CHEE & LEAPHORN

Attorneys at Law

Memorandum

Re: Let It Snow, Let It Snow, Let It Snow

To: Alex Associate

From: Kay Scarpetta

We represent two employees who were discharged from their jobs at the Capuano Trash Company. The Company does trash pickups for commercial businesses. It is not unionized.

In January, the Company discharged our clients, Clayton Shank and Jack Barlow, for not completing their Tuesday trash collection route. Mr. Chee agreed to handle the case, but he has been called to Arizona on family business. I don't know if this is a civil rights case, or what. Can you take it over until Mr. Chee's return?

Memorandum

Re: Let It Snow, Let It Snow, Let It Snow

To: Alex Associate

From: Perry Paralegal

I looked at the file and realized that it is a labor case, not a civil rights case. Mr. Chee has some handwritten notes in the file, but I cannot read them.

The client information form lists the client's names as John Barlow and Clayton Shank. There is a copy of a "charge" filed with the Regional Office of the National Labor Relations Board, Region 16. The charge just says that on February 4 of last year the clients were discharged by Capuano for engaging in conduct protected by § 7 of the NLRA.

There are two affidavits in the file and a letter from Region 16. The affidavits recite the same story, so I only copied one for you. The letter from Region 16 is a form letter that asks if there is more information or evidence that we would like to supply "before the Regional Director reaches a determination as to whether a complaint is warranted." I wouldn't know what the information might be, but maybe you can see something in these cases that would help us out.

September 11

Affidavit of Clayton Shank.

My name is Clayton Shank. I worked for the Capuano Trash Company for six years. I was discharged on February 4.

At the time that I was discharged, I was the pickup man on the Arlington 2 route. Jack Barlow was the driver on that truck. My duties were to pick up trash from the curb and put it into the truck using a hydraulic device that is part of the truck.

On February 4, in the early afternoon, it began to snow. Barlow heard on the radio that a blizzard was predicted and that the area could have more that seven inches of snow by 6 p.m.. Barlow said to me, "We should take this sucker in, so we aren't hung up like last week. My boy Larry has a basketball game, and if it's not cancelled, I want to see it."

"Sucker" referred to the truck. The week before, the area had a big snow storm while we were on Arlington 2 route, and we had trouble getting the truck to the dump site and back to the Capuano garage. By the time we did, the roads were closed, and both of us had to sleep in the garage instead of going home. Four other drivers had to stay there, too.

When Barlow said we should take the truck in, I said something like, "It don't pay me no never mind, go ahead."

When we got back to Capuano's, Jim Safty, the foreman, was mad that we brought the truck back before picking up all the trash. He said, "I'll have to take this up with Mr. Capuano." The next morning he called my house and told me not to come in, that Barlow and I was fired.

That was a good job, and I would like to have it back. I was out of work for four months.

NATIONAL LABOR RELATIONS BOARD v. WASHINGTON ALUMINUM CO.

370 U.S. 9
Supreme Court of the United States, 1962

BLACK, J.

The respondent company is engaged in the fabrication of aluminum products in Baltimore, Maryland, a business having interstate aspects that subject it to regulation under the National Labor Relations Act. The machine shop in which the seven discharged employees worked was not insulated and had a number of doors to the outside that had to be opened frequently. An oil furnace located in an adjoining building was the chief source of heat for the shop, although there were two gas-fired space heaters that contributed heat to a lesser extent. The heat produced by these units was not always satisfactory and, even prior to the day of the walkout involved here, several of the eight machinists who made up the day shift at the shop had complained from time to time to the company's foreman "over the cold working conditions."

January 5, 1959, was an extraordinarily cold day for Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22. When the employees on the day shift came to work that morning, they found the shop bitterly cold, due not only to the unusually harsh

weather, but also to the fact that the large oil furnace had broken down the night before and had not as yet been put back into operation. As the workers gathered in the shop just before the starting hour of 7:30, one of them, a Mr. Caron, went into the office of Mr. Jarvis, the foreman, hoping to warm himself but, instead, found the foreman's quarters as uncomfortable as the rest of the shop. As Caron and Jarvis sat in Jarvis' office discussing how bitingly cold the building was, some of the other machinists walked by the office window "huddled" together in a fashion that caused Jarvis to exclaim that "[I]f those fellows had any guts at all, they would go home." When the starting buzzer sounded a few moments later, Caron walked back to his working place in the shop and found all the other machinists "huddled there, shaking a little, cold." Caron then said to these workers, ". . . Dave [Jarvis] told me if we had any guts, we would go home. . . . I am going home, it is too damned cold to work." Caron asked the other workers what they were going to do and, after some discussion among themselves, they decided to leave with him. One of these workers, testifying before the Board, summarized their entire discussion this way: "And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." As they started to leave, Jarvis approached and persuaded one of the workers to remain at the job. But Caron and the other six workers on the day shift left practically in a body in a matter of minutes after the 7:30 buzzer.

