UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

HISPANICS UNITED OF BUFFALO, INC.

and Case 3-CA-27872

CARLOS ORTIZ, AN INDIVIDUAL

RESPONDENT, HISPANICS UNITED OF BUFFALO, INC.'S SUPPORTING BRIEF TO THE EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

III. ARGUMENT 13

A. HUB HAS NO IMPACT ON INTERSTATE COMMERCE AND JURISDICTION SHOULD BE DECLINED 13

B. THE FIVE TERMINATED AT-WILL EMPLOYEES WERE NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY 17

1. The ALJ's Finding of Protected Concerted Activity is Not Supported by the Evidence 17

2. Mariana's Facebook Post Had Nothing to Do with Hours, Wages orWorking Conditions at HUB 19

3. The Terminated Employees' Facebook Posts Were an Attack on Lydia 24

4. Mariana and the Other Terminated Employees Were Not Looking Towards Any Group Action with their Facebook posts 36

5. The Post Termination Evidence Overwhelmingly Establishes the Facebook Comments had Nothing to Do with Protected Activity 42

C. HUB'S MOTIVATION WAS TO DISCIPLINE THE FIVE EMPLOYEES FOR HARASSING A COWORKER 44

IV. CONCLUSION 49

TABLE OF AUTHORITIES

Cases *Page*

Adtranz ABB Daimler Benz Transportation, Inc. v. NLRB
253 F.3d 19 (D.C. Cir. 2001)..... 47

Air Surrey Corp. v. NLRB
601 F.2d 256, 257 (6th Cir. 1979)..... 45

Akal Security, Inc
355 NLRB No. 106 (2010)..... 32

Aroostook County Regional Opthamology Center
317 NLRB 218 (1995)..... 32

Daly Park Nursing Home
287 NLRB 710, 710-711 (1987)..... 31

Earle Indus. Inc. v. NLRB
75 F.3d 400, 405, 407 (8th Cir. 1996)..... 31

Eastex, Inc. v. NLRB
437 U.S. 556, 565 (1978)..... 31

Epilepsy Foundation of Northeast Ohio v. NLRB
268 F.3d 1095, 1105 (D.C. Cir. 2001)..... 46

Ewing v. NLRB
861 F.2d 353 (2d Cir. 1988)..... 18

Fivestar Transportation, Inc.
349 NLRB 42 (2007)..... 35

Gartner-Harf Co.
308 NLRB 531 (1992)..... 30

Harris v. Forklift Systems, Inc.
510 U.S. 17 (1993)..... 48

Cases	*Page*
Hartford Areas Rally Together, Inc.	
34-RC-1996 (2002)	16,17
Holling Press, Inc.	
343 NLRB 301, 302 (2004)	18
Jhirmack Enterprises	
283 NLRB 609	32
Lighthouse for the Blind of Houston	
244 NLRB 1144 (1979)	13
Meijer, Inc. v. NLRB	
463 F.3d 534, 540 (6th Cir. 2006)	44,45
Meyers (Industr.) (Meyers I)	
268 NLRB 493 (1984)	18
Meyers Industr., Inc. v. Prill	
474 U.S. 948 (1985), *on remand*	18
281 NLRB 118 (1986), *aff'd*	18
Mushrooom Transportation Co. v. NLRB	
330 F.2d 683 (3d Cir. 1964)	18,30
NLRB v. Deauville Hotel	
751 F.2d 1562, 1571 (11th Cir. 1985)	31
NLRB v. Jones & Laughlin Steel Corp.	
301 U.S.1, 45-46 (1937)	44
NLRB v. Office Towel Supply Co.	
201 F.2d 838, 840 (2d Cir. 1953)	31
NLRB v. Transp. Mgmt. Corp.	
462 U.S. 393, 394 (1983)	46
284 NLRB 281 (1987)	17
Ohio Public Interest Campaign	
284 NLRB 281 (1987)	16,17

Cases *Pages*

Parexel International, LLC
356 NLRB No. 82 (January 28, 2011)..... 32

Prill v. NLRB
755 F.2d 941 (D.C. Cir. 1985) 18

Prill v. NLRB
835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988)..... 18

Smalley v. Dreyfus Corp.
10 NY3d 55, 853 NYS2d 270 (2008)..... 45,46

St. Aloysius Home
224 NLRB 1344 (1976)..... 13

St. Lukes Episcopal-Presbyterian Hospitals v. NLRB
268 F.3d 575 (8th Cir. 2001)..... 33,34

Statutes

National Labor Relations Act 29 USC §157 (1988)..... 1,12,18,19, 31,32,35,42, 44,48

I. INTRODUCTION

After three days of trial, the testimony of the five terminated employees, and testimony from the Executive Director of Respondent, Hispanics United of Buffalo, Inc. (hereinafter referred to "HUB"), the Administrative Law Judge found merit to the unlawful labor practice charge based upon an incomplete set of facts, reliance on matters not in evidence, and the misapplication of the law. The record establishes the five terminated employees were griping and complaining about a co-worker in a harassing and bullying manner which is not protected activity, and not the type of conduct for which the National Labor Relations Act (hereinafter referred to as the "Act") was intended to be applied. HUB was fully within its rights to terminate the five at will employees for their conduct, which had nothing to do with a discussion of hours, wages, or working conditions, nor intended on inducing or initiating group action for their mutual aid or protection.

HUB did not violate §7 of the Act, and as such the Board should reject the ALJ's Order in its entirety and dismiss the Charge herein.

II. STATEMENT OF FACTS

HUB is a not-for-profit, social service agency, that provides services almost wholly in the City of Buffalo, and no farther than the County of Erie. The mission statement of HUB defines the purpose of the organization and the limited area where it provides services as follows:

> "Hispanics United of Buffalo (HUB), established in 1989, is Buffalo's only community based not for profit, multi-service organization providing low and moderate income Hispanics, African-Americans, Immigrants and others with culturally appropriate bilingual programs addressing serious social and economic self sufficiency needs. The organization provides services to Hispanics in Western New York for the purpose of self sufficiency and growth. Most clients reside in the Westside and Black Rock/Riverside (zip codes 14201, 14213, and 14207), an area with a large and growing Hispanic, African-American, and immigrant/refuge population. ...
> Our mission statement is to promote self-sufficiency and improve quality of life

for Hispanics in Erie County.
Hispanics United of Buffalo's vision is to advance and improve the social, educational, cultural, and economic status of members of the Latino community in Western New York through the rendering of advice, assistance, and operation of programs.
HUB offers a wide scope of services to meet the economic and social needs of its clients including: affordable housing referral, emergency shelter grants, transitional housing for domestic and homelessness clients, homeless intervention, domestic violence case management and Court advocacy, 24 hour hot line service, health and preventive services, case management, tutoring for youth, Court advocacy, senior services, ESL classes and GED tutoring, translation services for clients seeking services from other providers, development, job readiness training program, coaching, and job placement, training and higher education for youth and adults."[1] Resp. Ex. 10, pg. 5

Each of the five terminated employees at will received a copy of the Employee Handbook issued by HUB, and executed the acknowledgment they read and agreed to comply with the "Zero Tolerance Policy" regarding discrimination and sexual harassment at HUB. Resp. Ex. 9, 17, 18, 19 and 20. Under the Zero Tolerance Policy the following describes the conduct defined as prohibited harassment and the application of the policy:

> "Hispanics United of Buffalo will not tolerate any form of harassment, joking remarks or other abusive conduct (including verbal, non-verbal or physical conduct) that demeans or shows hostility toward an individual because of his/her race, color, sex, religion, national origin, age, disability, veteran status or other prohibited basis that creates an intimidating, hostile or offensive work environment, unreasonably interferes with an individual's work performance or otherwise adversely affects an individual's employment opportunity." Resp. Ex. 10, pg. 50
>
> "All employee's are required to adhere to the Hispanics United of Buffalo policy prohibiting discrimination and harassment while on HUB premises, engaging in work related activities, company sponsored training or other functions, **and at non-company activities when conduct of these activities would affect the work environment**." Resp. Ex. 10, pg. 49

HUB is a non-union work place and all of the employees are at-will, and the"Nature of

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[1] The exhibits entered into evidence by Respondent will be referenced herein as "Resp Ex.___"

Employment" is described as follows:

> "Employment with HUB is voluntarily entered into, and the employee is free to resign at will at any time. Similarly, the organization may terminate the employment relationship at will at any time, with or without notice or cause, so long as there is no violation of applicable Federal or State law.
>
> Policies set forth are not intended to create a contract, nor are they to be construed to constitute contractual obligations of any kind or a contract of employment between HUB and any of its employees. The provisions of these Personnel Policies have been developed at the discretion of management and, except for its policy of employment-at-will, may be amended or cancelled at any time, at HUB sole discretion." Resp. Ex. 8, pg. 7

HUB's Receipt of Harassment Complaint from Lydia Cruz-Moore

On October 12, 2010, Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos were terminated for violating the Zero Tolerance Policy by harassing and bullying their co-worker, Lydia Cruz-Moore.[2] HUB first became aware of the issues between Lydia and the five terminated employees with the receipt of a complaint from Lydia on October 9, 2010. Tr. pg. 124. Lydia was employed with HUB as a Court Advocate at the Family Justice Center through a one year stimulus grant. Tr. pgs.124-125. Mrs. Iglesias received Lydia's complaint in a text message which stated:

> **October 9, 2010 at 5:23 p.m.**
> **"This is Lydia ur employee. Mariana wrote stuff about me n HUB on Facebook publicly n other coworkers talked junk 2. This is slander n defamation of my character n hubs. I will c u Tuesday I will make copies of all she has text n inbox me."** Resp. Ex. 21.; Tr. pgs. 126 and 505.

This initial text was only one of many sent by Lydia from October 9th through the termination of the five at-will employees on October 12th. Tr. pg. 504. Mrs. Iglesias had the text messages transcribed into a memorandum which was identified and admitted into evidence

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[2] The HUB employees involved in the subject matter will be referenced herein by their first names.

during the hearing. Tr. pg. 504-506; Resp. Ex. 21. Mrs. Iglesias only communicated with Lydia through text messages up through the point of terminating the first employee on October 12th. Tr. pgs. 506-507. In addition to the text messages, Mrs. Iglesias also reviewed and considered additional documents prior to terminations. Those documents were identified as follows: GC Ex. 9 (Facebook Printout with Affidavit of Lourdes Iglesias), Resp. Ex. 12 (Facebook private messages between Lydia and Mariana) and Resp. Ex. 22 (Facebook private message to Mrs. Iglesias from Lydia). Tr. pgs. 506-508.

