studies have shown that a hostile work environment, by reducing diversity, can harm a company's reputation and overall financial results.[126] While the encouragement of diversity on moral or equality grounds is a subject rife with debate, evidence shows that diversity is good for business. One research study showed that "diverse groups outperformed more homogeneous groups not because of an influx of new ideas, but because diversity triggered more careful information processing that is absent in homogeneous groups."[127] Further, diverse companies have smarter, more innovative teams[128] and experience better financial returns[129] than homogenous companies.[130]

Beyond the negative effects that hate speech has on employees subject to it, retaining employees who engage in hate speech may negatively affect the employer financially due to consumer backlash and boycotts.[131] Consumers use the internet to track down individuals engaging in offensive speech and use the information to pressure the individual's employer to take adverse employment action against the individual.[132] They typically demand that the

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125. *Id.* ("This happens for a number of reasons, notably the 'stereotype threat,' where humans live up—or down—to others' expectations of them.").

126. David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter.

127. Katherine W. Phillips et al., *Better Decisions Through Diversity*, KELLOGGINSIGHT (Oct. 1, 2010), https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity. Despite improved performance, heterogeneous groups perceived that they were not progressing well. *Id.* Conversely, the homogenous group was more confident in their progress, even though their conclusions were ultimately wrong. *Id.*

128. Rock & Grant, *supra* note 126.

129. Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. (Jan. 2015), https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters (noting that racially and ethnically diverse companies "are 35 percent more likely to have financial returns above their respective national industry medians," and 15 percent more likely for gender diverse companies).

130. Mims, *supra* note 124.

131. *See* John V. Berry, *Legal Insider: Does the First Amendment Protect Hate Speech and Your Job?*, RESTONNOW (Aug. 14, 2017, 11:30 AM), https://www.restonnow.com/2017/08/14/legal-insider-does-the-first-amendment-protect-hate-speech-and-your-job.

132. *See, e.g.*, Associated Press, *How to Handle an Employee's Offensive Social Media Post*, MERCURY NEWS (Aug. 12, 2016, 4:20 AM), http://www.mercurynews.com/2015/02/18/how-to-handle-an-employees-offensive-social-media-post (providing examples of how some small companies have handled backlash from an employee's inappropriate comments); fleetwood mac sexpants (@ssocrateasee), TWITTER (Sept. 19, 2017, 9:41 PM), https://twitter.com/ssocrateasee/status/910363179661893632 (demonstrating the twitter dialogue between the alt-right and those exposing them); Patrick May, *How Berkeley Top Dog Employee at Charlottesville Rally got Outed on Twitter*, MERCURY NEWS (Aug. 15, 2017, 2:29 PM), http://www.mercurynews.com/2017/08/14/how-berkeley-top-dog-employee-at-charlottesville-rally-got-outed-on-twitter (discussing a Twitter

employer terminate the employee.[133] Even if the employer does bend to the outside pressure and fire the employee, the business's reputation may still suffer.[134]

C. *CONFLICTING DOCTRINES AND THE RESULTING EMPLOYER EXPOSURE TO LITIGATION RISKS*

Title VII requires employers to prevent workplace harassment based on "race, color, religion, sex or national origin."[135] When employees bring their intolerance into work, employers are vulnerable to lawsuits.[136] The employer may be liable for the speech or harassing conduct of not only its supervisors, but also co-workers of the victim.[137] Prohibiting employers from terminating

account which posts photos of white nationalist demonstrators and requests followers to help identify the individuals); April McCullum & Adam Silverman, *Man, Fired From Job, Makes No Apology for Carrying Torch in Charlottesville*, USA TODAY (Aug. 16, 2017, 7:38 AM), https://www.usatoday.com/story/news/nation-now/2017/08/16/charlottesville-vermont-man-fired-job-no-apology/571707001 (discussing a Vermont man who was fired after being identified on Twitter as having attended a white supremacy rally); Yes, You're Racist (@YesYoureRacist), TWITTER (Aug. 12, 2017, 12:28 PM), https://twitter.com/YesYoureRacist/status/896423173914230784 (providing the name, photo, and workplace of an attendee of a white supremacist rally in Charlottesville in 2017); Yes, You're Racist (@YesYoureRacist), TWITTER (Aug. 13, 2017, 7:42 AM), https://twitter.com/YesYoureRacist/status/896713553666871296 (noting that the attendee shown in the photo in the tweet from the previous day has been fired).