When the company's general foreman arrived between 7:45 and 8 that morning, Jarvis promptly informed him that all but one of the employees had left because the shop was too cold. The company's president came in at approximately 8:20 a.m. and, upon learning of the walkout, immediately said to the foreman, ". . . if they have all gone, we are going to terminate them." After discussion "at great length" between the general foreman and the company president as to what might be the effect of the walkout on employee discipline and plant production, the president formalized his discharge of the workers who had walked out by giving orders at 9 a.m. that the affected workers should be notified about their discharge immediately, either by telephone, telegram or personally. This was done.

On these facts the Board found that the conduct of the workers was a concerted activity to protest the company's failure to supply adequate heat in its machine shop, that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," and that the discharge of these workers by the company amounted to an unfair labor practice under § 8(a)(1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Acting under the authority of § 10(c) of the Act, which provides that when an employer has been guilty of an unfair labor practice the Board can "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," the Board then ordered the company to reinstate the discharged workers to their previous positions and to make them whole for losses resulting from what the Board found to have been the unlawful termination of their employment.

In denying enforcement of this order, the majority of the Court of Appeals took the position that because the workers simply "summarily left their place of employment" without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand," their walkout did not amount to a concerted activity protected by § 7 of the Act. On this basis, they held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10(c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged "for cause."

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in § 2(9) of the Act, which declares that it includes "any controversy concerning terms, tenure or *conditions of employment* . . . ." [Emphasis supplied.] The findings of the Board, which are supported by substantial evidence and which were not disturbed below, show a running dispute between the machine shop employees and the company over the heating of the shop of cold days—a dispute which culminated in the decision of the employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. Moreover, the evidence here shows that the conduct of these workers was far from unjustified under the circumstances. The company's own foreman expressed the opinion that the shop was so cold that the men should go home. This statement by the foreman but emphasizes the obvious—that is, that the conditions of coldness about which complaint had been made before had been so aggravated on the day of the walkout that the concerted action of the men in leaving their jobs seemed like a perfectly natural and reasonable thing to do.

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10(c) of the Act

does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities.[17] The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

We hold therefore that the Board correctly interpreted and applied the Act to the circumstances of this case and it was error for the Court of Appeals to refuse to enforce its order. The judgment of the Court of Appeals is reversed and the cause is remanded to that court with directions to enforce the order in its entirety.

VEMCO, INC. v. NATIONAL LABOR RELATIONS BOARD

79 F.3d 526
United States Court of Appeals, Sixth Circuit, 1996

NORRIS, J.

Vemco, Inc., petitions this court to set aside an order of the National Labor Relations Board (the "Board") that affirmed the decision of the administrative law judge (the "ALJ") who determined that the company had violated § 8(a) of the National Labor Relations Act . . . by disciplining a group of employees who left a job site because of allegedly unsafe working conditions. The Board seeks enforcement of its order. For the reasons outlined below, we set aside the Board's order. . . .

The issue presented for review concerns disciplinary action taken by Vemco against several employees after they left a job site in the early morning hours of Monday, April 20, 1992. The previous Friday happened to be Good Friday, a company holiday on which operations at the plant ceased. When the employees who were disciplined arrived for work as scheduled at 5 a.m. on Monday, they found that the work area was inaccessible because racks, boxes, and other items from the adjacent area had been moved into it so that work crews could take advantage of the long weekend to paint the floor.

[17] National Labor Relations Board v. Local Union No. 1229, I.B.E.W. [Jefferson Standard Broadcasting Co.], 346 U.S. 464, 477.

Finding themselves unable to work, the group considered what to do. The ALJ found that Kimberly Lucas, who was filling in as temporary spokesperson for the group, "led the discussion and was effectively in charge of what occurred." Although he discounted much of her testimony, the ALJ decided to "credit testimony to the effect that it was impossible to work, that the area was unsafe, and that employees should all go home." Eventually, nine employees left the plant. After a company inquiry, each was disciplined for this decision.

