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Unsafe Workplace, Injured Employees, and the Bizarre Bifurcation of Section 7 of the National Labor Relations Act

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I. INTRODUCTION

Passed in 1935, the National Labor Relations Act (NLRA) provides federal protection of workers' rights.1 Specifically, Section 7 of the NLRA protects the rights of workers to organize and engage in collective bargaining.2 Before 1935, state law governed most labor relations and management issues. Once the NLRA was passed, much of this state law was preempted in favor of new national standards, to the extent these standards covered the same ground as the state law.3 However, Congress failed to specify which state law still had preeminence over any federal labor law. Especially troublesome is the residual dichotomy of the NLRA and state workers compensation laws. This essay criti-
cally analyzes the bizarre bifurcation afflicting Section 7 of the National Labor Relations Act as it relates to the workers compensation schema.

The National Labor Relations Board (NLRB), which investigates unfair labor practices, and various circuit courts of appeals have created a pernicious dichotomy, holding that employees injured at work who invoke state law workers' compensation benefits are not engaging in NLRA Section 7 concerted, protected activities. Thus, retaliatory actions by vindictive employers against injured employees asserting workers' compensation claims pursuant to state law are not prohibited by the NLRA. Meanwhile, employees who complain of unsafe or unhealthy working conditions continue to be properly regarded by the NLRB and the courts of appeals as within the ambit of Section 7.

Consequently, employer retaliation against such employees engaging in Section 7 concerted, protected activities of reporting unsafe, unhealthy working conditions to federal or state or local agencies would constitute employer unfair labor practices in violation of the NLRA. The NLRB, the courts of appeals, and, ultimately, the Supreme Court must restore NLRA Section 7 protections to the former bloc of employees, and thus eliminate this pointless distinction between classes of employees injured by unsafe and unhealthy workplaces, and those only subject to unsafe and unhealthy workplaces.6

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4 The legal framework for workers' compensation insurance is largely made up of state statutory law and provides for monetary benefits, medical benefits, and rehabilitation for employees injured as a result of or in the course of their employment. Workers compensation is a no-fault system in lieu of jury trials, making employers strictly liable to accidentally injured employees, without regard to negligence of the employee or the employer. Workers' compensation is a widely used system. For example, New York State, with 8.6 million workers, has approximately 150,000 workers compensation claims annually filed by injured workers. States have had to address claims that their workers' compensation statutes are invalid and contrary to the Fourteenth Amendment to the United States Constitution. In 1911, the New York Court of Appeals pronounced the New York State workers' compensation law unconstitutional, depriving employers of their property without due process of law, but the law was subsequently reenacted, and significantly revised in 2007. See Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 317 (1911); Steven Greenhouse & N.R. Kleinfield, Deal in Albany Overhauls Worker Aid, N.Y. TIMES, Feb. 28, 2007, at A3. See generally Price V. Fishback, Workers' Compensation, EH NET ENCYCLOPEDIA, http://eh.net/encyclopedia/article/fishback.workers.compensation.

5 Occupational safety and health is a coordinated federal and state law regulatory regime, with the federal Occupational Safety and Health Act of 1970 as its iconic and controversial modern statutory cornerstone. Approximately 14 million employees develop medical conditions due to unsafe or unhealthy working conditions every year; there are approximately 6,000 workplace fatalities annually. See J.P. Leigh, S.B. Markowitz, and M. Fahs, Occupational Injury and Illness in the United States: Estimates of Costs, Morbidity, and Mortality, 157 ARCHIVE INTERNAL MED. 1557, 1568 (1997); see also ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW (Matthew Bender & Co., Inc. 2008)(1952); Emily A. Spieler, Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries, 31 HOUS. L. REV. 119 (1994).