Text Messages Between Lydia and Iglesias

Mrs. Iglesias exchanged numerous texts with Lydia leading up until the point when she began meeting with each of the alleged discriminatees on Tuesday, October 12, 2010. Tr. pgs. 508-511. The text messages received and sent between Mrs. Iglesias and Lydia were as follows:

> **10/9/10 5:27 pm**
> Lourdes: I am so sorry plse print out this information and bring it with you I will deal with as deen appropriate, again I truly apologize. Lourdes
>
> **10/11/10 10:13 am**
> Lydia: Lourdes im in the hospital I due to the stress of mariana they think I had a stroke n want to admit me.
>
> **10/11/10 10:13 am**
> Lourdes: Omg plse get checkout. What are the symptoms? Plse keep me posted.
>
> **10/11/10 10:15 am**
> Lydia: my throat shut n I fainted almost fallin this is serious. Kelly will go to court 4 me tomorrow.
>
> **10/11/10 10;15 am**
> Lydia: I had a sharp pain on my chest n headache that wouldt go away plus I felt my left cheek go numb.
>
> **10/11/10 10:15 am**
> Lourdes: Ok. Do you have information regarding facebook, I would like to address this tomorrow.

10/11/10 10:15 am
Im so scared I told bout facebook.

10/11/10 10:16 am
Lourdes: Why you did the right thing Lydia.

10/11/10 10:17 am
Lourdes: no one should go thru any humiliation

10/11/10 10:19 am
Lydia: yes I feel stomped on. I feel abused.

10/11/10 10:21 am
Lourdes: Don't feel like that you have a lot to offer, plse make sure I get that information. Please take care of yourself. Best regards.

10/11/10 11:23 am
Lydia: I will c if Kelly will come get it to u dr said I work in a hostile environment whn I already have to work with dv but im bein a victim at work. They r recordin everythin in my files its criminal charges against mariana

10/11/10 11:34 am
Lydia: my son will bring it 2 u

10/11/10 11:34 am
Lourdes: Ok, I hope you get better.

10/11/10 11:35 am
Lourdes: what is your sons name?

10/11/10 11:37 am
Lydia: Lourdes keep a record when I told u what u did about it n stamp on the copies when u received them n give copies 2 my son migueldanile Hernandez. Will u b in the office all day.

10/11/10 11:38 am
Lourdes: yes, call me and keep me posted.

10/11/10 11:59 am
Lydia: im 2 weak 2 talk. They game me some meds n takin me 2 get mris

10/11/10 12:06 pm
Lydia: they r admitin to stay in the hospital I don't want any of those people who slandered me to visit me.

10/11/10 2:46 pm
Lydia: subject:FWD. If u want to do that that's fine but really is Carmen u have to go to first>If u want to do that that's fine but really is Carmen u have to go to first shes gonna be pissed that u went to her wo going to Carmen that's what directors are for u wanna do that be my guest. I have appts on tue so is gonna have to be on a time that I am free so they don't Come to YOU and say we don't help them! This is actually petty u must not have anything else to do.

10/11/10 6:47 pm
Lydia: had a waitin 4 results of test dr said it seems like a stroke r heart attack the stress brung it on. Since this is work related can I apply for workers comp dr said my job has to do a report. Ill b out for a while, Kelly will go 2 court 4 the clients I have scheduled for tomorrow.

10/11/10 8:24 pm
Lydia: d hospital told me this a workers compensation case to report it 2 u. it happened last Thursday. She was at hub I was at fjc.

10/12/10 10:00 am
Lourdes: how r u doing?

10/12/10 10:10 am
Lydia: terrible. My son has the copies n will get them 2 u when he can get our of work. Thanks for caring n asking. I have confidence u will deal w this horrible crisis.

10/12/10 10:15 am
Lourdes: is there anything I can help you. Resp. Ex. 21.

Mrs. Iglesias reviewed additional texts that were sent by Lydia after 10:15 a.m., but only after meeting with and terminating the five employees. Tr. pgs. 510-511. The texts on October 12th from 10:21 a.m. through 10:34 a.m. were not seen by Mrs. Iglesias until later that evening, and she did not consider the information contained within those texts in determining whether or not any of the five should be fired. Tr. pgs. 510-511; Resp. Ex. 21

Facebook Private Message Exchange Between Lydia and Mariana

Mrs. Iglesias also received and reviewed a copy of the October 8, 2010, Facebook private message exchange between Lydia and Mariana. Resp. Ex. 12.; Tr. pg. 506. This exchange demonstrates the underlying conflict between them which had nothing to do with work.

Although they reference aspects of their jobs at HUB, the main dispute pertained to Mariana believing Lydia acted as if she was better than everyone else. Mariana sent a "telling" message to Lydia on October 8, 2010, at 12:37 p.m. which readily demonstrates her animosity towards Lydia, especially in this line:

> "...**and u make it seem that u do a better job than us that gets old and anoying having someone get on a high horse and looking at everyone from above** so I have been patient because the prenatal incident was once u do that almost every time we speak. I wish i could just do my job and not have to stop so i can make phone calls and drs appts for clients, **may be then i could also look down at people**." Resp. Ex. 12

Facebook Message from Lydia to Iglesias

On Tuesday, October 12th, Mrs. Iglesias reviewed and considered the Facebook private message sent to her by Lydia on October 11th, as part of her determination to terminate the five employees. Tr. pg. 507; Resp. Ex. 22. Lydia's message evinces the severity of the issue which HUB was faced with, and investigated, before deciding to terminate the five at-will employees. Lydia's message to Mrs. Iglesias stated as follows:

> **"Lourdes this is a private message. No one else sees it but u and I. I am so humiliated, broken, slandered, and Mariana has defamed my character. Not only that but HUB's name is slandered. So is DSS, FJC, and clients they were all mentioned on the post. A friend of mine on Channel 4 asked if they should put it on the news I said please don't.**
> **I am sure funders have seen it too.**
> **My attorney called me and saw it too said its Federal charges. That HUB is liable cause Mariana works there. This is very serious.**
> **I will be in court all day Tuesday. I have three clients I pray they didnt c the post.**
> **I made copies before she deleted the post to show u proof. I also will make copies of what she texted me on my cell phone.**
> **I cannot work in a hostile environment. Were people are slandering me and HUB's name. Let alone other partners.**
> **I will try to c u on Wednesday. Thanks. Lydia"** Resp. Ex. 22

Termination Meetings with the Five Employees

Mrs. Iglesias spoke to each of the five terminated at-will employees prior to deciding to terminate them. Tr. pg. 519

Mariana Cole-Rivera

Mariana was the first of the terminated employees that Mrs. Iglesias met with to discuss the Facebook posts. Tr. pg. 519. Mrs. Iglesias had not seen Mariana at all that morning prior to calling her in for the meeting. Tr. pg. 519-520. Mrs. Iglesias testified to the following exchange with Mariana during this meeting:

> "Q. When Mariana came in, she sat down in front of you, what happened?
> A. I informed Mariana that I had read the thread and I had asked Mariana, Mariana, do you have a personal problem with Lydia? And she said I am sick and tired. I am frustrated with her, her calling me at all hours of the night. And I said, well, if you had that problem, why didn't you go to your supervisor? At any point in time did you go to Carmen? No, I didn't think I needed to. And, you know, her attitude - -
> Q. What else did she say to you?
> A. Basically, that she didn't - - you know, that she didn't think there was anything wrong with what she had said. And, you know, her demeanor at that moment, she was not, you know, apologetic at all knowing that this woman was in the hospital, had been admitted at the hospital because of the stress this had created. She didn't even sit straight. She didn't even - - you know, it was just her whole demeanor.
> Q. What else did you say to her?
> A. I told her that this was harassment at its best. I said and you know that we have a zero tolerance in this organization for harassment. This creates an unhealthy work environment and this is something that I have fought very hard to keep out of this place because I want you all to enjoy working here.
> Q. What was her response?
> A. She didn't say anything after that.
> Q. Did she say anything else to you?
> A. She did say, well, I don't think that you should terminate me. I think you should suspend me.
> Judge Amchan: Well, when did you tell her that you were terminating her?
> The Witness: I told her after I explained to her that this had created a very unhealthy work environment. And at this time I could not have her stay on, that she was terminated.
> Judge Amchan: How long after she walked into your office did you tell her she was being fired?
> The Witness: After we spoke. After we had a conversation.

Judge Amchan: I mean - -
The Witness: About - - I'd say about five to seven minutes.
Judge Amchan: And then she, after you tell her she's fired, she says I don't think you should - -
The Witness: Terminate for this.
Judge Amchan: - - terminate, right.

Q. Before you told her she was fired, did she tell you anything about trying to survey employees about HUB?
A. No.
Q. Did she say anything to you about any complaints she had about hours, wages, or working conditions at HUB?
A. No, not at all." Tr. pgs. 520-523

"Q. Did she provide you with any documents during this meeting before you had fired her?
A. No, sir.
Q. Did she provide you with a copy of the Facebook stuff?
A. No, sir." Tr. pg. 523
"Q. All right. What happened after you told her she was terminated?
A. I asked her to leave her belongings and that Carmen would escort her out.
Q. Did you have any further communications with Mariana Cole-Rivera that day?
A. No, sir." Tr. pg. 523

Ludimar Rodriguez

After terminating Mariana, the next employee called in for a meeting was Ludimar Rodriguez, and the following exchange occurred during this meeting:

"Q. What did you say to Ludimar?
A. I asked Ludimar if she familiar with the thread and the comments that were made on Facebook and she said yes. And I asked her, you know, did she ever have a problem with Lydia and she said no. And I said, well, why did you participate in this, you know? If you had any concerns or anything, why didn't you come to us? She said she didn't think that it was anything. And I said do you know that Lydia's in the hospital, she's very sick because of this and she said no, that she did not. And I said yes, she in the hospital. She is very sick. We don't know if she had a heart attack. I did say if she would have committed suicide then, you know, we would have all felt horrible. I explained to her that we have a zero tolerance for harassment and that, you know, she was a part of contributing to Lydia Moore's hospitalization.
Q. What happened next?
A. She was surprised. She said she didn't think anything of it. And I explained to her that this creates an unhealthy work environment and we cannot tolerate this because we have a zero tolerance policy in the

workplace.

Q. What did you do then?

A. I informed her that she was no longer an employee of HUB.

Q. What did she say?

A. She says okay and she left.

Q. Anything else discussed between the two of you?

A. No, that was it." Tr. pgs. 523-525

Yaritza Campos

Mrs. Iglesias next meeting was with Yartitza Campos, and the following exchange occurred during this meeting:

Q. And what did you say to Yaritza?

A. I explained to Yaritza that I had read the thread, that why did she participate in humiliating Lydia, you know. She shrugged her shoulder and said she didn't think anything of it. And you know, I told her that this contributed to harassing another co-worker and that this was not acceptable.

Q. Then what did you do?

A. I explained to her that we have a zero tolerance to this type of behavior and that she could no longer work for us.

Q. What did she say?

A. She shrugged her shoulders too and I guess this is what really surprised me of the whole incident. Each one of those individuals felt like it was nothing. You know, the fact that another coworker was in the hospital because of the stress that this has caused was like nothing. And I was taken back by that. I was surprised by their behavior.

Q. Was there anything else discussed between you and Yaritza?

A. No, that was it.

Q. And after you told her she was terminated, what happened ?

A. She - - Carmen escorted her out and that was it." Tr. pgs. 525-527

Damicela Rodriguez

Mrs. Iglesias believed the next employee she met with was Damicela Rodriguez, and she testified to the following exchange during this meeting:

"Q. What did you say to Damicela Rodriguez?