For the purposes of analysis, we shall assume, as did the ALJ, that it was "literally impossible" for these employees to do their assigned jobs when they arrived at work on April 20. Section 7 of the NLRA grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7; Manimark Corp. v. NLRB, 7 F.3d 547, 549 (6th Cir. 1993). It is an unfair labor practice to interfere with this right. Before we can find an employer in violation of this provision, it must be established that the action taken by the employees was both concerted and protected in the sense that they were acting for the purpose of collective bargaining or other mutual aid. In addition, the Board must show "that the employer knew of the activity and its concerted nature, and that the employee's protected activity was a motivating factor prompting some adverse action by the employer." *Manimark*, 7 F.3d at 550 (quoting Ajax Paving Indus., Inc. v. NLRB, 713 F.2d 1214, 1216 (6th Cir. 1983)).

While we agree with the ALJ that the action taken in this case was concerted, we cannot accept his conclusion that it constituted protected activity, which this circuit has defined in the following terms:

> "Protected activity must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute.'" The NLRA defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment." 29 U.S.C. § 152(9). Because this definition is broad, employee interests must "bear a reasonably significant impact upon working conditions or some material incident of the employment relationship."

Leslie Metal Arts, 509 F.2d at 813 (quoting G & W Elec. Specialty Co. v. NLRB, 360 F.2d 873, 877 (7th Cir.1966)).

While the work area was in temporary disarray, none of the disciplined employees were required to work under those conditions. As the ALJ noted, working under those conditions would have been "literally impossible." Thus, these circumstances are distinguishable from those that faced the Supreme Court in NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), where employees chose to leave work rather than suffer from miserably cold conditions. As the Court made clear, the NLRA protects an unauthorized walkout "by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be." By contrast, the Vemco employees were not required to work until the area was cleared, a task that one witness testified would require about an hour. Nor is there any evidence that the disciplined individuals sought to effect a change in company policy. As the Court of Appeals for the Second Circuit has held, for an *ad hoc* walkout to fall within the protection afforded by the NLRA, "some articulation of goals to which an employer can respond" is required. NLRB v. Marsden, 701 F.2d 238, 242 (2d Cir. 1983). In sum, the decision to leave the work place without permission does not constitute "protected activity" where, as here, the employees were not required to work under the prevailing conditions, were paid for the time when they were present but unable to work, and did not walk out to protest any company policy.

EWING v. NATIONAL LABOR RELATIONS BOARD

861 F.2d 353
United States Court of Appeals, Second Circuit, 1988

KAUFMAN, J.

This case is before us for the third time in four years. In Ewing v. NLRB, 732 F.2d 1117 (2d Cir. 1984) ("*Ewing I*"), we reversed the National Labor Relations Board's ("NLRB" or "Board") finding that Herbert R. Darling, Inc. ("Darling") did not discriminate against Robert Ewing when it refused to rehire him in the mistaken belief that he had filed a complaint with the Occupational Safety and Health Administration ("OSHA"). We remanded for the Board to determine whether its intervening change of the controlling legal standard in Meyers Industries, Inc., 268 N.L.R.B. 493 (1984) ("*Meyers I*"), applied and should govern retroactively. *Meyers I* replaced the presumption that individual action for "mutual aid or protection" was "concerted" within the meaning of § 7 of the National Labor Relations Act ("NLRA" or the "Act") with an objective test requiring some linkage to group action before finding an act "concerted." On remand, the Board applied the *Meyers* rule and dismissed Ewing's complaint, finding a single employee's assertion of a statutory employment right too remotely related to collective acts to constitute "concerted activit[y]."

In 1985, Ewing appealed and we had our first opportunity to review the *Meyers* approach. We held that the Board adopted its new interpretation in the erroneous belief that the NLRA should be construed literally. Ewing v. NLRB, 768 F.2d 51, 54 (2d Cir. 1985) ("*Ewing II*"). Due to the absence of a definitive agency decision, we declined to rule on the legality of the *Meyers* standard and remanded to the Board for reconsideration. We suggested that it would be reasonable to hold that individual invocation of a statutory right was sufficiently related to group action to warrant protection under § 7.

