UNSAFE WORKPLACES, INJURED EMPLOYEES, AND THE BIZARRE BIFURCATION OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

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ABSTRACT

A particularly pernicious constriction of the scope of protection available under Section 7 of the National Labor Relations Act has occurred with respect to injured employees. Employees who complain about workplace safety and health issues are within the ambit of Section 7, protected against employer retaliation for having complained. Meanwhile, however, employees injured by those same workplace safety and health hazards, and who consequently exercise their state workers compensation law statutory rights to claim workers compensation monetary and medical care benefits, are not protected by Section 7. If the employer retaliates against the injured employee for claiming state workers compensation benefits, the employee’s protections against such retaliation are under state workers compensation law, but not under the federal National Labor Relations Act. This undue constriction of Section 7’s umbrella has fractured the practical and jurisprudential coherence of Section 7. Furthermore, this bizarre bifurcation has spawned atomistic progeny wholly antithetical to the spirit and purpose of Section 7. Perhaps most egregiously, the National Labor Relations Board now considers employees filing individual sexual harassment complaints with the United States Equal Employment Opportunity Commission to have acted individually, and thus not within Section 7’s concerted, protected activities. This essay will critically analyze the genesis and evolution (mutation) of this bizarre bifurcation of Section 7 in this context, and will propose avenues for rectification.
INTRODUCTION

This essay critically analyzes the bizarre bifurcation afflicting Section 7 of the National Labor Relations Act. The National Labor Relations Board and various circuit courts of appeals have created a pernicious false dichotomy, holding that employees injured at work who invoke state law workers compensation benefits are not engaging in NLRA Section 7 concerted, protected activities. Thus, retaliatory actions by vindictive employers against injured employees asserting workers compensation claims pursuant to state law are not prohibited by the NLRA. Meanwhile, employees who complain of unsafe or unhealthy working conditions continue to be properly regarded by the Board and the courts of appeals as within the ambit of Section 7. Consequently, employer retaliation against such employees engaging in Section 7 concerted, protected activities of reporting unsafe, unhealthy working conditions to federal or state or local agencies would constitute employer unfair labor practices in violation of the NLRA. The Board, the courts of appeals, and, ultimately, the Supreme Court must restore NLRA Section 7

1 29 USC 157.
2 Workers compensation insurance operates as a matter of largely state statutory law, and provides for monetary benefits, medical benefits, and rehabilitation for employees injured arising out of or in the course of their employment. Worker's compensation is a no-fault system in lieu of jury trials, making employers strictly liable to accidentally injured employees, without regard to negligence of the employee or the employer. New York State, with 8.6 million workers, has approximately 150,000 workers compensation claims annually filed by injured workers. In 1911, the New York Court of Appeals pronounced the New York State workers compensation law unconstitutional, depriving employers of their property without due process of law. Ives v. South Buffalo Railroad, 21 N.Y. 271, 317 (1911). The law was subsequently reenacted, and was significantly revised in 2007. See, Steven Greenhouse and N.R. Kleinfield, Deal in Albany Overhauls Worker Aid, nytimes.com February 2007. See generally, Price C. Fishback, Workers Compensation, EH Net Encyclopedia.
3 Occupational safety and health is a coordinated federal and state law regulatory regime, with the federal Occupational Safety and Health Act of 1970 an iconic and controversial modern statutory cornerstone. Approximately 14 million employees develop medical conditions due to unsafe or unhealthy working conditions every year; there are approximately 6,000 workplace fatalities annually. See, J.P. Lee, S.B. Markowitz., and M. Fahl, Occupational Injury and Illness in the United States 157 Archive Internal Medicine at 1557, 1568 (1997); see also ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW (Matthew Bender, 2008); Emily A. Spieler, Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries, 31 Hous. L. Rev. 119 (1994).
protections to the former bloc of employees, and thus eliminate this pointless distinction between classes of employees subject to unsafe and unhealthy workplaces.\(^4\)

