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How the NLRB's Light Still Shines on Anti-discrimination Law Fifty Years After Title VII

Michael Z. Green*

Introduction: The NLRB Gives Employees Support From Discrimination Fifty Years After Title VII

On July 2, 1964, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964. Provisions in Title VII of that statute ("Title VII") created a ban on employment discrimination.[1] Title VII specifically establishes that "it shall be unlawful for an employer to fail or refuse to hire, discharge, limit, segregate, classify, or otherwise discriminate against any individual, with respect to wages, privileges, and other terms of employment because of that individual's race, color, religion, sex, or national origin."[2] As the passage of Title VII approaches its fiftieth anniversary, this Article explores what may be thought of as the unlikely impact of the National Labor Relations Board ("NLRB" or "Board")[3] on anti-discrimination law principles used to protect employees. How an agency charged with enforcing labor law protections under the National Labor Relations Act ("NLRA")[4] has affected anti-discrimination principles for employee protection under Title VII may not represent an obvious correlation, especially with the creation of the Equal Employment Opportunity Commission ("EEOC") as the agency charged with enforcing employment

* Professor of Law, Texas A&M University School of Law. I would like to thank Ruben Garcia and Ann McGinley for their efforts in organizing the 8th Annual Colloquium on Current Scholarship in Labor and Employment Law held at the University of Nevada, Las Vegas William S. Boyd School of Law on September 27, 2013. At that Colloquium, I presented the paper that became this Article as part of a panel on "Labor Concepts in Antidiscrimination Law in the Changing Economic Environment." I am grateful to have the comments from the participants at that Colloquium. The editorial work by members of the Nevada Law Journal staff has added tremendous value to this Article for which I am very thankful. I also appreciate the financial support provided by the Texas A&M University School of Law and the dedicated student research assistance provided by Bethany Moore, Casandra Johnson, and Eniola Akinrinade.

[1] Pub. L. No. 88-352, tit. VII, 78 Stat. 255 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2012)). *See also Celebrating the 40th Anniversary of Title VII*, U.S. Equal Emp. Opportunity Commission, http://www.eeoc.gov/eeoc/history/40th/panel/firstprinciples.html (last modified June 24, 2004) (describing the legislative history of Title VII culminating with its "pass[age] in June 1964 by strong bipartisan majorities in both houses [of Congress], and signed into law by President [Lyndon B.] Johnson on July 2, 1964").

[2] 42 U.S.C. §§ 2000e-2(a) (2012).

[3] *See* 29 U.S.C. § 153(a) (2012) (discussing the responsibilities of the NLRB).

[4] 29 U.S.C. §§ 151–69 (2012).

discrimination claims under Title VII.[5] However, the merger of anti-discrimination law with labor law over the last fifty years has represented a necessary but uneasy relationship as union density has declined[6] while Title VII claims have increased[7] under daunting legal and procedural limitations[8] that typically make court claims a losing proposition.[9]

As a result, this Article asserts that after almost eighty years of existence, the NLRB continues to play a major role in addressing discrimination in the workplace. Several recent actions taken by the Board during President Barack Obama's tenure (the "Obama Board") have helped to amplify the necessity of the NLRB as a supplement to Title VII enforcement. As employees face more difficulties and obstacles in successfully pursuing Title VII claims, this Article argues that the presence of the NLRB as a check on employer actions that stifle concerted activities by employees, including employee efforts to protest or

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[5] *See Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/statutes/index.cfm (last visited Apr. 29, 2014) (referring to the following laws, among others, that the EEOC enforces: Title VII as amended (EEOC enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, and e-12) (2012)); Age Discrimination in Employment Act of 1967 (EEOC enforcement authority codified at 29 U.S.C. § 628 (2012)); and Title I of the Americans With Disabilities Act of 1990 ("ADA") (EEOC enforcement authority codified at 42 U.S.C. § 12116 (2012)).

[6] *See* News Release, U.S. Department of Labor Bureau of Labor Statistics, Union Members - 2013 (Jan. 24, 2014), *available at* http://www.bls.gov/news.release/pdf/union2.pdf (describing how union density for 2013 was 11.3 percent, the same as in 2012, and how this percentage represented a drop from 20.1 percent in 1983).

[7] *See* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1738 (2012) (describing how "in 1991 federal courts heard roughly 8300 employment discrimination claims but by 2000 the number exceeded 22,000").

[8] *See* William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 82–99 (2009) (describing overall problems with proof structures in employment discrimination law).

[9] *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276, 1282–83 (2012) (referring to empirical studies showing that "less than 5 [percent] of all discrimination plaintiffs will ever achieve any form of litigated relief" and noting that out of "every 100 discrimination plaintiffs who litigate their claims to conclusion (i.e., do not settle or voluntarily dismiss their claims), only 4 achieve any form (*de minimis* or not) of relief" and "[t]he other 96 of 100 see their claims rejected in their entirety: 45 of 100 have their claims dismissed on motions to dismiss, 41 of 100 are dismissed at summary judgment, and 10 of 100 lose at trial" as the "odds can properly be characterized as shockingly bad, and extend (with minor differences) to every category of discrimination plaintiff, including race, sex, age, and disability"); Fineman, *supra* note 7 ("People who bring employment discrimination cases lose at trial at a greater rate than any other group of civil plaintiffs, and even when they win, their victory is more likely than most other awards to be overturned on appeal."). *See also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127–31 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 449–52 (2004); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 925 (2006) (describing how plaintiffs have difficult hurdles in winning race and national origin discrimination cases with a study showing a win rate of 9 percent for plaintiffs and 91 percent for defendants); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (asserting that employers prevail in 98 percent of federal court employment discrimination cases resolved at the pretrial stage).

