

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**HISPANICS UNITED OF BUFFALO, INC.**

**and**

**Case 3-CA-27872**

**CARLOS ORTIZ, AN INDIVIDUAL**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 (d)(1) of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's Decision in the above-captioned case.

**I. INTRODUCTION**

Respondent objects to several credibility, factual and legal findings made by the ALJ in the Decision and Order.<sup>1</sup> General Counsel submits that the ALJ's findings are supported by the record and by extant Board law. General Counsel respectfully requests that the Board issue an order affirming the rulings, findings and conclusions of the ALJ and adopt his Decision and Order. Inasmuch as Respondent has taken exceptions to almost every line of the ALJ's decision, a brief recitation of the facts is necessary.

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<sup>1</sup> All references herein to Administrative Law Judge's Decision will be ALJD, with the page number preceding ALJD, and the line number after ALJD. The transcript will herein be cited as (Tr. \_\_). Respondent's Exceptions will herein be cited as: (R Exc. \_\_). Respondent's Brief in Support of Exceptions will be herein cited as Respondent's Brief, p. \_\_. All references to Counsel for Acting General Counsel's and Respondent's exhibits will herein be GC Exh. \_\_, and R Exh. \_\_, respectively. All references to Administrative Law Judge Exhibits shall be ALJ Exh. \_\_.

## **II. STATEMENT OF FACTS**

Lydia Cruz-Moore served as Respondent's court advocate at the Erie County Family Justice Center ("FJC"), often securing orders of protections for domestic violence victims. She physically worked at Respondent's facility only on Wednesdays and reported the remainder of the week to the FJC. (4 ALJD 11-15; Tr. 124-125).

The ALJ correctly found that Cruz-Moore communicated frequently with co-worker Mariana Cole-Rivera, often expressing work-related criticisms to Cole-Rivera. (4 ALJD 18-21; R Exc. 3; Tr. 236-237). From July 2010 through October 2010<sup>2</sup>, Cruz-Moore, through text-messages, by telephone, and in-person, complained to coworker Cole-Rivera that clients had been expressing that they did not want to seek services from Respondent's employees.<sup>3</sup> Specifically, Cruz-Moore indicated that Respondent's housing and employment departments were not servicing clients properly and in a timely fashion. Cruz-Moore expressed to Cole-Rivera that clients preferred Cruz-Moore, instead of Respondents' other employees, to handle the client matters. (4 ALJD 18-22; Tr. 237-239, 241-242). Around the end of June or beginning of July, in a conversation by text and by telephone between Cruz-Moore and Cole-Rivera, Cruz-Moore criticized Respondent for not doing enough to save a victim of domestic violence. Cole-Rivera disagreed, explaining that Respondent appropriately secured an order of protection and educational services for the victim. (Tr. 239-240).

Likewise, the ALJ correctly found that starting in the summer, Cruz-Moore complained to some of her other coworkers about perceived deficiencies in Respondent's employees' work performance. (4 ALJD 24-32; R Exc. 4-6). In early August, Cruz-Moore criticized Ludimar

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<sup>2</sup> All dates herein, unless otherwise indicated, refer to 2010.

<sup>3</sup> Cole-Rivera testified that she and Cruz-Moore texted each other from July 2010 until her termination on October 12, 2010, on a daily basis, communicated by phone from August through October 2010, every few days, and spoke in person once a week. (Tr. 237-238; 4 ALJD 18-19; R Exc. 3).

Rodriguez for keeping a client waiting and not doing enough for that individual. (Tr. 165, 168-169, 198; R Exc. 4). In addition, in August, as well as between the end of August and the beginning of September 2010, in conversations with co-worker Carlos Ortiz, she criticized the client assistance provided by Respondent's housing department employees. (Tr. 427-428; R Exc. 6). Also, in mid to late September, Cole-Rivera informed Damicela Rodriguez that Cruz-Moore had been criticizing the work performance of Respondent's staff. (Tr. 382; R Exc. 5).

Cole-Rivera also testified about a discussion she had with Cruz-Moore regarding their comparable workload responsibilities, where Cole-Rivera, discussed how, unlike Cruz-Moore, she had to balance client walk-in services (translations, phone calls, filling out social security forms), along with her other duties. The record reflects that employees had considerable responsibilities for walk-in clients, posing additional strain on their available time. (Tr. 233-235, 244, 425). Because Cruz-Moore did not work at Respondent's facility every day, she did not have to handle walk-in clients as much as employees who worked their on a daily basis. (Tr. 293-294).

