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Article

THERE IS MORE TO FEAR THAN FEAR ITSELF: THE NATIONAL LABOR RELATIONS BOARD'S ATTACK ON PURPOSEFUL AND NECESSARY WORKPLACE CONDUCT RULES MUST BE STOPPED

Robert J. Dignam*

This Article was substantially completed between the fall of 2016 and the spring of 2017. It was inspired by a concern that the National Labor Relations Board (NLRB or Board), while presumably acting with the honorable intention of protecting the rights of workers to discuss the terms and conditions of their employment, as bestowed by Section 7 of the National Labor Relations Act (NLRA), through its overzealous policing of workplace conduct rules, was actually detracting from an orderly work environment. This Article pointed out that the problem emanated from the NLRB's ruling in Lutheran Heritage Village-Livonia, after which the NLRB regularly predicted that employees would interpret seemingly innocuous rules of conduct in such a broad fashion that it would inhibit their Section 7 rights.

As this Article was undergoing final edits, the NLRB, in The Boeing Company, expressly overruled Lutheran Heritage. As explained in The Boeing Company, the Board will now evaluate the nature and extent of the potential impact of facially neutral policies, rules, or handbook provisions on NLRA rights, and whether there are legitimate justifications for such workplace rules and regulations. In contrast to the evaluation undertaken by the Board under Lutheran Heritage, the NLRB will now undertake the evaluation consistent with the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."

While there is now a basis to hope that employers will no longer will be subjected to "a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks," the immediate concern became the continued purpose of this Article, since the recommended change in the law has now apparently transpired.

Upon reflection, however, it became evident that the decision to overturn Lutheran Heritage was by way of a 3-2 party line vote, and not the product a substantive analysis embraced by the full NLRB concerning the flaw in its approach in recent years. Indeed, for too long, as this Article explains, the NLRB has been unique in its denouncement of facially neutral policies and handbook

provisions which it deemed *per se* unlawful, while in many other arenas and legal settings, the import of all relevant language and the intent and impact of a policy or provision must be taken into consideration. As such, this Article provides a detailed discussion of the numerous reasons why prior restraint of an employer's efforts to guide and control its workers must be avoided. The analysis offered in this Article should be fully considered when the time comes, under a future presidential administration, for a party line vote that could otherwise permit the NLRB to resurrect Lutheran Heritage and again impede employers from providing a quality working environment, paradoxically in the name of workers' rights as bestowed by Section 7.

I. INTRODUCTION

In 1933, the United States Congress passed the National Industrial Recovery Act (NIRA) which authorized the President of the United States to regulate industry and attempt to raise prices to counter severe deflation and stimulate the nation's economic recovery.¹ In *A.L.A. Schechter Poultry Corp. v. United States*, however, the Supreme Court of the United States ruled that the NIRA, which assigned lawmaking powers to the National Recovery Administration (NRA), violated the Commerce Clause of the United States Constitution.² The Supreme Court declared the NIRA to be an improper use of congressional power and invalidated the industrial "codes of fair competition," which the NIRA had enabled the President to issue.³ The Supreme Court ruled that these codes violated the Constitution's separation of powers because it was an impermissible delegation of legislative power to the executive branch.⁴ The unanimous pronouncement by the Supreme Court that the NIRA was

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¹ See National Industrial Recovery Act, 48 Stat. § 195 (1933) (authorizing the President of the United States to regulate industry).

² See 295 U.S. 495, 550 (1935) (expressing that the New Deal was to eliminate competition and bring industry, labor, and government together); U.S. Const. art. I, § 8, cl. 3 (stating that the United States Constitution provides that Congress shall have power to regulate commerce).

³ See *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 535 (invalidating the Congressional power of the NIRA).

⁴ See *id.* at 541-42 (supporting that the Supreme Court's ruling on the improper use of congressional power).

unconstitutional served to strike down a main component of President Franklin D. Roosevelt's New Deal.⁵

Once the Supreme Court adjudged the National Industrial Recovery Act unconstitutional, many unions explored potential relief from employers who they accused of spying on, interrogating, disciplining, discharging, and blacklisting union members.⁶ Additionally, during the 1930s:

workers had begun to organize militantly, and in 1933 and 1934, a wave of strikes occurred across the nation in the form of citywide general strikes and factory takeovers. Violent confrontations took place between workers attempting to form unions and the police and private security forces defending the interests of anti-union employers.⁷

In response to the concerns of organized labor and the Supreme Court's enforcement of the separation of legislative and executive powers mandated by the commerce clause, Senator Robert F. Wagner of New York, in February 1935, introduced the National Labor Relations Act in the Senate.⁸ The Senate bill included a proposal to create a new independent agency, known as the National Labor Relations Board (NLRB or "The Board"). The Board would be comprised of three members appointed by the President and confirmed by the Senate, which would be empowered to enforce the rights of employees who made up the American workforce.⁹

The NLRA became law in July 1935.¹⁰ The overarching intention of the law, commonly known as the Wagner Act, was to guarantee

⁵ See *id.* at 550–51 (holding that the code provisions are invalid). See also William Leuchtenburg, *Franklin D. Roosevelt: Domestic Affairs*, MILLER CENTER <https://millercenter.org/president/fdroosevelt/domestic-affairs> [https://perma.cc/WNH2-JKND] (explaining the unemployment crisis during the Great Depression). When President Roosevelt entered office in 1933, he immediately took steps to stabilize the economy, create jobs, and provide relief for many Americans who were suffering from the effects of the Great Depression. *Id.* Over the next eight years, during President Roosevelt's administration, the federal government initiated numerous projects and programs, known collectively as the New Deal. *Id.*

⁶ *National Labor Relations Act (1935)*, (Dec. 22, 2017), https://www.ourdocuments.gov/print_friendly.php?page=&doc=67&title=National+Labor+Relations+Act+%281935%29 [https://perma.cc/Z55Z-RHB6].

⁷ *Id.*

⁸ See *id.* (explaining the Wagner Act).

⁹ See *id.* (stating that the NLRA applied to all employers involved in interstate commerce except airlines, railroads, agriculture, and government).

¹⁰ See *id.* (providing when the NLRA was enacted).

employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.”¹¹

In President Roosevelt’s inaugural address on March 4, 1933, with the country mired in the Great Depression, President Roosevelt assured the nation, “[f]irst of all, let me assert my firm belief that the only thing we have to fear is fear itself.”¹² The pro-labor legislation that followed made complete sense in the moment.¹³ Yet, the interpretation and application by the NLRB of the aforementioned key language of the NLRA in recent times has created a national landscape in which employers have learned that they indeed do have much more to fear than fear itself.¹⁴ Well-intending employers instead must fear the very agency which is designed to protect workers and improve the workplace because the NLRB has seen fit to construe the language of the NLRA in such a broad fashion that it is actually interfering with an employer’s right and duty to issue and enforce rules designed to ensure order and civility in the workplace.¹⁵

II. APPLICABLE LAW

According to the NLRB, “Congress enacted the National Labor Relations Act . . . in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of

¹¹ Rights of Employees as to Organization, Collective Bargaining, Etc., 29 U.S.C. § 151-169 (1935).

¹² “Only Thing We Have to Fear Is Fear Itself”: FDR’s First Inaugural Address, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5057/> [<https://perma.cc/44YR-ZLZX>].

¹³ See *Wagner Act*, BRITANNICA, <https://www.britannica.com/topic/Wagner-Act> [<https://perma.cc/549Y-GP4W>] (explaining the policies enacted in the Wagner Act). The NLRA prohibited employers from engaging in unfair labor practices. *Id.* The legislation also barred employers from refusing to bargain with any union that had been certified by the NLRB. *Id.* The NLRA was opposed by Republicans and big business, and was challenged as an interference with the “freedom of contract” between employers and employees, and an unconstitutional intrusion by the federal government into industries that were not directly engaged in interstate commerce, which Congress was empowered to regulate under the Commerce Clause, Article I, § 8. *Id.* The Supreme Court, by a 5-4 vote, upheld the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Id.*

¹⁴ See *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA SECTION OF EMPLOYMENT AND LABOR LAW (Sept. 10, 2008), <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf> [<https://perma.cc/CZ7Z-STGN>] (explaining that companies have little incentive to respect workers’ rights).

¹⁵ See *id.* (stating that the Act is ineffective in terms of employers exploiting the labor of their employees).

workers, businesses and the U.S. economy.”¹⁶ This language, contained in Section 7 of the NLRA, has remained intact over the past eighty-two years.¹⁷

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157” of the NLRA.¹⁸ Many employers have now become the subject of decisions in which the NLRB has concluded that workplace rules which historically were accepted as reasonable and necessary to control workplace behavior constitute an infringement on employees’ Section 7 protections, and therefore, constitute an unfair labor practice in violation of Section 8 of the NLRA.¹⁹ According to the NLRB, among other prohibited employer activities, it is an unfair labor practice for an employer to:

Threaten employees with adverse consequences if they engage in protected, concerted activity. (Activity is ‘concerted’ if it is engaged in with or on the authority of other employees, not solely by and on behalf of the employee himself. It includes circumstances where a single employee seeks to initiate, induce, or prepare for group action, as well as where an employee brings a group complaint to the attention of management. Activity is ‘protected’ if it concerns employees’ interests as employees. An employee engaged in otherwise protected, concerted activity may lose the Act’s protection through misconduct.) Discharge, constructively discharge, suspend, layoff, fail to recall from layoff, demote, discipline, or take any other adverse action against employees because of their protected, concerted activities.²⁰

¹⁶ *National Labor Relations Act*, NAT’L LAB. REL. BD., <https://www.nlr.gov/resources/national-labor-relations-act> [<https://perma.cc/T5H7-JSHU>].

¹⁷ *See* Rights of Employees as to Organization, Collective Bargaining, Etc., 29 U.S.C. § 157 (1935) (“[T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.”).

¹⁸ Rights of Employees as to Organization, Collective Bargaining, Etc., 29 U.S.C. § 158 (1935).

¹⁹ *See id.* (elaborating on the Section 7 protections).

²⁰ *Interfering with Employee Rights*, NAT’L LAB. REL. BD., <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> [<https://perma.cc/MN54-DRW8>].

It should be obvious to employers of all types and sizes, employees who work for those employers, and the labor organizations who represent union workers that businesses are primarily interested in accomplishing the particular purposes for which they exist.²¹ After all, businesses do not materialize for the primary purpose of being employers.²² Rather, the founder of a company begins with a reason to go into business and then requires human capital to achieve the company's objectives, whether this involves agriculture, construction, education, healthcare, manufacturing, mining, retail, transportation, or any other industry.²³ As a result, businesses become employers of the individuals they need to move them toward their organizational goals.

The vast majority of employers in the United States are not unionized.²⁴ The number of union workers in the country has been in steady decline for many years.²⁵ In 1983, the United States had 17.7 million union workers.²⁶ At that time, 20.1 percent of workers were members of a union.²⁷ As of 2013, 14.5 million workers belonged to unions.²⁸ By then, the percentage of all workers belonging to a union had fallen to 11.3 percent.²⁹ According to 2013 data, 35.3 percent of public sector employees were unionized, while only 6.7 percent of private sector employees were in a union.³⁰ Based on 2015 statistics, the decrease in the percentage of employers who are unionized has continued.³¹ In 2014 and 2015, 11.1

²¹ See *Business Planning: Building an Effective Business Model*, KAUFFMEN ENTREPRENEURS (May 1, 2002), <https://www.entrepreneurship.org/articles/2002/05/business-planning-building-an-effective-business-model> [<https://perma.cc/US8M-NVMC>] (explaining the business planning process and reaching objectives).

²² See *id.* (describing the purpose of a business plan).

²³ See *id.* (explaining the importance of choosing your business team to get the objectives and vision that one wishes to reach).

²⁴ See *Union Membership in The United States*, U.S. BUREAU OF LAB. STATISTICS (Sept. 1, 2016), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/9LZG-HS6U>] (illustrating the decline of the unionized workforce in the United States).

²⁵ See *id.* (elaborating on the percentage of decline in union workers).

²⁶ *Union Members Summary*, BUREAU OF LAB. STATISTICS (Jan. 26, 2017), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/38BT-NLBN>].

²⁷ See *id.* (stating that there was 20.1 percent of workers in a union in 1983).

²⁸ See *Union Members—2013*, BUREAU OF LAB. STATISTICS (Jan. 24, 2014), https://www.bls.gov/news.release/archives/union2_01242014.pdf [<https://perma.cc/C9KD-R53G>] (describing the statistic of those that belonged to unions in 2013).

²⁹ See *id.* (expressing the percentage of workers who belong to unions and expressing that this number has dropped).

³⁰ See *id.* (providing that some individuals who have considered the question have opined that the decline in the number of union workers has resulted in the NLRB's increased vigilance about work rules of organized and non-union workplaces, also that the inspiration for the NLRB's activities is not the focus of this article, as the cause is likely multi-factoral).

³¹ See *Union Members Summary*, *supra* note 26 (showing the decrease in the amount of union workers).

percent of wage by hour and salaried workers were union members.³² The United States Bureau of Labor Statistics also indicated that 14.8 million wage by hour and salaried workers belonged to unions in 2015, which was again the same as in 2014.³³ By January 26, 2017, the Bureau reported that the percentage of unionized wage by hour and salaried workers had decreased to 10.7 percent, which constituted a decrease of 0.4 percent from the previous year.³⁴

The law permits private sector employers that are not unionized to interact with the workforce on an at-will basis.³⁵ The at-will employment doctrine is consistent among the states.³⁶ In simplest terms, the relationship is terminable at the will of either party.³⁷ For instance, in *Orr v. Westminster Village North, Inc.*, the Supreme Court of Indiana explained:

Historically, Indiana has recognized two basic forms of employment: (1) employment for a definite or ascertainable term; and (2) employment at-will. If there is an employment contract for a definite term, and the employer has not reserved the right to terminate the employment before the conclusion of the contract, the employer generally may not terminate the employment relationship before the end of the specified term except for cause or by mutual agreement. If there is no definite or ascertainable term of employment, then the employment is at-will, and is presumptively terminable at any time, with or without cause, by either party.³⁸

The *Orr* court further provided:

The employment-at-will doctrine is a rule of contract construction, not a rule imposing substantive limitations

³² See *Union Membership (Annual) News Release*, BUREAU OF LAB. STATISTICS (Jan. 28, 2016), https://www.bls.gov/news.release/archives/union2_01282016.htm [<https://perma.cc/BY77-3UC9>] (showing that union membership had steadied from 2014 and 2015).

³³ See *id.* (expressing the similar union member numbers from 2014 and 2015).

³⁴ See *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 26, 2017), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/38BT-NLBN>] (addressing the 0.4 percent decline of union worker memberships).

³⁵ See Charles Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, BUREAU OF LAB. STATISTICS (Jan. 2001), <https://www.bls.gov/opub/mlr/2001/01/art1full.pdf> [<https://perma.cc/HS92-D8JZ>] (explaining that at-will employees are terminable by either the employee or the employer).

³⁶ See *id.* (showing a chart representing the states that use the at-will employment doctrine).

³⁷ See *id.* (defining the employment-at-will doctrine).

³⁸ 689 N.E.2d 712, 717 (Ind. 1997).

on the parties' freedom to contract. If the parties choose to include a clear job security provision in an employment contract, the presumption that the employment is at-will may be rebutted.³⁹

The *Orr* opinion confirmed that, in Indiana, similar to other states, employers and employees have the right to agree to the terms and conditions of the employment relationship, including its duration; and in the absence of any clear intention to deviate from the norm, such employment relationships will be deemed at-will.⁴⁰

Most employment lawyers are familiar with the concept, as stated by the National Conference of State Legislatures, that "at-will means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences."⁴¹ Of course, many local, state, and federal laws with which employers must comply must still be considered in an at-will employment relationship and when bringing the relationship to a conclusion.⁴² Otherwise, consistent with the understanding that courts

³⁹ *Id.* (citations omitted).

⁴⁰ See *McClanahan v. Remington Frigate Lines, Inc.*, 517 N.E.2d 390, 392 (Ind. 1988) (providing some history about at-will employment). The Supreme Court of Indiana stated:

Prior to the mid-nineteenth century, an employer was responsible for his servant's health, welfare and security. The 'English rule' stated that hiring for an unspecified term was presumed to be for at least a year and the employer was required to give a 'quarter's warning' before discharging an employee who sought continued employment. By the mid-nineteenth century, however, 'emerging notions of the freedom of contract and of the value of economic growth contributed to the evolution of the at-will doctrine' The 'American rule' rejected the presumption of a yearly hiring and required the employee to bear the burden of proving that employment was for other than an indefinite term The American employment-at-will doctrine gained strength and reached its peak by the beginning of the twentieth century. At that time, the employer's right to discharge at his whim was virtually absolute. With the advent of federal and state legislation, collective bargaining, and employment contracts, the vitality of that rule has dwindled. The essence of the modern rule is that an employment contract of indefinite duration is presumptively terminable at the will of either party.

Id. (internal citations omitted).

⁴¹ *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. FOR STATE LEGISLATURES, <http://ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [<https://perma.cc/6YSW-PPA8>].

⁴² See generally Civil Rights Act of 1964, 42 U.S.C. § 200e (2017); 42 U.S.C. §§ 1981-1988 (2017); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001et seq (2017); Immigration Reform and Control Act of 2008, 8 U.S.C. § 1101 et seq (2017); Americans with

will normally not interfere with the affairs of business, cases such as *Thayer v. Vaughan*, all repeat the common theme that a court will “not sit as a super-personnel department that re-examines an entity’s business decisions”⁴³ The United States Court of Appeals for the Seventh Circuit has made the same proclamation.⁴⁴

Some employers become unionized, in whole or in part, at which point the employment relationship for the unionized workers is largely controlled by the terms and conditions of a collective bargaining agreement. A collective bargaining agreement, or CBA, is negotiated between the labor union which represents the workers and the employer. The CBA establishes the terms and conditions of employment for workers in the bargaining unit, and typically includes provisions addressing wages, vacation time, working hours, working conditions, and health insurance benefits.⁴⁵ Of course, a CBA invariably will not address every

Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2017); Americans with Disabilities Act Amendments Act of 2008, 29 C.F.R. § 1630.1 et seq (2017); Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq (2017); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq (2017); Age Discrimination in Employment Act of 1975, 29 U.S.C. § 621 et seq (2017); Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 623 et seq (2017); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); Workers Adjustment and Retraining Act of 1974, 29 U.S.C. § 2101 et seq (2017); Occupational Health and Safety Act of 1970, 29 U.S.C. § 651 et seq (2017); Fair Credit Reporting Act, 15 U.S.C. § 1681 (2017); Vietnam Era Veteran’s Readjustment Assistance Act of 1974, 38 U.S.C. § 4212 (2017); National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (2017); National Labor Relations Act of 1938, 29 U.S.C. § 201 et seq (2017); Indiana Age Discrimination Act, IND. CODE ANN. § 22-9-2-1 et seq (West 2017) (providing standards for age discrimination in Indiana); Indiana Civil Rights Law, Ind. Code Ann. § 22-9-1-1 et seq (West 2017) (establishing Indiana’s civil rights laws); Indiana Minimum Wage Law, IND. CODE ANN. § 22-2-2-1 et seq (West 2017); Indiana Employment Discrimination Against Disabled Persons Act, IND. CODE ANN. § 22-9-5-1 et seq (West 2017) (prohibiting disability discrimination in Indiana); IND. CODE ANN. § 22-2-5-1 et seq (West 2017) (providing labor safety standards in Indiana); Indiana Family Military Leave Law, Ind. Code Ann. § 22-2-13-11 et seq (West 2017) (establishing leave for military families); Indiana Occupational Safety and Health Act, IND. CODE ANN. § 22-8-1-1 et seq (West 2017) (outlining Indiana’s version of occupational health and safety standards); IND. CODE ANN. § 16-41-6-1 (West 2017) (establishing HIV screening in Indiana); IND. CODE ANN. § 16-41-8-1 et seq (West 2017) (describing confidentiality of health information); IND. CODE ANN. § 22-5-4-1 et seq (West 2017) (prohibiting employment discrimination on the basis of tobacco use).