133. *See supra* note 132.

134. This is true of both small and large businesses. In the wake of the rally in Charlottesville, one small business who previously employed a rally attendee found itself inundated with negative Yelp reviews. May, *supra* note 132. Likewise, a memo circulated by a Google employee that disparaged women further hurt Google's image as being another Silicon Valley company in which gender discrimination thrives. *See generally Google Now Giving Female Employees Free Day Each Week to Work on Lawsuits*, ONION (Sept. 15, 2017, 10:00 AM), https://www.theonion.com/google-now-giving-female-employees-free-day-each-week-t-1819580311 (referencing satirically Google's poor track record of gender diversity and problems with discrimination).

135. *See* 42 U.S.C. § 2000e-2(a) (2012).

> (a) It shall be an unlawful employment practice for an employer–
> . . . .
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing sexual harassment as "a form of sex discrimination prohibited by Title VII").

136. Clarke, *supra* note 7.

137. Russell Samson, *Supreme Court Clarifies Employer Liability for Supervisor Harassment under Title VII*, DICKINSON L. (June 26, 2013, 12:07 PM), https://www.dickinsonlaw.com/blogs-articles/2013/06/26/supreme-court-clarifies-employer-liability-for-supervisor-harassment-under-title-vii (explaining that if the harasser is the victim's co-worker, liability for unlawful harassment may be imposed against the employer "if the employer knew or should have known" of the harassment and did not take reasonable measures to stop it); *see also* 29 C.F.R. 1604.11(d) (2016) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows

employees who engage in hate speech would be contrary to anti-harassment regulation that has been a part of this country's public policy for decades.[138]

The current framework for evaluating hate speech under section 7 results in a catch-22[139] for employers: discharge the employee for the non-threatening hate speech and violate the NLRA or retain the employee and be vulnerable to discrimination claims under Title VII.[140] Either way, the employer is facing the potential for costly litigation, even before considering possible verdict damages.[141] An employer's costs in defending against an employment action generally serve as a deterrent from "arbitrary or capricious terminations," but this purpose is frustrated when the employer is exposed to litigation risk, regardless of whether they terminate the employee.[142]

At least one administrative law judge has addressed this concern, noting that "the occasional ethnic slur" is not generally sufficient to be considered "so excessive and [opprobrious] as to constitute an unlawful practice under Title VII."[143] However, given the high costs of employment litigation,[144] the employer should not be expected to take the risk that the comments will not be so severe as to trigger Title VII liability. Even claims that are ultimately meritless can serve as a drain on the company's resources and expose it to bad

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or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."); Faragher v. City of Boca Raton, 524 U.S. 775, 800 (1998) ("[I]f we use scope-of-employment reasoning to require the employer to bear the cost of an actionably hostile workplace created by one class of employees (*i.e.*, supervisors), it could appear just as appropriate to do the same when the environment was created by another class (*i.e.*, co-workers)."); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 744 (1998).

138. *See* 42 U.S.C. § 2000e-2(a); 29 C.F.R. 1604.11; Stone, *supra* note 117, at 191 (noting that "Title VII has slowly sowed the seeds of awareness that such [discriminatory and harassing] behavior is socially unacceptable and unlawful").

139. A catch-22 is a "frustrating situation in which one is trapped by contradictory regulations or conditions." *Catch-22*, DICTIONARY.COM, http://www.dictionary.com/browse/catch-22 (last visited Sept. 26, 2018). The term was coined by Joseph Heller in his 1961 novel, Catch 22. *See* JOSEPH HELLER, CATCH-22 (Simon & Schuster 1961).

140. *See* National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 157–58 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); Oppenheimer, *supra* note 112, at 946–47 (noting that employers are required under Title VII to maintain a harassment-free workplace).

141. *How Much Does it Cost to Defend an Employment Lawsuit?*, WORKFORCE (May 14, 2013), http://www.workforce.com/2013/05/14/how-much-does-it-cost-to-defend-an-employment-lawsuit (noting that "[d]efending a case through discovery and a ruling on a motion for summary judgment can cost an employer between $75,000 and $125,000. . . . [T]he employer can expect to spend a total of $175,000 to $250,000 to take a case to a jury verdict at trial").