In \textit{NLRB v. City Disposal Systems, Inc.} in 1984, the United States Supreme Court unequivocally held that a single employee acting alone can nevertheless be engaged in concerted Section 7 activity.\(^5\) In that landmark decision, truck driver James Brown voiced his concerns to supervision about unsafe conditions on the truck he refused to drive. Supervision cynically replied that half of the truck fleet was unsafe, and said that if “it tried to fix all of them it would be unable to do business”\(^6\)--- meanwhile, there was garbage to haul. Driver Brown then asked one of the classic rhetorical, plaintive questions in labor history, a paradigm for how the individual employee nevertheless can act on behalf of the collective bargaining unit: “[Supervisor] Bob [Madary], what are you going to do, put the garbage ahead of the safety of the men?”\(^7\) Obviously, yes. Mr. Brown was fired, for refusing to drive the truck with the bad brakes. If the employer could have had its way, it would have operated entirely unfettered by the inconvenient constraints of the law. The Court recognized that there can be no real distinction between the employee who complains today about unsafe equipment and perhaps the very same employee

\(^4\) Prominent scholars have called for reinvigoration of Section 7. See, Richard Michael Fischl, Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 Colum. L. Rev. 789 (1989); B. Glenn George, Divided We Stand: Concerted Activity and the Maturing of the NLRA, 56 George Wash. L. Rev. 509 (1988); Michael M. Oswalt, The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations, 57 Duke L.J. 691 (2007).


\(^6\) Id.

\(^7\) Id.
injured tomorrow by the unsafe equipment. It makes no sense whatsoever to exclude tomorrow's injured worker from the protection of Section 7.

Throughout much of the presidency of George W. Bush, the National Labor Relations Board has aggressively and relentlessly constricted the scope of Section 7 of the National Labor Relations Act.\(^8\).

My critique proceeds from a somewhat different perspective, focusing on starkly contradictory and jurisprudentially incoherent NLRB and circuit courts of appeals decisions that purport to remove employees' exercise of statutory workers’

\(^8\) Perhaps the single most radical decision deeply antithetical to employees’ Section 7 rights is Guard Publishing Co (Register-Guard), 351 NLRB No. 70 (2007), rendered in the context of cyberspace communications, rather than in the arena of safety and health per se. (NLRB held that employees had no Section 7 right to send pro-union emails on the employer’s computers, utterly and completely failing to recognize that emails are contemporary equivalents of Republic Aviation solicitation, circa 1945; Dissenting Members Liebman and Walsh said that the “decision confirms that the NLRB has become the ‘Rip Van Winkle of administrative agencies.’” Id. For commentary on the NLRB’s spasmodic and unreal failure to understand the labor law ramifications of cyberspace, see Frederick D. Rapone, Jr., This is Not Your Grandfather’s Labor Union—Or Is It?: Exercising Section 7 Rights in the Cyberspace Age, 39 Duq. L. Rev. 657 (2001); Jeffrey M. Hirsch, The Silicon Bullet: Will the Internet Kill the NLRA?, 76 Geo. Wash. L. Rev. 262 (2008). Kenneth R. Dolin, Battista Board’s Legacy, National Law Journal at 12, July 7, 2008 (“Most labor law practitioners would acknowledge the importance of many decisions issued by the Battista Board. Likewise, most would acknowledge that the Battista Board swung the legal pendulum back toward management in the following areas:… limiting ‘protected’ activity/expanding unprotected activity…”). There is voluminous critical literature regarding the National Labor Relations Board. See generally, David L. Gregory, The Long View of the NLRA at 70…Or, the More Things Change?" 56 Labor Law Journal 172 (2005) (Introduction to a Symposium on the 70th anniversary of the NLRA). The NLRA and the NLRB have always had vociferous, ideological critics from the inception. See generally, David L. Gregory, The National Labor Relations Board and the Politics of Labor Law, 27 Boston College L. Rev. 39 (1985) (summarizing some of the more egregious early criticisms of the NLRA and of the NLRB); David L. Gregory and Raymond T. Mak, Significant Decisions of the National Labor Relations Board, 1984: the Reagan Board’s ‘Celebration; of the 50th Anniversary of the National Labor Relations Act,” 18 Conn. L. Rev. 7 (1985). Stanford Law Professor William B. Gould IV, Chairman of the NLRB during the Clinton Administration, wrote Labored Relations, a bitter, hilarious memoir of his frustrations as the Chair of the Board. The Board during the Presidency of George W. Bush may be the most radically activist in the history of the NLRB. See, Wilma B. Liebman, Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board, 28 Berkeley J. Emp. & Lab. L. 569 (2007); William R. Corbett, The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability, 27 Berkeley J. Emp. & Lab. L. 23 (2006); Senator Arlen Specter and Eric S. Nguyen, Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act, 45 Harv. J. on LEGIS. 311 (2008); Jeffrey M. Hirsch, The Silicon Bullet: Will the Internet Kill the NLRA? 76 Geo. Wash. L. Rev. 262 (2008).
compensation rights from the protections of Section 7 of the NLRA. Ironically, this has occurred in the wake of 9/11, after the Board itself has sua sponte invoked national security concerns and expressly reminded everyone that the workplace can be a very dangerous place indeed.  