On Friday, October 8, at 1:00 a.m., Cruz-Moore sent Cole-Rivera a text message stating that she needed help because clients were complaining about not receiving adequate assistance from Respondent's employees. Cole-Rivera's response interjected staffing levels into the discussion. Specifically, Cole-Rivera sent a responding text message advising that Respondent was already short staffed and that the employees had a lot of responsibilities. (Tr. 240-245). Cruz-Moore followed up by sending Cole-Rivera, a 4:00 a.m. text message, on Friday, October 8, 2010, GC Exh. 33. GC Exh. 33 reads:

“mira mami calm down *it has nothing 2 do w dv its jobs housing* I told them w r *short staffed*, don't get ghetto on me. porque voy a buscar la belt y darlte.” (emphasis added).

Thus, as testified to by Cole-Rivera, and as shown by the text-message itself, GC Exh. 33, the discussion between Cole-Rivera and Cruz-Moore centered around criticisms of a department's job performance, and staffing levels. Specifically, Cruz-Moore clarified that her criticism of Respondent's employees, was not related to Cole-Rivera's domestic violence division, but rather to the housing and employment departments. In the message, GC Exh. 33, Cruz-Moore specifically mentions that she told clients that Respondent was short-staffed. (Tr. 241, 243-247; GC Exh. 33). Cruz-Moore also admonished Cole-Rivera, with the following figure of speech, as translated: "don't get ghetto on me, because, [in Spanish], I am going to get the belt and hit you." (GC Exh. 33; Tr. 247).<sup>4</sup>

Cruz-Moore and Cole-Rivera continued to communicate thereafter by text message, telephone, and some "private" Facebook messages (solely between Cruz-Moore and Cole-Rivera), through the morning of Saturday, October 9, which dealt with terms and conditions of employment. (Tr. 250-253; R Exh. 12). In an October 8 private Facebook message, R Exh. 12, Cole-Rivera discussed with Cruz-Moore her relative workload and assignments, including dealing with walk-in clients, compared to Cruz-Moore's responsibilities. Cole-Rivera was responding to Cruz -Moore's October 8, 5:53 am message, which also discussed both of their relative works loads, and the agency's effectiveness in obtaining orders of protection. While there are some personal discussions, as discussed *infra*, this exchange directly and primarily involves terms and conditions of employment. In her message, Cole-Rivera comments upon Cruz-Moore's criticism of Respondent's effectiveness. (R Exh. 12; Tr. 372-373).

On Saturday morning, October 9, Cruz-Moore declared by text message to

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<sup>4</sup> Respondent fails to quote the message in its entirety, in Respondent's Brief, p.22, especially the message's discussion about staffing and the reference to Lydia Cruz Moore's criticisms about work-performance. Cole-Rivera testified that she forwarded this text message on October 13 to her e-mail and that is why it was preserved; but that her phone was later damaged preventing access to the content of all of her text messages. (Tr. 246-250).

Cole-Rivera that because Cole-Rivera disagreed with Cruz-Moore's criticisms about Respondent's employees, Cruz-Moore was going to meet with Respondent's Executive Director Lourdes Iglesias on the next workday, Tuesday, October 12, to "settle" the matter. (Respondent was closed on Monday, October 11 in observance of Columbus Day.) Upon being called by Cruz-Moore, Cole-Rivera informed her to focus on something else, because it was the weekend. (R Exh. 21, p.2 ([10/11/10, 2:46 pm message])).

Cole-Rivera also responded, by text, that she did not agree with Cruz-Moore going to Lourdes Iglesias and questioned whether Cruz-Moore wanted Lourdes Iglesias to know about the matter. Cruz-Moore responded that Lourdes Iglesias already knew about her criticism of employees' work performance. This testimony was un rebutted, inasmuch as Respondent did not call Cruz-Moore to testify. Thus, the record reflects that Cruz-Moore expressed her intent to Cole-Rivera to meet with Lourdes Iglesias concerning her discussions and criticisms. (Tr. 251-253; R Exh. 21, p.2 [10/11/10, 2:46 pm]; p.3 [10/12/10, 10:23 am]; R Exc. 3, 17, 21).