142. *Id.*

143. Arthur Young & Co., 291 N.L.R.B. 39, 44 n.13 (1988), 1988 WL 214054 (quoting Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977)); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("'[M]ere utterance of an . . . epithet which engenders offensive feelings in a employee,' does not sufficiently affect the conditions of employment to implicate Title VII." (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986))).

144. *See supra* note 141.

press.[145] Further, the employer's choice to not respond to hate speech could still be used as evidence in a discrimination or harassment claim and, while not serving as the sole basis for the action, could strengthen or establish the plaintiff's case.[146]

IV. THE CLASSIFICATION AND REBALANCING APPROACH

The Board currently interprets section 7 broadly to provide the greatest protection to employees engaged in concerted activity.[147] This results in employees using the NLRA to protect speech that is otherwise categorized as hate speech.[148] The protection of hate speech is contrary to public policy and detrimental to employers.[149] Therefore, the Board must draw a distinction between hate speech and other forms of offensive speech. This Note proposes a categorization approach to classify protected speech that also draws from the totality of the circumstances tests that the Board currently uses to evaluate whether insubordinate speech loses protection.[150] Because the Supreme Court has not yet addressed the issue of the NLRA's scope of protection for offensive speech,[151] the Board could reconsider its past decisions and adopt this new approach in future cases.[152]

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145. *See supra* notes 132–34, 141 and accompanying text.

146. *See Facts About Race/Color Discrimination*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-race.cfm (last visited Sept. 26, 2018).

147. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

148. *See, e.g.*, Cooper Tire & Rubber Co., Case 08-CA-087155 at 11–12 (N.L.R.B. June 5, 2015) (decision) (holding that speech which included references to derogatory racial stereotypes was protected by the NLRA); Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006), 2006 WL 2206844; Detroit Newspaper Agency, 342 N.L.R.B. 223, 267–68 (2004), 2004 WL 1531758.

149. *See supra* Part III.

150. The *Atlantic Steel* test is usually the starting point when evaluating the protection of an employee outburst. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979), 1979 WL 10011; *see also supra* note 73 and accompanying text. Under the *Wright Line* test, the employer has the burden of showing that it would have taken the same adverse employment action "would have taken place even in the absence of the protected conduct." Wright Line, 251 N.L.R.B. 1083, 1089 (1980), 1980 WL 12312. More recently, a totality of the circumstances approach has been used to evaluate protected speech in social media cases. *See* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123 (2d Cir. 2017) ("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.").

151. Supreme Court jurisprudence on the issue of section 7 employee speech is currently limited to a holding that employee speech, even if made in the context of a labor dispute, can lose protection if it is a "separable act[] of insubordination, disobedience or disloyalty." NLRB. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 475 (1953).

152. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265–66 (1975) (noting that the Board may reconsider past decisions "in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question").

A. THE REWORKED BALANCING TEST APPLIED TO PROTECTED HATE SPEECH

The Board must engage in a fact specific endeavor to evaluate whether speech is so offensive as to lose NLRA protection.[153] This Note proposes a test which would reevaluate the "nature of the outburst" prong of the *Atlantic Steel* test to properly categorize the severity and effect of the speech. This more stringent test would properly consider the hateful nature of the speech, the effect it has on the victim, and the employers' interests, rather than solely focusing on whether the statement was subjectively threating physical violence. The Board would first classify the nature of the offensive speech —e.g., hate speech, profanity, insubordinate language. Hate speech would be the exception to the normal approach, and the Board would use the same reasoning it used in *Pier Sixty*[154] to decide the other section 7 speech cases. However, if the Board determines the speech is hate speech, it is presumptively unprotected and will not be protected unless the employee can show he or she was fired *only because* of the protected concerted activities. Essentially, the employee must show the employer's stated reason, use of hate speech, was a mere pretext for the adverse employment action. Employees may show this pretext either through direct evidence of employer animus or by presenting circumstantial evidence which would lead a reasonable person to assume the employer's stated reason was pretext.

1. Using Categorizations to Determine Level of Protection

In adjudicating First Amendment cases, the Supreme Court has identified, what one author has called, certain "low value" speech which is either completely outside the scope of protection, or at least given less protection than that given to "high value" speech.[155] Such "low value" speech, such as obscenities, threats, or libel, generally "violate[s] dominant norms of civility, decency, and piety."[156] Although these categories are ill-defined and vary across the history of the Court, they may provide a general framework from which the Board could analogize in deciding whether a category of speech will be protected.[157] In his concurrence in *R.A.V. v. City of St. Paul*, Justice Stevens provided concrete categorizations to demonstrate the high-low value speech concept:

> Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech

153. *See generally* O'Brien, *supra* note 66 (discussing offensive speech cases and noting "unique facts" and "special circumstances" that arise in these cases).

