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## LICENSE TO OFFEND: HOW THE NLRA SHIELDS PERPETRATORS OF DISCRIMINATION IN THE WORKPLACE

Molly Gibbons\*

*Abstract:* Congress established the National Labor Relations Board (NLRB or the Board) to enforce the National Labor Relations Act (NLRA or the Act) and ensure fair labor practices in workplaces across the United States. The NLRA protects employees from discipline while engaging in union activity. Under the NLRA, employers and unions must collectively bargain in good faith. Either party may only walk away from the table when another party's conduct makes good faith bargaining impossible. However, the NLRB's determination of what conduct constitutes bad faith bargaining and protected union speech is inconsistent with federal anti-discrimination laws. This discrepancy means employers cannot take affirmative steps to prevent hostile work environments. This Comment proposes a new approach: the NLRB should harmonize its decisions delineating speech protected under the NLRA versus speech that may create a hostile work environment and thus subject the employer to further liability under federal anti-discrimination laws. Union speech or conduct that rises to the level of harassment under Title VII of the Civil Rights Act of 1964 (Title VII) should be considered outside the scope of the NLRA's protections, even if it does not reach the current standard for bad faith bargaining or unprotected speech. This Comment argues that such harmonization should apply irrespective of whether the offensive conduct comes from an employee or nonemployee union member.

### INTRODUCTION

An employer's management team meets with a group of union representatives to negotiate next year's collective bargaining agreement. The first few days of bargaining proceed without issue, but then the unexpected happens: A member of the union team begins to harass and act aggressively towards a member of the managerial team. The union representative calls the member of the managerial team names, insults her looks and intelligence, gets increasingly close to her while yelling, and uses racial and sexual slurs. This goes on for a few days. Everyone engaged in bargaining is aware of this member's conduct and they do not

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\* J.D. Candidate, University of Washington School of Law, Class of 2021. I want to thank Mary Fan and Hugh Spitzer for their insight and input into this Comment. I would also like to thank the Editorial Staff of *Washington Law Review* for their hard work and insightful comments, especially Monica Romero, Robert Morgan, Ian Walsh, and R.K. Brinkmann. This Comment uses offensive, sexually and racially charged language from various cases for the purpose of illustrating the severity of the speech that has been protected under the NLRA. However, this Comment has censored racial and sexist slurs.

feel like they can effectively bargain for a new contract while the harasser is present. To protect a member of their team and make sure they can bargain in good faith, the management team wants to end bargaining—but this is impossible. The team must negotiate until bargaining rises to the level of *bad faith*, wherein good faith bargaining becomes impossible due to the party's presence.<sup>1</sup> Moreover, if the union representative also happens to be an employee, the employer cannot reprimand them for their improper behavior because they are likely engaged in protected union speech. If the union member is not an employee, the employer's only recourse would be to remove them from the property or refuse to bargain. However, if the managerial team took either action, essentially walking away from the bargaining table, the employer would risk an unfair labor practice claim. If the employer loses on this claim, it may face a financial penalty and an order to continue negotiations until an agreement is reached. Therefore, the employer is in a tough situation: Should it risk an unfair labor practice charge by the union, or a harassment lawsuit from its employee?

Under National Labor Relations Board (NLRB or the Board)<sup>2</sup> precedent, an employer's duty to bargain is discharged only when an individual's conduct qualifies as bad faith bargaining.<sup>3</sup> In certain circumstances, this precedent allows employees to remain protected under the National Labor Relations Act (NLRA or the Act)<sup>4</sup> even when engaging in profane, racist, or sexist outbursts.<sup>5</sup> However, such conduct may violate federal anti-discrimination laws—under which employers have a legal obligation to prevent and correct harassment in the workplace.<sup>6</sup> Congress did not give the NLRB unfettered discretion to enforce the Act in ways that potentially conflict with “federal statutes and policies unrelated to the

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1. See *Pan Am. Grain Co.*, 343 N.L.R.B. 205, 206 (2004) (citing *KDEN Broad. Co.*, 225 N.L.R.B. 25, 35 (1976)); see also *infra* section II.B.

2. The NLRB is the federal agency responsible for enforcing the National Labor Relations Act in relation to collective bargaining agreements and unfair labor practices. *Who We Are*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are> [<https://perma.cc/78KT-XZFZ>].

3. See *Fitzsimons Mfg. Co.*, 251 N.L.R.B. 375, 379 (1980), *aff'd sub nom.* *UAW v. NLRB*, 670 F.2d 663, 664 (6th Cir. 1982).

4. National Labor Relations Act, 29 U.S.C. §§ 151–69.

5. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272 (1974) (noting that the “freewheeling use of the written and spoken word [during labor disputes] . . . has been expressly fostered by Congress and approved by the NLRB”).

6. See *Vance v. Ball State Univ.*, 570 U.S. 421, 427–29 (2013); see also *Fresenius USA Mfg., Inc.*, 358 N.L.R.B. 1261, 1263 (2012), *vacated*, No. 12-1387 (D.C. Cir. 2014) (“The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, including complaints of harassment.” (citing *Consol. Diesel Co.*, 332 N.L.R.B. 1019, 1020 (2000), *enforced*, 263 F.3d 345 (4th Cir. 2001))).

NLRA.”<sup>7</sup> The conflict between the NLRB’s precedent and federal laws places employers in difficult situations where their obligations under the NLRA may put them at risk of civil liability under federal anti-discrimination laws.

This Comment examines the current legal and regulatory frameworks for determining bad faith bargaining and protected union speech, specifically in relation to workplace harassment under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>8</sup> Part I outlines the history of speech in the union context and the development of the doctrine of protected union speech. Part II explores the duty to bargain under the NLRA. It also addresses the concept of bad faith bargaining—how it discharges the duty to bargain and how the standard for it has evolved over the years. Part III describes the standard for actionable workplace harassment under federal anti-discrimination law and the conflict with NLRB precedent for evaluating speech. Part III also examines how outlooks on harassment have evolved drastically over time. Part IV argues that the NLRB must continue to reconsider its protection of speech or conduct that would otherwise be actionable under federal anti-discrimination laws. Although the NLRB issued a new decision in July 2020 that partially disavowed its refusal to consider employers’ right to maintain a respectful workplace, the opinion did not address how offensive conduct from a nonemployee union representative would affect an employer’s duty to adhere to its obligations under federal antidiscrimination laws and the duty to bargain under the NLRA. Harmonizing the NLRB’s standards with federal anti-discrimination laws across all contexts and parties would ensure efficient, respectful bargaining and workplace conversations.

## I. SPEECH IN THE UNION CONTEXT

Throughout its history, the NLRB has liberally interpreted the appropriateness of workplace speech arising from protected union activity.<sup>9</sup> Workers have used this leeway to zealously advocate for union members’ interests without fear of anti-union retaliation.<sup>10</sup> Once speech is no longer protected by the NLRA, employers may discipline an employee

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7. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 147 (2002) (“The United States Supreme Court does not defer to the National Labor Relations Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the National Labor Relations Act.”); see *infra* Part IV.

8. 42 U.S.C. § 2000e-2(a).

9. See *Stanford N.Y., LLC*, 344 N.L.R.B. 558, 564 (2005) (quoting *Winston-Salem J.*, 341 N.L.R.B. 124, 126 (2004), *enforcement denied sub nom. Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 208 (4th Cir. 2005)).

10. See *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. 309, 315 (1975); *Stanford*, 344 N.L.R.B. at 564.

for their actions, even if it occurred while engaged in union activity. This Part addresses the NLRA's protection of union speech that, in some situations, has prevented employers from disciplining employees who engaged in harassing conduct. This Part also walks through the various tests that the NLRB uses to analyze whether union speech loses protection of the NLRA and the exceptions that favor protecting such speech.

*A. The National Labor Relations Act*

One of the primary statutes that creates protections for worker and union speech is the NLRA,<sup>11</sup> which Congress enacted as a part of the New Deal in 1935.<sup>12</sup> The law represented a shift in workplace regulation and set strict limits on employer rights in an effort to support and protect collective worker action. The NLRA protects workers' union-related speech and prohibits private employers from discriminating against or disciplining workers for engaging in union activity.<sup>13</sup> The Act also guarantees employees "'the right to self-organization' and establishe[s] a system by which the government would certify unions and require employers to bargain collectively with workers."<sup>14</sup> Section 7 of the NLRA sets out the rights of employees to engage in union activities like "bargain[ing] collectively through representatives of their own choosing" along with "concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>15</sup>

Following the passage of the NLRA, Congress established the NLRB to enforce its provisions.<sup>16</sup> Section 8(a) of the NLRA prohibits employers from interfering with, restraining, coercing, or discriminating against

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11. 29 U.S.C. §§ 151–69.

12. Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 *YALE L.J.* 2415, 2422 (2003) (citing 29 U.S.C. §§ 151–69).

13. *Id.* (noting that these protections are only statutory, not rooted in the first amendment); *id.* at 2420 n.17 ("Employee speech is protected by section 7 of the National Labor Relations Act when it involves 'concerted activities' for the purpose of workers' 'mutual aid or protection.' The right to free speech as a form of concerted activity . . . may not be bargained away by union negotiators. Moreover, the Court has ruled that the Act includes as concerted activity speech aimed at improving the circumstances of a group of employees, even when the issue is not specific to contract negotiations. In order to trigger the protections of the Act, worker speech must be either entwined with worker group action or involve preparation for such action. In addition, the employer must be aware of the concerted activity." (citations omitted)).

14. *Id.* at 2422 (citing 29 U.S.C. § 157).

15. 29 U.S.C. § 157.

16. *1935 Passage of the Wagner Act*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-wagner-act> [<https://perma.cc/S7SK-U5YX>].

employees exercising their section 7 rights.<sup>17</sup> The NLRB enforced this provision by not allowing employers to interfere with employees' ability to unionize—any retaliation against union activity by an employer was considered an unfair labor practice under the Act.<sup>18</sup>

*B. Determining When Speech Loses Protection of the NLRA*

While the NLRA seeks to protect concerted activity by employees, the NLRB has established boundaries for the Act's speech protections over time. The NLRB has set forth multiple tests for determining the limits of section 7's protections.<sup>19</sup> Under each of the tests, the Board applies an objective standard to determine whether an individual's statement or conduct represents a physical threat.<sup>20</sup> The Board does not consider the subjective interpretation of the parties present for the outburst.<sup>21</sup> As the NLRB General Counsel noted, the Board treats racist and sexist speech the same way it treats other vulgar or profane language: it applies different tests depending on the situation in which the outburst occurred.<sup>22</sup> The Board primarily considers the context or location in which the speech occurred as well as the severity of the speech itself.

An employee may lose the protection of the Act depending on whether they engage in indefensible or abusive conduct as well as the overarching context of their conduct.<sup>23</sup> For example, the Board has devised tests for evaluating whether protection has been lost based on if the conduct occurred in the workplace, outside of the workplace, or during union activity like picketing. However, the NLRB's interpretation of the Act "allows a certain degree of latitude" to employees engaged in protected

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17. 29 U.S.C. § 158(a)(1)–(3).

18. *Id.* § 158(a)(1), (5). It is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA. *Id.* § 158(a)(1).

19. *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (applied for workplace outbursts); *Pier Sixty, LLC*, 362 N.L.R.B. 505, 531 (2015) (citing *Honda of Am. Mfg.*, 334 N.L.R.B. 746, 748 (2001)) (applied to situations occurring outside the workplace); *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985) (applied to outburst made on the picket line). The *Atlantic Steel* test is most commonly used as it applies across the most situations.

20. *See, e.g., Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25 & n.2, 27–29 (D.C. Cir. 2011) (finding that the Board was correct in noting that the employee's comment that the supervisor "better bring [his] boxing gloves" was not meant literally and was not reasonably threatening).

21. *Id.*

22. Brief of NLRB Gen. Couns. as Amicus Curiae at 10, *Gen. Motors LLC & Charles Robinson*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242) [hereinafter NLRB General Counsel].

23. *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011).

conduct, even when employees “express themselves intemperately.”<sup>24</sup> The NLRB has explained that it protects “offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities” because “the language of the shop is not the language of ‘polite society.’”<sup>25</sup>

The Board set forth a four-factor test in *Atlantic Steel Co.*<sup>26</sup> for inter-workplace outbursts to determine when union speech loses its protection under the NLRA.<sup>27</sup> *Atlantic Steel* applies to situations involving “direct communications, face-to-face in the workplace, between an employee and a manager or supervisor.”<sup>28</sup> The test balances: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”<sup>29</sup> Notably, while “not every impropriety . . . places the employee beyond the protective shield of the [A]ct,”<sup>30</sup> this leeway must be “balanced against an employer’s right

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24. *Stanford N.Y., LLC*, 344 N.L.R.B. 558, 564 (2005) (quoting *Winston-Salem J.*, 341 N.L.R.B. 124, 126 (2004), *enforcement denied sub nom. Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 208 (4th Cir. 2005)).

25. *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. 309, 315 (1975). The Board, while acknowledging that “tempers may run high in this emotional field, that the language of the shop is not the language of ‘polite society,’ and that tolerance of some deviation from that which might be the most desirable behavior is required, has held that offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act’s protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.” *Stanford*, 344 N.L.R.B. at 564 (quoting *Dreis*, 221 N.L.R.B. at 315).

26. 245 N.L.R.B. 814, 816 (1979).

27. *Id.*

28. *Three D, LLC*, 361 N.L.R.B. 308, 311 (2014); *see also Greyhound Lines, Inc.*, 367 N.L.R.B. No. 123, slip op. at 10 (May 6, 2019) (“The Board has typically applied the analysis of *Atlantic Steel* to situations where face-to-face workplace conversations have been alleged to infringe on employers’ rights to maintain workplace order.” (citations omitted)).