challenge discriminatory workplace practices, has provided an ongoing light at the end of the tunnel for employees frustrated by Title VII's limitations. With ongoing Congressional efforts to emasculate the NLRB's powers and limit the NLRB's funding, that light flickers.[10] But that light has not burnt out over the past fifty years of Title VII enforcement as the labor movement continued to supplement Title VII.[11]

The Obama Board has increased its efforts to challenge employer policies in non-union settings when those policies have the effect of chilling concerted activity. In taking these actions pursuant to the NLRA, the Obama Board has extended a helping hand to employees seeking protection from discrimination in the workplace under Title VII as well.[12] With NLRB rulings finding labor law violations for policies prohibiting the discussion of salaries, policies prohibiting discussion of confidential information, policies prohibiting disparagement of the employer, policies prohibiting harassment, policies limiting communications on social media, and policies limiting employee opportunities to pursue class arbitrations,[13] the Obama Board has filled an important gap that Title VII enforcement has not been able to address either through agency action by the EEOC or by legislative change. As a result, this Article asserts that the NLRB be allowed to continue as a viable force in addressing workplace concerns about unfair treatment of employees as a supplement to what employees with statutory discrimination claims may pursue.[14]

Ongoing efforts to render the NLRB powerless must be addressed directly.[15] A powerless NLRB can have an impact not just on organized labor, but also on employees of color and female employees as a whole who are not in organized workplaces. The NLRB must continue its important role in providing

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[10] *See* Richard D. Kahlenberg & Moshe Z. Marvit, *"Architects of Democracy": Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 225–26 (2013) ("Because the NLRB has exclusive jurisdiction over violations of workers' labor rights, it stands as a large target for those that seek to limit these rights. Unlike other forms of discrimination, where opponents must try to amend the law in order to limit rights, labor law can be limited in myriad other ways. In 2011 alone, there were a variety of approaches that conservatives took to limit the Board's power, including Republican senators' refusal to confirm President Obama's appointments to the Board, threats by Republican members of the Board to resign in order to strip the Board of a quorum and therefore its ability to adjudicate allegations of unfair labor practices, the introduction of legislation designed to partially or fully defund the Board, and the introduction of legislation to abolish the Board and transfer its functions to the Department of Justice.") (citations omitted); *see also* William B. Gould IV, *A Century and Half Century of Advance and Retreat: The Ebbs and Flows Of Workplace Democracy*, 86 ST. JOHN'S L. REV. 431, 439 (2012) (referring to how all Republican presidential candidates in 2011 seemed to support defunding of the NLRB).

[11] Kahlenberg & Marvit, *supra* note 10, at 231–36 (describing shared values and tactics that have allowed the labor movement and the civil rights movement to continue to be indispensable allies).

[12] *See infra* Part II.

[13] *See infra* Part II.

[14] *See* Kahlenberg & Marvit, *supra* note 10, at 236–38 (describing how labor rights complement civil rights).

[15] *See* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2077–85 (2009) (providing a comprehensive analysis of what reforms may be necessary to keep the NLRB viable).

additional support for certain employee rights that Title VII has attempted to address for almost fifty years. By applying NLRA analysis in a non-union setting to protect employees from being chilled in concerted activity including pursuing discrimination matters, the NLRB's crucial support for those employee concerns still represents an important contribution to the development of anti-discrimination law even fifty years after the passage of Title VII.

This Article is organized as follows: In Section I, this Article examines the historical impact of the NLRA's enforcement by the NLRB at the time of Title VII's passage fifty years ago and how the powers of the NLRB limited the development of the EEOC's powers. Section II describes a number of NLRB decisions that have supported employees with concerns about workplace matters by giving them an opportunity to use the NLRA to protect their rights, including several important decisions by the current Obama Board. Section III highlights the significance of continuing to allow the NLRB to play a major role in the union and non-union workplace. The Article concludes in Section IV that the NLRB's importance in providing a check on employer workplace discrimination operates in a way that consistently provides employees with the supplement to Title VII necessary to effectuate purposes of that statute fifty years after its passage.

I. THE NLRB AT THE TIME TITLE VII WAS PASSED IN 1964

When Title VII was passed, debates about the role of the EEOC as an enforcement agency highlighted the strengths and weaknesses of the NLRB as an enforcement agency.[16] Consideration of the effectiveness of Title VII has rarely focused on the role of the EEOC in that assessment.[17] However, the efforts of civil rights leaders to make sure that the bill that resulted in Title VII would make the EEOC a strong public enforcement agency similar to the NLRB were rebuked in order to reach a compromise in passing the legislation, given the opposition of several Southern Democrats in Congress who held key positions as chairs of important House and Senate Committees.[18] Specifically, the first bill introduced regarding Title VII in the 88th Congress "envisioned the creation of an . . . EEOC . . . that would resemble the . . . NLRB, the Board in operation."[19] The EEOC under this initial legislative proposal would have, similar to the NLRB, prosecuted complaints based upon a reasonable cause

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[16] *See* Michael Z. Green, *Proposing A New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 320 & nn.36–38 (2000); *see also* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 40–42 (1994); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 58–59.

[17] Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 21 n.81 (1996).