⁴³ *Thayer v. Vaughan*, 801 N.E.2d 647, 650-651 (Ind. Ct. App. 2004).

⁴⁴ See *Coleman v. Donahoe*, 667 F.3d 835, 862 (7th Cir. 2012) (“In adjudicating claims under federal employment discrimination statutes, a court does not sit as a ‘super-personnel department,’ second-guessing an employer’s ‘business decision as to whether someone should be fired or disciplined because of a work-rule violation.’”). See also *Hiatt v. Rockwell Int’l Corp*, 26 F.3d 761, 772 n.13 (7th Cir. 1994) (stating that company disciplinary policies and procedures that are worked out between the company and union are not reviewable by the court).

⁴⁵ *Your Rights: All About Unions, WORKPLACE FAIRNESS*, <https://www.workplacefairness.org/labor-unions#5> [<https://perma.cc/3EKM-S89H>].

issue that arises during the term of the agreement.⁴⁶ The “management rights” clause in a CBA typically empowers the company to exercise its judgment and manage the workforce in the absence of an applicable provision in the agreement.⁴⁷ Matters concerning terms and conditions of employment, however, that are included in the CBA usually must be negotiated before changes can be made, although some CBAs allow management to unilaterally alter certain terms and conditions of employment during the term of the agreement through the management rights clause.⁴⁸ Through such a clause, the union essentially waives the right to bargain over certain issues.⁴⁹ Put another way, the management rights clause establishes the issues the parties have agreed to leave to the employer’s discretion.⁵⁰

Recently, however, the NLRB has signified that it will employ a heightened standard when assessing whether a union has waived the right to bargain over certain terms and conditions of employment in a management rights clause by requiring a new degree of specificity in the CBA before an employer can make unilateral changes. In *Graymont PA, Inc.*, a three-member majority of the Board, with one member dissenting, decided that an employer violated the NLRA by not giving the union an adequate opportunity to bargain before it changed its existing policies.⁵¹ Based on this recent decision, it is apparent that management rights clauses will need to be more specific to pass muster with the NLRB.⁵²

⁴⁶ See *Employer/Union Rights and Obligations*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> [<https://perma.cc/3N9L-NHNS>] (discussing rights and obligations between employers and unions regarding collective bargaining agreements).

⁴⁷ See 39A OHIO JUR. 3D *Management rights clauses of collective bargaining agreements with private employers* § 516, Westlaw (last visited Aug. 23, 2017) (defining management rights clauses and how they work).

⁴⁸ See *Management Rights Clauses Spell Out Employer Autonomy in Collective Bargaining Agreements*, OHIO STATE BAR ASS’N, <https://www.ohioabar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-663.aspx> [<https://perma.cc/RXC8-ZQNE>] (discussing which subjects must be negotiated between employers and unions).

⁴⁹ See generally 39A OHIO JUR. 3D *Management rights clauses of collective bargaining agreements with private employers* § 516, Westlaw (last visited Aug. 23, 2017) (stating the function of management rights clauses in collective bargaining agreements between private employers and labor unions).

⁵⁰ See *id.* (outlining the purpose and functions of management rights clauses in collective bargaining agreements between private employer and labor union).

⁵¹ See *Graymont PA, Inc.*, 364 NLRB. No. 37 (June 29, 2016) (holding that the employer to be in violation of the National Labor Relations Act).

⁵² See *Who We Are*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/board> [<https://perma.cc/6WLH-HHXN>] (introducing the composition of the board and how it acts in an adjudicative manner and The Board consists of “five Members which serves in a quasi-judicial body, deciding cases based on formal records in administrative proceedings”). “The President appoints Board members to five-year terms, with Senate

consent, with the term of one member expiring each year." *Id.* *Nat'l Labor Relations Board v. Noel Canning*, Oyez, <https://www.oyez.org/cases/2013/12-1281> [https://perma.cc/8DF7-5QKF] (discussing the NLRB complaint initiation and adjudication processes and that the NLRA empower the Board to decide labor disputes among employers, unions, and employees.). Once an unfair labor practice charge is filed with a Regional Office, it conducts an investigation and, if necessary, files a complaint. *Id.* An Administrative Law Judge ("ALJ") presides over a hearing to consider the charge and issues a recommendation to the Board. *Id.* The ALJ's recommendation becomes the final order of the Board unless a party timely appeals to the Board. *Id.* The Board is required to have at least three of its five members present. *Id.* The number of Board members has occasionally generated controversy, because the requisite number of members has not always been in place. *Id.* The NLRA permits parties to appeal a Board ruling to the U.S. Court of Appeals in the Circuit where the unfair labor practice is alleged to have occurred or to the U.S. Court of Appeals for the District of Columbia. *Noel Canning*, OYEZ, <https://www.oyez.org/cases/2013/12/1281> [https://perma.cc/8DF7-5QKF] (analyzing that the NLRA allows parties to appeal a Board ruling to the relevant federal court). *See* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), Justice Stephen Breyer authored an unanimous opinion by which the Supreme Court unanimously rejected the specific exercises of the power to make recess appointments. The Supreme Court, however, by a 5-4 vote, rejected the rationale offered by the D.C. Circuit concerning the meaning of the Recess Appointments Clause. *Id.* at 2578. The majority instead considered the Framing-era history and subsequent executive branch application of the clause and concluded that recess appointments are allowed during intra-session recesses that last 10 days or longer, as well as appointments to fill vacancies that existed prior to the recess. *Id.* at 2567 (explaining that the Court looked to the Framing-era history and application of the clause in question). Justice Breyer, addressing the structural purpose of the clause, noted that the "Framers included the Recess Appointments Clause to preserve the 'vigour of government' at times when an important organ of Government, the United States Senate, is in recess." *Id.* at 2577. The Supreme Court then affirmed the D.C. Circuit's ruling because the Senate's use of pro forma sessions rendered the recess of insufficient length to permit recess appointments. *Id.* at 2578. The concurring opinion authored by Justice Antonin Scalia and joined by Chief Justice John G. Roberts, Justices Anthony Alito, Jr., and Clarence Thomas, clarifies that the President should only be permitted to make recess appointments during inter-session recesses and only to fill vacancies that arose during that recess. *Noel Canning*, 134 S. Ct. at 2592 (opining that the President should be permitted to make recess appointments only during inter-session recesses and only to fill vacancies that arose during the recess). The decision in *NLRB vs. Noel Canning* (a Pepsi-Cola distributor) resulted in the invalidation of over 100 decisions issued by the Board while the contested members were in place, including the labor dispute with a Pepsi-Cola distributor that initiated the case. *See* Sara Goldsmith Schwartz, *Supreme Court Invalidates Hundreds of NLRB Rulings*, SCHWARTZ HANNUM PC (Sept. 2014), <http://www.shpclaw.com/Schwartz-Resources/supreme-court-invalidates-hundreds-of-nlr-rulings?p=11399> [https://perma.cc/B6GY-MCSN]. One of the invalidated decisions was *Costco Wholesale Club*, 358 NLRB. 1100 (Sept. 7, 2012), in which the Board concluded that an employer's electronic communication policy that prohibited electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully restricted employee rights. The rationale for the NLRB's decision, which has not been invalidated based upon an unconstitutionally constituted Board in many other cases, is exactly the type of reasoning which employers continue to fear, and which is the subject of this article. *Id.* The nomination by President Donald Trump on January 20, 2017, his first day in office, of Andrew Pudzer to become the next Secretary of the Department of Labor appeared to signify a shift toward a more employer-friendly period of federal regulation. *See* Trey Kovacs, *Here's why Trump's Labor pick Andy Pudzer, will help grow the economy and create jobs*, FOX NEWS (Feb.

Employers of union workers naturally understand that because they employ organized labor, they are under the jurisdiction of the NLRB.⁵³ Yet, many private sector non-union employers have been surprised to learn that even though they do not have a unionized workforce, they are within the jurisdiction of the NLRB and are subject to the NLRA.⁵⁴ A

15, 2017), <http://www.foxnews.com/opinion/2017/02/15/heres-why-trumps-labor-pick-andy-puzder-will-help-grow-economy-and-create-jobs.html> [https://perma.cc/82K6-X22W]. At the time of his nomination, Mr. Pudzer served as the chief executive officer of CK Restaurants, the company that franchises Hardee's and Carl Jr.'s, and other fast-food establishments. *Id.* According to the Employment Policies Institute, a recent survey conducted by the survey research firm CorCom Inc., which used "data obtained from CKE franchisees representing over 300 stores around the country to complete 242 telephone interviews with employees between January 6 and January 9 of this year," confirmed that over 90 percent of employees of Carl's Jr. and Hardee's who participated confirmed that they felt "safe and respected" in their work environment, including 93 percent of female employees. *Id.* In addition, 92 percent of the workers surveyed agreed that "Carl's Jr. and Hardee's are great places to work." *Id.* This survey appears to confirm that business leaders understand the need to treat the workforce well, which should allay the need for hypervigilance by the NLRB based upon an unfounded presumption that Section 7 rights are in jeopardy. *Id.* On February 15, 2017, however, Mr. Pudzer withdrew his name from consideration because it became evident that he would not garner enough votes in the Senate to be confirmed. See Manu Raju, Dan Merica, *Andrew Pudzer withdraws as a labor secretary nominee*, CNN (Feb. 16, 2017), <http://www.cnn.com/2017/02/15/politics/top-senate-republicans-urge-white-house-to-withdraw-puzder-nomination/> [https://perma.cc/2NDU-SE29]. The following day, President Trump nominated R. Alexander Acosta, dean of the Florida International University College of Law, to be the next Secretary of the Department of Labor. See Robert Iafola, Steve Holland, *Trump Taps Ex-Labor Board Member Acosta to Be Labor Secretary*, U.S. NEWS (Feb. 16, 2017), <https://www.usnews.com/news/top-news/articles/2017-02-16/trump-to-name-ex-labor-board-member-acosta-as-labor-secretary> [https://perma.cc/YNU4-ZR98]. Mr. Acosta served as member of the NLRB from December 17, 2002 until August 21, 2003, and has signed hundreds of Board opinions. *Members of the NLRB since 1935*, NAT. LAB. REL. BD. <https://www.nlr.gov/who-we-are/board/members-nlr-1935> [https://perma.cc/4U82-QFK5] (listing the members of the NLRB since 1935, which seat each member held, the party in control of the Board, and the terms served by each member). Mr. Acosta's nomination was confirmed on April 27, 2017. His background had already been explored prior to his service as United States Attorney for the Southern District of Florida and his appointment by President George W. Bush as Assistant Attorney General in the Justice Department's Civil Rights Division. Accordingly, the change in the NLRB's analysis which is recommended in this article may not be imminent. *Id.* On the other hand, the Senate's 49-46 vote on November 8, 2017, to install Vermont labor lawyer Peter Robb as the NLRB's new Counsel, replacing former labor lawyer Richard Griffin, who served from November 2013 through October 2017 (board official and lawyer Jennifer Abruzzo has been serving as Acting General Counsel in the interim), suggests that change is in the air.

⁵³ See *Jurisdictional Standards*, NAT'L LAB. REL. BD., <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> [https://perma.cc/4U82-QFK5] (explaining the jurisdiction of the NLRB and standards for falling under the Board's jurisdiction for several categories of private employers).

⁵⁴ See *id.* (showing that private employers who do not employ union workers may still be subject to the NLRB's jurisdiction).

private sector employer, even when not employing union workers, is subject to the NLRB's statutory jurisdiction when its activity exceeds a minimal level of interstate commerce.⁵⁵ Over the years, the NLRB has established the standards for asserting jurisdiction.⁵⁶ As a practical matter, the NLRB's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profit organizations, employee-owned businesses, labor organizations, non-union businesses, and businesses in states, such as Indiana, with "Right to Work" laws.⁵⁷ This means that even in non-union workforces, the NLRB possesses the authority to review the employer's workplace conduct rules and policies, and may, through an exceedingly broad construction of the language contained in those rules and policies, require the employer to publicly repudiate the rules and policies and promise to refrain from using such rules in the future.⁵⁸

The NLRB bases its authority for such encroachments on employer's management of its workforce on the language of Section 7 of the NLRA.⁵⁹ The leading case in this area is *Lutheran Heritage Village-Livonia*.⁶⁰ In this case, the NLRB reaffirmed that a rule or policy violates Section 7 of the NLRA, known as the workers' "Bill of Rights," if the language "reasonably tends to chill employees in the exercise of their Section 7 rights."⁶¹ In

⁵⁵ See *id.* (describing that private employers that employ non-union workers can still be subject to NLRB jurisdiction if their interstate commerce reaches a certain level).

⁵⁶ See *id.* (defining the jurisdictional standards for several categories of private employers such as retailers, non-retailers, and other special categories).

⁵⁷ See generally *id.* (expounding what employers are exempt from the NLRB's jurisdiction by statute or regulation).

⁵⁸ See *Interfering with employee rights*, NAT'L LAB. REL. BD., <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> [<https://perma.cc/W52G-YEZK>] (explaining that employers are prohibited from creating and enforcing rules that prevent employees from exercising their rights under the National Labor Relations Act); David P. Phippen, *Can Your Employment Policies Survive the NLRB?*, COSTANGY, BROOKS, SMITH & PROPHETE LLP, <http://www.constangy.com/communications-500.html> [<https://perma.cc/68HU-CJDY>] (evaluating the NLRB's expansive policy of construing the language of employer rules and policies against the employer and finding them to be an unlawful encroachment of employees' Section 7 rights under the NLRA).

⁵⁹ See *National Labor Relations Act*, NAT'L LAB. REL. BD., <https://www.nlr.gov/resources/national-labor-relations-act> [<https://perma.cc/5KWX-VLD4>] (stating the text of the NLRA, which provides the Board's authority to investigate complaints and preside over cases brought before it).

⁶⁰ See *Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 646 (2004) ("[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights"). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (explaining that the Board may find a work place rule to violate Section 8(a)(1) if it reasonably tends to chill employees' exercising of their Section 7 rights, even if the rule is not enforced).

⁶¹ *Id.* at 646.

arriving at its determination, the NLRB employed a two-step inquiry, as follows:

First, a rule is unlawful if it explicitly restricts activities that Section 7 of the NLRA protects. Second, a rule is also unlawful “[i]f the rule does not explicitly restrict activity protected by Section 7,” but “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”⁶²

This standard, which renders a rule or policy unlawful based upon what an employee would “reasonably construe” to be an infringement on Section 7 activity, is precisely where the problem lies.⁶³ A standard which bases the lawfulness of a rule on how the person to which it applies would interpret the rule, without regard for the employer’s intent, invites a “tail wags the dog” scenario where reasonable and necessary rules of conduct are outlawed by a purported “reasonable” interpretation by a worker (or the Board member in his or her stead).⁶⁴ To make matters worse, the Board’s conclusions about what language is unlawful are based upon tortured interpretations with which no objectively reasonable employer could agree.⁶⁵

The *Lutheran Heritage* case does indicate that in conducting this inquiry, the NLRB “must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”⁶⁶ Despite that assurance, however, as will be shown in this article, the professed presumption of a rule’s lawfulness does not appear to have

⁶² *Id.* at 647.

⁶³ *Id.*

⁶⁴ See *The meaning and origin of the expression: The tail wagging the dog*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/341850.html> [<https://perma.cc/FRZ9-KT7Q>] (defining and discussing the phrase “the tail wagging the dog” as something of minor importance controlling a situation). This expression, which signifies that the subordinate individual or entity actually controls, is thought to have originated in the United States and there are many references to this quote in American publications beginning in the 1870s. *Id.* Perhaps the earliest use is from *The Daily Republican*, in April 1872: “Calling to mind Lord Dundreary’s conundrum, the *Baltimore American* thinks that for the Cincinnati Convention to control the Democratic party would be the tail wagging the dog.” Dundreary is a character in the play, *Our American Cousin*. *Id.*

⁶⁵ See, e.g., *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 646 (2004) (providing the standard and interpretation for finding what language Section 7 of the NLRA prohibits in work place rules).

⁶⁶ *Id.* at 646.

been consistently applied during the NLRB's analyses.⁶⁷ Due to the NLRB's expanded application of Section 7, many unions have been inspired to file unfair labor practice charges against the nation's employers, with unfortunate results for companies that desire order and decorum, with no intent to violate their workers' "Bill of Rights."⁶⁸ In this regard, the NLRB has gone too far because its zealous enforcement efforts are: 1) interfering with the operation of employer's ability to control its workforce, which is necessary for it to accomplish its intended purpose, and 2) in actuality, negatively affecting many of the workers it believes it is attempting to protect.⁶⁹

III. THE PURPOSE OF WORK PLACE RULES

Knowledgeable business leaders and company managers are familiar with the concepts espoused by Frederick I. Herzberg in his motivation and hygiene factors.⁷⁰ *The Motivation to Work* was authored by Herzberg with

⁶⁷ See *infra* Part IV (discussing cases where the NLRB has construed the language of work place rules).

⁶⁸ See Carl Horowitz, *NLRB Sides with Unions in Targeting Employee Handbooks*, NAT'L LEGAL AND POL'Y CENTER (Mar. 10, 2016), <http://nlpc.org/2016/03/10/nlrb-sides-unions-targeting-employee-handbooks/> [<https://perma.cc/UF42-2RTQ>] (discussing the NLRB's party composition during presidential terms). Customarily, three Board members belong to the political party of the United States President, while the other two belong to opposing party. *Id.* Accordingly, during President Barack Obama's terms, there was a 3-2 Democratic majority, given a full board. *Id.* This political advantage appears to have been enhanced by opinions issued by the Office of General Counsel, first headed by the Acting General Counsel, Lafe Solomon, and more recently by Richard Griffin, whose background includes serving as a lawyer for the International Union of Operating Engineers and then an NLRB board member before becoming General Counsel. *Id.* Labor organizations have certainly recognized this as a prime opportunity to require numerous employers to justify employment-related rules and policies. *Id.* On January 26, 2017, President Trump appointed current board member Philip A. Miscimarra as Acting Chairman. See Ted Goodman, *Trump Names Acting Chairman For National Labor Relations Board*, DAILY CALLER (Jan. 26, 2017, 4:51 PM), <http://dailycaller.com/2017/01/26/trump-names-acting-chairman-for-national-labor-relations-board/> [<https://perma.cc/25CM-PK6J>]. In response, Mr. Miscimarra proclaimed, "I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act in an even-handed manner that serves the interests of employees, employers and unions throughout the country." *Id.*

⁶⁹ See *infra* Part IV (analyzing cases where the NLRB has construed the language of work place rules).