29. *Atl. Steel*, 245 N.L.R.B. at 816; *see e.g., Stanford*, 344 N.L.R.B. at 558–59 (2005) (finding that the employee did not lose Act’s protection when calling the manager “a liar” and “a b[\*\*\*]h,” angrily pointing a finger at him, and repeating that he was a “f[\*\*]king son of a b[\*\*\*]h” because the outburst occurred while the employee was asserting a fundamental right, it was a direct and immediate reaction to employer’s threats of discharge, and occurred in a secluded room away from the employee’s work area); *Felix Indus., Inc.*, 339 N.L.R.B. 195, 195–97 (2003) (finding that the employee did not lose protection of the Act by referring to the supervisor as a “f[\*\*]king kid” three times over a phone call in which employee asserted his contract rights, and where circumstances make clear that the outburst would not have occurred but for employer’s provocation, including a threat of termination for engaging in protected activity).

30. *Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972, 978 (2014) (quoting *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965)). While the actual text of the NLRA says nothing about protecting profane, racially charged, or sexual language or behavior, the Board in *Atlantic Steel* determined that the NLRA protects such behavior under the provision in section 7 which guarantees employees the right “to engage in other concerted activities for . . . other mutual aid or protection . . . .” 29 U.S.C.

to maintain order and respect.”<sup>31</sup>

In addressing the location factor, the Board clarified that where the outburst occurs is significant when balancing the employee’s right to engage in section 7 activity “against the employer’s right to maintain order and discipline” in the workplace.<sup>32</sup> Board decisions reflect a distinction between outbursts “where there was little if any risk that other employees heard the obscenities and those where that risk was high.”<sup>33</sup> In *Atlantic Steel*, the Board noted that an employer’s interest in maintaining order in the workplace is “affected less by a private outburst in a manager’s office away from other employees than an outburst on the work floor witnessed by other employees.”<sup>34</sup> An employee is more likely to lose the protection of the NLRA when they engage in a public outburst, noticed by others.<sup>35</sup> However, when the employer initiates a confrontation in a public setting, the Board will not hold this factor against the employee.<sup>36</sup>

Under the second factor, a dispute is likely protected when it involves a discussion of key working conditions, like wages and workplace safety complaints, grievances, or terms of a collective bargaining agreement.<sup>37</sup> The Board reasons that such disputes are likely to produce strong, highly emotional responses and parties will often “speak bluntly and recklessly.”<sup>38</sup> Because tensions often run high during these conversations, the NLRA’s protections “would be seriously threatened if the employer could” insist that any emotional and argumentative point made during the

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§ 157.

31. Pipe Realty Co., 313 N.L.R.B. 1289, 1290 n.3 (1994) (citing *Thor Power Tool*, 351 F.2d at 587).

32. *Plaza Auto*, 360 N.L.R.B. at 978 (quoting *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 292 (9th Cir. 2011)).

33. *Id.* (quoting *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012)); see *Greyhound Lines, Inc.*, 367 N.L.R.B. No. 123, slip op. at 10 (May 6, 2019) (“The Board has found that ‘an employee’s outburst against a supervisor in a place where other employees could hear it would tend to affect workplace discipline by undermining the authority of the supervisor.’” (quoting *Kiewit Power Constructors Co.*, 355 N.L.R.B. 708, 709 (2010))).

34. *Plaza Auto*, 360 N.L.R.B. at 978.

35. *See id.*

36. *See Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25–27 (D.C. Cir. 2011) (accepting the Board’s reasoning that “while quarrels with management are more likely to disturb the workplace if they are made in front of fellow workers, the NLRB will not hold this against the employee when the company picks a public scene for what is likely to lead to a quarrel”).

37. *See Plaza Auto*, 360 N.L.R.B. at 979; *Greyhound Lines*, slip. op. at 5.

38. *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966) (noting that parties to these disputes often “embellish[] their respective positions with imprecatory language”); see *Consumers Power Co.*, 282 N.L.R.B. 130, 132 (1986); *USPS*, 360 N.L.R.B. 677, 682 (2014); *Plaza Auto*, 360 N.L.R.B. at 978–79.



discussion could lose the protection of the NLRA.<sup>39</sup>

When evaluating the third factor, the Board analyzes the nature of the outburst by taking into account the employee's statements, who the employee confronted, whether they made any threats or physically hit anyone, and the employee's history of aggression.<sup>40</sup> The Board has noted that "[i]t is possible for an employee to have an outburst weigh against him yet still retain [the NLRA's] protection because the other three [*Atlantic Steel*] factors weigh heavily in his favor."<sup>41</sup> Additionally, NLRB precedent reflects the principle that an outburst is less severe when the subject of the profanity is an employer's policy, rather than the employer itself.<sup>42</sup> The Board also considers workplace norms and an employer's tolerance of profanity in the workplace when analyzing whether the nature of the outburst weighs in favor of protection.<sup>43</sup>

Finally, when determining if the employee's outburst was provoked, the Board considers the timing of the outburst, the absence of prior similar misconduct, and management's hostility towards the employee's protected conduct.<sup>44</sup> Outbursts "are more likely to be protected when the employer expresses hostility to the employee's very act of complaining than when the employer has indicated a willingness to engage on the merits."<sup>45</sup> Further, threats of discharge are often considered adequate

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39. *USPS v. NLRB*, 652 F.2d 409, 412 (5th Cir. Unit A July 1981).

40. *Plaza Auto*, 360 N.L.R.B. at 977–80.

41. *Plaza Auto*, 360 N.L.R.B. at 977 (finding that the nature of the outburst weighed against protection because the outburst, which included comments like the employer would "regret it" if he was fired and calling the employer a "[\*\*]king mother [\*\*]ker," a "[\*\*]king crook," and an "a[\*\*]hole," was an obscene and denigrating, face-to-face, ad hominem attack against an employer at work (citing *Kiewit Power*, 652 F.3d at 27 n.1); *Greyhound Lines*, slip op. at 10 ("Although insubordinate conduct weighs against protection under the Act, the Board distinguishes between 'true insubordination' and behavior that is only 'disrespectful, rude, and defiant.'" (citing *Goya Foods, Inc.*, 356 N.L.R.B. 476, 478 (2011))).

42. See *Plaza Auto*, 360 N.L.R.B. at 977; *Greyhound Lines*, slip op. at 5; *Wal-Mart Stores, Inc.*, 341 N.L.R.B. 796, 806–08 (2004) (concluding that the employee retained the protection of the Act where employee used the profanity to describe the employer's policy and its effects rather than to describe a member of management), *enforced*, 137 Fed. App'x 360 (D.C. Cir. 2005).

43. See *Traverse City Osteopathic Hosp.*, 260 N.L.R.B. 1061, 1061 (1982) (employee's "profane outburst" was protected because "the use of profanity by hospital personnel was not uncommon . . . and had been tolerated in the past"), *enforced*, 711 F.2d 1059 (6th Cir. 1983); *Corr. Corp. of Am.*, 347 N.L.R.B. 632, 636 (2006) (employee's use of profanity was protected where profanities were "commonly used at the facility by [employees] and supervisors alike").

44. See *Felix Indus., Inc.*, 339 N.L.R.B. 195, 196–97 (2003).

45. *Plaza Auto*, 360 N.L.R.B. at 979 (comparing *Overnite Transp. Co.*, 343 N.L.R.B. 1431, 1437 (2004) (finding employee's speech protected where the employee did not bring up the subject of whether supervisor had committed wartime atrocities until after supervisor had refused to discuss the employee's workplace concerns) with *DirectTV U.S. DirectTV Holdings, LLC*, 359 N.L.R.B. 545, 559, 562 (2013) (concluding that the employee's profane outburst weighed against protection in part

provocation for an employee's outburst—weighing in favor of protection under the NLRA.<sup>46</sup>

In cases involving statements made outside of the workplace from one employee to another—for example, statements made online—the Board applies a “totality of the circumstances” analysis.<sup>47</sup> This analysis encompasses the *Atlantic Steel* factors, along with workplace policies, norms, discipline patterns, anti-union hostility, and the employee's previous conduct<sup>48</sup>:

(i) whether the employer maintained a specific rule prohibiting the language used by the employee; (ii) whether the employer generally considered language such as that used by the employee to be offensive; (iii) whether the employee's statement was impulsive or deliberate; (iv) whether the discipline imposed upon the employee was typical of that imposed for similar violations . . . ;(v) whether the discipline was clearly directed at offensive language as opposed to protected activity; (vi) whether the record contains any record of antiunion hostility; and (vii) whether the employee had previously engaged in similar protected conduct without objection.<sup>49</sup>

Finally, the NLRB applies the *Clear Pine Mouldings, Inc.*<sup>50</sup> test in cases involving picket-line speech directed at employees, which examines “whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the [NLRA].”<sup>51</sup>

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because the employee had already been told that the problem that he was again complaining to management about would be resolved in a few days)).

46. *Plaza Auto*, 360 N.L.R.B. at 978 (“Telling an employee who is engaged in protected concerted activity that he may quit if he does not like the employer's policies is an implied threat of discharge, because it suggests that continuing to engage in such protected activity is incompatible with continued employment.”); see also *McDaniel Ford, Inc.*, 322 N.L.R.B. 956, 962 (1997) (“[A]n employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that [engaging in] concerted activities and their continued employment are not compatible, and implicitly threaten[s] discharge of the employees involved.”).

47. *Fresenius USA Mfg., Inc.*, 358 N.L.R.B. 1261, 1267 (2012), *vacated*, No. 12-1387 (D.C. Cir. 2014); see *Honda of Am. Mfg.*, 334 N.L.R.B. 746, 747–49 (2001); *Pier Sixty, LLC*, 362 N.L.R.B. 505, 531 (2015); *Three D, LLC*, 361 N.L.R.B. 308, 311 (2014) (“[T]he *Atlantic Steel* framework is tailored to workplace confrontations with the employer.”).

48. *Pier Sixty*, 362 N.L.R.B. at 531.

49. *Id.* (citing *Honda*, 334 N.L.R.B. at 748).

50. 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

51. *Clear Pine Mouldings*, 268 N.L.R.B. at 1046; see also *Airo Die Casting, Inc.*, 347 N.L.R.B. 810, 812 (2006) (noting that the “Board has found that a striker's use of the most vile and vulgar language, including racial epithets, does not deprive him of the protection of the Act, so long as those actions do not constitute a threat”); *Detroit Newspaper Agency*, 342 N.L.R.B. 223, 268 (2004)

When analyzing the nature and severity of the employee's outburst under the above tests, the Board often applies two principles: the realities of industrial life and the norms of the workplace.<sup>52</sup> The Board is more willing to find that an employee's speech is protected under the NLRA if that speech is representative of the realities of industrial life or tolerated within the specific workplace.<sup>53</sup>

### 1. *Realities of Industrial Life*

The Board has consistently applied a "realities of industrial life" principle when evaluating whether an employee's profanity or offensive language loses protection under the NLRA.<sup>54</sup> This principle implies that profanity, vulgarity, or obscenity in the course of labor relations is presumptively permissible in any industrial workplace.<sup>55</sup> The Board has insisted that the protections section 7 affords employees "would be meaningless" if it did "not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."<sup>56</sup> While much has changed since the passage of the NLRA, the Board continues to find that the language of the workplace is not considered "the language of 'polite society.'"<sup>57</sup> Additionally, the Board has observed that "passions run high in labor disputes and that epithets and accusations are commonplace."<sup>58</sup> Accordingly, "'a certain amount of salty language and defiance' is to be expected and 'must be tolerated' in disputes over employees' terms and conditions of employment."<sup>59</sup> For

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(finding an employee's speech protected when they said "you f[\*\*]kin' b[\*\*\*]h, n[\*\*\*\*]r lovin' wh[\*]re" during a strike).

52. See *infra* section I.B.1.

53. See *infra* section I.B.1.

54. See *Consumers Power Co.*, 282 N.L.R.B. 130, 132 (1986). Federal courts have also appeared to honor this exception. See *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206-07 (7th Cir. 1971).

55. *Fresenius USA Mfg., Inc.*, 358 N.L.R.B. 1261, 1269 (2012) (Member Hayes, dissenting), *vacated*, No. 12-1387 (D.C. Cir. 2014); *Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972, 978-79 (2014).

56. *Consumers Power Co.*, 282 N.L.R.B. at 132.

57. *Stanford N.Y., LLC*, 344 N.L.R.B. 558, 564 (2005); see *Kiewit Power Constructors Co.*, 355 N.L.R.B. 708, 710 (2010) ("[T]he Board has found that a line 'is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.'").

58. *Greyhound Lines, Inc.*, 367 N.L.R.B. No. 123, slip op. at 18 (May 6, 2019) (citing *Atl. Steel Co.*, 245 N.L.R.B. 814, 819 (1979)).