154. *See supra* Section II.D.

155. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168, 2171 (2015).

156. *Id.* at 2168.

157. *See generally id.* (arguing that the distinction between high and low value speech emerged during the changed judicial climate of the New Deal and analyzing the evolution of this distinction).

> and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. . . . [While] this last class of speech is not wholly 'unprotected,' . . . fighting words and obscenity [should not] receive the *same* sort of protection afforded core political speech.[158]

Under the proposed categorization approach, the Board would use a spectrum similar to the one Justice Stevens provides. The Board would first categorize the nature of the speech to determine the level of protection. In other words, the Board would begin its analysis by deciding where on the spectrum of speech the statement at issue lies.

Threats would remain totally unprotected,[159] but there would be other categories of offensive speech—e.g., profanity, personal insults, hate speech—that would have different levels of protection. These levels of protection would be determined by the objective offensiveness of the speech—whether the statement was "disrespectful of the dignity and feelings" of the recipient, or reprehensible from society's view.[160] By adding this spectrum of categorization, the Board would no longer solely decide these cases based on whether the statement constituted a threat of physical violence.[161] Essentially, the more objectively offensive the speech, the less the protection. This logic follows because the more offensive the speech, the more likely it is that the employer fired the employee for using such speech rather than for his or her organizing activities.[162] Determining whether speech is hate speech may be difficult, but the broad definition of hate speech as a range on a spectrum of offensive speech is essential to accommodate the factual nature of these cases.[163]

In conducting this analysis, the Board should properly account for the derisive nature of hate speech in a way that it has failed to do in the past.[164] In the First Amendment context, hate speech could be likened to "fighting

158. R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

159. *Which Types of Speech are Not Protected by the First Amendment?*, FREEDOM F., http://www.newseuminstitute.org/about/faq/which-types-of-speech-are-not-protected-by-the-first-amendment (last visited Sept. 26, 2018).

160. Cooper Tire & Rubber Co., Case 08-CA-087155 at 7 (N.L.R.B. June 5, 2015) (decision).

161. *See id.* at 11–12; Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006), 2006 WL 2206844; Detroit Newspaper Agency, 342 N.L.R.B. 223, 269 (2004), 2004 WL 1531758; *see also supra* Section II.D.

162. Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 983 (2014), 2014 WL 2213747 (Member Johnson, dissenting) ("[F]ew, if any, employers would countenance such [offensive] behavior in the absence of protected activity. I do not believe they must act so differently when the confrontation involves protected activity.").

163. *See* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 208 (1990).

164. *See generally* Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELEY J. EMP. & LAB. L. 299, 303 (2012) (discussing "the mistreatment or disingenuous treatment of [hate speech] by trial and appellate courts").

words," not subject to constitutional protection.[165] "[T]he meaning and power of discriminatory language varies widely based on context, the relationship of the parties in question, and the historical realities that inform the meaning of the word used," and the Board must account for this historical and harassing effect when properly classifying hate speech.[166] Few would argue against racial epithets, like the derogatory use of the N-word, being classified as hate speech. Lesser known epithets or historically commonly used slurs, like derogatory terms for women, may traditionally not be considered hate speech, but hopefully, by considering the historical context and harassing effect of the speech, the Board will be able to objectively evaluate the language without inserting personal beliefs. Naturally, differences of opinions and experiences may lead to some definitional inconsistencies when applying the new approach, but the public policy and employer interest reasons[167] for this new test outweigh this risk of inconsistent application.

2. The Picket Line vs. the Work Line: Setting Matters but is No Longer Dispositive

The reworked test will retain the setting element that has been crucial in hate speech cases,[168] but it will be afforded less weight. It is reasonable to assume that there will be a reduced level of civility expected in the tense and confrontational nature of a picket line or organization election.[169] In fact, striking workers may purposefully engage in offensive or repugnant behavior in order to draw attention to the strike or deter people from crossing the picket line.[170] Nevertheless, this should not decrease expectations of civility to a point of requiring that the employee threaten physical violence to lose protection.[171] While the setting of the outburst may serve as a mitigating factor in weighing the nature of the outburst, it will not eliminate the need to categorize the speech beyond just whether it was threatening.[172] As noted above, hate speech is without value and can have serious emotional and physical impact on its recipients.[173] Therefore, while there is more leniency in

165. Chaplilinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

166. Eisenstadt, *supra* note 164, at 301–02.

167. *See supra* Part III.