A. I explained to her the same thing. I said I read the thread on facebook. I said why did you participate in this type of activity? Do you have anything against Lydia? And she said no. So I said well, then why did you participate? And she said she had no reason. She was like - - and I explained to her, do you realize that Lydia's in the hospital because of

this? And she said no, I didn't know.

Q. Then what did you do?

A. And I explained to her that we have a zero tolerance. I explained that this was harassment at its best. I explained to her that had she had any other problems that she could have came to see me. She has my cell phone number. She could have discussed anything and that at this time we don't tolerate harassment in the work place.

Q. Damicela was the one of the fired employees who was there the longest, right?

A. Yes." Tr. pgs. 527-529

"Q. What did she say to you during this meeting?

A. She did not say much. She was shocked because she felt that she didn't do anything, you know. That I asked her again, you know, the fact that you contributed to this put another coworker in the hospital."
Tr. pgs. 529-530

"Q. Now, at some point during this meeting, did you tell her that she was also fired?

A. Yes, I did tell her she was terminated.

Q. Before you told her she was fired, did she say anything else to you that we haven't covered?

A. No.

Q. After you told her she was fired, did she say anything else?

A. No.

Q. Did you say anything else to her?

A. No.

Q. What happened after you told her she was fired?

A. She was escorted. Magalie escorted her out of the office.

Judge Amchan: Just could you repeat? Did you tell Damicela why she was being fired?

The Witness: Yes, I did.

Judge Amchan: What did you tell her?

The Witness: I told her that she participated in the harassment of a coworker and that we have a zero tolerance to harassment in the work place."
Tr. pg. 532

Carlos Ortiz de Jesus

The last employee terminated by Mrs. Iglesias was Carlos Ortiz de Jesus, and she testified to the following exchange during this meeting:

"Q. Then Carlos Ortiz is the last employee. How was it that he came to your office that day?

A. Carmen had brought him up.

Q. And did he sit in the same seat as everyone else?
A. Yes, he did.
Q. And who else was in that meeting?
A. It was Carmen, Magalie, and myself.
Q. And what did you say to Carlos Ortiz?
A. Again, I expressed to him that I read the thread regarding the harassment of the coworker, Lydia Moore, and that Lydia was in the hospital. That I was very concerned because she could have committed suicide. So I went basically through the whole spiel of, you know, this is not tolerated. I take this very seriously and it's not tolerated in the work place, harassment. And I explained to him that he was terminated.
Q. Some of the terminated employees used the term bully, that you advise them that they had been bullying Lydia. Did you actually use that phrase?
A. I may have used that phrase, yes.
Q. And did you also use the word harassment when you spoke to them?
A. That's correct.
Q. And at some point did you advise Carlos Ortiz that he was terminated?
A. Yes, I did.
Q. All right. Before you told him he was terminated, did he say anything to you?
A. Again, he said that he didn't think that it was that serious.
Q. And after you told him he was terminated, did he say anything to you?
A. No.
Q. And what happened with him after he was terminated?
A. He was escorted out by Carmen Gallardo." Tr. pgs. 533-534

HUB's Motivation for Terminating the Employees

HUB's termination of the five employees did not violate §7 of the Act, but was rather the implementation of the Zero Tolerance Policy for the harassment of its employee, Lydia Cruz-Moore. Mrs. Iglesias testified to the following regarding why these employees were terminated:

"Q. Did the fact that HUB was mentioned on facebook by the five terminated employees in the thread that's at issue here have anything to do with why you fired them?
A. Absolutely not.
Q. What was the reason why you fired these five employees?
A. Because they humiliated and the bullied a coworker, a woman that had a very good reputation at the Family Justice Center. The Executive Directory loved her. I never had complaints about this employee and she always went the extra mile for the clients. She was an excellent worker."
Tr. pg. 538

The record establishes there was a prior history of conflict between Lydia and Mariana

that had nothing to do with hours, wages or working conditions. Mariana's animosity towards Lydia boiled over into her Facebook post, and was confirmed by the other documents and information relied on by Mrs. Iglesias in terminating the five at-will employees. In addition, Mrs. Iglesias met with each of the individual employees, and none of them stated anything about hours, wages or working conditions being the subject of the Facebook discussion or the dispute with Lydia.

III. ARGUMENT

A. HUB HAS NO IMPACT ON INTERSTATE COMMERCE AND JURISDICTION SHOULD BE DECLINED

(Exceptions Nos. 1 and 2)

The ALJ found jurisdiction over HUB on the basis that it received federal funds, and purchased more than $60,000.00 annually from entities which are engaged in interstate commerce. HUB opposes jurisdiction over it since all of the services provided by it are limited to the State of New York, and in fact more specifically, the City of Buffalo. In addition, any goods or services contracted for by HUB are solely for use and performance in the State of New York.

In order for HUB to be subject to the Board's jurisdiction, it must meet the statutory definition of "employer" in Section 2(2) of the Act, as well as the applicable monetary jurisdictional standard. HUB concedes that its not-for-profit status alone will not result in jurisdiction being declined. *see Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979). However, jurisdiction can be declined over a charitable organization if there is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction. *see St. Aloysius Home*, 224 NLRB 1344 (1976).

Mrs. Iglesias addressed the issue of the goods and services which HUB contracts for

during her testimony, stating as follows:

> "Q. And the organization as a whole, you talked about a number of different departments and services are provided, where are those services provided?
> A. On 255 - - at 254 Virginia Street in the City of Buffalo.
> Q. And can you tell us what other areas by way of regions, Cities, Towns, Counties, however you want to describe it, does Hispanics United of Buffalo do business?
> A. Erie County.
> Q. Do you do business anywhere outside of Erie County?
> A. No, we don't.
> Q. And Erie County is located in New York State, correct?
> A. That's correct.
> Q. Now, does Hispanics United of Buffalo sell any goods?
> A. No, we don't.
> Q. You just primarily provide services?
> A. Direct services, yes.
> Q. Now, in reference to those services then, they are all limited, as you've indicated, to the City of Buffalo in Erie County?
> A. That's correct." Tr. pg. 498

HUB respectfully requests that jurisdiction be declined herein on the basis that it does not have a sufficient impact on interstate commerce. The mere purchase of goods or services from out of state is so routine, that the evaluation of impact on commerce should take into consideration what the employer actually does with, and where, those goods or services are used and received. Jurisdiction should not be asserted against an employer solely because it purchases goods in New York State from an entity that is engaged in interstate commerce.

HUB's purchase of utility service such as gas, electric and telephone all within the State of New York does not have an impact on interstate commerce. It is quite a stretch by the Board to start asserting jurisdiction over an entity because it purchases local utilities from national corporations who are typically the only source for said item within the locality. If this is the standard for asserting jurisdiction, then there is hardly an employer in this country that will not fall within the broad reach of the Board; unless of course, the employer operates out of a

cardboard box, with a flashlight, and two tin cans with a string attached for a phone.

HUB, as all employers, needs to heat its building, have phones to accept and make calls, and electricity so they can see and operate basic machinery and computers. The acceptance of utility services should not be the controlling factor in determining impact on interstate commerce, especially when the proof establishes HUB does not operate outside of Erie County. Moreover, the fact that a good or service is purchased in-state from a company that operates nationally should not dicate the assertion of jurisdiction.

Jurisdiction by the Board should consider the actual business of the employer when evaluating jurisdiction. In this instance, HUB, a not-for-profit entity, provides much needed social services to an often ignored and under served population. HUB does not sell any goods, so that is not an issue. However, HUB does provide important services which are limited to the State of New York, and are primarily performed on the West Side of the City of Buffalo. HUB does not even engage in inter-county commerce in New York, as all the services provided never extend beyond Erie County.

The ALJ asserts jurisdiction as a result of HUB's receipt of funds from the Federal Government. However, this blanket assertion fails to acknowledge that those funds are limited to services provided in the City of Buffalo. Mrs. Iglesias testified to the following:

> "Q. Now, there's been some discussion when Mr. Sukert was asking questions about a number of grants. One of those grants comes from HUD, correct?
> A. That's correct.
> Q. Now, that money that comes from HUD, what is it utilized for?
> A. It's utilized to provide services to women of domestic violence here in Buffalo.
> Q. Does that money get used by Hispanics United of Buffalo for providing services anywhere outside of Buffalo?
> A. No, sir." Tr., pgs 497-498
> "Q. So the other grants at Hispanics United of Buffalo also gets,

whether it's through UB, the State, or the County, all those funds are used for services where?

A. In the City of Buffalo, primarily on the west side of Buffalo. It is open to the public within the City of Buffalo." Tr. pgs. 498-499

The Board and General Counsel have declined jurisdiction for other not-for-profit organizations similar to HUB. In *Hartford Areas Rally Together, Inc.*, 34-RC-1996 (2002), Regional Director, Peter B. Hoffman, from Region 34, found that the employer was not subject to the Board's jurisdiction and dismissed the Petition. The employer was a non-profit charitable corporation which engaged in grass roots community organizing activities limited to the southern portion of the City of Hartford, Connecticut. The employers Certificate of Incorporation stated that it would engage in the following activities for "charitable and educational purposes" similar to the mission statement of HUB.

The income and expenses of the employer was considered by the Regional Director. This included the fact that $145,000.00, in one calendar year, was received by *Hartford* through a Community Development Block Grant provided by the Federal Government. In addition, the employer had $50,000.00 of contributions from private sources outside of the State, about $10,000.00 in leased office equipment from a company outside of the State, and $5,000.00 in office supplies from outside the State. The Regional Director noted that there was no evidence that the employer's operations had any impact on interstate commerce. Specifically stating in the Decision and Order that:

> "To the contrary, the record clearly establishes that the employer's operations and impact are limited exclusively to a portion of the City of Hartford".

The Decision in *Hartford*, relied upon the Board's decision in *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), in which the employer was a non-profit corporation engaged in consumer lobbying that also met the Board's monetary jurisdictional standard. However, the

Board declined to exercise jurisdiction because "the nature of [its] operations and impact appear to be almost, if not exclusively, limited to matters concerning issues of public concern affecting Ohio residents and without a general impact on interstate commerce".

It is respectfully submitted the circumstances herein are similar to those in *Ohio Public Interest Campaign and Hartford Areas Rally Together, Inc.* HUB, although it meets the monetary jurisdictional standard, has a minimal impact, if any, on interstate commerce. All of the services provided by HUB are not only limited to New York, but more specifically, the West Side of the City of Buffalo. Asserting jurisdiction herein, is not in the interest of justice and does not support the intent and purpose of the Act.

B. THE FIVE TERMINATED AT-WILL EMPLOYEES WERE NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY (Exceptions No. 3 - 22 and 29 - 32)

HUB only became involved in the investigation of the conduct of the five terminated at-will employees as a result of Lydia's harassment complaint. This complaint found that Lydia was bullied and harassed both before, and as a result of the Facebook posts. HUB terminated these employees pursuant to the Zero Tolerance Policy governing the employees' conduct. The discussion on Facebook was not an attempt to induce any group action regarding hours, wages or working conditions at HUB. Mariana posted a lie about Lydia to Facebook in the hopes of embarrassing and humiliating her, so that Mariana's prior conduct would not be reported to management of HUB. There is nothing in the record to support the ALJ's finding that the discussion involved working conditions as is necessary to meet the elements of protected concerted activity.