[18] Green, *supra* note 16, at 319 & nn.33–35.

[19] Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1315 (1990) (citing H.R. REP NO. 88-570 (1963)); Green, *supra* note 16, at 320.

finding and an EEOC Board would have performed the judicial function by having the power to issue a cease-and-desist order and award back pay.[20]

As a result of the compromise that made the EEOC an agency with limited enforcement powers, the focus of enforcement under Title VII became the primary responsibility of individual employee efforts to bring federal court claims.[21] While removing any major enforcement powers from the EEOC in passing Title VII, no effort was made to allow for broader remedial recovery by employees bringing discrimination claims in federal court.[22] The original remedial section of Title VII only provided that "a court may enjoin discriminatory practices and 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay.' "[23] However, the final bill signed into law adopted an agency model where the EEOC would be responsible primarily for the conciliation and settlement of discrimination claims and the federal judiciary would become the primary decider of whether discrimination had occurred after a de novo trial.[24]

Thus, the commitment to an agency with power only to seek informal conciliation, rather than any strong enforcement, was a key part of the compromise and believed by proponents of the legislation to be a necessary component to Title VII's passage.[25] Getting northern Republicans to support Title VII legislation by not having a strong enforcement agency as a balance to southern Democrats who opposed the legislation as a whole led to the EEOC's limited enforcement model, completely different from the NLRB. Accordingly, the EEOC and many scholars recognized from the very beginning that it was a "toothless tiger"[26] of an agency when it started.[27]

Nevertheless, with the passage of Title VII, there was no need to think that the NLRB might still be as important in addressing individual employee rights. Instead, the passage of Title VII fostered an individual rights movement

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[20] Kotkin, *supra* note 19.

[21] *See* Franke, *supra* note 16, at 43.

[22] *Id. See also* Kotkin, *supra* note 19, at 1316–17.

[23] Kotkin, *supra* note 19, at 1314 (citing Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259–61 (codified as amended at 42 U.S.C. §2000e-5(g) (1981)).

[24] *Id.* at 1315–16. Apparently, congressional leaders were worried about a strong agency like the NLRB deciding under Title VII as to whether an employer had discriminated and instead wanted to foster settlement of cases by allowing a subsequent de novo review by federal court judges instead of a final agency determination. *See id.*

[25] Green, *supra* note 16, at 320 n.36 (discussing legislative compromise); *see also* Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 5 (1996) (citing statements of Senator Tower from the legislative history of Title VII).

[26] The origin of the term "toothless tiger" is attributed to Professor Alfred Blumrosen, who was the first chief of conciliations for the EEOC. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 957 & n.177 (1993) (citing ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 59 (1971) as the reference for calling the EEOC a "toothless tiger" and referring to this term as a description of the EEOC before the 1972 amendments that gave it power to bring suits and seek judicial enforcement of Title VII). Even the EEOC has referred to itself as a "toothless tiger" before Title VII was amended in 1972 to give it enforcement powers. *See 1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public*, EEOC: 35TH ANNIVERSARY, http://www.eeoc.gov/eeoc/history/35th/1965-71/ (last visited Apr. 29, 2014).

[27] *See* Green, *supra* note 16, at 323 & nn.51–52.

focused on filing those claims with the EEOC.[28] Even before Title VII's passage, some believed that Title VII was necessary because of the failure of unions to process individual employee rights grievances.[29] However, nearly fifty years later, the NLRB still helps employees who are seeking to pursue individual rights claims by protecting concerted activity aimed at effectuating those individual rights claims.

II. NLRB Decisions That Offer Employee Protections From Workplace Discrimination

A. *Section 7 Rights in the Non-Union Social Media Workplace*

Section 7 of the NLRA provides: "Employees shall have 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[30] Under Section 8(a)(1) of the NLRA, it is an unfair labor practice that can be prosecuted by the NLRB if an employer acts to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[31] Section 7 of the NLRA has no temporal limitations. It applies: when a union is engaged in an organizing campaign; when a union is the collective bargaining representative of the employees; and also when there is no union present at all.[32]

Given the limited number of employees who work in a union setting,[33] the application of Section 7 to the non-union workplace represents an important right for all workers. Non-union employers are just starting to see the significance of Section 7 of the NLRA in their workplaces. Specifically, the Obama Board has caused some consternation amongst employers for its actions aimed at challenging employer policies that may chill employees in the exercise of their right to form or join unions or otherwise engage in concerted activity for their mutual aid and protection.[34] Because of the political nature of the Board, the willingness to pursue charges extending Section 7 rights beyond union set-

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[28] *See* Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 81 (2004) (referring to a "workplace revolution" as a result of Title VII "ushering in a focus on individual rights instead of collective rights").

[29] *See, e.g.*, William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 40 (1970).

[30] 29 U.S.C. § 157 (2012).

[31] *Id.* § 158(a)(1).

[32] Fisk & Malamud, *supra* note 15, at 2024 (asserting that "Section 7 could be read as providing general antiretaliation protection for all forms of worker activism, so long as the activism is 'concerted' and for 'mutual aid or protection' "). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. Triangle Elec. Co., 335 N.L.R.B. 1037, 1038 (2001); Meyers Indus., 268 N.L.R.B. 493, 503 (1984).

[33] *See* News Release, *supra* note 6 (describing how the percentage of union members in the workforce has been reduced to 11.3 percent and how this percentage represented a drop from 20.1 percent in 1983).