The record reflects that on the morning of October 9, prior to the Facebook postings at issue, Cole-Rivera and Damicela Rodriguez discussed Cruz-Moore's criticisms and Cruz-Moore's expressed plan to speak with Executive Director Lourdes Iglesias on Tuesday, October 12. Cole-Rivera testified, as corroborated by Rodriguez, that Cole-Rivera informed Rodriguez that Cole-Rivera had been receiving constant communications from Cruz-Moore criticizing the job performance of Respondent's employees and the assistance provided to clients. In addition, as corroborated by Damicela Rodriguez, Cole-Rivera informed Damicela Rodriguez that Cruz-Moore had stated she was going to speak with Iglesias on October 12. (Tr. 253-254, 383). Rodriguez told Cole-Rivera that what Cruz-Moore was doing "was not correct." (Tr. 303).

Furthermore, as Cole-Rivera testified, and Damicela Rodriguez corroborated, Damicela Rodriguez responded that Cole-Rivera herself needed to discuss the issues relating to Cruz-Moore's criticisms with Iglesias immediately upon returning to work on Tuesday, October 12. (Tr. 254, 383). Damicela Rodriguez wanted Cole-Rivera to preemptively discuss the issues with Iglesias before Cruz-Moore had an opportunity to do so. (Tr. 404). Damicela Rodriguez testified that she explained to Cole-Rivera that Iglesias should "know exactly what was going on;" and that Cole-Rivera should discuss the text messaging, as well as Cruz-Moore's criticism of the staff. (Tr. 383, 404). Cole-Rivera testified that the conversation with Damicela Rodriguez about Cruz-Moore's criticisms crystallized the seriousness of the issue for her, as well as the decision to meet with Iglesias. (Tr. 303-304, 351-352).

Shortly thereafter, in preparation for her meeting with Iglesias, Cole-Rivera made the following posting to Facebook, at 10:14 am, on Saturday, October, 9:

"lydia cruz, a coworker feels that we dont help our clients enough at HUB i about had it! My fellow coworkers how do u feel?" (4 ALJD 40-41; GC Exh. 7; Tr. 254).

Cole-Rivera, who had recently studied surveys in a college course, initiated this Facebook posting to survey her coworkers to obtain feedback regarding Cruz-Moore's criticism of employees' job performance. (Tr. 254, 257-258, 367).

Cole-Rivera's initial October 9 Facebook posting and the responses on Facebook from her co-workers and her own responses is contained in GC Exh. 7, and 4 ALJD 37-6 ALJD 17.<sup>5</sup>

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<sup>5</sup> In addition to the five discriminatees, two other individuals participated in the Facebook posting: Nannette Dorrios, a Board Member, and admitted agent of Respondent, and Jessica Rivera. Respondent is correct that Jessica Rivera, was a former secretary for Lourdes Iglesias at the time of the Facebook posting. Both Nannette Dorrios and Jessica were friends of Cole-Rivera on Facebook. (GC Exh. 7; Tr. 26-28; Tr. 117; GC Exh. 1(i); Tr. 256-257; R Exc. 9). Cole-Rivera testified that only her friends could see her status update on her Facebook wall, because of the privacy setting, and that friends of her friends could not see the comments. (Tr. 255-256).

It is undisputed that the five discriminatees all accessed their Facebook account utilizing personal equipment, and during non-working hours. (Tr. 169, 258, 384, 410-411, 429, 569-570). The discriminatees did not criticize Respondent in the posting. (9ALJD 41; GC Exh. 7).

On the evening of Saturday, October 9, Cruz-Moore reported the Facebook conversation, via text message, to Executive Director Iglesias who said she would do something about the postings. (Tr. 124, 126, 554; R Exh. 21; 6 ALJD 22-23). In her October 9, text message, Cruz-Moore mentioned no other conduct other than the Facebook statements. (Tr. 127; R Exh. 21). Iglesias requested that Cruz-Moore supply a printed copy of the comments at issue. (R Exh. 21).

The following day, on Sunday, October 10, Cruz-Moore sent Cole-Rivera a text message stating “enough said Iglesias will take measures the board of directors, dss, erie county n fjc plus clients that were mentioned on a public platform u dug ur own grave.” (GC Exh. 34; Tr. 324-325, 362). On the same day, Sunday, October 10, Cruz-Moore had attended a community meeting with the New York State Governor, which was also attended by other employees and Board Members of Respondent. (Tr. 562). On Monday, October 11, 2010, after receiving a text at 10:13 am from Cruz-Moore that she was in the hospital, Lourdes Iglesias decided the Facebook comments “justified” the termination of the discriminatees, and that she would have to “deal with the issue.” (Tr. 549, 576, 578). On the morning of October 12, Cruz-Moore’s son brought Iglesias a printed copy of the Facebook comments, along with R Exh. 12 (October 8, 2010 Facebook exchange between Cole-Rivera and Cruz-Moore) (Tr. 132; 506, 574; GC Exh. 9, para. 4; R Exh. 12).