Employees who are injured in accidents on the job and file for workers disability insurance compensation benefits are, incredibly, not deemed to have acted within, and are thus not protected by, Section 7 of the National Labor Relations Act. Their individual claims are considered to be just that: individual claims under state workers compensation law, without any concerted, collective dimension. No matter how many workers are injured in recurring accidents due to unsafe conditions, their claims for benefits following injuries sustained in workplace accidents, as well as any actions for unlawful retaliation as a consequence of pursuing their state law workers’ compensation statutory rights, are not protected, concerted activities for purposes of Section 7 of the NLRA.

Tell that to the thousands injured at their workplace, the World Trade Center, on 9/11.  

According to the jurisprudential schizophrenia afflicting Section 7, each injured employee claiming workers compensation benefits is, amazingly enough, not considered to be engaged in a Section 7 concerted, protected activity, and any subsequent employer

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9 In IBM Corp., 341 NLRB No. 148 (2004) for example, the Board sua sponte found that national security after 9/11 was one factor in the Board’s decision removing from non-unionized employees the Weingarten right to representation in employer investigatory interviews. “Further, because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks. Because of these events, the policy considerations expressed in DuPont have taken on any new vitality.”

10 The landmark study of the workers compensation experience of first responders is Eli N. Avila, Jacqueline Moline, John Doucette, and Elizabeth Hill, Responders to the World Trade Center Disaster and Their Ensuing New York State Workers Compensation Sequelae (July, 2008) (Draft on file with the author)
retaliation for the employee pursuing statutory state workers compensation law benefits is not prohibited by Section 7.

Meanwhile, however, the Board and the Courts of Appeals continue, quite properly, to regard safety and health complaints per se as Section 7 protected, concerted activities. Thus, the fundamental cornerstone of federal labor law has been artificially and radically bifurcated; worker assertions of safety and health issues continue to come within Section 7’s umbrella, as protected, concerted activity, while workers injured in classic accidents arising from the same unsafe conditions do not have Section 7 protections against unlawful employer retaliation for having exercised their state workers compensation rights.

For example, an employee slips and falls and breaks an arm in the middle of a factory floor, due to an accidental spill of grease and oil---the classic accident at work, covered by state worker’s compensation insurance law. Although the potentially recurrent oil spill poses a direct threat to the health and safety of other employees, the employee filing for workers compensation insurance is deemed to have an only individual claim unique to the employee, and utterly without any Section 7 collective dimensions or ramifications if the employee is retaliated against for having filed for workers compensation benefits pursuant to state law. Meanwhile, the same grease and oil spill may trigger an investigation by the Occupational Safety and Health Administration, especially since other employees remain exposed to the potentially recurrent hazard and could sustain similar future injuries. The individual employee who
brings the matter to the attention of OSHA is deemed to be engaged in protected, concerted activity under the umbrella of Section 7 of the NLRA. While a few articles have touched indirectly upon this manifest incongruity, none has yet analyzed in any integrated fashion the major NLRB and courts of appeals decisions that have, if anything, further accelerated and exacerbated the bifurcation of Section 7.

I. THE RADICAL REMOVAL OF NLRA SECTION 7 PROTECTIONS FROM INJURED WORKERS EXERCISING WORKERS COMPENSATION STATE LAW STATUTORY RIGHTS

So, whatever happened to the old Wobblies\textsuperscript{11} axiom?---“An injury to one is an injury to all!”

The collective, communitarian principle at the heart of Section 7 has been cruelly transmogrified into the ruthlessly Darwinistic law of the (super) capitalist\textsuperscript{12} jungle---“every man for himself!” For injured employees trapped in this bleak scenario, misery is virtually guaranteed, exacerbated by the unavailability of the protections of Section 7 of the NLRA.

Pursuing statutory workers compensation rights under state law regimes is not protected activity under Section 7. While the United States Supreme Court periodically

\textsuperscript{11} The Industrial Workers of the World, the “Wobblies,” founded in Chicago in June, 1905, celebrated their centennial in 2005. See, Paul Buhle, A Cosmic Celebration: The 100\textsuperscript{th} Anniversary of the IWW, New Labor Forum Spring 2005.

