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# NEW NIP IN THE BUD: DOES THE OBAMA BOARD'S PREEMPTIVE STRIKE DOCTRINE ENHANCE TACTICAL EMPLOYMENT LAW STRATEGIES?

*Michael C. Duff\**

## INTRODUCTION

Some scholars are justifiably skeptical of the potential of labor law for improving the employment conditions of working Americans and have suggested the use of employment law as a kind of substitute labor law.<sup>1</sup> The claim is that "Workers . . . are relying on employment statutes, not only for the traditional purpose of securing the substantive rights provided by those laws, but also as the legal architecture that facilitates their organizational and collective activity—a legal architecture we conventionally call labor law."<sup>2</sup> While I agree that employment law has been used in this manner, I doubt the tactic's ultimate efficacy because, as a statistical matter—and as sophisticated employers probably know—most employment law claims fail.<sup>3</sup> The recent court-imposed limitations on the ability of employment lawyers to take on class action litigation calls into profound question the future of employment claims.<sup>4</sup> In addition, the National Labor Relations Board (NLRB) has held that union assistance with worker-filed employment law claims is illegal once the union has filed an election petition to formally recognize workers involved in the claims.<sup>5</sup> Unions, as a practical matter, may not involve themselves in any case in which they have plans to file an NLRB petition for election.<sup>6</sup> Regardless of petitioning intention, any organizing campaign built around cases destined to fail seems unlikely to meet with success. While workers' excitement may occur over the initiation of legal action, their enthusiasm cannot help but be deflated by subsequent unhappy developments in a given case. Finally, there is little collective ethic in the pursuit of individually grounded employment claims, a theme I will address in a later section.<sup>7</sup> Labor law is still relevant for addressing individual worker claims in a manner that allows for future collective action initiatives.

Nevertheless, it is easy to agree that informing workers of apparent violations of employment law can galvanize them in the early stages of a protest movement, before one can conceive of such inchoate general unrest as a coherent union organizing drive. In a similar manner, an agitated worker could become sufficiently aggrieved to file a charge or complaint with an

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<sup>1</sup> Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685 (2008).

<sup>2</sup> *Id.* at 2687

<sup>3</sup> Kevin M. Clermont and Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 *J. EMPIRICAL LEGAL STUD.* 429 (2004).

<sup>4</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (Requiring at class certification stage "significant proof" that an employer "operated under a general policy of discrimination.")

<sup>5</sup> *Stericycle*, 357 NLRB No. 61 (2011) (finding union filing of lawsuits after filing of election petitions objectionable conduct under conferral of benefits theory).

<sup>6</sup> I realize that many unions have been choosing for the last two decades not to follow the NLRB election route. But in FY 2009 2,696 representations petitions resulting in the conduct of secret-ballot elections were filed in NLRB regional offices. Obviously some petitioners remain persuaded of benefits arising from government-certified collective bargaining relationships; it seems a questionable tactic therefore to take the possibility of certification off the table.

<sup>7</sup> See *infra*. Part IV.

employment law enforcement agency. If an employer becomes aware of the worker's complaint, it is easy to imagine the employer taking retaliatory adverse action against the worker. And, if any of the complaining can be couched as a violation of the National Labor Relations Act, union organizers will have the advantage of a low cost — from the organizers' point of view — workplace investigation that is likely to gain the notice of rank and file workers.<sup>8</sup>

In individual worker, enforcement agency complaint scenarios — especially with no union involvement in a workplace — the NLRB has wrestled with the seemingly straightforward question of whether an individual worker pursuing such a claim does so solely on the worker's own behalf, an activity that would traditionally not be protected by the National Labor Relations Act (NLRA), or is somehow acting on behalf of an entire insurgent work group, an activity that may be protected under the NLRA.<sup>9</sup> The question is easy to answer when there is unambiguous evidence of concerted worker activity leading up to the individual complaint — for example where all workers in a work group explicitly designate a co-worker to individually raise a claim known by the employer to be brought on behalf of the entire group. But in the absence of such evidence the issue is much more nuanced because the answer has seemed to hinge on whether all workers are somehow derivatively complaining, so as to render the complaint "concerted" and therefore falling under the protection of the NLRA.<sup>10</sup>

In this essay I will argue that the NLRB is authorized to remedy certain discharges of individual workers who have *not* engaged in concerted activity, building on an idea that Professor Charles Morris developed in an exhaustive article analyzing *pre*-organizational worker activity published in the late 1980s<sup>11</sup>: Section 7 of the NLRA protects more than workers' actual concerted activities; it also protects the *right* of workers to act in concert.<sup>12</sup> Predecessor statutory language contained in Section 7(a) of the National Industrial Recovery Act (NIRA), and identical in many respects to the language of Section 7 of the NLRA, stated that employees had "the *right* to organize and bargain collectively through representatives of their own choosing," which tracks the language of Section 7 of the NLRA; but that they merely "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." <sup>13</sup> The NLRA promoted the ambiguous *shall be free from* language of the NIRA to a full-fledged "right . . . to engage in

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<sup>8</sup> I will address in more detail possible additional benefits of NLRB investigation in Part IV.

<sup>9</sup> *Cf.* Meyers Industries, 281 NLRB 882 (1986) (Meyers II) (holding that workers individually filing non-NLRB employment law claim were not engaging in "constructive concerted activity" protected by the NLRA) with Alleluia Cushion Co., 221 NLRB 999 (1975) (reaching opposite result).

<sup>10</sup> Section 7 of the National Labor Relations Act states:

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*, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (emphases supplied)

<sup>11</sup> Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1988) [hereinafter Morris, *Glimpse at a General Theory*]

<sup>12</sup> Morris, *Glimpse at a General Theory* at 1679.

<sup>13</sup> *Id.*

other concerted activities for . . . mutual aid or protection . . .<sup>14</sup> With Professor Morris,<sup>15</sup> I view this as a critical addition to the statutory language.

The Obama Board's<sup>16</sup> recent decision in *Parexel International (Parexel)* may significantly impact the manner in which the NLRB and the courts analyze such cases.<sup>17</sup> Previously, a threshold question to be considered in government agency complaint cases was whether the worker was *in fact* acting in concert with, or on the express or implied authorization of, other workers.<sup>18</sup> But the NLRB in *Parexel* appeared to ask a different question in assessing whether an employer's discharge of a worker violated the NLRA: did the adverse action violate the Act because the employer *anticipated* that the worker would engage in protected concerted activity at some time in the future and thereby intend to suppress the possibility of that activity?<sup>19</sup> Answering the question in the affirmative, the NLRB said:

If an employer acts to prevent concerted protected activity to nip it in the bud that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more. That conclusion is supported not only by the plain text of Section 8(a)(1), by the policies underlying Sections 7 and 8(a)(1) , , , but it is consistent with other lines of Board precedent holding that, under certain circumstances, employees who have engaged in no concerted activity at all are protected from adverse action. For example, an adverse action taken against an employee based on the employer's belief that the employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not in fact engage in such activity. Similarly, a mass discharge undertaken without concern for whether individual employees were engaged in concerted activity ó where ósome white sheep suffer along with the blackö ó violates the Act. What is critical in those cases is not what the employee did, but rather the employer's intent to suppress protected concerted activity. So here . . . [The worker's] discharge had the obvious effect of restricting her own further protected discussions of wages and possible discrimination with other employees, thus interfering with her Section 7 rights . . . [T]he discharge also had the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination.<sup>20</sup>

Though *Parexel* did not involve a worker's complaint to a government agency, it did address the nature of concert, which has been the analytical sticking point for "outside agency complaint" cases. The NLRB's analysis in *Parexel* presents an opportunity to think more deeply

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<sup>14</sup> See *supra*. n.9 for NLRA statutory language.

<sup>15</sup> *Id.*

<sup>16</sup> That is, the most recent version of the National Labor Relations Board in which three of the five members were appointed by President Obama. By recent tradition, presidents have appointed members in this 3:2 ratio in presumptive favor of the presidents' parties interests.

<sup>17</sup> 356 NLRB No. 82 (2011)

<sup>18</sup> See *N.L.R.B. v. Portland Airport Limousine Co.*, 163 F.3d 662 (1<sup>st</sup> Cir. 1998) (finding no protected concerted activity because the involved worker was not seeking to initiate, induce or prepare for group action).

<sup>19</sup> *Parexel International*, 356 NLRB No. 82, slip op. at 5 ("The Respondent *sought* to erect óa dam at the source of supplyö of *potential*, protected activity.") (Emphases supplied).

<sup>20</sup> *Id.*

about why, in light of the dismal and worsening track record of employment law plaintiffs,<sup>21</sup> employers would bother to discharge individual workers seeking redress from government employment law enforcement agencies. Perhaps in the normal course of events the employer is merely angry with the worker for questioning its authority – a motive for which the law offers little if any redress. Maybe the employer is concerned that other workers may become aware of the lone worker standing up to its authority, and fears that this spirit of resistance may spread. This motive brings consequences, for the NLRB has consistently held that conduct that would reasonably tend to chill employees in the exercise of their Section 7 rights violates the NLRA.<sup>22</sup> Thus, reasonable inferences drawn from the facts of a given case may show that an employer's discharge of a lone worker was intended to send a broader message to the work group as a whole: *try to obtain help - any help from any quarter - and you will be discharged.*<sup>23</sup> Further, can there be reasonable doubt that a worker willing to approach a governmental agency, without co-worker support, is precisely the kind of worker who would make initial overtures to a union? Regardless, it seems hard to argue that this kind of discharge – with or without unlawful intent – would not chill or suppress *future* attempts by the involved work group (and perhaps workers in other work groups learning of the action) to engage in the concerted activity that *is* protected under the NLRA.<sup>24</sup>

I first address the facts of *Parexel* in Part I of this essay. In Part II, I explain how *Parexel* departs from the reasoning of NLRB decisions limiting the application of the National Labor Relations Act to cases in which workers were acting with or on the authority of other workers, implicitly or explicitly. I defend *Parexel's* outcome in Part III, but on a different theory than the one relied on by the NLRB, which drew for support on cases like *Monarch Water Systems*<sup>25</sup> and *Phelps Dodge Corp v. N.L.R.B.*<sup>26</sup> I will argue that while *Parexel's* majority in reality borrows substantially in spirit from anti-union discrimination cases like *Darlington Manufacturing*<sup>27</sup> and *George Lithograph*,<sup>28</sup> Section 8(a)(1) of the National Labor Relations Act, properly interpreted, is more than equal to the task of protecting workers victimized by nip-in-the-bud discharges, even where the workers have *not* yet engaged in either union activity or non-union "concerted" activity.<sup>29</sup> In Part IV, I explain how an expanded 8(a)(1) rationale in support of the outcome in *Parexel* – rather than a borrowed anti-union rubric<sup>30</sup> – might strengthen employment law as labor law strategies.