1. The ALJ's Finding of Protected Concerted Activity is Not Suppoted by the Evidence

In order for the ALJ to find HUB committed an unfair labor practice in violation of

§8(a)(1) he must find evidence of four factors. First, the employees must be engaged in concerted activity. Second, the employer must have knowledge of the concerted nature of the activity. Third, the concerted activity has to be protected under the Act. Lastly, it must be proven that the employer's discrimination was motivated by the employees' protected concerted activity. *see Meyers (Industr.) (Meyers I)*, 268 NLRB 493 (1984) *remanded on other grounds*; Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) *cert. denied*; Meyers Industr., Inc. v. Prill, 474 U.S. 948 (1985), *on remand,* 281 NLRB 118 (1986), *aff'd,* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

Under §7 of the National Labor Relations Act, 29 USC §157 (1988), it guarantees that employees "have the right to self organization, to form, join, or assist labor organizations, ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board stated in *Meyers I* that "in general, to find an employee's activity to be 'concerted' we shall require that it be engaged in with or on the authority of other employee's, and not solely by and on behalf of the employee himself. The question of whether an employee is engaged in concerted activity is a factual one based on the totality of record evidence." *see* Ewing v. NLRB, 861 F.2d 353 (2d Cir. 1988).

The Board has also repeatedly and consistently upheld that "for conversations between employees to be found to constitute "protected concerted activity", **they must look toward group activity and that mere 'griping' is not protected**." *see* Mushrooom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964). "Where employees concertedly ban together to seek from their employer an improvement in terms and conditions of employment, or protection against an adverse change in the same, they are engaged in §7 activity. That is, their activity is concerted, and it is for mutual aid or protection." *Holling Press, Inc.,* 343 NLRB 301, 302

(2004).

2. Mariana's Facebook Post Had Nothing to Do with Hours, Wages or Working Conditions at HUB

The ALJ had no rational basis for finding that the Facebook comments pertained to explicit or implicit criticism by a co-worker of the manner in which the five terminated employees performed their jobs. The evidence established during the hearing demonstrated the discussion was a focused attack on Lydia and her alleged opinion, and had nothing to do with the actual performance of any of the five employees' jobs. Moreover, the ALJ's analysis that any discussion by employees regarding work is considered protected activity is flawed and not supported by established precedent or the Act.

It is well established that in order for there to be protected concerted activity the employees' communications have to be about more than just work, and there is a requirement there be an actual, or even inferred, attempt towards group activity pertaining to a specific term and condition of their collective employment. A dispute between co-workers about a claim that another worker thinks they are no good at their job is not the type of activity meant to be protected under the Act.

In considering the factual situation leading up the termination of the five employees, the ALJ failed to allow HUB the ability to discover relevant and material information. The ALJ permitted General Counsel to introduce evidence in support of its claim, but denied HUB access to documents and names of witnesses which may have contradicted said evidence. Specifically, the ALJ revoked the subpoenas duces tecum served on the five terminated employees. The documents sought in the subpoenas pertained to communications of the five terminated employees and Lydia regarding the issues of the hearing. The ALJ used the proverbial "shield and sword" in rendering his decision by denying HUB the right to explore such relevant

information with the subpoenas, and then turning around and relying on the testimony provided by the five terminated employees about the prior history between the five employees and Lydia.

In addition, the ALJ denied HUB's request for unredacted Jencks materials regarding potential witnesses regarding the claims of the terminated employees. Tr. pgs. 175-179, 272-277, and 601-602; ALJ Ex. 1-5. The rationale for denying the request was completely baseless in well established law and principles of what is privileged attorney-client communications and work-product. The redacted witnesses were not employees of HUB at the time of the hearing, and there was no issue of potential employer retribution. The ALJ's denial of these requests was just another example of HUB being denied due process in defending against the charge herein.

The ALJ also made factual findings which mis-characterize the events prior to the Facebook posts on October 9, 2010. ALJD at pg. 4:9-32. These factual findings distort the history between Mariana and Lydia, and concludes that the issue between them pertained to job performance, which is in direct contradiction to the evidence. The ALJ specifically states:

> "Cruz-Moore and discriminatee Mariana Cole-Rivera communicated very often, normally by sending each other text messages. In these messages Cruz-Moore was often critical about the job performance of other HUB employees, primarily those in Respondent's housing department. Early on the morning of Saturday, October 9, Cruz-Moore told Cole-Rivera that she was going to raise these concerns with Respondent's Executive Director, Lourdes Iglesias."
> ALJD at pg. 4: 18-22

The conclusion that Lydia was going to tell HUB's Executive Director that Mariana was not performing her job is not supported in the record. Lydia's concerns were about the way Mariana was treating her and not about her job performance. This was evidenced in the private Facebook message from Lydia to Mariana on October 8th when she states:

> **"Lydia Cruz Moore 5:53am October 8th, 2010**
> **... You acted like I was stupid and don't know crap. But I took it cuz I luv u and know u are frustrated and full of anger. <u>But I am not your bunching bag anymore</u>. I treat u with respect I expect the same... Friendship is a two way street .. I dont want**

to talk about this matter anymore. Good luck in your endevours." Resp. Ex. 12

The ALJ fails to reference this communication, and more importantly the relevant history between Mariana and Lydia in his decision. The ALJ also ignores the fact that Mariana testified she had not exchanged any private Facebook messages with Lydia before her Facebook post on October 9th. Mariana testified to the following during her cross-examination:

> "Q. Did you ever send any private messages to Lydia on October 8th of 2010?
> A. Private messages? I may have sent her Magalie's - - not on October 8th.
> Q. On Friday, October 8th of 2010, that same day that you had gotten the early morning text; did you send her a private message on Facebook?
> A. I don't know. On October 8th? That was a Friday. I can't remember. No, I don't think so." Tr. pg. 295

After Mariana's denial of sending any private messages on October 8th, she was presented with Resp. Ex. 12. Tr. 2, pg. 304. She confirmed it was a private message she received from Lydia and the response she sent while at HUB during her lunch hour on October 8th. Tr. pgs. 305-306. As such, Mariana's intial denial was finally withdrawn after being confronted with the actual document. This exchange was conveniently left out of the proof introduced by General Counsel during her testimony, and ignored by the ALJ in rendering his decision. The ALJ's failure to reference and rely on this document renders his findings incomplete since this exchange provides a reference for the state of mind of Mariana before she makes the Facebook post, and the true nature of the conflict with Lydia which had nothing to do with work.

Moreover, the claim herein is that the employees were terminated for discussing working conditions for their mutual aid or protection. But the record shows that Mariana spent a full afternoon at work after her private message exchange with Lydia, and never brought any issues to the attention of any other HUB employees, her Supervisor, or the Executive Director. Tr. pgs. 306-307. If her dispute with Lydia were truly work related she had more than ample opportunities to raise the matters at work to management, or even to some other employee.

The fact this was not a work related dispute is further established by the text message Mariana stated she received from Lydia at 4:00 am on October 8th, before starting her work day, and prior to engaging in the Facebook private message exchange with Lydia. Tr. pg. 291; GC Ex. 33. The text message was interpreted from Spanish to English as follows:

> **"Q. And were the text message, look at the - - it could be either one, the first page, but we can look at the second page of the exhibit, where it says, "porque' voy a buscar la belt y darlte," what does that does that mean in Spanish?**
> **A. That means "Because I'm going to get the belt and hit you."**
> Tr. pg. 247

The ALJ never references this exchange in his decision. Mariana testified she received a threat of being hit by a belt from Lydia, and then spent an entire day at work without telling anyone, including management, about the threat. She claimed she did not tell anyone because she was in Court in the morning, but the record establishes she was back to work at lunch and the rest of the afternoon. Tr. pgs. 306-307. Mariana testified to the following:

> **"Q. All right, so the GC-33 Exhibit you're indicating is the text message you received from Lydia Cruz some time before work on Friday, October 8th of 2010?**
> **A. Yes.**
> **Q. And did you bring it to the attention of anybody at Hispanics United that Lydia had threatened to hit you with a belt?**
> **A. Well, no, I did not, I was in court all morning on Friday."** Tr. pg. 291

The ALJ's conclusion overlooks two material communications between Mariana and Lydia that establishes the conflict between them had nothing to do with work. The ALJ stated the following:

> "Cruz-Moore and discriminatee Mariana Cole-Rivera communicated very often, normally by sending each other text messages. In these messages Crus-Moore was often critical about the job performance of other HUB employees, primarily those in Respondent's housing department." ALJD at pg. 4, 18-20.

The ALJ's conclusion fails to reference the evidence of the non-work related conflict

between Mariana and Lydia. Mariana provided an Affidavit to General Counsel prior to the charge herein being filed, and within that affidavit, she states the following:

- "In or about every Wednesday, on almost a weekly basis, since in or about July, 2010, when I saw her at the facility, Lydia Cruz-Moore complained that the clients did not want to come to the employers facility, but preferred to go to the Family Justice Center, so that Lydia Cruz-Moore could take care of the clients. Lydia Cruz-Moore complained that the clients expressed that they did not want to go to the employer for services and that Lydia Cruz-Moore did a better job taking care of the clients than the other employees at the employers facility."
  GC. Ex. 35, para. 5, pgs. 2-3

- "From in or about June, 2010 until October, 2010, Lydia Cruz-Moore would text me or call me, if I did not answer a text, a few times a day, during work hours and after work hours, and during the weekends, to discuss her personal marital problems..." GC Ex. 35, para. 9, pg. 3

Mrs. Iglesias received additional text messages from Lydia forwarding Mariana's texts to Lydia from the weekend before and after the Facebook posts on October 9th. Tr. pgs. 510-511. These text messages further exemplify the dispute between these two employees was non-work related:

- FWD: are u sure u want Lourdes to know haw u speak about hub and how u feel we do>are u sure u want Lourdes to know how u speak about hub and how u feel we don't do our job and how ur not sticking up for the agency or asking the proper questions to find out what is behind their complains? I have nothing to hide im proud to work at hub aren't u? Resp. Ex. 21, pg.3-4

- jelous! Lmao Lydia stop it defending my coworkers is not personal but tha>jelous! Lmao Lydia stop it defending my coworkers is not personal but that's how u r taking it.I got tired of u bad mouthing hub and acting like u are the best worker ther. No client was mentioned so stop the drama! Resp. Ex. 21, pg. 3-4

This text was the most honest statement made by Mariana introduced during this whole matter. Mariana just got "tired" of Lydia acting like she was the best worker at HUB and she merely tolerated her. Tr. pg. 304. Mariana made her Facebook post about Lydia because she did not like Lydia, and the ALJ completely ignored all of this evidence. This evidence was uncontradicted and cannot simply be swept under the rug. The reality is that the Facebook posts by these

employees had nothing to do with HUB, and everything to do with attacking Lydia.

