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Equal Protection Challenges To Legislative Abrogation Of The Collateral Source Rule

THE STRUGGLE TO DEFINE SECTION 7 CONCERTED ACTIVITY: A LITERAL DEFINITION EMERGES

The National Labor Relations Act[1] (the Act) governs the rights of employers and employees in the employment relationship.[2] Section 7 of the Act grants employees the rights to form and join labor unions, to bargain collectively and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection.[3] Generally, the National Labor Relations Board (the NLRB or Board) and the courts agree that concerted activity means a group of employees acting together to register work-related complaints.[4] A conflict that is causing inconsistency between the Board and the federal courts, however, is whether the Act protects an individual employee's action in light of the "concerted activity" language in section 7 of the Act.[5] The Board and the courts frequently have

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1. 29 U.S.C. §§ 151-169 (1982). Congress created the National Labor Relations Board (the Board) in §§3-6 of the National Labor Relations Act (the Act). *See* 29 U.S.C. §§153-56 (1982) (discussing creation of NLRB). The Board is an administrative agency that enforces the provisions of the Act and oversees the election procedures of the Board. *Id.* §§ 158-59. *See also generally* Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board*, 59 IND L.J. 583, 583 n.1 (1984) (hereinafter Bethel, *Constructive Concerted Activity*) (discussing functions of National Labor Relations Board).

2. *See* 29 U.S.C. § 151 (policy and purpose of National Labor Relations Act is to enhance employment relationship between employee and employer); *see also* International Ass'n of Machinists v. NLRB, 362 U.S. 411, 428 (1960) (policy of Act is adjustment and compromise of competing interests of labor and management); American Bread Co. v. NLRB, 411 F.2d 147, 155 (6th Cir. 1969) (purpose of Act is to promote peace within labor - management relationship); Gatciff Coal Co. v. Cox, 152 F.2d 52, 56 n.2 (6th Cir. 1945) (policy of Act is to encourage friendly negotiation of industrial disputes).

3. 29 U.S.C. § 157 (1982). Section 7 of the National Labor Relations Act (the Act) provides that employees have the right to self-organize, to form or join labor unions, and to engage in collective bargaining and "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". *Id.* Section 7 also provides employees the right to refrain from joining in collective bargaining or other concerted activities unless required as a condition of employment. *Id.* Section 8(a) of the Act specifically forbids an employer from interfering with the rights of employees under section 7 of the Act. 29 U.S.C. § 158.

4. *See infra* note 21 and accompanying text (illustrating court and Board decisions that have held that concerted activity exists when group of employees act together).

5. *See, e.g.*, City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 841 (1985) (individual employee's attempts to enforce collective bargaining agreement is concerted activity); Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1138 (1986) (individual employee must act with or on behalf of fellow employees to seek protection as § 7 concerted

struggled with the interpretation of concerted activities under section 7 of the Act.[6] Because the legislature did not define the term "concerted activity" in the Act, the NLRB and the courts have rendered inconsistent decisions regarding a definition of concerted activities.[7] The Board, however, in *Meyers Industries, Inc.*[8], recently held that an individual employee's activities, absent some form of interaction with fellow employees, will not constitute concerted activity for the purposes of section 7 of the Act.[9]

Congress established the rights embodied in section 7 to place employees on equal ground with their employers.[10] According to the United States Supreme Court, section 7 rights are so basic and important to the labor relationship that the Court has labeled the rights fundamental.[11] If the employer has interfered with, restrained, or coerced an employee in the exercise of his section 7 rights, the employer has committed an unfair labor

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activity); Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975) (individual employee's invocation of statutory right affecting all employees constitutes concerted activity within § 7); Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966) (individual employee's enforcement of collective bargaining agreement is protected concerted activity), *enforced*, 388 F.2d 495 (2d Cir. 1967).

6. *See supra* note 5 and accompanying text (discussing conflict of courts and Board to define concerted activity within § 7 of Act); *see also* Mak, *City Disposal Systems and the Interboro Doctrine: The Evolution of the Requirement of "Concerted Activity" Under the National Labor Relations Act*, 2 HOFSTRA LAB. L.J. 265, 265 (1985) (NLRB and courts have trouble deciding specific activities that § 7 protects).

7. *See, e.g.*, Aro, Inc., v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979) (section 7 protects employee activity only when employee acts on behalf of other employees, regardless of existence of collective bargaining agreement); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970) (individual employee's complaints regarding collective bargaining agreement constitute protected concerted activity within § 7); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (concerted activity exists when individual employee acts for purpose of inducing group activity). In addition to the inconsistent decisions of the federal circuit courts regarding the definition of concerted activity within section 7 of the National Labor Relations Act, the National Labor Relations Board also has rendered varying opinions. *See, e.g.*, Mannington Mills, 272 N.L.R.B. 176, 176-77 (1984) (concerted activity is not present if individual employee complains to management without support of fellow employees even when complaints address common concern of fellow employees); Air Surrey Corp., 229 N.L.R.B. 1064, 1064 (1977) (individual employee's complaints constitute concerted activity within § 7 if complaints are matter of common concern to fellow employees); King Soopers, Inc., 222 N.L.R.B. 1011, 1018 (1976) (concerted activity exists when individual employee invokes right contained in collective bargaining agreement); Traylor Pamco, 154 N.L.R.B. 380, 388 (1965) (similar but separate complaints of individual employees do not constitute concerted activity if employees did not consult with each other regarding complaints).

8. 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137 (1986).

9. *See* Meyers Indus., Inc., 281 N.L.R.B. 118, 123 L.R.R.M. (BNA) 1137, 1142 (1986) (section 7 of Act does not protect purely individual employee activity).

10. *See* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 835 (1984) (Congress enacted § 7 of Act to equalize bargaining power of employee with that of employer).

11. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61 (1975) (section 7 rights are most basic rights involved in industrial self-determination); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 33 (1937) (right of employees to self-organize for purposes of collective bargaining and other mutual protection without employer's interference or restraint is fundamental right).

practice under section 8(a)(1) of the Act.[12] A violation of section 8(a)(1) usually occurs when an employer discharges an employee because the employee has engaged in protected concerted activities or collective bargaining.[13] The Act, however, will not protect all the activities of an employee.[14] If the employee's activity is unrelated to employment, is unlawful, or the activity consists of mere personal complaints, section 7 will not protect the employee from discharge.[15] In addition, section 7 will not protect employee activities if the employer has no knowledge that section 7 protects the specific activity of the employee.[16] An employer, however, does not violate

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12. *See* 29 U.S.C. §158 (1982) (employer commits unfair labor practice if employer violates employee's §7 rights).

13. *Id.* Section 8(a)(1) of the National Labor Relations Act states in part that an employee commits an unfair labor practice if the employer fires an employee for engaging in concerted activity or collective bargaining. *Id.*

14. *See infra* notes 15-16 and accompanying text (discussing employee activities that § 7 does not protect).

15. *See, e.g.*, Southern S.S. Co. v. NLRB, 316 U.S. 31, 48 (1942) (mutiny of sit-down strikers in violation of federal criminal code was unlawful, unprotected activity); Puerto Rico Food Prods. Corp. v. NLRB, 619 F.2d 153, 155 (1st Cir. 1980) (complaints unrelated to working conditions do not constitute concerted activity); Tabernacle Community Hosp. & Health Center, 233 N.L.R.B. 1425, 1428 (1977) (NLRB held that employee's complaint regarding transfer was personal and unprotected by § 7 of Act); Ryder Tank Lines, Inc., 135 N.L.R.B. 936, 938 (1962) (individual complaint regarding salary is not concerted activity), *enforcement denied on other grounds*, 310 F.2d 233 (5th Cir. 1962). *See generally* Finkin & Gormon, *The Individual and the Requirement of 'Concert' Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 290 (1981) (prevailing principle of law endorsed by courts of appeals and NLRB is that § 7 does not apply to personal complaints of single employees).

In *Puerto Rico Foods Prods. Corp.*, employees staged a concerted work stoppage, protesting management's discharge of a supervisor. Puerto Rico Foods Prods. Corp v. NLRB, 619 F.2d at 154-55. The Circuit held that section 7 of the National Labor Relations Act (the Act) does not protect the employees' activity because the activity did not relate to employment conditions. *Id.* at 157. The First Circuit in *Puerto Rico Foods*, thus held that the employee's discharge was lawful. *Id.*

In *Tabernacle Community Hosp. & Health Center*, the employee protested to management regarding management's refusal to transfer the employee to a different department. Tabernacle Community Hosp. & Health Center, 233 N.L.R.B. at 1427. The Board held that the employee's complaints and protests were merely personal complaints, and section 7 of the Act, therefore, did not protect the employee's activity. *Id.* at 1428.

In *Ryder Tank Lines, Inc.*, an employee complained to management, alleging that management did not pay to the employee the correct salary for the employee's truck haul. Ryder Tank Lines, Inc., 135 N.L.R.B. at 937. The Board found that the employee's complaint did not arise from concerted activity, but merely was a personal complaint that section 7 of the Act did not protect. *Id.* at 938.

16. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964) (section 7 protection requires that employer recognize that employee's activities are concerted and protected when employer discharges employee for that activity); NLRB v. Office Towel Supply Co., 201 F.2d 838, 840 (2d Cir. 1953) (employer must know that employee's activity is protected by § 7 for discharge to be unlawful under Act). *See generally* Mak, *supra* note 6, at 266. (unfair labor practice occurs if employer knowingly interferes with employee's protected rights and discharges employee because employee was exercising protected rights). *Id.*

In *NLRB v. Burnup & Sims, Inc*, the Supreme Court first recognized the requirement

section 8(a)(1) when the employer discharges the employee for cause regardless of whether the employee engaged in concerted activity or collective bargaining.[17] In order to decide, therefore, whether an employer has committed an unfair labor practice under section 8(a)(1) of the Act, the courts and the Board first determine whether certain employee activity falls within the protective boundaries of section 7 of the Act.[18]

A literal reading of section 7 of the Act suggests that section 7 protects employees who act in concert with each other.[19] The concept of concerted activities within the meaning of section 7 protects a broad range of employee activities, including complaints regarding wages, working conditions and racial discrimination in the work environment.[20] The Board and the courts agree that section 7 provides protection to employees when the employee action involves more than one employee and the activity consists of legitimate labor-related complaints regarding wages, working conditions and racial discrimination.[21] Section 7, however, is silent regarding the protection

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that an employer must have knowledge of an employee's protected rights *See* NLRB V. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964) (violation of § 8(a) requires that employer know that employee is engaged in activity protected by § 7). The Supreme Court stated that the employee must be engaged in protected concerted activity at the time of discharge, that the employer must know that section 7 protects the employee's activity, and finally, that the employer discharged the employee because the employee engaged in the protected concerted activity. *Id.*

17. *See, e.g.*, NLRB v. Superior Co., 199 F.2d 39, 42 (6th Cir. 1952) (Board does not interfere with normal exercise of employer's right to hire or discharge employees for any reason other than legal involvement in union activities); Appalachian Elec. Power Co. v. NLRB, 93 F. 2d 985, 989 (4th Cir. 1938) (section 7 does not regulate employer's control in business regarding employment, promotion, or discharge of employees when employer is not interfering with employees' right to organize); Klate Hoh Co., 161 N.L.R.B. 1606, 1612 (1966) (if employee provides to employer sufficient cause for discharge and employer discharges employee for that cause, discharge is not unlawful under § 8(a)(1)).

18. *See* 29 U.S.C. § 158(a)(1) (1982) (employer violates § 8(a)(1) of Act if employer interferes with employee rights under § 7 of Act).

19. *See* 29 U.S.C. § 157 (1982) (section 7 of Act states that employees have right to join, assist or engage in labor unions, bargain collectively and "engage in other concerted activity"). *See generally* Mak, *supra* note 6, at 274 (plain reading of § 7 requires at least two employees acting together to satisfy requirement of acting in concert); Comment, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw. U.L. Rev. 813, 819 (1981) (section 7 literally requires at least two employees acting together to constitute protected concerted activity).

20. *See, e.g.*, Morrison-Knudson Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (section 7 protects concerted employee complaints regarding company's failure to supply employees with protective goggles and respirators); Southern Oxygen Co. v. NLRB, 213 F.2d 738, 741 (4th Cir. 1954) (group employees' complaints about expense allowance policy is protected concerted activity within § 7 of NLRA); Hintzee Contracting Co., 236 N.L.R.B. No. 8 (1978) (employer interfered with employees' protected concerted activities when employer refused to assign more work to employees demanding higher wages); Lewistown Sportswear, Inc., 213 N.L.R.B. No. 5 (1974) (employees engaged in protected concerted activity when employees visited director of vocational school to complain about job conditions).

21. *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1245, 1350 (3d Cir. 1969) (two employees complaining to management regarding profit sharing plan constitutes protected concerted activity within § 7), *cert. denied*, 397 U.S. 935 (1970); Essex Int'l, Inc., 213 N.L.R.B.

of employees who act alone.[22] The disagreement among the NLRB occurs when an individual employee registers complaints regarding his own working conditions or the working conditions of his co-workers.[23] In deciding whether concerted activity under section 7 protects an individual employee's activities, the Board often has relied on the theory of constructive concerted activity.[24] Under the constructive concerted activity theory, section 7 concerted activities include not only group activities, but also individual activities when the activity benefits all employees.[25] In contrast, courts and Boards have adopted a much narrower interpretation of section 7, holding that section 7 protects employee activity only when two or more employees complain to management about labor conditions or an individual employee acts on behalf of a group, intends to induce group activity, or attempts to enforce a collective bargaining agreement.[26]

260, 266 (1974) (three employees at wire manufacturing plant who, complaining to management regarding condition of work equipment were engaged in protected concerted activity). *See generally* Gregory & Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's 'Celebration' of the 50th Anniversary of the National Labor Relations Act*, 18 U. CONN. L. REV. 7, 49 (1985) (Board and courts have been consistent in applying § 7 protection to legal activities involving more than one employee).

22. *See* 29 U.S.C. § 157 (1982) (section 7 provides protection to employees engaged in concerted activity); *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830-31 (1985) (court should study relationship between employer and employee when addressing § 7 labor issue). The United States Supreme Court in *City Disposal* noted that the National Labor Relations Act (the Act) does not define concerted activity. City Disposal Sys., Inc. v. NLRB, 465 U.S. at 830-31. The Court maintained, therefore, that to determine whether particular individual employee activities constituted concerted activity under section 7 of the Act, a court must define the type of relationship that existed between the actions of the individual employees and the actions of other employees. *Id.*; *see* Krispy Kreme Doughnut Dorp. v. NLRB, 635 F.2d 304, 306 (4th Cor. 1980) (section 7 protection literally requires more than individual participant). *See generally* Bethel, *supra* note 1, at 583 (literal language of § 7 of NLRA protects employees who act in concert, but language is silent regarding employees acting alone).

23. *See* Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137,1144 (Sept. 30, 1986) (individual employees' complaints to management regarding condition of company trucks did not constitute concerted activity); *but see* Alleluia Cushion Co., 221 N.L.R.B. 999, 1001 (1978) (individual employee's complaints to management regarding unsafe working conditions did constitute concerted activity), *vacated*, 268 N.L.R.B. 493 (1984).

24. *See infra* note 25 and accompanying text (discussing Board decisions applying theory of constructive concerted activity); *infra* notes 77-94 and accompanying text (discussing Board's decision in *Alleluia Cushion Co.*, and application of theory of constructive concerted activity).

25. *See* Hanson Chevrolet, 237 N.L.R.B. 584, 590 (1978) (individual employee's attempts to seek salary raise benefits all employees, and thus constitutes protected concerted activity); Steere Dairy, Inc., 237 N.L.R.B. 1350, 1351 (1978) (section 7 protects individual employee's complaints about issues benefitting fellow employees); Alleluia Cushion Co., 221 N.L.R.B. 999, 1001 (1975) (individual employee's attempt to enforce statutory right is protected concerted activity because enforcement of statutory rights benefits all employees).

26. *See* City Disposal Sys., Inc., v. NLRB, 465 U.S. 822, 831-33 (1985) (individual employee engages in concerted activity when employee seeks to invoke collectively bargained right); Mushroom Transp. Inc. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (concerted activity exists when individual employee acts with intent to initiate, induce, or prepare for group employee activity); Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137, 1141

The conflicting interpretations of concerted activity under section 7 of the Act are due partly to the failure of the legislature to define concerted activity.[27] The "concerted activity" language first appeared in the Norris-Laguardia Act of 1931.[28] The Norris-Laguardia Act did not protect expressly concerted employee activities.[29] The Norris-Laguardia Act however, did prohibit the federal courts from enjoining concerted employee activities.[30] The Norris-Laguardia Act also endorsed the rights of employees to engage in concerted activity and collective bargaining.[31] Congress first characterized concerted activity and collective bargaining as protected rights with the

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(Sept. 30, 1986) (concerted activity exists when group of employees complain to management regarding labor conditions, or single employee acting with group authority complains to management or seeks to invoke collective bargaining agreement).

27. *See infra* notes 30-35 and accompanying text (discussing legislative history of § 7 of Act).

28. Norris-Laguardia Act, Ch. 90, §2, 47 Stat. 70, 70 (1932). Prior to the Norris-Laguardia Act, the common law prohibited employees engaging in concerted activities such as strikes and picketing. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825-26 (1926). The Sherman Anti-Trust Act of 1890 (Sherman Act) also was a barrier against employees' concerted activities. *See* 15 U.S.C. §1 (1964) (conspiracies restraining trade are unlawful). The Sherman Act declared as unlawful conspiracies that restrained trade or commerce. *Id.* Although the Sherman Act sought to eliminate price fixing between manufacturers and suppliers, the courts also invoked the Sherman Act against labor union activities. *See* Loewe v. Lawlor, 208 U.S. 274, 297 (1908) (discussing coverage of Sherman Act). In *Loewe v. Lawlor*, the United States Supreme Court held that the Sherman Act covered labor union activity. *Id.* More specifically, the *Loewe* Court decided that the concerted activities of unions violated the Sherman Act when the activities obstructed the flow of an employer's goods in commerce. *Id.* at 306; *see* Mak, *supra* note 6, at 271 (discussing impact of Sherman Act on employees' concerted activities).

The first congressional attempt to protect employees' concerted activities came with the passage of the Clayton Act of 1914. Ch. 323, § 20, 38 stat. 738, 738 (1914). Section 20 of the Clayton Act attempted to give employees the right to act together without the threat of an injunction. *Id.* The Clayton Act's protection of concerted activity became void, however, when the Supreme Court announced that section 20 of the Act was ineffective as a bar to the court's issuance of an injunction against concerted activities such as boycotts. *See* Duplex Printing Press v. Deering, 254 U.S. 443, 449 (1921) (section 20 of Clayton Act does not forbid issuance of injunctions against employee boycotts).

Although the protection of employees under the Clayton Act soon diminished, in 1932 Congress passed the Norris-Laguardia Act which provided that courts could not enforce injunctions against employees acting in concert. Ch. 90, § 1-15, 47 Stat. 70, 70-71 (1932).

29. Norris-Laguardia Act, Ch. 90, § 1-15, 47 Stat. 70, 70-71 (1932). Although the Norris-Laguardia Act (the Act) did not expressly protect employees acting together from employer discharge, the Act stated that employees acting in concert would not be subject to injunctions. *Id.* § 4. The Act also stated in section 5 that concerted activity did not constitute unlawful conspiracy. *Id.* § 5.