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<sup>21</sup> Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009)

<sup>22</sup> Unbelievable, Inc., 323 NLRB 815, 816 (1997) ("Under well-established Board law, an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.")

<sup>23</sup> See *Alleluia Cushion*, 221 NLRB 995, 1000 (1975) (discharge of individual worker one day after OSHA had inspected the workplace "would indicate to the other employees the danger of seeking assistance from Federal or state agencies in order to obtain their statutorily guaranteed working conditions.")

<sup>24</sup> See e.g. *Crown Stationers*, 272 NLRB 164 (1984) (finding violation of Section 8(a)(1) where workers stumbled upon threatening letter written by employer's principal that was never intended to be disclosed to workers but would reasonably have tended to chill workers in the exercise of Section 7 rights).

<sup>25</sup> 271 NLRB 558 (1984)

<sup>26</sup> 313 U.S. 177 (1941)

<sup>27</sup> *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965)

<sup>28</sup> *George Lithograph Company*, 204 NLRB 431 (1973)

<sup>29</sup> The text of Section 7 of the NLRA, see *supra.*, n.9, renders this proposition problematic.

<sup>30</sup> Section 8(a)(3) of the NLRA states in relevant part, "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

## I. THE FACTS OF *PAREXEL*

In *Parexel* the employer performed research studies for pharmaceutical companies at its Baltimore, Maryland facility and employed a number of people from South Africa.<sup>31</sup> The discharged worker, a licensed practical nurse, was not from South Africa.<sup>32</sup> On a date in 2006, the worker had a discussion with a co-worker, who was from South Africa.<sup>33</sup> The South African co-worker had ceased working for the employer a month or so earlier but had recently returned to employment for reasons that were not clear. During the discussion the South African co-worker claimed, falsely, that he had received a raise upon his return, that he had been promoted to shift-supervisor, and that his wife, also a South African and who had also recently left employment with the employer, would also be returning to employment with a raise.<sup>34</sup> Two other employees were in the area of the discussion at the time but did not participate in it.<sup>35</sup> The South African co-worker, in fabricating his nonexistent good fortune, and that of his wife, explained to the non-South African worker, " . . . we're clever people and . . . [Manager of Clinical Operations Liz Jones, also a South African] is going to look after us."<sup>36</sup> The NLRB ALJ found as fact that by "us" the South African co-worker meant all South Africans working for the employer.<sup>37</sup>

A day or two later, the worker told her immediate supervisor about her conversation with the South African co-worker.<sup>38</sup> The worker said "that she thought the whole unit should quit and come back with a raise."<sup>39</sup> She also told her supervisor "that all the South Africans socialized together and that Liz Jones was going to look after them."<sup>40</sup> The worker's supervisor then informed Jones of the worker's comments.<sup>41</sup> Shortly thereafter, Jones and a human resources consultant summoned the worker to discuss her conversation with the South African co-worker.<sup>42</sup> Jones and the human resources consultant "were concerned about a "rumor," which they believed originated with the worker, that South African employees were receiving favored treatment and "taking over."<sup>43</sup> The worker recounted the substance of her discussion with the South African co-worker and opined that the employer "was paying South Africans higher wages and that Jones was going to continue favoring the South Africans in that manner."<sup>44</sup> Jones then asked the worker if she had discussed her conversation with the South African co-worker with anyone other than her immediate supervisor.<sup>45</sup> When the worker confirmed that she had not, the employer discharged her, about a week later.<sup>46</sup>

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<sup>31</sup> *Id.* at 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Parexel International*, 356 NLRB No. 82, slip op. at 1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Parexel International*, 356 NLRB No. 82, slip op. at 1

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Parexel International*, 356 NLRB No. 82, slip op. at 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2

<sup>44</sup> *Id.*

<sup>45</sup> *Parexel International*, 356 NLRB No. 82, slip op. at 1.

<sup>46</sup> *Id.*

The Administrative Law Judge hearing the case, Arthur Amchan, was understandably hesitant to find a violation of the NLRA on the facts before him. The Judge stated,

In some respects, Neuschafer's termination was a preemptive strike to prevent her from engaging in activity protected by the Act . . . However, I have not encountered any precedent for the proposition that I can find a violation on this basis without evidence that the alleged discriminatee had in fact engaged in concerted protected activity. Therefore, I decline to affirm the complaint on this basis.<sup>47</sup>

The Judge's hesitation was understandable because the Board had decided no case that he could cite holding that a "preemptive strike," "nip-in-the-bud" discharge, in the absence of activity the involved employer knew or at least suspected (even if erroneously) to be either concerted or union-affiliated, violated the NLRA.<sup>48</sup> In the next section, I will develop how the Board might have been expected to decide *Parexel* under traditional Board law. In short, it would have summarily upheld Judge Amchan.

## II. EVALUATION OF PAREXEL UNDER A "TRADITIONAL" CONCERTED ACTIVITY ANALYSIS

In this Part, I will first discuss how the Board has traditionally handled nip-in-the-bud discharges. No significant precedent exists for application of a nip-in-the-bud or preemptive strike theory in non-union contexts in which an employer did not at least believe that an individual worker was already engaged in activity with or on the authority of other workers. Next, I will discuss attempts by the NLRB to broaden protection of individual workers under the NLRA on a "constructive concerted activity" theory. I will then recount the NLRB's subsequent rejection of the constructive concerted activity theory. In the wake of that rejection, one might

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<sup>47</sup> *Id.* slip op. at 16

<sup>48</sup> There was another route by which the ALJ might have found a violation, however. The judge might simply have concluded that the worker was discharged as a result of her original conversation with the apparently fibbing South African co-worker, *see supra* n.30 and accompanying text, which was in itself concerted activity. *See Morris, Glimpse at a General Theory* at 1728-29 (discussing the dissenting opinion in *Root-Carlin, Inc.*, 92 NLRB 1313 (1951)). Though it might be argued that the conversation did not have as its purpose preparation for group action and was therefore not concerted within the meaning of the NLRA,

The finding of concertedness, or the right to engage in concerted conduct, surely cannot be based on the employee's own perception of purpose. An employee may have no clear perception of her intent when she first engages in a discussion with a fellow employee about a condition of employment. Clear intent may not develop until after that discussion, or it may never develop. Nor should it be the function of the Board to find her intent, whether a "personal" one as the majority found, or a "concerted" one as the dissent found. If "equality" between employee and employer means anything at all at the pre-organizational stage of Section 7, it means that employees cannot be prohibited from engaging in discussions about their conditions of employment, unless there is a showing of legitimate business justification.

*Morris, Glimpse at a General Theory* at 1729

Equality of bargaining power is one of the fundamental policies of the National Labor Relations Act. 29 U.S.C. § 151.

have predicted that the NLRB would summarily uphold Judge Amchan's dismissal of the complaint in *Parexel*, but it did not.

*A. Prior Board Protection of Workers from Nip-In-The-Bud Actions in Union or Inferable Concerted Activity Contexts*

Generally speaking Board law protects workers discharged to prevent them from exercising rights under the NLRA.<sup>49</sup> NLRB law has consistently protected the early stages of *union* organizing activity from nip-in-the-bud actions<sup>50</sup> — typically employer discharges of known or suspected union adherents. This protection is one of the bases upon which the NLRB will, under Section 10(j) of the NLRA, seek injunctive relief from a federal district court to reestablish the status quo ante pending an evidentiary hearing on the merits of the underlying administrative case.<sup>51</sup> Nevertheless, the parameters of NLRA coverage must be scrutinized to fully understand the nature of this protection.

In the common nip in the bud case,<sup>52</sup> the requisite precursors for NLRA coverage — that worker activity be both “protected” and “concerted” — will have been met as a matter of law upon finding that 1) a worker has become affiliated with a union, activity explicitly protected under Section 7 of the NLRA, and 2) the worker suffered adverse action because his or her employer knew or suspected the union affiliation. The underlying activity is presumptively concerted even if undertaken by a lone worker.<sup>53</sup> Moreover, in cases in which union activity of any kind is involved, an employer’s adverse action based on mere suspicion of a worker’s complicity in the activity is sufficient to violate the NLRA, assuming the employer is unable to establish that the worker would have suffered the same fate in the absence of the union activity.<sup>54</sup> Outside of the union context, however, the situation becomes more complicated because worker activity is not as obviously protected or concerted. In non-union contexts worker activity may be unprotected altogether, or it may be protected but not concerted. As Professors Gorman and Finkin effectively summarized the rule decades ago,

The prevailing principle of law — endorsed both by the courts of appeals and the

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<sup>49</sup> *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983) (“... it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice.”). The remedy for such a discharge is reinstatement and backpay subject to ordinary mitigation principles.