The ALJ's findings are based on non-existent evidence and distortion of the facts that were established. For instance, the ALJ stated that, "[T]he discriminatees herein were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." ALJD at pgs. 8:48 and 9:5-6. This finding is completely unfounded and ignores Mariana's own affidavit wherein she states the following:

- "... I received a text that evening and Saturday morning, October 9, 2010, from Lydia Cruz-Moore. I had responded in one of my texts that she is judging too quickly, and she stated, in text, that Lourdes Iglesias needs to settle our differences on Tuesday. **I did not understand what differences needed to be settled**. I simply stated that I did not agree with her. I complained Saturday morning to Damicela Rodriguez that Lydia Cruz-Moore was constantly bothering me with texts. I had responded at one point to Lydia Cruz-Moore that it was a long weekend and she should focus on something else..."
  GC Ex.35, para. 14, pg. 4

If Mariana had no idea what "differences" Lydia intended on bringing up with Lourdes Iglesias, then how can ALJ know what that meant? There is no testimony, nor records, anywhere in this matter which supports this conclusion by the ALJ. The ALJ relies on this misguided conclusion to establish the requirement the employees were taking group action, but there is simply no evidence in the record to support same.

3. The Terminated Employees' Facebook Posts Were an Attack on Lydia

The testimony from the terminated at-will employees established they were not discussing, either directly, or through inference, hours, wages or working conditions. Instead, all of their Facebook comments were attacks on Lydia to belittle her alleged statement as claimed by Mariana. Each of them testified regarding the Facebook posts and the reason they made same. The theme was repeated over and over again by each witness that the comments were made to

"defend the agency". However, upon being confronted about who they were defending the agency from, each of them stated it was from the comment allegedly made by Lydia, as falsely presented by Mariana.

Testimony of Mariana Cole-Rivera

"Q. Now, during your meeting with Lourdes you told her that you were defending the Agency with your comments on Facebook; correct?
A. Correct.
Q. And who were you defending the agency from?
A. From? No. From the comments that Lydia had made to me.
Q. Okay. So you were defending comments made by Lydia?
A. Correct." Tr. pgs. 341-342

"Q. And that would assume that Lydia actually made those comments; correct?
A. Yes.
Q. All right. And isn't it true that Lydia actually called your indication that she had made that statement a lie?
A. Yes, she could have said that. Yes, she did, actually." Vol. 2, pg. 342

"Q. Well, what - - when you say "In the affidavit and the letter," I'm just asking what did you tell Lourdes on October 12th regarding that?
A. Oh, I didn't - - I don't remember talking about my frustration. I don't remember. I know I said to her when she said that I was no longer an employee, I said, "You're going to fire me for defending the Agency?" I remember saying that to her.
Q. You were asked on cross was it your intention to let out your frustration - - you were asked on cross did you say that it was your intention - - your intention was none other than to let your frustration after months of hearing comments - -
A. Correct.
Q. - - from Lydia Cruz-Moore?
A. Correct.
Q. Okay. Did you say that Lourdes Iglesias?
A. I don't recall. I think I did. I might have. I might have.
Q. And if you said it what would have been the reason for saying it?
A. Because if I did say that to her it was for her to understand the reasons why I put the posting. My reason for the posting. The main reason was for me to know whether or not I was being totally biased because like I said, everybody in HUB was very, very supportive what I was going through with my daughter, so I did not think that I was having a clear judgment. When you are, you know, when you are so invested emotionally on an agency, on your job, on your co-workers, and somebody tells you that they're not doing the job - - that we're not doing the job that we're

supposed to, I did not think that I was being totally bias - - you know, that I was being totally bias, so I - - one of the reasons was to say, okay, what do other people think? Maybe I'm thinking - - maybe I'm wrong. Maybe we're not doing –" Tr. pgs. 366-367

Testimony of Ludimar Rodriguez

"Q. Ms. Rodriguez, you can see the post that you made on Facebook on October 9th of 2010 on the document, correct?
A. Yes.
Q. Did you make this post in response to what was said by Mariana Cole?
A. Yes, I was defending my job.
Q. Who were you defending your job from?
A. Somebody said that I wasn't doing enough for the client.
Q. Who was that somebody?
A. Ms. Lydia Cruz.
Q. And you knew who Lydia Cruz was, correct?
A. Yes." Vol. 1, pgs. 197-198

"Q. And when you say you were defending your job is it because you liked your job?
A. Yes.
Q. You didn't have any problems with your job?
A. Yes." Vol. 1, pg. 200

Testimony of Damicela Rodriguez

"Q. When you read that comment, "Lydia Cruz is a co-worker, feels that we don't help our clients enough at HUB," did you take any - - were you personally insulted by that?
A. I was just defending my job.
Q. And you were defending it - - is it because - - I mean, you took offense to it?
A. No, I just knew that - - I just made the statement because I know that first of all we do our job." Vol. 2, pg. 394

"Q. You said, "I was defending my job" . From whom were you defending your job?
A. From the statement that Mariana just made. I just wanted to make - - I just wanted to state that I do my job and I just said try to do my job, I got five programs.
Q. And you weren't trying to change your job; correct?
A. I was trying to change my job?
Q. You were not trying to change anything about your job; were you?
A. No.
Q. You weren't suggesting a change at the work place with that comment; were you?

A. No.
Q. And you weren't suggesting that anyone else change what they do - -
Mr. Sukert: Objection.
The Witness: No.
Mr. Kooshoian: - - at the work place?
The Witness: No." Tr. pgs. 396-397

Testimony of Yaritza Campos

"Q. Now, who were you referring to in this comment when you said "her"?
A. Ms. Lydia Cruz-Moore.
Q. And isn't it true that at the time you made the comment you were under the impression that Lydia Cruz would not actually see what you wrote?
A. Yes.
Q. Okay. And what was the purpose of this comment that you made?
A. It was just to show that we do do our job at Hispanics United of Buffalo and we did do our job at Hispanics United of Buffalo. I, myself, I work very hard. There were numerous times where I left home late just to show - - I mean just to help the clients, I mean, and I didn't ask to be recompensated (sic) for it.
Q. And you enjoyed your job?
A. Of course.
Q. You really liked working; correct?
A. Yes.
Q. And did you want your job to change?
Mr. Sukert: Objection Your Honor.
Judge Amchan: Overruled.
Q. Did you want your job to change?
A. What do you mean "change"?
Q. Well, were you - - when you made this comment on Facebook were you hoping that by making this comment some part of your job would change?
Mr. Sukert: Objection, Your Honor.
The Witness: No.
Judge Amchan: Overruled.
Mr. Sukert: What's the - -
Judge Amchan: You can answer. I'm sorry, did you answer?
The witness: No.
Mr. Sukert: What was the answer?
The Witness: No I mean, I didn't - -
Q. No, right, you didn't want to change your job; right?
A. No." Tr. pgs. 419-420

Testimony of Carlos Ortiz de Jesus

"Q. Now, you also indicated, and I'm going to fast forward to October 2010, when you made the comment on Facebook in response to Mariana's post,

that you were defending your job; correct?

A. Yes.

Q. Who were you defending it from?

A. I guess what was basically defending my job from the comment I made that Lydia said.

Q. And so Lydia, according to Mariana, had made a statement and that's what you were responding to; correct?

A. I was responding to that statement, yes.

Q. And what was the purpose of your comment?

A. The purpose of the comment basically you can - - that I was asking what else I could do to help my client because I do know that I did whatever is in my power or whatever I can do to help them, to help them in their needs or to help them with their issues.

Q. And the comment you were making was directed towards Lydia Cruz' opinion as indicated by Mariana; correct?

A. I responded to the - - to her comments, yes.

Q. And when you made that comment were you trying to change something about your job?

Mr. Sukert: Objection, Your Honor.

Judge Amchan: Overruled.

The Witness: No." Tr. pgs. 435-436

None of these employees were trying to change or address anything about their jobs, work hours, wages or working conditions. The only thing concerted about why these employees were terminated, is that it involved their collective attacks on the false statement attributed to Lydia. Even the most cursory review of the Facebook posts can see that the employees were not discussing hours or wages. As such, the only way that an unlawful labor practice can be established is if it can be shown that they were terminated for discussing working conditions. However, there are no issues of working conditions raised by any of the five terminated employees. Mariana started the thread with a post directed at eliciting comments about Lydia, not HUB. Which is exactly what occurred with posts such as:

- Ludimar Rodriguez:
  "What the f. .. Try doing my job I have 5 programs" ALJD at pg. 5:8

- Yaritza Campos
  "Tell her to come do mt[my] fucking job n c if I don't do enough, this is just dum" ALJD at pg 5:16

Mariana did not even believe she was discussing working conditions in her Facebook posts. During her cross examination, the ALJ sustained the objection by General Counsel when Mariana was asked directly whether or not she believed her Facebook posts had anything to do with working conditions at HUB. The cross-examination exchange went as follows:

> "Q. Did you ask Andrea her opinion about these working conditions of HUB?
> A. We didn't talk about working conditions at HUB.
> Q. What did you talk to her about then?
> A. We talked about the Facebook postings.
> Q. What about the postings?
> A. If she had seen them, you know, and that after everything was said and done that I was going to talk to, you know, Lourdes on Tuesday, and - - I mean, you know, when we came back to work.
> Q. So you don't believe that the Facebook posts were about working conditions?
> Mr. Sukert: Objection
> Judge Amchan: They are what they are.
> Mr. Sukert: She's – you're asking for a legal conclusion on those.
> Mr. Gomez: She just indicated to me she didn't talk to her about working conditions, only the Facebook posts.
> Judge Amchan: Well, I --
> Mr. Sukert: She mentioned her Facebook postings, she didn't say the content of them. She said --
> Judge Amchan: The postings are in the record and speak clear what they're about."
> Tr. pgs. 318-319

The ALJ denied HUB the right to examine the primary witness for General Counsel on the very issue about which the charge herein is based. If Mariana states that her Facebook posts had nothing to do with working conditions, this matter is done, and the charge herein has to be dismissed. By preventing a response, the ALJ was able to distort the record to fit into the analysis that there was an unlawful labor practice, in direct contradiction to the proof.

The record also fails to prove that Mariana was attempting to act for, or on behalf of other employees in making her Facebook posts. Nowhere within her multiple posts did she reference or attempt to induce group action, nor try to recommend or discuss any changes to the terms and

conditions of their employment. In fact, none of the other employees involved in the Facebook thread wanted to change or address anything about their jobs. It is well established that in order to find protected activity the conduct of the employees must seek a collective goal, and not simply trying to advance a personal claim. *see Gartner-Harf Co.,* 308 NLRB 531 (1992) [Board noted that an employee's personal complaints about his own lack of work hours deemed not protected]

In this matter the opinions being solicited by Mariana from her "co-workers", was for her own personal benefit and not done on behalf of truly group complaints. Mariana testified to the following:

> "Q: And after your – turning your attention to discussion with Damicela, after that discussion, what, if anything, happened next?
>
> A: Well, you know, I was going to talk to Lourdes about the discussion with Lydia. I wanted to know that what I felt was correct because I felt that I was not being objective. My daughter had had a near-drowning back in August and everbody in HUB was very supportive of me. So I didn't think – I didn't think that my perception, maybe, of what Lydia was saying might have been correct, so basically a put a survey on Facebook to see what my other co-workers felt about our job performance ' cause maybe I wasn't being, you know – I was – I'm thinking that we are doing our job, she's saying we're not; if I'm going to talk to Lourdes I want to know how other people feel." Tr. pgs. 257-258

Mariana's entire focus in making the Facebook post, assuming her claim is true, was solely for her own benefit. She never intended on resolving any issues that constituted truly group complaints, but rather wanted to satisfy her own conscience related to her "debates" with Lydia. She never testified to seeking to address any issues that mattered to the group, which is a requirement for there to be concerted activity, regardless of whether the discussion was protected.