⁷⁰ See, e.g., *Frederick Herzberg Motivational Theory*, BUSINESSBALLS.COM, <http://www.businessballs.com/herzberg.htm> [<https://perma.cc/L99R-6XLW>] (providing a brief background of Frederick Herzberg's background). Further:

Frederick I. Herzberg (1923-2000), clinical psychologist and pioneer of 'job enrichment', is regarded as one of the great original thinkers in management and motivational theory. Herzberg was born in Massachusetts on April 18, 1923. His undergraduate work was at the City College of New York, followed by graduate degrees at the

two research colleagues in 1959.⁷¹ This seminal work established valuable theories about motivation in the workplace. Herzberg's study, which included a survey of 200 Pittsburgh engineers and accountants, "remains a fundamentally important reference in motivational study."⁷² According to Herzberg's hygiene-motivation theory, dissatisfied workers are primarily concerned about the conditions of their work environment.⁷³ Hygiene (or maintenance) factors, such as the employer's policies and administration, proper supervision, and working conditions, are necessary, and the absence of these factors can adversely affect an employee's productivity and motivation.⁷⁴ Yet, Herzberg was not as concerned about motivation as he was about the basic dignity to which each employee is entitled to enjoy.⁷⁵

In addition to Herzberg's sound theory, the efforts of Abraham Maslow apply to this discussion as well. Maslow, an American psychologist, is best known for creating his famous *Maslow's Hierarchy of Needs*.⁷⁶ According to Maslow, before a worker can be expected to pursue an organization's goals, that individual's basic needs must first be satisfied.⁷⁷ As a consequence, the individual will first need to fulfill

University of Pittsburgh. Herzberg was later Professor of Management at Case Western Reserve University, where he established the Department of Industrial Mental Health. He moved to the University of Utah's College of Business in 1972, where he was also Professor of Management. He died at Salt Lake City, January 18, 2000.

Id.

⁷¹ See FREDERICK HERZBERG, *THE MOTIVATION TO WORK* (1959) (expounding Herzberg's theories on motivation in the workplace).

⁷² See *Frederick Herzberg Motivational Theory*, *supra* note 70 (opining that Herzberg's survey is a key theory in what motivates employees in the work place).

⁷³ See CLIFF GOODWIN & DAN GRIFFITH, *THE CONFLICT SURVIVAL KIT, TOOLS FOR RESOLVING CONFLICT AT WORK* 17 (describing Herzberg's theory of hygiene-motivation).

⁷⁴ *Id.*

⁷⁵ See *Frederick Herzberg Motivational Theory*, *supra* note 70 (explaining Herzberg's intent in creating his workplace motivation theories). Moreover:

Although Herzberg is most noted for his famous 'hygiene' and motivational factors theory, he was essentially concerned with people's well-being at work. Underpinning his theories and academic teachings, he was basically attempting to bring more humanity and caring into the workplace. He and others like him, did not develop their theories to be used as 'motivational tools' purely to improve organisational performance. They sought instead primarily to explain how to manage people properly, for the good of all people at work.

Id.

⁷⁶ See Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCHOLOGY (2016), <https://www.simplypsychology.org/maslow.html> [<https://perma.cc/6P3K-7PNS>] (discussing Maslow's theory of the hierarchy of human needs).

⁷⁷ See *id.* (stating that Maslow's theory proposes that humans must first meet their most basic needs before continuing along the hierarchy).

physiological (or survival) needs.⁷⁸ In any setting, including the workplace where American workers often are expected to spend an inordinate part of their adult lives, the most basic human needs are for safety, security, and acceptance.⁷⁹ When an employee is unable to fulfill these physiological needs in the workplace, conditions are conducive to the eruption of conflict.⁸⁰

These well-recognized concepts espoused by Herzberg and Maslow underscore that an employee cannot be in a position to accomplish the employer's objectives until that individual feels safe and secure in the environment.⁸¹ This feeling of safety and security is accomplished, as Herzberg has demonstrated, through an employer's use of clear rules and policies so that the employee understands what is to be expected, and through proper supervision of the workforce to assure that the rules and policies are administered in a fair and consistent manner.⁸² This concept is akin to the substantive due process to which citizens are entitled in their dealings with the government.⁸³ After all, an individual is entitled to know that something is either expected or prohibited before being sanctioned for the violation.

The works of Herzberg and Maslow have carried over into labor and employment law.⁸⁴ One entity which recognizes the right of an employee to know that particular conduct is prohibited before a consequence comes to bear is the Indiana Department of Workforce Development (IDWD).⁸⁵ The IDWD processes claims for unemployment benefits filed in the state of Indiana. Eligible employees are entitled to receive temporary income through Indiana's unemployment insurance program managed by the IDWD.⁸⁶ This agency's stated mission is to "develop [] a premier

⁷⁸ See *id.* (explaining that Maslow's theory states that humans must first satisfy physiological needs).

⁷⁹ See GOODWIN & GRIFFITH, *supra* note 73, at 17 (providing that safety, security, and acceptance are two of a person's most basic human needs).

⁸⁰ See *id.* (addressing when a work environment is vulnerable to the development of conflict).

⁸¹ See *id.* at 17-18 (discussing contributions to modern employment psychology).

⁸² See *id.* (noting that employees have certain psychological wants within employment).

⁸³ See *Due Process*, BLACK'S LAW DICTIONARY (10th ed. 2014) Westlaw (database updated 2014) ("[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case").

⁸⁴ See GOODWIN & GRIFFITH, *supra* note 73, at 17-18 (noting the need for rule enforcement to maintain a happy work environment).

⁸⁵ See UNEMPLOYMENT INSURANCE CLAIMANT HANDBOOK 23-4 (Ind. Dep't of Workforce Development) (2017), <http://www.in.gov/dwd/2334.htm> [<https://perma.cc/3WHU-8KRC>] (showing the process and appeals for garnering unemployment benefits).

⁸⁶ See *Indiana Unemployment Information-Benefits, Eligibility etc.*, ABOUTUNEMPLOYMENT.ORG (Mar. 2017), <http://aboutunemployment.org/indiana->

workforce that will allow Indiana employers to flourish and entice businesses from outside the state to relocate to Indiana.”⁸⁷ To meet eligibility requirements for unemployment benefits, a claimant cannot be unemployed through his or her own fault.⁸⁸ In other words, a claimant is disqualified from receiving unemployment benefits if there was just cause for the termination.⁸⁹ The term ‘just cause’ is defined in Indiana Code § 22-4-15-1(d).⁹⁰

In accordance with this statutory scheme, when an unemployment benefits claim is made, an employer has the option to protest the benefits, and will be inclined to do so if the employee deserved the termination

unemployment/ [https://perma.cc/5KV3-LFVH] (discussing processes for the role of unemployment insurance).

⁸⁷ See *Mission, Goals, and Overall Strategy*, IND. DEP’T OF WORKFORCE DEV. (2017), <https://www.in.gov/dwd/2338.htm> [https://perma.cc/54AH-XSP9] (reporting IDWD’s mission statement).

⁸⁸ See *Unemployment-Individuals*, IND. DEP’T OF WORKFORCE DEV. (2017), <http://www.in.gov/dwd/2334.htm> [https://perma.cc/3WHU-8KRC] (showing that an employee must not be unemployed due to personal fault).

⁸⁹ See *City of Carmel v. Review Bd. of the Ind. Dep’t of Workforce Dev.*, 970 N.E.2d 239, 242 (Ind. Ct. App. 2012) (elaborating on the former burden of proof for unemployment benefits claims in Indiana). The unemployment insurance program is administered by the IDWD deputy, and the party that loses initially may appeal to an Administrative Law Judge (ALJ) who works for the IDWD. *Id.* The ALJ conducts an administrative hearing, receives evidence, and decides whether to affirm or reverse the initial ruling. *Id.* Here, the former rule dictates that if an employer believed it possessed just cause to fire the worker, then the employer had the burden to prove this. *Id.* See also Pub. L. No. 121-2014 (H.E.A. 1083) (West) (amending the former structure of burden of proofs by adding statutory language law to Indiana Code 22-4-1-2(c) which now provides that “an applicant’s entitlement to unemployment benefits is determined based on the information that is available without regard to burden of proof. . . . There is no equitable or common law allowance for or denial of unemployment benefits.”). This amendment to the statute affords the ALJ more discretion to make determinations on a case-by-case basis. *Id.* But see *Ass’n of Admin. Law Judges v. Colvin*, 777 F.3d 402, 403–05 (7th Cir. 2015) (expounding that this amendment to the statute affords the ALJ more discretion make determinations on a case-by-case basis). The Honorable Richard Posner compared ALJs to workers on “a poultry processing assembly line” in rejecting their claim that high caseloads interfere with their decisional independence. *Id.* The union for the ALJs, the Association of Administrative Law Judges, once sued Social Security Administration’s acting commissioner, Carolyn Colvin, in her official capacity concerning a policy setting a goal of 500 to 700 “legally sufficient judgments” per judge, per year. *Id.* In rejecting the Association’s concerns, Judge Posner drew a parallel between the ALJs and a poultry processing worker whose assembly line is speeded up. *Id.* According to Judge Posner, work quality might suffer from extra speed in both cases, but neither workers’ independence is compromised. *Id.* If it were, Judge Posner observed, the courts would be flooded with cases brought by civil servants complaining about “incidental and unintentional” effects of changes in their working conditions. *Id.*

⁹⁰ See IND. DEP’T OF WORKFORCE DEV., *GROSS MISCONDUCT POLICY*: 2016, https://www.in.gov/dwd/files/gross_misconduct_policy_2016_Final.pdf [https://perma.cc/9YRL-5LA2].

from employment.⁹¹ To challenge an unemployment benefits claim, an employer must submit an Unemployment Insurance Protest Form (Employer).⁹² One choice the employer may select on the form is that the claimant's separation from employment was a "[d]ischarge for Cause."⁹³ In Indiana, "[d]ischarge for just cause" includes a "knowing violation of a reasonable and uniformly enforced rule of an employer . . ."⁹⁴ The IDWD has informed Indiana employers through its Employer Handbook, available on its website, that "'[d]ischarge for just cause' means discharging (or firing) an employee with complete documentation and acknowledgement of understanding by the employee of . . . [k]nowingly violating a reasonable and uniformly enforced employer policy or rule."⁹⁵ Consistent with this definition of "just cause," the IDWD has historically issued a questionnaire to employers who protest an unemployment benefits claim which includes an inquiry about whether the employer had a rule which it contends that the claimant violated, and whether the rule was in writing.⁹⁶ After informing the IDWD that the employee's termination was for "just cause," an employer is normally asked for proof that the rule which the employee violated was in writing and that the employee was informed of the written rule.⁹⁷ If an Indiana employer

⁹¹ See *Unemployment Insurance Employer Handbook*, INDIANA WORKFORCE DEV. 31 (2015), http://www.in.gov/dwd/files/Employer_Handbook.pdf [<https://perma.cc/8D37-9LAG>] (stating that an employer has a chance to protest unemployment benefits where the employee was justly discharged from employment).

⁹² See *Unemployment Insurance Employer Handbook*, IND. DEP'T OF WORKFORCE DEV. (2015) 36 http://www.in.gov/dwd/files/Employer_Handbook.pdf (showing conditions for an employer to protest unemployment benefits) [<https://perma.cc/8FDT-PDV3>]. See also IND. DEP'T OF WORKFORCE DEV., Indiana State Form No. 54244(3-10), DWD 6 40-P, <https://www.in.gov/dwd/2406.htm> [<https://perma.cc/Q5LB-RDHS>] (showing the documentation necessary for an employer to initiate a contest of unemployment benefits).

⁹³ See *Unemployment Insurance Employer Handbook*, IND. DEP'T OF WORKFORCE DEV., http://www.in.gov/dwd/files/Employer_Handbook.pdf [<https://perma.cc/Q5LB-RDHS>].

⁹⁴ See IND. CODE ANN. § 22-4-15-1(d)(2) (2017) (proscribing the laws for unemployment in Indiana).

⁹⁵ See *Unemployment Insurance Employer Handbook*, IND. DEP'T OF WORKFORCE DEV. (2015), 36 http://www.in.gov/dwd/files/Employer_Handbook.pdf [<https://perma.cc/8FDT-PDV3>].

⁹⁶ See *Unemployment Insurance Protest*, State Form 54244, IND. DEP'T OF WORKFORCE DEV. (2015) (requiring the employer to give a statement for the reason of separation). See also *Unemployment Insurance Employer Handbook*, IND. DEP'T OF WORKFORCE DEV. (2015), 36 http://www.in.gov/dwd/files/Employer_Handbook.pdf [<https://perma.cc/8FDT-PDV3>].

⁹⁷ *Id.*

cannot show the IDWD that the employee was terminated for violating a known and uniformly enforced rule, benefits will be awarded.⁹⁸

Wisconsin's Department of Workforce Development takes the same approach. The Wisconsin agency has explained to employers, "[y]our work rules play an important part in a discharge investigation. Rules must be reasonable, known to the employee and consistently enforced."⁹⁹ This shows that state agencies that process such claims also mandate that an employer be able to show that the employee had a fair chance to know that the conduct which precipitated the discharge from employment was prohibited, and that the sanction for a violation was consistent.

The Court of Appeals of Indiana has addressed the requirement of written work rules in the context of unemployment benefits in *City of Carmel v. Review Board of the Indiana Department of Workforce Development*.¹⁰⁰ In its opinion, the appellate court explained:

The employer bears the initial burden of establishing that an employee was terminated for just cause. To establish a *prima facie* case for just cause discharge for violation of an employer rule, the employer has to show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule. To have knowingly violated an employer's rules, the employee must: (1) know the rule; and (2) know his conduct violated the rule. If an employer meets this burden, the claimant must present evidence to rebut the employer's *prima facie* showing.¹⁰¹

The appellate court further stated:

A uniformly enforced rule is one that is carried out in such a way that all persons under the same conditions and in the same circumstances are treated alike. 'In order to evaluate uniformity one must first define the class of persons against whom uniformity is measured.' This court has often stated that '[a]n employer's asserted work

⁹⁸ See *Co. v Review Bd. of Ind. Dep't of Workforce Dev.*, 58 N.E. 2d 175, 178 (Ind. Ct. App. 2016) (violation of a vague work rule that fails to inform the employee of precisely what conduct is prohibited does not constitute a rule under Ind. Code § 22-4-15-1 (d)(2) and will not constitute "just cause" for discharge so as to disqualify the employee from receiving benefits).

⁹⁹ WIS. DEP'T OF WORKFORCE DEV., UNEMPLOYMENT INSURANCE HANDBOOK FOR EMPLOYERS: SECTION 1-BENEFITS: PART 7 ELIGIBILITY (2017), <https://dwd.wisconsin.gov/ui201/b7201.htm> [<https://perma.cc/73KQ-J4AU>].

¹⁰⁰ See 970 N.E.2d at 241 (addressing the usefulness of written employment rules).

¹⁰¹ *Id.* at 245 (italics added for emphasis and internal citations omitted).

rule must be reduced to writing and introduced into evidence to enable this court to fairly and reasonably review the determination that an employee was discharged for 'just cause' for the knowing violation of a rule.' The reason for requiring uniform enforcement of a known and reasonable rule is to give notice to employees about what punishment they can reasonably anticipate if they violate the rule and to protect employees against arbitrary enforcement.¹⁰²

This concept applies with particular force to behavioral rules. Akin to the due process concerns expressed above, it is only fair that in order to discipline an employee for improper behavior, there should first be a rule prohibiting the conduct, which should be in writing and made known to the employee. In addition, the behavioral rule should be enforced in a timely manner and on a uniform basis.

Thus, for the reasons described, the dissemination of a conduct rule and its timely and uniform enforcement is certainly important to the employee who is the subject of a corrective action and perhaps discipline.¹⁰³ Yet, clear rules and the enforcement thereof are equally important for any employee who is being negatively affected by a co-worker's behavior.¹⁰⁴ As Herzberg and Maslow understood, since workers must feel safe and secure in the workplace for them to be productive, if one employee is acting out and making others in the workforce feel distracted, uncomfortable, harassed, or threatened, it is incumbent upon the company, through its supervisors and managers, to intercede and correct the situation through the enforcement of rules which prohibit such conduct.¹⁰⁵ When this natural and expected activity by a manager does not occur, those whom are victimized cannot perform their jobs.¹⁰⁶ At best, the affected employees will still attempt to be productive, but to a lesser degree, while tolerating the situation.¹⁰⁷ A quality employee, however, who sees no reason to expect improved working conditions, because there are no rules to effect change, may eventually

¹⁰² *Id.*

¹⁰³ See GOODWIN & GRIFFITH, *supra* note 73, at 134–37 (noting that discipline is supposed to improve the conduct of an employee and not serve as a form of punishment). Failure to use corrective rules can be effectively precluded from correcting an employee's behavior for that employee's own benefit. *Id.*

¹⁰⁴ See *id.* at 17 (discussing the importance of rule enforcement).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 133–37 (elaborating on rule enforcement based on ego maturity).

¹⁰⁷ See *id.* (noting employees' various need for responsive measures based on ego-maturity to rule enforcement).

leave the company.¹⁰⁸ At worst, an employee who is being subjected to inappropriate conduct of a co-worker that is not corrected by the employer may develop a meritorious claim of sexual or other form of harassment based on a hostile work environment.¹⁰⁹ This creates potential exposure for an employer, and a possible affirmative defense is discussed in more detail below.¹¹⁰

Another important consideration, separate and apart from legal concerns and requirements, is that when an employer hires workers, the employees inevitably possess different levels of ego maturity. In this context, the term ego maturity signifies the capacity of a given employee to understand the need for order in the workplace and to work in harmony with the others and the company to achieve organizational goals. As a result of the varying capacity of employees to act in such a manner, they must be controlled and motivated in differing ways. Some employees can only be controlled and motivated through well-defined and consistently enforced rules.¹¹¹ According to one model, ego maturity involves four levels which factor into how a supervisor might deal with each category of employee.¹¹² The four levels of ego maturity, developed by Stephen Earnest, Ph.D., in descending order, are: (1) goals level, (2) self-aware level, (3) rules level, and (4) opportunistic level.¹¹³

Goals level employees are the most mature workers in the company.¹¹⁴ These employees generally possess insight into their own motivation as well as the motivation of others.¹¹⁵ They are able to participate in establishing goals and solving problems.¹¹⁶ They are fully capable of

¹⁰⁸ See *id.* (highlighting the need for strong rule enforcement).

¹⁰⁹ See, e.g., *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). See also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (explaining that an employer, when no tangible employment action has been taken against the employee, such as a termination, may be able to assert an affirmative defense and avoid vicarious liability if it has implemented and disseminated an anti-harassment policy).

¹¹⁰ See *infra* notes 222-27 and accompanying text (discussing employee liability and affirmative defense for discharge).

¹¹¹ See GOODWIN & GRIFFITH, *supra* note 73, at 135 (explaining the characteristics of rules-level employees).

¹¹² See *id.* at 133-37 (defining the levels of ego maturity amongst employees).

¹¹³ See *id.* at 133-37, 141 (revealing the research involved to establish the categories). Dr. Earnest developed these levels and delivered a lecture on the subject in 1999 at Indiana University-Purdue University, Indianapolis, based on research conducted by developmental psychologist, Jane Loevinger, entitled, *Ego Development: Conceptions and Theories* (San Francisco: Jossey-Bass, 1980), 51.

¹¹⁴ See *id.* at 136-37 (discussing goals level employees).

¹¹⁵ See *id.* (noting the motivation found amongst goals level workers).