<sup>50</sup> *See e.g. Atlantic Veal & Lamb*, 342 NLRB 418, 426 (2004) (noting that the NLRB’s general counsel characterized the employer’s discharge of workers in the early stages of an organizational campaign as “nip in the bud tactics”)

<sup>51</sup> “Section 10(j) [injunctive] proceedings are authorized to prevent the irreparable destruction of a union’s nascent organizational campaign . . . Such violations virtually “nip in the bud” the union’s campaign or clearly threaten to do so if not immediately enjoined.” NLRB ELECTRONIC REDACTED SECTION 10(J) MANUAL USER’S GUIDE *available at* [http://www.nlr.gov/sites/default/files/documents/44/redacted\\_10j\\_manual\\_5.0\\_reduced.pdf](http://www.nlr.gov/sites/default/files/documents/44/redacted_10j_manual_5.0_reduced.pdf).

<sup>52</sup> By common I mean simply that a worker known or suspected to be a union adherent is fired to prevent union organizing at the employer’s establishment.

<sup>53</sup> *TNT Logistics*, 340 N.L.R.B. 1185, 1186, n.1 (2003) (“[D]espite the fact that other employees did not directly engage in any organizational activity, Morgan nonetheless engaged in protected concerted activity by sharing the contents of his letter [expressing interest in having a union represent employees] to management. . .”) I do not mean to suggest that it would be impossible for an individual worker in a unionized workplace to engage in protected activity deemed not to be concerted as a matter of law.

<sup>54</sup> *Atlantic Veal & Lamb*, *supra*. 342 NLRB at 419-20 (finding sufficient evidence to support finding that employer at least suspected discharged worker’s involvement with union in nip in the bud circumstances.)



NLRB is that section 7 does not protect personal gripes by individual employees. If an individual complains to management about working conditions affecting him alone, this will be treated as individual rather than concerted activity, and the employee will not be protected against discharge.<sup>55</sup>

In either eventuality the absence of protected *or* concerted activity the conduct may fall outside the scope and protection of Section 7.

Prior NLRB law protects unambiguously concerted protests of favoritism in the workplace, real or perceived, provided the subject of protest has its nexus in terms and conditions of employment.<sup>56</sup> Thus, if the worker in *Parexel* had obviously joined other workers to complain about alleged work-related preferential treatment of South African co-workers, the explicitly joint complaint would have been protected unless the employer was able to establish that it had a non-NLRA reason for taking adverse action against the worker.<sup>57</sup> The difficulty in *Parexel* arises precisely because the worker did not discuss her complaint with coworkers before complaining herself,<sup>58</sup> nor did she express to her employer an intention of discussing in the future the South African policy with co-workers. Rather, the evidence suggested strongly that her employer baldly anticipated she would engage in such discussions, and took steps to prevent it from happening.<sup>59</sup> In other words, the employer nipped the situation in the bud in the same way that an employer might nip a union organizing drive in the bud by firing a suspected union adherent in the very early stages of a union organizing drive.

The problem for the NLRB is that the union organizing drive analogy is imperfect. While the *in futuro*, nip-in-the bud impact is arguably parallel in both union and non-union workplace scenarios, the decided "suspicion" cases are premised on some known link to union activity that is independently protected by the NLRA.<sup>60</sup> For example, assume that an employer discharges a worker because the worker's relative is a known union adherent at another establishment, and the employer therefore suspects the worker will instigate union activity at its establishment.<sup>61</sup> Settled authority holds this motive for discharging the worker to be unlawful even though the

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<sup>55</sup> Robert A. Gorman and Matthew W. Finkin, *Individual and the Requirement of Concert Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 290 (1981) [hereinafter Gorman & Finkin, *Individual and the Requirement of Concert*]

<sup>56</sup> North Carolina License Plate, 346 NLRB 293 (2006) (finding violation in connection with discharges carried out after workers alleged workplace favoritism and threatened to complain to employer's contractor, the state Department of Motor Vehicles).

<sup>57</sup> *Id.*; see also Needell & McGlone, 311 NLRB 455 (1993) (finding the complaints of a lone worker regarding the employer's alleged preferential treatment of a co-worker protected because the lone worker had previously discussed the situation with other co-workers and her subsequent lone complaint to employer was therefore the "logical outgrowth" of group activity). The logical outgrowth test was famously endorsed by the Third Circuit in *Mushroom Transportation*, 330 F.2d 683 (3rd Cir. 1964), which remains the lead case for the proposition.

<sup>58</sup> *Parexel International*, 356 N.L.R.B. No. 82, slip op. at 15

<sup>59</sup> *Id.* at 16

<sup>60</sup> Section 8(a)(3) states in relevant part that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." Thus, an employer taking action against a lone worker for anti-union reasons violates the NLRA.

<sup>61</sup> *Martech MDI*, 331 N.L.R.B. 487, 488 (2000) (finding violation where employer admitted that employee "was selected for lay off because she was part of a group of employees [including her sister] of whom he had personal knowledge.")

discharged worker was not actually involved in union activity.<sup>62</sup> If, however, even in a union context case,<sup>63</sup> a discharged worker engages in no union activity, *and* there is no evidence as to why the employer would have suspected union activity of the worker, a prima facie violation of the NLRA could not be made out.<sup>64</sup> On the other hand, if the employer admitted that it discharged a worker whom it believed had not yet engaged in union activity, but whom it believed to assume for unspecified reasons to might in the future engage in such activity, the hypothetical case would resemble *Parexel*, if *Parexel* had arisen in a unionized context, and *would* make out a violation of the NLRA.<sup>65</sup>

Although these rules have essentially been in place for decades, the implications flowing from them can still lead to controversy or criticism even in a unionized context. To take a recent example, a unionized employer's anticipation of the exercise of protected activity by its unionized workers was at the center of the recent Boeing controversy, a case that settled as I was writing portions of this piece.<sup>66</sup> In *Boeing*, the employer essentially admitted it was relocating its facility from Washington state to South Carolina at least partly because it feared its Washington-based unionized employees, who had struck in the past, and might similarly engage in a strike in the future.<sup>67</sup> The popular discussion of the matter reflected a widespread misunderstanding that the legal issue in the ensuing NLRB case was whether the employer could lawfully relocate.<sup>68</sup> In reality, the case concerned in substantial measure the lawfulness of an employer's communication to unionized workers that it was relocating certain manufacturing work because it anticipated the workers' exercise of NLRA protected union activity in the future,<sup>69</sup> which was in some respects similar to the anticipatory situation in *Parexel*, although *Boeing* arose in a unionized context.

Because the facts in *Parexel* seemed to establish that the worker had not engaged in (and had no future intention of engaging in) discussions with co-workers of the alleged favoritism, the case bears resemblance to earlier non-union context cases in which employers mistakenly assumed that workers had been engaging in concerted activity. For example, in *JCR Hotel* a non-union employer fired a worker whom it mistakenly believed was about to lead co-workers

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<sup>62</sup> See e.g., *Permanent Label Corp.*, 248 N.L.R.B. 118, 136 (1980); *N.L.R.B. v. Clinton Packing Co.*, 468 F.2d 953, 955 (8th Cir. 1972); *N.L.R.B. v. Ritchie Manufacturing*, 354 F.2d 90, 98 (8th Cir. 1965);

<sup>63</sup> By "union context" I mean simply a case in which a union is somehow engaged in attempts to organize workers at a particular workplace.

<sup>64</sup> See e.g. *Amcast Automotive of Indiana*, 348 NLRB 836 (2006) (finding that employer's knowledge of worker's prior but temporally remote union activity insufficient to establish its knowledge or suspicion of worker's present union activity).

<sup>65</sup> See e.g. *Talladega Cotton Factory*, 213 F.2d 209, 214 n. 4 (5th Cir. 1954) (upholding NLRB's reinstatement of otherwise unprotected supervisors for refusing to engage in unfair labor practices because of the potential chilling impact on the future exercise of workers' Section 7 rights);

<sup>66</sup> Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, December 10, 2011, available at <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>

<sup>67</sup> See N.L.R.B. Complaint of General Counsel paragraph 6(a)-(e), April 20, 2011 [hereinafter GC's Boeing Complaint] available at [http://www.nlr.gov/sites/default/files/documents/443/cpt\\_19-ca-032431\\_boeing\\_4-20-2011\\_complaint\\_and\\_not\\_hrg.pdf](http://www.nlr.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing_4-20-2011_complaint_and_not_hrg.pdf). I say "essentially admits" because, as the complaint chronicles, the statements were made in various mass media outlets. The case would not have been about whether the statements were made - all of that would have been stipulated - but, rather, the legal consequences flowing from the statements.

<sup>68</sup> See e.g. *A Watchdog Bites: A federal agency bashes Boeing*, THE ECONOMIST, May 19, 2011, available at <http://www.economist.com/node/18713700> (quoting Boeing's General counsel as saying that the complaint represents "a breathtaking substitution of [the NLRB] for management in the running of an American company")

<sup>69</sup> GC's Boeing Complaint, paragraphs 7(b) and 8(b).

out on a strike.<sup>70</sup> The Eighth Circuit upheld the NLRB's conclusion that a discharge based solely on the belief that a worker intended to engage in concerted activity, even where the belief was erroneous or did not come to fruition, violated the NLRA.<sup>71</sup> *JCR* is distinguishable from *Parexel*, however, because in *JCR* the employer was aware of work-related discussions between the discharged worker and co-workers ó discussions the discharged worker claimed to be merely jocular ó before taking adverse action.<sup>72</sup>

Closer to *Parexel*, in terms of the absence of preliminary worker discussions in a non-union setting, is the NLRB's decision in *Monarch Water Systems*,<sup>73</sup> a case the *Parexel* Board cited with approval.<sup>74</sup> In *Monarch*, the NLRB found that an employer discharged a non-union worker who had participated in a Department of Labor compliance investigation.<sup>75</sup> The Administrative Law Judge hearing the case found that the discharge was motivated both by the individual worker's solo participation in an underlying DOL investigation, and by the employer's president's belief that the worker had joined with a co-worker in making complaints leading to the investigation.<sup>76</sup> The Judge thought that the discharge was unlawful under either motivation.<sup>77</sup> The NLRB declined to find that the worker's solo outreach represented "constructive" concerted activity.<sup>78</sup> Instead, it found that the discharge violated the NLRA because it was based, at least in part, on the president's belief that the two co-workers had been responsible for causing the investigation, in other words in his belief that the worker in question had actually been involved in concerted activity.<sup>79</sup> In a footnote, the NLRB observed that there was no evidence in the record establishing that the president was correct in this belief and emphasized that its accuracy was irrelevant.<sup>80</sup>