As explained in <u>*Mushroom Transportation Co. v. NLRB*</u>, 330 F.2d 683, 685 (3d Cir. 1964), and adopted by the Board in *Meyers II*:

> "It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must

> appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees".

The Board stated in *Daly Park Nursing Home*, 287 NLRB 710, 710-711 (1987), that activity which is "mere talk" must be looking toward action:

> "If its only purpose is to advise an individual as what he could or should do without involving fellow workers or union representatives to protect or improve his status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more likely then to be mere griping."

The law is clear that there is no protected activity unless the employees are actually trying to improve work conditions. *see* Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978); NLRB v. Office Towel Supply Co., 201 F.2d 838, 840 (2d Cir. 1953) [The Circuit Court held that an employee's "mere griping" is far too inchoate and an employee's complaint, if addressed to other employees, is not, without more, the sort of activity which congress intended to protect.] Purely personal griping and complaining about working conditions is not an activity protected by section 7 of the NLRA. NLRB v. Deauville Hotel, 751 F.2d 1562, 1571 (11th Cir. 1985). Analyzing the context in which the activity occurs is essential to assessing whether it is for the mutual aid or protection of employees. *see* Earle Indus. Inc. v. NLRB, 75 F.3d 400, 405, 407 (8th Cir. 1996).

In order to qualify as protected concerted activity, the employees must indicate the desire to improve, change or address something about their employment. The ALJ wholly ignores the requirement that the employees' discussions be for their mutual aid or protection. The evidence at the hearing failed to establish any desire or attempt by any of the employees to address any of the alleged issues raised in the Facebook posts. The ALJ relies on Board decisions which are factually distinguishable from the circumstances herein and actually deal with employees engaging in conduct for their mutual aid or protection, related to wages or a specific condition of

their employment.

In *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995), the employees were discharged after complaining to each other regarding the employers' change in their schedule for the following day.

In *Parexel International, LLC,* 356 NLRB No. 82 (January 28, 2011) the employee was discharged for having a discussion about wages, a clearly protected activity.

In *Jhirmack Enterprises*, 283 NLRB 609, the employee was discharged for discussing a work productivity issue with a co-worker which was raised by management in a meeting.

In *Akal Security, Inc.*, 355 NLRB No. 106 (2010), two employees were discharged for holding a meeting with a co-worker regarding specific safety concerns about the co-worker's performance of his job duties.

The ALJ's finding that the terminated employees' Facebook attacks on Lydia constituted discussion of the terms and conditions of employment is unsupported by established precedent and the Act. The attempt to analogize the critiques of Lydia as posted on Facebook to a discussion of wages is unheralded. The reality is that wages are integral part of an employees terms and conditions of employment for which the employee has the full and fair right to discuss with others. The ALJ's extension of what constitutes protected activities goes well beyond the extension of Section 7 rights that have ever been applied in a non-union setting. The ALJ fails to acknowledge that there are limitations on Section 7 rights and that employees do not have an unfettered right to say whatever they desire as long as it encompasses something about work.

An employee's public statements can be considered protected concerted activity if they are directly related to an ongoing labor dispute, are not a disparagement of the company's

reputation or the quality of the company's product, and they are not maliciously motivated. *see* St. Lukes Episcopal-Presbyterian Hospitals v. NLRB, 268 F.3d 575 (8th Cir. 2001)

The Facebook posts were not just a discussion between the five employees. Instead, it was a public post that went to more than 60 people, with less than 10% of them actually being employees of HUB. Mariana testified to the following regarding her Facebook friends:

"Q. Now, when you made this post on October 9th of 2010, how many friends did you have?
A. I think - - I mean, if I give you a number I really don't know.
Q. Isn't it true when you go on your Facebook page it actually tells you how many friends you have?
A. Yeah. I don't look at it.
Q. Okay. So when you see all your friends and you interact with them on Facebook you've never looked at the actual number to see how many you had?
A. No. Not unless I delete - - when I delete friends then I know how many friends I have.
Q. Would you have had about 30 some friends in October of 2010?
A. No, I had more.
Q. So you've lost friends from October 2010 to today?
A. Yeah, I've deleted people from there.
Q. How many people did you have back then; more than 50?
A. Probably 60 - something, yeah.
Q. Now, when you made this post on GC - 7, October 9th of 2010, that post went to all of your friends; correct?
A. The people that I had, yes, um-hmm.
Q. So that included people who worked as Hispanics United, as well as people who did not work there; correct?
A. Correct.
Q. And how many people who worked at Hispanics United with you did you have as friends on October 9th of 2010?
A. All right, the four, Jessica, Lydia, I think Andrea might have been there, Susan. Was Susan there? I can't remember if Susan was there but around 7 to 10.
Q. So less than 10 percent of your Facebook friends were actually employees of Hispanics United back on October 9th of 2010; correct?
A. Less than ten percent of my friends?
Q. Correct.
A. Yeah. Um-hmm." Tr. pgs. 284-286

The ALJ's finding it was irrelevant that the Facebook posts constituted discussions with

persons other than HUB employees, wholly ignores the established case law regarding this issue. The public nature of the statements has a significant bearing on evaluating the conduct for which the employees were terminated. see St. Luke's supra at 575 [A nurse in the context of a labor dispute went on television and recklessly accused her professional colleagues and the hospital by which she was employed of reducing the standards of patient care at the hospital, and the Court held that she was not engaged in protected activity and that her discharge for such conduct did not violate the act.] The statements and the circumstances surrounding why the five employees were terminated were directly effected by the fact that this post was public. It was the public nature of the post which resulted in the reaction by Lydia to the slanderous statement posted by Mariana and the attacks by the other co-workers.

Also, of significant note, is the ALJ's finding that HUB disciplined all of the employees that participated in the post other than the Executive Director's secretary, Jessica Rivera. This finding once again shows that the ALJ did not pay attention to the details and the evidence presented during the hearing. Mrs. Rivera was not employed with HUB at the time that the posts were made, and that is the reason why no action was taken against her because she was not under the control or authority of HUB. This was testified to by Mrs. Iglesias during the examination by General Counsel:

"Q. And Jessica Rivera, who is she?
A. She was my secretary.
Q. And during what time frame did she serve as your secretary?
A. I believe up until June, June, 2010." Tr. pg. 117

The fact that Mrs. Rivera did not work for HUB at the time of the Facebook post was also confirmed during the testimony of Mariana, who testified to the following during the direct examination by General Counsel:

"Q. Are you familiar with Jessica Rivera?

A. Yes.
Q. And who is she?
A. She used to be Lourdes' secretary.
Q. Was she a friend of yours on Facebook?
A. Yes, she was." Tr. pg. 257

The ALJ cites to the Board's Decision in *Fivestar Transportation, Inc.*, 349 NLRB 42 (2007), however he does not review the analysis done by the Board regarding the circumstances surrounding all of the employees therein. In *Fivestar*, the Board found that all of the driver employees were engaged in concerted activity, but not all were engaged in protected activity. Two of the drivers, Ocasio and Kupras, had written individual letters regarding concerns that had been discussed by all of the employee drivers. The Board affirmed the Judge's finding that although the letters contained very generalized assertions about the quality of the employer's buses, the employees made no references to wages or working conditions of the bus drivers. In making this finding, the Board determined that Ocasio and Kupras were not engaged in protected activity under the Act, and reiterated the well established proposition that," Section 7 protects employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee/employer relationship."

Nothing in this record establishes these employees were trying to improve or affect anything about their employment with HUB. Moreover, if this was truly a work related issue, Mariana could have sent a private message to the handful of co-workers she was friends with on Facebook. The reason this was not done, was because the desired effect would have been diminished. The attack on Lydia was only effective if sent to a broader audience, and that is why more than 90% of the recipients of Mariana's post were not employees of HUB. Mariana's initial Facebook post stated the following:

> **"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?"** GC Ex. 9

The analysis of this statement must begin with the fact it was a lie. Mariana claims her coworker made this statement, and Lydia vehemently denies ever making it, specifically responding to the Facebook thread as follows:

> "At 2:27 Lydia Cruz-Moore posted:
> **Marianna stop with ur lies about me. I'll be at HUB Tuesday..**" ALJD at pg. 6:5-7.

The ALJ finds the Facebook posts were the reactions of employees to a coworker's criticisms of the manner in which they performed their jobs. However, Mariana's initial post ends with the question, " How do you feel?" This can be easily viewed as seeking an opinion from coworkers about what they thought about Lydia, and not the alleged statement about whether they do enough for their clients. If Mariana was truly seeking opinions of coworkers about their job performance, then there was no reason to insert Lydia's name in the post. But, as established through the limited documents the ALJ allowed HUB to obtain, the point of the Facebook post was to attack Lydia, and not to discuss hours, wages or work conditions. So, Lydia's name had to be included by Mariana to garner the desired effect, which was to harass Lydia so she would not report Mariana to Mrs. Iglesias.

4. Mariana and the Other Terminated Employees Were Not Looking Towards Any Group Action with their Facebook posts

Mariana testified that the reason she initially posted the comment about Lydia was to take a survey of her co-workers. Tr. pg. 257-258; The first time this claim arises is after she meets with General Counsel to provide an affidavit. Resp. Ex. 14, pg. 4, para. 14. All of her statements, in letters, and communications with HUB, the terminated employees and the first letter to General Counsel never mention anything about the Facebook post involving a survey of her co-workers.

Before Mariana was fired she met with Mrs. Iglesias, and had a full opportunity to tell her

version of what occurred with Lydia. Mrs. Iglesias testified to the following exchange during the termination meeting:

"Q. Before you told her she was fired, did she tell you anything about trying to survey employees about HUB?
A. No.
Q. Did she say anything to you about any complaints she had about hours, wages, or working conditions at HUB?
A. No, not at all." Tr. pgs. 522-523

Mariana's claim she was taking a survey was not supported by her own fellow terminated co-workers, and it is respectfully submitted this claim was only crafted after General Counsel sat down and met with her.