59. *Id.*, slip op. at 4 (quoting *Severance Tool Indus.*, 301 N.L.R.B. 1166, 1170 (1991), *enforced*, 953 F.2d 1384 (6th Cir. 1992)).

example, *Consumers Power Co.*<sup>60</sup> involved an employee who was upset over unsafe work conditions and protested to his supervisor.<sup>61</sup> The employee used abusive profanity against the supervisor, shook his finger in the supervisor's face, and supposedly struck the supervisor in the chest.<sup>62</sup> Since the employee's actions occurred in the heat of the moment, while the employee was protesting the safety of work conditions, the Administrative Law Judge (ALJ) found that they were protected under section 7 of the NLRA.<sup>63</sup> Likewise, in *Greyhound Lines, Inc.*,<sup>64</sup> the ALJ held that the NLRA shielded the employee's outburst, which involved shouting profanities like "[\*\*]k you," because he was engaged in union activity and his language was not so egregious as to lose protection under the Act.<sup>65</sup> The ALJ made clear that his finding was "consistent with the Board's reasoning that 'a certain amount of salty language and defiance' is to be expected and 'must be tolerated' in disputes over employees' terms and conditions of employment."<sup>66</sup>

## 2. *Norms of the Workplace*

The Board also applies the "norms of the workplace" principle when determining if an employee's outburst is protected by the NLRA.<sup>67</sup> Specifically, the Board looks at "whether profanity [or obscenity] is commonplace and tolerated" in the workplace.<sup>68</sup> If it is, the nature of the outburst supports retaining protection of the Act because a profane

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60. 282 N.L.R.B. 130 (1986).

61. *Id.* at 130–31.

62. *Id.* at 131.

63. *Id.* at 137. The ALJ noted that the employee's action "was a reflexive reaction and that physical contact, if any, was moderate and amounted to nothing more than Knight's hand brushing against Supervisor Currie's chest. There was no attempted blow, threatening gesture, or threatening words by Knight and no other contact between the two men occurred." *Id.* The Board affirmed the ALJ's decision, noting that

Knight raised his fists to Currie reflexively, responding to Currie's moving his hands in front of Knight as if to gesture or shake a finger in Knight's face. Knight was admittedly 'hot under the collar' . . . [but] never struck a blow . . . . We likewise do not find Knight's later conduct so egregious as to lose the protection of the Act now.

*Id.* at 132.

64. 367 N.L.R.B. No. 123 (May 6, 2019).

65. *Id.*

66. *Id.* (quoting USPS, 364 N.L.R.B. No. 62, slip op. at 4 (July 29, 2016) ("In addition, the Board and the courts 'have recognized that some tolerance is necessary if grievance meetings are to succeed at all,' and 'bruised sensibilities may be the price exacted for industrial peace.'" (quoting USPS v. NLRB, 652 F.2d 409, 411 (5th Cir. Unit A July 1981))).

67. Gen. Motors LLC, 368 N.L.R.B. No. 68, slip op. at 2 (Sept. 5, 2019).

68. *Id.*

outburst is considered less distressing and disruptive to the work environment and the manager's ability to maintain order.<sup>69</sup> NLRB decisions imply that profanity in the course of labor relations is a permissible norm in most workplaces.<sup>70</sup> In *Traverse City Osteopathic Hospital*,<sup>71</sup> the NLRA protected an employee's use of obscene and vulgar language while he engaged in union activity because the employer had tolerated the language in the past and no other employees who witnessed the outburst complained about the language used.<sup>72</sup> However, in *Aluminum Co. of America*,<sup>73</sup> the Board noted that even if profanity in a workplace is common, an employee's profanity can be so egregious as to weigh against protection under the NLRA due to its extreme degree and individualized character.<sup>74</sup>

If an employee's speech falls within either principle, the above tests favor protecting that speech under the NLRA. However, workplace speech that fits within these principles may create a hostile work environment—and would thus be unlawful under federal anti-discrimination laws.<sup>75</sup>

## II. BAD FAITH BARGAINING

While the NLRA protects union speech in a variety of workplace contexts, a specific intersection of union activity and speech exists during

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69. *Greyhound Lines, Inc.*, 367 N.L.R.B. No. 123, slip op. at 10 (May 6, 2019) (“[T]he Board has held that where the use of profane and vulgar language was ‘a daily occurrence in [the] Respondent’s workplace, and [it] did not engender any disciplinary response,’ such a factor weighed in favor of retaining the protection of the Act.” (citing *Pier Sixty, LLC* 362 N.L.R.B. 505, 505–06 (2015)); see *Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972, 983 (2014) (Member Johnson, dissenting)).

70. See *Fresenius USA Mfg., Inc.*, 358 N.L.R.B. 1261, 1269 (2012) (Member Hayes, dissenting), *vacated*, No. 12-1387 (D.C. Cir. 2014); *Corr. Corp. of Am.*, 347 N.L.R.B. 632, 636 (2006) (finding that an employee’s use of profanity was protected by the Act where profanities were “commonly used at the facility by [employees] and supervisors alike”).

71. 260 N.L.R.B. 1061 (1982), *enforced*, 711 F.2d 1059 (6th Cir. 1983).

72. *Id.* at 1069–70. The Board affirmed the ALJ’s decision, finding that:

Aldridge’s outburst was not so flagrant or egregious as to remove him from the protection of the Act. We note . . . that the use of profanity by hospital personnel was not uncommon, including its use in the cafeteria, and had been tolerated in the past, that Aldridge’s profane outburst was, to some degree, provoked by employee Jessup’s intemperate and profane comments to Aldridge regarding unionization and Aldridge’s future job status, that Jessup herself frequently used profanity in conversations with other employees, that the outburst was made during nonworking time outside of a patient care area, and that there were apparently few nonemployee visitors in the cafeteria at the time in question and no evidence that any complaints, other than by Jessup, were made to management regarding Aldridge’s conduct.

*Id.* at 1061–62.

73. 338 N.L.R.B. 20 (2002).

74. *Id.* at 21–22.

75. See *infra* Part III.

bargaining. This Part addresses the duties of employers and unions to bargain in good faith and the right to choose representatives, as the NLRA only allows parties to walk away from the table if bargaining in good faith becomes impossible. It then discusses how certain speech, or conduct, can ultimately lead to bad faith bargaining, such that it loses protection under the NLRA. However, the NLRB has articulated an incredibly high standard for bad faith bargaining, thereby forcing parties to sometimes tolerate significant outbursts or harassment. This sets up another potential conflict between federal anti-discrimination laws and protected union speech. This Part concludes with examples of bad faith bargaining cases that distinguish between impermissible and permissible conduct under the NLRA.

#### A. *Duty to Bargain in Good Faith*

The duty to bargain in good faith is one of the key concepts of collective bargaining. The NLRA<sup>76</sup> is one of the most well-known federal acts governing collective bargaining, along with other union activity.<sup>77</sup> Under the NLRA, private employers “have a legal duty to bargain in good faith with their employees’ representative and to sign any collective bargaining agreement that has been reached.”<sup>78</sup> Section 8(d) of the NLRA sets forth the requirements for collective bargaining.<sup>79</sup> Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of its employees” unless certain criteria are met.<sup>80</sup> Under section 8(b)(3) of the NLRA, a union must also bargain in good faith on behalf of the employees it represents.<sup>81</sup> Pursuant to the NLRA, if a union or employer believes that the other party has failed

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76. National Labor Relations Act, 29 U.S.C. §§ 151–69.

77. State statutes govern the collective bargaining duties for state employers and employees. *See, e.g.*, WASH. REV. CODE. § 41.56 (2019) (describing Washington State’s regulations for public employees’ collective bargaining).

78. *Bargaining in Good Faith with Employees’ Union Representative (Section 8(d) & 8(a)(5))*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section> [<https://perma.cc/D47X-T396>] (“An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1).”).

79. 29 U.S.C. § 158(d) (“[Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached . . .”).

80. *Id.* § 158(a)(5).

81. *Id.* § 158(b)(3).

to bargain in good faith, it may file an unfair labor practice complaint.<sup>82</sup> This could lead to remedies ordered by the NLRB.<sup>83</sup>

### B. *Right to Choose Representatives*

Within the collective-bargaining relationship, each party has both “the right to select the representative for bargaining and negotiations” and “the duty to deal with the chosen representative of the other party.”<sup>84</sup> Section 7 of the NLRA gives employees the right to bargain collectively with representatives of their choosing.<sup>85</sup> And it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees exercising that right.<sup>86</sup>

However, the right to select one’s bargaining representatives is not absolute.<sup>87</sup> If the presence of one’s representative in negotiations “makes collective bargaining impossible or futile,” the other party is relieved of its duty to deal with that particular individual—thus limiting one’s right to choose their representative.<sup>88</sup> These limitations have generally been confined to situations “infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical.”<sup>89</sup>

### C. *Refusal to Bargain*

Given the established duty to bargain under the NLRA, a union or an employer can only refuse to bargain with an opposing party’s representative “if that person’s conduct is so egregious and beyond the pale as to make the bargaining process itself untenable.”<sup>90</sup> For a party to

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82. *Id.* § 158.

83. *Id.*

84. *Victoria Packing Corp.*, 332 N.L.R.B. 597, 600 (2000); *see also* *Pan Am. Grain Co.*, 343 N.L.R.B. 205, 206 (2004) (citing *Fitzsimons Mfg. Co.*, 251 N.L.R.B. 375, 379 (1980), *aff’d sub nom. UAW v. NLRB*, 670 F.2d 663 (6th Cir. 1982)).

85. 29 U.S.C. § 157.

86. *Id.* § 158(a)(1).

87. *See* *Long Island Jewish Med. Ctr.*, 296 N.L.R.B. 51, 71 (1989) (“[A]n employer can refuse to deal with a union representative whose conduct has crossed over a line of permissible conduct established by the Board and the courts.”).

88. *Victoria Packing*, 332 N.L.R.B. at 600 (quoting *Fitzsimons*, 251 N.L.R.B. at 379).

89. *Long Island*, 296 N.L.R.B. at 71 (quoting *Gen. Elec. Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969)).

90. *Victoria Packing*, 332 N.L.R.B. at 600; *see also* *Sahara Datsun*, 278 N.L.R.B. 1044, 1046 (1986) (“When an individual engages in conduct directed at the employer or its representatives which engenders such ill will that it weakens the fabric of the relationship to the extent that good-faith bargaining is impossible, however, we recognize an employer’s right to refuse to meet and bargain with that individual.”).

be relieved of its duty to bargain, there must be “persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible.”<sup>91</sup> Even behavior that does not occur during the bargaining session can still undermine the overall bargaining process.<sup>92</sup> According to the Board, this high standard for relieving the duty to bargain is appropriate because “the obligation to bargain also imposes the obligation to thicken one’s skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior.”<sup>93</sup> Additionally, the determination as to whether a representative has acted in such a way that his or her presence would make “good-faith bargaining ‘impossible’ is essentially a factual inquiry.”<sup>94</sup> The standard is not based on the “subjective asserted reactions of individual bargainers;” the NLRB makes an “objective determination of whether the conduct is reasonably likely [to] create ill will . . . .”<sup>95</sup>

#### *D. Recent Case Examples of Conduct That Renders Bargaining Impossible*

Generally, profanity or vulgar language is insufficient to constitute bad faith bargaining.<sup>96</sup> Instead, the NLRB’s application of the bad faith bargaining test has upheld an employer’s refusal to bargain with a union representative only where the representative’s conduct was egregious, such as physical assaults or death threats.<sup>97</sup>

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91. *Pan Am. Grain Co.*, 343 N.L.R.B. 205, 206 (2004) (citing *KDEN Broad. Co.*, 225 N.L.R.B. 25, 35 (1976)).

92. *King Soopers, Inc.*, 338 N.L.R.B. 269, 270 (2002) (citing *Sahara Datsun*, 278 N.L.R.B. at 1046–47).

93. *Victoria Packing*, 332 N.L.R.B. at 600.

94. *Pan Am. Grain*, 343 N.L.R.B. at 206.

95. *Ready Mix USA, LLC*, No. 10-CA-140059, 2015 WL 5440337 (N.L.R.B. Sept. 15, 2015) (finding that even if the bargainers subjectively felt like the employee’s presence would make bargaining impossible, it was a reasonable person’s reaction that mattered).

96. *See, e.g.*, *KSL Claremont Resort, Inc.*, 344 N.L.R.B. 832, 835 (2005) (“The standards for behavior in negotiations are much different than the standards of conduct for an employee in a luxury hotel. . . . Thus, to the extent a [party] becomes visibly upset, shaking, or out of control . . . , negotiations, in general, have been known to accommodate such behavior. Negotiations may also accommodate some profanity.”).

97. *Victoria Packing*, 332 N.L.R.B. at 600 (citing *Sahara Datsun*, 278 N.L.R.B. at 1044); *see also Pan Am. Grain*, 343 N.L.R.B. at 206; *cf. Neilmed Prods., Inc.*, No. 20-CA-35363, 2011 WL 2689292 (N.L.R.B. July 11, 2011). In *Neilmed Products, Inc.*, the ALJ found that the employer violated the NLRA by denying a union representative access to the bargaining table because the union representative had yelled angry comments at employees crossing a picket line and had broken the windshield of a passing car. *Id.* They determined that the representative’s conduct and presence during bargaining did not amount to bad faith bargaining. *Id.* While this Comment notes that the standard for what constitutes bad faith bargaining is likely outdated and needs adjusting, it is beyond scope of this



*I. Situations Where an Employer's Refusal to Bargain Was Upheld*

In *Fitzsimmons Manufacturing Co.*,<sup>98</sup> the NLRB upheld an employer's refusal to bargain after a physical altercation between a Union representative and the employer's personnel director.<sup>99</sup> The representative believed that the personnel director had disclosed confidential material to the Union's bargaining committee.<sup>100</sup> The representative grabbed the director by his tie, said he would punch him in the face and "knock him on his ass," and suggested that they go outside and fight.<sup>101</sup> This altercation occurred during a grievance meeting, without provocation, and in the presence of other employees.<sup>102</sup> The employer then requested that the Union remove him as the representative for its facility.<sup>103</sup> The Union repeatedly assured the employer that an outburst like that would not happen again and the representative would control his behavior.<sup>104</sup> However, the employer refused to bargain with the Union unless the representative was removed.<sup>105</sup>

The Board concluded that the employer's refusal to bargain with the Union was lawful because the representative's conduct was sufficiently egregious as to render good faith bargaining impossible.<sup>106</sup> The Board rested its conclusion on the fact that the representative assaulted the director and his conduct was unprovoked.<sup>107</sup> Since the assault occurred after the parties had stopped discussing any topics of dispute, there was no justification for the representative's initial use of physical force or his attempt to continue the confrontation.<sup>108</sup> Moreover, the representative's behavior was disruptive to bargaining because his outburst took place in the presence of the employee bargaining committee—whose members looked to the representative for leadership—and the employer's management officials.<sup>109</sup> The Board did not alter its conclusion, despite

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Comment.