*Monarch* did not explicitly deal with a nip in the bud scenario. The case was decided on a theory of remedying retaliation for prior worker action rather than curing unlawful preemption of future worker action.<sup>81</sup> But it does hold that an employer's retaliation premised on an erroneous belief that a worker has previously engaged in concerted overtures to government agencies, even outside of unionized contexts, may make out a violation of the NLRA.<sup>82</sup> Significantly, the violation in *Monarch* was found in the absence of evidence of actual concerted activity. The Board found that the employer was concerned about other workers talking to the worker suspected of sparking the DOL investigation of company business, and that the employer knew generally that the worker and at least one other co-worker were friends.<sup>83</sup> The employer explicitly directed that co-worker "not to talk to" the worker responsible for the DOL investigation.<sup>84</sup> Accordingly, a similarity exists between *Monarch* and *Parexel* because in each

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<sup>70</sup> *JCR Hotel v. N.L.R.B.*, 342 F.3d 837 (8th Cir. 2003)

<sup>71</sup> *Id.* at 840

<sup>72</sup> *Id.* at 841

<sup>73</sup> 271 NLRB 558 (1984)

<sup>74</sup> *Parexel*, slip op. at 8, notes 9 & 10

<sup>75</sup> *Monarch Water Systems*, *supra.*, 271 NLRB at 558

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* For development of the constructive concerted activity concept *see infra* at II.B.

<sup>79</sup> *Monarch Water Systems*, *supra.*, 271 NLRB at 558

<sup>80</sup> *Id.* at 559, n.3

<sup>81</sup> *Id.* at 558

<sup>82</sup> *Id.*

<sup>83</sup> *Monarch Water Systems*, *supra.*, 271 NLRB at 558

<sup>84</sup> *Id.*

case actual concerted activity was absent; but, as I will discuss,<sup>85</sup> the two cases are critically distinguishable.

The *Parexel* Board also cited *Compuware Corp.*,<sup>86</sup> a non-union case in which an employer discharged a worker to prevent him from speaking during a company meeting about work-related complaints.<sup>87</sup> Certain state officials had been expected to attend the meeting.<sup>88</sup> Because the state was a customer of the employer, the worker was attempting to exert heightened pressure in support of the complaints by communicating directly with the customer-officials. Thus, the case is similar to *Parexel* because in a non-union context the employer discharged a worker to interfere with the future exercise of *what would have been* concerted activity.<sup>89</sup> In Section III, I will explain<sup>90</sup> why *Compuware*, like *Monarch*, does not quite fit the facts of *Parexel*.

In sum, the NLRB's authority to remedy nip-in-the-bud employer discharges outside of a union or other obvious "concerted" context seems questionable based on existing precedent.<sup>91</sup> Prior attempts by the NLRB to construct or supply the element of concert in *any* non-union context have, moreover, met with significant resistance.<sup>92</sup> For example, the protection of non-union, individual worker solicitations of assistance from government workplace enforcement agencies like the Department of Labor has been problematic. That kind of protection is, of course, central to this essay's argument that such outreach could strengthen employment law as labor law initiatives.

NLRB adjudicators have at times argued that individual worker participation in workplace agency enforcement processes is constructively concerted because it necessarily inures to the benefit of the entire work group.<sup>93</sup> At other times – and as generally insisted on by the circuit courts<sup>94</sup> – the NLRB has taken the position that the relevant statutory language will simply not bear the "constructive" concerted activity theory outside of unionized contexts.<sup>95</sup> I turn now to that debate, both to illustrate the difficulties in articulating theories of "constructive concerted activity," and to demonstrate how the resistance to such theories has encouraged the NLRB to often reflexively and prematurely dismiss charges not alleging the most explicit interference with obvious concerted activity. My larger purpose is to explore whether the NLRB might permissibly protect under Section 8(a)(1) of the NLRA facially individual overtures to various

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<sup>85</sup> See *infra*. Section III

<sup>86</sup> *Parexel*, slip op. at 8, n.9

<sup>87</sup> 320 N.L.R.B. 101, 102 (1995) *enfd.* 134 F.3d 1285 (6th Cir. 1998)

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 103

<sup>90</sup> See *infra*. Section III

<sup>91</sup> The additional cases cited by the Board in *Parexel*, slip op. at 8, notes 9 & 10, *viz.* Phoenix Processor, 348 NLRB 28, 28 fn. 7 (2006), *petition for review denied sub nom.* Cornelio v. NLRB, 276 Fed. Appx. 608 (9th Cir. 2008), *cert. denied* 129 S. Ct. 490 (2008), Koronis Parts, Inc., 324 NLRB 675, 698 (1997), Metropolitan Orthopedic Assn., 237 NLRB 427, 427, n.3 (1978), and Hamilton Avnet Electronics, 240 NLRB 781, 791 (1979), add little to the present discussion because they involved either employer suspicion of established union activity or, in the non-union context, employer knowledge or suspicion of preliminary worker discussions. I will omit explicit discussion of the cases in this essay because their disposition will be subsumed within the analysis I will develop in Section III, *infra*.

<sup>92</sup> See Gorman & Finkin, *Individual and the Requirement of Concert* at 310 (discussing the backlash of the circuit courts against expanded constructive concerted activity theories)

<sup>93</sup> See discussion *infra*. II.B.

<sup>94</sup> *But see* Prill v. N.L.R.B., 755 F.2d 941, 952 (1985) (". . . neither the language nor the history of section 7 requires that the term "concerted activities" be interpreted to protect only the most narrowly defined forms of common action by employees . . . the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA.")

<sup>95</sup> See discussion *infra*. II.C.

government enforcement agencies.

*B. Alleluia Cushion - Constructive Concerted Activity*

In *Alleluia Cushion*,<sup>96</sup> the NLRB reached for an expansive theory of concert. The attempt was predictably rebuffed, and in my opinion the Board has never recovered. In that case, a maintenance worker began complaining about safety conditions at his workplace soon after his hire.<sup>97</sup> He objected to "the lack of instruction regarding chemicals used in production, the absence of protective guards on machines, his inability to communicate safety instructions to the majority of employees who were Spanish-speaking, and the absence of first aid stations, eyewash stations, and an overall safety program."<sup>98</sup> In response, the employer informed him that it did not want to invest in safety at the individual plant in question because, it claimed, that plant would soon be closing.<sup>99</sup> Soon thereafter the worker was transferred to another of the employer's plants.<sup>100</sup> There, he claimed to have encountered a similar lack of safety and began again to protest.<sup>101</sup> Faced with alleged repeated failures to address his concerns, the worker wrote a letter of complaint to the state "OSHA" office, and forwarded a copy of the letter to his employer.<sup>102</sup> Prior to orally complaining to his employer about these most recent safety issues and writing the letter to the OSHA office about the issues, the worker had not discussed the concerns with co-workers.<sup>103</sup> Nor had he registered his complaints with the prior knowledge of co-workers.<sup>104</sup>

An operations manager soon thereafter reprimanded the worker for contacting the state OSHA office "and stated that if so ordered by the home office [the worker] would have to be fired."<sup>105</sup> Other supervisors allegedly informed the worker that a raise he had been promised was cancelled to pay for the employer's unanticipated safety expenditures.<sup>106</sup> In his exchange of correspondence with the state OSHA office, the worker learned that the employer had previously been cited by the same agency for similar offenses and was already under an obligation to post notice of the citations the agency had previously issued.<sup>107</sup> When the worker questioned the employer about these contentions the employer informed him that it did not intend to comply with the posting requirement.<sup>108</sup> A couple of weeks later, the employer fired the worker after he accompanied a state OSHA inspector on a tour of the facility in order to point out the alleged safety violations.<sup>109</sup>

The Administrative Law Judge hearing the case found that the worker was motivated solely by his own safety concerns in approaching the state OSHA.<sup>110</sup> The judge focused on the lack of evidence that the worker was engaged in concerted activity with co-workers or that the worker's

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<sup>96</sup> 221 NLRB, *supra*. at 999

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Alleluia Cushion Co.*, *supra*, 221 NLRB at 999

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Alleluia Cushion*, *supra.*, 221 NLRB at 999

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Alleluia Cushion*, *supra.*, 221 NLRB at 999

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1000

approach to the agency was an outgrowth of concerted worker action.<sup>111</sup> The judge found no evidence of, and was unwilling to infer, that other workers were also concerned with workplace safety.<sup>112</sup> The judge conceded, however, that the worker's conduct in approaching the agency would have been protected if it had also been concerted.<sup>113</sup> Finding no evidence of concerted activity, the judge recommended the complaint be dismissed.<sup>114</sup>

On review of the Judge's decision the NLRB majority acknowledged that the protesting worker had acted alone in complaining to the state OSHA about the employer's alleged dearth of safety precautions.<sup>115</sup> The NLRB argued, however, that

[T]he absence of any outward manifestation of support for [the worker's] efforts is not, in our judgment, sufficient to establish that [the employer's] employees did not share Henley's interest in safety or that they did not support his complaints regarding the safety violations. Safe working conditions are matters of great and continuing concern for all within the work force. Indeed, occupational safety is one of the most important conditions of employment.<sup>116</sup>

Indeed, the NLRB majority argued that it should be presumed that other workers supported the complaining lone worker in the absence of evidence that other workers had disavowed representation by the worker.<sup>117</sup> This principle has become known as the *Alleluia* presumption.<sup>118</sup> The majority also argued that, because the federal and state governments had been active in recent years passing a number of statutes mandating occupational safety, it would be acting in a vacuum if it ignored these trends in the broader fabric of workplace law. The Board's controversial conclusion was that,

Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

It came as no surprise to many observers that the decision was swiftly revisited by the Reagan Boards and promptly reversed.<sup>119</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Alleluia Cushion, supra.*, 221 NLRB at 1000

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Alleluia Cushion, supra.* 221 NLRB at 1000

<sup>117</sup> *Id.* at 1000

<sup>118</sup> See e.g. *Ewing v. N.L.R.B.*, 861 F.2d 353 (2d.Cir. 1988) in which the circuit court makes familiar use of the term.