On the morning of October 12, at around 11:15 a.m., Cole-Rivera was called to Iglesias’ office along with her direct supervisor, Carmen Gallardo, and Respondent’s human resources manager, Magalie Lomax. Upon entering Iglesias’ office, Cole-Rivera observed that Iglesias

had a printout of the October 9 Facebook comments in front of her. Cole-Rivera stated to Iglesias “that’s exactly what [she] wanted to talk to her about.” Iglesias read her comments and another employee’s response. Iglesias then asked Cole-Rivera if she knew that Cruz-Moore had been hospitalized with a heart attack, and Cole-Rivera responded she had no such knowledge. Iglesias informed Cole-Rivera that Cruz-Moore felt humiliated and it was a type of bullying. In order to explain the context of the Facebook postings, Cole-Rivera detailed Cruz-Moore’s frequent criticisms of Respondent’s employee performance. Cole-Rivera explained that she posted her question during non-working time to determine how other employees felt about Cruz-Moore’s criticisms, which she needed to talk about with Iglesias. Cole-Rivera also explained that she was “defending the agency.” Cole-Rivera apologized that Cruz-Moore had been hospitalized. Cole-Rivera then asked if Iglesias was going to fire her for defending the agency. (Tr. 265-269, 343, 365-366). That same day, Respondent terminated the remaining discriminatees. (Tr. 172-174, 265, 387, 412, 431).

During the October 12, meetings, according to the five discriminatees, Iglesias showed them, or had in her visible possession, hardcopies or a computer screen containing the Facebook string. (Tr. 172, 266, 386-387, 413, 432). Iglesias informed all of the discriminatees that Cruz-Moore had a heart attack or a stroke, as a result of the Facebook comments. Iglesias also expressed to some of the discriminatees the possibility that Cruz-Moore could have committed suicide. The record establishes that Iglesias uttered these statements even though she had not independently verified Cruz-Moore’s medical condition or hospitalization, established any medical link between the October 9, Facebook comments and Cruz-Moore’s October 11, hospitalization, or accounted for intervening events between the October 9 Facebook comments

and hospitalization. (6 ALJD 37-38; Tr. 172, 268, 387, 389, 413, 415 432, 521-522, 533, 525, 526, 532, 558-559, 561, 564-567; R Exc. 10, 11, 23).

Furthermore, Iglesias testified that she alone made the ultimate decision to terminate the five discriminatees, and that she did so, before actually speaking with the discriminatees. (Tr. 535, 561). Respondent conducted no separate investigation into the matter, other than having received text messages and private messages from Cruz-Moore. (Tr. 143-144, 547-549, 561; R Exc. 11).<sup>6</sup>

The ALJ accurately expressed that Respondent conceded that the sole reason it terminated the five discriminatees was the October 9 Facebook postings. (8 ALJD 5-6; GC Exh. 7; GC Exh. 9, Attachment I; Tr. 127-131; 151, 155, 160, 174, 265-270, 388, 415, 433, 521-522, 525, 526, 532, 535; GC Exh. 9, para.8; GC Exh. 20).

Respondent issued letters of termination to the five discriminatees, which failed to provide any reasons for the terminations. (GC Exh. 11-15; Tr. 174, 269, 388-389, 414, 416, 433). Upon terminating the five discriminatees, Respondent replaced the discriminatees with other coworkers. Respondent's employee complement changed from 30 to 25 employees. (7 ALJD 11-14; Tr. 38-39, 542). Since December 2010, Cruz-Moore has no longer worked for Respondent. (Tr. 543).

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<sup>6</sup> Iglesias testified that she had seen the following documents by the time of the termination meetings: GC Exh. 7 or GC Exh. 9, Attachment I (October 9 Facebook posting); R Exh. 12 (10/8/10 Facebook private message exchanges between Cruz-Moore and Cole-Rivera only); the text messages she had received from Cruz-Moore from October 9, 2010 through October 12, 2010, at 10:10 am, contained in R Exh. 21, referring to the October 9 Facebook comments; and R Exh. 22 (October 11, 201, 1:37 am, private message from Cruz-Moore to Iglesias, regarding the October 9 Facebook comments). (Tr. 547-549).