¹¹⁶ See *id.* (showing the traits of goals level workers).

collaborating with co-workers, supervisors, and managers to find “win/win” solutions to problems and challenges.¹¹⁷

Self-aware level employees are the next level down in terms of ego maturity.¹¹⁸ These employees have some insight and ability to solve problems, which permits them to work toward conflict resolution.¹¹⁹ Employees who possess this degree of ego maturity are reasonably capable of resolving conflict in the workplace, but may be intolerant of co-workers with less ego maturity.¹²⁰ These workers may struggle with long-range planning and fully understanding complex cause and effect considerations.¹²¹ Resolving conflict with self-aware employees requires a careful analysis of the conflict and assisting the employee with a clear definition of the particular workplace issue.¹²²

Rules level employees are another step down on the ego maturity ladder.¹²³ These employees are inclined to conform to accepted behavior and established practices.¹²⁴ They are motivated by clearly defined rules, and they can be counted on to follow them.¹²⁵ These are typically polite employees who desire workplace fairness.¹²⁶ They prefer to steer clear of unpleasant situations at work.¹²⁷ On the other hand, rules level employees tend to oversimplify the cause and effect relationship of workplace problems.¹²⁸ Although resolving conflicts with employees at this level of ego maturity may appear easy, they tend to possess limited insight into their own or any co-worker's motivation, and are prone to simplistic cause-and-effect assumptions.¹²⁹ Consequently, a supervisor who attempts to resolve a conflict with a rules level employee must be prepared

¹¹⁷ See *id.* (presenting information about goals level workers).

¹¹⁸ See *id.* at 135–36 (discussing self-aware employees).

¹¹⁹ See *id.* (explaining the ability of self-aware level employees to problem solve).

¹²⁰ See *id.* (noting self-aware level workers' moderate ability to settle conflict).

¹²¹ See *id.* (stating that self-aware level workers require a detailed explanation of conflict resolution plans).

¹²² See *id.* (describing how to resolve conflict with self-aware level workers).

¹²³ See *id.* at 135 (analyzing the character traits of rules-level employees).

¹²⁴ See *id.* (describing what motivates rules-level employees).

¹²⁵ See *id.* (detailing rules-level employees' propensity to be rule abiders).

¹²⁶ See *id.* (describing rules level employees and their concerns over workplace fairness). See also Indiana Continuing Legal Education Forum, *Emerging Trends in Employment Law*. One Indiana lawyer, Daniel Zamudio, who represents plaintiffs in employment law matters, has offered in connection with this article that an employer's need to manage its workforce with rules and policies is not only the concern of the company, but is also a basic expectation of the clients he represents. After all, as this attorney recognizes, most employees desire an orderly workplace. This is another confirmation that Herzberg and Maslow knew of what they wrote.

¹²⁷ See GOODWIN & GRIFFITH, *supra* note 73, at 135 (noting how rules-level employees prefer to avoid conflicts).

¹²⁸ See *id.* (explaining how rules-level employees handle conflict in the workplace).

¹²⁹ See *id.* (providing insight into the psychology of rules level employees).

to explain why the conflict exists, clearly explain the issues, and then encourage questions.¹³⁰ While a rules level employee will be inclined to conform to a solution, the lack of insight may result in a solution that is not a long-term solution, despite the initial appearance of a resolution.¹³¹

Opportunistic level employees possess the least amount of ego maturity.¹³² They usually view conflicts as a competition.¹³³ Any gain for the other side is deemed as a loss for this type of employee.¹³⁴ These employees often demonstrate an uncanny grasp of any loopholes in the rules or the absence of applicable rules, so they can assert that they were not in violation.¹³⁵ Opportunistic level employees cannot be relied on for insight, honesty or acceptance of responsibility, will manipulate others to get their way, and will blame their workplace problems on any person or any circumstance, rather than on their own decisions and actions.¹³⁶ Supervising this category of employee is a constant challenge, and perhaps the only way to control such employees is with clear rules that are consistently enforced through a progressive discipline program.¹³⁷

As one can appreciate, with this wide range of employee maturity, while an employer may hope to work well with goal-oriented employees, such optimism is not warranted for other segments of the workforce.¹³⁸ As a result, there is little hope for an employer to guide and control certain immature workers without rules and consequences. The NLRB's intrusion on an employer's use of such necessary rules to orient and control employees and preserve order has created a real problem.¹³⁹

IV. AN EMPLOYER'S IRRECONCILABLE DILEMMA

While established notions of workplace fairness and bottom line requirements of workforce development agencies mandate that employees be permitted to understand the employer's expectations, through written rules and policies that are made known to the workforce and consistently enforced, the NLRB has taken the position that many work rules designed to orient workers and provide order are unlawful

¹³⁰ See *id.* (describing how to resolve a conflict with rules-level employees).

¹³¹ See *id.* (detailing a rules-level employee's tendency to conform and accept resolutions made by their employer).

¹³² See *id.* at 134 (explaining the characteristics of opportunistic-level employees).

¹³³ See *id.* (analyzing opportunistic-level employee maturity in the workplace).

¹³⁴ See *id.*

¹³⁵ See *id.* (describing the way opportunistic-level employees frame conflict).

¹³⁶ See *id.*

¹³⁷ See *id.* (identifying the true purpose of corrective actions and progressive discipline).

¹³⁸ See *id.* at 136-37 (describing goal-oriented employees).

¹³⁹ See *infra* Part IV (explaining how the NLRB has overstepped on employers' ability to effectively discipline employees).

because they have the potential to violate an employee's Section 7 rights.¹⁴⁰ A prime example of the NLRB's position is found in its Report of General Counsel Regarding Employee Rules (the "Report").¹⁴¹ In the Report, the NLRB's General Counsel informed all NLRB Regional Directors, Officers in Charge, and Resident Officers about the NLRB's position on the unlawfulness of many seemingly innocuous workplace rules.¹⁴² For instance, the NLRB found numerous rules to be unlawfully overbroad because employees "reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general."¹⁴³ Such "unlawful" rules included:

- [B]e respectful to the company, other employees, customers, partners, and competitors.
- Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.
- Be respectful of others and the Company.
- No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.¹⁴⁴

The NLRB also determined that it was unlawful for employers to prohibit the following behavior:

- Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.
- 'Chronic resistance to proper work-related orders or discipline, even though not overt insubordination,' will result in discipline.¹⁴⁵

¹⁴⁰ See National Labor Relations Act of 1935, 29 U.S.C. § 157 (1935) (giving employees with the right to organize and collectively bargain).

¹⁴¹ See Richard F. Griffin, *Report of General Counsel Concerning Employer, Rules, 1-3* (Mar. 18, 2015), <https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf> [<https://perma.cc/28Z4-QWDM>] (reporting notable information on cases adjudicated by the NLRB).

¹⁴² The general counsel's opinions and advice memoranda are not binding on the NLRB or any court, but they reveal whether such rules or policies will be perceived by the NLRB as a violation of Section 8 of the NLRA. *Id.* at 3.

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 8.

The NLRB took issue with these two rules because it believes that while they prohibit insubordination, they also preclude an employee from conduct that does not rise to the level of insubordination, which the NLRB asserts “reasonably would be understood as including protected concerted activity.”¹⁴⁶ In short, the NLRB appears to be outlawing an employer from requiring its workforce to be respectful and follow the directions of superiors, based on a professed concern that an employee would interpret the language as a rule which interferes with Section 7 rights.¹⁴⁷

In its Report, the NLRB concluded that additional rules also were impermissibly overbroad. The rules which the NLRB found to be problematic included:

- Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation.
- It is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer’s] business operation or reputation.
- Do not make ‘[s]tatements ‘that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.’
- Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself.¹⁴⁸

The Report was based upon the Board’s holding in *Quicken Loans, Inc.*, where it concluded that employees have the right, under Section 7 of the NLRA, to criticize an employer’s labor policies and its treatment of employees, including in a public forum.¹⁴⁹ According to the NLRB, these rules were unlawfully overbroad because they “reasonably would be read to require employees to refrain from criticizing the employer in public.”¹⁵⁰

The NLRB has recognized that while the NLRA protects an employee who criticizes an employer’s labor practices or working conditions, the protection does not extend to a worker’s disparagement of an employer’s

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (providing a summary of what the NLRB is outlawing).

¹⁴⁸ *Id.*

¹⁴⁹ *See* 361 N.L.R.B. No. 94 (Nov. 3, 2013) (ordering that the employer cease and desist from upholding rules that barred employees from criticizing the employer’s labor practices).

¹⁵⁰ Griffin, *supra* note 141, at 8.

product.¹⁵¹ Yet, with regard to the rules it disallowed, the NLRB determined that there was insufficient context or examples to distinguish between rules pertaining to working conditions and those protecting the company's product to save the rules from being considered an unlawful infringement on Section 7 rights.¹⁵²

Under the heading, *Lawful Rules Regulating Employee Conduct Towards the Employer*, the NLRB did approve of the following rules:

- No 'rudeness or unprofessional behavior toward a customer, or anyone in contact with' the company.
- Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.¹⁵³

Of course the problem with the NLRB's approval of these particular rules regarding "conduct towards the employer" is that they have nothing to do with *conduct towards the employer*.¹⁵⁴ These rules merely regulate conduct toward customers and members of the public, not conduct toward co-workers, supervisors, or managers. Thus, despite some apparent concessions, the NLRB's exceptions to its concerns about a violation of Section 7 rights are unhelpful for any employer attempting to guide and control its workforce for legitimate psychological, motivational, and legal reasons.

According to the NLRB's report, some workplace conduct rules were also deemed to be acceptable. They were as follows:

- Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.
- Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.
- 'Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in' discipline.¹⁵⁵

¹⁵¹ See *id.* (stating that employees are not protected when their conduct is purely disparaging to an employer's product).

¹⁵² See *id.* (providing another example of a rule the NLRB found to be lawful).

¹⁵³ *Id.* at 9.

¹⁵⁴ *Id.* at 7 (italics added for emphasis).

¹⁵⁵ *Id.* at 9.

The NLRB's rationale for approving the later rule is that it addresses serious misconduct, instead of garden variety disrespect or insubordination.¹⁵⁶ With regard to the first two rules, the NLRB believed that employees would reasonably understand the first one to encourage employees to work together in an atmosphere of civility, while the second one would apply only to investigations of workplace misconduct.¹⁵⁷ Based on these comments, the NLRB apparently believes it is unlawful for an employer to prohibit insubordinate, denigrating, and disrespectful behavior in a general sense, but it is acceptable to have such rules if they pertain to serious misconduct or are for the purpose of encouraging civility in the workplace.¹⁵⁸ This distinction is confusing, and the confusion is exacerbated by the subjective standard the NLRB utilizes in analyzing a rule, which amounts to a hypothetical inquiry into "whether employees would read the rule's language in a manner that would prohibit Section 7 activity."¹⁵⁹ Furthermore, while the Report appears to include an assurance that the NLRB will read workplace rules in context and approve those rules which are designed to promote civility, many of the decisions issued by the NLRB belie that assurance.¹⁶⁰

One example of such a case is *T-Mobile U.S.A., Inc.*¹⁶¹ Consistent with its aggressive review of employee handbooks, the NLRB found numerous workplace rules in T-Mobile's employee handbook and the employee handbook of MetroPCS Communications, Inc. to be unlawful, including language which required positive workplace behavior.¹⁶² The NLRB determined that the following provisions were unlawful because employees would reasonably construe them to interfere with their Section 7 rights: (1) a policy that explained that all employees should "behave in a professional manner that promotes efficiency, productivity, and cooperation" and "maintain a positive work environment by

¹⁵⁶ See *id.* (explaining the rationale behind the NLRB's approval for the rule).

¹⁵⁷ See *id.* (providing the NLRB's apparent reason for allowing these particular rules).

¹⁵⁸ See *id.* (explaining that the Court found a rule requiring cooperation amongst employees to be lawful because the employees would reasonably understand that the employer had a legitimate expectation that there be an atmosphere of civility between co-workers and a rule requiring cooperation between employers' investigations would reasonably be interpreted by employees to refer to an investigation relating to workplace misconduct).

¹⁵⁹ See *id.* at 2, 4 (suggesting that the Board's decisions regarding employer rules often hinge on whether the employees would reasonably construe the rules to prohibit protected activity).

¹⁶⁰ See *id.* at 4, 9 (noting that rules will be viewed in context and rules outlining an employer's expectation that employees keep an "atmosphere of civility" are lawful).

¹⁶¹ See 363 N.L.R.B. No. 171, 1-5 (2016) (holding that portions of T-Mobile's policies were unlawful because they could reasonably be construed to interfere with employee rights, despite the fact that the policies were intended to promote civility).

¹⁶² See *id.* at 12-15, 18, 20, 23-25 (finding various rules in the employee handbooks of both T-Mobile and MetroPCS to be unlawful for violations of Section 8(a)(1) of the NLRA).

communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management"; and (2) a rule that prohibited employees from using the company's "information or communication resources in ways that could reasonably be considered disruptive, offensive, or harmful to morale."¹⁶³ The Board concluded that these workplace rules were facially invalid because they served to inhibit the Section 7 rights of workers to engage in "concerted activities for collective bargaining or other mutual aid or protection."¹⁶⁴ In its decision, the Board acknowledged that the rules did not explicitly restrict protected activities and were not promulgated in response to or applied to restrict Section 7 activities, but the lack of an unlawful purpose did not save the rules from being deemed unlawful.¹⁶⁵

In *Tinley Park Hotel & Convention Ctr., LLC & Audelia Santiago*, an employee was fired for criticizing her employer on Facebook in violation of workplace rules.¹⁶⁶ The employer's rules prohibited employees from making "false or malicious" statements about the company and from engaging in:

discourteous or disrespectful treatment of . . . supervisors, or fellow associates, or displaying "disloyalty, including disparaging or denigrating the food, beverages, or services of the company," as well as "[a]ny other conduct that the company believes has created, or may lead to the creation of a situation that may disrupt or interfere with the amicable, profitable and safe operation of the company."¹⁶⁷

The facts of the case involve a banquet server at a hotel who, while working an extended shift, went on break with her coworkers where they began taking selfies, after which they posted the images on Facebook.¹⁶⁸ Social media communications then followed, including an exchange between the employee and her Facebook friends regarding: "how hard [the employee] and other employees had been working. [The employee]

¹⁶³ *Id.* at 2, 22.

¹⁶⁴ *Id.* at 1, 19.

¹⁶⁵ *See id.* at 1 (clarifying that the rules at issue had not been alleged to explicitly restrict protected Section 7 activities).

¹⁶⁶ *See* JD-36-15, 4 (2015) (describing the details of the situation in which an employee was fired after using her cell phone, while at work, to post a photo of co-workers on Facebook and later commenting back and forth with some of her friends, criticizing her employer).

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *See id.* at 4 (detailing the events of the employees' policy violation, in which she took some photos with her co-workers during a break and posted them to Facebook).

stated she had been working like a ‘slave’ and noted that she had no time to play games like she used to do.”¹⁶⁹ In ruling that the employee’s termination was unlawful, the NLRB concluded that the company’s rules “reasonably could be construed to prohibit protected activity, such as coworkers discussing with one another the complaints they have about their supervisors.”¹⁷⁰ The Board found that the rules were overly broad, and then addressed the termination, holding that while the Facebook posts were not concerted activity (because the friends were not fellow employees), the posts were still protected because “[e]mployees’ complaints about their hours of work, including heavy workloads, long have constituted protected activity.”¹⁷¹ There are many more cases in which the NLRB reached similar, troubling conclusions.¹⁷²

In *First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO*, the NLRB again ruled that numerous provisions in an employee handbook were unlawful.¹⁷³ The Board rejected rules, among others, that prohibited discourteous or inappropriate attitude or behavior toward other employees, prohibited employees from making false statements about the company, and prohibited employees from conducting themselves “during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the company.”¹⁷⁴ The NLRB’s problem with these workplace conduct rules was that they were sufficiently ambiguous to cause employees to reasonably construe them as limiting their communications and therefore violating their right to engage in protected concerted activity.¹⁷⁵

In *Hills and Dales General Hospital and Danielle Corlis*, the NLRB received a complaint against the hospital after it issued a written warning

¹⁶⁹ *Id.* at 7.

¹⁷⁰ *Id.* at 6.

¹⁷¹ *Id.* at 7.

¹⁷² See, e.g., *Beverly Health and Rehabilitation Services, Inc.*, 332 N.L.R.B. No. 26, 349, 356 (2000) (invalidating a rule that prohibited “false or misleading work-related statements concerning the company, the facility or fellow associates.”); *Purple Communications, Inc.*, 361 N.L.R.B. No. 126, 62 (2014) (rejecting a rule that prohibited employees from “[c]ausing, creating, or participating in a disruption of any kind during working hours on [c]ompany property.”). See also *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 1754 (2012) (finding a rule unlawful because it prohibited “language which injures the image or reputation of the [employer]” and prohibited being “disrespectful” to co-workers or others); *KSL Claremont Resort, Inc.*, 344 N.L.R.B. No. 105, 836 (2005) (striking down a rule that prohibited “[n]egative conversations about associates and/or managers.”).

¹⁷³ See *First Transit, Inc.*, 360 N.L.R.B. No. 72, 619 (2014) (ruling that numerous provisions in the employers handbook unlawfully violated Section 8(a)(1) of the Act because employees could reasonably construe the language as prohibiting protected activity).

¹⁷⁴ *Id.* at 622.

¹⁷⁵ See *id.* at 621, 628 (finding the rule to be ambiguous and overbroad because it could reasonably be construed to prohibit employees from free communication).

to an employee about her Facebook post.¹⁷⁶ The employee posted the comments in response to a post by a former employee, who had been terminated for throwing a yogurt cup at her boss, as follows: "Holy [expletive], rock on . . . Way to talk about the [expletive] you used to work with. I LOVE IT!!!"¹⁷⁷ The employee received a warning that her post violated paragraph 16 of the hospital's Values and Standards of Behavior Policy, which provided that employees "will represent Hills and Dales in the community in a positive and professional manner in every opportunity."¹⁷⁸ The Board did not focus on that single paragraph, but instead examined the entire Values and Standards of Behavior Policy and ruled that paragraph 16, as well as paragraph 11, which precluded employees from making "negative comments about . . . fellow team members," and paragraph 21, which states that employees "will not engage in or listen to negativity or gossip," violated Section 7 because they could inhibit employees from engaging in protected concerted activities.¹⁷⁹ The NLRB ruled that policies that prohibit conversations that are critical of coworkers or managers are unlawful on their face.¹⁸⁰ The NLRB further determined that paragraph 16 was unlawful because the requirement that employees must be positive and professional representatives of the employer in the community "is just as overbroad and ambiguous as the proscription of 'negative comments' and 'negativity.'"¹⁸¹

It is interesting that the NLRB, in deciding cases such as *Quicken Loans, Inc., infra*, did not merely conclude that a company's rules are susceptible to a broad interpretation; rather, it claimed to know that employees *would* gravitate toward the most liberal reading of the language so as to keep themselves from engaging in protected and concerted activities.¹⁸² This prescient approach by the Board is contrary to the method employed by the many learned jurists who serve in the country's federal trial and appellate courts.¹⁸³ As explained in *Coleman v. Donahoe*, "[i]n adjudicating claims under federal employment discrimination statutes, a court does not sit as a 'super-personnel department,' second-guessing an employer's

¹⁷⁶ See Hills and Dales General Hospital, 360 N.L.R.B. No. 70, 615 (2014) (stating that an employee received a written warning for posting a comment on Facebook for violating one of the employers policies).

¹⁷⁷ *Id.* at 615.

¹⁷⁸ *Id.* at 616.

¹⁷⁹ *Id.* at 611-12, 616.

¹⁸⁰ See *id.* at 611 (quoting Claremont Resort and Spa, 344 NLRB 832).

¹⁸¹ *Id.* at 612.

¹⁸² See 359 N.L.R.B. No. 141 (2013) (concluding that employees could reasonably read the rules as restricting their rights to engage in protected activities).