The Board rejected our approach and justified its interpretation as a reasonable construction of the Act. On this third petition, we have carefully reviewed the *Meyers* rule and the Board's revised rationale. The Board's conclusion that a single employee's invocation of a statutory employment right is not "concerted activit[y]" under § 7 is not, in our view, preferable. Nevertheless, we reluctantly conclude that the Board has offered a reasonable interpretation of the Act.

I.

Since *Ewing I* details the now undisputed facts, we offer only a brief summary. Petitioner Robert T. Ewing, a member of the Piledrivers, Dock Builders, Trestle, Crib and Breakwater Builders, Local 1978, AFL-CIO (the "Union"), operated a piledriver at Darling's mass transit construction project in Buffalo, NY. Unprompted by any complaint, OSHA officials visited the jobsite in October 1980 for a routine inspection. On December 3, 1980, Darling laid off Ewing and four of his coworkers. Although the other employees were rehired by December 19, 1980, Darling did not reemploy Ewing because it suspected he was one of three individuals who might have filed a complaint with OSHA. In testimony credited by the Administrative Law Judge ("ALJ"), the Union Business Manager told Ewing that, according to the grapevine, "he blew the Darling Company into OSHA, and as a result, wasn't going to be put back to work." After learning from OSHA that Ewing had not filed a complaint, Darling rehired Ewing on April 27, 1981. During the next 4 months, Ewing worked approximately 30 days. He was laid off and rehired three times.

Ewing filed an unfair labor practice charge on July 21, 1981. After a two day hearing, the ALJ found that Darling had violated § 8(a)(1) of the Act by interfering with Ewing's § 7 right to engage in "concerted activit[y]" . . . for "mutual aid or protection." The ALJ's opinion correctly stated that Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), governed the case. *Alleluia* established the pre-

sumption that individual invocation of a statutory employment right constituted "concerted activ-it[y]" under § 7. The assertion of such a collective concern, the Board held, received the implied consent of all, absent evidence that co-workers disavowed the act.

The Board's decision in Herbert F. Darling, Inc., 267 N.L.R.B. 476 (1983) ("*Darling I*"), rejected credibility determinations the ALJ made after observing the demeanor of witnesses, reversed the ALJ's findings, and dismissed the complaint. By focusing on the facts, the Board did not reach the applicable legal standard. Ewing petitioned for review and we reversed, finding the Board's actions unsupported by substantial evidence. *Ewing I*, 732 F.2d at 1121-22.

We remanded because, in its intervening *Meyers I* decision, the Board overruled the *Alleluia* presumption and instituted a rule requiring a demonstrable link with group action before an individual act could be deemed "concerted." Under the new approach, such activity is "concerted" only if "engaged in with or on the authority of other employees." *Meyers I* dealt with an employer's discharge of Kenneth Prill for filing a safety complaint with a state agency regarding the defective brakes on the company truck he was driving. The Board held that Prill's invocation of his statutory right lacked sufficient connection with collective employee action to warrant § 7 protection.

On remand from *Ewing I*, the Board, in Herbert F. Darling, Inc., 273 N.L.R.B. 346 (1984) ("*Darling II*"), applied *Meyers I* retroactively pursuant to its "traditional approach" of deciding pending cases with its current standard. Over a dissent, the Board followed *Meyers*. It dismissed Ewing's complaint after finding his alleged action was not "concerted" because it lacked the requisite link to group activity.

Ewing again petitioned us for review. We reversed and remanded "for reconsideration [of the new standard] because of the Board's mistaken view that it was required to interpret 'concerted activities' literally. . . ." *Ewing II*, 768 F.2d at 54. We noted that while *Meyers I* responded to circuit criticism of *Alleluia*, "'many of the cases that rejected *Alleluia* relied on reasoning or on earlier decisions that disapproved all forms of "constructive concerted activity" . . . [and many] did not involve occupational safety or other statutory rights, but rather involved individual employee protests about job conditions.'" *Ewing II*, 768 F.2d at 55 (quoting Prill v. NLRB, 755 F.2d at 953 n. 72). After observing that *Alleluia* expressed a reasonable presumption, we refrained from passing on the *Meyers* standard because the Board's approach stemmed from an erroneous premise. We instructed the NLRB to articulate "a sustainable basis for its definition of 'concerted activities' . . . or to reinstate the [ALJ's] decision. . . ." *Ewing II*, 768 F.2d at 56. In particular, the Board was required to offer "a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule." Id. (quoting New York Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir. 1985)).