\textsuperscript{12} Robert Reich, the former U.S. Secretary of Labor during the Clinton Administration, suggests that supercapitalism has mutated into forms that even the most sophisticated capitalists do not understand, and certainly are unable to control. Ultimately, supercapitalism threatens democracy. Robert Reich, Supercapitalism (2007).
considers the parameters of Section 7, the Court has never directly addressed, let alone definitively resolved, this specific issue, although the divorce from Section 7 protections of injured workers exercising state workers compensation statutory rights has been unequivocally, if summarily, pronounced by United States Courts of Appeals in several circuits, as well as by the National Labor Relations Board.

The NLRB and the federal courts of appeals have withdrawn the Section 7 protections in summary, cursory fashion, without furnishing any rationale of any depth or significance. Rather, there has been a reflexive implicit deference to radical Jeffersonian states’ rights federalism by judicial fiat, without examining the pernicious ramifications that the deprivation of Section 7 protections ineluctably have for injured, vulnerable employees.

In a two-step of judicial jujitsu, the Board and the courts of appeals first engage in the blatant legal fiction that the injured employee’s invocation of state workers compensation law statutory rights is a purely individual act, not a concerted, protected activity within the meaning of Section 7. This is a particularly poignant repudiation of labor reality. It is also exquisitely ironic, since much of labor solidarity and collective consciousness was catalyzed by the horrific loss of life among largely immigrant young women workers in the notorious Shirtwaist Triangle factory fire in Manhattan nearly a century ago.\(^\text{13}\) The disaster was the social catalyst spurring enactment of state workers compensation laws throughout the nation.

\(^{13}\) Dave Von Drehle, Triangle: The Fire That Changed America (Thorndike Press, 2004).
Under the dichotomized Section 7 regime today, a factory girl reporting a fire hazard at a contemporary sweatshop would, at least theoretically, be protected against employer retaliation by Section 7. But, if she were injured while physically removing the fire hazard, filed for workers compensation, and was retaliated against by the employer because she filed for workers compensation, she would not be protected by Section 7. Today, the Board and the courts simply assume that injured workers exercising statutory workers compensation rights under state law are adequately and fully protected by those particular state law regimes against unlawful retaliatory actions—such as termination from employment--by vengeful employers. Therefore, why burden the scenario with redundant NLRA Section 7 clutter, pointlessly confusing with needless complexity the state law avenue of recourse available to injured workers believing they have been unlawfully retaliated against by employers for having filed workers compensation claims? Therefore, even the most egregious unlawful employer retaliation, which would surely be an NLRA unfair labor practice in virtually any other context, is irrelevant for Section 7 purposes.

A. A Synoptic Review Of Salient NLRB and Circuit Courts of Appeals Decisions Regarding NLRA Section 7 (Non) Availability In The Workers Compensation Context

In 1979, the National Labor Relations Board analyzed a Section 8(a)(1) employer unfair labor practice in violation of the NLRA in *Krispy Kreme Doughnut Corp.*, determining that an employer discharging an employee for expressing his intention to file a workers' compensation claim committed an unfair labor practice.¹⁴ The Fourth Circuit

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Court of Appeals, however, overruled the NLRB, refused to order enforcement of the NLRB’s decision, and used the opportunity to disavow Section 7’s applicability in the state workers compensation context.\textsuperscript{15} The court held that an employee filing a claim was not engaging in a “concerted activity,” and that the NLRB’s efforts to create a concerted activity were manifestly wrong. "Our circuit has indicated that the term ‘concerted activity’ means that the employee must be acting ‘with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself….. The Board in effect concedes that there is no evidence that the action of the solitary employee in this case intended or contemplated any group activity or that he was ‘in fact acting on behalf of or as representative of, other employees;’ at most his action can be said to have been ‘for the benefit of other employees only in a theoretical sense.’\textsuperscript{16}

In 1981, the Tenth Circuit unequivocally held, in \textit{Peabody Galion v. Dollar}, that the employer’s termination of employees in retaliation for filing workers’ compensation claims is not prohibited as an unfair labor practice within the meaning of the NLRA.\textsuperscript{17} The court summarily declared: “The conduct at issue in this case-discharge of workers because they pursued workers compensation claims-is not subject to either protection or