6 Prominent scholars have called for reinvigoration of Section 7. See Richard Michael Fischl, Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 COLUM. L. REV. 789 (1989); B. Glenn George, Divided We Stand: Concerted Activity and the Maturing of the NLRA, 56 GEO. WASH. L. REV. 509 (1988); Michael M. Oswalt,
In NLRB v. City Disposal Systems, Inc. in 1984, the United States Supreme Court unequivocally held that a single employee acting alone can nevertheless be engaged in concerted Section 7 activity. In that landmark decision, truck driver James Brown voiced his concerns to supervision about unsafe conditions on the truck he refused to drive. Supervision cynically replied that half of the truck fleet was unsafe and said that if "it tried to fix all of them it would be unable to do business"—meanwhile, there was garbage to haul. Driver Brown then asked one of the classic rhetorical, plaintive questions in labor history, a paradigm for how the individual employee nevertheless can act on behalf of the collective bargaining unit: "[Supervisor] Bob [Madary], what are you going to do, put the garbage ahead of the safety of the men?" Obviously, yes. Mr. Brown was fired, for refusing to drive the truck with the bad brakes. If the employer could have had its way, it would have operated entirely unfettered by the inconvenient constraints of the law. The Court recognized that there can be no real distinction between the employee who complains today about unsafe equipment and perhaps the very same employee injured tomorrow by the unsafe equipment. It makes no sense whatsoever to exclude tomorrow's injured worker from the protection of Section 7.

Throughout much of the presidency of George W. Bush, the National Labor Relations Board has aggressively and relentlessly constricted the scope of Section 7 of the National Labor Relations Act. Notwithstanding these relative...


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9 Id.

10 See id. at 830-38.

11 Perhaps the single most radical decision deeply antithetical to employees' Section 7 rights is Guard Publishing Co (Register-Guard), 351 NLRB No. 70 (2007), rendered in the context of cyberspace communications, rather than in the arena of safety and health per se. NLRB held that employees had no Section 7 right to send pro-union emails on the employer's computers, utterly and completely failing to recognize that emails are contemporary equivalents of Republic Aviation solicitation, circa 1945. Dissenting Members Liebman and Walsh said that the "decision confirms that the NLRB has become the 'Rip Van Winkle of administrative agencies." Id. at 17. For commentary on the NLRB's spasmodic and unreal failure to understand the labor law ramifications of cyberspace, see Frederick D. Rapone, Jr., This is Not Your Grandfather's Labor Union—Or Is It?: Exercising Section 7 Rights in the Cyberspace Age, 39 DUQ. L. REV. 657 (2001) and Jeffrey M. Hirsch, The Silicon Bullet: Will the Internet Kill the NLRA?, 76 GEO. WASH. L. REV. 262 (2008). See also Kenneth R. Dolin, Battista Board's Legacy, NAT. L. J., July 7, 2008, at 12. ("Most labor law practitioners would acknowledge the importance of many decisions issued by the Battista Board. Likewise, most would acknowledge that the Battista Board swung the legal pendulum back toward management in the following areas: . . . limiting 'protected' activity/expanding unprotected activity . . . .").
ly recent impairments, my critique proceeds from a somewhat different perspective, focusing on starkly contradictory and jurisprudentially incoherent NLRB and circuit courts of appeals decisions that purport to remove employees' exercise of statutory workers' compensation rights from the protections of Section 7 of the NLRA. Ironically, this has occurred in the wake of September 11, after the Board itself has sua sponte invoked national security concerns and expressly reminded everyone that the workplace can be a very dangerous place indeed.\

II. THE ROOT OF THE PROBLEM\

Employees who are injured in accidents on the job and file for workers' disability insurance compensation benefits are, incredibly, not deemed to have acted within the bounds of, and are thus not protected by, Section 7 of the National Labor Relations Act. Their individual claims are considered to be just that: individual claims under state workers' compensation law, without any concerted, collective dimension. No matter how many workers are injured in recurring accidents due to unsafe conditions, their claims for benefits following injuries sustained in workplace accidents, as well as any actions for unlawful retaliation as a consequence of pursuing their state law workers' compensation statutory rights, are not protected, concerted activities for purposes of Section 7 of the NLRA.13


12 In IBM Corp., 341 N.L.R.B. 1288 (2004), for example, the Board sua sponte found that national security after 9/11 was one factor in the Board's decision removing from non-unionized employees the Weingarten right to representation in employer investigatory interviews. "Further, because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks. Because of these events, the policy considerations expressed In du Pont have taken on any new vitality." Id. at 1291.

