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NLRB: Employees' Facebook Comments Are Protected Concerted Activity

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The National Labor Relations Board's closed out an already busy year addressing social media's impact on employee rights in non-unionized workplaces (see our prior related blog entries **here**, **here**, **here**, and **here**) with yet another social media ruling – this time involving Facebook. On December 14, 2012, in the matter of ***Hispanics United of Buffalo, Inc. and Carlos Ortiz***, the NLRB held that employees' Facebook comments about another employee's criticism of their job performance were protected concerted activity under Section 7 of the National Labor Relations Act. Therefore, the Board held, the employer violated Section 8 of the NLRA when it terminated the employees for the bullying tone of their Facebook comments.

Hispanics United of Buffalo, Inc. (HUB) employed coworkers Marianna Cole-Rivera and Lydia Cruz-Moore. The two often communicated with each other via phone and text message both during and outside of work. Cruz-Moore often criticized her coworkers' job performance and sent a text message to Cole-Rivera, stating that she intended to address these concerns with company executive director, Lourdes Iglesias. Cole-Rivera responded via text, asking whether Cruz-Moore thought Ms. Iglesias really wanted to know how she felt about her co-workers, and used her personal home computer to post the following message on Facebook:

> Lydia Cruz, a coworker feels that we don't help our clients enough at [HUB]. I about had it! My fellow coworkers how do u feel?

In response, four off-duty coworkers posted messages to Facebook, also from their personal computers, objecting to Cruz-Moore's job-performance criticisms. Cruz-Moore complained to Ms. Iglesias about the employees' posts and comments, claiming she had been slandered and defamed. After reviewing the comments in issue, Ms. Iglesias fired Cole-Rivera and the other four Facebook-commenting employees, on the basis that their conduct violated the company's "zero-tolerance" policy for "bullying and harassment."

As an initial matter, the Board agreed with the finding of the administrative law judge, that the Facebook post and comments were "without question" concerted activity for the purpose of mutual aid and protection under Section 7, in that the terminated employees were making "common cause" and "taking a first step towards taking group action to defend themselves against accusations they could reasonably believe Cruz-Moore was going make to management." The Board flatly rejected HUB's argument that the Facebook postings constituted unprotected harassment and bullying in violation of its "zero tolerance" policy, noting first that the comments could not be reasonably construed as harassment or bullying within the meaning of HUB's policy, despite the fact that Cruz-Moore reported that she felt offended. Further, the Board held, even if HUB's policy did cover the comments, the policy could not be applied without reference to the NLRA, under which employees' Section 7 rights take precedence over another employee's wholly subjective reaction to their protected comments. Therefore, the NLRB ruled that HUB's termination of employees for Facebook "bullying" was unlawful because it violated the employees' rights to engage in protected concerted activity, and ordered the employees' reinstatement to their previous or substantially similar positions.

Social media is still a "hot-button" issue and employers need to be cautious about basing termination decisions on employee social media use (even if that use takes place outside of -work). As always, employers should seek counsel with their trusted employment lawyers as to how to best implement social media policy and procedures and handle social media-related terminations.

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