Testimony of Damicela Rodriguez

"Q. And you said when she updated her Facebook page you didn't know about it.
A. No.
Q. So she didn't tell you that she was conducting a survey of co-workers to see how they felt; did she?
A. No." Tr. pgs. 403-404

Testimony of Carlos Ortiz de Jesus

"Q. Have you ever – did you ever talk to Mariana about being fired after you were fired?
A. Yes.
Q. And did Mariana ever talk to you about the reason why she put that post that started everything on October 9th of 2010?
A. No.
Q. Did she ever tell you that she had posted that for the purpose of conducting a survey of employees?
A. No." Tr. pg. 441

"Q: Now, after you were terminated you had an opportunity to have discussion with Mariana Cole-Rivera about the firing; correct?
A. Yes.
Q. Did Mariana ever tell you she was trying to take a survey of employees?
Mr. Sukert: Objection, Your Honor.
Judge Amchan: Overruled.
The Witness. What do you mean a survey of employees?
Judge Amchan. Well, he's just saying did Mariana ever tell you that.
Q. Right, did she ever tell you that when she made her Facebook post she was trying

to make a survey of employees?
A. I don't think so, no." Tr. pg. 421

Further undermining Mariana's testimony is her claim she intended on meeting with Mrs. Iglesias on Tuesday morning, October 12th, to discuss the issues between her and Lydia. The ALJ "did not credit" Mariana's testimony that she attempted to speak to Mrs. Iglesias on October 12th, prior to her termination meeting, but incredibly found it did not materially affect the outcome of the case. This opinion is completely contradictory, since the false testimony pertained to the alleged action intended from the discussion that resulted in the terminations. If the ALJ does not believe this happened, then there is no proof of a direct attempt, nor inferred plan of action, by the employees which is required to establish protected concerted activity.

The ALJ's refusal to credit this part of Mariana's testimony was based on the considerable evidence establishing she lied. Mariana testified to the following:

"Q: Ms. Cole-Rivera, when over the course of the weekend had you decided that you were going to go talk to Lourdes on Tuesday?
A: After my conversation with Damicela; that was Saturday morning.
Q: And before you made the post?
A: That is correct." Tr. 351-352

"Q. Turning your attention to October 12th of 2010, what, if any, plans did you have that day?
A. I planned to talk to Lourdes about what had happened on Saturday.
Q. And turning your attention to October 12th of 2010, what, if anything, happened on that date?
A. I saw Lourdes going up the stairs and I followed her and I said that I needed to talk to her.
Q. And did there come a point in time when you spoke with Lourdes?
A. Yeah, at the time she said she was going to be in meeting, that she was going to call me." Tr. pg. 265

On cross-examination further details were elicited regarding her claim that she sought out Mrs. Iglesias on October 12th. Mariana testified to the following:

"Q. While you were sitting at the reception desk did you ever seek Lourdes

Iglesias?

A. I did. I saw her, you know, walk in and that's when I, you know, asked somebody to stay at reception and follow her - - and I told up the stairs that I needed to talk to her.

Q. Okay. So you saw her at the reception desk first?

A. Yeah, walking in, I believe. Yes.

Q. All right. Isn't it true that you indicate in your statement you saw her actually going up the stairway?

A. Well, I followed her 'cause I had to find somebody to sit at reception before I went after her. So by the time I got to her she was going up the stairs." Tr. pg. 336

In Mariana's affidavit to General Counsel she made the following statement regarding the circumstances on October 12, 2010:

> *"I had off on October 11, 2010, which was Columbus Day. On Tuesday, October 12, 2010 I arrived for work and had clients waiting. I saw one clinical appointment in the morning. When I signed in the morning, at around 8:45 a.m., I saw Lourdes Iglesias going up the stairway, and said I wanted to speak with her. Lourdes Iglesias said that she was going to be in a meeting and she would call me when she was available. GC Ex. 35, pg. 5, para. 20.*

Mariana's story changed during her testimony at the hearing. During the hearing, she claimed to have arrived at work at 8:30 a.m. on October 12th, and that there was nobody waiting for her at that time because her appointment was not until 9:00 a.m. Tr. pg. 331. She then claimed during her testimony that she went to her office, dropped off her belongings, and went to the reception desk because there was nobody there and remained until 9:00 a.m. Tr. pg. 333-335. She then added to her testimony and made the following claim:

Q. And what time then did you leave the reception desk?

A. I - -

Mr. Sukert: Objection, Your Honor, to all this line of questioning. I don't - - I fail to see the relevance.

Judge Amchan: Well, I haven't seen it yet, either but maybe we might. Go ahead.

The Witness: I got the reception - - actually one of the reasons why I wanted to be there is because I wanted to see when Lourdes, you know, would come in. But I had my non-clinical counseling there, they were there early, and I believe that's what that statement was there about. But I basically was there for - - probably 'til 8:45, you know, 10 minutes to 9:00, you know. Tr. pg. 335

It is respectfully submitted that the relevance of this line of questioning is that what Mariana testified to under oath never happened. She never spoke, nor saw, Mrs. Iglesias prior to being called in to her termination meeting. She never intended on bringing any issues to Mrs. Iglesias' attention that morning as argued by General Counsel. The point of this line of questioning was to demonstrate her lack of credibility, and her attempt to try and make her Facebook posts protected activity. Mariana testified to the following:

> "Q. And the stairway that would take you to Lourdes' office, the quickest way would be on the other end of the building past a door that you couldn't see through at the reception desk; correct?
> A. Correct.
> Q. What time was it that you saw Lourdes going up the stairway?
> A. I'm thinking it had to be between 8:45 and 9:00. I'm not sure. I know I saw her at the reception desk, I mean at the - - when I talked to Lourdes and I told her that I needed to speak to her we were standing at the stairs, that - - yes. I - - specifically at what time by the second, millimeter, second, I cannot say. I'm under oath so I cannot give you a time because I truly do not remember the exact time." Tr. pgs. 339-340

The curtain was pulled back on Mariana's deception when Mrs. Iglesias testified to her activities the morning of October 12th, prior to the termination meetings. Mrs. Iglesias testified to the following:

> "Q. All right. Let's talk about the day that you fired the five employees, October 12th of 2010. What time did you get to work?
> A. I got to work about 8:00 o'clock.
> Q. And you indicated earlier that that was your usual time for going to work?
> A. Yes.
> Q. And describe for me from when you first arrived at Hispanics United until you got to wherever you were going?
> A. I got into the Agency at about 8:00 o'clock and I come in through the side door. I don't come in - -
> Q. Well, hold on. Where's the side door?
> A. It's a distance away from the main door.
> Q. And does the main door - - where does the main door take you?
> A. The main door takes you to the reception area and then into the general offices.
> Q. And you were here during the testimony of Mariana Cole-Rivera, correct?
> A. That's correct.

Q. And she made an indication about sitting at a reception desk. Where would that be located?
A. In the front entrance.
Q. And is that the doorway that you used to go into HUB that morning?
A. No, I did not.
Q. So you go in through the side entrance, as you described, what happens next?
A. I go upstairs, open up my door and I take - - put down my purse. And the first thing I do is listen to any messages. I turn on my computer. And this day, I went on to my Facebook to see if I had heard anything or, you know, from Lydia because I was very concerned." Tr. pgs. 511-512

"Q. Now, I want to back up and just talk about your actual physical path from when you walked in the door till you got to your office. When you came in through that side door, what does that take you into?
A. It's a hallway and it goes up to the stairs going on to the second floor. And as you - -
Q. Hold it. Where's your office?
A. It's on the second floor to the right.
Q. So when you go through the side door and you walk into this hallway, is it a closed hallway? Is it open into a room? How does that work?
A. No, it's a closed hallway and there is an entrance to go into the main - - the first floor where all the offices are.
Q. When you opened the side door that morning and walked into that hallway was there anyone in there?
A. No, sir.
Q. And are there stairs in the hallway?
A. Yes, there is.
Q. And did you go up those stairs?
A. Yes, I did.
Q. And in the course of walking up from the first floor to the second floor that morning to go to your office, did you see anybody?
A. No.
Q. Did you see Mariana Cole-Rivera?
A. No, sir.
Q. Then you get to the second floor. Tell me what you did?
A. I go and I open up my door and I close the door behind me and I sit at my desk.
Q. At any time from when you got into the building until you got into your office on October 12th of 2010, did you see Mariana Cole-Rivera?
A. No, I did not." Tr. pgs. 512-514

"Q. Who was the first person you spoke to?
A. Mariana.
Q. And how was it that Mariana came to your office?
A. Carmen had called her.

Q. And did you have any communication with Mariana Cole-Rivera before she came into your office after you asked Carmen to go get her?
A. No, I did not.
Q. Did she attempt to contact you in any way that you're aware of?
A. No, sir.
Q. Had you seen her at all prior to that?
A. No, sir.
Q. So the first time you see her is when she comes into the office for the meeting?
A. That's correct." Tr. pgs. 519-520

Further undermining Mariana's claim was Charging Party, Carlos Ortiz de Jesus, who testified that on the morning of October 12th he arrived at work at 8:45 a.m. Tr. pg. 436. He walked into HUB through the main door, but could not remember if he saw anyone at the reception desk. Tr. pg. 436. However, when asked if he had seen Mariana at all, he testified to the following:

"Q. Had you seen Mariana that morning at all before you were fired?
A. No." Tr. pg. 437

If Mariana had been working the reception desk at the time claimed, then he would have seen her. Carlos did not see her, because Mariana was not looking for Mrs. Iglesias and had no reason to be at the receptionist's desk. In fact, if she had been working at the reception desk that morning, an important fact in believing her tale, then this fact would have been put in her affidavit. The reality is that there was never any intention by Mariana to meet with Mrs. Iglesias, or anyone from management at HUB about the Facebook posts. Mariana's testimony about this intention is a fabrication made in an attempt to justify the Facebook posts, and the circumstances surrounding same, as an exercise of the terminated employees' Section 7 rights.

5. The Post Termination Evidence Overwhelmingly Establishes The Facebook Comments had Nothing to Do with Protected Activity

After their termination the five employees prepared, signed and sent two letters to HUB's Board of Directors. Neither of these letters mentions anything in support of the arguments

asserted by General Counsel and the findings reached by the ALJ. The ALJ failed to reference these letters in his decision, notwithstanding their disclosure of the terminated employees' positions about what occurred contemporaneous with the matter at issue. All five employees met and discussed the preparation of these letters in the hopes of getting their jobs back. So, the reasons stated therein, prior to General Counsel's involvement, are the most reliable sources of evidence to determine if this matter had anything to do with protected activity.

On October 13, 2010, the day after being fired, the five terminated employees, led by Mariana, prepared a two page letter to HUB's Board members to tell their "side of the story" regarding their termination. Resp. Ex. 10A; Tr. pgs. 343-346. Completely missing from this two page letter is any mention of wages, hours, working conditions, a survey of the employees, or anything else that could potentially support the claim they were engaged in protected concerted activity. The letter states that, "[T]he comments were non aggressive, it was to defend what we do for the agency." Yet, there is no mention of intended group action, an attempt to seek improvement in terms and conditions of employment, or protection against an adverse change in their employment.