30. *See* Norris-Laguardia Act, Ch. 90, § 1, 47 Stat. 70, 70 (1932) (section 1 of Norris-Laguardia Act expressly prohibited federal courts from issuing restraining orders or injunctions in labor dispute cases).

31. *See* Ch. 90, § 2, 47 Stat. 70, 70 (1932) (policy statement of § 2 states that employee who engages in collective bargaining or concerted activity should be free from interference and restraint of employers).

passage of section 7 of the National Labor Relations Act.[32] The legislative history of section 7 of the Act suggests that Congress wanted to protect the labor movement from the common law prohibition against labor conspiracies.[33] Congress, therefore, afforded protection to employees engaged in concerted activity or collective bargaining.[34] Congress, however, did not define whether concerted activity under section 7 included acts of an individual employee nor does the legislative history of the Act explain whether employees have to act together to gain protection from employer retaliation.[35]

Because Congress did not define whether concerted activity under section 7 of the Act included acts of an individual employee, the major issue that the courts and the NLRB faced, prior to 1967 therefore was, the relationship between section 7 concerted activities and individual employee activity.[36] The federal circuit courts and the Board were reluctant to find that concerted activity existed when an individual employee, acting alone to complain about working conditions, sought protection under section 7 of the Act.[37] In 1967, however, the Board, in *Interboro Contractors*,[38] found that an employee acting alone to enforce a collective bargaining agreement could seek protection under the concerted activity clause of section 7 of the Act.[39] In *Interboro*, the employer, Interboro Contractors, Incorporated (Interboro) employed John Landers as a steamfitter.[40] During the course of employment, Landers made various complaints to management regarding working conditions.[41] Landers' complaints were attempts to enforce provisions in the

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32. *See* 29 U.S.C. § 157 (1982) (section 7 of Act protects employees' right to bargain collectively and engage in concerted activity); *see also supra* note 3 and accompanying text (discussing employees' protected rights to engage in collective bargaining and concerted activities under § 7 of Act).

33. *See supra* notes 28-31 and accompanying text (discussing history of § 7).

34. *See* 29 U.S.C. § 157 (1982) (section 7 of Act protects employees engaging in concerted activity or collective bargaining).

35. *See supra* notes 28-31 and accompanying text (discussing failure of history of § 7 and its failure to define scope of concerted activity).

36. Note, *The Interboro Doctrine of Constructive Concerted Activity - A Logical Interpretation of Section 7 of the NLRA or a Legal Fiction?*, 7 J. CORP. L. 75, 80 (1981).

37. *See, e.g.*, Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1963) (individual employee's complaints to fellow employees that company treated employees unfairly was not concerted protected activity within § 7); NLRB v. Office Supply Towel Co., 201 F.2d 838, 840 (2d Cir. 1953) (employee's verbal complaints of dissatisfaction with job was not concerted activity within § 7); Continental Mfg. Corp., 155 N.L.R.B. 255, 257-58 (1965) (section 7 did not protect employee's letter to management regarding unsanitary conditions in restrooms and employee's complaints about unfair supervisors).

38. 157 N.L.R.B. 1295 (1966).

39. *Id.* at 1298.

40. *Id.* at 1295.

41. *Id.* at 1296. In *Interboro*, management had assigned John Landers a welding job. *Id.* Landers complained that he should not work on the welding alone and pointed out that both the collective bargaining agreement and local city fire regulations require welders to work in pairs. *Id.* Landers also complained to management that he had been working without a partner for the four previous days. *Id.* Landers also repeatedly requested that management supply protective leather equipment for the employees. *Id.* at 1297.

collective bargaining agreement that provided for safe and proper labor conditions.[42] Subsequently, Interboro discharged Landers.[43] Landers then filed unfair labor practice charges against Interboro, alleging that Interboro violated section 8(a)(1) of the Act for discharging Landers because Landers had invoked rights that section 7 protected.[44] The Administrative Law Judge (ALJ), however, found that because Landers acted alone and for his own benefit, section 7 of the Act did not protect Landers' activities.[45] On review, the Board disagreed with the ALJ and found that the record illustrated that Landers had acted in concert with two other employees.[46] The Board, therefore, found that Landers' activities were protected concerted activities under section 7 of the Act, and that Interboro violated section 8(a)(1) of the Act by interfering with Landers' exercise of the section 7 rights.[47] The Board also noted that even if Landers actually had acted alone in complaining to management, Landers' activity nevertheless was concerted and, therefore, protected because the complaints were attempts to enforce the collective bargaining agreement that affected the rights of all employees.[48] On appeal, the United States Court of Appeals for the Second Circuit affirmed the decision of the Board.[49] The Second Circuit held that activities of an individual employee that involve attempts to enforce a collective bargaining agreement are concerted activities under section 7 of the Act even if fellow employees do not join in the complaint.[50]

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42. *Id.* at 1296. The collective bargaining agreement in *Interboro* that covered steamfitters required the workmen to work in pairs. *Id.*

43. *Id.* at 1298. According to the Administrative Law Judge in *Interboro*, when John Landers inquired to the superintendent about his discharge, the superintendent stated that the superintendent was following the orders of management. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1301-02.

48. *Id* at 1298. The Board in *Interboro* relied on a previous Board decision in *Bunny Brothers Construction Company*. *Id.* at 1298 n.4.; *see* Bunny Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962) (individual employee's attempts to enforce collective bargaining agreement constitute concerted activity). In *Bunny Brothers*, Wilkins, an employee of Bunny Brothers, reported to work and the foreman told Wilkins that the company did not need Wilkins to drive that day. Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1517 (1962). The foreman, however, told Wilkins to report Wilkins' show-up pay to the timekeeper. *Id.* When the company refused to pay Wilkins his show-up pay, Wilkins complained and the company fired Wilkins. *Id.* On review the board noted that the collective bargaining agreement provided that if an employee showed up for work to drive but the company did not need more drivers, the company still had to pay the employee for showing up. *Id.* at 1517-18. the Board held that because Wilkins sought to enforce the provisions of a collective bargaining agreement, Wilkins' activity was an extension of the concerted activity that gave rise to the agreement, and section 7 thus protected Wilkins. *Id.* at 1519.

49. NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967) (attempts of individual employee to enforce provisions of collective bargaining agreement constitute protected concerted activity).

50. *Id.* at 500. The Second Circuit in *Interboro* stated that the record illustrated that on several occasions, John Landers complained on behalf of himself and two other employees.

The NLRB consistently followed the Board's decision in *Interboro*, while federal circuit courts split regarding the *Interboro* decision (*Interboro* doctrine).[51] The United States Supreme Court recently resolved the question of whether an individual employee's assertion of a right contained in a collective bargaining agreement constituted concerted activity for the purposes of section 7.[52] In *City Disposal Systems, Inc. v. NLRB*[53], employee James Brown refused to drive a truck that Brown thought was unsafe because of faulty brakes.[54] Brown neither discussed his complaint with fellow employees, nor did the fellow employees join with Brown to complain about the condition of the company trucks.[55] Because Brown refused to

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Id. at 499-500. The *Interboro* court followed the Board's reasoning and held that even if Landers acted for himself, Landers' complaints nevertheless constituted concerted activities under section 7 of the Act because Landers was attempting to enforce the collective bargaining agreement. *Id.* at 500.

51. *See* NLRB v. Ben Peking Corp., 452 F.2d 205, 207 (7th Cir. 1971) (employee's assertion of rights contained in oral agreement between union and employer constituted concerted activity); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970) (individual employee's enforcement of rights secured by collective bargaining agreement are protected rights under § 7 because collective bargaining agreement is result of concerted activity of employees); Mak, *supra* note 6, at 267 (although some circuit courts have accepted *Interboro*, other circuit courts have rejected or misunderstood doctrine).

In *NLRB v. Ben Peking Corp.*, an employee made disparaging remarks to his supervisor regarding the employee's compensation. 452 F.2d at 207. The president of Ben Peking, Corporation (Ben Peking) fired the employee for making the remarks. *Id.* Although no collective bargaining agreement was in existence, Ben Peking and the union had an oral agreement regarding employee compensation. *Id.* As a result of the oral agreement, the National Labor Relations Board (the Board) found that the employee engaged in protected concerted activity. *Id.* at 205. The Seventh Circuit, relying on *Interboro*, adopted the findings of the Board, and held that the employee's remarks constituted concerted activity within section 7 of the Act. *Id* at 206-07. *But see* Royal Dev. Co., Ltd. v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983) (*Interboro* doctrine is not consistent with express language of Act); Roadway Express Inc. v. NLRB, 700 F.2d 687, 694 (11th Cir. 1983) (individual employee's assertion of right contained in collective bargaining agreement is not concerted activity within § 7); Frank Briscoe, Inc. v. NLRB, 637 F.2d 946 (3d Cir. 1981) (rejecting *Interboro* doctrine).

The National Labor Relations Board has continued to follow *Interboro. See, e.g.*, T & T Indus. Inc., 235 N.L.R.B. 517, 520 (1978) (individual employee's complaints about rights embodied in labor contract constitute protected concerted activity); Roadway Express, Inc., 217 N.L.R.B. 278, 279 (1975) (individual employee's assertion of collective bargaining agreement right is concerted activity because employee is acting in interest of all employees covered by agreement); C & I Air Conditioning, Inc., 193 N.L.R.B. 911, 911-12 (1971) (same).

52. *See* City Disposal Sys., Inc., v. NLRB, 465 U.S. 822, 832 (1985) (individual employee's assertion of rights contained in collective bargaining agreement constitutes concerted activity).

53. 465 U.S. 822 (1985).