<sup>119</sup> See Matthew W. Finkin, *Labor Law By Boz - A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155 (1985) (From a purely political perspective this development should be of little surprise . . .) [hereinafter Finkin, *Boz*]; Reagan Boards refers to versions of the five member NLRB made up of a majority of members appointed by President Reagan. The first *Meyers* case was decided by the Board

C. *Meyers Industries* - Rejection of the Constructive Concerted Activity Theory in Non-Union Workplaces

Not long after deciding the case, the NLRB reversed itself and rejected *Alleluia Cushion's* expansive constructive concerted activity approach. In *Meyers Industries*,<sup>120</sup> an employer assigned a truck driver to drive a truck and trailer hauling boats from the employer's manufacturing facility in Michigan to boat dealers around the country.<sup>121</sup> The driver's truck frequently malfunctioned - the brakes were especially unreliable - and he lodged multiple safety complaints with the employer.<sup>122</sup> A co-worker had previously experienced similar malfunctions with the same equipment.<sup>123</sup> Eventually, the employer made unsuccessful attempts to repair the equipment.<sup>124</sup> A few weeks later the driver was involved in an accident in Tennessee that he claimed was caused by the truck's malfunctioning brakes.<sup>125</sup> Defying the employer's insistence that the truck depart Tennessee expeditiously, notwithstanding the accident and the still bad brakes, the driver instead had the truck inspected by the Tennessee Public Service Commission.<sup>126</sup> The Commission cited the vehicle on multiple counts and forbade that it be taken out on the road until the employer made repairs.<sup>127</sup> Thereafter, the trailer was sold for scrap and the driver drove the truck back to Michigan.<sup>128</sup> Upon his return, the employer asked the driver why he had not attempted to drive the truck and trailer back to Michigan instead of contacting the authorities.<sup>129</sup> The driver answered that he did not think it was safe to drive the vehicle.<sup>130</sup> The employer summarily fired him stating, "[W]e can't have you calling the cops like this all the time."<sup>131</sup>

Hearing these facts the Administrative Law Judge concluded that the employer fired the driver both because he had refused to drive an unsafe vehicle after filing a report with the Tennessee Public Service Commission, and in retaliation for his earlier safety complaints.<sup>132</sup> The judge found a violation under *Alleluia Cushion*, a decision the judge thought "established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees."<sup>133</sup> The judge found that the driver, by contacting local authorities and refusing to drive the vehicle, "was enforcing the cited provisions of the national transportation policy, and that his invoking

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appointed during Reagan's first term. The second *Meyers* case, *see infra*. II.E., was decided by the Board appointed during Reagan's second term.

<sup>120</sup> *Meyers Industries*, 268 NLRB 493 (1984). As will be discussed momentarily the D.C. Circuit remanded this case to the NLRB to provide an adequate explanation for its decision. Following the remand the NLRB issued a second decision. I follow tradition by hereinafter referring to the first decision as *Meyers I* and the second as *Meyers II*.

<sup>121</sup> *Meyers I, supra.*, 268 NLRB at 497

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Meyers I, supra.*, 268 NLRB at 497

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Meyers I, supra.*, 268 NLRB at 497-98

<sup>130</sup> *Id.* at 498

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Meyers I, supra.*, 268 NLRB at 498

the Tennessee Public Service Commission's inspection apparatus was the legal equivalent of a safety complaint to OSHA.<sup>134</sup> The judge added that the employer was "free, under *Alleluia Cushion*, to rebut the inference that [the employer's] activity inured to the benefit of all employees."<sup>135</sup>

The manner in which the NLRB dismissed the Administrative Law Judge's decision remains revealing. First, the *Meyers I* Board alleged that *Alleluia Cushion* had dispensed with any requirement that a finding of concert of action depended on objective manifestations of "group will."<sup>136</sup> Rather, claimed the majority, the Board in *Alleluia Cushion* had simply substituted its views of what workers *ought* to be concerned about for what they were in fact concerned about in a given workplace.<sup>137</sup> In an especially scathing passage, the *Meyers I* Board next claimed that *Alleluia Cushion* had simply "questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity "concerted," without regard to its form. This is the essence of the per se standard of concerted activity."<sup>138</sup> In other words, *Alleluia Cushion* was charged with imposing its worker-friendly view of the world on the regulated community rather than with simply, but in good faith, having a wrong-headed view as to how to read statutory provisions or regimes *in pari materia*.<sup>139</sup>

Perhaps predictably, on appeal the D.C. Circuit Court of Appeals remanded the case to the NLRB to explain its decision more fully.<sup>140</sup> One very large factor occasioning remand was surely the Supreme Court's intervening decision in *City Disposal*, an opinion issuing in the same year the Board decided *Meyers I*.<sup>141</sup> In a critical passage in the D.C. Circuit's remand opinion, *Prill v. N.L.R.B.*, Judge Harry T. Edwards argued that *City Disposal* "made clear that Section 7 does not compel a narrowly literal interpretation of "concerted activities," but rather [it] is to be construed by the Board in light of its expertise in labor relations."<sup>142</sup> It is extremely important to my present purpose to emphasize Judge Edwards' observation that in *Meyers I*, "the Board failed even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions."<sup>143</sup> That prescient comment reflects a deep understanding of workplace reality "the shock and awe attendant to the immediate discharge of an individual worker for general employment rights invocation *obviously* would tend to chill assertion of Section 7 rights. As an administrative law matter, the NLRB would be entitled in any event to find that it did."<sup>144</sup>

I next digress to discuss *City Disposal* itself and follow the digression by a return to the *Meyers* controversy to reflect on the Board's decision on remand in *Meyers II*.

#### *D. City Disposal - Acceptance of the Constructive Concerted Activity Theory in Union Workplaces*

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<sup>134</sup> *Id.* at 498

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 495

<sup>137</sup> *Meyers I*, *supra.*, 268 NLRB at 495

<sup>138</sup> *Id.*

<sup>139</sup> For an elucidating discussion of the *Alleluia Cushion* debate see Gorman & Finkin, *Individual and the Requirement of Concert* at 307-310.

<sup>140</sup> *Prill v. N.L.R.B.*, 755 F.2d 941, 948 (D.C. Cir. 1985) ("*Prill I*"), *cert. denied*, 474 U.S. 948 (1985).

<sup>141</sup> *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984)

<sup>142</sup> *Prill v. N.L.R.B.*, 755 F.2d at 951 *quoted in* Morris, *Glimpse at a General Theory* at 1715.

<sup>143</sup> *Id.* at 953

<sup>144</sup> *Id.* at 951



*City Disposal* was a landmark Supreme Court case in which the Court's majority approved the NLRB's constructive concerted *Interboro* Doctrine in workplaces governed by collective bargaining agreements.<sup>145</sup> *City Disposal* established that in some instances individual conduct was indeed protected by the NLRA where it was the outgrowth of a preexisting and obvious collective bargaining process.<sup>146</sup> While I will not here delve deeply into the facts of the case, it is enough to say that a lone worker complained about having to operate an unsafe truck and was discharged as a result.<sup>147</sup> What distinguished *this* unsafe truck case from the unsafe truck scenario in *Meyers* was the existence of a unionized work group and a collective bargaining agreement governing the workplace.<sup>148</sup> The worker in *City Disposal*, though asserting the individual right of not being required to drive an unsafe truck, could be said to be invoking the grievance arbitration machinery of a collective bargaining agreement that was itself the product of concerted action.<sup>149</sup>

The concept of group creation of a right that necessarily may only be individually enforced or asserted — which is how the Court characterized the collective bargaining workplace<sup>150</sup> — continues to have potentially sweeping ramifications. After all, it would be difficult to locate a workplace statute that was not in substantial measure influenced by organized labor's political lobbying.<sup>151</sup> At a minimum, to the extent the NLRB felt at liberty to assume that individual conduct could *never* be protected by the NLRA as a matter of law, *City Disposal* negated the assumption. The decision has subsequently been narrowly applied to unionized workplaces, however, and the *Meyers II* decision has remained the reflexive presumption in the non-union workplace. Nevertheless, *City Disposal* gave the *Meyers II* Board cause for repose.

One extremely underappreciated fact in *City Disposal* is that the aggrieved worker, Brown, never got to the point of formally filing a grievance prior to his discharge.<sup>152</sup> The Court

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<sup>145</sup> *Id.* at 835-36

<sup>146</sup> *Id.* at 836

<sup>147</sup> *Id.* at 826-27

<sup>148</sup> N.L.R.B. v. *City Disposal Systems*, *supra.*, 465 U.S. at 828

<sup>149</sup> *Id.* at 832-33

<sup>150</sup> *Id.* at 832

<sup>151</sup> A point the Board dismissed in *Meyers II* by arguing that "the critical link between lobbying and enforcement of the law is the legislative process itself, which is not a part of any ongoing employee-generated process such as the negotiation and administration of collective-bargaining agreements." *Meyers II*, 281 NLRB 882, 888 (1986). A 21<sup>st</sup> century reader is apt to find quaint the conceptual severance of legislation from lobbying. Such lobbying there was:

During the subcommittee hearings [in the House of Representatives regarding passage of Title VII] many witnesses, including George Meany, President of the AFL-CIO, Walter P. Reuther, President of the United Automobile Workers, AFL-CIO, and Sidney Zagri, legislative counsel for the International Brotherhood of Teamsters, testified in favor of such provisions.

Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 434-35 (1966).