A second letter dated October 18, 2010, was drafted by Mariana, and once again signed by all five terminated at-will employees. Resp. Ex. 11; Tr. pgs. 346-348. This letter was also directed to the Board members of HUB for the purpose of advising them of the grievance which they had about their termination. Completely missing from this two page letter is any mention of hours, wages, working conditions, a survey of employee opinions, or anything else that could potentially support the claim they were engaged in protected concerted activity. However, what was not missing from this letter was the employees' acknowledgment of culpability for their comments resulting in Mrs. Cruz-Moore being hospitalized. Specifically the portion of the letter

which says:

> "As stated in a previous letter we apologized for the comments but we feel that a written warning or a suspension at the most would have been fair ..." Resp. Ex. 11

The terminated employees took the time to prepare two letters, within a week of their termination, outlining their opinions on the Facebook posts, and their feelings regarding why they were terminated. However, neither letter even suggests they were trying to engage in any type of protected Section 7 activities. No issues are raised about their hours, wages, policies of HUB, terms of employment, nor any other work condition which any of them thought needed to be discussed, changed or addressed in any manner.

C. HUB'S MOTIVATION WAS TO DISCIPLINE THE FIVE EMPLOYEES FOR HARASSING A COWORKER (Exceptions No. 23 and 28)

Notwithstanding General Counsel's failure to establish a prima facia case of protected concerted activity, there was also a failure to establish that HUB had knowledge of the protected nature of the alleged conduct. Motivation is an essential and requisite element of a §8(a)(1) violation. The ALJ's decision fails to recognize that "the only restriction that [the] Act places upon an employer's right to discharge employees, is that it not be because of union activity or affiliation. Meijer, Inc. v. NLRB, 463 F.3d 534, 540 (6th Cir. 2006). This proposition has been firmly established since the Supreme Court's seminal interpretation of the Act appeared in NLRB v. Jones & Laughlin Steel Corp., 301 U.S.1, 45-46 (1937), when the High Court stated:

> "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pre-text for interference with the right of discharge when that right is exercised for other reasons and such intimidation and coercion." Meijer, Inc., *supra* at 540

Moreover, "**an employer cannot be held in violation of §8(a)(1) of the Act when it discharges an employee for activity which may in fact be protected under the Act, but the employer lacks knowledge of its protected character. It is the employers knowledge of an employees protected activity and its subsequent discharge of the employee for engaging in such activity which violates the Act.**" Meijer, Inc., *supra at 541: citing* Air Surrey Corp. v. NLRB, 601 F.2d 256, 257 (6th Cir. 1979).

The ALJ ignored the motivation requirement in his decision, and never considered the burden on General Counsel to establish same to prove an unlawful labor practice. HUB established that the reason the five employees were terminated was due to the harassment of Lydia, which resulted in her being hospitalized, humiliated, and embarrassed. This record is devoid of any evidence to support a claim that the employees were engaged in any type of protected activity. Even assuming , *arguendo*, that a prima facie case was established, there was no evidence at all that the motivation for the terminations had to do with infringing on said protected activity, or that HUB had knowledge they were engaged in protected activity.

Lydia sent Mrs. Iglesias a text message on October 11th at 10:13 a.m. which stated:

> "Lourdes im in the hospital I due to the stress of mariana they think I had a stroke n want admit me." Resp. Ex. 21.

The hospitalization of Mrs. Cruz-Moore significantly impacted Mrs. Iglesias and as a result changed her perception of the complaint, and what would have to be done to address the conduct of the five terminated at-will employees. Tr. pgs. 548, 574-575.

New York Law is clear that absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired. see Smalley v. Dreyfus Corp., 10 NY3d 55, 853 NYS2d 270 (2008) Thus, either the employer or the employee generally

may terminate that at-will employment for any reason, or for no reason. Smalley, *supra at 273.*

The ALJ found the five terminated at-will employees were engaged in protected concerted activity, but never addressed the motivation requirement, nor the at-will status of their employment. The internet and social media have turned the work place into a virtual "wild west" of inappropriate, offensive and unprofessional employee conduct and behavior. However, regardless of where the comments and actions of the five terminated at-will employees took place, the result herein would have been the same. HUB maintains, as most employers, a "Zero Tolerance Policy" regarding harassment. All of the employees signed a pledge acknowledging their receipt of the Employee Handbook and Zero Tolerance Policy, awareness of both, and confirming they had read both and understood its application to their positions with HUB. see Resp. Ex's. 17, 18, 19 and 20.

The ALJ unjustly failed to consider the great pressures on HUB, as an employer, to avoid potential liability for harassment. The Board does not have authority to regulate all behavior in the work place, and the Board cannot function as an ubiquitous "personnel manager," supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer. see Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095, 1105 (D.C. Cir. 2001). It is well recognized that an employer is free to lawfully run its business as it pleases. *Id.* at 1105. **This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason**. Epilepsy Foundation, *supra at 1105;* see also NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 394 (1983).

The ALJ reaches the following incredible conclusions, in which he supplants the employer's decision to protect Lydia, with his own management evaluation:

> "It is not established in this record that Cruz-Moore had a heart attack, nor whether there was any causal relationship between whatever health problems Cruz-Moore may have

been experiencing and the Facebook posts." ALJD at pg. 6:40-42

> "In summary, Lourdes Iglesias had no rational basis for concluding that the discriminatees violated Respondent's zero tolerance or discrimination policy. For reasons not disclosed in this record, Respondent was looking for an excuse to reduce its workforce and seized upon the Facebook posts as an excuse for doing so." ALJD at pg. 10:20-23

The ALJ reaches these conclusions without any basis in the record. This hearing was about an alleged unlawful labor practice, and not a personal injury claim. The employer does not bear the burden of establishing by any standard that the harassment led to the alleged medical condition. Instead, the evaluation must focus on the employer's requirement to maintain a work place free and clear of harassment. A point wholly lost on the ALJ in his analysis of this matter, and the decision to protect the abusers, rather than the victim.

In Adtranz ABB Daimler Benz Transportation, Inc. v. NLRB, 253 F.3d 19 (D.C. Cir. 2001) the Circuit Court stated:

> "We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a work place free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law...while a single, isolated remark will rarely be sufficient to trigger employer liability, failure to maintain a work place free of such language can place an employer at significant financial risk nonetheless. Under current law, the only reliable protection is a zero tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment. Indeed, such rules are commonplace. To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22."

The ALJ reaches sweeping conclusions in his decision as a "Monday Morning Quarterback" criticizing the management decision of HUB in the "real world" work place. The underlying complaint arose because of an isolated conflict between Mariana and Lydia which was not brought to HUB's attention until after the Facebook posts. If these employees had not

harassed Lydia, they would all likely still be working for HUB. The ALJ's claim that HUB was looking for an excuse to get rid of employees is baseless, and further evidence of the ALJ stretching to justify a violation of the Act.

The Supreme Court has stated that an objectively hostile or abusive work environment is created when (1) a reasonable person would find [it] hostile or abusive, and (2) the victim subjectively perceives it as such. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). HUB, as the employer, must respect all of its employees' rights to be free from any type of harassment. The mere fact the harassment arises as part of an alleged work place dispute does not give it the overly broad protection as the ALJ attempts to assert herein. Harassment in the work place, under any circumstances, is unacceptable.

The sanctity of operating an employment at-will work place is undermined by the ALJ's findings and recommendations. HUB enforced its Zero Tolerance Policy in terminating the five employees. The at-will work place is not a court of law requiring "probable cause" or evidence "beyond a reasonable doubt" to issue discipline in response to a complaint of harassment. The "catch 22" is that if HUB ignored this harassment, it opened itself to liability from a claim by Lydia. The Act was never intended to turn the non-union workplace into a "free for all" environment for at-will employees to act as they please, as long as they mention work during the harassment.

Moreover, there is no evidence of any anti-union animus by HUB, and to the contrary, the NLRB was invited by management to speak to its employees in March of 2010 (seven months before the termination of these employees). Tr. pgs. 536-537. The finding that HUB infringed on the Section 7 rights of its employees is offensive, and contradictory to the history of this employer. The ALJ revoked HUB's subpoena duces tecum on the Speaker's Bureau of the NLRB

which would have produced evidence of the invitation from HUB to speak to its employees. Another violation of HUB's due process right to defend itself in this hearing and present relevant and material evidence in support of its defense.

The ALJ also ignored the fact that HUB maintains an open door policy for bringing work place issues to the attention of management. Tr. pgs. 500-501. This includes bi-weekly staff and management meetings, an anonymous suggestion box, and an Executive Director who welcomes all employees to bring any issues to her if needed. Tr. pgs. 500-502. The "blind eye" to this evidence by the ALJ renders his opinions incomplete, since he failed to weigh the many opportunities the employees had to address the alleged working conditions and their complete failure to do so. This fact is not determinative of the issues herein, but carries significant consideration when the totality of the circumstances are evaluated. The suggestion that HUB was motivated in the termination of these employees by the desire to restrain employee rights is wholly controverted by the history of this employer, and the evidence presented herein.

IV. CONCLUSION
(Exceptions No. 24 - 27)

The interests of the Board, the NLRA, and employers in this Country are not served by asserting jurisdiction herein. The impact by HUB, if any, is so minimal on interstate commerce, that jurisdiction should be declined.

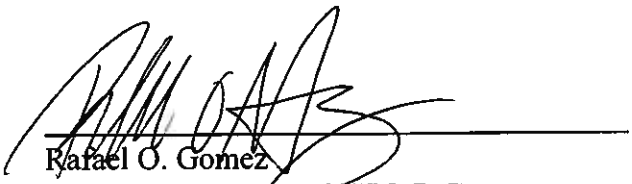
Assuming jurisdiction is asserted, then it is respectfully submitted that the ALJ's finding of protected concerted activities is not supported by the record herein. The Facebook comments posted by the five terminated employees served no purpose other than to harass and bully Lydia Cruz-Moore. HUB, as the employer, takes harassment seriously, which is what Federal and State Law obligates from employers. The Zero Tolerance Policy was known to the five terminated at will employees, yet they each individually chose to participate in the Facebook thread.

The Facebook thread started by Mariana Cole-Rivera did not have the intended purpose as found by the ALJ. There was no attempt to induce group action, nor was she addressing hours, wages, or working conditions which would render the activity protected under the Act. Each employee conceded they did not want anything to change about their jobs at HUB, and their comments were made to "defend the agency" from Mrs. Cruz-Moore. Not one witness testified to any policy, procedure, or term of employment at HUB as being the reason for their Facebook post.

Based on all the foregoing, it is respectfully submitted that the five terminated at-will employees were not engaged in protected concerted activities, and that the Charge herein should be dismissed in its entirety.

Dated: October 21, 2011
Buffalo, New York

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

HISPANICS UNITED OF BUFFALO, INC.

and Case 3-CA-27872

CARLOS ORTIZ, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Supporting Brief to Exceptions was electronically served on October 21, 2011, on the following:

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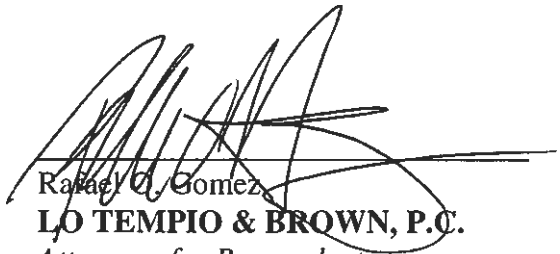

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