¹⁸³ See *Coleman v. Donahoe*, 667 F.3d 835, 862 (7th Cir. 2012) (portraying the method used by the Seventh Circuit in deciding such cases).

‘business decision as to whether someone should be fired or disciplined because of a work-rule violation.’”¹⁸⁴ Based upon this judicial restraint, a federal court will afford an employer the opportunity to articulate a legitimate, nondiscriminatory reason for an employment decision which resulted in an adverse employment action for a worker.¹⁸⁵ This is because

¹⁸⁴ *Id.*

¹⁸⁵ See *Krchnavy v. Limagrain Genetics Corporation*, 294 F.3d 871, 875 (7th Cir. 2002) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973)) (setting forth the burden-shifting analysis, whereby a plaintiff is first required to establish a *prima facie* case of discrimination by providing membership in a protected class, job performance at a level which met the employer’s legitimate expectations, an adverse employment action, and treatment different than a similarly situated employee outside the protected class). Only where a plaintiff establishes a *prima facie* case will the burden shift to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. *Id.* at 876. Thereafter, once the employer proffers a legitimate, nondiscriminatory basis for the employment action, the burden returns to the plaintiff to show the proffered basis is a pretext for discrimination. *Id.* See also *O’Reagan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (reiterating the procedure and elements for a *prima facie* case); *Peele v. Country Mutual Insurance Co.*, 288 F.3d 319, 327 (7th Cir. 2002) (“If a plaintiff is unable to establish a *prima facie* case of employment discrimination under *McDonnell Douglas*, an employer may not be subjected to a pretext inquiry.”); *Kulumani v. Blue Cross Blue Shield Ass’n*, 224 F.3d 681, 685 (7th Cir. 2000) (stating that pretext is more than a poor business judgment: it “means a dishonest explanation, a lie rather than an oddity or an error”); *Smith v. Chicago Transit Authority*, 806 F.3d 900, 905 (7th Cir. 2015) (noting that the direct and indirect approaches method, which is a tool for a summary judgment analysis, appears to be in the process of being phased out in favor of “a more straight-forward analysis which explores whether a reasonable jury could infer prohibited discrimination”); *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765–66 (7th Cir. 2016) (criticizing the differentiation between direct and indirect evidence in discrimination cases). More specifically, the Seventh Circuit goes on to state:

[a]ccordingly, we hold that district courts must stop separating ‘direct’ from ‘indirect’ evidence and proceeding as if they were subject to different legal standards. Once again, this court must accept its share of the responsibility – because even as some panels were disparaging the “direct” and “indirect” approaches, other panels were articulating them as governing legal standards. We need to bring harmony to circuit law, and the way to do that is to overrule *Andrews*, 743 F.3d 230; *Silverman*, 637 F.3d 729; *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487 (7th Cir. 2007); *Rhodes*, 359 F.3d at 498; *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524 (7th Cir. 2003); *Oest v. Illinois Department of Corrections*, 240 F.3d 605 (7th Cir. 2001); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000); *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391 (7th Cir. 1997); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359 (7th Cir. 1988); and *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984), to the extent that these opinions insist on the use of the direct-and-indirect framework. (As with the convincing-mosaic cases, we are not saying that any of these decisions produced a victory for the wrong litigant; our concern is with the legal standards they employed rather than with their outcomes.) One point of clarification may be helpful. The burden-shifting framework created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), sometimes is

federal courts are “concerned solely with whether the reason for which the [employer] discharged the [employee] was discriminatory.”¹⁸⁶ Thus, when an employer establishes a reason for its actions that is not forbidden by law, federal courts understand that it is not their province to decide whether the decision was wise, fair, or even correct, so long as it was the actual reason for the adverse employment action.¹⁸⁷

By contrast, the NLRB does not afford an employer the opportunity to demonstrate the lawful application of its workplace rules and policies.¹⁸⁸ It simply deems them facially unlawful. Worse still, the NLRB does not even need to be presented with an adverse employment action by an employer; instead, it immediately assumes that any language susceptible of a broad interpretation will, in turn, render the workforce susceptible of an improper infringement on Section 7 rights, thereby stripping the employer of legitimate and necessary rules and policies to guide and control its workers.¹⁸⁹

referred to as an “indirect” means of proving employment discrimination. Today’s decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled “direct” and “indirect,” that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors.

Id.

¹⁸⁶ *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997).

¹⁸⁷ *See id.* at 411 (finding that it is not the court’s job to judge an employer’s reason for terminating an employee, so long as the reason given is the true and accurate reason the employee was terminated).

¹⁸⁸ *See* Fred Miner and Adam Tuzzo, *NLRB General Counsel Issues Report Concerning Legality of Common Employer Rules*, LITTLER (Mar. 25, 2015), <https://www.littler.com/nlrb-general-counsel-issues-report-concerning-legality-common-employer-rules> [<https://perma.cc/G63L-PK2Z>] (describing the context for the NLRB’s Report and review of the rules and policies in employee handbooks).

¹⁸⁹ *See id.* at 2 (explaining that the NLRB places a high burden on employers to ensure that their rules and policies are not overly broad). *See also* Trip, *Employers With No Visible Tattoo Policies*, TAT2X (June 16, 2015), <http://blog.tat2x.com/employers-with-no-visible-tattoo-policies/> [<https://perma.cc/P22R-AE4R>] (listing the employers who have policies in place which either prohibit or limit visible tattoos on their employees). Taken to its extreme, one can envision the NLRB concluding that an employer’s no tattoos policy constitutes an 8(a) violation. Many prominent employers fall within the NLRB’s jurisdiction require tattoos to be covered. *Id.* One could easily argue, based upon numerous NLRB rulings, that these policies violate the Section 7 rights of workers because they would conclude that they are prohibited from any type of union speech or work-related speech through an expression via a tattoo. *Id.* This would be particularly true with regard to those policies which inject an element of subjectivity by only forbidding tattoos which the company finds offensive. *Id.* The United States Postal Service has such a subjective “some tattoos OK” policy. *Id.* Police departments in Chicago, Dallas, Houston, Huntsville, Los Angeles, San Diego, and St. Louis are among the forces which ban visible tattoos. *Id.* According to the NLRB’s way of thinking,

The NLRB's "throw the baby out with the bathwater" approach creates an unavoidable dilemma for employers in the area of sexual harassment law.¹⁹⁰ The Board, for instance, has rejected as unlawful a company memo informing its workers that threats, intimidation, and harassment among workers was unacceptable and that the company intended to "enforce [its] Workplace Violence Prevention Policy to keep [the] workplace free from such improper conduct."¹⁹¹ The Board's refusal to allow employers to control and protect their employees cannot be reconciled with the guidance provided by the EEOC on workplace harassment, which requires that "an anti-harassment policy and complaint procedure . . . should contain, at a minimum . . . [a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible."¹⁹²

The NLRB's approach brings to mind the compelling testimony offered by the late Frank Zappa of *The Mothers of Invention* fame, a uniquely talented musical artist whose "life's work reveals two consistent concerns: bullies and First Amendment issues."¹⁹³ It seems that Mary Elizabeth "Tipper" Gore, estranged spouse of former Vice President Al Gore, Jr., became alarmed, in 1984, about the lyrical content of Prince and the Revolution's album, *Purple Rain*.¹⁹⁴ Mrs. Gore inspired the formation

all of these policies must be *per se* unlawful because they have the effect of chilling Section 7 rights. *Id.* See also *infra* note 172 and accompanying text (explaining the standard for determining whether a rule violates Section 7 rights). Yet, they pass muster according to the anti-discrimination laws because they are facially neutral. Cf. *infra* note 193 and accompanying text (describing the elements of a *prima facie* anti-discrimination case).

¹⁹⁰ See, e.g., *Care One at Madison Avenue, LLC*, 361 N.L.R.B. No. 159, *6 (2014) (indicating the NLRB's approach to dealing with sexual harassment law). See also *Throw The Baby Out With The Bathwater*, GRAMMARIST, <http://grammarist.com/usage/throw-the-baby-out-with-the-bathwater/> [<https://perma.cc/M8BR-RC74>] ("To throw the baby out with the bathwater is an idiom which means to lose something important while trying to get rid of unwanted things . . . The phrase is directly translated from a German proverb dating from at least 1512. In German it reads *das Kind mit dem Bade ausschütten*. It was paired with an illustration of a woman dumping a tub of water and an infant falling out into the river.").

¹⁹¹ *Care One at Madison Avenue, LLC*, 361 N.L.R.B. No. 159 at *2.

¹⁹² *Ida L. Castro, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EEOC (June 18, 1999), <http://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/5R6H-SA4M>].

¹⁹³ James Stafford, *30 Years Ago: Frank Zappa Responds to the PMRC on 'Frank Zappa Meets the Mothers of Prevention'*, ULTIMATE CLASSIC ROCK (Nov. 21, 2015), <http://ultimateclassicrock.com/frank-zappa-meets-the-mothers-of-prevention/> [<https://perma.cc/349X-K2KD>].

¹⁹⁴ See *id.* (describing Tipper's reaction to *Purple Rain*). See also *Tipper Gore Bio*, CNN ALL POLITICS, <http://www.cnn.com/ALLPOLITICS/1996/conventions/chicago/players/gore/tipper.shtml> [<https://perma.cc/4F3F-7VMF>] (detailing the life of Tipper Gore, including how she met former Vice President Al Gore, their marriage, and his eventual inclusion in politics).

of the Parents Music Resource Center (PMRC), among whose aims was to require a system similar to what was being used in the movie industry to rate the content of music albums.¹⁹⁵

In 1985, the PMRC's effort to chill recording artists' language based on a presumption that it would be put to bad use raised a serious prior restraint issue for Mr. Zappa.¹⁹⁶ In response to the attempted censorship, Mr. Zappa, in a prepared statement, provided:

The PMRC proposal is an ill-conceived piece of nonsense which fails to deliver any real benefits to children, infringes the civil liberties of people who are not children, and promises to keep the courts busy for years dealing with the interpretational and enforcement problems inherent in the proposals design. It is my understanding that, in law, First Amendment issues are decided with a preference for the least restrictive alternative. In this context, the PMRC's demands are the equivalent of treating dandruff by decapitation The establishment of a rating system, voluntary or otherwise, opens the door to an endless parade of moral quality control programs based on things certain Christians do not like. What if the next bunch of Washington wives demands a large yellow "J" on all material written or performed by Jews, in order to save helpless children from exposure to concealed Zionist doctrine?¹⁹⁷

On November 1, 1985, before the "porn rock" hearing, as it came to be known, concluded, the Recording Industry Association of America agreed to place Parental Advisory stickers on certain releases at its own discretion, rather than the descriptive labels categorizing the lyrics, as advocated for by the PMRC.¹⁹⁸ Mr. Zappa fully understood that a radical

¹⁹⁵ See Stafford, *supra* note 193 and accompanying text (depicting the concern of Ms. Gore regarding the censoring of music such as Purple Rain).

¹⁹⁶ See *Contents of Music and the Lyrics of Records: Hearing Before the Committee on Commerce, Science, and Transportation*, 99th Cong. 23 (1985) (statement of George David Weiss) (explaining PMRC's efforts to censor explicit lyrics in order to protect children listeners).

¹⁹⁷ *Contents of Music and the Lyrics of Records: Hearing Before the Committee on Commerce, Science, and Transportation*, 99th Cong. 52, 54 (1985) (statement of Frank Zappa).

¹⁹⁸ See Zach Schonfeld, *Does the Parental Advisory Label Still Matter?*, NEWSWEEK (Nov. 10, 2015, 3:20 PM), <http://www.newsweek.com/does-parental-advisory-label-still-matter-tipper-gore-375607> [<http://perma.cc/4PW6-WVM9>] (noting that the RIAA chose to label records to inform the public of possibly offensive lyrical content).

reaction to a predicted problem, in advance of it actually transpiring, is often an ill-conceived way to address a concern.¹⁹⁹

The NLRB's solution to perceived infringements on employees' Section 7 rights amounts to a more recent attempt at, in Mr. Zappa's compelling terms, "treating dandruff by decapitation." If there are indeed aspects of a company's conduct rules or policies which must be cured, then the NLRB is fully authorized to affect the appropriate remedy as problems arise.²⁰⁰ It does indeed amount to improper censorship, however, for the NLRB, in an overzealous, pre-emptive effort to protect the very employees the company's rules are designed to protect, to lop off the heads of management, and to outlaw well-intended efforts to guide and control a workforce.²⁰¹

Beyond the right employers must possess to control and protect their employees with workplace rules and policies, the Supreme Court has explained that employers actually have a legal duty to implement measures to prevent sexual harassment in the workplace, and employers can potentially avoid vicarious liability if those measures provide a means of recourse for a victimized employee.²⁰² This is known as the *Faragher Ellerth* affirmative defense.²⁰³ This affirmative defense is available to an

¹⁹⁹ See *Contents of Music and the Lyrics of Records: Committee on Commerce, Science, and Transportation*, *supra* note 197, at 52, 54 (pointing out the inadequacies of the PMRC and rebuking their effort to censor offensive lyric content).

²⁰⁰ See National Labor Relations Act, 29 U.S.C. § 160 (2012) (assigning powers to the National Labor Relations Board to prevent a person from using unfair labor practices).

²⁰¹ See *infra* Part IV (describing the outlawed rules that have resulted in problems for employees).

²⁰² See *Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998) (requiring that measures be taken to prevent sexual harassment in the workplace).

²⁰³ See L. Castro, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC (Apr. 6, 2010), <https://www.eeoc.gov/policy/docs/harassment.html> [<http://perma.cc/6Q89-RJ62>] (recognizing the affirmative defense to harassment claims whereby employers take necessary steps to prevent harassment). See also *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (holding that an employee can be regarded as a "supervisor" if the supervisor gives them power to take tangible employment actions against a victim). The Supreme Court rejected in part the EEOC's definition of supervisor. *Id.* at 2443. The EEOC acknowledged that the Supreme Court held that an employee is a supervisor if the employer has empowered that employee "to take tangible employment actions against the victim, i.e., to affect 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.'" *Id.* at 2443 (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (defining a tangible employment action)). According to the Supreme Court, an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." *Id.* at 2453. In assessing such negligence, the Supreme Court indicated that "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." *Id.* at 2451. It also ruled that "[e]vidence that an employer did not monitor the workplace,

employer who is charged with claims of harassment under Title VII of the Civil Rights Act of 1964, as amended, or one of the state civil rights laws.²⁰⁴ The Supreme Court first articulated the affirmative defense in the companion cases decided on June 26, 1998. One case is *Faragher v. City of Boca Raton*.²⁰⁵ The sister case is *Burlington Industries, Inc. v. Ellerth*.²⁰⁶

In *Ellerth*, the plaintiff, Kimberly Ellerth, from early 1993 until mid-1994, worked as a salesperson in one of Burlington's Chicago divisions.²⁰⁷ Once Ellerth was hired, her boss began making sexual advances toward her, accompanying her on business trips; and once, in a hotel lounge, after "ogling her body," is alleged to have said, "you know, Kim, I could make your life very hard or very easy at Burlington."²⁰⁸ Later, in a telephone conversation, Ellerth's boss reportedly said, "I don't have time for you right now, Kim, unless you tell me what you're wearing."²⁰⁹ He also supposedly commented that shorter skirts would help, rubbed her knee, and said she was not "loose enough" for him.²¹⁰

Ellerth's boss's statement that he could make her life very hard or very easy could have amounted to one element of a *quid pro quo* sexual harassment claim.²¹¹ She did not, however, accept the propositions and

failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed" is relevant to the analysis. *Id.* at 2453.

²⁰⁴ See 42 U.S.C. § 2000e-2(a)(1) (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, 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."). See also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)): While the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to "economic" or "tangible" discrimination. *Id.* See also *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (discussing that the prohibition covers more than "'terms' and 'conditions' in the narrow contractual sense"); *Meritor Savings Bank*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (1982)). As a result, it is understood that when sexual harassment is so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment," violates Title VII. *Id.* See, e.g., IND. CODE § 22-9-1-1-18 (2014) (Indiana's Civil Rights Law).

²⁰⁵ See 524 U.S. 775, 780 (1998) (finding that employers are subject to an affirmative defense that evaluates the reasonableness of the action they took to prevent sexual harassment).

²⁰⁶ See *id.* at 765 (highlighting that an affirmative action is available for an employer if no tangible employment action is taken, the employer took reasonable measures to prevent sexual harassment, and the victim employee unreasonably failed to utilize those measures).

²⁰⁷ *Id.* at 747.

²⁰⁸ *Id.* at 748.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *Quid Pro Quo*, CORNELL L. SCH., https://www.law.cornell.edu/wex/quid_pro_quo [<http://perma.cc/EU9A-PB2S>] (defining "quid pro quo"). In general, this term is Latin for "something for something." *Id.* It means an "exchange of acts or things of approximately equal value." *Id.* In employment law, this is a form of "sexual harassment in which a boss

also did not lose her job or miss out on any promotion as a result.²¹² Yet, after approximately one more year, Ellerth quit when her boss allegedly refused to authorize a project, and asked on the telephone, “Are you wearing shorter skirts yet . . . ?”²¹³

In a 7-to-2 opinion, with Justices Antonin Scalia and Clarence Thomas dissenting, the Supreme Court, in a decision authored by Justice Anthony Kennedy, ruled that an employer is subject to vicarious liability when its employee has been subjected to an actionable hostile environment created by a supervisor “with immediate (or successively higher) authority over the employee.”²¹⁴ The Supreme Court explained that in circumstances where no tangible adverse employment action is taken, an employer may assert an affirmative defense to liability or damages, “subject to proof by a preponderance of the evidence.”²¹⁵ The defense consists of two parts: “(a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the aggrieved employee unreasonably failed to take advantage of the preventive or remedial opportunities.”²¹⁶ The Supreme Court further ruled that although proof of an anti-harassment policy with a complaint procedure is not necessary in every case as a matter of law, the need for a policy suitable to the circumstances may appropriately be addressed when

conveys to an employee that he or she will base an employment decision,” such as “whether to hire, promote, or fire that employee, on the employee’s satisfaction of a sexual demand.” *Id.* “For example, it is *quid pro quo* sexual harassment for a boss to offer a raise in exchange for sex.” *Id.*

²¹² See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 742 (1998) (stating that Ellerth rejected her boss’s advances and that she never suffered any retaliation as a result).

²¹³ See *id.* at 748 (summarizing Ellerth’s harassment claim).

²¹⁴ *Id.* at 745. See also *How Much Is Enough? Difficulties Defining “Hostile Work Environment” In Title VII Harassment Claims*, FINDLAW, <http://corporate.findlaw.com/human-resources/how-much-is-enough-difficulties-defining-hostile-work.html#sthash.zTkxAEYr.dpuf> [<http://perma.cc/4MS8-Q2DV>] (discussing the factors that should be considered to find harassment). An actionable hostile environment is determined by looking at:

“[T]he totality of the circumstances,” including: the frequency of the harassing conduct, the severity of the conduct, whether the conduct is physically threatening and whether the conduct unreasonably interferes with an employee’s work performance. No one factor is required in order to find actionable harassment, and there is no precise formula to use when considering these factors.

Id. See also *Faragher*, 524 U.S. at 788 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 53 U.S. 75, 82 (1998)) (asserting that workplace comments alone are generally not sufficient to create a hostile work environment). This rationale is that the “severe or pervasive” requirement contained in the law was designed to “filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender related jokes, and occasional teasing.’” *Id.*

²¹⁵ *Ellerth*, 524 U.S. at 765.