\textsuperscript{15} \textit{Krispy Kreme Doughnut Corp. v. N.L.R.B.}, 635 F.2d 304, 308 (1980)
\textsuperscript{16} \textit{Krispy Kreme Doughnut Corp} at 306
prohibition by the National Labor Relations Act because it has nothing whatsoever to do with union organization and collective bargaining. Likewise, the underlying activity that provoked the conduct complained of—that is, the filing of worker's compensation claims under state law—has no tendency to conflict with the National Labor Relations Act or the federal law. Even if discharges related to workmen's compensation claims were covered by federal law, the discharges would more likely be prohibited than protected. It is inconceivable that there would be state court interference with federal labor policy in connection with the present type of statute… The activity present in the case before us bears little resemblance to that found to be federally protected… there has been no special congressional consideration of worker's compensation related discharges. Moreover, discharging workers because they have filed claims has nothing to do with collective bargaining. It cannot be classed as an essential aspect of the economic forces which enter into the shaping of viable labor agreements… there is one other exception that we have discussed… that is the tenuous relationship between the federal labor laws of the remedy that is here being challenged. In other words, the concern of the federal labor laws is, to say the least, peripheral and tenuous.”

In 1985, the Tenth Circuit reinforced its summary conclusion in Dollar, reiterating that the employer’s dismissal of employees filing workers compensation claims is not prohibited by the NLRA.19

18 Id.
19 Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1353, (1985) (“The court analyzed the relationship between Dollar's statutory claim and the NLRA, and concluded that the discharge of workers because they filed workers' compensation claims is not protected or prohibited by the NLRA and is unrelated to the collective bargaining agreement.” Id.)
According to the 11th Circuit in 1987, employees fired for entering into a monetary settlement of workers compensation claims, in violation of the employer’s policy to against entering into such settlements, have no recourse under Section 7.\textsuperscript{20}

More than coincident with the ascendency of the Reagan administration and the Supreme Court’s corresponding turn towards radical Jeffersonian states rights federalism, the labor preemption doctrine declared more than two decades earlier by the Supreme Court became a perverse instrument for the suppression of worker's rights.

The Supreme Court held in \textit{San Diego Bldg. Trades Council v. Garmon} that “when an activity to which the state law would attach liability is ‘arguably protected’ or ‘arguably prohibited’ by the NLRA, the state law is preempted.”\textsuperscript{21} However, the state law is not preempted if the activity is only a “peripheral” concern to NLRA.\textsuperscript{22} In \textit{Peabody}, the filing of workers’ compensation claims was viewed by the court of appeals as only a “peripheral” concern of the NLRA.\textsuperscript{23} As such, the Oklahoma state law regulating the issue was not preempted, and the filing of claims was held not to be an NLRA protected activity.

The \textit{Garmon} labor preemption doctrine has thus been transmogrified into a blunt instrument antithetical to workers rights. It presents a stark “either or” dilemma---

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  \item \textsuperscript{20} Zartic, Inc. v. United Food and Commercial Workers International Union, 810 F.2d 1080 (11th Cir. 1987).
  \item \textsuperscript{22} \textit{Id.} at 243
  \item \textsuperscript{23} \textit{Peabody Galion}, 666 F.2d at 1317-1319
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namely, either injured workers are protected exclusively by Section 7 of the NLRA preempts all state law, or their recourse must be exclusively through state workers compensation law.

Unfortunately, the current legal regime does not recognize that injured employees manifestly deserve the integrated protections of both Section 7 of the NLRA and of the state workers compensation law, just as employees reporting unsafe conditions have the protection of Section 7 of the NLRA and of the various federal, state, and local laws designed to insure safe workplaces. Meaningful federalism should eschew the radical “either or” jurisprudential choice of either only Section 7 or only state workers compensation law exclusively governing the field, and instead endorse an integrated regime of federal and state law protections.

The Reagan Board repeatedly slammed the door on injured workers in communication with state workers compensation offices. One need not file for benefits; apparently, according to the Reagan Board, simply speaking with the state law workers compensation regime is sufficient to fall outside the ambit of Section 7.24

B. The Continuing Relevance of Section 7 in the Workplace Safety and Health Context

Section 7 of the NLRA protects the employee who files a safety and health complaint with the Occupational Safety and Health Administration (OSHA)---perhaps the same employee injured because of the unsafe, unhealthy condition, and fired for filing a state workers compensation claim, the latter of which is not protected by Section 7.