In another of the seemingly endless stream of intervening decisions affecting this case, the Board filed *Meyers* Industries, Inc. 281 N.L.R.B. No. 118 (Sept. 30, 1986) ("*Meyers II*"), enf'd, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) ("*Prill II*"), while considering our decision in *Ewing II*. On remand from the District of Columbia Circuit, *Meyers II* reconsidered and expanded the rationale of *Meyers I*. The NLRB also noted numerous instances where, under the *Meyers* rule, it would deem individual action "concerted." Subsequently, the Board rendered its second supplemental decision, Herbert F. Darling, Inc., 287 N.L.R.B. No. 148 (Feb. 29, 1988) ("*Darling III*"), which reaffirmed the *Meyers I* rule and its updated reasoning. Except for addressing *Meyers*' retroactive application to Ewing's case, *Darling III* merely reiterated the justifications offered in *Meyers II*. See id. at 10 ("*Meyers II* directly addresses the court's . . . concerns."). In reviewing these findings, we are, of course, mindful that decisions based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, "considerable deference." NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 829 (1984) (citing NLRB v. Local Union No. 103, Int'l

Ass'n of Bridge, Structural and Ornamental Iron Workers, 434 U.S. 335, 350 (1978); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944)). Unless unreasonable or inconsistent with the Act, we may not replace the Board's determination with our own. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965). Nor is it relevant that the Board altered its doctrinal position. "'An administrative agency is not disqualified from changing its mind; and when it does, the courts . . . should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.'" *Ewing II*, 768 F.2d at 56 (quoting Iron Workers, 434 U.S. at 351). Nevertheless, the Supreme Court has admonished us "not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (quoting NLRB v. Brown, 380 U.S. 278, 291 (1965)).

Meyers II afforded the Board an opportunity to reexamine its decision to reject the *Alleluia* presumption. Like *Darling II*, *Meyers I* was erroneously based on the theory that the Act compelled a literal interpretation of § 7. Rather than return to its old rule, the NLRB adhered to its view that individual acts require some demonstrable link with group action to be deemed "concerted." It offered the detailed justification of its position this court sought when we remanded in *Ewing II*. It is to this analysis that we now turn.

II.

The Section 7 right to engage in "concerted activities for . . . mutual aid or protection" did not emerge in a vacuum. Although the Supreme Court stated that "there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in enacting the 'concerted activities' language," *City Disposal*, 465 U.S. at 834, its discussion of the legislative usage of the phrase reveals an awareness of Congress's efforts to even leverage in negotiations between employer and employee.

Congress first used the word "concert" in §§ 6 and 20 of the Clayton Act, which sought to nurture trade unionism by preventing employers from inhibiting collective action through criminal conspiracy and restraint of trade suits. The phrase "concerted activities" first appeared in the Norris-LaGuardia Act, which narrowed the courts' ability to issue labor injunctions. This same language then reappears in § 7 of the NRLA, § 7(a)(1) of the National Industrial Recovery Act of 1933, and § 2(a) of the Labor-Management Reporting and Disclosure Act of 1959. As the Supreme Court stated, "Against the background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer. . . ." *City Disposal*, 465 U.S. at 835.

Meyers II presented a similar analysis of § 7, focusing on Congress's intent to foster "collective, as distinct from purely individual, activity." The NLRB then grounded its decision to require "some linkage" to group action before finding individual action "concerted" on this essential element of the Act. The Supreme Court cited *Meyers I* with approval for expressing the proposition that "[t]he term 'concerted activit[y]' is not defined in the Act but clearly enough embraces the activities of employees who have joined together in order to achieve common goals."

The Board asserted that *Meyers I* "proceeds logically" from the structure and purposes of the NLRA. Its gloss of the Act's legislative history and the Supreme Court's analysis revealed that "protection for joint employee action . . . lies at the heart of the Act." Therefore, the Board concluded, requiring "some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7," is "most responsive to the central purposes for which the Act was created."

The second leg of the Board's justification for replacing the *Alleluia* presumption with the *Meyers* rule is that the *Meyers II* analysis of § 7 is consistent with the Supreme Court's analysis of § 7 in *City Disposal*. *City Disposal* concerned the discharge of an employee for invoking his collectively bargained right not to drive a truck he reasonably considered unsafe. The Supreme Court held that individual invocation of a collectively bargained right constitutes a "concerted activit[y]" under the Act.