98. 251 N.L.R.B. 375 (1980), *aff'd sub nom.* UAW v. NLRB, 670 F.2d 663 (6th Cir. 1982).

99. *Id.* at 376, 379.

100. *Id.*

101. *Id.* at 376.

102. *Id.* at 376, 379.

103. *Id.* at 376–77.

104. *Id.* at 377.

105. *Id.*

106. *Id.* at 379.

107. *Id.*

108. *Id.*

109. *Id.*

the Union's assurances that the representative had not previously assaulted the employer's officials and would not act out again, and the fact that the director later departed from the employer's management team.<sup>110</sup> While a pattern of assaults may justify a party's refusal to meet with a particular representative, the Board noted in this case that it can also find the refusal to bargain justified on other grounds.<sup>111</sup>

*King Soopers, Inc.*<sup>112</sup> featured an altercation between a supervisor and a long-time employee.<sup>113</sup> The employee, who had previously been a union steward, confronted his supervisor about the employer's decision to schedule him for a Saturday shift.<sup>114</sup> During the confrontation, the employee "angrily threw his meathook over his shoulder, narrowly missing [another] employee."<sup>115</sup> The employee also "threw a 40-pound piece of meat into a saw (breaking its blade); threw his knife into a box; threatened his supervisor; and refused to follow the store manager's order to leave the store."<sup>116</sup> Before this incident, the employee had "placed his hand over the store manager's mouth during a discussion with her."<sup>117</sup> The employer terminated the employee, citing his threatening and violent behavior.<sup>118</sup> Four years later, the Union hired the former employee as a business agent and assigned him to duties at his former store.<sup>119</sup> Once the employer learned that the agent would be entering the workplace as a business agent, it told the Union it would not deal with him regarding union matters because of his violent past.<sup>120</sup>

The Board held that the employer did not violate the NLRA by refusing to deal with the Union's business agent, since the agent had previously engaged in violent and disruptive behavior during minor disputes, such as

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110. *Id.* at 379–80 (“[W]e find that neither the informal settlement agreement nor the Union’s assurances are sufficient to dissipate the effect of Mastos’ conduct. . . . Mastos’ conduct was not prompted by personal animosity towards Vogel. Rather, Mastos responded as he did because he believed that Vogel would refer to matters previously resolved through collective bargaining. In these circumstances, Respondent could reasonably fear that similar attacks might occur if other of Respondent’s officials mentioned the October 1977 meeting or any other subject of collective bargaining as to which Mastos might be or become sensitive.”).

111. *Id.* at 380.

112. 338 N.L.R.B. 269 (2002).

113. *Id.* at 269.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

scheduling issues.<sup>121</sup> This “egregious misconduct” meant that individuals required to deal with him in an adversarial setting, like a grievance meeting, might “reasonably be preoccupied with the legitimate concern that he would react violently if his position did not prevail.”<sup>122</sup> That preoccupation might undermine good faith collective bargaining by impeding “a vigorous exchange of positions unencumbered by the threat of an adversary’s violent reaction.”<sup>123</sup> Thus, the agent’s propensity to react violently during disputes would make good faith bargaining impossible.<sup>124</sup> Finally, the Board found that the absence of physical injury or intent to cause physical injury was irrelevant to its conclusion that the agent’s presence would cause ill-will.<sup>125</sup>

## 2. *Situations Where an Employer’s Refusal to Bargain Was Held Unlawful*

In *Victoria Packing Corp.*,<sup>126</sup> a Union representative became confrontational and aggressive with a company’s owner.<sup>127</sup> The representative yelled, “I’m going to get you and your f[\*\*]king company” while aggressively shaking his finger at the company’s owner, who told him that he could not talk to employees during work hours.<sup>128</sup> The Board concluded that the employer’s refusal to allow the Union representative to be present at its workplace violated its duty to bargain.<sup>129</sup> It found that the Union representative’s conduct could not “reasonably be construed as tainting the bargaining process as long as he was personally involved.”<sup>130</sup> While the representative’s conduct may have been “rude and even excessive in a social or business context,” it was of a short duration, “did

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121. *Id.* at 269–70 (noting that the employee’s violent outburst prior to termination “clearly jeopardized the safety of a supervisor and a fellow employee”).

122. *Id.* at 269.

123. *Id.*

124. *Id.* at 269–70 (“The fact that Gonzales has had nonviolent encounters as a shop steward in the past as well as some nonviolent encounters with employers in his capacity as a business agent is of limited significance in resolving the issue at hand, namely, whether his tendency to react violently during a confrontation justifies the Respondent’s refusal to deal with him.”).

125. *Id.* at 270 (“Gonzales’ behavior was plainly reckless, and although he might have acted without a subjective intent to cause physical injury when he narrowly missed striking an employee with a meathook, this does not mitigate or change how it would reasonably be perceived by bystanders, and thus does not ameliorate the potentially debilitating effect on bargaining.”).

126. 332 N.L.R.B. 597 (2000).

127. *Id.*

128. *Id.* at 599.

129. *Id.* at 597–98.

130. *Id.* at 600.

not involve any kind of physical contact or explicit threat of force, and . . . was a one time event in an otherwise business like and productive relationship between the Union and the Employer.”<sup>131</sup>

In *Long Island Jewish Medical Center*,<sup>132</sup> a Union business agent engaged in repeated confrontations with the employer’s hospital staff. In one incident, he pushed a hospital administrator, called her an “asshole” multiple times, and briefly blocked her from accessing her desk.<sup>133</sup> During a second incident, the agent directed obscenities at hospital staff.<sup>134</sup> The final incident involved the agent handing out leaflets to hospital staff about the upcoming union meetings.<sup>135</sup> As the agent was handing out leaflets, a hospital administrator took the leaflets, handed them back to the agent, and then pushed him.<sup>136</sup> The agent then did the same to the administrator.<sup>137</sup> The employer subsequently banned the business agent from the hospital.<sup>138</sup> The Board found that the business agent’s acts during the final incident, which formed the crux of the allegation, were provoked by the hospital administrator.<sup>139</sup> Further, while the business agent’s actions were not condoned, they were not sufficiently egregious to justify the employer refusing to bargain with the business agent.<sup>140</sup> In light of all three incidents, the NLRB concluded that the business agent’s presence at bargaining would not cause ill-will or make future bargaining impossible.<sup>141</sup>

These decisions illustrate that, in some circumstances, behavior such as shoving supervisors, shouting profanities on numerous occasions, and becoming confrontational does not amount to bad faith bargaining. When the NLRB does find the bad faith bargaining standard to be met, it is often

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131. *Id.*

132. 296 N.L.R.B. 51 (1989).

133. *Id.* at 71.

134. *Id.* at 57 (“Nordenberg immediately began yelling: ‘Tough shit, I don’t need your permission, I’m going to do what I want to do . . . screw you—you don’t know the contract.’ She said: ‘I do know the contract; now is not the time to be here.’ Carnel then called security, and told them that she needed a security officer . . . She then walked out of her office and saw that Nordenberg was walking toward the front of the office. . . . When he reached the front, Nordenberg was in the corridor yelling: ‘You don’t know the contract—screw you, you’re an asshole.’”).

135. *Id.* at 57–59.

136. *Id.*

137. *Id.*

138. *Id.* at 60.

139. *Id.* at 72.

140. *Id.* (“An employer cannot rely on an employee’s indiscretion to justify a discharge when it was provoked by an agent of the employer.”).

141. *Id.*

due to the presence of a physical altercation or threats of physical violence. Accordingly, the NLRB's decisions have established a high standard as to what rises to the level of bad faith bargaining, and in doing so, sometimes protect otherwise harassing conduct.

### III. HARASSMENT IN THE WORKPLACE: INTERPLAY BETWEEN FEDERAL ANTI-DISCRIMINATION LAW AND NLRA

The NLRB decisions above focus on the scope of an employer's duty to bargain in good faith with union representatives, but employers must also comply with a host of other employment laws. Federal anti-discrimination laws may be invoked alongside the NLRA in situations involving the types of harassing conduct described above.<sup>142</sup> This Part addresses what constitutes actionable workplace harassment under federal anti-discrimination laws, specifically Title VII of the Civil Rights Act of 1964.<sup>143</sup> This Part then discusses employer liability for workplace harassment and its duty to establish a safe, harassment-free work environment. It gives examples that illustrate the interplay between workplace conduct that violates federal anti-discrimination law, but, under current precedent, may remain protected under the NLRA. Finally, this Part concludes by suggesting that the norms of appropriate workplace behavior have evolved over the years, and that the NLRB's standards have largely overlooked these changes.

#### A. *Actionable Harassment in the Workplace Under Federal Anti-Discrimination Laws*

Title VII makes it unlawful for an employer to discharge, refuse to hire, "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>144</sup> The

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142. *See infra* section III.C. Federal anti-discrimination laws and the NLRA both address the lawful or unlawful workplace speech or conduct. However, the two are distinct in that the NLRA applies specifically to union speech while federal anti-discrimination laws apply to all workplace speech. While State laws may also impose anti-discrimination obligations for an employer, this Comment focuses solely on federal law.

143. 42 U.S.C. § 2000e-2(a).

144. *Id.* Title VII's prohibition on discrimination extends to a prohibition on harassment based on the same protected traits. *See, e.g.,* *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799–801 (8th Cir. 2003) (concluding that harassment based on national origin was actionable where Hispanic employees were mocked about their accent and told "Hispanics should be cleaning" and "Hispanics are stupid"); *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007) (finding that case law

law's prohibition on discrimination with respect to "terms, conditions, or privileges of employment" covers harassment involving a protected characteristic that "create[s] a hostile or abusive work environment."<sup>145</sup> Title VII also prohibits employers from retaliating against employees who oppose "unlawful employment practice[s]."<sup>146</sup> The Americans with Disabilities Act<sup>147</sup> (ADA) and the Age Discrimination in Employment Act<sup>148</sup> (ADEA) prohibit workplace discrimination and harassment based on a disability<sup>149</sup> and age,<sup>150</sup> respectively. An employer could violate federal anti-discrimination law when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"<sup>151</sup> But not all workplace harassment is actionable under federal law.<sup>152</sup>

To be actionable under federal anti-discrimination law, workplace harassment must be "objectively hostile or abusive" and the victim must "subjectively perceive the environment to be [hostile or] abusive."<sup>153</sup>

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"establishes that the use of sexually degrading, gender-specific epithets, such as . . . 'b[\*\*\*]h,' . . . has been consistently held to constitute harassment based upon sex").

145. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) ("Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category such as sex." (quoting *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1301–02 (11th Cir. 2007))).

146. 42 U.S.C. § 2000e-3(a).

147. 42 U.S.C. § 12112(a).

148. 29 U.S.C. § 623.

149. 42 U.S.C. § 12112(a); *see, e.g.*, *Quiles-Quiles v. Henderson*, 439 F.3d 1, 3, 7–8 (1st Cir. 2006) (affirming jury verdict under ADA for harassment based on the employee's disability where the evidence demonstrated that the employee's supervisors mocked him, made comments to other employees, and drove a truck at him while he crossed a street).

150. 29 U.S.C. § 623(a)(1); *see, e.g.*, *Davis-Garett v. Urb. Outfitters, Inc.*, 921 F.3d 30, 42 (2d Cir. 2019) (reversing the district court's grant of summary judgment to defendants on the plaintiff's age harassment claim because a triable issue of material fact existed as to plaintiff's claim of a hostile work environment based on daily "age-disparaging criticisms" directed at the plaintiff).

151. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986)).

152. *See id.*

153. *Id.* at 21–22 ("So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (citations omitted)); *see also* *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 871 (9th Cir. 2001); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) ("Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics."). Workplace harassment based on protected characteristics is only actionable under Title VII if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working

Courts and the Equal Employment Opportunity Commission (EEOC) determine whether the harassment was sufficiently hostile or abusive by looking at the totality of the circumstances.<sup>154</sup> These can include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>155</sup> However, no single factor is required for a claim of workplace harassment to succeed.<sup>156</sup>

With specific regard to workplace sexual harassment claims, the totality of the circumstances analysis generally includes consideration of the harasser’s status, who witnessed the harassment, where the harassment occurred, how often the harassment occurred, what the outburst involved, and the social context in which the outburst occurred.<sup>157</sup> Courts may consider whether the harasser was a supervisor, coworker, or non-employee.<sup>158</sup> Harassment from a supervisor is “inherently more severe than that of a coworker because of the supervisor’s authority over the employee.”<sup>159</sup> A coworker’s harassment, however, can also lead to a hostile work environment.<sup>160</sup> Harassment is generally most severe when

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environment.” *Meritor Sav. Bank*, 477 U.S. at 67 (internal quotation marks and citation omitted).