168. *See* Cooper Tire & Rubber Co., Case 08-CA-087155 at 10–11 (N.L.R.B. June 5, 2015) (decision); Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006), 2006 WL 2206844; Detroit Newspaper Agency, 342 N.L.R.B. 223, 269 (2004), 2004 WL 1531758.

169. *See* Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948), 1948 WL 7880.

170. *See* Mischa Gaus, *Verizon Strike Turns Away Customers and Chases Scabs*, LABORNOTES (Aug. 11, 2011), http://labornotes.org/2011/08/verizon-strike-turns-away-customers-and-chases-scabs.

171. *See* Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 983 (2014), 2014 WL 2213747 (Member Johnson, dissenting); *see also Cooper Tire*, Case 08-CA-087155 at 11; *Airo Die Casting, Inc.*, 347 N.L.R.B. at 811; *Detroit Newspaper Agency*, 342 N.L.R.B. at 269.

172. *See supra* Section IV.A.1.

173. *See supra* Section III.A.

the picket line context, this leniency does not abrogate the expectation of basic human decency.

3. Accounting for Employers' Interests

Unlike the current approach, the proposed test properly accounts for employers' interests in firing employees who engage in hate speech because it balances the employer's important interest of having autonomy in controlling its workplace while still protecting section 7 speech. "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."[174] The approach allows employers to introduce specific circumstances, such as fostering a hostile work environment and exposure to litigation risk,[175] that justify restrictions on employee use of hate speech.[176] Such circumstances will weigh in favor of not protecting the conduct. Additionally, the employer would be able to present evidence of company policy—that employees have notice of—which provides that the employer may take adverse action if an employee engages in harassing behavior against co-workers, supervisors, or customers. While an employee would be able to rebut the employer's policy with evidence that it was not enforced, this factor would support the inference that the employer would have taken the adverse employment action regardless of the protected activity.

4. Final Balancing Act: "Nature of the Outburst" Weighed Against Other Factors

Once the Board takes the category of offensive speech into account, the context in which the statement was made—including the setting and the employer's interest—it will balance the "nature of the employee's outburst" and whether the employer's unfair labor practices provoked the employee's statement.[177] When hate speech is involved, the employee will have a very high burden to overcome, and the speech will be presumptively unprotected. However, "direct, documentary evidence of unlawful motivation" may be sufficient in cases of employer suppression of protected activities to overcome hate speech's seriously offensive nature.[178]

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174. NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965).

175. *See supra* Part III.

176. *See* O'Brien, *supra* note 66, at 106.

177. *See* Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979), 1979 WL 10011.

178. *See* Starbucks Corp., 360 N.L.R.B. 1168, 1171 (2014), 2014 WL 2736112. The Wright Line test is traditionally used to determine whether an employer's decision to discharge an employee was improperly motivated by the employee's protected activity. Jackie Gessner, *A Practice in Legal Fundamentals: Third Circuit Court Tells NLRB to Apply the Correct Legal Test*, LEXOLOGY (Feb. 19, 2016), https://www.lexology.com/library/detail.aspx?g=2aa7c8e1-7b02-49a2-8b06-2345802f5238; *see also* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), 1980 WL 12312.

While the result of this proposed test is that less speech will be protected, it does not unnecessarily chill employee speech. Employee speech in the private sector is already largely unprotected.[179] The proposed solution simply stands for the proposition that federal law should not prevent private employers, who ordinarily may fire an employee for his or her speech, from firing an employee who engages in hate speech just because the speech just happened to occur during a labor dispute. Hate speech is without value,[180] its use is wholly unnecessary to discuss or advocate for mutual aid and protection, and its divisive nature and detrimental effects make it far more likely that the employer fired the employee for cause, rather than for his or her concerted activities. Further, the harm in allowing hate speech, i.e., hostile work environment for fellow employees, diminished diversity, and loss of employer autonomy, far outweighs any employee's interest in engaging in hate speech.