Despite a tumultuous history surrounding the issue, especially concerning the interpretation of Section 7 concerted protected activity, National Labor Relations Board decisions continue to hold that filing a safety and health claim with OSHA is protected activity under Section 7 of the N.L.R.A.\(^25\) It has not been a jurisprudential straight line, by any means; and, the Board’s now-long standing refusal to accord Section 7 protections to injured employees asserting state workers compensation law statutory rights is all the more glaring and aberrational vis-à-vis any possible integrated understanding of Section 7.

Prior to the enactment in 1970 of the now-cornerstone federal law regarding workplace safety and health, the Occupational Safety and Health Act, the N.L.R.B. had long held that an employee’s filing of health complaints was protected activity under

\(^{25}\) The NLRB has consistently held that employee complaints to OSHA are protected concerted Section 7 activities. See, for example, Systems with Reliability Inc., 322 NLRB No. 132 (1996) ("The Company discharged Yuhas because he engaged in concerted activity protected under Section 7 of the Act. The action which precipitated Yuhas’ discharge, i.e., his statement that he would complain to OSHA, was one step in the concerted efforts of the three welders to improve safety and health conditions in the workplace. By saying that he would contact OSHA, Yuhas engaged in concerted activity for the purpose of mutual aid and protection; protected under Section 7 of the Act."); Garage Management Corporation, 334 NLRB 940, 951 (2001); United Sates Postal Service, 338 NLRB 1052, 1057 (2003) ("The Respondent may not lawfully seize upon an incident…")
Section 7 of the N.L.R.A. And, after the effectuation of OSHA in 1970, the Board did not change its view. In 1975, for example, the N.L.R.B., in Alleluia Cushion Co., Inc. held that filing a complaint under OSHA was Section 7 concerted protected activity.

The evolution of the law following the N.L.R.B.’s decision in Alleluia was tumultuous, as best. Six years later, the Board overruled its Alleluia decision. In Meyers Industries, the Board resurrected an “objective” test for defining Section 7 concerted activities that existed before Alleluia. This standard maintains that an employee’s activity is concerted only if the activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

This objective standard was attacked the following year in 1986 in Prill v. N.L.R.B. (Prill I). In Prill I, the District of Columbia Circuit relied on the Supreme Court’s holding in N.L.R.B. v. City Disposal Systems Inc. where the Court rejected a literal reading of “concerted activities.” The Court in City Disposal held that “Section 7 does not compel a narrowly literal interpretation of “concerted activities,” but rather is to be construed by the Board in light of its expertise in labor relations.” The circuit court in Prill I held that the Board in Meyers I effectively failed to interpret “concerted activities” beyond the most narrow definition of joint action by employees. The Meyers I Board’s

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26 Walls Mfg. Co. v. N. L. R. B., 321 F.2d 753 (D.C. Cir. 1963) (holding that “complaining of [poor] sanitary conditions at employer’s premises…was protected activity [under Section 7 of the NLRA]).
27 Alleluia Cushion Co., Inc., 221 NLRB No. 162 (1975)
29 Id. at 497.
30 Prill v. N.L.R.B., 755 F.2d 941 (D.C. Cir. 1985) (Prill I)
32 Prill, 755 F.2d at 951.
failure was that is did not “recognize the extent of its own interpretative authority.”

However, while criticizing the Board’s interpretation in *Meyers I*, the circuit court did not state that the objective test was an unreasonable interpretation of Section 7.

Following *Prill I*, in 1986 the N.L.R.B. stated in *Meyers II* that its standard in *Meyers I* for determining whether activity is concerted, and that its rejection of the *Alleluia* decision, was both reasonable and consistent with *City Disposal*. This decision was subsequently affirmed in Prill II by the District of Columbia Circuit.