54. *See id.* at 827. In *City Disposal*, the employer assigned to each employee a particular truck that the employee would drive every day. *Id.* at 826. In May, 1979, employee Brown, while driving a company truck, almost collided with another employee who was driving truck number 244. *Id.* The faulty brakes of truck 244 were the cause of the near collision. *Id.* Later in May, Brown's truck was in the repair shop and Brown's supervisor requested that Brown drive truck 244. *Id.* at 827. Brown refused to drive truck 244 because of the truck's faulty brakes. *Id.*

55. *Id.* at 827.

drive the truck, a supervisor of City Disposal Systems, Incorported (City Disposal) discharged Brown.[56] As a result of the discharge, Brown filed an unfair labor practice charge with the Board.[57] The ALJ first noted that the collective bargaining agreement between City Disposal and the local union, of which Brown was a member, provided that the employer could not require the employee to drive an unsafe truck.[58] The ALJ further noted that the agreement stated that if an employee refused to drive an unsafe truck, the employee was not in violation of the collective bargaining agreement, unless the employee's refusal was unjustified.[59] The ALJ then found that Brown was asserting a right under the existing collective bargaining agreement.[60] The ALJ, therefore, held that City Disposal had interfered with Brown's protected rights under section 7.[61] In a hearing before the Board, the Board affirmed the holding of the ALJ.[62] On appeal, the United States Court of Appeals for the Sixth Circuit, reversed the findings of the ALJ and the Board, holding that concerted activity exists when an individual employee asserts rights contained in a collective bargaining agreement that benefit fellow employees.[63]

The United States Supreme Court granted certiorari and subsequently reversed the Sixth Circuit's decision.[64] The Supreme Court in *City Disposal* first reviewed the *Interboro* doctrine.[65] The Supreme Court noted that the rights contained within a collective bargaining agreement are an integral part of the negotiation process that gives rise to the agreement, and that the negotiation of the agreement and subsequent enforcement of the rights granted by the collective bargaining agreement is one single concerted

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56. *Id.* In *City Disposal*, employee Brown attempted to return to work. *Id.* City Disposal, however, refused to rehire Brown. *Id.*

57. *Id.* In *City Disposal*, before employee Brown filed his complaint with the National Labor Relations Board, Brown filed a grievance with the union, alleging that the employer wrongfully fired Brown for refusing to drive an unsafe truck. *Id.* The union refused to file Brown's grievance, finding that the grievance lacked merit. *Id.*

58. *Id.* at 824-25.

59. *Id.*

60. City Disposal Sys., Inc., 256 N.L.R.B. 451, 454 (1981).

61. *Id.* The Administrative Law Judge in *City Disposal* noted that whether the truck actually was safe or unsafe, employee Brown honestly believed that the brakes of the truck were unsafe. *Id.* City Disposal's contention that Brown did not exercise any collective bargaining right because the truck actually was in safe operating condition, therefore, had no merit. *Id.*

62. *Id* at 451.

63. City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005, 1007 (6th Cir. 1980). The United States Court of Appeals for the Sixth Circuit in *City Disposal* found that the record failed to provide any evidence that employee Brown acted on behalf of anyone other than himself. *Id.* The *City Disposal* court noted that Brown did not warn any fellow employees regarding the unsafe truck. *Id.*

64. City Disposal Sys., Inc. v. NLRB, 465 U.S. 822 (1983).

65. *Id.* at 829.; *see* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966) (section 7 protects indiviual employee's attempts to enforce provisions of collective bargaining agreement).

activity.[66] The Court thus found that when an employee invokes the rights of a collective bargaining agreement, the employee is not acting for himself because the employee also is asserting the rights of fellow employees to whom the agreement applies.[67] The Supreme Court further stressed that the *Interboro* doctrine is consistent with the purpose of the Act, which is to encourage collective bargaining.[68] The Supreme Court in *City Disposal* noted that although the legislative history of section 7 does not express the exact meaning of concerted activity, the legislative history does not indicate that Congress intended to withdraw protection from the employee who individually attempts to enforce rights contained in a collective bargaining agreement.[69] The Supreme Court noted that Congress intended to maintain equality between the employee and employer throughout the process of collective bargaining.[70] The Court found, therefore, that the *Interboro* doctrine was consistent with the congressional intent of section 7 of the Act.[71] Finally, the Supreme Court held that an individual employee does not have to refer explicitly to the collective bargaining agreement when the employee voices his complaints under section 7.[72] The Court reasoned that requiring an employee to refer specifically to the collective bargaining agreement is unreasonable because employees involved in employment disputes generally lack sophistication in collective bargaining matters.[73] Applying the *Interboro* doctrine to the dispute between Brown and City Disposal, the Supreme Court in *City Disposal* held that Brown's refusal to drive a truck was protected concerted activity within section 7 of the Act because the refusal was an attempt to enforce the collective bargaining agreement.[74]

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66. *City Disposal* 465 U.S. at 831-32. The United States Supreme Court in *City Disposal* reasoned that collective bargaining agreements would be fruitless if an individual employee covered by the agreement was unable to assert the rights within the agreement against his employer. *Id.*

67. *Id.* at 832.

68. *Id.* at 833.

69. *Id.* at 834-35.

70. *Id.* at 835.

71. *Id.* The Supreme Court in *City Disposal* reasoned that the *Interboro* doctrine mitigates the inequality between the employer and employee in an employment relationship by expanding the protection of section 7 of the National Labor Relations Act to employees who seek to invoke collective bargaining rights against their employers. *Id.*

72. *Id* at 840. The United States Supreme Court in *City Disposal* held that regardless of whether the employee's complaint is meritorious, an employee's complaint must be only honest and reasonable to constitute concerted activity. *Id.*

73. *Id.*

74. *Id.* at 841. The dissent in *City Disposal* held that the National Labor Relations Board's (the Board) enforcement of the *Interboro* doctrine was an exercise of undelegated legislative power. *Id.* at 842 (O'Conner, J., dissenting). The dissent first argued that the *Interboro* doctrine confers upon the Board the final authority to interpret all contracts and to resolve contract disputes. *Id.* at 842-43. The dissent noted that Congress explicitly decided that enforcement of a collective bargaining agreement is a function of the unions and the courts, and not a function of the Board. *Id.* at 843. The dissent conceded that the Board has power to act on contract matters, but has no authority to create unfair labor claims out of the

Both *Interboro* and *City Disposal* represent the proposition that concerted activity exists when an individual employee asserts a right contained in a collective bargaining agreement.[75] Neither the Second Circuit in *Interboro* nor the Supreme Court in *City Disposal*, however, addressed the question of whether an individual employee's actions ever can constitute concerted activity within section 7, absent the existence of a collective bargaining agreement.[76] In *Alleluia Cushion Co.*[77], the NLRB considered whether section 7 protected an employee who individually complained to management regarding the working conditions of all employees when no collective bargaining agreement was in existence.[78] In *Alleluia*, Jack Henley, an employee of Alleluia Cushion Company (Alleluia), complained to management about the lack of safety equipment and the lack of supervisor concern in the workplace.[79] Henley neither discussed his complaints with fellow employees, nor did the fellow employees join in Henley's complaints to management.[80] Because Alleluia management did not attend to Henley's complaints, Henley notified the California Occupational Safety and Health Administration (OSHA), informing OSHA of Alleluia's safety violations.[81]

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contract disputes themselves. *Id.* at 844.

The dissent disagreed with the majority's reasoning that enforcing a right contained in a collective bargaining agreement is concerted activity because the individual employee's complaint is an extension of the group interest involved during the negotiation of the collective bargaining agreement. *Id.* at 845. The dissent argued that the majority failed to distinguish between substantive contract rights and the vindication of the rights. *Id.* The dissent noted that when a group of employees together seek enforcement of the collective bargaining rights, the employees seek vindication through the Board. *Id.* The Board further noted that the individual employee asserting collective bargaining rights, although his action falls short of concerted, may nevertheless seek vindication of his rights through the unions or, if necessary, through the courts. *Id.* In both cases, the dissent argued that the union or the Board preserves employee rights. *Id.* Finally, the dissent rejected *Interboro* and held that because Brown did not discuss the safety of the truck with other employees, nor seek assistance from other employees, Brown's activity was not concerted activity within the meaning of section 7 of the Act. *Id.* at 846.

75. *See* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 840 (1985) (individual employee's invocation of collectively bargained right constitutes concerted activity); Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966) (individual employee's attempt to enforce provision of collective bargaining agreement is protected concerted activity); *see also supra* notes 52-74 and accompanying text (discussion of *City Disposal*); *supra* notes 38-50 and accompanying text (discussion of *Interboro Contractors, Inc.*).

76. *See* City Disposal Sys., Inc. v. NLRB 465 U.S. 822, 831-32 (1984) (United States Supreme Court considered whether individual employee's assertion of collectively bargained right constituted concerted activity within § 7 of Act); *see also* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966) (Board considered whether § 7 protected individual employee's attempt to enforce provisions of collective bargaining agreement).

77. 221 N.L.R.B. 999 (1975).

78. *Id.* at 1001-07.