13 NLRA proceedings are before an Administrative Law Judge—there are no juries, and no compensatory damages. The NLRA should nevertheless be available as a backstop or a floor for...
Tell that to the thousands injured at their workplace, the World Trade Center, on September 11. According to the jurisprudential schizophrenia afflicting Section 7, each injured employee claiming workers' compensation benefits is, amazingly enough, not considered to be engaged in a Section 7 concerted, protected activity, and any subsequent employer retaliation for the employee pursuing statutory state workers' compensation law benefits is not prohibited by Section 7.

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

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

workers, in the event that, for example, their state workers' compensation system is dysfunctional, broke, not timely paying benefits, or not properly providing for medical treatment.

The landmark study of the workers' compensation experience of first responders is Eli N. Avila, Jacqueline Moline, John Doucette & Elizabeth Hill, Responders to the World Trade Center Disaster and Their Ensuing New York State Workers Compensation Sequelae (2008) (Draft on file with the author).
So, whatever happened to the old Wobblies' axiom, "An injury to one is an injury to all"?

The collective, communitarian principle at the heart of Section 7 has been cruelly transmogrified into the ruthlessly Darwinian law of the (super) capitalist jungle—"every man for himself!" For injured employees trapped in this bleak scenario, misery is virtually guaranteed, exacerbated by the unavailability of the protections of Section 7 of the NLRA.

Pursuing statutory workers' compensation rights under state law regimes is not protected activity under Section 7. While the United States Supreme Court periodically considers the parameters of Section 7, the Court has never directly addressed, let alone definitively resolved, this specific issue. The divorce from Section 7 protections of injured workers exercising state workers' compensation statutory rights has been unequivocally, if summarily, pronounced by United States Courts of Appeals in several circuits, as well as by the National Labor Relations Board.

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

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

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16 Robert Reich, the former U.S. Secretary of Labor during the Clinton Administration, suggests that supercapitalism has mutated into forms that even the most sophisticated capitalists do not understand, and certainly are unable to control. Ultimately, supercapitalism threatens democracy. ROBERT REICH, SUPERCAPITALISM (The Power of Public Ideas ed., Alfred A. Knoff 2007).

Under the dichotomized Section 7 regime today, a factory girl reporting a fire hazard at a contemporary sweatshop would, at least theoretically, be protected against employer retaliation by Section 7. But, if she were injured while physically removing the fire hazard or in an actual fire, and she filed for workers' compensation and was retaliated against by the employer because she filed for workers' compensation, she would not be protected by Section 7. Today, the Board and the courts simply assume that injured workers exercising statutory workers' compensation rights under state law are adequately and fully protected by those particular state law regimes against unlawful retaliatory actions—such as termination from employment—by vengeful employers. Why burden the scenario with redundant NLRA Section 7 clutter, pointlessly confusing with needless complexity the state law avenue of recourse available to injured workers believing they have been unlawfully retaliated against by employers for having filed workers' compensation claims? Therefore, under this scheme, even the most egregious unlawful employer retaliation, which would surely be an NLRA unfair labor practice in virtually any other context, is irrelevant for Section 7 purposes when it stems from workers' compensation claims.

A. A Synoptic Review of Salient NLRB and Circuit Courts of Appeals Decisions Regarding NLRA Section 7 (Non) Availability in the Workers' Compensation Context

The Supreme Court held in San Diego Bldg. Trades Council v. Garmon that when an activity to which the state law would attach liability is "arguably protected" or "arguably prohibited" by the NLRA, the state law is preempted. However, the state law is not preempted if the activity is only a "peripheral" concern to NLRA. In Peabody Galion v. Dollar, the filing of workers' compensation claims was viewed by the court of appeals as only a "peripheral" concern of the NLRA. As such, the Oklahoma state law regulating the issue was not preempted, and the filing of claims was held not to be an NLRA protected activity.

The Garmon labor preemption doctrine has since been transmogriified into a blunt instrument antithetical to workers' rights. It presents a stark "either

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18 All states have workers' compensation laws, but not all of the laws necessarily have substantive provisions protecting workers against the employer's unlawful retaliation. See ARTHUR LARSON & LEX K. LARSON, WORKERS' COMPENSATION LAW § 104.07[1] (Matthew Bender & Co., Inc. 2007). In those instances, where unscrupulous employers are unconcerned about state workers' compensation law as weak and ineffectual, such employers may think twice before unlawful retaliation if they know that the federal government, the NLRA/NLRB, may come into the enforcement and compliance picture.


or” dilemma—namely, either injured workers are protected exclusively by Section 7 of the NLRA preempting all state law, or their recourse must be exclusively through state workers’ compensation law.