The NLRB reasoned that its new rule followed *City Disposal* by giving "separate meanings to the 'mutual aid or protection' clause and the 'concerted activities' clause of Section 7." Before addressing the question of concertedness, the Supreme Court noted that all parties agreed such an invocation met the "mutual aid or protection" requirement. While not directly adopting separate standards, the Court's approach followed its decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), which involved employees' distribution of a union newsletter.

Eastex did not question that the employees' action was "concerted." Rather, the dispute centered on whether circulation of the pamphlet related to "mutual aid or protection." We adopted this bifurcated analysis in *Ewing II*, where the conflict turned on whether Ewing's alleged act was "concerted" and all agreed that the "mutual aid or protection" clause encompassed "'seek [ing] to improve working conditions through resort to administrative and judicial forums.'" *Ewing II*, 768 F.2d at 53 (quoting *Eastex*, 437 U.S. at 566).

The Board cited this mode of analysis as support for its critique of the *Alleluia* presumption, which collapsed the "concerted[ness]" and "mutual aid or protection" tests by deeming any act for "mutual aid or protection" "concerted." In the Board's view, *Alleluia* "questioned whether the purpose of the activity was one it wished to protect and, if so, if [sic] then deemed the activity 'concerted,' without regard to its form." *Meyers I*, 268 N.L.R.B. at 495. The *Meyers* rule rejected this presumption, adopting in its stead an objective rule that examines an act's concertedness without regard for its purpose.

We agree with the District of Columbia Circuit's analysis that the NLRA "could be read to support either the *Alleluia* or *Meyers* Interpretation of concerted activity. . . ." *Prill II*, 835 F.2d at 1483. Therefore, we hold the *Meyers* rule to be a reasonable construction of the Act.

III.

Having approved the Board's new approach in principle, we must consider its application in this case. The issue is whether individual invocation of a statutory employment right constitutes "concerted activit[y]" under the *Meyers* rule. The NLRB answered this question in the negative. It reasoned that the nexus with group activity *City Disposal* required before holding individual invocation of a collectively-bargained right "concerted" is absent when statutory rights are at issue.

Were we considering the question *de novo*, we might have considered the opposite view more in keeping with the spirit and purpose of the NLRA. By its own admission, the Board advocates an interpretation of the Act that condones "outrage[ous]" employer conduct. *Meyers I*, 268 N.L.R.B. at 499. The vast majority of American employees are not unionized. They do not work under the protections a collective bargaining agreement often affords. Statutory employment rights provide the only protection they have against the arbitrary power of their employer. As it stands, the NLRB's interpretation of Section 7 would allow management to discharge or otherwise discipline an individual worker for exercising statutory employment rights.

While disputing its wisdom, we must nevertheless defer to what is a reasonable interpretation. We note, however, that determining the concertedness of a single employee's invocation of a stat-

ute must be read in conjunction with the Board's views on when individual action bears sufficient relation to group action to be "concerted."

In reaching its conclusion, the NLRB utilized methodology the Supreme Court developed in *City Disposal*. There, in determining whether individual assertion of a collectively bargained right was "concerted activit[y]," the Court set forth three relevant factors. Each represented a sufficient link with group action to deem the act "concerted." Specifically, the Court found that the invocation in question: (1) was part of a "single collective activity" that started when the union was formed, continued during the negotiation of an agreement, and culminated with the enforcement of that pact; (2) "reenact[ed]" the employees' decision to bargain for the right asserted; and (3) is integrally related to collective action because no right would be available without "the prior negotiating activities of . . . fellow employees." Adopting these three elements as the only possible links to group action, the Board held that in contrast to collectively bargained rights, invocation of a statutory right is not "part of any ongoing employee-generated process such as the negotiation and administration of collective-bargaining agreements." *Meyers II*, 281 N.L.R.B. No. 118.

The Board bolstered this interpretation by asserting that statutory rights bear no relation to "actual group activity" in a labor context. Rather, it argued, these rights are related to the legislative process. In the NLRB's view, the only possible link to group acts would be employee lobbying on behalf of the bill. Applying the *City Disposal* factors, the Board then determined that any such efforts were too "remotely related" to group acts to form "concerted activities" because of the intervening legislative process. Id. at 18-19 (quoting *City Disposal*, 465 U.S. at 833 n. 10).