[34] *See* James J. McDonald, Jr., *Has the NLRB Outlawed Courtesy?*, LAW 360 (Oct. 26, 2012, 1:11 PM), http://www.law360.com/articles/387035/has-the-nlrb-outlawed-courtesy

tings has "ebbed and flowed over time, with Republican Boards taking a narrow view of the scope of Section 7 and Democratic Boards finding it to have broader applicability in nonunion workplaces."[35]

As a result, some of the decisions that address this issue had been in place before the current Board.[36] However, decisions by the Obama Board and opinions by the NLRB's General Counsel during the Obama Administration have highlighted the importance of the NLRA's protection of employees in a nonunion setting.[37] Although the initial interest in these decisions probably resulted from a need to understand the NLRB's approach in examining the legality of social networking policies,[38] the NLRB has also started to examine other employer policies to determine whether they may chill employees in exercising their right to mutual aid or protection.[39]

What has possibly baffled employers about these NRLB decisions is that they involve a review of policies that do not appear on their face to prohibit employees in the non-union workplace from forming or joining a union, and have even involved policies requiring protection of employees from unfair treatment, discrimination or abuse by their fellow workers.[40] Specific policies reviewed by the NLRB have included those prohibiting abuse or harassment,[41] prohibiting discourtesy,[42] requiring appropriate decorum in communications,[43] prohibiting defamatory statements that damage any person's reputation,[44]

(referring to comments by management attorney regarding the NLRB's decisions that have caused concern for employers).

[35] Fisk & Malamud, *supra* note 15, at 2024–25 (describing oscillations on the application of Section 7 rights between the two previous Boards before the Obama Board, the Boards of President William Jefferson Clinton, a Democrat, and President George W. Bush, a Republican).

[36] *See, e.g.*, Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 647 (2004) (narrowing prior Board decisions finding that employer rules broadly prohibiting "profane" and "abusive" language amounting to harassment were per se invalid and finding that the rules could be valid on their face but they could be challenged in specific instances).

[37] McDonald, *supra* note 34.

[38] *See* Mark Gaston Pearce, *It Gets Hot in the Kitchen: New Challenges for the NLRB*, *in* THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR 1-1, 1-7 (Michael Z. Green ed., 2013) [hereinafter, Green, CHALLENGE FOR COLLECTIVE BARGAINING] (referring to the NLRB's "opportunity to address protected concerted activity in the context of use and restrictions on social media" following "several years of fanfare regarding Facebook").

[39] McDonald, *supra* note 34.

[40] *Id.*

[41] Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012 WL 6800769, at *2 (Dec. 14, 2012) (addressing claim of harassment by a co-worker with respect to Facebook communications made by five workers who were fired for those communications which were deemed protected activity by the Board); *see also* Costco Wholesale Corp., 358 N.L.R.B. No. 106, 2012 WL 3903806, at *3 (Sept. 7, 2012) (describing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004) which found that "rules addressing conduct that is reasonably associated with actions that fall outside the [NLRA's] protection, such as conduct that is malicious, abusive, or unlawful" are to be "considered in context" which is different from those rules that chill section 7 rights on their face).

[42] Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012 WL 4482841, at *1 (Sept. 28, 2012).

[43] *See* Costco Wholesale Corp., 2012 WL 3903806, at *1.

[44] *Id.* at *2.

requiring claims be brought to arbitration,[45] and prohibiting class arbitration claims.[46] For the Board right before the Obama Board, the NLRB's approach had been much narrower when addressing policies as being overly broad and chilling concerted activity, especially in the non-union workplace.[47] However, the Obama Board decisions actually return to the broad protections for employees that had been the practice until the previous Board during President George W. Bush's administration limited those rights.

Some further examples of the Obama Board's efforts to apply employer policies broadly to protect concerted activity include setting aside a decertification election based on objections filed regarding a two-year-old employee handbook containing overbroad and unlawful no-solicitation, distribution, loitering and clothing-standard rules.[48] In another decision, *2 Sisters Food Group Inc.*,[49] the Board found that an employer's rules subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees" was unlawful.[50] The Board also found that the rule in *2 Sisters Food Group* requiring the submission of all disputes to arbitration was unlawful as well.[51] Both the harmonious working rule and the arbitration rule could reasonably be interpreted by employees to prohibit protected concerted activity, including the filing of a charge with the NLRB.[52]

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[45] *See* Supply Techs., LLC, 359 N.L.R.B. No. 38, 2012 WL 6800784, at *1 (Dec. 14, 2012).

[46] D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012), *aff'd in part and rev'd in part sub nom.* D.R. Horton Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013). Several commentaries have responded to the *D.R. Horton* case. *See* Craig Becker, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401, 402–03 (2012); Austin Leland Fleishour, "Horton *[Helps] A Who"? Playing Linguistic Hopscotch with the NLRB and Discussing Implications for Employees' Section 7 Rights*, 80 TENN. L. REV. 449, 459–69 (2013); Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2965–72 (2013); Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1022–29 (2013) (discussing lower court cases responding to *D.R. Horton* and asserting that the decision should be affirmed as within the broad powers given to the NLRB to protect employees involved in concerted activity under the NLRA). *See also* Samuel Estreicher & Katherine C. Huibonhoa, *NLRB Lacks Authority for its* D.R. Horton *Decision*, *in* Green, CHALLENGE FOR COLLECTIVE BARGAINING, *supra* note 38, at 10-1; Adam T. Klein & Michael J. Scimone, *Arbitration vs. Labor Law: An Imagined Conflict*, *in* Green, CHALLENGE FOR COLLECTIVE BARGAINING, *supra* note 38, at 9-1.