<sup>152</sup> N.L.R.B. v. *City Disposal Systems*, *supra.*, 465 U.S. at 846 (O'Connor, J, dissenting):

There is no evidence that employee James Brown discussed the truck's alleged safety problem with other employees, sought their support in remedying the problem, or requested their or his union's assistance in protesting to his employer. He did not seek to warn others of the problem or even initially to file a grievance through his union. He simply asserted that the truck was not safe enough for *him* to drive.

forgave this omission, but it is worth mulling over why it did so, for even if grievance filing activity can be conceived as an outgrowth of the concerted collective bargaining process, *pre-grievance* activity is a degree farther removed from the concrete contractual manifestation of that process. The Court, while asserting that “at some point an individual employee’s actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity,”<sup>153</sup> fails to explain why an individual worker raising an extemporaneous complaint, but not filing a grievance or referring to the collective bargaining agreement, is engaging in concerted activity. I think the answer is that allowance of discharge by employers in such circumstances would represent a failure to recognize how grievances become grievances. Shutting off workplace complaints in the hazy “pre-grievance” stage would almost certainly chill the filing of formal grievances. Furthermore, it is precisely the initial impulse of resistance that might culminate in the more recognizable concerted activity that the policy of the law claims it wishes to protect. And if shutting off initial impulses of resistance could stifle collective activity in a unionized workplace, it is hard to explain why the same preliminary suppression would not operate in a similar manner in a non-union workplace, and why the conduct would not therefore be subject to NLRB regulation. It is a most curious policy. In the words of Judge Harry T. Edwards,

Moreover, the Board’s decision in *Meyers*[I] produces the anomaly that a unionized worker who complains about safety or other matters covered by a collective bargaining agreement will be held protected under *Interboro* and *City Disposal*, while an unorganized employee will be denied protection for engaging in identical conduct. We agree with the Board that its responsibility is to apply the National Labor Relations Act and not to enforce all state and federal law. This does not mean, however, that with respect to matters within its discretion, the Board should ignore the policy implications of its decisions.<sup>154</sup>

On those parting words the D.C. Circuit remanded the case to the NLRB.

#### E. *Distinguishing Meyers II from Meyers I*

The point of departure of *Meyers II* was that the NLRB was now required to acquiesce to the D.C. Circuit’s view that *Meyers I* represented only one possible interpretation of the meaning of “concerted activity.” In effect, the NLRB was bound by the view made inescapable after *City Disposal*: that concerted activity could be found as a matter of law when a lone worker intends to induce group activity, acts as a representative of at least one other worker, or asserts rights rooted in a collective bargaining agreement.<sup>155</sup> Even more expansively, the NLRB was all but invited to articulate its *preferred* view of the outer boundary of concerted activity.<sup>156</sup> As the *Prill* dissent understood perfectly,<sup>157</sup> implicit in the rejection of *Meyers I* was the possibility that *Alleluia*

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<sup>153</sup> *Id.* at 832, n.10

<sup>154</sup> *Prill v. N.L.R.B.*, *supra.*, 755 F. 2d at 957

<sup>155</sup> *Id.* at 951, n.62

<sup>156</sup> *Id.* at 957. (“ . . . we do not find it necessary to consider the validity of *Alleluia* or any other test of concerted activity in this case, and we express no opinion on this issue.”)

<sup>157</sup> *Id.* at 960-61 (Bork, J., dissenting) (“The majority denies that it is *holding* that the Board has discretion under section 7 to adopt the *Alleluia* doctrine . . . [b]ut the majority does not explain how its suggestion, that individual

*Cushion* represented a permissible reading of Section 7.<sup>158</sup>

Understood in that context *Meyers II* is properly read as a policy justification for the narrowest possible reading open to the NLRB following *City Disposal* – i.e., the slight nudges of the envelope that the circuit courts had allowed up to that time.<sup>159</sup> The NLRB would go no further. As Professor Morris has observed,

*Meyers II* failed to recognize the true relationship between activity for mutual aid or protection and group action, because it failed to see that the former is but a prelude to group action, and, therefore, entitled to protection as part of the right to engage in such action. The Board even “freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of “mutual aid of protection,” but it failed to make the logical connection between such activity and the benefit other employees would receive. Instead of addressing the presumption created by *Alleluia*, it set up two other possibilities as straw men: “either . . . to indulge in a presumption that all statutes that benefit employees are the product of concerted employee activity or . . . to make factual inquiries into who had worked for passage of the law in question.”<sup>160</sup>

Thus, there was little recognition of a pre-organizational workplace reality in which it is the initial *individual* impulse to resistance possessing the potential to culminate in concerted activity. *Meyers II* essentially authorized the stamping out of pre-organizational activity in its earliest possible glimmerings. While Judge Bork’s dissent in *Prill I* dismisses such a lament as non-acceptance of statutory limitations, Justice Brennan’s *City Disposal* opinion is in my judgment far more faithful to the expansive designs of the architects of Section 7.<sup>161</sup>

#### F. Applying *Meyers II* to *Parexel*

*Meyers II*, while broader in tone than *Meyers I*, is narrow enough to be simply and reflexively applied. Thus, in *Parexel*, because the discharged worker acted alone, was not engaged in union activity, did not intend to induce group activity, was not acting as a representative of at least one other worker, and was not asserting rights rooted in a collective bargaining agreement, Judge Amchan would not find that an NLRA violation had been committed. The NLRB’s subsequent reversal of the judge, an outcome with which I agree, was in my view not sufficiently persuasive to withstand appellate scrutiny. The retaliatory conduct previously found violative of the Act, and to which the NLRB analogized, was not in fact analogous, as I will explain in the next Part.

### III. BEYOND KNEEJERK MEYERS II

In my view *Parexel* has set the stage for the NLRB to revisit *Meyers II*. An obvious

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complaints relating to safety statutes are distinguishable from other individual complaints, can be reconciled with the language of section 7 except by reliance on one or both of the rationales the majority identifies as underlying the *Alleluia* doctrine.)

<sup>158</sup> *Id.*

<sup>159</sup> *Prill v. N.L.R.B.*, *supra.*, 755 F. 2d at 951, n.62.

<sup>160</sup> Morris, *Glimpse at a General Theory* at 1718

<sup>161</sup> *N.L.R.B. v. City Disposal Systems*, *supra.*, 465 U.S.

preemptive strike by an employer to prevent the possibility of discussions between workers is unlawful for the same reason that the preemptive strike of a worker complaining to a government employment enforcement agency should be found unlawful: it squelches pre-organizational worker activity. Concerted activity is extinguished before it can begin. No Supreme Court precedent would preclude such an interpretation of Section 7.<sup>162</sup> In this part, I first explore, in subpart A, the *Parexel* majority's theories for reversing Judge Amchan's decision. I reject the theories, because they are a poor fit to *Parexel*'s facts. In subpart B, I explore a different rationale in support of *Parexel*'s outcome.

#### A. *The Majority's Theories in Support of Finding a Violation*

To its credit, the *Parexel* majority refused to engage in a kneejerk *Meyers II* analysis. I applaud because it seems very difficult to accept that employers are at liberty to discharge workers to prevent them from exercising statutory rights in the future. Conceptually, however, it is not so simple to provide a *coherent* justification for reinstating the involved discharged worker.<sup>163</sup> The majority understandably reached out for situations in which the Board and courts had found violations in various nip-in-the-bud scenarios. Regrettably, in my view, each of the scenarios selected provide insufficient doctrinal justification for affording the discharged worker in *Parexel* statutory protection.

The *Parexel* majority analogized the discharge of individual workers to prevent future protected concerted activity to refusals to hire union-affiliated workers.<sup>164</sup> Indeed, this was the only theory with the benefit of case support in the main body of the decision. Under the famous *Phelps Dodge* case,<sup>165</sup> decided by the Supreme Court in 1941, it is unlawful to refuse to hire a worker because of a known or suspected affiliation with a union.<sup>166</sup> The Court's *Phelps Dodge* argument was that attempts by employers to exclude union-affiliated job applicants acted as "a dam to self-organization at the source of supply of union labor."<sup>167</sup> *Parexel*'s majority analogized, "[t]he Respondent sought to erect a dam at the source of supply of potential, protected activity."<sup>168</sup> But the entire *Phelps Dodge* analysis presumes unionization,<sup>169</sup> and the case therefore supplies a predicate of concert that is simply not present in *Parexel*.<sup>170</sup>

The Board also cited one of its cases from the 1980s, *Monarch Water*,<sup>171</sup> as authority.<sup>172</sup> But in *Monarch* the evidence showed that the employer had at least a suspicion of prior concerted activity.<sup>173</sup> There was no such evidence in *Parexel*.<sup>174</sup> While the *Parexel* majority may have

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<sup>162</sup> Michael Harper, *Brand-X* (need full cite)

<sup>163</sup> There is for example no provision paralleling Section 510 of ERISA where Congress created a cause of action for the interference with attainment of a right. 29 U.S.C. § 1140.

<sup>164</sup> *Parexel International, supra.*, 356 NLRB No. 82, slip op. at 5

<sup>165</sup> 313 U.S. 177 (1941)

<sup>166</sup> *Id.* at 186

<sup>167</sup> *Id.* at 185

<sup>168</sup> *Parexel International, supra.*, 356 NLRB No. 82, slip op. at 5

<sup>169</sup> The Court briefly recounts a history of discrimination against union men at the point of hire, *Id.* at 184-85. While the phrase "self-organization" need not lend itself to a cramped construction excluding non-union contexts, there is no indication in the opinion that a broader meaning was contemplated.

<sup>170</sup> As I argued above, *see supra.*, Part II.A, union activity provides presumptively a predicate of concert.

<sup>171</sup> 271 NLRB 558 (1984)

<sup>172</sup> *See also* my earlier discussion respecting *Monarch, supra.*, II.A.