B. THE BALANCING ACT IN PRACTICE

The Board's broad interpretation of section 7 protected speech has real world implications for employers making firing decisions. To further explore the implications of this line of decisions, this subsection will discuss how the proposed approach to protected speech cases involving hate speech applies to the cases already discussed[181] and contemporary news events.[182]

1. Rebalancing with Proper Consideration for Category of the Speech

This new test reverses the outcomes in *Airo Die Casting*, *Detroit Newspaper*, and likely *Cooper Tire*. The statements in all three cases included language that falls under the definition of hate speech.[183] *Detroit Newspaper* involved speech which threatened, harassed, and insulted a woman on the basis of race and gender—including use of an incendiary racial epithet.[184] The employee in

> Under the *Wright Line* standard, the Board first decides whether . . . the employee's union support or other protected activity was a motivating factor in the employer's decision to take the challenged action against the employee. If not, the employer wins. If so, the Board decides whether the employer has proven by a preponderance of the evidence that it would have taken the same adverse action regardless of the employee's protected conduct.

Michael J. Hayes, *Has* Wright Line *Gone Wrong? Why Pretext can be Sufficient to Prove Discrimination Under the National Labor Relations Act*, 65 MO. L. REV. 883, 887 (2000) (citations omitted).

179. *See supra* Section II.B.

180. *See* Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1147–48 (2010).

181. *See supra* Section II.D.

182. *See supra* Part I.

183. *See generally* Cooper Tire & Rubber Co., Case 08-CA-087155 (N.L.R.B. June 5, 2015) (decision) (shouting derogatory racial stereotypes at replacement workers); Airo Die Casting, Inc., 347 N.L.R.B. 810 (2006) (involving use of a racial epithet); Detroit Newspaper Agency, 342 N.L.R.B. 223 (2004) (involving use of a racial epithet and threats).

184. *Detroit Newspaper Agency*, 342 N.L.R.B. at 268; s*ee also supra* note 90 and accompanying text.

Airo Die Casting also made statements that included the same epithet, but would likely only be seen as harassing and insulting, not threatening.[185] In finding the speech was protected, the Board relied on the fact that both incidents happened on the picket line, and neither statements were subjectively threatening. However, under the new test, these factors would not sufficiently mitigate the nature of the speech to protect it. The Board would determine the speech at issue was hate speech and thus presumptively unprotected, deferring to the employer's decision to end its association with an individual who uses such derogatory language. Unless there was evidence of employer animus or unlawful labor practices, the harmful and extreme nature of the language would be sufficient to lose protection.

The employee in *Cooper Tire* did not use racial epithets, but rather insulted other employees on the basis of race through the use of derogatory stereotypes.[186] This would certainly be a closer case because the Board may determine that making references to negative stereotypes alone is not enough to be considered hate speech. If it decided the speech was not hate speech, the Board would continue with its analysis under *Atlantic Steel* and the totality of the circumstances, as outlined in Part II. This author would argue the language was hate speech and, absent unlawful labor practices, the employee would also lose protection. By shouting the insults and encouraging others to do the same, the employee was fostering a hostile environment that could also expose the employer to liability in the form of a discrimination action.

2. Predicting Outcomes of Contemporary News Events

The proposed test will make it easier for employers to predict the outcome of an NLRA action, as it is very unlikely that hate speech will be protected in the absence of unfair labor practices from the employer. For example, the speech of the terminated Google employee who wrote the sexist memo[187] would not be protected. The speech insulted his female co-workers on the basis of sex (and there was no evidence of employer animus).[188] Further, as was shown by the wide dissemination of this story,[189] the employer has a sizable interest in quickly alleviating the scandal by firing the employee.

185. *Airo Die Casting, Inc.*, 347 N.L.R.B. at 811; *see also supra* note 94 and accompanying text.

186. *See Cooper Tire*, Case 08-CA-087155 at 4; *see also supra* note 103 and accompanying text.

187. *See supra* notes 4–5 and accompanying text.

188. *See* DAMORE, *supra* note 5.

189. The memo initially went viral within Google before it was obtained and within days spread widely by mainstream news sources both inside and outside the tech community. *See, e.g.*, Christopher Carbone, *Google Employee's Anti-Diversity Memo Goes Viral, Prompts Response from Execs*, FOX NEWS (Aug. 6, 2017), http://www.foxnews.com/tech/2017/08/06/google-employees-anti-diversity-memo-goes-viral-prompts-response-from-execs.html; Andrew Liptak, *A Google Employee Wrote an Anti-Diversity 'Manifesto' That's Going Viral Inside the Company*, VERGE (Aug. 5, 2017, 3:17 PM), https://www.theverge.com/2017/8/5/16101978/google-employee-wrote-anti-diversity-manifesto; Jon Russell, *Google Fires the Engineer who Wrote that Viral Memo Criticizing Its Diversity Efforts*, TECH CRUNCH (Aug. 7, 2017), https://techcrunch.com/2017/08/07/google-fires-memo-author.