154. *Harris*, 510 U.S. at 23; *see also* 29 C.F.R. § 1604.11(a)–(b) (2019). The Equal Employment Opportunity Commission’s Guidelines on Discrimination Because of Sex require the Commission to assess the totality of the circumstances in determining whether an individual’s claim of sexual harassment in the workplace is actionable. 29 C.F.R. § 1604.11(a)–(b).

155. *Harris*, 510 U.S. at 23; *see also* *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (quoting *Harris*, 510 U.S. at 23).

156. *Harris*, 510 U.S. at 23.

157. *Id.* (“These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”); *Martinez v. Marin Sanitary Serv.*, 349 F. Supp. 2d 1234, 1253 (N.D. Cal. 2004) (“When the harassment comes from a supervisor, rather than a coworker, the conduct may be considered more severe.”); *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) (“[A] sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.”).

158. *See, e.g.*, *EEOC v. Fed. Express Corp.*, No. C94-790C, 1995 WL 569446, at \*3 (W.D. Wash. Aug. 8, 1995) (noting that Title VII protects employees from harassment instigated by non-employees).

159. Brief of EEOC as Amicus Curiae at 10, *Gen. Motors LLC*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242) [hereinafter *EEOC*]; *see also* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) (“[A] supervisor’s power and authority invests his or her harassing conduct with a particular threatening character . . . .”); *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc) (“In measuring the severity of harassing conduct, the status of the harasser may be a significant factor . . . .”).

160. *Franchina v. City of Providence*, 881 F.3d 32, 55 (1st Cir. 2018) (finding that a reasonable trier of fact could determine that a hostile work environment existed based on evidence that the

directed at a specific individual, although indirect harassment can create a hostile work environment as well.<sup>161</sup> Courts have also concluded that harassment might be more severe when it occurs in the presence of others.<sup>162</sup>

The frequency and gravity of the conduct is also important for a court to consider in determining if harassment meets the “severe or pervasive” requirement.<sup>163</sup> Even isolated incidents of severe harassment can be actionable, especially if the harassment is sexual or race-based.<sup>164</sup> Furthermore, harassment can meet the sufficiently severe requirement even if it is not physically threatening.<sup>165</sup> Finally, the social context in which “behavior occurs and is experienced by its target” is also important in determining whether the harassment created a hostile work environment.<sup>166</sup> The objective hostility of the harassment requires “an

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plaintiff’s coworker subjected her to “humiliating sexual remarks and innuendos”); *see also infra* section III.B.

161. *See, e.g.,* *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 647 n.2 (7th Cir. 2011) (“[S]econdhand harassment is less severe than firsthand harassment.”); *see also* *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (“It is enough to hear co-workers on a daily basis refer to female colleagues as ‘b[\*\*\*]hes,’ ‘wh[\*]res’ and ‘c[\*]nts,’ to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff specifically: ‘and you are a “b[\*\*\*]h,” too.’”); *Adams v. Austal, USA, LLC*, 754 F.3d 1240, 1253 (11th Cir. 2014) (noting that while a noose in breakroom “is a severe form of racial harassment,” the plaintiff’s experience “was less severe because he did not see it firsthand”).

162. *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000).

163. *See* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see also* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001) (“The required level of severity or seriousness ‘varies inversely with the pervasiveness or frequency of the conduct.’ ‘[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.’” (citations omitted)).

164. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (“[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.”); *Gerald v. Univ. of P.R.*, 707 F.3d 7, 18 (1st Cir. 2013) (concluding that plaintiff successfully established a hostile work environment claim where her male supervisor grabbed her breast and made sexually suggestive noises); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 213 (D. Mass. 2006) (concluding that “a reasonable jury could determine that the noose incident, standing alone, was *objectively* hostile or abusive” and created a hostile work environment (emphasis in original)); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (finding that a “single incident might well have been sufficient to establish a hostile work environment” in a case involving a supervisor who “used a deeply offensive racial epithet [‘n\*\*\*\*r’] when yelling at [the employee] to get out of the office”).

165. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (“Names can hurt as much as sticks and stones, and the Supreme Court has never indicated that the humiliation so frequently attached to hostile environments need be accompanied by physical threat or force.”).

166. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (“A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.”).



appropriate sensitivity to social context.”<sup>167</sup> This sensitivity to social context helps courts to distinguish “between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”<sup>168</sup>

Although context matters under the Title VII totality of circumstances analysis, courts have refused to grant leeway to employees who make racist or sexist comments despite an alleged workplace norm.<sup>169</sup> Contrary to NLRB precedent regarding the scope of acceptable conduct in a workplace bargaining context, courts interpreting Title VII have consistently held that there is no crude work environment or industrial life workplace justification for offensive language.<sup>170</sup> Further, there is no exception under Title VII for offensive comments made by an employee who has impassioned feelings about workplace matters.<sup>171</sup> Under Title VII, severe or pervasive harassment based on a protected characteristic is unlawful if it is both objectively and subjectively hostile—there is no statutory safeguard for discriminatory behavior based on norms of the workplace.<sup>172</sup>

### *B. Employer Liability for Workplace Harassment*

Courts and agencies have held that an employer can be liable for workplace harassment, but the degree of liability depends on the perpetrator’s identity as either a supervisor, coworker, or non-employee.<sup>173</sup> Employers are vicariously liable<sup>174</sup> for a hostile work

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167. *Id.* at 82 (The “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”).

168. *Id.*

169. *See Sunbelt Rentals*, 521 F.3d at 318.

170. *See id.* (“Title VII contains no [ ] ‘crude environment’ exception, and to read one into it might vitiate statutory safeguards for those who need them most.”); *Quiles-Quiles v. Henderson*, 439 F.3d 1, 7 (1st Cir. 2006) (noting that an employer could not argue that daily harassment about the employee’s disability was not actionable because that type of “conduct is common in blue-collar workplaces”); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999); *cf. Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972, 978–79 (2014).

171. Susan Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL’Y REV. 2, 22–29, 37–47 (2016).

172. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

173. *See Vance v. Ball State Univ.*, 570 U.S. 421, 427–29 (2013).

174. As union representatives are often not supervisors, the standard applicable to liability for supervisor harassment is not relevant to this Comment’s focus on the intersection between Title VII and NLRA standards for evaluating inappropriate conduct by a union representative. This Comment will focus on the standard applicable to coworker or non-employee harassment.

environment created by a supervisor's harassment when the supervisor takes a tangible employment action.<sup>175</sup> Such actions can include a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>176</sup>

When a non-supervisory coworker creates the hostile work environment, courts analyze an employer's liability under a negligence standard.<sup>177</sup> The standard looks at whether the employer acted reasonably to prevent or correct harassment it knew about, or should reasonably have known about.<sup>178</sup> In other words, employers must take corrective action "reasonably calculated to end the harassment" as soon as they have notice of the conduct, even if the harassment has not yet created a hostile work environment.<sup>179</sup> Courts must consider "whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior."<sup>180</sup> The type of action that will be appropriate to end the harassment will vary case-by-case. In some situations, a warning or suspension may be appropriate, whereas others may require discharge or transfer.<sup>181</sup> While it is not a complete defense, employers can demonstrate that they are preventing workplace harassment by implementing effective

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175. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

176. *Id.* ("[S]uch as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.") In defining a supervisor, the Supreme Court has held that a supervisor is someone who an employer has empowered "to take tangible employment actions against the victim." *Vance*, 570 U.S. at 431. Additionally, when the supervisor's harassment does not result in a tangible employment action, an employer may escape liability by establish "as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." *Id.* at 424 (first citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); and then citing *Burlington Indus.*, 524 U.S. at 765).

177. *Vance*, 570 U.S. at 424, 427 ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions."); see also *Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006).

178. See *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669–70 (4th Cir. 2011); *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006); *Williams v. Waste Mgmt.*, 361 F.3d 1021, 1029–30 (7th Cir. 2004); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940–41 (8th Cir. 2004); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119–21 (9th Cir. 2004).

179. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008) (quoting *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131–32 (4th Cir. 1995)); see *Erickson*, 469 F.3d at 605–06; *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027–28 (D. Nev. 1992); see also 29 C.F.R. § 1604.11(f) (2019).

180. *Scarberry v. ExxonMobil Oil Corp.*, 328 F.3d 1255, 1259–60 (10th Cir. 2003).

181. See *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 343–44 (6th Cir. 2008); *Bailey v. Runyon*, 167 F.3d 466, 467–68 (8th Cir. 1999).

anti-discrimination policies.<sup>182</sup>

Employer liability can also extend beyond the workplace, and beyond interactions between solely employees. Employers can be liable for non-employee harassment that occurs inside or outside of the workplace.<sup>183</sup> For example, employers may be responsible for a non-employee's sexual harassment of employees in the workplace when the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."<sup>184</sup> Employers can also be liable for harassment that occurs outside the workplace when that conduct affects an employee's perceived treatment inside the workplace, thus creating a hostile work environment.<sup>185</sup> When an employee is harassed outside the workplace, such as on social media, a trip for work, or a picket line, employers who do nothing to prevent or correct harassment may be liable if the conduct affects the employee's work life.<sup>186</sup>

*C. The Board's Precedent for Evaluating Racially or Sexually Offensive Language or Conduct Likely Conflicts with Federal Anti-Discrimination Laws*

In certain circumstances, NLRB precedent protects employees who engage in profane, racist, or sexist outbursts.<sup>187</sup> The conflict between this precedent and federal anti-discrimination laws may protect intolerable behavior in the workplace and subject employers to potential liability under laws like Title VII, especially because employers can be held liable

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182. *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (noting that an employer's written harassment policy was relevant to the negligence analysis in determining employer liability for harassment); *see also Powell*, 841 F. Supp. at 1027–28.

183. *Powell*, 841 F. Supp. at 1024; *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997); *EEOC v. Fed. Express Corp.*, No. C94-790C, 1995 WL 569446, at \*3 (W.D. Wash. Aug. 8, 1995) (“Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.’ The alleged harassment here was instigated by a FedEx customer and directed at a FedEx employee during the course and scope of her employment. FedEx cannot escape the dictates of Title VII on the fortuitous ground that its employees are couriers whose duties take them onto the premises of FedEx customers.” (citations omitted)).

184. 29 C.F.R. § 1604.11(e) (2019).

185. *See Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 n.4 (1st Cir. 2019) (finding that Facebook messages could be considered when determining if an employee's harassment created a hostile work environment, particularly where they were about workplace conduct and were sent by someone who worked with the plaintiff).

186. *Fed. Express*, 1995 WL 569446, at \*2–4; *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966–69 (9th Cir. 2002).

187. *See Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972 (2014); *Pier Sixty, LLC*, 362 N.L.R.B. 505 (2015); *Cooper Tire & Rubber Co.*, 363 N.L.R.B. No. 194 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

for harassment created by employees or nonemployees.<sup>188</sup> To comply with the NLRA, an employer may be forced to continue bargaining with union members who are creating a hostile workplace and may not be allowed to discipline employees for engaging in conduct that violates federal law. This makes it difficult for an employer to abide by its obligations under both federal anti-discrimination laws and the NLRA, and it could leave the employer vulnerable to a discrimination claim under Title VII. The court in *Adtranz ABB Daimler-Benz Transportation, National Ass'n v. NLRB*<sup>189</sup> addressed this discrepancy when it noted the issues that employers face when the Board finds unlawful behavior to be protected under the NLRA: employers are subject to civil liability if they fail to maintain a workplace free of harassment, but some abusive language protected under the NLRA “can constitute verbal harassment triggering liability under state or federal law.”<sup>190</sup> Thus, to bar or limit an employer’s ability to “insulate itself from such liability is to place it in a ‘catch 22.’”<sup>191</sup>

1. *NLRB Precedent Protecting Racially or Sexually Offensive Language/Conduct*

In *Constellium Rolled Products Ravenswood, LLC*,<sup>192</sup> the Board found the employer had violated the NLRA by terminating employee Andrew Williams after he wrote a sexually offensive statement on the employer’s overtime signup sheets.<sup>193</sup> This event occurred after the Union and the employer reached an impasse during bargaining, leading to the employer’s unilateral implementation of a new overtime scheduling system.<sup>194</sup> Under the new policy, employees interested in working overtime could sign up on a sheet posted on a bulletin board outside the lunchroom.<sup>195</sup> The employees who opposed the new system began calling the overtime signup sheets a “wh[\*]re board,” “clearly implying that those who signed it were compromising their loyalty to the Union and their coworkers in order to benefit themselves and accommodate” the

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188. *Powell*, 841 F. Supp. at 1024; *Folkerson*, 107 F.3d at 756; *Fed. Express*, 1995 WL 569446, at \*3.

189. 253 F.3d 19 (D.C. Cir. 2001).

190. *Id.* at 27.

191. *Id.*

192. 366 N.L.R.B. No. 131 (July 24, 2018).

193. *Id.*, slip op. at 1.