²¹⁶ *Id.*

evaluating the first element of the defense.²¹⁷ Also, a showing that the affected employee unreasonably failed to use a complaint procedure provided by the employer will usually satisfy the employer's burden under the second element of the defense.²¹⁸ Finally, the Supreme Court made clear that no affirmative defense exists for the employer when the supervisor's harassment causes the victim to experience a tangible adverse employment action.²¹⁹ In *Ellerth*, the Supreme Court remanded the case to the district court to allow evidence to be introduced which might satisfy the proof necessary to establish a meritorious affirmative defense.²²⁰

The plaintiff in *Faragher*, Beth Ann Faragher, was a college student who worked part-time as a lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton.²²¹ Between 1985 and 1990, two supervisors subjected her and other female lifeguards to sexually harassing behavior.²²² Faragher did not complain about her employment circumstances to the City or the offending supervisors, although she did mention the problem to one superior she respected, but he did nothing.²²³ A couple of months before Faragher resigned, a female lifeguard who had previously been employed by the City wrote to its Personnel Director to complain that she and her co-workers had been harassed by these same supervisors.²²⁴ The City investigated and reprimanded the supervisors, making them elect between unpaid suspension or forfeiting annual leave benefits.²²⁵ Faragher resigned in June 1990, and sued the City in 1992 for sexual harassment, alleging that the supervisors had subjected her and the other female lifeguards to "uninvited and offensive touching,' by lewd remarks, and by speaking of women in offensive terms."²²⁶ She specifically alleged that one supervisor said he would never promote a woman to the rank of lieutenant and that

²¹⁷ *Id.*

²¹⁸ *See id.* at 765 (concluding that a failure to use a complaint procedure satisfies the burden of proof). The Court recognized in this opinion that failing to use a complaint procedure is not an unreasonable failure when the victim is required to report to the harasser. *Id.* at 748-49.

²¹⁹ *See id.* at 765 (clarifying when affirmative defenses are unavailable).

²²⁰ *Id.* at 766.

²²¹ *Faragher*, 524 U.S. at 780.

²²² *See id.* (explaining Faragher's harassment claim).

²²³ *See id.* at 782 (clarifying that Faragher did not make an official complaint to her manager about the harassment).

²²⁴ *See id.* at 783 (discussing that before Faragher resigned a former employee wrote the City Personnel Director that she was harassed by Terry and Silverman as well).

²²⁵ *Id.*

²²⁶ *Id.* at 780 (internal citations omitted).

the other supervisor had asked her to choose between dating him or being subjected to cleaning toilets for a year.²²⁷

The Supreme Court, in *Faragher*, reiterated that an employer may raise an affirmative defense to a hostile environment sexual harassment claim if it produced proof that: “(a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) [the aggrieved] employee unreasonably failed to take advantage of the preventive or remedial opportunities.”²²⁸ The Supreme Court, however, concluded that while the City normally would be given an opportunity to raise this newly-described affirmative defense, the record in this case revealed that the City had entirely failed to disseminate its sexual harassment to its beach employees and that the City had made no attempt to monitor the conduct of its supervisors.²²⁹ In addition, the Supreme Court noted that the City’s policy contained no assurance that a supervisor being accused of harassment could be bypassed by the employee—registering complaints, which could effectively foreclose a victim of harassment from having an alternative means of reporting the problem.²³⁰ Accordingly, the Supreme Court held as a matter of law that the City lacked any ability to show that it had exercised reasonable care to prevent the supervisors’ harassing conduct.²³¹ Moreover, the Supreme Court observed that in contrast to an employer of a small workforce, who might reasonably believe that prevention of harassment could be achieved less formally, it could not reasonably have thought that efforts to preclude hostile environments in its many departments in distant locations could be effective without communicating a formal policy against harassment and providing an adequate complaint procedure.²³²

Since the advent of the *Faragher-Ellerth* affirmative defense, it has been further evaluated by numerous federal courts, which have explained that the existence of the policy described by the Supreme Court in 1998 does not effectively constitute a “Get Out of Jail Free” card.²³³ For example, in *Gorzynski v. Jet Blue Airways Corp.*, the U.S. Court of Appeals for the Second Circuit decided that the ability of an employer to assert the affirmative

²²⁷ See *Faragher*, 524 U.S. at 780 (describing the instance of harassment where Faragher was threatened with cleaning toilets if she did not date her lieutenant).

²²⁸ *Id.* at 807.

²²⁹ *Id.* at 808.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ See *Get-Out-of-Jail-Free-Card*, YOURDICTIONARY, <http://www.yourdictionary.com/get-out-of-jail-free-card#54PMoDjFMQCAGUu>.⁹⁹ [<http://perma.cc/64H9-NEJN>] (defining “get-out-of-jail-free” as “[a]n element of the board game Monopoly, which allows a player to leave the “jail” square immediately, without missing game turns”).

defense must be determined on a case-by-case basis.²³⁴ Indeed, there is currently a split among the federal judicial circuits regarding the second prong of the affirmative defense, with some courts concluding that the second prong of the affirmative defense is unfair to employers in single-incident harassment situations because the affirmative defense is fact-specific and to hold otherwise would impermissibly impose strict liability on employers.²³⁵ The Seventh Circuit has continued to apply both prongs in all situations.²³⁶

Despite the circuit spilt about the application of the affirmative defense's second prong, unanimity exists among the federal courts that employers who wish to avail themselves of the affirmative defense have a legal duty to: (1) utilize a written policy which prohibits harassment in the workplace; (2) make the policy known to its workers; and (3) provide a means of recourse within the company.²³⁷ Yet, the NLRB has told employers that the use of language in a policy to prevent harassment is a violation of the NLRA.²³⁸ As recognized by the United States Chamber of Commerce, "the NLRB has ruled that policies ensuring confidentiality for employees in workplace investigations and prohibiting harassment somehow interfere with Section 7 rights."²³⁹ The NLRB has served to put employers squarely "between a rock and a hard place."²⁴⁰ This seems like

²³⁴ See 596 F. 3d 93, 104–05 (2d Cir. 2010) (determining that affirmative defenses should be determined on a case-by-case basis). In this case, the Second Circuit clarified that:

[d]etermining whether a plaintiff has unreasonably failed to take advantage of the options provided in an employer's sexual harassment policy is not as formulaic as JetBlue would have us hold. Rather, it depends on the facts and circumstances of a given case and can, as it does here, raise a question for the jury.

Id.

²³⁵ See Natalie S. Neals, *Flirting With the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MARQ. L. REV. 166, 167 (2013) (explaining why some courts have moved away from applying the second prong of the *Ellerth/Faragher* defense because the defense is fact specific and would impose strict liability unfairly on employers for single incidences of harassment).

²³⁶ See *id.* at 207 (recognizing the Seventh Circuit's continued application of the second prong of the *Ellerth/Faragher* defense).

²³⁷ See *id.* at 195–96 (discussing the incentive for employers to create anti-harassment policies, distribute those policies to workers, and give workers workplace recourse for harassment).

²³⁸ See U.S. Chamber of Commerce, *Theater of the Absurd*, https://www.uschamber.com/sites/default/files/documents/files/nlr_b_theater_of_the_absurd.pdf [<https://perma.cc/ZM8Y-HVEY>] (detailing the restrictions on policy language used by employers that violate the employees' rights).

²³⁹ See *id.* at 6–7.

²⁴⁰ See *Between a Rock and a Hard Place*, GINGER (Jan. 1, 2013), http://www.gingersoftware.com/content/phrases/between-a-rock-and-a-hard-place/#.WjdNz_krLIU [<https://perma.cc/CW3F-JK4Z>] (explaining the significance of the common phrase "between a rock and hard place). The article states:

a particularly precarious place for an employer to be situated at the present time, since 2017 has proved to be a reawakening of the right of women to be free from sexual harassment in society. The last time this important topic played out on such a national level, Anita Hill, in 1991, was withstanding a grilling before Congress in connection with Justice Clarence Thomas' confirmation hearing. The response to Professor Hill's courageous efforts was a seventy-one percent increase in the number of sexual harassment claims filed with the EEOC in 1992. Accordingly, employers will be well-served to have the recommended policy, even if it might meet with the disapproval of the NLRB.

As mentioned, historically, the NLRB's focus has been on unionized employers.²⁴¹ While the NLRB has broadened its focus in recent times, the fact remains that all union employees are protected by the ability to assert their "Weingarten" rights, which stem from the Supreme Court's decision in *National Labor Relations Board v. J. Weingarten, Inc.*²⁴² In *Weingarten*, the company accused its employee, Laura Collins, of stealing.²⁴³ Collins was employed as a lunch-counter sales clerk for the J. Weingarten, Store No. 98, in Houston, Texas, and one day she was interrogated by the manager

The origin of the idiom 'between a rock and a hard place' can be found in ancient Greek mythology. In Homer's *Odyssey*, Odysseus must pass between Charybdis, a treacherous whirlpool, and Scylla, a horrid man-eating, cliff-dwelling monster. Ever since, saying one is stuck between a rock (the cliff) and a hard place (the whirlpool) has been a way to succinctly describe being in a dilemma.

Id.

²⁴¹ See Michael Rybicki, *The NLRB Continues To Go After Non-Union Employers in Industries it Has Historically Not Targeted*, LABOR AND EMPLOYMENT LAW COUNSEL (Nov. 3, 2016), <http://www.laborandemploymentlawcounsel.com/2016/11/the-nlr-continues-to-go-after-non-union-employers-in-industries-it-has-historically-not-targeted/> [<https://perma.cc/NTH3-X55F>]. The article states:

Although many employers (and some of their attorneys) think that the application of the National Labor Relations Act is limited to union-represented employees or at least limited to union or union-related activities, such as collective bargaining, union organizing, or union strikes, hand billing, picketing, or boycotts, the Act's coverage is much broader. As the Board's website notes: The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities. Employees at union and non-union workplaces have the right to help each other by sharing information, signing petitions and seeking to improve wages and working conditions in a variety of ways.

Id.

²⁴² See 420 U.S. at 265–66 (explaining the rights of employees to have union representation during employer investigation interviews when the employee believes the interview might put the employee's livelihood in jeopardy).

²⁴³ *Id.* at 254.

and an undercover investigator employed by the company.²⁴⁴ The investigator had placed Collins under surveillance to look into a report that she was stealing money from the lunch counter cash register.²⁴⁵ While his investigation turned up no evidence of wrongdoing, the store manager had received a report from another employee that Collins “had purchased a box of chicken that sold for \$2.98, but had placed only \$1 in the cash register.”²⁴⁶ As a result, the company thought that Collins had taken a large box of chicken while only paying for a small box.²⁴⁷ Collins insisted that she took only the amount of chicken which customers receive in a small box, but used a large box because the store was out of small boxes.²⁴⁸ As a result, Collins was not disciplined by her employer.²⁴⁹

Collins was a member of the United Food and Commercial Workers International Union, Local 455.²⁵⁰ She asked several times during the interview for her union representative or the shop steward to be present, but the company did not grant her request.²⁵¹ The company then instructed Collins to keep the interview to herself, but she informed her shop steward about the experience, after which the union filed an unfair labor practice charge against the company.²⁵²

The Supreme Court ruled that an employee who is a member of a union is entitled to union representation for investigatory interviews.²⁵³ The Supreme Court, therefore, determined that the company had committed an unfair labor practice.²⁵⁴ As a result of the Supreme Court’s decision, it became clear that a union employee is entitled to be represented by the union at an investigatory interview by the employer when the employee reasonably believes that the interview may lead to disciplinary action.²⁵⁵ These “Weingarten” rights provide that an

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See Weingarten*, 420 U.S. at 254 (noting Collins’ testimony during the interview with her manager and the investigator).

²⁴⁸ *Id.*

²⁴⁹ *See id.* at 254 (describing the main issue of the case, that the employee was not given the right to have her union representative present during an interview in which she was being questioned about theft).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 253.

²⁵² *Weingarten*, 420 U.S. at 256.

²⁵³ *Id.* at 267.

²⁵⁴ *Id.* at 256–57.

²⁵⁵ Union employees often carry a “Weingarten” card. *See Weingarten Rights Card*, ICWUC, <http://www.icwuc.org/wp-content/uploads/weingartenrightscard.pdf> [<https://perma.cc/CTW2-WFT7>] (illustrating a sample Weingarten card). The sample card reads as follows:

employee who reasonably believes that an investigatory interview could lead to discipline is entitled to ask for union representation.²⁵⁶ An investigatory interview is a meeting with management at which the employee will be questioned or asked to explain his or her conduct, and which could lead to disciplinary action against the employee.²⁵⁷

Since the employee's union representative is entitled to be present in such meetings, a protest can be immediately raised if there is any concern that the employer is infringing on the employee's Section 7 rights.²⁵⁸ In other words, if a neutral employment policy designed to guide and protect the entire workforce is being applied in an unlawful manner, such a concern can be addressed at the very moment of application. This process obviates the need for the NLRB to issue blanket letters of guidance to its personnel about supposedly overbroad policies and issue Board rulings that eradicate the ability of employers to protect the workforce from bullies and harassers due to a hypothetical possibility of an exceedingly liberal construction of a conduct or communication rule.²⁵⁹

Currently, non-union employees cannot assert the same "Weingarten" entitlement.²⁶⁰ One can reasonably expect, however, that

If the discussion in this meeting could in any way lead to my being disciplined or terminated, or impact on my personal working conditions, I request that my steward, local officer or union representative be present. Without union representation, I choose not to answer any further questions at this time.

Id.

²⁵⁶ See *id.* (addressing the statement made by the Weingarten card, that employees are allowed to bring their union representatives to interviews in which they reasonably believe could lead to discipline by the employer).

²⁵⁷ See *Weingarten Rights*, <https://www.umass.edu/usa/weingarten.htm> [<https://perma.cc/D2WN-NGAS>] (defining investigatory interview as "one in which a Supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his/her conduct.").

²⁵⁸ See *NLRB v. Weingarten*, 420 U.S. 251, 267 (1975) (reiterating the rights of employees under section 7 to have their union representatives at investigatory interviews, which allows the representative to oversee the protection of employee rights during the investigation).

²⁵⁹ See Jennifer Cluverius, *Employers Beware: NLRB Continues to Target Policies and Agreements*, NEXSEN PRUET (June 4, 2013), http://mobile.nexsenpruet.com/Employers_Beware [<https://perma.cc/8YQW-SGJY>] (contributing that the NLRB no longer needs to issue blanket letters to guide employers).

²⁶⁰ See *The NLRB Limits Weingarten Rights in Non Union Worksites*, FINDLAW, <http://corporate.findlaw.com/litigation-disputes/the-nlr-limits-weingarten-rights-in-non-union-worksites-but.html> [<https://perma.cc/85MR-PJFF>] (elaborating on the limits of Weingarten Rights in the context of non-unionized employers). The article states:

One of the most common pitfalls for non-union employers during the past four years was the extension in 2000 of so called 'Weingarten rights' to non-union employees. The U.S. Supreme Court in a 1975 decision in *NLRB v. J. Weingarten Inc.*, required that employers grant union employee requests for a union representative to attend an investigatory

since the application of the rule can be tested by a union representative at an early stage, employers will be sensitive to the concept that neutral policies for the protection of all will not be used for an unlawful purpose through an overbroad application which encroaches on Section 7 rights.²⁶¹ In other words, the rules will be used to improve the workplace and not to inhibit protected communications.²⁶²

IV. BALANCING SECTION 7 CONCERNS AND EMPLOYER RIGHTS

To the extent the NLRB remains concerned about an employee's potentially overbroad reading of the plain language of a workplace conduct rule, such as "be respectful" to other employees, one would do well to consider elementary concepts of statutory interpretation which apply in all courts.²⁶³ Legal cases cannot be decided in a vacuum.²⁶⁴ There is no utility in permitting the NLRB to negate the efforts of employers to guide and control the workforce through its own broad interpretations of

interview that might lead to discipline of the employee. In July 2000, the NLRB ruled that non-union employees could request the presence of a co-worker at an investigatory interview. On June 9, 2004, the NLRB reversed its position for the fourth time in the past 22 years, announcing 'that the Weingarten right does not extend to a workplace where . . . the employees are not represented by a union.'[] According to the Board's 3-2 decision, 'the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough and confidential workplace investigations.' The policy concerns guiding the Board's recent split decision include a practical recognition of changing patterns in the workplace, such as 'the rise in the need for investigatory interviews . . . particularly laws addressing workplace discrimination and harassment,' and 'because of the events of September 11, 2001 and their aftermath.'

Id. (internal citations omitted).

²⁶¹ See *Interfering with Employee Rights Section 7 and 8*, FINDLAW <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> [<https://perma.cc/85MR-PJFF>] (discussing how employers must be conscious of not encroaching on employers Section 7 rights). Despite the historical application of *Weingarten* rights to only union workers, on December 1, 2016, the Associate General Counsel of the NLRB issued an Advice Memorandum to Regional Director of NLRB Region 6 to use then pending cases as a vehicle to extend *Weingarten* rights to a non-union setting. *Id.*

²⁶² See Robert Baror, *Employer Policies and the NLRA: How Handbook Provisions Can Violate Employee Rights*, BAROR LAW, http://barorlaw.com/global_pictures/Labouring%20Oar%20-%20Just%20Article.pdf (2016) [<https://perma.cc/FD3K-HUWC>] (explaining that employers have rights to communications that the workplace policies may not prohibit, but that the workplace policies must work to protect employees and keep the workplace safe).

²⁶³ See *id.* (restating the idea that some workplace provisions may be found to be too broad by the NLRB and thus considered to have a chilling effect on workers' rights in the workplace).

²⁶⁴ See *Park v. Chessin*, 60 A.D.2d 80, 88 (1977) (noting the court's statement that law must be taken in context).

language with no attention to the context of the rule, despite its hollow assurances to the contrary.

One statutory interpretation tool is *noscitur a sociis*, which in Latin means “it is known by the company it keeps.”²⁶⁵ This is a legal maxim that permits the meaning of an unclear word or phrase to be determined in the context of the words or phrases which accompany it.²⁶⁶ As United Kingdom Judge J. Stamp explained in *Bourne v. Norwich Crematorium Ltd.*, “[s]entences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning you have assigned to them as separate words.”²⁶⁷ More recently, on our side of the pond, this canon of construction has been described as follows: “Under this canon, the meaning of an ambiguous word is determined by its context. The Supreme Court has applied this canon to ‘avoid giving one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.’”²⁶⁸

The canon of construction related to *noscitur a sociis* is known as *ejusdem generis*, which may be even more useful to the NLRB in assessing the true meaning and intent of a workplace conduct rule.²⁶⁹ The Latin phrase *ejusdem generis* means that words should be construed in the context of the other words in a rule or law that are “of a like kind.”²⁷⁰ The Supreme Court, applying this canon, has explained, “Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to

²⁶⁵ *What is Noscitur Sociis*, LAW DICTIONARY, <http://thelawdictionary.org/noscitur-a-sociis/> [<https://perma.cc/VJ56-2EAY>].

²⁶⁶ See Kaushalya Kumari, *Principles of “Ejusdem Generis” – “Noscitur a Sociis” in Taxation Law*, TOP CA FIRMS (Sept. 5, 2013), <https://www.topcafirms.com/index.php/white-paper/5716-principles-of-ejusdem-generis-noscitur-a-sociis-in-taxation-laws> [<https://perma.cc/8J32-5YU4?type=image>] (describing the interplay between *ejusdem generis* and *noscitur a sociis* and how *ejusdem generis* is used when the meaning of a law is unclear).

²⁶⁷ See *Definition of Noscitur a sociis*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/noscitur-a-sociis.html> [<https://perma.cc/GZR4-U2H8>].

