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### **CORROBORATION EFFORTS FOR WORKPLACE-HARASSMENT COMPLAINTS NOW DEEMED CONCERTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT**

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The National Labor Relations Board (NLRB) ruled on Monday that an employee's efforts in seeking witness statements from co-workers to corroborate a sexual-harassment complaint constitute protected activity under Section 7 of the National Labor Relations Act (NLRA). *Fresh & Easy Neighborhood Mkt., Inc. and Elias*, No. 28-CA-064411.

Employee Margaret Elias worked as a cashier for Fresh & Easy Neighborhood Market Inc. in Phoenix, Arizona. After another employee drew a derogatory picture next to Elias's name on a workplace whiteboard, Elias sketched a copy of the image on a piece of paper and asked several coworkers to sign the paper to certify that they had seen the same image.

The NLRB held that Elias's actions constituted concerted activity carried out for the purpose of mutual aid or protection, which is protected activity under the NLRA. While the NLRB acknowledged that Elias's efforts related to a single complaint made on her own behalf, it noted that the proper inquiry in determining the existence of protected activity is whether there is a link between the activity and matters concerning the workplace or employees' interests.

The NLRB found that Elias's attempt to obtain the assistance of others was sufficient to constitute "group action" and the purpose of deterring sexual harassment was enough to show "mutual aid and protection," thereby invoking the NLRA. The NLRB's finding ultimately means that employers cannot discipline employees for soliciting support for a harassment claim. Fresh & Easy, however, was held not to have violated the NLRA by instructing Elias to discontinue her collection of witness statements. The

NLRB determined that Fresh & Easy had a legitimate interest in conducting a fair and impartial investigation, without the interference of Elias's own parallel investigation. And Fresh & Easy did not prohibit Elias from discussing the pending investigation with other employees, asking them to be witnesses for her, bringing subsequent complaints or obtaining statements in future complaints. On the other hand, the NLRB suggested that an employer's blanket statements to employees prohibiting the discussion of harassment complaints could violate the NLRA.

Two NLRB members filed dissenting opinions. One dissent asserted that while Elias's conduct should be considered concerted activity, the majority's ruling created a standard for finding protected activity that was too relaxed. The other dissent rejected the determination that Elias's seeking of witness statements constituted concerted activity, warning that the majority's expansion of Section 7 "will impair employee rights and hinder the ability of employers to comply with statutes that require prompt, thorough investigations and meaningful corrective actions."

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