In approving this view, the District of Columbia Circuit reasoned that *City Disposal* "simply recognized that a worker's actions are concerted when tied to the actions of . . . fellow employees. . . ." *Prill II*, 835 F.2d at 1484. This holding, in that circuit's view, "neither required nor precluded treating workplace-related statutory rights as establishing, without more, the necessary bond among workers." Id. at 1484-85. As a result, the court ruled that it was not inconsistent or unreasonable for the Board to hold that collectively-bargained rights, but not statutory employment rights, "demonstrate[ ] the requisite bond." Id. at 1485.

Of course, this position, as the D.C. Circuit also noted, "is by no means the only reasonable[ ] interpretation of section 7." Id. at 1484. Instead of relying so heavily on *City Disposal*, the Board might reasonably have argued that such literal reliance was inapposite. *City Disposal* merely discussed how a collectively bargained right is linked to group acts. It did not attempt to consider statutory rights in this context. Nor did the Court give any indication that the three factors set forth constituted an exclusive list of all possible linkages with collective action.

Application of *City Disposal* does not lead inextricably to the NLRB's view. The conclusion that individual invocation of statutory rights bears little relation to the collective process at the core of the Act is not the only reading of the NLRA. Statutory rights form the fabric upon which employees weave the pattern of their collective bargaining agreement. The NLRB, citing *City Disposal*, noted that this process begins when a union is formed and continues during negotiation. It might have also viewed the procedure more comprehensively. A labor-management agreement is not written on a *tabula rasa*; rather, it is created against the background of a panoply of statutory employment rights. Employees, conscious of the milieu in which they decide to organize and bargain, rely on the availability of the enacted rights they already possess.

Looking beyond the three *City Disposal* factors themselves, an equally plausible interpretation might have noted that at the heart of the Supreme Court's analysis stands a broad vision of the "integral aspect[s] of . . . [the] collective process." *City Disposal*, 465 U.S. at 835. The Court refused to adopt a narrow interpretation of collective bargaining, recognizing that to equalize bargaining

power "the entire process envisioned by Congress as the means by which to achieve industrial peace" should be protected. As a result, the Supreme Court rejected a literal interpretation of § 7—that the acts of a single employee could not be "concerted"—because it would have excluded numerous forms of individual action crucial to the success of the Act.

This expansive vision of § 7 is not limited to *City Disposal* and collectively bargained rights. Ten years ago, and six years before *City Disposal*, the Supreme Court established a similarly broad interpretation when it construed the meaning of § 7's "mutual aid or protection" clause in *Eastex*. As we noted earlier, *Eastex* held distribution of a union newsletter to be activity for "mutual aid or protection." The Court declined the opportunity to "reject[ ] the idea that § 7 might protect any activity that could be characterized as 'political.'" Nor did it hold that under § 7, "the employee is only protected for activity within the scope of the employment relationship." Rather, the Court adopted a far-reaching interpretation as the only one capable of implementing the intent of Congress.

"The 74th Congress knew well enough," as Justice Powell wrote for the Court, "that labor's cause is often advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." The concern of the *Eastex* Court for the ill effects of a narrow interpretation of § 7 are equally true in this case:

> To hold that activity of this nature is entirely unprotected . . . would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to better their working conditions," NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962), we do not think that Congress could have intended the protection of § 7 to be as narrow as . . . [the NLRB] insists.

But as noted earlier, if reasonable, we must take the Board's views as we find them, not as we might like them to be. Nevertheless, we note that *Meyers* does protect individual invocation of a statutory employment right in certain situations. Only when individual action lacks the requisite nexus with the collective action fostered by the NLRA will the act be deemed unconcerted.

As the Board noted in *Meyers II*, and in its brief, there are numerous situations where, applying the *Meyers* rule, individual action will be considered "concerted" because sufficient nexus exists between the act in question and collective action. For example, a lone act is concerted if it stems from prior "concerted activit[y]" or if an individual acts, formally or informally, on behalf of a group. See, e.g., Every Woman's Place, Inc., 282 NLRB No. 48 (Dec. 11, 1986), enf'd, Every Woman's Place v. NLRB, 833 F.2d 1012 (6th Cir. 1987); Consumers Power Co., 282 N.L.R.B. No. 24 (Nov. 13, 1986) (individual safety complaint concerted because it was previously discussed at group meeting). The Board has also held that "attempts to initiate, induce, or prepare for group action even where the individual is unable to sway the group are concerted." See, e.g., El Gran Combo de Puerto Rico, 284 N.L.R.B. No. 112 (July 20, 1987); Vought Corp.-MLRS Systems Division, 273 N.L.R.B. 1290 (1984), enf'd, NLRB v. Vought Corp.-MLRS Systems Division, 788 F.2d 1378 (8th Cir. 1986). These cases also apply when statutory rights are at issue.