194. *Id.*

195. *Id.*

employer.<sup>196</sup> The term “wh[\*]re board” became a “common expression, frequently uttered even by supervisors.”<sup>197</sup> The Board found no evidence that the employer censored or punished employees for using the expression.<sup>198</sup> During the ongoing dispute regarding the overtime policy, Williams wrote “wh[\*]re board” at the top of the overtime signup sheets.<sup>199</sup> The employer suspended, and ultimately terminated, Williams for “willfully and deliberately engaging in insulting and harassing conduct.”<sup>200</sup>

The Board held, contrary to the ALJ, that the employer violated the Act when it terminated Williams.<sup>201</sup> It concluded that Williams was engaged in protected activity when he wrote “wh[\*]re board” on the overtime signup sheets because his act was a “continuation and outgrowth of the employees’ boycott and opposition to the Respondent’s implementation of an overtime policy.”<sup>202</sup> Applying the *Atlantic Steel* test, the Board concluded that Williams’s protected activity was not so egregious as to lose the NLRA’s protection.<sup>203</sup>

The NLRB found the location factor neutral or slightly in favor of losing the Act’s protection.<sup>204</sup> The signup sheets were in a highly-trafficked work area right outside of the lunchroom.<sup>205</sup> Thus, Williams’s sexist expression “was certain to be seen by employees.”<sup>206</sup> However, because the weekly signup sheets were “temporary in nature and could have been easily removed or replaced,” the Board concluded that Williams’s conduct did not disrupt work or interfere with the use of the signup sheets.<sup>207</sup>

As to the subject matter of the dispute, the NLRB found it strongly favored retaining the Act’s protection.<sup>208</sup> Other employees previously had protested the employer’s new overtime policy and had used the same

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196. *Id.*

197. *Id.*

198. *Id.* (“Indeed, there appears to have been a general laxity toward profane and vulgar language in the workplace.”).

199. *Id.*, slip op. at 2.

200. *Constellium Rolled Prods. Ravenswood, LLC v. NLRB*, 945 F.3d 546, 549–51 (D.C. Cir. 2019).

201. *Constellium*, slip op. at 4.

202. *Id.*, slip op. at 2.

203. *Id.*, slip. op. at 3.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

expression as Williams—“wh[\*]re board.”<sup>209</sup> Thus, the Board concluded that Williams’s conduct and use of the term was directly related to the ongoing employee opposition of the new policy.<sup>210</sup>

The NLRB found that the nature of Williams’s conduct favored protection of the Act.<sup>211</sup> It noted that his outburst was spontaneous and directed at his coworkers and his employer, not just an act of “mere vandalism.”<sup>212</sup> While the Board acknowledged that Williams’s word choice “was harsh and arguably vulgar,” it noted that the expression reflected his and his coworkers’ “strong feelings about the ongoing dispute” related to the new policy.<sup>213</sup> Referring to the norms of the workplace, the Board noted that the employer’s failure to discipline employees’ for their use of the expression “wh[\*]re board”—and “general tolerance of profanity in the workplace”—weakened any argument that Williams’s expression was egregious.<sup>214</sup>

Finally, the NLRB concluded that the provocation factor was neutral.<sup>215</sup> The employer’s unilateral implementation of the new overtime policy precipitated a labor dispute and employee protest.<sup>216</sup> The Board noted that Williams’s act was a response to the employees’ boycott and his belief that the implementation of the new policy violated the terms of the expired collective-bargaining agreement.<sup>217</sup> However, it also found that Williams’s act was not an immediate reaction to an unfair labor practice or any type of uncivil conduct by the employer.<sup>218</sup>

In *Cooper Tire & Rubber Co.*,<sup>219</sup> an employee on a picket line shouted obscenities at predominantly African-American replacement workers, including “Hey, did you bring enough KFC for everyone?” and “Hey anybody smell that? I smell fried chicken and watermelon.”<sup>220</sup> Fellow picketers allegedly laughed at the employee’s offensive comments,

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*, slip. op. at 4.

216. *Id.*, slip. op. at 3.

217. *Id.*

218. *Id.*, slip. op. at 4 (noting that it was not a reaction to an unfair labor practice because the Board had not yet deemed the implementation of the new policy unfair).

219. 363 N.L.R.B. No. 194 (May 17, 2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

220. *Id.*, slip. op. at 4.

mocking the replacement workers in the process.<sup>221</sup> The employer fired the employee based on his comments made during the strike because the comments violated the company's anti-harassment policy and the union's conduct rules.<sup>222</sup>

The Board, affirming the ALJ's ruling, required the employee's reinstatement, concluding that the NLRA protected the employee's use of racial slurs on the picket line.<sup>223</sup> The ALJ concluded that the employee's conduct was racist and offensive, but under the *Clear Pine Mouldings, Inc.*<sup>224</sup> standard, "did not tend to coerce or intimidate employees," nor did it "raise a reasonable likelihood of an imminent physical confrontation."<sup>225</sup> Additionally, the employee's statements were "unaccompanied by any threatening behavior or physical acts of intimidation."<sup>226</sup> These findings were consistent with clearly established Board precedent holding that a "striker's or picketer's use of even the most vile language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat."<sup>227</sup>

2. *Racially or Sexually Offensive Language/Conduct Similar to That Protected by NLRB Precedent is Found by Courts to Violate Title VII*

To avoid liability for harassment, employers have an obligation to take prompt, effective action to stop and prevent harassing conduct in violation of Title VII. Consequently, an employer that refrains from remedial action because it is trying to meet NLRA obligations may find itself facing liability under Title VII. This section compares similar conduct that violates Title VII but is protected under the NLRA.

In *Howley v. Town of Stratford*,<sup>228</sup> the Second Circuit Court of Appeals

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221. *Id.*

222. *Id.*, slip. op. at 5.

223. *Id.*, slip. op. at 1, 5, 12.

224. 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985); *see supra* section I.B.

225. *Cooper Tire*, slip. op. at 5–8, 10. ("[In *Clear Pine Mouldings*, the Board adopted a test] for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate. According to that test, an employer can lawfully deny reinstatement to a striker if his misconduct is such that under the circumstances, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act . . . . Since the *Clear Pine Mouldings* standard is an objective one, it does not involve an inquiry into whether any particular employee was coerced or intimidated." (citations omitted)).

226. *Id.*, slip. op. at 8.

227. *Id.*

228. 217 F.3d 141 (2d Cir. 2000).

held that the district court erred in granting summary judgment and dismissing the plaintiff's hostile-work-environment claim.<sup>229</sup> The case involved a female firefighter who brought a Title VII action against the town and her coworker, alleging both sexual harassment and failure to promote.<sup>230</sup> The court noted that considering the totality of the circumstances, the coworker's conduct "could reasonably be viewed as having intolerably altered [the plaintiff's] work environment."<sup>231</sup> The court buffered its conclusion by finding that the coworker "did not simply make a few offensive comments; nor did he air his views in private; nor were his comments merely obscene without an apparent connection to [the plaintiff's] ability to perform her job."<sup>232</sup> The coworker made obscene comments on one occasion, but did so at length, loudly, and in front of a large group of the female plaintiff's male subordinates.<sup>233</sup> His comments included allegations that the plaintiff had only gained her position by performing sexual acts.<sup>234</sup> Because a firefighter's success often depends on the "unquestioning execution of line-of-command orders in emergency situations," gender-based skepticism as to the competence of a commanding officer may easily "diminish[] the respect accorded the officer by subordinates and thereby impair[] her ability to lead in the life-threatening circumstances often faced by firefighters."<sup>235</sup> The court concluded, as a matter of law, that a "rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley's working conditions."<sup>236</sup>

Likewise, in *EEOC v. Central Wholesalers, Inc.*,<sup>237</sup> the Fourth Circuit Court of Appeals reversed the district court's grant of summary judgment to the defendant, Central Wholesalers.<sup>238</sup> The plaintiff's coworkers "used the word b\*\*\*h on a daily basis when referring to women," had Playboy items in the office, watched porn next to the plaintiff, and had screensavers depicting partially naked women.<sup>239</sup> One coworker called the

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229. *Id.* at 145.

230. *Id.*

231. *Id.* at 154.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. 573 F.3d 167 (4th Cir. 2009).

238. *Id.* at 179.

239. *Id.* at 175.



plaintiff a “b\*\*\*h” a number of times during one outburst at work.<sup>240</sup> The court also noted that multiple of the plaintiff’s coworkers used the word “n\*\*\*\*r in her presence on a regular basis,” and one coworker called the plaintiff “a [B]lack stupid n\*\*\*\*r and other racially derogatory terms” during a single outburst at work.<sup>241</sup> The court concluded that a reasonable jury could find that the plaintiff perceived the harassment based on her race and gender to be sufficiently abusive or hostile, as she had complained that she found the harassment objectionable and it caused her emotional distress.<sup>242</sup> Additionally, the court held that a reasonable jury could find that the gender-based and race-based harassment was objectively severe or pervasive.<sup>243</sup> Its conclusion was supported by evidence that the plaintiff’s coworkers used offensive and derogatory words like “b\*\*\*h” and “n\*\*\*\*r” in the workplace on a regular basis.<sup>244</sup>

These cases illustrate how the NLRA potentially protects individuals when they engage in one type of behavior, while Title VII may not. Another key difference is that under Title VII, courts generally consider both the employer’s obligations under federal anti-discrimination laws and the alleged harasser’s conduct. But in NLRA cases, the Board rarely, if ever, considers the employer’s obligations to maintain a harassment-free workplace under anti-discrimination laws.

*D. The NLRB’s Outdated Views of Protected Union Speech Overlook the Changes in Our Culture*

The boundaries of tolerated workplace behavior have evolved drastically over the past few decades due to growing social pressure to establish workplaces that value civility, respect, and inclusion. Employers and workers alike have expressed a commitment to these values. NLRB standards, however, have allowed profanity, vulgarity, obscenity, and harassment in the workplace under the guise of being part of industrial life or norms of the workplace. These standards are outdated and unproductive. Since the enactment of the NLRA eighty-five years ago, the type of behavior that is tolerated both in and outside of the workplace has changed drastically.

One societal revolution at the forefront of this change in tolerated

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240. *Id.*

241. *Id.* (“In addition, both Tony and DaBay kept blue-colored mop-head dolls in their offices and had the dolls hanging from nooses which were tied around the dolls’ necks.”)

242. *Id.* at 176.

243. *Id.*

244. *Id.* at 176–77.

workplace behavior is the #MeToo movement.<sup>245</sup> The movement emerged in late 2017 and challenges workplace conduct that previously went unchecked.<sup>246</sup> It encourages and empowers victims of workplace sexual harassment and abuse to come forward, and for organizations to re-examine the issues plaguing their workplaces.<sup>247</sup> One possible explanation for this shift is that workplace cultures in the 1970s paid insufficient attention to employee complaints about harassment. The movement has prompted state legislatures to re-evaluate certain legal standards and introduce new bills governing workplace conduct that limit certain types of speech and protect workers.<sup>248</sup> Some of the new legislation altered the standard that harassment must be considered “severe or pervasive” to be a hostile work environment.<sup>249</sup> Others extended legal protections against harassment beyond just employees to contractors, interns, volunteers, and students.<sup>250</sup> The new legislation also aims to promote transparency when handling harassment claims by requiring certain employers or agencies to report investigations and settlements.<sup>251</sup> Many states also considered requiring anti-harassment policies in the workplace, even though these are not required by federal law.<sup>252</sup> Finally, some lawmakers tried to tighten employer liability for harassment in the workplace by ensuring they would be held legally responsible even if an individual did not make a

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245. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1147–49 (2019).

246. *Id.*; see *#MeToo: A Timeline of Events*, CHI. TRIBUNE (July 2, 2020, 10:49 AM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> [<https://perma.cc/Z9R4-WNHM>].

247. Sindhu Sundar, *How #MeToo Is Changing Internal Investigations*, LAW360 (Jan. 28, 2018, 9:17 PM EST), [https://www.cov.com/-/media/files/corporate/publications/2018/01/how\\_metoo\\_is\\_changing\\_internal\\_investigations.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/01/how_metoo_is_changing_internal_investigations.pdf) [<https://perma.cc/PGM7-AWP9>].

248. ANDREA JOHNSON ET AL., NAT’L WOMEN’S L. CTR., PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020, at 2 (2019), <https://nwlc-ciw49tixgw5lbab.stackpath.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf> [<https://perma.cc/RNP7-6LA3>] (noting that by the end of 2018, nearly 300 organizations and 300 state legislators from 40 states came together to call for strengthened protections against sexual harassment and violence in the workplace); *id.* (“[S]tate legislators have introduced around 200 bills to strengthen protections against workplace harassment in the past two years, and to date, 15 states have passed new protections.”). While Congress has not passed substantive legislature on the issue, Senator Patty Murray and Representative Katherine Clark introduced the BE HEARD bill in an effort to address harassment in the workplace. *Id.* at 4 (citing BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019)).

249. See CAL. GOV’T CODE § 12923 (West 2020); Assemb. B. 8421, 2019–2020 Reg. Sess. (N.Y. 2019).

250. See H. Substitute 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018); S.B. 7507C, 2017–2018 Leg. Sess. (N.Y. 2018); H.B. 679, 2019 Reg. Sess. (Md. 2019).

251. See Disclosing Sexual Harassment in the Workplace Act of 2018, S.B. 1010, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); S.B. 0075, 101st Gen. Assemb. (Ill. 2019).