In response to what he considered a wrongful discharge, the employee filed a charge with the Board claiming he wrote the memo "to express [his] concerns about the terms and conditions of [his] working environment."[190] The General Counsel of the NLRB issued an Advice Memorandum noting that the Google employee's memo "included both protected and unprotected statements, and that the Employer discharged [the employee] solely for [his] unprotected statements."[191] The Advice Memo acknowledged the importance of balancing employers' autonomy with an employee's section 7 rights, and it also noted the employer's duty under federal law to maintain a harassment free working environment.[192] It supported its decision by citing two cases from 2001 and one from 1985 in which the Board found that the employees were discharged for their language rather than protected activities.[193]

As noted in the Advice Memo, these cases all involved discriminatory speech, but the case opinions do not explicitly say that it is was the discriminatory nature of the speech that warranted the decision to withhold protection.[194] Rather, they classified the speech as inflammatory, profane, or provocative.[195] This Advice Memo is a step in the right direction in classifying hateful and discriminatory speech as unprotected. However, it noted that it came to its decision because Google showed that it fired the employee for cause.[196] Because of the seriously offensive nature of hate speech, the burden should not be upon the *employer* to show just cause, but hate speech should instead, as proposed by this Note, be presumptively unprotected. The burden would then be upon the *employee* to show pretext. Making the initial distinction between hate speech and other forms of offensive speech should be part of the Board analysis in offensive speech to account for employers' interests in workplace inclusion and employees' interest in enjoying harassment free workplaces.

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190. Scott Thurm, *The Guy Who Wrote the 'Google Memo' Just Might Sue*, WIRED (Aug. 8, 2017, 3:05 PM), https://www.wired.com/story/james-damore-author-google-memo-might-sue. The employee has also filed a discrimination suit against Google under California state law. Complaint, Damore v. Google, LLC, Case No. 18CV321529 (Cal. Super. Ct. Jan. 8, 2018), *available at* https://cmportal.scscourt.org/Portal/DocumentViewer/Index/_4BmWiB67yfDHACsIcbubT5kOuRgqFzrJF6Ea-1W2Gvxzz7RgUSB4ter4oLVyTavU1xfkfrkmapZvOI_VJZQZ18O92MTM4Ui_ZM4g6ob-koMHXhbJbfiACfofvQdj58bo?p=0.

191. Advice Memorandum, Office of the General Counsel of the NLRB, Google, Inc., a subsidiary of Alphabet, Inc., Case Number: 32-CA-205351 at 3 (Jan. 16, 2018).

192. *Id.* at 3–4.

193. *Id.* at 4.

194. *See* Honda of Am. Mfg., Inc., 334 N.L.R.B. 746, 747–49 (2001), 2001 WL 855868; Avondale Indus., Inc., 333 N.L.R.B. 622, 637–38 (2001), 2001 WL 273226; Advertisers Mfg. Co., 275 N.L.R.B. 100, 133 (1985), 1985 WL 45641.

195. *Honda of Am. Mfg., Inc.*, 334 N.L.R.B. at 747–49; *Avondale Indus., Inc.*, 333 N.L.R.B. at 637–38; *Advertisers Mfg. Co.*, 275 N.L.R.B. at 133.

196. Advice Memorandum, *supra* note 191, at 5 ("The Employer demonstrated that the Charging Party was discharged only because of [his] unprotected discriminatory statements.").

This situation at Google is just one well publicized account of what could be a common occurrence: an employee complaint about a company's affirmative action policies. It is entirely foreseeable that these complaints may contain insulting stereotypes on the basis of race, gender, sexual orientation, etc. Under the proposed approach, the Board will continue to protect simple complaints about company policy that do not insult a blanket group. On the other hand, if it is classified as hate speech, the Board will balance the interest in the employer in discharging the employee, given the negative effects on the work environment and possible litigation risks with the employee's interest in expressing his or her complaints.