### **III. ARGUMENT**

#### **A. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY TERMINATING ITS EMPLOYEES FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY. (4 ALJD – 12 ALJD; R Exc. 3-24).**

The ALJ properly concluded, based upon the record evidence and caselaw, that Respondent violated Section 8(a)(1) of the Act by terminating the five discriminatees for engaging in protected concerted activity – namely, their October 9 posts on Facebook. (9 ALJD 22-24; R Exc. 22).

The ALJ correctly found that the discriminatees engaged in concerted activity. (7 ALJD 18). The record establishes that on the morning of October 9, Damicela Rodriguez prompted her co-worker, Mariana Cole-Rivera, to plan to meet with Executive Director Lourdes Iglesias on October 12, to preempt a meeting between co-worker Cruz-Moore and Iglesias. Cruz-Moore had been conveying criticisms of employees' work performance to Cole-Rivera and other co-workers. The record establishes that Cole-Rivera initiated the October 9 Facebook discussion, to conduct a survey and appeal to her coworkers to address job performance criticism, in preparation for her planned meeting with Iglesias. The Facebook discussion constituted concerted activity.

Likewise, the ALJ correctly found that the discriminatees engaged in protected activity. (8 ALJD 10-12; 8 ALJD 19-20; 8 ALJD 24-27; 9 ALJD 18-24; R Exc. 13, 15, 16, 20, 22). The Facebook statements implicated working conditions (staffing, relative workload, and job performance issues), and were initiated in preparation for a meeting with Respondent to discuss matters related to those working conditions. Conversations, such as the Facebook communications, solely among employees, without employer involvement, and relating to terms and conditions, have been found protected by the Board. Cole-Rivera reasonably believed that

Cruz-Moore's threat to speak with the Executive Director regarding their dispute over working conditions, could lead to adverse effects. Thus, the discriminatees' posting constituted concerted activity for their "mutual aid or protection" under Section 7. The record further establishes that the discriminatees did not lose the Act's protection through their posts, which did not violate the standards established under Atlantic Steel Co., 245 NLRB 814, 816-817 (1979).

Under Section 7 of the Act, employees have the right "[...] to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection [...]" The objective test for a Section 8(a)(1) violation is whether Respondent's conduct would reasonably tend to interfere with, threaten or coerce employees in the exercise of their Section 7 rights. Alliance Steel Products, Inc., 340 NLRB 495 (2003).

In Meyers Industries, 268 NLRB 493, 497 (1984) (Meyers I) and Meyers Industries, 281 NLRB 882, 885-886 (1986) (Meyers II), the Board explained that an activity is "concerted" when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board has long recognized that a conversation between a speaker and a listener, or other circumstances, may constitute concerted activity, if the activity 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 employees." Meyers II, *supra*, at 887, citing Mushroom Transportation v. NLRB, 330 F.2d 683, 685 (3rd Cir. 1964). See Whittaker Corp., 289 NLRB 933 (1988). The object of inducing group action need not be express. Whittaker Corp., *supra*.

If an activity is deemed concerted, the Board will find a Section 8(a)(1) violation: 1) if the employer knew of the concerted nature of the employee's activity; 2) the concerted activity was protected under Section 7; and 3) the challenged adverse employment action was motivated by

the employee's protected concerted activity. Meyers I, 268 NLRB 493, 496-497 (1984); Meyers II, 281 NLRB 882, 882-885 (1986). In Meyers I and Meyers II, *supra*, the Board followed an objective test for protected concerted activity, concluding that "concerted activity" for "mutual aid or protection" were separate and indispensable elements, and both had to be established. Meyers I, *supra*, at 494-495; Meyers II, *supra*, at 885.

1. The discriminatees' posting on Facebook constituted concerted activity.

Concerted activities include " 'activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,' " so long as what is being articulated goes beyond mere griping." Holling Press, Inc., 343 NLRB 301, 302 (2004), citing Meyers II, 281 NLRB at 887; see also El Grand Combo, 284 NLRB 1115, 1117 (1987). Preliminary discussions between a speaker and a listener may be concerted activity even though they have not resulted in organized action or in positive steps toward presenting demands, if the discussions involve "talk looking toward group action." Mushroom Transportation v. NLRB, *supra*, at 685; Circle K Corp., 305 NLRB 932, 933 (1991). Thus, the Board's definition of concerted activity encompasses employee initiation of group action through the discussion of complaints with fellow employees. American Red Cross Blood Services, 322 NLRB 590, 592, 594 (1996); Martin Marietta Corp., 293 NLRB 719, 724-726 (1989).