More than coincident with the ascendancy of the Reagan administration and the Supreme Court’s corresponding turn towards radical Jeffersonian states’ rights federalism, the labor preemption doctrine declared more than two decades earlier by the Supreme Court became a perverse instrument for the suppression of workers’ rights. The Reagan Board repeatedly slammed the door on injured workers in communication with state workers’ compensation offices. One need not file for benefits; apparently, according to the Reagan Board, simply speaking with the state law workers’ compensation regime is sufficient to fall outside the ambit of Section 7.22

Just before the Reagan presidency, in 1979, the National Labor Relations Board analyzed a Section 8(a)(1) employer unfair labor practice in violation of the NLRA in Krispy Kreme Doughnut Corp., determining that an employer discharging an employee for expressing his intention to file a workers’ compensation claim committed an unfair labor practice.23 The Fourth Circuit Court of Appeals, however, overruled the NLRB, refused to order enforcement of the NLRB’s decision, and used the opportunity to disavow Section 7’s applicability in the state workers’ compensation context.24 The court held that an employee filing a claim was not engaging in a “concerted activity,” and that the NLRB’s efforts to create a concerted activity were manifestly wrong:

Our circuit has indicated that the term ‘concerted activity’ means that the employee must be acting ‘with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself.’ . . . The Board in effect concedes that there is no evidence that the action of the solitary employee in this case intended or contemplated any group activity or that

24 Krispy Kreme Doughnut Corp. v. N.L.R.B., 635 F.2d 304, 308 (4th Cir. 1980).
he was 'in fact . . . acting on behalf of or as representative of, other employees;' at most his action can be said to have been 'for the benefit of other employees only in a theoretical sense.'\textsuperscript{25}

In 1981, the Tenth Circuit unequivocally held, in \textit{Peabody Galion}, that the employer's termination of employees in retaliation for filing workers' compensation claims is not prohibited as an unfair labor practice within the meaning of the NLRA.\textsuperscript{26} The court summarily declared:

The conduct at issue in this case—discharge of workers because they pursued workers' compensation claims—is not subject to either protection or prohibition by the National Labor Relations Act because it has nothing whatsoever to do with union organization and collective bargaining . . . . Likewise the underlying activity that provoked the conduct complained of—that is, the filing of workmen's compensation claims under state law—has no tendency to conflict with the National Labor Relations Act or the federal law.

. . . .

Even if discharges related to workmen's compensation claims were covered by federal law, the discharges would more likely be prohibited than protected. It is inconceivable that there would be state court interference with federal labor policy in connection with the present type of statute . . . .

. . . .

The activity present in the case before us bears little resemblance to that found to be federally protected . . . . There has been no special congressional consideration of workmen's compensation related discharges. Moreover, discharging workers because they have filed claims has nothing to do with collective bargaining. It cannot be classed as an essential aspect of

\textsuperscript{25} Id. at 306-08.

the economic forces which enter into the shaping of viable labor agreements . . . .

. . . .

There is one other exception that we have discussed . . . . That is the tenuous relationship between the federal labor laws of the remedy that is here being challenged. In other words, the concern of the federal labor laws is, to say the least, peripheral and tenuous.27

In 1985, the Tenth Circuit reinforced its summary conclusion in Peabody Galion, reiterating that the employer's dismissal of employees filing workers' compensation claims is not prohibited by the NLRA.28

According to the Eleventh Circuit in 1987, employees fired for entering into a monetary settlement of workers' compensation claims, in violation of the employer's policy against entering into such settlements, have no recourse under Section 7.29

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

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

It is generally accepted that Section 7 of the NLRA protects the employee who files a safety and health complaint with the Occupational Safety and Health Administration (OSHA). This principle further illuminates the Section 7 dichotomy because if the same employee who complains of unsafe, unhealthy working conditions is actually injured by these conditions, he may be fired for filing a state workers' compensation claim and would not be protected by Section 7.