79. *Id.* at 999. In *Alleluia*, employee Henley complained about the lack of instructions given to employees regarding chemical use, the absence of protective guards on machines, and the absence of first aid stations and eyewash stations. *Id.*

80. *Id.*

81. *Id.* In *Alleluia*, the management, responding to employee Henley's complaint about

In response to Henley's complaints, OSHA officials visited the Alleluia plant and discovered numerous safety and health hazards.[82] Following the visit of OSHA officials, Alleluia management discharged Henley.[83] Henley then filed a complaint with the Board, alleging that Alleluia violated section 8(a)(1) of the Act by firing Henley for making complaints to OSHA.[84] Henley further alleged that the complaints were protected concerted activity under section 7 of the Act.[85]

In a hearing before an ALJ of the Board, the ALJ concluded that Alleluia did not violate section 8(a)(1) of the Act because Henley had not engaged in a protected concerted activity within the scope of section 7 of the Act.[86] The ALJ conceded that although Henley may have been engaged in conduct that was for the mutual aid and benefit of his fellow employees, the activity was not concerted.[87] The ALJ noted that no collective bargaining agreement was in force, and Henley did not seek the aid or approval of his fellow employees in bringing the safety hazards to the attention of management.[88] The ALJ held that because Henley acted solely out of his individual concern for safety, Henley's acts fell short of protected concerted activity under section 7 of the Act.[89]

On review before the Board, the Board members disagreed with the conclusions of the ALJ and held that Henley's complaints constituted protected concerted activity within the scope of section 7.[90] The *Alleluia* Board reasoned that although Henley acted purely on his own, Henley's complaints reflected a mutual concern of all Alleluia employees and, thus, Henley did not need to communicate with his fellow employees regarding the complaints to management.[91] The *Alleluia* Board noted that a contravention of the policy of OSHA would occur in presuming that without an outward manifestation of fellow employee support, the employees did not

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safety, told Henley that because management intended to close the facility, management did not want to invest money in improving working conditions at the plant. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1007.

87. *Id.* at 1004. the Administrative Law Judge (ALJ) in *Alleluia* noted that section 7 of the National Labor Relations Act contains two elements that the employee must prove to assert successfully a section 8(a)(1) labor violation. *Id.* The ALJ stated that the employee not only must prove that his activities were for the mutual aid and protection of other employees, but the employee also must prove that he engaged in concerted activities and that management fired the employee for enagaging in concerted activities. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1001.

91. *Id.* The *Alleluia* Board stated that the undisputed facts illustrated that Henley acted alone, but the lack of communication between Henley and his fellow employees was insufficient to establish that Henley's fellow employees did not share Henley's interest in safety. *Id.* at 1000.

agree with Henley.[92] The Board in *Alleluia*, therefore, adopted a more expansive definition of concerted activity and held that when an employee seeks to enforce a statutory right that benefits all employees, the Board will find implied consent among fellow employees even in the absence of any outward manifestation of support by the fellow employees.[93] The Board thus implied that whenever an employee complains to management regarding statutory rights that affect all employees, the Board will find concerted protected activity under section 7 of the Act.[94]

The *Alleluia* Board's expansive interpretation of section 7 of the Act has caused most federal circuit courts to reject the *Alleluia* holding.[95] In contrast, the Board usually has applied *Alleluia* to employment issues concerning section 7, and in some cases the Board has expanded the *Alleluia* holding.[96] A recent Board decision addressing the concerted activity issue, however, expressly overruled the *Alleluia* decision.[97] In *Meyers Industries, Inc.*,[98] Kenneth Prill, a truck driver for Meyers Industries, Incorporated

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92. *Id.* The *Alleluia* Board noted that the public policy that OSHA promoted was safe and healthy working conditions for employees. *Id.*

93. *Id.*

94. *Id.* The Board in *Alleluia* stated that the Board will find concerted activity when an individual seeks to enforce an occupational health statute only on the condition that no evidence exists that employees disavow the individual employees activities. *Id.*

95. *See, e.g.*, Ontario Knife Co. v NLRB, 637 F.2d 840, 844 (2d Cir. 1980) (section 7 requires that activity be not only for mutual aid and protection, but activity also must be concerted); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 308 (4th Cir. 1980) (individual employee action for benefit of fellow employees is not concerted if employee did not intend to enlist group support); Pelton Casteel Inc. v. NLRB, 627 F.2d 23, 30 (7th Cir. 1980) (employees simply sharing concerns that individual employee voiced is insufficient to constitute concerted activity); ARO, Inc. v. NLRB, 596 F.2d 713, 717-18 (6th Cir. 1979) (employee must actually, not impliedly, be representing views of fellow employees to find protection within § 7 of Act).

96. *See, e.g.*, Morten Rosen, 264 N.L.R.B. 1342, 1345 (1982) (complaints voiced by individual employee that are of concern to fellow employees constitute concerted activity); Hansen Chevrolet, 237 N.L.R.B. 584, 590 (1978) (individual employee's effort to seek salary increase is protected concerted activity because issue of salary interests all employees); Steere Dairy, Inc., 237 N.L.R.B. 1350, 1351 (1978) (individual employee's protest involving issues that concern all employees constitutes concerted activity).

In *Hansen Chevrolet*, Cornelius Suggs (Suggs) was an employee of Hansen Chevrolet (Hansen). 237 N.L.R.B. at 585. Suggs made complaints to Hansen, contending that Suggs' salary was inadequate. *Id.* at 586-87. Subsequently, Hansen discharged Suggs for voicing complaints. *Id.* The Board held that Suggs was engaged in protected concerted activity because his efforts to seek a salary increase would benefit his fellow employees. *Id.* at 590.

In *Steere Dairy*, the employer, Steere Dairy, discharged the employee for protesting a change in work conditions that resulted in lower wages. 237 N.L.R.B. at 1351. The Board in *Steere Dairy*, relying on *Alleluia*, held that although the employee individually protested the change in working conditions, his protest constituted protected concerted activity because the protest involved a group employee concern. *Id.*

97. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 496 (1984) (*Alleluia* is inconsistent with principles inherent in § 7 of Act); *see also infra* notes 106-32 and accompanying text (discussing Board's decision in *Meyers Industries, Inc.*).

98. 268 N.L.R.B. 493 (1984)

(Meyers), complained to management about brake malfunctions in the company trucks.[99] Later, while driving a truck for Meyers, Prill was involved in an accident as a result of the truck's faulty brakes.[100] Prill contacted Meyers to inform management of the accident, and also contacted the local public service commission to arrange for an inspection of the truck.[101] Meyers subsequently discharged Prill for contacting the local public service commission, and Prill brought an action against Meyers, claiming that his dismissal violated section 8(a)(1) of the Act because Prill engaged in concerted activities that section 7 protected.[102] The ALJ, relying on *Alleluia*, concluded that Meyers violated section 8(a)(1) of the Act because Meyers' management had discharged Prill for engaging in protected concerted activity within section 7 of the Act.[103] The Board in *Meyers Industries* (*Meyers I*), reversed the ALJ's conclusion and overruled *Alleluia*, holding that concerted activity exists only when an employee engages with other employees or acts on the authority of fellow employees, and not solely on behalf of himself, to complain about labor conditions or to invoke a statutory right.[104] On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded *Meyers I* so that the Board could reexamine *Meyers I* in light of the Supreme Court's recent decision in *City Disposal*.[105]

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99. *Id.* at 497.

100. *Id.*

101. *Id.* In *Meyers*, as a result of the inspection, the local public service commission issued to Prill a citation for operating an unsafe vehicle. *Id.*

102. *Id.* at 498. The Administrative Law Judge in *Meyers* concluded that management discharged Prill for two reasons. *Id.* First, the management discharged Prill because Prill refused to drive the company truck back to the company office after the local public service commission issued Prill a citation. *Id.* Second, management discharged Prill because prior to the collision, Prill had made safety complaints to management and Ohio State inspection authorities regarding the condition of the company trucks. *Id.* at 497-98.

103. *Id.* at 508. The Administrative Law Judge in *Meyers* followed the rationale of *Alleluia Cushion, Co.* and concluded that because Prill made work-related complaints that would benefit all employees, section 7 of the National Labor Relations Act protected Prill's activities. *Id.*

104. *Id.* at 496. The National Labor Relations Board (the Board) in *Meyers I* first reasoned that the Board should abandon *Alleluia* because, prior to the *Alleluia* decision, the Board defined concerted activity in terms of group employee interaction. *Id.* at 494. The *Meyers I* Board noted that the Board in *Alleluia* determined the existence of concerted activities without any regard to the form of the employee's activity. *Id.* The *Alleluia* Board protected individual activity if the activity involved an issue in which all employees ought to have an interest, regardless of whether an individual employee voiced the complaint solely for his own benefit. *Id.* The Board in *Alleluia* thus artificially presumed group interaction among employees whenever an individual employee made safety complaints solely for his own benefit. *Id.* at 496. The *Meyers I* Board, in rejecting *Alleluia*, held that individual activity that should generate group support, is insufficient to constitute concerted activity within section 7 of the National Labor Relations Act, if the activity actually does not generate the necessary group support. *Id.*

105. *See* Prill v. NLRB, 755 F.2d 941, 953 (D.C. Cir. 1985) (Board did not have benefit of United States Supreme Court's decision in *City Disposal* when Board rendered *Meyers I* decision). The United States Court of Appeals for the District of Columbia Circuit in *Prill v.*

On remand to the Board (*Meyers II*), the NLRB chose to reaffirm its decision in *Meyers I* that concerted activity exists when an employee engages with other employees to complain to management regarding working conditions, or when the employee acts on the authority of fellow employees in complaining.[106] The Board reasoned that *Meyers I* is faithful to the purposes of the Act.[107] The Board noted that section 7 of the Act has roots in the Norris-LaGuardia Act and the Wagner Act, both of which emphasize collective activity as distinguished from individual activity.[108] *Meyers I*, which defines concerted activity as some form of group activity, is thus the reasonable interpretation of section 7 according to the Board in *Meyers II*.[109] The *Meyers II* Board, therefore, reaffirmed the Board's decision in *Meyers I* to overrule *Alleluia*.[110]

After concluding that the *Meyers I* definition of concerted activity was reasonable, the Board then examined whether *Meyers I* was consistent with the Supreme Court's decision in *City Disposal* that an individual employee's assertion of a right contained in a collective bargaining agreement constitutes concerted activity.[111] The Board initially inferred that the overruling of *Alleluia* in *Meyers I* was not an indication that *Meyers I* was inconsistent with *City Disposal*.[112] The *Meyers II* Board first noted that the *Alleluia* Board focused on whether an individual employee's action is for the mutual aid or protection of employees, and if such action is for the mutual aid and protection, the activity was concerted within section 7 of the Act, regardless of whether other employees were involved.[113] The *Meyers II* Board then noted, however, that prior to *Alleluia*, the Board recognized that the

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NLRB, criticized the decision in *Meyers I*. 755 F.2d at 953. The *Prill* court, however, stated that the court would not offer any particular approach to concerted activity, nor decide whether the Board's decision in *Meyers I* was correct. *Id.* Rather, the *Prill* Court remanded the case to the Board so that the Board could reconsider its position in *Meyers I* in light of the Supreme Court's decision in *City Disposal Systems v. NLRB*. *Id.*

106. Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1138 (Sept. 30, 1986) (*Meyers II*).