In American Red Cross Blood Services, 322 NLRB 590, 592, 594 (1996), the Board upheld an ALJD finding that an employee's comments about benefits for part-time employees, working hours and winter travel requirements constituted concerted and protected activity. The employee complaints were made in the presence of other coworkers at an employee-only meeting. American Red Cross Blood Services, *supra*.

Also, in Martin Marietta Corp., 293 NLRB 719, 724-726 (1989), the Board upheld an ALJ finding that an employee who had posted notices in break rooms, which solicited coworkers to join in discussions with a reporter regarding workplace illness, had engaged in concerted activity.

Likewise, here, the discriminatees were engaged in concerted activity. The ALJ correctly concluded that the discriminatees' action was in fact concerted, and that through their Facebook discussion they took the first steps toward group action to defend themselves against accusations that they could reasonably believe Cruz-Moore was going to make to management. (8 ALJD 47-49; 9 ALJD 5-6; 9 ALJD 9). Hence, Respondent's contentions throughout its Brief, (pp.29-31), and in its exceptions (R Exc. 15, 17, 19), that the discriminatees engaged in mere griping; that Cole-Rivera solely pursued a selfish motive; and that Cole-Rivera and the other discriminatees were not seeking to induce or prepare for group action, should be rejected.

Cole-Rivera initiated the discussion in an appeal to her coworkers for assistance concerning criticisms regarding work performance issues, and in preparation for her meeting with Lourdes Iglesias. The Facebook string begins "my fellow coworkers how do u feel?" The thrust of Cole-Rivera's opening line sets the preliminary stage to initiate and prepare for group action. Cole-Rivera's posting did not emerge out of a vacuum. The topic of Cruz-Moore's persistent criticisms of Respondent's employees' effectiveness in providing client services, which implicated relative workload levels, had been discussed immediately beforehand that morning by Cole-Rivera with coworker, Damicela Rodriguez. Damicela Rodriguez urged Cole-Rivera to speak with Iglesias on October 12, the next work day, about Cruz-Moore's criticisms and Cruz-Moore's various text messages. (Tr. 254, 383).

As a result of the morning conversation between Rodriguez and Cole-Rivera, which also constituted concerted activity in its own right, Cole-Rivera decided to take action, by preemptively speaking with the Executive Director before Cruz-Moore availed herself of such an opportunity. (Tr. 254, 303-304, 383, 351-352, 404). The topic raised by Cole-Rivera on the Facebook string, and Cole-Rivera's intention, after talking with coworker Rodriguez, to meet with the Executive Director on October 12, was a "logical outgrowth" of that earlier October 9 discussion between Cole-Rivera and Damicela Rodriguez. See Amelio's, 301 NLRB 182, 182 n.4 (1991) (the Board found "that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group."); see also Every Woman's Place, 282 NLRB 413 (1986).

Cole Rivera drew upon a recent college course regarding surveys, and testified she sought to take a "survey" of her fellow co-workers' sentiments regarding criticisms of the agency's performance, to prepare for her intended meeting with Iglesias.<sup>7</sup> (Tr. 254, 257-258, 367).

Hence, Cole-Rivera was not engaged in mere griping – rather she had a purpose behind her Facebook posting – to collect objective feedback about criticisms regarding work performance, which potentially impacted all of the discriminatees as well as herself. Cole-Rivera was "initiating," and "preparing" through her survey on Facebook, for the concerted action of speaking to Lourdes Iglesias on October 12, which had been urged by Damicela

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<sup>7</sup> Respondent's contention in its Brief, p.36, that Cole-Rivera manufactured her testimony to reflect that she had been conducting a "survey," only after providing an affidavit with Region Three (and thereby implying that Region Three influenced her testimony), does not even acknowledge Cole-Rivera's un rebutted testimony that she conducted a survey because of a recent college course taken before October 9, 2010. Just because Cole-Rivera did not use the word "survey" in describing GC Exh. 7 in her extremely concise preliminary correspondence with the Region, or in her conversations with fellow discriminatees, does not change her genuine characterization of her initial solicitation as a survey. Cole-Rivera informed Iglesias during her termination meeting that she posted her comment to find out how everyone else felt, which essentially was a survey. (Tr. 267).

Rodriguez. In short, Cole-Rivera sought the group activity of forging a defensive bulwark against Cruz-Moore's criticisms relative to work performance and work load, in preparation for her intended Tuesday morning meeting. (Tr. 154, 257-258). Meyers I, supra, at 496-497; Circle K Corp., 305 NLRB 932, 933-934, and 933 n.9 (1991).