[47] *See* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 41–44 (2006).

[48] Jurys Boston Hotel, 356 N.L.R.B. No. 114, 2011 WL 1127474, at *1–2 (Mar. 28, 2011).

[49] 2 Sisters Food Grp., Inc., 357 N.L.R.B. No. 168, 2011 WL 7052272 (Dec. 29, 2011).

[50] *Id.* at *1 (internal quotations omitted).

[51] *Id. See also* Supply Techs., LLC, 359 N.L.R.B. No. 38, 2012 WL 6800784, at *4 (Dec. 14, 2012) (finding a mandatory arbitration policy in violation of the NLRA because its language would reasonably be construed by employees as restricting their right to file charges with or pursue any processes with the NLRB).

[52] *2 Sisters Food Group, Inc.*, 2011 WL 7052272, at *2–3.

In *Hispanics United of Buffalo, Incorporated*,[53] five employees of a company that renders social services to economically disadvantaged clients were discharged solely because of Facebook postings.[54] The postings were made from the employees' home computers and covered their concerns regarding their working conditions and their frustrations with the criticism received from a co-worker regarding their respective job performance.[55] The Board found the Facebook postings were clearly protected as concerted activity. The co-worker who had complained of their performance alleged that the comments on Facebook constituted a violation of the employer's policy prohibiting harassment because she stated "solely . . . (in a text message) that she felt offended by the Facebook comments" when she saw them.[56] The Board explained that even if the communications were covered by the employer's policy against harassment, "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity."[57]

In *DaNite Sign Co.*,[58] the Board made it clear that any rule prohibiting employees from discussing their compensation is a violation of Section 8(a)(1) of the NLRA.[59] Further, in *Taylor Made Transportation Services, Inc.*,[60] the employer adopted a policy requiring that employees not disclose confidential pay rates without validity. When an employee did discuss her salary with other employees, the employer terminated her. The Board found that the policy of disciplining employees for discussing their wages had violated Section 8(a)(1) of the NLRA.[61] The Board applied its recently adopted standard articulated in *Continental Group, Inc.*,[62] where the Board explained that: "[D]iscipline imposed pursuant to an unlawfully overbroad rule violates the [NLRA] in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the [NLRA]."[63] As a result, even activity that is not concerted may represent a violation of the NLRA if the conduct implicates concerns underlying Section 7, such as wages.[64] Former NLRB Member Sharon Block recently reviewed these NLRB wage discussion cases and

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[53] Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012 WL 6800769 (Dec. 14, 2012).
[54] *Id.* at *2.
[55] *Id.* at *1.
[56] *Id.* at *4.
[57] *Id.* (citing Consolidated Diesel Co., 332 N.L.R.B. 1019, 1020 (2000)).
[58] DaNite Sign Co., 356 N.L.R.B. No. 124, 2011 WL 158412 (Mar. 31, 2011).
[59] *Id.* at *1 n.1, *11 (issuing an amended conclusion of law stating "[r]espondent violated Section 8(a)(1) by promulgating a rule that prohibited employees from discussing their compensation").
[60] Taylor Made Transp. Servs., Inc., 358 N.L.R.B. No. 53, 2012 WL 2069673 (June 7, 2012).
[61] *Id.* at *1–2.
[62] Continental Grp., Inc., 357 N.L.R.B. No. 39, 2011 WL 3510489 (Aug. 11, 2011).
[63] *Taylor Made Transportation Services, Inc.*, 2012 WL 2069673, at *1 (internal quotations omitted).
[64] *Id.*

explained how they are "vitally important . . . to workers' ability to ferret out pay discrimination."[65]

B. D.R. Horton and its Progeny: Protecting Concerted Activity By Preventing Employees From Being Coerced Into Arbitration of Statutory Claims

As previously discussed, the Obama Board has already started to examine broadly worded mandatory arbitration policies to make sure that they do not chill employees from pursuing protected activities, including filing charges with the NLRB.[66] In probably the most significant demonstration of support for employees seeking statutory employment claims, the Obama Board in *D.R. Horton* addressed an employer's policy of banning class arbitration of statutory claims in a non-union workplace.[67] Therein, D.R. Horton's "Mutual Arbitration Agreement" also provided a class action waiver stating only "individual" claims can be heard in arbitration.[68] Further, the arbitration agreement provided that an arbitrator may not consolidate employees' claims or otherwise "award relief to a group or class of employees" in a single arbitration proceeding.[69]

Michael Cuda had alleged that D.R. Horton had misclassified him and other superintendents as exempt under federal wage and hour law and sought overtime compensation and damages for him and the class through arbitration.[70] D.R. Horton responded to Cuda's request for class arbitration by asserting that it was defective due to the arbitration agreement that prohibited arbitration of collective or class claims. Cuda filed an unfair labor practice and the NLRB's General Counsel issued a complaint alleging that D.R. Horton violated the NLRA by coercing employees in the exercise of their Section 7 rights and retaliation under Section 8(a)(4) of the NLRA.[71]

The administrative law judge ("ALJ") found the mandatory arbitration class waiver did not violate Section 8(a)(1) by coercing employees' Section 7 rights.[72] However, the ALJ found that D.R. Horton's mandatory arbitration policy language "would lead employees reasonably to believe they could not file charges with the [NLRB]" in violation of Sections 8(a)(1) and Section 8(a)(4) of the NLRA.[73] The NLRB has established a body of law[74] that supports the

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[65] Sharon Block, *Perspectives from a New Member of the NLRB*, *in* Green, CHALLENGE FOR COLLECTIVE BARGAINING, *supra* note 38, at 2-1, 2-12 to 2-13. Block also noted the "various ways in which labor law and employment law intersect" and discussed "the importance to workers of how we at the Board handle those intersections." *Id.* at 2-13.