27 Peabody Galion, 666 F.2d at 1316-19.

28 Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1354 (9th Cir. 1985) ("The court analyzed the relationship between Dollar's statutory claim and the NLRA, and concluded that the discharge of workers because they filed workers' compensation claims is not protected or prohibited by the NLRA and is unrelated to the collective bargaining agreement.").

29 Zartic, Inc. v. N.L.R.B., 810 F.2d 1080 (11th Cir. 1987).
Despite a tumultuous history surrounding the issue, especially concerning the interpretation of Section 7 concerted, protected activity, National Labor Relations Board decisions continue to hold that filing a safety and health claim with OSHA is protected activity under Section 7 of the NLRA.\textsuperscript{30} It has not been a jurisprudential straight line by any means, and the Board's now long-standing refusal to accord Section 7 protections to injured employees asserting state workers' compensation law statutory rights is all the more glaring and aberrational vis-à-vis any possible integrated understanding of Section 7.

Prior to the enactment in 1970 of the now-cornerstone federal law regarding workplace safety and health, the Occupational Safety and Health Act,\textsuperscript{31} the NLRB had long held that an employee's filing of health complaints was protected activity under Section 7 of the NLRA.\textsuperscript{32} And, after the effectuation of OSHA in 1970, the Board did not change its view. In 1975, for example, the NLRB, in Alleluia Cushion Co., Inc., held that filing a complaint under OSHA was Section 7 concerted, protected activity.\textsuperscript{33}

The evolution of the law following the NLRB's decision in Alleluia was tumultuous at best. Six years later, the Board overruled its Alleluia decision. In Meyers Industries, Inc., the Board resurrected an "objective" test for defining Section 7 concerted activities that existed before Alleluia.\textsuperscript{34} This standard maintains that an employee's activity is concerted only if the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."\textsuperscript{35}

This objective standard was attacked the following year in 1985 in Prill v. N.L.R.B. (Prill I).\textsuperscript{36} In Prill I, the District of Columbia Circuit Court relied on the Supreme Court's holding in N.L.R.B. v. City Disposal Systems Inc. where

\textsuperscript{30} The NLRB has consistently held that employee complaints to OSHA are protected, concerted Section 7 activities. See, e.g., Systems with Reliability Inc., 322 N.L.R.B. 757, 760 (1996) ("The Company discharged Yuhas because he engaged in concerted activity protected under Section 7 of the Act. The action which precipitated Yuhas' discharge, i.e., his statement that he would complain to OSHA, was one step in the concerted efforts of the three welders to improve safety and health conditions in the workplace. By saying that he would contact OSHA, Yuhas engaged in concerted activity for the purpose of mutual aid and protection;" protected under Section 7 of the Act.); In re Garage Mgmt. Corp., 334 N.L.R.B. 940, 951 (2001); In re U.S. Postal Service, 338 N.L.R.B. 1052, 1057 (2003) ("The Respondent may not lawfully seize upon an incident . . . to retaliate against one for engaging in activity protected by section 7 of the Act, such as filing an OSHA complaint.").


\textsuperscript{32} Walls Mfg. Co. v. N.L.R.B., 321 F.2d 753 (D.C. Cir. 1963) (holding that "complaining of [poor] sanitary conditions at employer's premises . . . was protected activity [under Section 7 of the NLRA]).


\textsuperscript{35} Id. at 497.

\textsuperscript{36} Prill I, 755 F.2d at 948-57.
the Court rejected a literal reading of "concerted activities."\textsuperscript{37} The Court in \textit{City Disposal} held that "section 7 does not compel a narrowly literal interpretation of 'concerted activities,' but rather is to be construed by the Board in light of its expertise in labor relations."\textsuperscript{38} The circuit court in \textit{Prill I} held that the Board in \textit{Meyers I} effectively failed to interpret "concerted activities" beyond the most narrow definition of joint action by employees. The \textit{Meyers I} Board's failure was that it did not "recognize the extent of its own interpretative authority."\textsuperscript{39} However, while criticizing the Board's interpretation in \textit{Meyers I}, the circuit court did not state that the objective test was an unreasonable interpretation of Section 7.\textsuperscript{40}

Following \textit{Prill I}, in 1986 the NLRB stated in \textit{Meyers II} that its standard in \textit{Meyers I} for determining whether activity is concerted, and that its rejection of the \textit{Alleluia} decision, were both reasonable and consistent with \textit{City Disposal}.\textsuperscript{41} This decision was subsequently affirmed in \textit{Prill II} by the District of Columbia Circuit Court.\textsuperscript{42}