Cole-Rivera's coworkers, who responded to Cole-Rivera's appeal, by strenuously defending their personal and the agency's overall job performance, while also discussing relative workload, engaged in concerted activities. (Tr. 173, 198-200; 394-395). Express Messenger Systems, Inc., 301 NLRB 651, 655 (1991) (each discussant is protected when engaged in discussing subjects affecting employment); Meyers I, supra, at 497; Myers II, supra, at 886, and 887 (inception of concerted activities involves a speaker and listener).

The ALJ properly found that Respondent in effect impeded any further group action through its terminations. (9 ALJD 6-7; R Exc.18). Respondent's October 12 termination of the discriminatees "nipped" Cole-Rivera's intentions to meet with Iglesias about criticisms regarding work performance issues. These preliminary discussions could have potentially led to further concrete steps taken as a group regarding these concerns. Circle K Corp., *supra*, at 933; El Grand Combo, 284 NLRB 1115, 1117 (1987); Mushroom Transportation v. NLRB, 330 F.2d 683, 685 (3rd Cir. 1964). Both the initial solicitation and the resulting conversation among coworkers in the Facebook posting, akin to the breakroom posting in Martin Marietta Corp., 293 NLRB 719, 724-726 (1989), or akin to discussions during an employee-only conducted meeting in American Red Cross Blood Services, 322 NLRB 590, 592, 594 (1996), implicated job performance, relative workloads, and staffing level issues. Therefore, the discriminatees engaged in concerted activity through these postings.

The ALJ correctly rejected Respondent's claim (which resurfaces in its Brief, pp. 17,

25-28, 36), and in its exception, R Exc. 3, that Cruz-Moore had never actually criticized Respondent's employees' work performance or assistance provided to clients, as expressed in Cole-Rivera's initial comment on the October 9 Facebook string. (4 ALJD note 4). Through this argument, Respondent is attempting to undermine the concerted nature of the conduct, by claiming that Cole-Rivera lied about Cruz-Moore's established criticisms. The record, based upon Cole-Rivera's testimony, which was also corroborated by three other discriminatees, and appropriately credited by the ALJ, clearly establishes that Cruz-Moore expressed her criticisms about employees' work performance to employees Cole-Rivera, Ludimar Rodriguez, Damicela Rodriguez and Ortiz. (4 ALJD note 4; Tr. 165, 168-169, 198, 237-242, 382, 427-428; 4 ALJD 18-33; R Exc. 3-6). The ALJ noted that Respondent failed to call Cruz-Moore to testify at the hearing. (4 ALJD note 4). An adverse inference should be drawn from Respondent's failure to call Cruz-Moore to testify concerning any factual question about which Cruz-Moore would likely have possessed knowledge (such as what she told Cole-Rivera). Douglas Aircraft Co., 308 NLRB 1217 (1992).

By the same token, the ALJ correctly found that the discriminatees reasonably believed that Cruz-Moore might raise her concerns about work performance with management. (9 ALJD 5-6; 9 ALJD 21-22; R Exc. 17, 21). Contrary to Respondent's contention in its Brief, (pp. 20, 28) and exceptions (R Exc. 3, 17, 21), the record reflects that the ALJ correctly found that Cruz-Moore had expressly stated to Cole-Rivera, that she was going to raise her criticisms concerning job performance issues with Iglesias on Tuesday, October 12. (4 ALJD 21-22; R Exc. 3). It was in response to this declaration by Cruz-Moore, that both Damicela Rodriguez and Cole-Rivera concertedly decided that Cole-Rivera should pre-emptively speak with Iglesias as well. Cole-

Rivera's testimony, as corroborated by Damicela Rodriguez, supports these findings.<sup>8</sup> (Tr. 250-254, 303, 383; 4 ALJD 21-22; R Exc. 3, 17, 21).