107. *Meyers II*, 123 L.R.R.M. at 1138. The National Labor Relations Board (the Board) in *Meyers II* concluded that the Supreme Court has granted the Board wide discretion in interpreting section 7 of the National Labor Relations Act (the Act). *Id.* The Board, however conceded that the Board must choose a construction that promotes the major purposes of the Act. *Id*; *see also* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 829 (1983) (courts give considerable deference to Board's reasonable construction of Act).

108. 123 L.R.R.M. at 1138; *see supra* notes 28-34 and accompanying text (discussing history of National Labor Relations Act).

109. 123 L.R.R.M. at 1138.

110. *Id.*

111. *Id.* at 1139.

112. *Id.* at 1139-40. The *Meyers I* Board overruled *Alleluia Cushion Co.* because the *Alleluia* Board's determination of when section 7 of the National Labor Relations Act protected individual concerted activity depended on whether the activity was for the mutual aid and protection of fellow employees. *Id.* at 1140. The *Meyers II* Board maintained, however, that employee activity also must meet the "concerted" test of section 7. *Id.*

113. *Id.*

clauses "for the mutual aid and protection" and "concerted activities" were separate clauses within section 7 of the Act.[114] The Board in *Meyers II*, therefore, stated that employees must prove that an activity meets the requirements of both clauses within section 7 in order to claim the protection of section 7.[115] Accordingly, the *Meyers II* Board found that the *Alleluia* Board incorrectly had focused on only the mutual aid and protection requirement of section 7 rather than focusing on both the mutual aid and the concerted activity requirements of section 7.[116] Unlike *Alleluia*, the *Meyers II* Board found that the Supreme Court in *City Disposal* correctly recognized "concerted activity" and "for the mutual aid and protection" as two separate clauses of section 7 and, therefore, the *Meyers I* overruling of *Alleluia* is consistent with the Supreme Court's decision in *City Disposal*.[117] The *Meyers II* Board did concede, however, that the issue before the Supreme Court in *City Disposal* was not the same issue that was before the Board in *Meyers I*.[118] The *Meyers II* Board, however, recognized that the *City Disposal* decision offers two guiding principles to the Board that support the *Meyers I* Board's overruling of *Alleluia*.[119] First, the Supreme Court's decision in *City Disposal* suggests that a definition of concerted activity should include individual action only when an employee acts as a representative of a group.[120] Next, the *City Disposal* decision suggests that

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114. *Id.*

115. *Id.*; *see* Ontario Knife Co. v. NLRB, 637 F.2d 840, 844 (2d Cir. 1980) (section 7 protection requires that activity be not only concerted but also for mutual aid and protection of fellow employees); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 308 (4th Cir. 1980) (section 7 protects individual employee activity for mutual aid and protection of fellow employees if activity is moving towards group action or group enlistment).

116. *Meyers II*, 123 L.R.R.M. at 1140; *see* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 830-31 (1985) (section 7 protects employee activity that is both concerted and for mutual aid and protection of other employees).

117. *Meyers II*, 123 L.R.R.M. at 1140. The *Meyers II* Board concluded that the Supreme Court in *City Disposal* recognized that the core of the concerted activity issue was whether an employee's action had any type of connection to collective bargaining or group activity of fellow employees. *Id*; *see* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 831 (1981) (existence of concerted activity depends on whether employee interacts with fellow employees). The Supreme Court stated in *City Disposal* that an inquiry into the concerted activity issue requires a court to determine the exact manner in which an individual employee interacts with his fellow employees. 465 U.S. at 831.

118. *Meyers II*, 123 L.R.R.M. at 1140. In *City Disposal*, the employee alleging section 7 protection was asserting a right contained in a collective bargaining agreement. City Disposal Sys., Inc. 465 U.S. 822, 825 (1984). The issue in *City Disposal* was thus whether an individual employee's complaints regarding rights secured by the collective bargaining agreement constituted concerted activity within the meaning of the National Labor Relations Act (the Act). *Id.* In contrast, no collective bargaining agreement existed in *Meyers I*. *Meyers I*, 268 N.L.R.B. 493, 497-98 (1984). The issue before the National Labor Relations Board (the Board), therefore, was whether an individual employee's complaints to management regarding hazardous working conditions constituted concerted activity within the meaning of section 7 of the Act. *Id.*

119. *Meyers II*, 123 L.R.R.M.. at 1140-41.

120. *Id.*; *see* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 831 (1983) (concerted activity exists when employee intends to induce group activity or acts as representative of fellow employees).

the definition of concerted activity should include collective activities as well.[121]

Concluding that the Board's decision in *Meyers I* was consistent with the Supreme Court's decision in *City Disposal*, the *Meyers II* Board next clarified the *Meyers I* definition of concerted activity.[122] The Board in *Meyers I* held that an employee engages in concerted activity when the employee joins with fellow employees to complain to management regarding working conditions, or the employee complains to management on behalf of his fellow employees, and not on behalf of himself.[123] The *Meyers II* Board, however, noted that the *Meyers I* definition of concerted activity does not always preclude individual employee activity.[124] Instead, the *Meyers I* definition of concerted activity fully embraces individual employee activity that is for the purpose of initiating, inducing, or preparing for group employee action.[125]

After clarifying the *Meyers I* definition of concerted activity, the Board in *Meyers II* addressed the question of whether public policy should direct the Board to reconsider the *Alleluia* decision and protect purely individual activity when an individual employee invokes a statutory right that benefits all employees.[126] The *Meyers II* Board stated that public policy should not direct a court to protect an individual employee's assertion of a statutory right.[127] The *Meyers II* Board reasoned that the relationship between an

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121. *Meyers II* 123 L.R.R.M. at 1141; *see supra* notes 68-73 and accompanying text (discussing *City Disposal* position that individual employee's assertion of collectively bargained right constitutes concerted activity).

122. *Meyers II*, 123 L.R.R.M. at 1141.

123. *Meyers I*, 268 N.L.R.B. 493, 497 (1984).

124. *Meyers II*, 123 L.R.R.M. at 1141. The *Meyers II* Board stated that the *Meyers I* definition of concerted activity attempts to define the situations in which an individual employee's acts constitute concerted activity. *Id.*

125. *Id.* at 1142. The United States Court of Appeals for the District of Columbia Circuit, in *Prill v. NLRB*, remanded *Meyers I* to allow the National Labor Relations Board (the Board) to determine whether the *Meyers I* definition of concerted activity embraced the widely accepted standard of concerted activity enunciated in *Mushroom Transportation v. NLRB*. Prill v. NLRB, 755 F.2d 941, 955 (D.C. Cir. 1985). In *Mushroom Transportation*, the employee, Keeler, was an extra driver for the employer, Mushroom Transportation. Mushroom Transp., Co. v. NLRB, 330 F.2d 683, 684 (3d Cir. 1964). Keeler constantly talked with fellow employees, advising the employees of their labor rights. *Id.* The president of Mushroom Transportation, hearing rumors of Keeler's talk, removed Keeler from the list of extra drivers. *Id.* The Board found that Keeler's activities were within the scope of section 7 of the National Labor Relations Act. *Id.* The United States Court of Appeals for the Second Circuit, however, reversed the Board's decision. *Id.* at 685. The *Mushroom Transportation* court conceded that a conversation between two people may constitute concerted activity if the employee's object is to initiate, induce, or prepare for some type of group activity. *Id.* The Second Circuit found no evidence that group action was the object of Keeler's conversations with fellow employees and consequently held that Keeler's actions were not concerted. *Id.*

126. *Meyers II*, 123 L.R.R.M. at 1143; *see supra* notes 74-91 and accompanying text (discussing *Alleluia* Board's holding that individual employee's invocation of statutory right that benefits all employees constitutes concerted activity).

127. *Meyers II*, 123 L.R.R.M. at 1143.

employee's invocation of a statutory right and the workplace is too attenuated for the employee's invocation to constitute concerted activity.[128] The *Meyers II* Board distinguished an individual employee's invocation of a statutory right from an employee's invocation of a right grounded in a collective bargaining agreement by noting that the invocation of a right grounded in a collective bargaining agreement is part of the ongoing concerted process of negotiation and administration of the agreement, but an individual employee's assertion of a statutory right is not part of an ongoing process.[129] Finally, the *Meyers II* Board admitted that Congress intended the Board to be a forum in which to resolve employment injustices resulting from violations of the Act, but cautioned that the Board does not possess the power to remedy all immorality and illegality resulting from employers' violations of federal and state law.[130] Accordingly, the *Meyers II* Board reaffirmed the definition of concerted activity adopted in *Meyers I*, and held that Prill acted alone without any intent to draft the support of his fellow employees.[131] The Board, therefore, determined that Prill's activity did not constitute section 7 concerted activity.[132]

The NLRB's decisions in *Meyers I* and *Meyers II* represent the Board's recent attempts to define concerted activity within the meaning of section 7 of the Act.[133] Since the *Meyers II* decision, the Board, in two subsequent cases, has held that concerted activity exists when employees act together or when an individual employee seeks to enforce a collective bargaining agreement or acts on behalf of a group.[134] The Board's definition of

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128. *Id.*

129. *Id.*

130. *Id.* The National Labor Relations Board (the Board) in *Meyers II* suggested that employee Prill may have an action against Meyers Industries, Inc. (Meyers) under state law. *Id.* The Board, however, noted that Prill already had filed a complaint under the Michigan Occupational Safety and Health Act, alleging that Meyers' discharge of Prill violated the Michigan Act. *Id.* at 1143 n.4. The Michigan Department of Labor, however, dismissed Prill's action, finding that Prill failed to establish his burden of proof. *Id.*

131. *Id.* at 1144.