[66] *See* Supply Techs., LLC, 359 N.L.R.B. No. 38, No. 18-CA-019587, 2012 WL 6800784, at *1 (Dec. 14, 2012); 2 Sisters Food Grp., Inc., 357 N.L.R.B. No. 168, Nos. 21-CA-38915, 21-CA-38932, 21-RC-21137, 2011 WL 7052272, at *1 (Dec. 29, 2011).

[67] *See* D.R. Horton, Inc., 357 N.L.R.B. No. 184, No. 12-CA-25764, 2012 WL 36274, at *1 (Jan. 3, 2012), *aff'd in part and rev'd in part sub nom.* D.R. Horton Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at *1–2. Section 8(a)(4) provides that it is unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (2012).

[72] *D.R. Horton*, 2012 WL 36274, at *2.

[73] *Id.* at *24.

D.R. Horton decision by finding that policies which chill employees from exercising statutory rights, including filing charges, should be violations under Sections 8(a)(1) and 8(a)(4) of the NLRA.[75]

The NLRB reversed the ALJ to find a Section 8(a)(1) violation for the class arbitration waiver as part of a "careful accommodation" of Section 7 rights and federal pro-arbitration policy.[76] The Supreme Court's Federal Arbitration Act (FAA)[77] jurisprudence notes that parties cannot be required to forego the vindication of any substantive statutory rights. As a result, the NLRB also found the Section 7 rights violation was substantive, as the process of seeking a class is distinguished from the process of certifying a class which is procedural. The NLRB also agreed with the ALJ that the arbitration policy included language that "reasonably would lead employees to believe that they were prohibited from filing charges with the Board" in violation of Section 8(a)(1) and did not need to rule on the similar 8(a)(4) violation as it would not affect the remedy.[78] Specifically, the Board found there was no evidence that the employer told employees "that they would still be able to bring complaints to the EEOC or similar agencies."[79] The Board stated: "We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."[80]

After the NLRB decision in *D.R. Horton* issued, several lower courts were asked to address the validity of the decision as those courts were also wrestling with challenges to the validity of class arbitration waivers.[81] The *D.R. Horton* decision was also appealed by the employer to the United States Court of Appeals for the Fifth Circuit.[82] Many of the other federal Circuit Court decisions refused to follow the NLRB's *D.R. Horton* decision.[83] However, in

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[74] *See* Supply Techs., LLC, 359 N.L.R.B. No. 38, 2012 WL 6800784, at *1 (Dec. 14, 2012); Bill's Elec., Inc., 350 N.L.R.B. 292, 296 (2007); U-Haul Co. of Cal., 347 N.L.R.B. 375, 377 (2006). *But see* Liquita Lewis Thompson, *Arbitrators—Unlike Too Many Cooks—Do Not Spoil the Soup! Making the Case for Allowing Pre-Dispute Mandatory Arbitration of Unfair Labor Practice Charges in Nonunion Workforces*, 23 LAB. LAW. 301, 315–16 (2008) (describing NLRB decisions finding that an agreement to arbitrate that fails to make it clear that the employee is not waiving the right to file a charge with the NLRB such as the U-Haul decision's finding that it creates a chilling effect that deters employees from filing charges with the NLRB and arguing those decisions should not be used to prevent arbitration from proceeding).

[75] *See generally* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. (forthcoming June 2014) (describing how efforts to seek arbitration can chill employees from filing charges with the NLRB and the EEOC and arguing such acts should be prohibited as improper retaliation under the NLRA and Title VII).

[76] *D.R. Horton*, 2012 WL 36274, at *10.

[77] Pub. L. No. 68-401, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

[78] *D.R. Horton*, 2012 WL 36274, at *2 n.2.

[79] *Id.*

[80] *Id.* at *17.

[81] *See* Sullivan & Glynn, *supra* note 46, at 1022, 1028–29 (discussing cases).

[82] *See* D.R. Horton, Inc., v. NLRB, 737 F.3d 344 (5th Cir. 2013).

[83] *Id.* at 362 ("Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable.").

December 2013 the Fifth Circuit reversed in part and denied in part the appeal filed by the employer.[84] In rejecting the NLRB's decision, the Fifth Circuit found the NLRB's analysis with respect to the FAA was flawed and determined that the NLRB failed to accommodate the FAA's broad policy requiring enforcement of arbitration agreements.[85]

The Fifth Circuit also found that the arbitration agreement was procedural and not substantive and decided that the NLRA does not have a provision requiring that it ignore the requirements of the FAA.[86] Although the Fifth Circuit rejected the NLRB's efforts to protect employees from forced individual arbitration along with a class waiver, there is a powerful silver lining. The court did find the NLRB properly concluded that language in the arbitration agreement "would lead employees to a reasonable belief that they were prohibited from filing unfair labor practice charges."[87] Consequently, the court enforced the NLRB order requiring the employer take corrective action because the arbitration agreement violated Section 8(a)(1).[88]