The development of this area of law was, to say the least, less than linear. Ultimately, however, the NLRB continues to hold that the worker’s exercise of the federal OSHA statutory right to file a safety or health claim under OSHA is Section 7 protected activity. Most recently, in 2007, the Board, in *Stevens Construction Co.*, found that an employee calling OSHA to report unsafe working conditions engaged in Section 7 concerted, protected activity. In 2006, in *T. Steele Construction, Inc.* the Board expressly reaffirmed that the worker’s act of complaining to OSHA about safety conditions is protected activity: “T. Steele was aware that Farrell had engaged in protected activity by

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33 *Id.* at 952.
34 *Meyers Industries, Inc.*, 281 NLRB No. 118, 882 (1986)
35 *Id.*
36 *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (Prill II)
37 *Stevens Construction Co.*, NLRB (June, 2007).
38 *T. Steele Constr., Inc. and Int’l Union of Operating Eng’rs, Local 150, AFL-CIO*, 348 NLRB No. 79 (2007). *See also, In re U.S. Postal Service*, 338 NLRB No. 160 (2003) “[T]he Respondent may not lawfully seize upon an incident…to retaliate against one for engaging in activity protected by Section 7 of the Act, such as filing an OSHA complaint.”; *In re West Virginia Steel Corp.*, 337 NLRB No. 3 (2001); *Systems with Reliability, Inc.*, 322 NLRB No. 132 (1996) (“By saying that he would contact OSHA, Yuhas engaged in concerted activity for the purpose of mutual aid and protection… he engaged in concerted activity protected under Section 7 of the Act”)

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complaining to OSHA about the Respondent's safety practices, and was contemplating making further such complaints.” 39

In this line of decisions regarding the applicability of Section 7 in the context of employee safety and health complaints, the NLRB summarized that the worker’s individual actions are concerted when the “evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group.” 40

To be protected by Section 7, the employee need not have the eloquence of Daniel Webster, nor eschew self-interest. In fact, the employee can be venal and not really concerned about fellow workers: “… Section 7 requires neither altruism, nor unequivocal solidarity, on the part of an individual employee who seeks help from coworkers with respect to working conditions.” 41


The most outrageous consequence of the bizarre bifurcation of Section 7 is the NLRB’s refusal to extend Section 7 protections to employees who complain of sexual harassment.

39 T. Steele Constr., Inc., 348 NLRB No. 79 at 20.
41 Holling Press, 343 NLRB No. 45 (2004) (Member Liebman, Dissenting)
The emergent recent trend is that filing a discrimination complaint with the EEOC or state or local human rights agency is not protected under Section 7, especially when it is undertaken by an employee whom the NLRB regards as acting only for her own individual benefit. It was not always so. In Hotel and Restaurant Employees, the Board held in 1980 that filing a sexual discrimination claim with the state employment commission was protected under the N.L.R.A.\(^{42}\) This is especially so when the employee can also point to a fair employment practices provision in the collective bargaining agreement.\(^{43}\)

But, congruent with the many radical decisions of the Bush II Board, the Board repudiated its long-standing position in 2004 in Holling Press and Boncraft-Holling Printing Group.\(^{44}\) Employee Fabozzi believed that she was being unlawfully harassed by her work group leader. She learned that employee Garcia may have also been harassed by Mr. Leon, the group leader. Ms. Garcia informed Ms. Fabozzi of her reluctance to testify in support of Ms. Fabozzi’s complaint with the New York State Division of Human Rights. When the employer learned that Ms. Fabozzi had approached Ms. Garcia about being a supporting witness, Ms. Fabozzi was terminated. The N.L.R.B. found that no Section 8a1 unfair labor practice had been committed. Dismissing the complaint, the Board ruled that Ms. Fabozzi was not engaged in Section 7 protected activity, because

\(^{42}\) Hotel & Restaurant Employees, Local 28, 252 NLRB No. 158 (1980); See also, General Teamsters Local Union 528, 237 NLRB No. 38 (1978); Boese Hilburn Electric Service Company, 313 NLRB 372, 373 (1993) (employee wrongfully discharged after assisting fellow employee in filing charges of sexual harassment against the employer).


\(^{44}\) 343 NLRB No. 45 (2005); See also, Abramson LLC, 345 NLRB 171 (2005).
the complainant only sought to benefit herself. The Board held that her activity “was not engaged in for the purposes of mutual aid or protection.” The NLRB characterized Ms. Fabozzi’s conduct as purely self interested, without any concern for the wellbeing of fellow employees. The Board found that it was entirely too speculative and remote to presume that Ms. Garcia might, at some future point, suffer an injury and turn to Ms. Farbozzi for help.

This plainly denies the reality of the dynamics of sexual harassment in the workplace, and leaves every employee subject to unlawful harassment without the protections of Section 7. As Member Liebman forcefully stated in her pointed dissent:

“...The majority sets an arbitrary standard, at odds with what our case law contemplates. It treats sexual harassment at work as merely an individual concern, even when victims seek help from coworkers. That view is simply unacceptable... As a recent study observed, "sexual harassment is a fact of life for many working women, with some studies suggesting that work-related sexual harassment may affect as many as one in two women at some point in the work lives."”