In *Prill II*, the D.C. Circuit adopted this method of analysis. After approving the *Meyers* rule's application to an individual's invocation of statutory employment rights, the court noted that only a slight change in the facts would have rendered the action "concerted." In that case, as discussed above, Prill was fired for filing a safety complaint with the Tennessee Public Service Commission. The Board found that Prill's action was not concerted because it was individual and lacked the requisite link to group concerns. The court upheld the rule's application based on "the singularity of Prill's case." *Prill II*, 835 F.2d at 1485. "Had Prill simply gotten together with his co-workers to

complain about the violation of statutory safety provisions, he would have been protected from dismissal under the Board's current reading of section 7. . . ."

The Board has reasonably required some nexus with group action. But we do not in this case address an individual action that in fact relates to a matter which can be demonstrably connected to a pre-existing group concern. The *Meyers* rule prevents personal gripes relating to job conditions and the purely individual invocation of statutory workplace rights from falling within section 7's definition of "concerted activit[y]." But it may well be another matter when, to employees on the jobsite, the subject of the complaint itself has been a topic of group concern that can be proven at an administrative proceeding.

This approach does not apply to Ewing because he was only suspected of acting. His only "crime" was that his employer thought he filed a complaint. His § 8(a)(1) claim is thus based on the chilling effect Darling's actions allegedly had on the exercise of other employees' § 7 right to engage in "concerted activities . . . for mutual aid or protection."

We first point out that contrary to the Board's assertion, evidence does exist that shows that employees were aware of the company's actions. The Union Business Manager learned the reason Darling refused to rehire Ewing through the grapevine. Second, the Board's analysis placed undue emphasis on the employer's view of the situation, focusing on whether Darling thought Ewing's alleged act was linked to the actions of other employees. The key element in a chilling effect analysis should be the impact on the employees.

As already discussed, the Board may abandon the *Alleluia* presumption, which recognized an implied chilling effect, in favor of an objective standard. But we note that the chilling effect, in a case such as this one, is often detected slowly over time and is difficult, if not impossible, to show in the period between the incident and the ALJ's determination. The Board's current view may, with the passage of time be shown to have unintended, and even unreasonable, results. In this case, however, we cannot say that the Board's determination was either unreasonable or not supported by substantial evidence.

IV.

To defeat retroactive application of *Meyers* to his case, Ewing argues that the Board misapplied the 5 factors the court adopted as a guide to determining the question. See NLRB v. Niagara Machine & Tool Works, 746 F.2d 143, 151 (2d Cir. 1984). We reject this argument and hold retroactive application proper. . . .

Charles Pharol, Labor Law Basics

Margee Pub. Company

Unprotected activity

In NLRB v. Local 1229, IBEW [Jefferson Standard Broadcasting Co.] 346 U.S. 464 (1953), the Court held that the Act afforded no protection for employees who, without striking, issued literature and displayed signs disparaging the company's product without disclosing that there was a labor dispute.

In *Jefferson Standard*, the Court listed other examples of unprotected, concerted activity:

> Labor Board v. Rockaway News Co., 345 U.S. 71 (discharge, for violation of an obligation to make deliveries, even though crossing a picket line, sustained); Auto Workers v. Wisconsin Board, 336 U.S. 245, 255-263 (arbitrary unannounced interruptions of work, not protected by §7); Southern S.S. Co. v. Labor Board, 316 U.S. 31 (discharge of seamen, for disobedience on shipboard while away from home port, sustained); Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740 (mass picketing, unprotected); Hotel Employees' Local v. Wisconsin Board, 315 U.S. 437 (violence, while picketing, unprotected); Labor Board v. Sands Manufacturing Co., 306 U.S. 332 (discharge, for repudiation of employee's agreement, sustained); Labor Board v. Fansteel Corp., 306 U.S. 240 (discharge for tortious conduct, violence or sit-down strike, sustained).

In addition to the activities listed in *Jefferson Standard*, strikes to force an employer to commit an unfair labor practice (*e.g.*, recognize a minority union) and to grant a wage increase rendered unlawful by federal statute have been declared unprotected. The Board and the courts have also held unprotected intermittent, unannounced ("quickie") strikes, sitdown strikes, slowdowns, and refusals to perform selected pieces of work.