²⁶⁸ *In re Nance*, 371 B.R. 358, 365 n. 8 (Bankr. S.D. Ill. 2007) (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)).

²⁶⁹ See *Ejusdem Generis*, BUSINESS DICTIONARY, <http://www.yourdictionary.com/ejusdem-generis> [<https://perma.cc/P8G4-BQB3>] (“Of the same kind, class, or nature. In statutory construction, the “ejusdem generis rule” is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned”).

²⁷⁰ See *id.* (describing the constructions of *ejusdem generis*).

those objects enumerated by the preceding specific words.”²⁷¹ As a result, this canon ordinarily limits general terms which follow specific ones to matters similar to those specified.²⁷²

These canons of construction should authorize the NLRB to easily realize the context of the terms used in employers' workplace rules to appreciate that, in context, such rules are meant to preserve order and protect the nations' workforce.²⁷³ Only by ignoring these established maxims can the Board conclude that innocuous language *would* be read so broadly by employees that they will be fearful about an encroachment on their Section 7 rights.²⁷⁴

The law of contracts provides another means of determining the true intent of particular language.²⁷⁵ The interpretation of a contract is deemed to be an issue of law.²⁷⁶ This means that the tribunal has the authority to

²⁷¹ See *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (quoting *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 553 U.S. 371, 384, (2003)). In *Yates*, the United States Court of Appeals for the Eleventh Circuit ruled that the captain of a fishing boat was properly convicted of violating 18 U.S.C.S. § 1519 because he instructed a member of his crew to throw undersized fish they caught overboard rather than complying with an order issued by a Florida Fish and Wildlife Conservation Commission Officer who had been deputized as a federal agent which required Captain Yates to segregate the undersized fish from other fish and return with them to port. *Id.* The Supreme Court reversed the federal appellate court on the basis that § 1519 applied only to objects that were used to record or preserve information, and “not all objects in the physical world.” *Id.* Thus, it did not include fish. *Id.*

²⁷² See *Gooch v. United States*, 297 U.S. 124, 128 (1936) (continuing to explain how the canon works in the context of cases, and the technical structure what the canon allows).

²⁷³ *Cf. id.*

²⁷⁴ See Katherine M. Scott, Note, *When is Employee Blogging Protected by Section 7 of the NLRA?*, 17 DUKE L. & TECH. REV. 1, 6–7 (2006) (emphasizing how language can cause one to feel hopeful as opposed to fearful). Although the tenor of the language seems to be a factor in the analysis, several appellate courts and the NLRB have found employee speech protected even when that speech uses harsh language. *Id.* Thus, many variables factor into whether employees fear that seemingly harmless language is capable of infringing upon their Section 7 rights. *Id.*

²⁷⁵ See Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 LA. L. REV. 765, 766 (2000) (discussing how the most important aspect of interpreting a contract is understanding the intent of the parties).

²⁷⁶ See *Colburn v. Tr. of Ind. Univ.*, 739 F. Supp. 1268, 1291 (S.D. Ind. 1990) (concluding that the interpretation, construction, or legal effect of a contract is to be determined by the court as a question of law). See also *Colburn v. Trustees of Indiana University*, 739 F. Supp. 1268, 1291 (S.D. Ind. 1990), which explains how Indiana courts have adopted the Indiana Law Encyclopedia's summary of contract interpretation:

As a general rule the interpretation, construction or legal effect of a contract is a matter to be determined by the court as a question of law. This rule has been frequently announced as applicable when the contract involved is written, and, likewise, the rule has been applied where the contract is clear and unambiguous. On the other hand, the broad general rule is frequently laid down that the construction of a

conclude what the terms of the document were intended to accomplish.²⁷⁷ “The ‘cardinal rule’ of contract interpretation requires a court to ‘ascertain the parties’ intention and give effect to that intention when legal principles so allow.’”²⁷⁸ “Reasonable rather than unreasonable interpretations of contracts are favored, and accordingly, interpretations which lead to absurdity or negate the purpose of the contract should be avoided.”²⁷⁹ Based on this rule, when discerning the meaning of a contract’s language, all terms of the agreement should be read in harmony with the plain meaning.²⁸⁰

This rule of interpretation does not impose an ominous burden on the decision maker.²⁸¹ All the rule requires is that all of the words in the provision be construed in harmony with each other and in context.²⁸² Since the NLRB has elected to scrutinize employers’ rules and policies for potential violations of employees’ Section 7 rights, it should accept a duty to exercise some discretion and analyze the rules in harmony and in the context of the purpose for which they were issued.²⁸³ The NLRB purports

contract is for the jury where the terms of the contract are ambiguous and their meaning is to be determined from extrinsic evidence. Further, it has been held that where extraneous facts and circumstances are resorted to explain an ambiguous or uncertain contract, the question of construction is one of mixed law and fact. Strictly speaking, however, the interpretation of a contract is not submitted to the jury; insofar as the question is one of construction, it is always a question of law, although the facts on which the construction rests must be determined by the jury. Thus, it has been indicated that the construction of an ambiguous contract is a question of law for the court where the ambiguity arises by reason of the language used and not because of extrinsic facts. Likewise, where the contract is in question, it is the duty of the jury to find the facts, and for the court to say whether the contract is executed or executory.

Id. (quoting 6 *Indiana Law Encyclopedia* § 137 (1980)).

²⁷⁷ See *id.* at 1287 (discussing how courts, the equivalent of tribunals, are free to determine what the terms of a contract are intended to accomplish if no ambiguity in the terms exists).

²⁷⁸ *In re* Tabares, No. 08-40324, WL 5539808, at *1 (Bankr. D. Kan. Dec. 15, 2008).

²⁷⁹ *Id.* (internal quotations omitted).

²⁸⁰ See *id.* (stating the previous rule that reasonable interpretations of contracts are favored). See also *Wooddale, Inc. v. Fid. & Deposit Co. of Md.*, 378 F.2d 627, 630 (8th Cir. 1967) (summarizing that courts should consider the contractual language of a contract in harmony with its plain meaning).

²⁸¹ See *In re* Tabares, WL 5539808, at *2 (holding that unambiguous contracts are enforced per the terms in the contract and courts should never rewrite or insert term under the guise of interpretation).

²⁸² *Id.* at *1.

²⁸³ See Michael J. Westcott, *Are Employer Codes of Conduct Meaningless in Today's NLRB Climate?*, WISCONSIN EMPLOYMENT LAW LETTER (Apr. 22, 2015), <http://www.hrhero.com/hl/articles/2015/04/22/are-employer-codes-of-conduct-meaningless-in-todays-nlr-clubmate/> [<https://perma.cc/J7WZ-U283>] (emphasizing that

to afford employers such deference, but its rulings to date have not lived up to that promise.²⁸⁴

V. RULES OF CONDUCT ARE IMPERATIVE

The federal government does understand that workplace rules are necessary for order and safety.²⁸⁵ For example, in 2011, the Occupational Safety and Health Administration (OSHA) adopted a safety program for its own workforce, which includes a workplace anti-bullying policy.²⁸⁶ Congress created OSHA to ensure safe and healthful working conditions by establishing and enforcing standards, and through training, outreach, education and assistance.²⁸⁷ “OSHA is part of the United States Department of Labor.”²⁸⁸

The OSHA workplace anti-bully policy is contained in the *OSHA Field Health and Safety Manual* which was released on May 23, 2011.²⁸⁹ The manual provides safety practices for all OSHA field offices.²⁹⁰ It is noteworthy that the document was drafted in cooperation with the National Council of Field Labor Locals, a union that represents OSHA

broad or ambiguous codes of conduct or company values statements will be weighed against the employer as opposed to the employees who are charged with obeying them).

²⁸⁴ See *id.* (concluding that employers often draft codes of conduct or rules of business etiquette in terms of employer expectations, however, this practice often weighs against the employer because it violates employees Section 7 rights, which is investigated by the NLRA).

²⁸⁵ See *Government Regulation of Safety In the Workplace*, BIZ FILINGS, <https://www.bizfilings.com/toolkit/research-topics/office-hr/government-regulation-of-safety-in-the-workplace> [<https://www.perma.cc/7SGE-DSSD>] (stating that the Occupational Safety and Health Act was enacted to address the uneven patchwork of workplace safety state laws and its federal regulations are beneficial for both employers and employees).

²⁸⁶ See Patricia Barnes, *OSHA Adopts Workplace Anti-Bullying Policy*, WHEN THE ABUSER GOES TO WORK BLOG (June 2, 2011), <http://www.abusergoestowork.com/ohsa-adopts-workplace-anti-bullying-policy/> [<https://perma.cc/PSE4-LTBS>] (agreeing that the Occupational Safety and Health Administration has adopted a safety program for its own workers that includes a workplace anti-bullying policy).

²⁸⁷ See *About OSHA*, U.S. DEP'T OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Aug. 21, 2017), <https://www.osha.gov/about.html> [<https://perma.cc/28R8-N6DJ>] (discussing how OSHA was created to set and enforce standards that assure safe and healthful working conditions for employees).

²⁸⁸ *Id.*

²⁸⁹ See *OSHA Field Safety and Health Manual*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Aug. 21, 2017), https://www.osha.gov/OshDoc/Directive_pdf/ADM_04-00-001.pdf [<https://perma.cc/8GHB-VBYC>] (stating that no employee shall engage in bullying).

²⁹⁰ See *id.* at 161 (stating that the program applies to all staff of the OSHA's Field offices).

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workers.²⁹¹ This is important because the NLRB's scrutiny of a particular employer's workplace policies often follows the sequence of a union filing an unfair labor practice charge challenging the discipline or discharge of a union worker and then turning over all of the employer's rules and policies for review, even when the rules and policies have nothing to do with the charge.²⁹² Yet, the union for OSHA field officers simultaneously endorses anti-harassment rules for its own workers.²⁹³

OSHA's workplace bullying policy tracks with the General Duty Clause of the Occupational Safety and Health Act of 1970, which requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" ²⁹⁴ OSHA's workplace bullying policy, a component of its manual's "Violence in the Workplace" chapter, is intended: "To provide a workplace that is free from violence, harassment, intimidation, and other disruptive behavior."²⁹⁵ According to OSHA's manual, "intimidating behavior" is defined as: "Threats or other conduct that in any way create a hostile environment, impair Agency operations, or frighten, alarm or inhibit others. Verbal intimidation may include making false statements that are malicious, disparaging, derogatory, disrespectful, abusive, or rude."²⁹⁶ The OSHA manual defines workplace violence as "[a]n action, whether verbal, written, or physical aggression, that is intended to control, cause, or is capable of causing injury to oneself or other, emotional harm, or damage to property."²⁹⁷

Based on OSHA's workplace conduct policy, this federal agency requires its employees to:

[T]reat all other employees, as well as customers, with dignity and respect. Management will provide a working environment as safe as possible by having preventative measures in place and by dealing immediately with

²⁹¹ See *National Council of Field Labor Locals AFGE/AFL-CIO, NCFLL* (Aug. 21, 2017), <http://www.ncfil.org/> [<https://perma.cc/FT7G-2382>] (summarizing that the American Federation of Government Employees (AFGE) is the largest federal employee union).

²⁹² See *Investigate Charges*, NATIONAL LABOR RELATIONS BOARD (Aug. 24, 2017), <https://www.nlr.gov/what-we-do/investigate-charges> [<https://perma.cc/7WF5-F27Z>] (stating that the NLRB investigates thousands of charges annually by gathering relevant evidence and participating in hearings before NLRB Administrative Law Judges).

²⁹³ See Barnes, *supra* note 286 (stating that OSHA adopted its own safety program that includes a workplace ant-bullying policy).

²⁹⁴ Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (2012).

²⁹⁵ Barnes, *supra* note 286.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

threatening or potentially violent situations. No employee will engage in threats, violent outbursts, intimidations, bullying harassment, or other abusive or disruptive behaviors.²⁹⁸

According to the OSHA manual, the Assistant Regional Administrator/Director for Administrative Programs or the equivalent unit is required to:

- (1) Disseminate the workplace violence policies and procedures to all employees;
- (2) Provide annual training on this policy and U.S. Department of Labor workplace violence program for responsible OSHA Manager(s); and
- (3) Conduct an investigation and complete a Workplace Violence Incident Report for all incidents reported. The report will be submitted to the Regional Administrator within 24 hours of completion.²⁹⁹

Both OSHA and the union that helped formulate the workplace anti-bullying policy are to be applauded for implementing a policy to guide and protect the workforce. Workplace violence is an epidemic in this nation.³⁰⁰ According to OSHA, "[n]early 2 million American workers report having been victims of workplace violence each year."³⁰¹ OSHA believes as follows:

In most workplaces where risk factors can be identified, the risk of assault can be prevented or minimized if employers take appropriate precautions. *One of the best protections employers can offer their workers is to establish a zero-tolerance policy toward workplace violence. This policy should cover all workers, patients, clients, visitors,*

²⁹⁸ *Id.*

²⁹⁹ Barnes, *supra* note 286.

³⁰⁰ See Sandy Smith, *Nurses Testify for National Standard to Prevent Workplace Violence in Healthcare Settings*, EHS TODAY (Jan. 10, 2017), <http://www.ehstoday.com/osha/nurses-testify-national-standard-prevent-workplace-violence-healthcare-settings> [<https://perma.cc/QH7V-8NWP>] (stating that workplace violence in healthcare settings are at epidemic levels and OSHA regulations are vital to protecting nurses and healthcare workers, as well as their patients, from the epidemic of workplace violence).

³⁰¹ *Workplace Violence*, UNITED STATES DEPARTMENT OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/SLTC/workplaceviolence/> [<https://perma.cc/7HK7-V6W8>].

contractors, and anyone else who may come in contact with company personnel.

By assessing their worksites, employers can identify methods for reducing the likelihood of incidents occurring. *OSHA believes that a well-written and implemented workplace violence prevention program, combined with engineering controls, administrative controls and training can reduce the incidence of workplace violence in both the private sector and federal workplaces.*

This can be a separate workplace violence prevention program or can be incorporated into a safety and health program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all workers know the policy and understand that all claims of workplace violence will be investigated and remedied promptly. In addition, OSHA encourages employers to develop additional methods as necessary to protect employees in high risk industries.³⁰²

In fact, on January 11, 2017, OSHA announced that it is starting efforts to establish a national standard to protect health care and social assistance employees from workplace violence.³⁰³ OSHA's interest in developing rules to reduce the significant risk of workplace violence for this segment of the workforce comes in response to a petition filed by a group of labor unions in July 2016 "advocating that the agency pursue a formal standard to mandate that healthcare employers take appropriate actions to protect their workers."³⁰⁴ Unions previously pursued the same protection in California, which led to the adoption of the first workplace violence

³⁰² *Id.* (emphasis added).

³⁰³ See Gloria Gonzalez, *OSHA Focuses on Workplace Violence Standard for Health Sector*, BUSINESS INSURANCE (Jan. 11, 2017), <http://www.businessinsurance.com/article/20170111/NEWS08/912311363/OSHA-focuses-on-workplace-violence-standard-for-health-care-social-service-sector> [<https://perma.cc/B7FG-QV93>] (discussing OSHA's rule-making, which is intended to protect healthcare and social assistance workers from workplace violence nationwide).

³⁰⁴ *Id.*

prevention standard for health care workers in the country.³⁰⁵ Workplace violence is a concern of organized labor, as it should be.³⁰⁶

The problem should now be plain to see. While OSHA recognizes the importance of addressing various sources of workplace violence and rightfully now requires its own employees to act with dignity and respect toward co-workers, a responsible private sector employer that tried to utilize a similar policy for the guidance and protection of its workers was found by the NLRB to have violated its employees' Section 7 rights.³⁰⁷ Specifically, as referenced above, in *Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue*, a union initiated an organizing campaign at one of the employer's facilities to attempt to unionize a segment of the workforce.³⁰⁸ Once a sufficient number of authorization cards were signed

³⁰⁵ See Joyce Famakinwa, *California's Health Care Employers Prepare for Workplace Violence Rule*, BUSINESS INSURANCE (Jan. 2, 2017), <http://www.businessinsurance.com/article/20170102/STORY/912311197?template=printart> [<https://perma.cc/C2GN-YVLW>] (discussing how the murder of psychiatric technician, Donna Gross, by a patient attracted attention to the dangers faced by health care employees).

³⁰⁶ See *Workplace Violence*, *supra* note 301 (detailing how 403 workplace homicides occurred in 2014 and how such instances are major concerns for employers and employees nationwide).

³⁰⁷ See Barnes, *supra* note 286 (stating that all OSHA employees are required to "treat all other employees, as well as customers, with dignity and respect"). See also Kelsey Basten, *NLRB Rules Employer Memo Violates NLRA*, GOV. DOCS. (Jan. 16, 2015), <https://www.govdocs.com/nlrb-rules-employer-memo-violates-nlra/> [<https://perma.cc/27C7-LQFH>] (ruling that a sign requesting employees get along with each other days after a turbulent union election violated NLRB rules).

³⁰⁸ See 832 F.3d 351, 356 (D.C. Cir. 2016) (stating that employer allegedly committed a series of unfair labor practices, in violation of National Labor Relations Act (NLRA), in an effort to prevent certification of a union at its nursing home and rehabilitation facility).

by the workers in the targeted bargaining unit, the NLRB conducted an election.³⁰⁹ The union lost the election by one vote.³¹⁰

It is particularly easy to appreciate in this day and age, given the spectacle our country just witnessed during the national election for president, that hard feelings might result from the hard fought battle over whether the workers should unionize, and Care One management sensed that was the case among its employees.³¹¹ Accordingly, the facility's administrator posted a memo about "Teamwork and Dignity and Respect."³¹² The administrator addressed reports of hostility and even threats of violence by calling on employees to treat each other with "respect and dignity."³¹³ The administrator communicated as follows: "I want everyone to be on notice that threats, intimidation, and harassment will not be tolerated at Care One Madison Avenue. We will enforce the Workplace Violence Prevention Policy to keep our workplace free from such improper conduct."³¹⁴ In response to the administrator's call for

³⁰⁹ See *Conduct Elections*, NATIONAL LABOR RELATIONS BOARD <https://www.nlr.gov/what-we-do/conduct-elections> [<https://perma.cc/DH4H-MNHP>] (detailing required steps to start the NLRB election process). In full, the election process can be defined as follows:

To start the election process, a petition and associated documents must be filed, preferably electronically, with the nearest NLRB Regional Office showing support for the petition from at least 30% of employees. NLRB agents will then investigate to make sure the Board has jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election. Shortly after the petition is filed, the employer is required to post a Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted. If the employer customarily communicates with employees in the petitioned-for unit through electronic means, the employer must also distribute the Notice of Petition for Election electronically to those employees. The NLRB agents will seek an election agreement between the employer, union, and other parties setting the date, time, and place for balloting, the ballot language(s), the appropriate unit, and a method to determine who is eligible to vote. Once an agreement is reached, the parties authorize the NLRB Regional Director to conduct the election. If no agreement is reached, the Regional Director will hold a hearing and then may order an election and set the conditions in accordance with the Board's rules and its decisions. Typically, elections are held on the earliest practicable date after a Director's order or authorization, which will vary from case to case.

Id.

³¹⁰ See *Care One at Madison Ave.*, 832 F.3d at 356 (discussing how the union ultimately lost the vote).