A January 2014 NLRB ALJ opinion in *Leslie's Poolmart, Inc.*[89] has expanded the significance of the *D.R. Horton* case. The employer sought to compel an employee, Keith Cunningham, to pursue individual arbitration rather than allowing class claims for wage and hour law violations. The ALJ agreed with the NLRB's General Counsel in finding that even though the arbitration agreement did not address class or collective claims, Leslie's Poolmart still committed an unfair labor practice by seeking to utilize the arbitration agreement to bar Cunningham's class and collective action claims.[90] The employer in *Leslie's Poolmart* applied a class action waiver by filing a motion to dismiss the class/collective claims in federal court and compel individual arbitration.[91] In deciding the matter, the ALJ stated that she was bound by the Board's decision in *D.R. Horton* to find that the arbitration agreement violated the NLRA.[92]

As a result, efforts to compel arbitration that limit an employee's ability to work concertedly with other employees to recover as a class still represents a chilling of concerted activity at the NLRB despite the decision of the Fifth Circuit Court of Appeals in *D.R. Horton*.[93] Former NLRB member Sharon Block has asserted that the *D.R. Horton* decision emphasizes "the important

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[84] *Id.* at 364.
[85] *Id.* at 361–62.
[86] *Id.* at 357.
[87] *Id.* at 363.
[88] *Id.* at 364 ("The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Mutual Arbitration Agreement as prohibiting the filing of a claim with the Board, is ENFORCED.").
[89] Leslie's Poolmart, Inc., Case 21-CA-102332, 2014 WL 204208 (Jan. 17, 2014).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id. See also* Neiman Marcus Grp., Inc., Case 31-CA-074295, 2014 WL 495797 (Feb. 6, 2014) (decision by NLRB administrative law judge (ALJ), Eleanor Laws, finding that an employer's attempt to compel enforcement of its mandatory arbitration policy in state court class action wage and hour claim brought by an employee was an unfair labor practice and the ALJ ordered, among other things, that the employer cease and desist from seeking to enforce its mandatory arbitration policy in the state court matter). The ALJ in *Neiman Marcus* also found that she was still bound by the NLRB's decision in *D.R. Horton* regardless of

ways that labor law and employment law intersect" and even though it "may seem to some observers as labor law intruding where it does not belong, . . . the [*D.R. Horton*] decision illustrates that the workplace is a legally complicated place, where more than one old statute may have something to say."[94]

III. Acknowledging The Significance Of The NLRB In Supplementing Workplace Rights After Title VII

Mark Gaston Pearce, Chairman of the NLRB, recently defended the existence of the NLRB and its importance in protecting employees from unfair employer practices.[95] Pearce quoted a comment from United States Senator Tom Harkin made in response to challenges to President Obama's NLRB appointments during a debate on the Senate floor in January 2012:

> [D]isabling the NLRB would mean that American workers would have nowhere to turn if their rights are violated. Thousands of American workers are fired every year for trying to organize a union in their workplace. With the Labor Board out of commission, those workers might never get their jobs back. If an employer or a union refused to adhere to a contract, there would be no NLRB to resolve the dispute. The Labor Board also ensures that unions do not step outside the law in their interactions with workers or employers, and those cases would be stuck in limbo, too.[96]

Chairman Pearce used this quote from Senator Harkin to also respond to various attempts to stifle the NLRB.[97] Additionally, Chairman Pearce noted that these attacks on the NLRB have come at a time when the NLRB helps protect workers who "experience the personal devastation of layoffs, terminations or denial of employment as a result of unfair labor practices."[98] Further, according to Chairman Pearce, the NLRB is the agency that "puts people back to work" and helps "get them paid for the wages they lost."[99]

In looking at the impact of the NLRB's decisions invalidating certain policies for chilling employees in pursuing concerted activity, Claire Gordon identified in a recent AOL Jobs website story six tips on how to not get fired for posts on Facebook.[100] Because it is illegal for employers to retaliate against their workers for engaging in concerted activities for the purpose of collective bargaining or mutual aid or protection, Gordon explained that "[p]osting on

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the Fifth Circuit decision. *Id.* ("Because I am bound by Board precedent until it is either overturned by the Supreme Court or reversed by the Board itself, this argument fails.").

[94] Block, *supra* note 65, at 2–5.

[95] *See* Pearce, *supra* note 38, at 1–12.

[96] *See id.* (citing Press Release, Senate Comm. on Health, Educ., Labor & Pensions, Harkin Statement on President Obama's Appointments to the NLRB and CFPB (Jan.26, 2012), http://www.help.senate.gov/newsroom/press/release/?id=cf2288b9-4906-448a-91ff-bba7424e9b05&groups=Chair).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* Claire Gordon, *How Not to Get Fired for Facebook Posts: 6 Tips*, AOL Jobs (Jan. 29, 2013, 8:31 AM), http://jobs.aol.com/articles/2013/01/29/amy-mcclenathan-facebook-fired/. Those six tips were: 1. If you mock your boss, focus on wages and working conditions for all employees; 2. Don't try to be funny or sarcastic; 3. Get your co-workers to join you; 4. Mention a plan to act; 5. Your Company cannot tell you not to talk about the company; and 6. If you are a public employee, make your speech worthwhile. *Id.*