252. See S.B. 726, 80th Leg., Reg. Sess. (Or. 2019); S.B. 6471, 65th Leg., 2018 Reg. Sess. (Wash. 2018); Vermont Act 183, H.707, 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

complaint.<sup>253</sup> These new laws hold employers liable for harassment by any supervisor with the power to make employment status decisions.<sup>254</sup>

The #MeToo movement has empowered individuals to be less tolerant of abusive workplace environments and more comfortable reporting violations or harassing behaviors in the workplace. During 2018, the EEOC filed sixty-six lawsuits involving unlawful workplace harassment, and forty-one alleging sexual harassment.<sup>255</sup> This was more than a 50% increase from the number of lawsuits filed the prior year, while the number of charges filed by employees alleging sexual harassment increased by over 12% from the prior year.<sup>256</sup> Additionally, the EEOC found probable cause to believe that unlawful harassment had occurred in nearly 1,200 charges filed, a nearly 25% increase from 2017.<sup>257</sup> These statistics demonstrate the growing intolerance for harassment in the workplace. In most workplaces today, “the prevailing ‘realities’ reflect a commitment to preventing and rooting out discrimination that takes the form of sexually or racially profane or intimidating speech.”<sup>258</sup>

Similar to addressing issues of sexual harassment, new movements are also challenging society’s tolerance of racial harassment in the workplace. The Black Lives Matter movement, which began in 2016, is one example of a revolution that has put a spotlight on the racial inequity and injustice that permeates society.<sup>259</sup> While this movement originated with a focus on racism within the criminal justice system, it has prompted a discussion regarding the ways in which racism arises in other areas of life, such as the workplace.<sup>260</sup> In almost every workplace in America, “[r]acial

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253. See Assemb. B. 8421, 2019–2020 Reg. Sess. (N.Y. 2019).

254. See H. Substitute 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018); H.B. 679, 2019 Reg. Sess. (Md. 2019). These states expanded employer accountability for harassment by lower-level supervisors, counter to the *Vance* Supreme Court decision. That decision limited a victim’s ability to recover under federal law when they experience sexual harassment by low-level supervisors (meaning employees without the ability to hire or fire). The Court refused to hold employers vicariously liable for the harassment of employees by low level supervisors. Many state courts follow federal law interpretations, like the *Vance* decision, when interpreting state harassment laws. See JOHNSON ET AL., *supra* note 248, at 11.

255. *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, EQUAL EMP. OPPORTUNITY COMM’N (Oct. 2018), <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [<https://perma.cc/QKM5-WBPS>].

256. *Id.*

257. *See id.*

258. Brief of Coal. for a Democratic Workforce as Amici Curie at 15, *Gen. Motors LLC*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242) [hereinafter *Democratic Workforce*].

259. *What We Believe*, BLACK LIVES MATTER, <https://blacklivesmatter.com/what-we-believe/> [<https://perma.cc/9M3B-RXRN>].

260. Emily Peck, *The Reckoning Over Workplace Racism Has Begun*, HUFFPOST (June 9, 2020,

discrimination is a problem that's bubbling under the surface."<sup>261</sup> For example, Mark Luckie, a former Facebook employee, wrote a statement about how the lack of Black representation at Facebook negatively impacts the work environment for Black employees and the experiences that the Black community has on Facebook.<sup>262</sup> During his time at Facebook, he describes how Black employees frequently complained about coworkers and managers who called them "aggressive or hostile for how they share their thoughts," and about being accosted by campus security.<sup>263</sup> By ignoring the mistreatment and marginalization of Black employees, Luckie asserted that Facebook's few Black employees will not want to remain at the company, which in turn may "undermine the quality and reach of [the] products."<sup>264</sup> Similar to the #MeToo movement, the Black Lives Matter movement will likely empower Black employees and other employees of color to share stories of mistreatment and protest racial harassment and inequities both in and outside the workplace.<sup>265</sup> Such a movement highlights the issues that the Black community may

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5:57 PM), [https://www.huffpost.com/entry/like-me-too-but-for-racism\\_n\\_5edfee15c5b64843bde220d0](https://www.huffpost.com/entry/like-me-too-but-for-racism_n_5edfee15c5b64843bde220d0) [<https://perma.cc/8C9X-T6QD>] ("Like they have been for years, Black people and other people of color are calling out not just police brutality, but also racism, discrimination, harassment and racial bias in the workplace."); Jon Hyman, *Why #BlackLivesMatter Should Matter to Employers*, WORKFORCE (July 13, 2016), <https://www.workforce.com/news/why-blacklivesmatter-should-matter-to-employers> [<https://perma.cc/W2G7-8BWT>] ("If America is polarized over these issues, so are your workers.").

261. Arran Heal, *Is Racial Discrimination the Next MeToo?*, MEDIATE (Aug. 2019), <https://www.mediate.com/articles/heal-racial-discrimination.cfm> [<https://perma.cc/PW4J-USS7>].

262. Jessica Guynn, *Facebook Has a Problem With Black People, Former Employee Charges*, USA TODAY (Nov. 27, 2018), <https://www.usatoday.com/story/news/2018/11/27/facebook-has-problem-black-people-former-employee-says/2126056002/> [<https://perma.cc/9EQN-TLY8>] ("Under pressure to make its workforce more closely resemble the more than 2 billion users it serves, Facebook increased the number of black employees to 4 percent of U.S. employees in 2018 from 2 percent in 2016. Yet just 1 percent of technical roles are held by blacks and 2 percent of leadership roles. Black women account for an even smaller fraction of the workforce. Overall, Facebook employs 278 black women out of a U.S. workforce of just under 20,000.").

263. *Id.* Luckie also notes how "black people here are scared of talking about the issues that affect them because they don't see this as a supportive company." *Id.* (internal quotation marks omitted).

264. *Id.*

265. Peck, *supra* note 260 ("The founder of lifestyle retailer Ban.Do, Jen Gotch, announced she would take a leave of absence after a former employee shared a detailed post describing both covert and overt racism at the company. The CEO of clothing company Reformation is also under fire after former employees spoke up about racism. A reckoning could be at hand."); Jessica Guynn, *Zuckerberg Reprimands Facebook Staff Defacing 'Black Lives Matter,'* USA TODAY (Feb. 26, 2016), <https://www.usatoday.com/story/tech/news/2016/02/25/facebook-mark-zuckerberg-black-lives-matter-diversity/80933694/> [<https://perma.cc/MC5S-ATQN>]; Sam Wood, *Jefferson Health Fires Employee Over Racist Facebook Post*, PHILA. INQUIRER (July 14, 2016), [https://www.inquirer.com/philly/health/20160715\\_A\\_racist\\_Facebook\\_post\\_leads\\_to\\_firing\\_of\\_Jefferson\\_employee.html](https://www.inquirer.com/philly/health/20160715_A_racist_Facebook_post_leads_to_firing_of_Jefferson_employee.html) [<https://perma.cc/W5LU-66ZZ>].

face if they find themselves subjected to the NLRB's antiquated standards.

In the wake of these movements, even the NLRB appears to be aware that its precedent is outdated. In July 2020, after months of litigation and a flurry of amicus briefs urging the NLRB to overrule its precedent protecting profane and racially-charged outbursts,<sup>266</sup> the NLRB issued its decision in *General Motors LLC*<sup>267</sup> that acknowledged the tension between federal anti-discrimination laws and the NLRA's speech protections as applied to employees.<sup>268</sup> The decision states that the NLRA is not meant to protect abusive conduct and, as such, the NLRB must interpret the NLRA in a way that allows employers to maintain a workplace free from harassment by other employees.<sup>269</sup> However, the case focuses on the conduct of an employee union member. It does not address what—if any—right the employer has to refuse to interact with a non-employee union representative so that it can keep its workplace harassment-free without violating its duty to bargain with the union.

The NLRB has taken the first step in making a change, but there is a long way to go to dismantle the NLRB's pattern of deciding cases seemingly without any consideration of employer liability under Title VII or whether the employee's speech violates Title VII.<sup>270</sup> Much of the speech that the NLRB has protected may violate federal anti-discrimination laws, as it would create a hostile work environment. The

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266. See Press Release, Nat'l Lab. Rels. Bd., Board Invites Briefs Regarding NLRA Protection for Profane or Offensive Statements (Sept. 5, 2019), <https://www.nlr.gov/news-outreach/news-story/board-invites-briefs-regarding-nlra-protection-for-profane-or-offensive> [<https://perma.cc/B4BV-HZJ8>]. The Board invited interested parties to address five questions: (1) when should profane language or sexually or racially offensive speech lose the protection of the Act; (2) to what extent should the realities of industrial life protection of speech under the NLRA remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex; (3) should the Board continue to take into account the norms of the workplace, like whether profanity is commonplace and tolerated, in determining whether an employee's outburst is unprotected; (4) should the Board continue to follow its previous standards to the extent it permitted a finding in those cases that racially or sexually offensive language did not lose the protection of the Act; and (5) "[w]hat relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act?" Gen. Motors LLC, 368 N.L.R.B. No. 68, slip op. at 2–3 (Sept. 5, 2019) (Cases 14-CA-197985 and 14-CA-208242) (describing the NLRB's notice and invitation to file briefs in the case).

267. 369 N.L.R.B. No. 127 (July 21, 2020) (Cases 14-CA-197985 and 14-CA-208242).

268. *Id.*, slip op. at 6–8.

269. *Id.*, slip op. at 7–8.

270. See *supra* Parts I, II, & III. In *General Motors*, the Board stated that they overrule "all pertinent cases to the extent that they are inconsistent with this holding." *General Motors*, slip op. at 2. However, this decision is the first of its kind, and it remains to be seen how this decision will be interpreted and applied in the future.

fact that the NLRB just issued the *General Motors* decision addressing how federal anti-discrimination laws relate to employee and union rights under the NLRA adds to the relevance of what this Comment seeks to address. Today's society demands that the NLRA no longer shield the previously protected, egregious workplace behavior.

#### IV. THE TIME IS RIPE FOR THE NLRB TO STOP PROTECTING HARASSING SPEECH

NLRB precedent has protected employees engaged in union activities even if they use profanity and racially- or sexually-charged language that is wholly inappropriate in a modern workplace.<sup>271</sup> The Board's standards for assessing protected conduct under the NLRA have allowed the Act to become a shield for unlawful discrimination, inappropriate language, threats of violence, and racist speech.<sup>272</sup> The Board has protected employees who have targeted coworkers based on their race or gender, with obscenity or violence, while ignoring the harm inflicted on the affected employees and the work environment. Its speech and bad faith bargaining standards have also shielded union representatives who create hostile environments while engaging in union work. Even though the Board has recognized that the differences in power between workers and employers can cause emotions to flare up during discussions about working conditions,<sup>273</sup> this does not mean that conduct should be immune from repercussions. Union members are entitled to a wide range of freedom and latitude in their communication, but it should not be unlimited,<sup>274</sup> something that even the NLRB recognizes.<sup>275</sup> Now is the time for the NLRB to fully abandon its current understanding of bad faith bargaining and protected speech, and—as this Comment outlines—shape

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271. *See supra* section III.C. “Board law currently weighs so heavily in favor of protecting profane, sexually offensive, and racially offensive language that it can almost be deemed to promote such behavior.” Brief of USPS as Amicus Curiae at 1, *Gen. Motors LLC*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242).

272. Michael H. LeRoy, *Sturred Speech: How the NLRB Tolerates Racism*, 8 COLUM. J. RACE & L. 209, 224 (2018).

273. *See Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. 309 (1975).

274. *See supra* Part I.

275. *See supra* section I.B; *Gen. Motors LLC*, 369 N.L.R.B. No. 127, slip op. at 8 (July 21, 2020) (Cases 14-CA-197985 and 14-CA-208242) (noting that “[a]busive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line)”; *see also Plaza Auto Ctr., Inc.*, 360 N.L.R.B. 972, 985–86 (2014) (Member Johnson, dissenting) (noting that employees engaged in protected union activities are permitted “some leeway” to engage in outbursts under the NLRA, not “substantial leeway, [] maximum leeway, and certainly not unrestrained freedom”).

its decisions around the parameters for lawful workplace conduct established by federal anti-discrimination law, regardless of the identity of the alleged harasser. Harmonizing federal anti-discrimination law and the NLRA's standards for permissible workplace union speech will enable employers to address offensive statements or conduct that may violate anti-discrimination laws. This, in turn, will enable the NLRB and courts to strike a balance between an employer's duty to comply with federal anti-discrimination laws and the NLRA, while still affording employees protection to engage in impassioned speech.

*A. Most NLRB Precedent Has Protected Conduct That Likely Violates Federal Anti-Discrimination Law*

The Board's previous decisions, which have protected employees' hateful, profane, or obscene speech, have signaled to union representatives and employees that the NLRA can be invoked as a shield against legitimate responses to such action.<sup>276</sup> However, "[i]t is both 'preposterous' and insulting to ensconce into labor law the assumption that 'employees are incapable of organizing a union or exercising their other statutory rights under the National Labor Relations Act without resort[ing] to abusive or threatening language' targeted at a person's gender or race."<sup>277</sup> While its new decision in *General Motors* is a step in the right direction,<sup>278</sup> the NLRB still has a long way to go to harmonize the NLRA's protection of union representative conduct with federal anti-discrimination laws.

Racist, sexist, and potentially violent speech is harmful to an employee's right to a safe and discrimination-free workplace.<sup>279</sup> Additionally, incivility in the workplace "is often an antecedent to workplace harassment, as it creates a climate of 'general derision and disrespect' in which harassing behaviors are tolerated."<sup>280</sup> Racially or

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276. As various organizations noted in their amicus briefs to the NLRB on this issue, "in the 21st century, any variation on a 'she had it coming' exception is simply indefensible." Democratic Workforce, *supra* note 258.

277. *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 23 (D.C. Cir. 2016) (Millett, J., concurring) (citing *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001)).

278. *See supra* section III.D.

279. In 2016, an EEOC task force published a report investigating the nature and scope of workplace harassment. CHAI R. FELDBLUM AND VICTORIA A. LIPNIC, EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF THE CO-CHAIRS (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [<https://perma.cc/MU53-CALM>]. The task force found that incivility in the workplace often leads to workplace harassment. *Id.*

280. *Id.* at 55.

sexually offensive comments serve only to harm those to whom they are directed.