³¹¹ *Id.* at 356.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *N.L.R.B. v. Care One at Madison Avenue, LLC D/B/A Care One at Madison Avenue*, 2014 WL 7339612, at *2 (2014). He went on to say that "employees have a right to make up

dignity and respect, the SEIU filed an unfair labor practice charge with the NLRB, after which the Board ruled that the employer's actions of posting the memo with its Workplace Violence Prevention Policy amounted to retaliation against workers who engaged in legitimate union activity protected under Section 7 of the NLRA.³¹⁵ The basis for the Board's decision was that employees seeing the memo cautioning them to refrain from violence, intimidation, and harassment and directing them to treat each other with dignity and respect would "reasonably" be interpreted it as prohibiting union organizing activities.³¹⁶ According to the NLRB's approach, the employer was required to remain silent in the face of a palpable danger and hope for the best.³¹⁷ OSHA would disagree with that ineffective, "turn a blind eye" approach.³¹⁸ The same can safely be said for Herzberg, Maslow, and any of the employees at Care One who were

their own minds regarding the union" and that he "respect[ed] the right employees have to be for or against the union," but cautioned that those rights "do not give anyone the right to threaten or intimidate another team member, for any reason." *Id.* Arezzo attached to the memorandum Care One's pre-existing Workplace Violence Prevention policy. *Id.* There was in fact no evidence of any threats or intimidation, or even reports thereof, leaving employees to wonder what communications or activities surrounding the union representation election the management thought the referenced disciplinary policy encompassed." *Care One at Madison Ave., LLC*, 832 F.3d 351, at 356.

³¹⁵ See *Theater of the Absurd: The NLRB Takes on the Employee Handbook*, *supra* note 238 (discussing that the memo filed by the facility's administrator went against legitimate union activity that is protected under the NLRA).

³¹⁶ See *id.* (noting how the employees at Care One Madison would interpret the memo).

³¹⁷ See *N.L.R.B. v. Care One at Madison Avenue, LLC D/B/A Care One at Madison Avenue*, 832 F.3d 351, 356 (D.C. Cir. 2016) (reasoning that the workplace violence prevention policy was in violation of the NLRA because could reasonably be interpreted as a threat to lawful protected union activity).

³¹⁸ See, e.g., *Gonzalez*, *supra* note 303 (explaining the intent of OSHA's rule-making to protect healthcare and social assistance workers from workplace violence). See also *The Meaning and Origin of the Expression: Turn a Blind Eye*, THE PHRASE FINDER (Aug. 26, 2017), <http://www.phrases.org.uk/meanings/turn-a-blind-eye.html> [<https://perma.cc/X3HC-9DFD>] ("To knowingly refuse to acknowledge something which you know to be real."). British Admiral Horatio Nelson is reported to have willfully disobeyed a signal to withdraw from a naval engagement in the battle of Copenhagen in 1801, as the British fleet attacked a joint Danish/Norwegian enemy. *Id.* The British fleet commander, Admiral Sir Hyde Parker, signaled with flags for Admiral Nelson to disengage, but the admiral was convinced of impending victory, so he 'turned a blind eye' to the signal. *Id.* Admiral Nelson's actual words at the time were: [Putting the glass to his blind eye], "You know, Foley, I have only one eye—and I have a right to be blind sometimes . . . I really do not see the signal." *Id.* In the form used today, the first apparent use is found in *More letters from Martha Wilmot: impressions of Vienna, 1819–1829*. *Id.* These letters were reprinted in 1935, with the quote being sent by Ms. Wilmot in 1823: "turn a blind eye and a deaf ear every now and then, and we get on marvelously (sic) well." *Id.*

unable to rely on their employer to help them to feel safe and secure in the workplace.³¹⁹

OSHA is not the only federal agency acting with more prudence than the NLRB would appear to allow.³²⁰ A further example of the inconsistency between the NLRB's position and that of another agency of the federal government may be found in a policy issued by the Department of the Interior on December 28, 2011.³²¹ At that time, the Director of the National Park Service issued an order in connection with the agency's Anti-Harassment Policy.³²² This policy specifically provides, in part, that:

The National Park Service is committed to a workplace free of discrimination and harassment based on sex, gender identity, race, color, religion, age, national origin, sexual orientation, disability, genetic information and/or reprisal. Offensive sexual or non-sexual harassing behavior against any employee will not be tolerated. Therefore, *the Service will take immediate and appropriate action when it is made aware of allegations of harassment or it determines that harassing conduct has occurred.* Any employee who engages in sexual or non-sexual harassment will be subject to disciplinary action up to removal or termination.³²³

In plain English, this federal employer utilizes a rule which prohibits harassment in the workplace.³²⁴ The purpose of the Director's order was to update the anti-harassment policy of the National Park Service, establish procedures for addressing allegations of harassment, and identify the roles and responsibilities of agency employees, managers, and supervisors, as well as the Offices of Equal Employment Opportunity and Human Resources Management.³²⁵ The Director explained that his Order

³¹⁹ See *Care One at Madison Avenue, LLC*, 832 F.3d at 363 (giving context to support the assertion that CareOne employers did not provide a safe and secure workplace).

³²⁰ See generally *Director's Order on National Park Service Anti-Harassment Policy*, UNITED STATES DEP'T OF THE INTERIOR, NATIONAL PARK SERVICE (2011), https://www.nps.gov/policy/DOrders/DO_16F.pdf [<https://perma.cc/SZ9K-22XF>] (providing the National Park Service's Anti-Harassment Policy).

³²¹ See *id.* (providing documentation to show another agency position).

³²² See *id.* (detailing the National Park Service's order).

³²³ *Id.* (emphasis added).

³²⁴ See *id.* (interpreting the Director's language).

³²⁵ See *id.* (explaining the purpose of the Order).

was intended to support the agency's goal of maintaining a workplace that remained free of harassment and discrimination.³²⁶

It is inconceivable that numerous government agencies understand the importance of rules to control and protect employees while another agency which exists to advance worker's rights frowns upon such responsible efforts and concludes that they are unlawful infringements on an employee's Section 7 rights.³²⁷ With all due respect to the NLRB's efforts, the right to a safe and secure workplace is paramount. The NLRB's enforcement of the Section 7 rights of workers to engage in protected, concerted activity through an overbroad interpretation of the plain language contained in workplace rules of conduct deprives employers of the ability to ensure decorum and safety in the work environment.³²⁸ This

³²⁶ See Director's Order on National Park Service Anti-Harassment Policy, *supra* note 320 (describing that the purpose and goals is to update the anti-harassment policy).

³²⁷ Compare N.L.R.B. v. Care One at Madison Avenue, LLC D/B/A Care One at Madison Avenue, 832 F.3d 351, 356 (D.C. Cir. 2016) (finding an employer to be in violation of the NLRA for enacting a workplace violence policy because it was seen as being reasonably related to preventing protected union activity) with Barnes, *supra* note 286 (providing an example of an agency that protects employees with a workplace violence policy).

³²⁸ The concern is real, not hypothetical. In *Pier Sixty LLC and Evelyn Gonzalez*, 362 N.L.R.B. No. 59 (Mar. 31, 2015), an employee was permitted to use extreme profanity toward a supervisor and keep his job because the NLRB concluded that the termination of the employee violated Sections 8(a)(1) and 8(a)(3) of the NLRA. *Id.* Some of the company's employees had expressed interest in joining a union because they thought that managers were treating them in a disrespectful and undignified manner. *Id.* Two days before the union election, a long-time employee, who was working at a fundraising event, became upset what he felt was his supervisor's disrespectful tone and comments towards the wait staff. *Id.* He went on break and posted a Facebook message that said: "Bob is such a NASTY MOTHER [expletive] don't know how to talk to people!!!!!! [Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" *Id.* The post was visible to the worker's Facebook friends, including some coworkers. *Id.* The employee deleted the post following the union election, but was fired. In evaluating the posting, the NLRB considered the following factors:

- (1) whether the record contained any evidence of the employer's antiunion hostility;
- (2) whether the employer provoked the employee's conduct;
- (3) whether the employee's conduct was impulsive or deliberate;
- (4) the location of the Facebook post;
- (5) the subject matter of the post;
- (6) the nature of the post;
- (7) whether the employer considered language similar to that used by the employee to be offensive;
- (8) whether the employer maintained a specific rule prohibiting the language at issue; and
- (9) whether the discipline imposed upon the employee was typical of that imposed for similar violations or disproportionate to his offense.

Id. The NLRB then indicated that, viewing the evidence "objectively," none of the factors weighed in favor of finding that the employee's comments were so egregious as to take them

tradeoff makes no sense and should not be permitted to continue.³²⁹ Protecting speech at the expense of employee safety and security cannot have been the intent of Senator Wagner and all those who were contributing authors of the NLRA in 1935.³³⁰

In order to study the situation from still another perspective, the values espoused by the United States Army are useful.³³¹ The Army's

outside the protection of the NLRA, so the termination violated the employee's Section 7 rights. *Id.* This ruling would seem to constitute a preposterous over-application of a regulation designed to protect "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection." *Id.* Notably, on April 21, 2017, the U.S. Court of Appeals for the Second Circuit granted the Board's application for enforcement and denied the employer's cross-petition for review, albeit with a recognition that the line for what constituted unprotected conduct was close. Taking into account past conduct of workers which had not been similarly sanctioned, the appellate court stated:

In sum, Pier Sixty has failed to meet its burden of showing that Perez's behavior was so egregious as to lose the protection of the NLRA under the Board's 'totality of the circumstances' test. However, we note that this case seems to us to sit at the outer-bounds of protected, union-related comments, and any test for evaluating opprobrious conduct must be sufficiently sensitive to employers' legitimate disciplinary interests, as we have previously cautioned. We have considered all of Pier Sixty's objections to enforcement and have found them to be without merit.

NLRB v. Pier Sixty, 855 F. 3d 115, 125 (2nd Cir. 2017). It is striking that the Second Circuit's ruling about what type of language is in bounds in the workplace and protected by the NLRA is, in part, a product of the barrage of profanity to which we, as a society, have become accustomed. *Id.* It seems we are numb to the aggression and rudeness which pervades our lives through cinema, television, and various forms of social media. Although the broadcasting of "any . . . indecent . . . language" continues to be prohibited by 18 U. S. C. § 1464, including references to sexual or excretory activities or organs—see *FCC v. Pacifica Foundation*, 438 U. S. 726 (2009)—and the Supreme Court, in *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (1978), in a 5-4 decision, upheld the ban on the seven words contained in the late comedian George Carlin's monologue, the amount of offensive dialogue to which we are exposed appears to have desensitized us to the vulgarities contained in mainstream media and primetime entertainment. While this author would be hypocritical, based on other reasoning offered in this Article, in suggesting any form of censorship, the hope remains that employers will regain the legal right to guide their workforce and possess the authority to require that the individuals whom they provided gainful employment act with common decency and civility in the workplace. After all, there is the message, which must be protected by the NLRA, and then there is the delivery, which should be subject to some modicum of control to ensure a work environment that is palatable for all.

³²⁹ See *Pier Sixty, LLC*, 362 NLRB No. 59 at *2 (suggesting the NLRB's enforcement of Section 7 rights contradicts ensuring workplace safety).

³³⁰ Cf. 29 U.S.C. § 151 (2012) (establishing that the foremost policy concern was outright banning of unionization by some employers).

³³¹ The author has the utmost respect for all who are serving and have served in our armed forces, some of whom have made the ultimate sacrifice. The comparisons in this section of the Article are for the purpose of making a point about the propriety of certain core values

values are "Loyalty, Duty, Respect, Selfless Service, Integrity, Personal Courage and Honor."³³² Of course, the Values of Honor, Integrity and Personal Courage, which are at the core of every soldier, also are welcome in a public or private workplace setting. Indeed, those values are imperative in any quality workplace, where employers must be able to invoke policies and rules to insist on an environment that fosters dignity and respect.

It is evident from the Army's stated values that the military emphasizes discipline and order, prioritizes the group over any individual, and requires compliance through enforced rules. The Army recognizes that in order for the institution to be effective, individuals must be required to treat others with dignity and respect.³³³ As we have seen, however, the NLRB believes that a rule requiring employees to treat others with dignity and respect is an unlawful infringement on Section 7 rights.³³⁴ This conclusion defies logic and reason.

Finally, the Army, through the values and the conduct requirements it enforces to assure that military personnel act accordingly, evidently embraces a profound concept attributable to Aristotle.³³⁵ It was Aristotle's philosophy the whole is greater than the sum of its parts.³³⁶ Thus, in addition to the considerations expressed earlier in this article that workers must feel safe and secure in the workplace before they can be expected to perform, it is equally true that rules and policies are absolutely necessary

in our nation's places of employment, and not to specifically compare those environments with the environments into which our servicemen and servicewomen place themselves to protect our freedoms. See *The Army Values*, ARMY.MIL FEATURES, <https://www.army.mil/values/> [<https://perma.cc/8YCX-72GZ>] (examining values of the army to analogize to values in our nation's places of employment).

³³² *Id.*

³³³ See *The Army Values*, *supra* note 331 (discussing the Army core value of Respect).

³³⁴ See Memorandum from Richard F. Griffin, Jr., Gen. Counsel, Office of the General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Mar. 18, 2015), <https://www.nlr.gov/reports-guidance/general-counsel-memos> [<https://perma.cc/44PB-LHZG>] (stating broadly that a work rule may violate Section 7 even if it can be construed as prohibiting lawful concerted activities).

³³⁵ See *The Army Values*, *supra* note 331 (providing the key values of the Army). See also Aristotle, A&E TELEVISION NETWORKS (June 8 2017), <https://www.biography.com/people/aristotle-9188415> [<https://perma.cc/NN3G-ZDKK>] (discussing the history of Aristotle and his eventual influence on Western philosophy). The ancient Greek philosopher Aristotle, along with Socrates and Plato, initiated these underpinnings of western philosophy. *Id.* Aristotle, born circa 384 B.C. in Stagira, Greece, enrolled in Plato's Academy when he was age 17. *Id.* In 338, he began tutoring Alexander the Great. *Id.* In 335, Aristotle established his own school, the Lyceum, in Athens, where he studied, taught, and wrote during the remainder of his life. *Id.* Aristotle died in 322 B.C., in Chalcis. *Id.*

³³⁶ J.A. SMITH & W.D. ROSS, THE WORKS OF ARISTOTLE, 1045a, at 8-10 (Clarendon Press 1908, Volume VIII) ("[T]he whole is not, as it were, a mere heap, but the totality is something besides the parts.").

to accomplish an organization's larger purpose.³³⁷ Everyone must be guided to work together for the common good. This consideration is particularly important in today's seemingly narcissistic culture of "Me first" attitudes and expectations of instant gratification.³³⁸ To the extent that many workers in today's society are disinclined to be selfless or team oriented, rules and regulations are paramount to preserving order in the workplace and achieving company goals.³³⁹ This is not a convenience for an employer; it is a necessity.

VI. CONCLUSION

The NLRB must discontinue its intrusion into the domain of employers to guide and protect their employees with proper rules of conduct. The Board must recognize that companies exist for a purpose whether it be for the provision of quality healthcare, the manufacture of widgets, or anything in between. It is more than safe to assume that no company has ever been ever created for the purpose of mistreating and abusing the very workers it has hired into the organization and placed on the payroll. Rather, the safe assumption is that the vast majority of companies seek the most qualified workers for the available positions, orient and train them, inform them of the pertinent rules and policies, and then provide fair compensation while encouraging their growth as a quality employee. That effort is severely hindered when an employer is unable to institute and enforce necessary rules to guide its workers.

While there should be a presumption of lawful conduct on the part of employers, it is understood that there will always be some unscrupulous employers that will mistreat workers and infringe on their Section 7 rights. This is where the NLRB should be required to engage in the same type of analyses that are employed by lawyers and judges to first understand the true contest and meaning of a rule or a policy, using canons of statutory

³³⁷ See, e.g., Ethan Pendleton, *The Importance of Obeying the Rules and Regulations in the Workplace*, CHRON <http://smallbusiness.chron.com/importance-obeying-rules-regulations-workplace-18690.html> [<https://perma.cc/Y2TL-HCBB>] (supporting the author's assertion that rules and regulations are necessary in the workplace).

³³⁸ See Carrie A. Moore, *The Me, Me, Me, Generation: Have Youths in America Brought into 'entitlement' mentality?*, DESERET NEWS (Oct. 18, 2008), <http://www.deseretnews.com/article/705256091/The-me-me-me-generation.html> [<https://perma.cc/F8RX-64JZ>] (discussing how the "me first" mentality is a trait of many CEOs of failed companies).

³³⁹ See Rafati, *What Steve Jobs Taught Executives About Hiring*, FORTUNE INSIDERS (June 9, 2015), <http://fortune.com/2015/06/09/shahrazad-rafati-keeping-your-best-employees/> [<http://perma.cc/YEZ6-L7ZJ>]. It is true that the late Steve Jobs, former CEO of Apple, said, "it doesn't make sense to hire smart people and tell them what to do; we hire smart people so they can tell us what to do." *Id.* Yet, that option is not always possible for employers, rendering the need for rules of conduct a reality which the NLRB must not ignore.

construction such as *noscitur a sociis* and *ejusdem generis*, as well as basic rules of contract construction which require that words be read in harmony with the rest of the provision's language. None of these methods will permit the NLRB to apply a tortured reading of plain language which is so overbroad that innocent and neutral rules are disallowed as unlawful on the basis of a predicted worst case scenario usage that will likely never materialize.

Thereafter, if the NLRB remains concerned that certain language could be put to a bad use, it still must refrain from essentially cancelling the picnic because it sees one cloud on the horizon. Instead, the NLRB should engage in the same evaluation which has proved effective in the federal courts. One familiar method is the burden-shifting analysis whereby the employee first establishes a *prima facie* case of a Section 8(a) violation by showing that an adverse employment action has occurred due to the application of a company's rule or policy, after which the company will have a burden of production to explain the legitimate and lawful reason for applying its rule. At that point, the aggrieved employee will still be afforded an opportunity to demonstrate that the company's explanation was a pretext or lie to cover up its unlawful behavior. Like courts, the NLRB should only be empowered to take remedial action when there is a proven violation of Section 7 rights and not merely because the NLRB has unilaterally concluded that a Section 8(a) violation has occurred based upon its overbroad interpretation of a neutral and necessary rule.

As mentioned in this article, some courts are presently questioning the continued usefulness of the burden-shifting method, and are gravitating toward a totality of the circumstances approach. While that would also be appropriate, the point is that some type of evaluation is warranted, instead of a finding that rules are unlawful just because the NLRB feels that an unknown employee at some still to be determined time would read a rule in such a liberal fashion that the inclination to talk about working conditions would be affected. The NLRB has taken to putting out fires before they start, and its zeal has likely caused harm to many of the very workers it seeks to protect because those employees must exist in a workplace where the bullies and harassers cannot be controlled by rules and policies which prohibit their behavior.

The NLRB's approach has become akin to a permanent injunction through which it can force an employer to cease and desist using workplace behavior rules or policies based solely on an ominous forecast. It is imprudent and unnecessary for the NLRB to use this fix it before it is broken approach, because even if a rule or policy is eventually applied in manner that amounts to a Section 8(a) violation, the resulting harm is not irreparable.

A case-by-case approach by the NLRB, rather than one based upon an asserted foreknowledge that an unspecified employee's Section 7 rights would be inhibited by a basic rule of conduct, is necessary to balance the interests of all who are affected by the application of the NLRA. This will still afford complete protection to employees in the rare circumstance when an employer misuses a valid workplace conduct rule. Meanwhile, quality employers will no longer need to fear the NLRB's precipitous enforcement of the language of Section 7 of the NLRA, and will be free to operate with necessary order while providing a safe and secure work environment for employees who are working together as one. This will be good for all workers, the economy, and our country as a whole.