<sup>173</sup> *Monarch Water Systems, supra.*, 271 NLRB at 558

<sup>174</sup> *Parexel International, supra.*, 356 NLRB No. 82, slip op. at 2

thought the cases sufficiently parallel because in each actual concerted activity was absent,<sup>175</sup> the employer's belief of the existence of concerted activity in *Monarch* deals a deathblow to the analogy.

As I have discussed above,<sup>176</sup> the *Parexel* majority also cited *Compuware Corp.*<sup>177</sup> to support its decision.<sup>178</sup> But the discharged non-union worker in *Compuware* had made it known to several of his co-workers that he intended to complain to state officials about terms and conditions of employment. *Compuware* is probably the cited case most similar to *Parexel*, both because it arose in a non-union context and because the employer discharged a worker to interfere with the future exercise of *what would have been* concerted activity.<sup>179</sup> But the *would have been* was preceded by *actual* concerted activity of which the employer had been aware. In the words of presiding Administrative Law Judge Rose,

I further conclude, however, that Schillinger *had been engaged in concerted activity protected by Section 7 of the Act*, and he was terminated because of a perception that *he might continue to do so* by expressing concerns of employees at a meeting to be attended by representatives of the State of Michigan. I conclude that Schillinger was not terminated so much for what he did as what Mutter and Hess believed he might do if he continued as an employee.<sup>180</sup>

Thus, *Compuware* is a *“suspicion”* case in a way that *Parexel* is not. One might say that the employer's suspicion in *Compuware* was grounded in the common sense notion that earlier known concerted activity may not have ceased. In *Parexel* any suspicion the employer might have harbored respecting future concerted activity was purely a product of its imagination, not of reasonable inference.

Another union-context theory might have been raised by the *Parexel* Board, and I explore it here to illustrate what I think was wrong generally about *Parexel*'s *“spirit”* of analysis, and how the error of the method could be unwittingly exacerbated. Under the long-established *Darlington Manufacturing* doctrine an employer may lawfully close its business where the avowed motive of the closure is anti-union discrimination.<sup>181</sup> But this rule, which can be surprising to those unfamiliar with labor law,<sup>182</sup> is not without limits. It might be found that a multi-facility or multi-departmental employer closed only a portion of its business with the *“purpose or effect”* of chilling remaining workers in other facilities or departments in the exercise of their Section 7

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<sup>175</sup> The case was cited as support for the proposition,

[I]t is consistent with other lines of Board precedent holding that, under certain circumstances, employees who have engaged in no concerted activity at all are protected from adverse action. For example, an adverse action taken against an employee based on the employer's belief that the employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not in fact engage in such activity. *Parexel International, supra.*, 356 NLRB No. 82, slip op. at 6.

<sup>176</sup> See *supra.* Section II.A.

<sup>177</sup> 320 N.L.R.B. 101, 102 (1995) *enfd.* 134 F.3d 1285 (6th Cir. 1998)

<sup>178</sup> *Parexel*, slip op. at 8, n.9

<sup>179</sup> *Id.* at 103

<sup>180</sup> *Compuware Corp., supra.*, 320 NLRB at 102

<sup>181</sup> *Textile Workers Union v. Darlington Manufacturing*, 380 U.S. 263 (1965)

<sup>182</sup> The unsatisfying rationale is that the function of labor law is to facilitate a collective bargaining relationship; if the employer ceases to exist there can be no such relationship. *Id.* at

rights. In such a case, a violation of the NLRA can be made out,<sup>183</sup> and under the *George Lithograph* line of authority that is true whether or not the remaining workers had any future intention of engaging in union or protected concerted activity.<sup>184</sup>

It would be tempting to ignore the union context of *Darlington* and *George Lithograph* and to fixate on the fact that anti-union conduct chilling workers who may themselves have engaged in no union or concerted activity is nevertheless unlawful. But the anti-union conduct is unlawful because the employer's inferred motive is to suppress *union* activity. Moreover, a violation is made out only after establishment of antecedent unlawful activity. So the violation is in a sense derivative, which is, again, not factually similar to *Parexel*.

In sum, *Parexel*'s undergirding theories, while intuitively satisfying or even seemingly obvious are seriously vulnerable to sustained scrutiny. Nevertheless, as I explain in the next subpart, the outcome in *Parexel* is justifiable.

### B. An Alternative Rationale – Protecting the Right to Engage in Concerted Activities for Other Mutual Aid or Protection

The thrashing resort by *Parexel* to union-context, nip-in-the-bud actions is understandable. The *Meyers* cases, which are actually quite distinct, have left an indelible impression and act as a brake on expansive readings of Section 7. But there are two reasons that the NLRB should not be so quick to deny protection to individual workers protesting their working conditions. First, the legislative history shows that Congress had expansive intentions when enacting Section 7 and adopting the term "concerted activities." It is hard to conceive that reasonably broad applications of the provision would have been repugnant to the then-existing congressional intent.<sup>185</sup> Obviously, considerations of congressional mood points are secondary to statutory language, especially while textualists dominate the courts.<sup>186</sup> Thus, I place particular emphasis on a second fundamental reason for extending Section 7 protections in these situations. As Professor Morris observed in the 1980s, Section 7 protects the *right* of workers to engage in concerted activities as well as their actual engagement in such activities.<sup>187</sup> Employers can invade this right by *directly*

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<sup>183</sup> *Id.* at 275

<sup>184</sup> *George Lithograph*, 204 NLRB 431 (1973). (*Darlington* . . . does not require evidence that the other employees actually felt chilled, only that the employer acted with the purpose and the foreseeable consequence of chilling other employees.); *Purolator Armor, Inc. v. N.L.R.B.*, 764 F.2d 1423, 1430 (1985) (accord); *Plastics Transport, Inc.*, 193 NLRB 154 (1971) (finding violation where "chilled" workers were strikebreaking drivers crossing union picket line to remove trucks of employer formerly used by striking workers; no evidence of Section 7 activity by strikebreakers).

<sup>185</sup> Gorman & Finkin, *Individual and the Requirement of Concert* at 331-46

<sup>186</sup> In saying this I wish in no way to part company with the sentiments expressed in Professor Finkin's wonderful diatribe comparing the NLRB's unnecessary distinction between *Alleluia Cushion* and *City Disposal* to a strange plot by Dickens. See Finkin, *Labor Law by Boz* at 177-78 (recounting Mrs. Bumble, the law is an ass, & etc.). Nor do I concede that Section 7 has been properly interpreted to deny protection to workers engaged in purely altruistic conduct, as an individual outreach to a government agency may in many instances represent. See Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activity under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 790-91 (1989). It is certainly true that "[i]t is extraordinary how much of the law of [§ 7] pertains to ways in which employees may lose rather than gain section 7 rights." Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1403 n.196 (1982). Nevertheless, there is more to be learned by parsing the statutory music of the NLRA, which is my primary intent here. See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (exploring profoundly interesting analogies between musical and statutory interpretation).

<sup>187</sup> Morris, *A Glimpse at a General Theory* at 1679

interfering with workers' actual concerted activities undertaken for the purpose of mutual aid or protection. But protection of the *right* to engage in concerted activities introduces a degree of ambiguity to the matter that I think has been severely underappreciated by both the NLRB and the circuit courts. Surely protection of actual concerted activities from adverse employer actions as the *sole* means of protecting the right to engage in concerted activities is not the *only permissible* reading of section 7. *Parexel* presents the textbook case of the inadequacy of such an interpretation. For if an employer discharges a worker whom it believes may engage in such concerted activities, before any such concerted activities have taken place, the employer has obviously interfered with the right of the worker to engage in the activities.

To be sure, *any* discharge interferes with the attainment of any right to which a worker may have become entitled by virtue of continued employment. But *Parexel* represents the pure case in which the facts established that the employer's purpose in discharging a worker was to prevent future exercise of protected concerted rights in a non-union context. This cannot be acceptable and does not follow from the language or history of Section 7. In the penetrating words of Professors Gorman and Finkin,

. . . the narrow reading of the Act proceeds upon a false dichotomy, for at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all. Merely because Congress, for historically explicable reasons, chose in framing section 7 to emphasize out of that continuum of individual activity only the controversial aspect of combination is no reason to read the noncontroversial, lesser included activity out of the Act's omnibus guaranty of freedom.<sup>188</sup>

Those of us who have spent time in the world of work know that workers in a cowed workplace will not exercise Section 7 rights.<sup>189</sup> A nation in which workers can be summarily fired simply for advancing statutory employment claims is a nation in which workers' awareness, let alone exercise of, NLRA rights will be curtailed severely. That is obviously a world that some find attractive — how else does one (rationally) explain the trenchant opposition by employer groups to requiring employers to post notices in the workplace merely informing workers of their Section 7 rights, including, one might mention, the right *not* to belong to a labor organization or to engage in protected concerted activities?<sup>190</sup> To the statutory point, the conduct in question interferes with the *right* to engage in protected concerted activity.

As Professor Morris cogently observed, it is precisely at the pre-organizational stage of worker activity that the potential and desire for worker organization is most hazy.<sup>191</sup> Justice Brennan made note of this in *City Disposal*,<sup>192</sup> as Professor Morris also recognized.<sup>193</sup>

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<sup>188</sup> Gorman & Finkin, *Individual and the Requirement of Concert* at 345

<sup>189</sup> Morris, *A Glimpse at a General Theory* at 1752. (. . . [T]he reality has been that American employees are usually afraid to express their feelings about organizational activity, for they fear retaliation within the at-will employment system under which they work).