Facebook about unsafe working conditions, and other co-workers joining in, is therefore protected."[101] However, "broadcasting how your boss is a psycho, or how the vending machines at your office have stupid snacks, or how you wish you could be fired, probably is not" protected because it is not concerted activity aimed at seeking joint action regarding workplace matters with another employee.[102] As a result, Gordon counseled employees to make sure you talk to a co-worker when you make negative postings on Facebook about your company if you want those postings to be protected.[103]

The overall conclusion from all of the NLRB decisions recently invalidating employer policies for their potential to chill employees in exercising their right to pursue mutual aid or protection is that employers, including those in non-union workplaces, now know that they should make sure their policies address more specific misconduct. Rather than generally suggesting that communications an employer does not like, including communications involving protected concerted activity, will result in disciplinary action, the policy should identify the specific types of communications that are banned and provide disclaimers asserting that the policy does not prohibit an employee from pursuing concerted activity protected under the NLRA.[104]

NLRB Chairman Pearce has recently explained: "Before the Facebook cases it was not widely known that the [NLRA] applies in non-union workplaces, or that it also protects concerted activity unrelated to the presence of a union."[105] Because the Obama Board has taken an active role in protecting non-union employees who want to know whether their salaries are discriminatory by discussing them with other employees[106] or who want to pursue statutory discrimination claims as a class or a group without limitation,[107] employees who may have claims under Title VII are actually being protected by the NLRB. A former member of the Obama Board, Sharon Block, has recently explained: "In these difficult budgetary times, our sister worker protection agencies often struggle to find the resources to fully enforce the law" and as a result, "protection afforded by the Board's cases . . . can provide a useful tool for employees seeking to uncover discrimination in the workplace and help enforcement of our civil rights laws."[108] Because of the protections that the NLRB offers as a supplement to civil rights and anti-discrimination laws such as Title VII, the NLRB must be allowed to continue its important work without distractions, especially those distractions based on politics aimed at closing down the NLRB.[109]

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *See* McDonald, *supra* note 34.

[105] Pearce, *supra* note 38, at 1-10 to 1-11.

[106] Taylor Made Transp. Servs., Inc., 358 N.L.R.B. No. 53, 2012 WL 2069673, at *1 (June 7, 2012).

[107] D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012), *aff'd in part and rev'd in part sub nom.* D.R. Horton Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

[108] Block, *supra* note 65, at 2-9, 2-13.

[109] *See* Kahlenberg & Marvit, *supra* note 10 (describing political and legal efforts to limit the NLRB's effectiveness).

IV. CONCLUSION

The NLRB has started to help employers recognize that policies chilling or potentially chilling employees in the exercise of their rights to pursue concerted activity can be a problem, even in a non-union workplace. As a result, employees with mutual concerns about workplace discrimination or statutory employment laws have found a source of protection from the NLRB that supplements the protections created by Title VII. With the limitations imposed upon the EEOC as the primary agency charged with enforcement of Title VII and difficulties prevailing in court, recent efforts by the NLRB to challenge employer policies that chill the exercise of concerted activity have also added some fresh alternatives for employees seeking to challenge employer actions.

In the non-union workplace, employers must make certain that any policies subjecting an employee to disciplinary action do not also chill employees from pursuing rights to concerted activity protected by the NLRA. If those policies do create that chilling effect, employees can file an unfair labor practice charge with the NLRB to prevent enforcement of such policies and any related disciplinary action.[110] This opportunity to challenge certain policies pursuant to the NLRA allows the NLRB to supplement Title VII's enforcement regime, given the difficult proof structures involved in prevailing under Title VII. With repeated efforts in Congress to defang the NLRB by limiting its enforcement efforts and even prevent President Obama from appointing new members to the NLRB after incumbent members' terms have expired,[111] those seeking protection for employee rights under Title VII should start to realize the importance of the NLRB. In recognizing the NLRB's significant role in protecting employee access to Title VII rights, employees even in non-union settings and their advocates should come to the aid of the NLRB in defending it from congressional and political attacks aimed at closing down the NLRB.

Even in some of the most challenging times for pursuing employment discrimination claims under Title VII's statutory regime, the NLRB remains a viable alternative for employee protection. With the passage of Title VII and its creation of the EEOC to address workplace discrimination fifty years ago, the NLRB's ability to also provide employees protection from workplace discrimination continues. This protection remains crucial in these times for the non-union workplace, which now represents a clear majority of the workplaces as union density continues to diminish.[112] Although one may have assumed that

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[110] 29 U.S.C. § 160(b) (2012) (referring to investigation of NLRB charges); 29 C.F.R. § 102.9 (2013) (describing process of filing unfair labor practice charges with the NLRB); *see also Investigate Charges*, NAT'L LAB. REL. BOARD, www.nlrb.gov/what-we-do/investigate-charges (last visited Apr. 29, 2014).

[111] Kahlenberg & Marvit, *supra* note 10 (identifying various attacks being levied against the NLRB). The challenge to the President's NLRB member appointments has led to a case currently expecting to be decided by the Supreme Court in 2014. That case will address whether Congress actually took a recess to validate the President's recess appointments to the Board made after the President's nominations had languished for many months in the Senate and the Board was getting perilously close to not having enough members to be able to function. *See* Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom.* NLRB v. Canning, 133 S. Ct. 2861 (2013).

[112] *See* News Release, *supra* note 6.

the NLRB's role in workplace discrimination would become totally diminished by the creation and development of Title VII's enforcement regime, the reality is that the NLRB's most recent efforts to protect concerted activity have offered a bright shining light for those struggling down the dark path of seeking to help employees address workplace discrimination matters.