The development of this area of law was, to say the least, less than linear. Ultimately, however, the NLRB continues to hold that the worker's exercise of the federal OSHA statutory right to file a safety or health claim under OSHA is Section 7 protected activity. In 2006, in \textit{T. Steele Construction, Inc.},\textsuperscript{43} the Board expressly reaffirmed that the worker's act of complaining to OSHA about safety conditions is protected activity: "T. Steele was aware that Farrell had engaged in protected activity by complaining to OSHA about the Respondent's safety practices, and was contemplating making further such complaints."\textsuperscript{44} Most recently, in 2007, the Board, in \textit{Stevens Construction Co.}, found that an employee calling OSHA to report unsafe working conditions engaged in Section 7 concerted, protected activity.\textsuperscript{45}

In this line of decisions regarding the applicability of Section 7 in the context of employee safety and health complaints, the NLRB summarized that

\textsuperscript{38} \textit{Prill I}, 755 F.2d at 951.
\textsuperscript{39} \textit{Id.} at 952.
\textsuperscript{40} Meyers Industries, Inc., 281 N.L.R.B. 882, 882 (1986) (Meyers II).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} Prill v. N.L.R.B., 835 F.2d 1481 (D.C. Cir. 1987) (Prill II).
\textsuperscript{43} T. Steele Constr., Inc. and Int'l Union of Operating Eng'rs, Local 150, AFL-CIO, 348 NLRB No. 79 (2006). \textit{See also} In re U.S. Postal Service, 338 N.L.R.B. 1052, 1057 (2003) ("[T]he Respondent may not lawfully seize upon an incident . . . to retaliate against one for engaging in activity protected by Section 7 of the Act, such as filing an OSHA complaint."); In re W. Va. Steel Corp., 337 N.L.R.B. 34 (2001); Systems with Reliability, Inc., 322 N.L.R.B. 757, 760 (1996) ("By saying that he would contact OSHA, Yuhas engaged in concerted activity for the purpose of mutual aid and protection . . . he engaged in concerted activity protected under Section 7 of the Act.").
\textsuperscript{44} \textit{T. Steele Constr., Inc.}, 348 N.L.R.B. No. 79 at 20.
the worker’s individual actions are concerted when the “evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group.”

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

IV. THE ABSURD CONSEQUENCE OF THE BIZARRE BIFURCATION OF SECTION 7: THE UNAVAILABILITY OF SECTION 7 IN THE CONTEXT OF THE EMPLOYER’S DELIBERATE SEXUAL HARASSMENT

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

The emergent recent trend is that filing a discrimination complaint with the EEOC or state or local human rights agency is not protected under Section 7, especially when it is undertaken by an employee whom the NLRB regards as acting only for her own individual benefit. It was not always so. In Hotel and Restaurant Employees, the Board held in 1980 that filing a sexual discrimination claim with the state employment commission was protected under the NLRA. This is especially so when the employee can also point to a fair employment practices provision in the collective bargaining agreement.

But, congruent with the many radical decisions of the Bush II Board, the Board repudiated its long-standing position in 2004 in Holling Press and Boncraft-Holling Printing Group. Employee Fabozzi believed that she was being unlawfully harassed by her work group leader. She learned that employee Garcia may have also been harassed by Mr. Leon, the group leader, but Ms. Garcia was reluctant to testify in support of Ms. Fabozzi’s complaint with the New York State Division of Human Rights. When the employer learned that Ms. Fabozzi had approached Ms. Garcia about being a supporting witness, Ms. Fabozzi was terminated. The NLRB found that no Section 8(a)(1) unfair labor practice had been committed. Dismissing the complaint, the Board ruled that Ms. Fabozzi was not engaged in Section 7 protected activity, because the com-

50 343 N.L.R.B. 301 (2004); see also Abramson LLC, 345 N.L.R.B. 171 (2005).
plainant only sought to benefit herself. The Board held that her activity "was not engaged in for the purposes of mutual aid or protection." The NLRB characterized Ms. Fabozzi's conduct as purely self-interested, without any concern for the wellbeing of fellow employees. The Board found that it was entirely too speculative and remote to presume that Ms. Garcia might, at some future point, suffer an injury and turn to Ms. Fabozzi for help.