132. *Id.*

133. *See* Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1141 (Sept. 30, 1986) (concerted activity exists when group of employees complain to management regarding labor conditions, individual employee acting with group authority complains to management, or individual employee invokes collective bargaining right); Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (same). *See generally* Finkin & Gorman, *supra* note 15, at 323 (narrow application of concerted activity exists when employee's activity must be for purpose of inducing or preparing for group action); Note, *The Supreme Court Takes One Step Forward and the NLRB Takes One Step Backward: Redefining Constructive Concerted Activity*, 38 VAND. L. REV. 1295, 1330 (1985) (Board's definition of concerted activity in *Meyers I* is restrictive).

134. *See* Every Woman's Place, 282 N.L.R.B. No. 48, 124 L.R.R.M. (BNA) 1001, 1001 (Dec. 11, 1986) (refusing to repudiate rationale of Board in *Meyers II*); Consumers Power Co., 282 N.L.R.B. No.24, 123 L.R.R.M. (BNA) 1305, 1306 (Nov. 13, 1986) (following *Meyers II* definition of concerted activity to determine whether employee was protected by § 7 of

concerted activity in *Meyers I* and *Meyers II*, however, represents a more narrow definition than the decisions at which the Board arrived in earlier decisions.[135] The Board's recent swing away from a more inclusive definition of concerted activity may be a result of the current membership of the Board.[136] Presently, the Board consists entirely of members whom President Reagan appointed, and the Board's decisions in *Meyers I* and *Meyers II* are pro-management.[137] In contrast, the Board's decisions primarily favored

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Act).

In *Every Woman's Place*, Cathee Doran, an employee of Every Woman's Place, telephoned the Wage and Hour Division of the United States Department of Labor to complain about insufficient wages that she and her fellow employees were receiving from their employer. Every Woman's Place, 123 L.R.R.M. at 1001. Prior to the telephone call, Doran and two fellow employees brought the issue of overtime compensation to the attention of their employer on several occasions. *Id.* As a result of Doran's actions, the management discharged her. *Id.* The National Labor Relations Board (the Board) held that Doran's activities fell within the *Meyers II* definition of concerted activity. *Id.* The Board distinguished Doran's activities from the activities of the employee in *Meyers II*, noting that Doran had complained to management with two fellow employees, while the employee in *Meyers II* registered complaints individually. *Id.* Finally, the Board specifically noted that the Board was not returning to the definition of concerted activity enunciated in *Alleluia*. *Id.* at 1002.

In *Consumer Power Co.*, the employer discharged employee Knight for complaining to the supervisor regarding the employer's failure to provide protection to an employee who received a threat of violence from a customer. Consumers Power Co., 123 L.R.R.M. at 1305. The Board maintained that because Knight and another employee approached the supervisor to complain, Knight's complaints were concerted. *Id.* at 1306. The Board noted that even if Knight individually had complained to the supervisor, Knight's complaints nevertheless were concerted because the activities were a continuation of the concerted safety complaints that all of the employees voiced at weekly meetings with the employer. *Id.* The Board, therefore held that Knight's activities were concerted within the *Meyers II* definition of concerted activities because Knight acted on the authority of fellow employees. *Id.*

135. *Compare* Meyers Indus., Inc., 123 L.R.R.M. (BNA) 1137, 1141 (section 7 protects employees' activities when group of employees complain to management about working conditions or single employee complains to management on behalf of group) *and* Meyers Indus., Inc. 268 N.L.R.B. at 497 (same) *with* T & T Indus., Inc., 235 N.L.R.B. 517, 520 (1978) (individual employee's complaints regarding statutory right constitutes concerted activity) *and* Alleluia Cushion Co., 221 N.L.R.B. 99, 1000 (1975) (concerted activity exists when individual employee invokes statutory right even without authorization from fellow employees).

136. *See infra* notes 137-38 and accompanying text (effect of Board membership on Board decisions).

137. *See infra* note 139 (illustration of Board's contrasting labor positions during different political administrations). Each of the five National Labor Relations Board members serves one term of five year with the exception of one member who serves a term of only two years. 29 U.S.C. § 153(a) (1982). The President may appoint a new member to the National Labor Relations Board (the Board) only when a previous member's term expires, and the President may remove a member from the Board only if the member has neglected his duties to the Board. *Id.* The Board presently consists entirely of Reagan appointees. *See* Morris & Turk, *A Labor Board Roundup and Forecast: The Balance Continues to Shift*, 11 EMPL. REL. L.J. 32, 54-55 (1985). Currently, the Board is pro-management because the Board members share the philosophy and idealogy of the present conservative Reagan Administration. *See* 29 U.S.C. § 153(a) (1982) (National Labor Relations Act reserves power in President to appoint Board members).

labor when the Board consisted entirely of Democratic appointees.[138] The present Board's decisions in *Meyers I* and *Meyers II*, which demonstrate pro-management sympathies by restricting the definition of concerted activity, nevertheless promote the policy of the Act.[139] Congress designed labor laws, such as section 7 of the Act, to encourage employees to act together.[140] The policy behind section 7 of the Act is to encourage collective bargaining and friendly compromises of industrial disputes between employers and employees regarding labor conditions.[141] The Board's decisions in *Meyers I* and *Meyers II*, therefore, support the policy behind the labor laws because the Board's decisions promote group employee activity by affording protection to employees who act collectively or concertedly.[142] The promotion of group employee activity not only saves production time and reduces administrative costs, but also avoids the unnecessary discharge of employees.[143] The Board's decisions in *Meyers I* and *Meyers II* which provide section 7 coverage to employees acting together, rather than to a single employee acting alone, are consistent with, and promote the policy of, collective activity in the work environment.[144] In contrast, the Board's decisions in

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138. *See* Mak, *supra* note 6, at 268 n.7. One commentator introduces an example illustrating the varying labor positions of the Democratic and Republican administrations with respect to labor issues. *Id.* During the Eisenhower Administration, the Board in *Fibreboard Paper Products Corp.*, held that an employer did not violate section 8(a)(5) of the National Labor Relations Act when the employer failed to bargain with the union regarding a decision to subcontract maintenance work that employees performed. Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558, 1561 (1961). The following year, after President Kennedy appointed new members to the Board, the Board reconsidered the *Fibreboard* decision, and on the same set of facts, reversed the position of the previous Board. Fibreboard Paper Prod. Corp., 138 N.L.R.B. 550, 555 (1962); *see* Meyers Indus., Inc., 268 N.L.R.B. 493, 494 (1984) (*Meyers I* decision was 2-1 decision, with Member Zimmerman, appointee of President Carter, dissenting).

Commentators have criticized the construction of the Board, arguing that political considerations influence the members' decisions. Fogen, *What's Right is Right - Labor Board Should Not Be Political*, 13 LAB. L.J. 1060, 1060 (1962). One commentator asserts that because the Board members affiliate with different political factions, the Board's decisions that previously held for management are overruled when a pro-labor administration appoints new Board members. *Id.* The commentator also notes that because the President appoints Board members, the members are likely to share the President's political views. *Id.*

139. *See infra* notes 140-44 (discussing favorable policy results of *Meyers'* decisions)

140. *See* NLRB v. Weingarten, 420 U.S. 251. 261-62 (1975) (goal of § 7 is to provide all employees freedom to associate with fellow employees, to self-organize and to designate employee representatives).

141. *See* City Disposal Sys., Inc. v. NLRB, 465 U.S. 822, 834 (1983) (policy of Act is to equalize bargaining power between employer and employee); *see also supra* note 2 and accompanying text (discussion of purpose and policy of Act).

142. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (section 7 protects employees engaged in group activity or employees acting on authority of group of employees); Meyers Indus., Inc., 281 N.L.R.B. No.118, 123 L.R.R.M. (BNA) 1137, 1141 (same).

143. City Disposal Sys., Inc. V. NLRB, 465 U.S. 822, 844 (1983) (O'Conner, J. dissenting).

144. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (section 7 does not protect individual employees acting to further own interest); Meyers Indus., Inc., 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1141 (Sept. 30 1986) (section 7 does not protect employee acting solely for his own behalf); *see also supra* notes 140-43 and accompanying text (decision of *Meyers II* promotes labor policy).

Alleluia and its progeny stifle the promotion of group employee activity.[145] The *Alleluia* line of cases, which provides section 7 protection to an individual employee whose activity benefits fellow employees, fails to promote interaction among employees.[146] Instead, *Alleluia* allows the Board to review an employer's actions against an individual employee under the disguise of protecting an employee's section 7 rights.[147]

In contrast to the criticism of *Alleluia* in the *Meyers* decisions, supporters of *Alleluia* argue that section 7 protects individual employee activity because Congress intended for section 7 to protect individual employee activity from employer retaliation.[148] The commentators argue that Congress, by expanding protection to employees acting in concert under section 7 of the Act, could not have intended for section 7 to deprive the same protection from single employees having the same motive as the group employees.[149] Commentators contend that a strict *Meyers I* interpretation of section 7 would deter individual employees from voicing complaints to management because section 7 no longer protects the employees' individual activities.[150] Arguably, a *Meyers I* construction of concerted activity condones employers who have discharged individual employees for filing complaints regarding safety, compensation, or other working conditions.[151] Furthermore, the opponents of a

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145. *See infra* notes 146-47 and accompanying text (discussion of *Alleluia's* contravention of policy of Act); *supra* notes 114-17 and accompanying text (same).