Only those individual employees who carefully allude to prohibitions of unlawful discrimination in the language of the collective bargaining agreement, in their individual claim of unlawful workplace discrimination made to external agencies, may be protected by Section 7.

45 Id.
46 Id.
47 Id.
Individual contentions of disability discrimination were held protected under Section 7, because the claims were grounded in rights based on a collective bargaining agreement.\footnote{Milton v. Scrivner, Inc., 901 F.Supp. 1541(1994), aff'd, 53 F.3d 1118 (10th Cir. 1995)} In Milton v. Scrivner, Inc., the Tenth Circuit affirmed a ruling that an individual claim of disability discrimination was protected by Section 7, primarily because the rights alleged to have been violated were based on the collective bargaining agreement.\footnote{Id.}

CONCLUSION

Beginning in 1979 with the Krispy Kreme decision, and reinforced in the subsequent Dollar, Truex, and Zartic decisions, the circuit courts of appeals and the N.L.R.B. have inexplicably excluded workers who file state workers compensation claims from Section 7 protections. The circuit courts and the Board have made the unnecessary, and highly unreasonable, assumption that workers who file for workers compensation will be protected by state laws, and that federal protections are inappropriate and unnecessary.

This crabbed reasoning flows from an unnaturally narrow view of the N.R.L.A. The Board reasons that a workers compensation claim only benefits a single employee, and accordingly, precludes the application of the N.L.R.A. However, this ignores the underlying reality compelling the employee to file for workers compensation in the first place. Quite often, the stimulus that required the employee to file for workers compensation...
compensation, such as unsafe, unhealthy working conditions and management exploitation and intimidation of vulnerable workers, will constitute the unfair labor practices that the N.L.R.A. was designed to prevent; to preclude Section 7 protections for the employee undermines the very purpose of the N.L.R.A.

Eventually, the United States Supreme Court must definitively resolve the bizarre bifurcation of Section 7, expressly repudiate the NLRB and lower courts’ decisions that have removed from the scope of Section 7 workers compensation and discrimination complaints, and restore Section 7 protections to all individual employee initiatives.

The Court need only reaffirm the essence of its classic decision in 1984 in NLRB v. City Disposal Systems Inc., \(^50\) which, in turn, was premised on the Court’s broad and integrated reading of Section 7 concerted protected activities in Eastex, Inc. v. NLRB, \(^51\) recognizing that employees who supported enhanced federal minimum wage laws for other workers would themselves indirectly benefit in future contract negotiations, as any legislative increase in minimum wages for low wage workers would raise the floor from which the higher wage workers could bargain for proportionately greater wage increases from their particular employer.

To maintain the protections of Section 7 of the NLRA for employees who individually resort to external agencies with complaints of unlawful discrimination, for


\(^{51}\) 437 U.S. 556 (1978). But see, Harrah’s Lake Tahoe Resort Casino, 307 NLRB 182 (1982) (Board found against employees asserting 8(a)(1) unfair labor practices by the employer hotel casino, which prohibited employees from distributing literature about Employee Stock Ownership Plan proposals without first being approved for distribution by the employer.
example, it is imperative that the individual employee accentuate the relevant language of the pertinent collective bargaining agreement that prohibits unlawful discrimination. Otherwise, in the wake of the NLRB’s 2004 decision in Holling Press, it is likely that the NLRB will not accord Section 7 protections to individuals retaliated against for filing employment discrimination allegations with the United States Equal Employment Opportunity Commission, or state or local equivalent agencies.

Alexander Dumas’ Musketeers subscribed to the axiomatic principle of “All for One, and One for All.” In the early twentieth century, this truth was reaffirmed by the Wobblies’ cry that “An injury to one is an injury to all.” Well, apparently not so, say the current NLRB and some of the more brittle, rigid circuit courts of appeals, with their atomized Darwinistic law of the jungle ethos of every man for himself, further isolating the most vulnerable injured and harassed workers. Accordingly, after three decades of decisions by the N.L.R.B and the circuit courts vitiating the Section 7 rights of employees who pursue workers compensation claims, it will take a decision by the Supreme Court to restore those Section 7 protections to employees injured at work.

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