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FACEBOOK COMMENTS BY EMPLOYEES ADDRESSING COLLEAGUE'S CRITICISM OF THEIR WORK PERFORMANCE:
PROTECTED, CONCERTED ACTIVITY OR GROUP GRIPING?

In *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, 359 NLRB No. 37 (December 14, 2012), the National Labor Relations Board ("Board") ruled that an employer violated the National Labor Relations Act ("NLRA") by firing five employees for posting Facebook comments in response to a co-worker's criticism of their job performance. The Board found that the group's Facebook postings were protected, concerted activity and their termination retaliatory.

The employer is a non-profit corporation that provides services to the economically disadvantaged. The case began when one employee was critical of the job performance of co-workers and threatened to take her concerns to management. In response, one of the co-workers placed a posting on Facebook during non-work hours alerting fellow co-workers to the criticism and asking her co-workers for their opinions. Several responded to the posting with profanity and derision. All of their postings were made on a non-workday and outside of the workplace. The next workday, the first employee complained to the employer's executive director who terminated the co-workers on grounds that the postings constituted harassment and bullying in violation of the employer's policies.

The Board's majority found that the Facebook comments constituted protected activity because the co-workers "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe [the first employee] was going to take to management." The dissenting Board member, however, argued that the Facebook comments were not undertaken for the purpose of "mutual aid and protection," as there was "no credible evidence that [the] initial posting [was made] with the intent of promoting a group defense, or that her co-workers responded for this purpose." The dissent instead characterized the Facebook comments as "shop talk" or "group griping," which is traditionally not considered protected activity under the NLRA. This decision is another example of the Board's application of Section 8(a)(1) of the NLRA which makes it illegal for employers to interfere with, restrain, or coerce employees in the exercise of their rights to engage in concerted activity for their mutual aid or protection.

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