146. *See* Bethel, *supra* note 1, at 631 (*Alleluia* failed to find proper balance between rights of employers and of employees and underlying policy of National Labor Relations Act); *see also* Alleluia Cushion Co., 221 N.L.R.B. 999, 1001 (1975) (individual employee's assertion of statutory right benefitting fellow employees constitutes concerted activity); Hansen Chevrolet, 237 N.L.R.B. 584, 590 (1984) (individual employee's activities that benefit fellow employees are concerted activities); Steere Dairy, Inc., 237 N.L.R.B. 1350, 1351 (1978) (section 7 protects individual employee's complaints regarding issues that should concern fellow employees).

147. Bethel, *supra* note 1, at 631. Commentators suggest that the *Alleluia* line of cases creates concert among employees when no concert actually exists. *Id.* Further, *Alleluia* and its progeny read the requirement of concert out of the National Labor Relations Act. *Id.* Commentators thus maintain that the results of the *Alleluia* interpretation of section 7 allow the National Labor Relations Board to assess all employer and employee activity under the pretense of protecting employee rights to act in concert. *Id.*

148. *See* Finkin & Gorman, *supra* note 15, at 344. Commentators maintain that the history of section 7 of the National Labor Relations Act (the Act) suggests that courts should use an expansive interpretation of section 7 that would encompass an individual employee's right to complain and to act in his own self-interest. *Id.* The commentators reason that Congress chose to emphasize concerted activity in the Act because concerted employee activity is controversial. *Id.* at 345. In contrast, Congress had no need to emphasize individual employee activity because the protection of individual employees is not controversial, and individual employee activity is a lesser included activity of concerted activity. *Id.*

149. *See id.* at 338 (only anomalous reading of Act would allow discharge of individual employee protesting mistreatment while prohibiting discharge of employee for making same protests if accompanied by fellow employee).

150. *See* Note, *supra* note 133, at 1332 (employees who are aware of their rights under *Meyers I* definition of concerted activity may not file complaints against management for fear of discharge).

151. *Id.* at 1338.

Meyers I definition of concerted activity argue that because *Meyers I* represents the position that individual employee activity never constitutes concerted activity under section 7, the standard is too rigid because situations exist when an individual employee legitimately acts on behalf of a group.[152]

The arguments of opponents to a strict interpretation of concerted activity suggest that commentators are objecting to the *Meyers I* Board's construction of concerted activity, and not the construction of concerted activity as clarified in *Meyers II*.[153] First, the Board in *Meyers II* specifically clarified *Meyers I*, holding that the new construction of concerted activity does not preclude all individual employee activity from the protection of section 7 of the Act.[154] Concerted activity under *Meyers II* includes not only purely group activity but also individual activity when the employee's purpose is to induce or to initiate group activity.[155] *Meyers II* also recognizes an individual employee's complaint regarding a collective bargaining agreement to be within the scope of concerted activity.[156] *Meyers II*, therefore, affords section 7 protection to limited individual employee activity.[157] The *Meyers II* Board, although precluding purely individual employee activity from section 7 protection, emphasized that an employee has the option of recourse against his employer under a common law discharge action.[158] Furthermore, if an individual employee complains to management regarding a statutory right, like the employee in *Alleluia*, the employee, although unprotected by section 7, may proceed against the employer in the federal courts under the particular statute.[159] *Meyers II*, therefore, does not condone

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152. *See* Bethel, *supra* note 1, at 605 (*Meyers I* interpretation of concerted activity disallows § 7 protection for any individual employee conduct); *see also* Note, *supra* note 128, at 1325 (*Meyers I* standard of concerted activity would not protect individual employee's activity that induces group employee activity).

153. *See supra* note 152 and accompanying text (discussing commentators arguements against *Meyers I*); *see also* Meyers Indus., Inc., 281 N.L.R.B. No.118, 123 L.R.R.M. (BNA) 1137, (Sept. 30 1986). Commentators discussing *Meyers* have addressed only *Meyers I* decision because the Board recently rendered *Meyers II* decision. *Id.*

154. *See Meyers II*, 281 N.L.R.B. No.118, 123 L.R.R.M. (BNA) 1137, 1141 (1986) (noting that *Meyers I* attempted to determine when individual employee activity constitutes concerted activity within meaning of § 7); *see also supra* note 133 and accompanying text (discussing *Meyers II* clarification of *Meyers I* definition of concerted activity).

155. *See supra* note 125 and accompanying text (discussing *Meyers II* acceptance of concerted activity under *Mushroom Transportation* standard that concerted activity exists when individual employee intends to induce group employee activity).

156. *See supra* notes 124-30 and accompanying text (discussing *Meyers II* acceptance of concerted activity under *City Disposal* standard that individual employee engages in concerted activity when employee asserts right grounded in collective bargaining agreement).

157. *See Meyers II*, 281 N.L.R.B. No.118, 123 L.R.R.M. 1137, 1140-42 1986) (concerted activity exists when employee acts to induce or to initiate group activity or asserts right contained in collective bargaining agreement); *see also supra* notes 106-32 and accompanying text (discussing *Meyers II* interpretation of concerted activity).

158. *Meyers II*, 123 L.R.R.M. at 1139-42; *see* Note, *supra* note 128, at 1331-32 (without protection that *Alleluia* decision provides, discharged workers still have common law cause of action for wrongful discharge against employer).

159. *See Meyers II*, 123 L.R.R.M. at 1143. The *Meyers II* Board maintained that employee

the discharge of an employee, but merely states that the Board is not the forum in which to resolve every conflict that arises between an employer and employee.[160]

Meyers II is consistent with congressional intent because Congress did not address purely individual rights in section 7 of the Act.[161] Furthermore, the legislative history discloses that the focus of section 7 of the Act is collective bargaining and other forms of employee group activity.[162] Congress, therefore, may have intended to protect only group activity because group activity is the most effective means to enforce the complaints of employees.[163] One commentator notes that expanding the meaning of concerted activity to include situations in which an employee acts alone is contrary to the terms of section 7.[164] Not only has Congress expressed in section 7 of the Act that employee activity should be concerted, but the Supreme Court in *City Disposal* also has ruled that an individual employee's activity must have a relationship to group action to receive section 7 protection.[165] *Meyers II*, in overruling *Alleluia*, holds that when an individual employee acts solely for himself absent any contact with fellow employees, the individual employee's activity becomes so remotely related to group activity that section 7 no longer protects the employee's activity.[166]

Prill, although unprotected by section 7, could proceed against his employer, alleging a violation of a state statute. *Id.* The Board noted that the Surface Transportation Act of 1982 prohibits the discharge of an employee because the employee has filed a complaint regarding carrier safety. *Id.* at 1143-44. In *Alleluia Cushion Co.*, the employee had an available remedy against the employer under the Occupational Safety and Health Act. Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975); *see* 29 U.S.C. § 11(c) (1982) (employer may not discharge employee for filing OSHA claim against employer).

160. *See Meyers II*, 123 L.R.R.M. at 1143 (employees can resolve some labor disputes in courts).

161. *See* 29 U.S.C. § 157 (1982) (section 7 protects individuals engaged in concerted activity); *see also* Bethel, *supra* note 1, at 602. One commentator suggests that because Congress created new rights specifically for the benefit of group employee activities, the inference is strong that section 7 protects only the expressly stated concerted and collective employee activity. *Id.*

162. *See* S. REP. No. 573, 74th Cong., 1st Sess. 2 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 8 (1949) (Congress designed §§ 7 and 8 of Act to protect basic rights involved in collective bargaining). *see also* H.R. REP. No. 1147, 74th Cong., 1st Sess. 16 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 8. (1949) (section 7 of NLRA forbids employers to interfere with employee organization and encourages acceptance of collective bargaining).

163. *See generally* Mak, *supra* note 1, at 603 (by protecting group activity, Congress may have decided that only group activity could further the labor concerns individual of employees).

164. Note, *Interboro Revisited: Keeping the Door Open on Alleluia Cushion*, 37 LAB. L.J. 300, 307 (1986).

165. *See* 29 U.S.C. § 157 (1982) (section 7 protects employees engaged in concerted acitivity or collective bargaining); City Disposal Sys., Inc., 465 U.S. 822, 833 n.10 (1983) (individual employee's activity is not concerted when activity remotely is related to activities of fellow employees).

166. *See* Meyers Indus., Inc. 281 N.L.R.B. No. 118, 123 L.R.R.M. (BNA) 1137, 1140 (Sept. 30 1986) (section 7 does not protect individual employee acting solely on his own behalf).

The Board's decision in *Meyers II* affords protection to an individual employee's activity if the employee complains on behalf of a group, if the employee intends to initiate group employee activity, or if the employee complains regarding a right contained in a collective bargaining agreement.[167] The *Meyers II* definition of concerted activity is consistent with the policy and purposes of section 7, which are to promote interaction among fellow employees.[168] The Board and federal courts, therefore, should continue to follow the *Meyers II* definition of concerted activity and should protect only employee activity that has some connection to group employee activity.[169] The Board's construction of concerted activity in *Meyers II* is a valid and logical interpretation of section 7 that clearly satisfies the primary objectives of the National Labor Relations Act, which are to encourage employee interaction and to eliminate industrial strife in the labor environment.[170]

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167. *See supra* notes 106-32 and accompanying text (discussing *Meyers II* interpretation of concerted activity).

168. *See supra* notes 140-44 and accompanying text (discussing *Meyers II* decision's consistency with purposes of § 7 of Act).

169. *See supra* notes 106-32 and accompanying text (discussing *Meyers II* definition of concerted activity within § 7 of Act).

170. *See supra* notes 139-42 and accompanying text (discussing objectives of § 7 of Act).