This plainly denies the reality of the dynamics of sexual harassment in the workplace and leaves every employee subject to unlawful harassment without the protections of Section 7. As Board Member Liebman forcefully stated in her pointed dissent: "The majority sets an arbitrary standard, at odds with what our case law contemplates. It treats sexual harassment at work as merely an individual concern, even when victims seek help from coworkers. That view is simply unacceptable . . . . As a recent study observed, 'Sexual harassment is a fact of life for many working women, with some studies suggesting that work-related sexual harassment may affect as many as one in two women at some point in the work lives.'"

The only way an employee could be protected by Section 7 from retaliation for filing a complaint with a federal agency about harassment in the workplace is if, in her claim, she carefully alluded to prohibitions of unlawful discrimination in the language of the collective bargaining agreement.

Similarly, individual contentions of disability discrimination have been held protected under Section 7 when the claims are grounded in rights based on a collective bargaining agreement. In Milton v. Scrivner, Inc., the Tenth Circuit affirmed a ruling that an individual claim of disability discrimination was protected by Section 7, primarily because the rights alleged to have been violated were based on the collective bargaining agreement.

V. CONCLUSION

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

This crabbed reasoning flows from an unnaturally narrow view of the NLRA. The Board reasons that a workers' compensation claim only benefits a

51 Holling Press, 343 N.L.R.B. at 301.
52 Id.
53 Id. at 304-06.
54 Milton, 901 F. Supp. 1541.
55 Id. at 1118.
single employee, and accordingly, precludes the application of the NLRA. However, this ignores the underlying reality compelling the employee to file for workers' compensation in the first place. Quite often, the stimulus that required the employee to file for workers' compensation, such as unsafe, unhealthy working conditions and management exploitation and intimidation of vulnerable workers, will constitute the unfair labor practices that the NLRA was designed to prevent: to preclude Section 7 protections for the employee undermines the very purpose of the NLRA.

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

The Court need only reaffirm the essence of its classic decision in 1984 in *NLRB v. City Disposal Systems Inc.* (which, in turn, was premised on the Court's broad and integrated reading of Section 7 concerted protected activities in *Eastex, Inc. v. NLRB*), recognizing that employees who supported enhanced federal minimum wage laws for other workers would themselves indirectly benefit in future contract negotiations, as any legislative increase in minimum wages for low wage workers would raise the floor from which the higher wage workers could bargain for proportionately greater wage increases from their particular employer. In other words, it was foreseeable, and not "speculative" that all workers would benefit, albeit indirectly, from one worker's, or one class of workers' cause.

For now, to maintain the protections of Section 7 of the NLRA for employees who individually resort to external agencies with complaints of unlawful discrimination, for example, it is imperative that the individual employee accentuate the relevant language of the pertinent collective bargaining agreement that prohibits unlawful discrimination. Otherwise, in the wake of the NLRB's 2004 decision in *Holling Press*, it is likely that the NLRB will not accord Section 7 protections to individuals retaliated against for filing employment discrimination allegations with the United States Equal Employment Opportunity Commission, or state or local equivalent agencies.

Alexander Dumas' Musketeers subscribed to the axiomatic principle of "All for One, and One for All." In the early twentieth century, this truth was reaffirmed by the Wobblies' cry that "An injury to one is an injury to all." Well, apparently not so, say the current NLRB and some of the more brittle, rigid circuit courts of appeals, with their atomized Darwinian law of the jungle ethos of every man for himself, further isolating the most vulnerable injured and

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57 437 U.S. 556 (1978). *But see* Harrah's Lake Tahoe Resort Casino, 307 N.L.R.B. 182, 186-87 (1982) (finding against employees asserting 8(a)(1) unfair labor practices by the employer hotel casino, which prohibited employees from distributing literature about Employee Stock Ownership Plan proposals without first being approved for distribution by the employer.).
harassed workers. Accordingly, after three decades of decisions by the NLRB and the circuit courts vitiating the Section 7 rights of employees who pursue workers' compensation claims, it will take a decision by the Supreme Court to restore those Section 7 protections to employees injured at work.