The Board has held that employees who are engaged in protected activities “generally do not lose the protective mantle of the Act simply because their activity contravenes an employer’s rules or policies.”<sup>281</sup> But such a standard may render an employer helpless in maintaining a civil and discrimination-free workplace, exposing it to potential liability from victims of harassment. The Board’s decisions must all be brought up to date with modern cultural and workplace norms. The Supreme Court has noted that the primary objective of Title VII is “not to provide redress but to avoid harm.”<sup>282</sup> As the EEOC suggests, an employer’s duty to prevent or alleviate harassment in the workplace “is best served by encouraging employees to complain of harassing conduct” before it becomes actionable.<sup>283</sup> Allowing employers to put policies in place that limit the possibility of workplace harassment would ideally prevent an actionable hostile work environment from developing.<sup>284</sup>

*B. Recommendations for Harmonizing the NLRB’s Decisions with Federal Anti-Discrimination Law*

The modern workplace demands that the Board stop excusing offensive, harassing language as incidental to the exercise of workplace rights in a confrontational or adversarial atmosphere. The Board must continue to harmonize its standards with federal anti-discrimination laws like Title VII because the NLRA should not preempt such laws.<sup>285</sup> Instead,

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281. *Greyhound Lines, Inc.*, 367 N.L.R.B. No. 123, slip op. at 21 (May 6, 2019) (citing *Crowne Plaza LaGuardia*, 357 N.L.R.B. 1097, 1101 (2011)).

282. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotation marks and citation omitted).

283. EEOC, *supra* note 159; *see also* *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (en banc) (concluding that a Black employee suing an employer regarding a single, racially derogatory comment was able to establish a retaliation claim under Title VII).

284. *See* *Honda of Am. Mfg.*, 334 N.L.R.B. 746, 748 (2001); *Avondale Indus.*, 333 N.L.R.B. 622, 637–38 (2001) (noting employer was justifiably concerned about the disruption that the employee’s offensive speech would cause in the workplace).

285. *See* *Constellium Rolled Prods. Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019); NLRB General Counsel, *supra* note 22; EEOC, *supra* note 159; Brief of Hum. Res. Pol’y Ass’n as Amicus Curiae, *Gen. Motors LLC*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242) [hereinafter HR Policy]; *S. S.S. v. NLRB*, 316 U.S. 31, 47 (1942). The NLRB’s General Counsel suggests that the NLRB should

overrule its holdings in *Plaza Auto*, *Pier Sixty*, and *Cooper Tire* to the extent that they protect outbursts and statements that in and of themselves create or have the potential to create violence or a hostile work environment on the basis of a protected status such as race or gender.

NLRB General Counsel, *supra* note 22.



conduct that rises to the level of harassment under Title VII, even if it does not reach the current standard for bad faith bargaining or unprotected speech, should be considered outside the scope of the NLRA's protections.<sup>286</sup>

The NLRA was not intended to be a tool to disable an employer's ability to discipline its employees, maintain a harassment-free workplace, or keep its bargaining team members safe; using it in such a manner corrupts its purpose.<sup>287</sup> The Supreme Court has long held that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act *so single-mindedly* that it may wholly ignore other and equally important Congressional objectives."<sup>288</sup> For example, as discussed above in *Constellium*, the NLRB concluded that the employer violated the NLRA when it terminated an employee who wrote "wh\*re board" on the overtime signup sheets.<sup>289</sup> However, on appeal to the Federal Court of Appeals for the D.C. Circuit, the court refused to uphold the Board's decision.<sup>290</sup> The Court concluded that while the NLRB's decision "did not impermissibly depart from precedent without explanation," the Board "failed, however, to address the potential conflict between its interpretation of the NLRA and [the employer's] obligations under state

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286. Such a standard would be in line with the Board's previous acknowledgements that "an employee's offensive and personally denigrating remarks alone can result in loss of protection [under the NLRA]." *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 293–94 (9th Cir. 2011); *see also* *Indian Hills Care Ctr.*, 321 N.L.R.B. 144, 151 (1996) (noting that there are situations in which vulgar, profane, and obscene language directed at supervisor or employer, uttered in the course of protected union activity, may lose protection of the Act).

287. *See* NLRB General Counsel, *supra* note 22; EEOC, *supra* note 159 ("Given that employers must address racist or sexist conduct that violates Title VII, and may need to do so even before the conduct becomes actionable in order to avoid liability for negligence, the EEOC urges the NLRB to consider a standard that permits employers to address such conduct, including by disciplining employees, as appropriate."); HR Policy, *supra* note 285 (all noting that the NLRA should not preempt federal anti-discrimination laws).

288. *S. S.S.*, 316 U.S. at 47 (emphasis added); *see also* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 147 (2002) ("Since *Southern S.S. Co.*, we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. Thus, we have precluded the Board from enforcing orders found in conflict with the Bankruptcy Code, rejected claims that federal antitrust policy should defer to the NLRA, and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act . . . . The *Southern S.S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." (citations omitted)); *NMC Finishing v. NLRB*, 101 F.3d 528, 530–32 (8th Cir. 1996) (denying enforcement of NLRB decision which had found a picketer's conduct protected under the Act where he carried a sign saying "Who is Rhonda F [with an X through F] Sucking Today?").

289. *Constellium Rolled Prods. Ravenswood, LLC*, 366 N.L.R.B. No. 131 (July 24, 2018).

290. *Constellium*, 945 F.3d at 548–49.

and federal equal employment opportunity laws.”<sup>291</sup> The Court remanded the case for the Board to address the conflict between the employer’s obligation to maintain a harassment-free workplace and its ability to discipline the employee under the Act.<sup>292</sup> Accordingly, while the Board is legally required to balance employee’s rights under the NLRA against the right to a safe workplace free of discrimination, “the Board has utterly failed to [do] so.”<sup>293</sup> In *General Motors*, the Board acknowledged that the NLRA should not continue to “read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline. [The NLRA’s] duty is to protect employees from interference in the exercise of their Section 7 rights.”<sup>294</sup>

For employers to prevent actionable hostile work environments and alleviate themselves of liability related to their duty to bargain, they must be able to act in response to inappropriate behavior that may support a hostile work environment claim even when it occurs in conjunction with union activity. Currently, in situations where union conduct directed at members of the management team may constitute harassment under Title VII, an employer that refuses to continue bargaining may face an unfair labor practice penalty.<sup>295</sup> Because *General Motors* did not analyze how an employer can address a nonemployee’s behavior while complying with its other NLRA obligations, a union representative’s offensive conduct would still be analyzed under the outdated bad faith bargaining standard—without due consideration to the employer’s rights and obligations under federal anti-discrimination laws. However, by fully harmonizing Title VII and the NLRA, employers will be able to protect their employees from a hostile work environment and avoid liability under Title VII, without fear of violating the NLRA for refusing to bargain.<sup>296</sup>

Because Title VII requires employers to actively prevent and stop unlawful harassment,<sup>297</sup> employers must be able to protect their employees by “‘nipping in the bud’ the kinds of employee conduct that could lead to a ‘hostile workplace’” before an actionable hostile

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291. *Id.*

292. *Id.*

293. NLRB General Counsel, *supra* note 22.

294. *See* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 8 (July 21, 2020) (Cases 14-CA-197985 and 14-CA-208242)

295. *See supra* section II.D.

296. *See supra* Part II; *c.f.* Victoria Packing Corp., 332 N.L.R.B. 597, 600 (2000) (citing Sahara Datsun, 278 N.L.R.B. 1044 (1986)).

297. *See supra* section III.A.

workplace is created.<sup>298</sup> Without congruence between the laws, the employer faces a dilemma—it is unable to insulate itself from liability under both federal and state law for failing to maintain a harassment-free workplace without also risking an unfair labor practice charge.<sup>299</sup> To eliminate this possibility, the Board should give deference and consideration to an employer’s duties under federal anti-discrimination law when determining if the NLRA protects a union member’s federally unlawful conduct. This deference should be given irrespective of whether the union member is an employee or union representative, or whether the conduct occurs within the scope of the parties’ other rights and obligations under the Act.

Although some organizations have voiced concerns about “[g]rafting a code of etiquette onto the NLRA”<sup>300</sup> that may be used to quell pro-union activity,<sup>301</sup> this perspective fails to acknowledge the change in circumstances for determining appropriate workplace conduct since the twentieth century.<sup>302</sup> An employer cannot weaponize Title VII to quell pro-union activity because it requires that employer discipline be appropriately tailored to preventing or ending the workplace harassment. Moreover, even under Title VII, courts have admonished that the law is not a “civility code.”<sup>303</sup> Rather, conduct is only actionable under Title VII when it is objectively and subjectively hostile or abusive, based on protected characteristics, and is severe or pervasive.<sup>304</sup> A union employee who feels that the employer’s response to the action was not reasonably consistent with preventing Title VII violations might seek relief from the NLRB on the grounds that the response was instead motivated by anti-union sentiments. Assuming that the conduct did not immediately rise to

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298. NLRB General Counsel, *supra* note 22.

299. *See* *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001); *see also* *Consol. Commc’ns, Inc. v. NLRB*, 837 F.3d 1, 21 (D.C. Cir. 2016) (Millett, J., concurring) (“Conduct that is designed to humiliate and intimidate another individual because of and in terms of that person’s gender or race should be unacceptable in the work environment. Full stop.”).

300. Brief of Liuna Mid-Atl. Reg’l Org. Coal. as Amici Curiae, *Gen. Motors LLC*, 368 N.L.R.B. No. 68 (2017) (Cases 14-CA-197985 and 14-CA-208242) [hereinafter *Liuna*] (“[E]nacting a code of etiquette onto the NLRA would be inconsistent with the modern cultural trends and long-standing industrial reality. Everything from the popularity of adult-themed television to the frequently coarse and profane language from the current President demonstrates that profane language is becoming more accepted in everyday life, not less . . .”).

301. *Liuna*, *supra* note 300; Brief of The Am. Fed. of Lab. & Cong. of Indus. Orgs. as Amici Curiae, *Gen. Motors*, 368 N.L.R.B. No. 68 (Cases 14-CA-197985 and 14-CA-208242).

302. *Liuna*, *supra* note 300; Brief of Nat’l Nurses United as Amicus Curiae, *Gen. Motors*, 368 N.L.R.B. No. 68 (Cases 14-CA-197985 and 14-CA-208242).

303. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

304. *See supra* Part III.

the level of severe conduct, employers should be expected to impose proportionate consequences that do not unduly impose upon union employees' or representatives' ability to engage in union activities. Employees would still be able to express emotions during bargaining and other discussions on workplace conditions, but in a manner that does not create a hostile work environment under Title VII.

Federal anti-discrimination law is not wholly distinct from the NLRA; both are pieces of the larger puzzle that is labor and employment law. Following *General Motors*, the Board must continue to align its decisions regarding both employee and union representative's protected speech under the Act with the standards defining hostile work environments under federal anti-discrimination law. Because the Supreme Court has previously held that the Board's rulings cannot violate federal law,<sup>305</sup> the harmonization that this Comment calls for will require the Board to shape its rulings around the parameters for lawful workplace conduct and employer behavior set forth under federal anti-discrimination laws.<sup>306</sup> Likewise, such harmonizing would not allow an employer to terminate employees for all offensive conduct. Many instances of profanity or crude behavior are not actionable under Title VII,<sup>307</sup> and that same behavior would remain protected under the NLRA. As a result, even if Title VII governed conduct in the workplace alongside the NLRA, there remains room for passionate advocacy.

## CONCLUSION

Over the years, the NLRB has deployed the NLRA as a shield to protect union members from discipline for conduct that would otherwise violate federal anti-discrimination laws. Under NLRB precedent, employers and unions may be forced to continue to bargain with a party who engages in harassment that is actionable under Title VII, or risk an unfair labor practice charge because the conduct does not constitute bad faith bargaining. However, an employer does not have to—and should not have to—wait to act until conduct reaches unlawfulness under the NLRA in

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305. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 147 (2002).

306. This is something that even the Board itself acknowledged that it should be doing, specifically when analyzing an employee's protected union speech under the Act. *See Gen. Motors*, 369 N.L.R.B. No. 127 (July 21, 2020) (Cases 14-CA-197985 and 14-CA-208242).

307. *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2008) (“But while no one condones boorishness, there is a line between what can justifiably be called sexual harassment and what is merely crude behavior. Profanity, while regrettable, is something of a fact of daily life. Flatulence, while offensive, is not often actionable, for Title VII is not ‘a general civility code.’ The occasional off-color joke or comment is a missive few of us escape. Were such things the stuff of lawsuits, we would be litigating past sundown in ever so many circumstances.” (citations omitted)).

order to avoid liability. Harmonizing the NLRA and federal anti-discrimination laws would spare employers from inconsistent obligations, especially during bargaining. Employers would be able to take affirmative and effective steps, in compliance with their Title VII obligations, to prevent or stop conduct that would lead to a hostile work environment. Title VII's corrective action standard, which has been interpreted to include a proportionality aspect, can provide guidance in evaluating workplace conduct under the NLRA to ensure that employers are not overreacting and taking severe action in response to actions that are neither severe nor pervasive under Title VII.

Ultimately, this Comment proposes a standard that balances protecting workers' and union representatives' rights under the NLRA by providing some leeway for inappropriate outbursts associated with union activity, and letting employers enforce their own workplace policies to promote a healthier, more prosperous work environment. The NLRB has taken the first step in remedying the harm created by its past precedent, but needs to continue harmonizing its standards with parties' respective duties under the Act and their rights and obligations under federal anti-discrimination laws, across all contexts and actors.