<sup>190</sup> See, e.g., letter of opposition from the Pennsylvania Chamber of Commerce to Lester Heltzer, Executive Secretary of the NLRB available at [http://www.pachamber.org/www/advocacy/labor\\_laws/nlr/ttestimony/pdf/PA%20Chamber%20Comment%20Letter%20RIN%203142-AA07.pdf](http://www.pachamber.org/www/advocacy/labor_laws/nlr/ttestimony/pdf/PA%20Chamber%20Comment%20Letter%20RIN%203142-AA07.pdf). The text of the proposed Notice language can be found by linking to the NLRB's Final Rule available at <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>

<sup>191</sup> Morris, *A Glimpse at a General Theory* at 1687

<sup>192</sup> 465 U.S. 822, 835:

Longstanding law has irregularly taken notice of this fragility, albeit at times in oblique terms. One good example of this recognition is the rule forbidding employer maintenance of rules reasonably tending to interfere with, coerce, or restrain workers in the exercise of Section 7 rights.<sup>194</sup> It is unnecessary (and probably impossible) to prove there has been actual unlawful impact on those rights.<sup>195</sup> It is enough that the rules are overly broad and *could* be interpreted as doing so.<sup>196</sup> Thus a violation of Section 8(a)(1) can be found in the utter absence of concerted activity. Moreover, an employer violates Section 8(a)(1) by discharging a worker because of a violation of the overly broad rule.<sup>197</sup> What is the policy undergirding this NLRB rule? It is plainly pre-organizational protection of Section 7 rights. We will never know whether workers might have exercised Section 7 rights if there are employer rules that will nip the exercise in the bud. In several areas, the policy of the law has not waited for actual interference with concerted activity, especially in worker communication contexts covered by the NLRA, even if modern courts are not always up to the task of remembering this.<sup>198</sup>

In the next section I explain how an expanded view of concerted activity could impact employment law as labor law strategies.

#### IV. APPLICATION OF THE FOREGOING TO EMPLOYMENT LAW AS LABOR LAW

As I mentioned in the introduction to this essay, interest exists among some scholars in the utilization of employment law in a way previously thought reserved to labor law. I will not repeat here my surface objections to this approach. But from what has preceded I suspect my line of thinking respecting the continued viability of a labor law centered approach to nascent protest activity has revealed itself. If an individual worker's complaint to a government employment enforcement agency could find shelter in the NLRA, the act of resistance might have the opportunity to ripen into full-fledged concerted activity. That is, it might experience a transformation from pre-organizational to actual organizational activity.<sup>199</sup> Expressed in negative terms, swift, crushing retaliation against such a worker might be avoided or remedied thereby reducing the interference, restraint, or coercion that Section 7 is meant to guard against.

Even the mere investigation of such a claim could have beneficial effects. As things stand

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[W]hat emerges from the general background of §76 and what is consistent with the Act's statement of purpose is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.

<sup>193</sup> Morris, *A Glimpse at a General Theory* at 1687

<sup>194</sup> American Cast Iron Pipe, Co., 234 NLRB 1126 (1978) *enfd* 600 F.2d 132 (8<sup>th</sup> Cir. 1979)

<sup>195</sup> Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 800 (1945)

<sup>196</sup> Lafayette Park Hotel, 326 NLRB 824 (1998). Obviously, there will be the usual argument about *what represents* a reasonable reading of a rule. Lutheran Heritage Village, 343 NLRB 646 (2004). But there has been no dispute for a half-century that a rule reasonably read by workers as tending to interfere with the exercise of Section 7 rights violates the NLRA without any additional evidence of actual coercion, that workers had been engaged in union or concerted activity, or even that workers had ever seen the rule.

<sup>197</sup> The NLS Group, 352 NLRB 744 (2008).

<sup>198</sup> Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091 (2011) ("Before employees can exercise th[e] right . . . [to employee collective action] they must overcome numerous problems that interfere with their ability to act together.")

<sup>199</sup> See N.L.R.B. v. City Disposal Systems, *supra.*, 465 U.S.



now, the NLRB would dismiss reflexively a charge that in essence alleged a common claim of the type rejected by the *Meyers* cases. When I was a regional office NLRB agent investigating such charges and I saw a number of them it seemed that only those allegations reflecting concerted activity in the most obvious sense survived more than two or three weeks on my desk. But when one combines *Parexel* with the original *Alleluia* presumption the potential for a dramatically different NLRB investigative culture emerges. For *Parexel* says, at the most practical level, "wait." In the investigation underlying *Parexel*, the Regional Director waited long enough to discover the discharge of a worker whom the facts strongly suggested *might have* engaged in concerted activity. To be sure, the investigation might have revealed in a convincing sense that the worker had affirmatively disavowed any intention of talking to co-workers about the underlying dispute. But because the facts did not suggest anything of the kind, the Region kept faith with its statutory mission and caused an administrative complaint to issue. On reflection, the regional reflex in *Parexel* evinces an instinct akin to what the *Alleluia* Board originally proposed decades ago. With respect to discharges undertaken in apparent retaliation for seeking the aid of government enforcement agencies, the NLRB of that time said,

[I]t is reasonable to presume that when an individual employee invokes a statute governing a condition in the workplace he is within the scope of employee action contemplated by the Act . . . . [I]t would be incongruous with the public policy embedded in employment-related legislation. . . . to assume that, in the absence of an express manifestation of support, other employees do not collectively share an interest in an attempted vindication of the statutory right created for their benefit . . . . Making this presumption does not end the matter; it merely shifts the burden to the employer to show that, in a particular case, the employees, for whatever reasons, opposed the individual's assertion of that interest or that the individual specifically acted in his own interest.

Because the action of a worker in invoking such a protective workplace statute so obviously inures to the benefit of most workers in the workplace and for some it may represent the first suggestion that they might have *any* hope of gaining improvements to their working lives it is reasonable to presume other workers would support the initiative. And if that presumption is at least reasonable,<sup>200</sup> the NLRB should have all the authority it requires to find that a retaliation against the claim filing is presumptively interference with the *right* to engage concerted activities for mutual aid or protection and unless it finds evidence rebutting the presumption. As a practical matter, at the level of regional investigation, such a presumption would communicate to regional personnel, "wait!" just as they waited in *Parexel*.

It remains to explain why "the waiting" matters. Suppose additional investigations. Suppose administrative complaints. Suppose findings of violations and in our wildest imaginings and upholding of those violations by circuit courts. Does that not simply bring one right back around again to the roundly criticized and admittedly unsatisfactory NLRA regime that prompted exploration of the "employment law as labor law" gambit in the first place? For even assuming

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<sup>200</sup> N.L.R.B. v. Town & Country Elec., 516 U.S. 85, 89-90 (1995) ("... this Court's decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application.")

the unsatisfactory state of the employment law architecture, it is not apparent why the answer would be a return to the NLRA.

To address that question I return to my days in the late 1990s as a new NLRB agent. I would find myself involved in cases in which my region had found violations of the NLRA that did not involve a monetary remedy. The remedy simply required the offending employers to enter into settlement agreements to “cease and desist” the unlawful conduct and to post standard “Notices to Employees.” The employers’ counsel negotiated for days or weeks over the wording of the notices. Even assuming workers would read the notices, which in my experience is a very large assumption,<sup>201</sup> employers were sometimes willing to go to formal hearings — spending hundreds or even thousands of dollars in the process — over hypertechnical language disagreements. Why? Not because the employers had anything to fear about the consequences of later being found to be in breach of the settlement agreements by monitoring workers. Everyone knows about the weakness of NLRA remedies,<sup>202</sup> and unless the cases involved major union organizing drives breaches of settlement agreements commonly had very limited repercussions. So — why?

As I have written previously, law signals society’s views respecting labor’s legitimacy.<sup>203</sup> For example, after enactment of the Norris-LaGuardia Act in 1932 and Section 7(a) of the National Industrial Recovery Act in 1933, a wave of union organizing involving millions of workers commenced. This wave was premised on contentions that “President Roosevelt wanted workers to join unions.”<sup>204</sup>

Countless Unions were aroused overnight from the doldrums of depression lethargy. Confident in the protection of the law, organizers set out to restore the depleted strength of moribund locals, for new ones, and invade territory from which they had formerly been barred.<sup>205</sup>

The organizers were wrong about the assumed protections, which would not exist in any affirmative way — as weak as the protections ultimately were — until the passage of the Wagner Act in 1935. But the organizers *believed* they had rights. And those they were organizing believed they had rights. And it is my simple contention that no one would have litigated *Alleluia Cushion* all the way to the U.S. Supreme Court for any purpose other than to extirpate the possibility that workers may once again believe they have rights.

The waiting matters because it is worthwhile to reflect — at least for a moment — on the question of whether the stamping out of a lone complaining worker may represent an attack on the right of all workers to engage in concerted activity for their mutual aid or protection. For this is an exercise of allowing labor law — the only body of law explaining to workers by virtue of its very existence that there is indeed safety (and power) in numbers — to fulfill its function.

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<sup>201</sup> The NLRB has struggled for years to simplify its notice language, see GENERAL COUNSEL MEMORANDUM OM 02-43 available at <http://www.aele.org/law/2002FPJUN/plain-language.html>, and I have spent many an entertaining afternoon listening to career administrative lawyers make such attempts.

<sup>202</sup> See e.g., Paul Weiler, *Promises to Keep: Securing Workers Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1787-91 (1983); Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1584 (2005)

<sup>203</sup> Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth*, 15 EREPJ \_\_\_\_ (2012)

<sup>204</sup> See e.g., KIRSTIN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE AND LEGACY OF FRANCES PERKINS* 207-208 (2009)

<sup>205</sup> See DUBOFSKY & DULLES, *LABOR IN AMERICA* at 252-53.

## CONCLUSION

In *Parexel* the “Obama Board” made a good start at recovering from the self-inflicted institutional trauma represented by the *Meyers* decisions. The agency dared to see the obvious: an employer firing a sole worker out of a feverish belief that the worker *might* talk to other workers about workplace unfairness preemptively strikes at the right of all workers to engage in protected concerted activity. Employers may discharge individual workers complaining to government enforcement agencies in order to interfere with, coerce, and restrain other workers in the exercise of Section 7 rights. Given the weakness of the employment law regime, it would not be unreasonable for the NLRB to presume “pending a full administrative investigation” that that is precisely what is going on. A slumbering formality holding to the contrary defies both common sense and workplace reality. Once that formality is interrogated and exposed a flood of disinfecting sunlight may yet uncover all stratagems meant to thwart the design of Section 7.