# NLRB Confirms that Comments Posted on Social Media May Be Entitled to Protection

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The National Labor Relations Board (NLRB) recently issued a significant decision - solidifying the position it has staked out over the past 18 months - that an employee's posts on social media may be entitled to protection under the National Labor Relations Act (NLRA), regardless of whether the employee is part of a unionized workforce.

In *Hispanics United of Buffalo, Inc.*, the NLRB held that, in certain circumstances, it is unlawful for an employer to discipline or discharge employees over comments made in social media. In analyzing whether comments are entitled to protection, the NLRB held that the same analytical framework applied to oral communications among co-workers (known as the *Meyers Industries* framework) should be applied to comments made by workers using social media.

Under *Meyers Industries*, employees' comments are entitled to protection if those comments are motivated by employees' concerted, NLRA-protected activity. In determining whether activity is concerted, the NLRB examines whether activity is engaged in with or on the authority of other employees, and not solely by the employee on behalf of himself. Furthermore, to be protected, the content of the speech must concern the terms and conditions of employment.

In the *Hispanics United* case, the employer terminated five employees for comments made on Facebook. Specifically, one employee (Lydia Cruz-Moore), who was not terminated, commented that the employer was not doing enough to help victims of domestic violence who used the organization's services. Thereafter, another employee posted, "a coworker feels that we don't help our clients enough… I about had it! My fellow coworkers how do u feel?" This comment prompted responses from four other employees, who objected to Cruz-Moore's implication that their work was subpar. Cruz-Moore complained about the exchange to management, who fired the five other employees for bullying and harassment.

The NLRB held that the terminations were unlawful because the employees' comments were the first step toward taking action against accusations about their performance that they believed Cruz-Moore would make to management. The Board reasoned that that comments did not rise to the level of harassment and bullying that was banned by the employer's policy. It further held that even if the comments did violate the employer's policy, a workplace policy that discourages protected activity cannot lawfully be enforced.

This case confirms the NLRB's position that social media comments will be analyzed in the same way that traditional oral statements have been evaluated. Moreover, the NLRB's conclusion that the specific comments were "protected conduct" shows that the current Board is inclined to find protection if the comments can possibly be construed as a first step toward group activity, regardless of whether a union is involved.

As such, *Hispanics United* serves as an important reminder to employers to exercise caution when considering discipline or discharge over employee comments made on social media. In addition, employers should ensure that their social media policies are carefully drafted so that they are not so broad as to prohibit employees from engaging in protected activity.

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