Unlike complaints about affirmative action policies, which would most often not be considered offensive enough to be hate speech, the types of speech expressed in a white nationalist rally would almost certainly fall under the definition of hate speech.[197] These rallies could plausibly be considered concerted activities for mutual aid and protection because many of the attendees are protesting what they call a "genocide of white people," or the replacement of white people as the majority.[198] This concern, while more severe and offensive than a simple criticism of company policy, is analogous to affirmative action complaints that could be protected under section 7 as concerted activity for the purpose of mutual aid and protection. "The Board has long extended this Section 7 protection beyond the confines of the employment relationship to concerted political advocacy when the subject of that advocacy has a direct nexus to employee working conditions."[199] For example, a memo from the general counsel of the Board indicated that protesting an immigration bill could be protected activity for both "immigrant employees and even non-immigrant employees" as it could impact their interests as employees.[200]

197. For an example of the typical rhetoric at one of these rallies, see generally Vice News, *Charlottesville: Race and Terror*, VICE NEWS (Aug 21, 2017), https://news.vice.com/story/vice-news-tonight-full-episode-charlottesville-race-and-terror (documenting the events in Charlottesville leading up to and including the rally with first-hand accounts and interviews from participants). The Charlottesville white nationalist rally was attended by members of the Ku Klux Klan, neo-Nazis, and white nationalists, and disparaging remarks and group chants about groups such as minority populations, the Jewish community, and immigrants. *See id.*; *see also* German Lopez, *Vice's Documentary on Charlottesville is Really Worth Watching*, VOX (Aug 16, 2017, 9:38 AM), https://www.vox.com/identities/2017/8/16/16155942/charlottesville-protests-nazis-vice (describing chants including "Jews will not replace us! Jews will not replace us! Jews will not replace us!").

198. *White Haze*, THIS AM. LIFE (Sept. 22, 2017), https://www.thisamericanlife.org/radio-archives/episode/626/transcript ("'Destroy a people,' 'genocide.' . . . [A]pparently this is something lots of these groups believe in. . . . The man who organized the rally in Charlottesville believes there's a genocide of white people in America.").

199. Memorandum from Ronald Meisburg, General Counsel, to All Regional Directors, Officers-in-Charge, & Resident Officers 3 (July 22, 2008), https://onlabor.org/wp-content/uploads/2017/03/GuidelineMemorandumConcerningULPChargesInvolvingPoliticalAdvocacy.pdf.

200. *Id.* at 8.

The outcome of a case involving a white nationalist protest participant would largely depend on the individual's statements, but a typical employee at a white nationalist rally would not be protected under the new test because the speech would likely qualify as hate speech.[201] Internet activists have taken up the helm of not only identifying the attendees, but also the attendees' employers.[202] Employers could face financial distress in the form of consumer backlash, a hostile and less diverse work environment, and exorbitant litigation costs by employing a known white nationalist.[203] The employer's interest, coupled with the serious offensive nature of the hate speech, makes it nearly impossible for this speech to be protected unless the employee can show employer animus.

V. CONCLUSION

Employer autonomy in maintaining a stable and harassment free workplace is important to not only employers but to employees. Federal laws protect private employees from unlawful employment action, but one of these laws, the NLRA, is being used to protect hateful speech which fosters hostile work environments. The purpose of federal interference into the private sphere can only be served if an employer can ensure a non-harassing environment for its employees.

This Note proposes a new test that resolves this catch-22 for employers by balancing the category of offensive speech—with threatening and hate speech being afforded the least protection—to account for employers' interest and public policy. Recognizing the uniquely harmful nature of hate speech ensures that employers do not fear NLRA action for terminating an employee who engages in hate speech. The test also maintains the purpose of section 7 by balancing the nature of the speech with whether the employer has engaged in unfair labor practices. Categorization of a statement will not be entirely dispositive, consistent with the purpose to protect concerted activities employer animus will overrule any offensive speech. In this way, the proposed test achieves a balance of employer interest and employee's rights to organize, consistent with the purpose of the NLRA.

201. *See generally* Paul Singer, *Neo-Nazis Can Still Rally Because There is No Law Against 'Hate Speech,'* USA TODAY (Aug. 18, 2017, 9:34 AM), https://www.usatoday.com/story/news/politics/onpolitics/2017/08/18/neo-nazis-can-still-rally-because-there-no-law-against-hate-speech/579321001 (discussing the protection of hate speech in the context of white nationalist rallies).

202. *See supra* notes 132–34 and accompanying text.

203. See *supra* Part III.