Additionally, Respondent's own exhibit, R Exh. 21, pp.2-3, contains text messages purportedly from Cole-Rivera to Cruz-Moore {which Cruz-Moore forwarded to Iglesias on October 11, at 2:46 p.m., and forwarded on October 12 at 10:23 a.m.}. Both of these text messages corroborate Cruz-Moore's intentions to meet with Lourdes Iglesias. (R Exh. 21, p.2 [10/11/10, 2:46 p.m.]; R Exh. 21, p.3 [10/12/10, 10:23 a.m.]). The message from Cole-Rivera to Cruz-Moore, which Cruz-Moore forwarded on October 11, 2010, corroborates Cole-Rivera's testimony that Cruz-Moore had stated that clients prefer Cruz-Moore's assistance over other employees, and that clients believe that "we don't help them," referring to the agency. The message also corroborates that Cruz-Moore was threatening to go to speak to Iglesias about work issues. The text reflects that Cole-Rivera urged Cruz-Moore to speak with supervisor Carmen Gallardo first.<sup>9</sup> (R Exh. 21, p.2, 2:46 p.m.). Likewise, the text message forwarded from Cruz-Moore to Lourdes Iglesias, 10/12/10, 10:23 a.m., which apparently was from Cole-Rivera to Cruz-Moore also corroborates Cruz-Moore's expressed intentions to speak with Iglesias, as well as Cruz-Moore's criticisms of employees' work performance:

"are u sure u want Lourdes to know haw u speak about hub [Respondent].... 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 [...]" (R Exh. 21, p.3; Tr. 510-11). (misspellings kept).

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<sup>8</sup> Moreover, it should be noted that in arguing in its Brief, p.17, that Cole-Rivera's October 9 posting sought to prevent Cruz-Moore from reporting on Cole-Rivera's prior conduct to management, Respondent implicitly admits that Cruz-Moore actually planned to go to management. Cruz-Moore did not testify, and there is no evidence in the record to support the pure speculation argued in Respondent's Brief, p.20, about what Cruz-Moore was actually going to discuss with Iglesias. The record evidence establishes what Cruz-Moore told Cole-Rivera about her intentions. (Tr. 250-254, 303, 383).

<sup>9</sup> The message states the following (emphasis added):

"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." (R Exh. 21, p.2) (emphasis added; misspellings kept).

Hence, the ALJ appropriately found that Cruz-Moore was “going to raise these concerns” (referring to work-performance criticism) with Iglesias. (4 ALJD 21-22).<sup>10</sup>

The ALJ correctly noted that the lack of express discussion in the Facebook communication regarding further action did not impact his analysis. (9 ALJD 15-16). Contrary to Respondent’s contention in its brief, p. 29, it does not matter that Cole-Rivera did not explicitly mention her planned October 12 meeting with Lourdes Iglesias through her Facebook comments. (R Exc. 17; R Exc. 19). As already mentioned, the object of inducing group action need not be express. Whittaker Corp., 289 NLRB 933, 933-934 (1988) (employee engaged in protected concerted activity when he spontaneously protested employer’s announcement at a meeting that it was withholding anticipated wage increase; employee engaged in initial call for group action); see also Timekeeping Systems, Inc., 323 NLRB 244, 247-248 (1997) (single employee e-mailed co-workers comments critical of a new vacation policy and the conduct was found to be protected concerted activity).

By the same token, Respondent in its Brief, (pp.38-42), and in its exception, R Exc. 8, argues that because Cole-Rivera did not attempt to meet with Iglesias on the morning of October 12, that there was no genuine plan for action. Through this argument, Respondent seeks to eviscerate the concerted nature of the October 9 Facebook comments, and paint a broad stroke so

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<sup>10</sup> Respondent points to one sentence out of Cole-Rivera’s entire affidavit, which Respondent notably failed to ask her about at trial, and completely mischaracterizes it, to manufacture the argument that Cole-Rivera was not intending to take group action or did not know the nature of her disagreement with Cruz-Moore that Cruz-Moore planned to raise with Iglesias. In paragraph 4 of her affidavit, Cole-Rivera describes that in response to Cruz-Moore texting that Iglesias needed to “settle their differences,” Cole-Rivera stated in her affidavit that she did not “understand what differences need to be settled.” (GC Exh. 35, para.4). The very next sentence in her affidavit, not commented upon by Respondent, in its Brief, p.24, states “I simply stated that I did not agree with her.” In other words, it is clear that Cole-Rivera is not saying she does not actually “comprehend,” or somehow can not mentally grasp that they are in disagreement or what the disagreement is about, as Respondent flippantly implies; rather, she is saying that she did not understand why Cruz-Moore had to bring the issues to Iglesias and that they should be able to work it out on their own. This is completely consistent with her testimony and the record, R Exh. 21 [messages forwarded 10/11/10, 2:46 pm; 10/12/10, 10:23 am], establishing that Cole-Rivera tried to dissuade Cruz-Moore from speaking with Iglesias, before she had discussed the matter that morning with Damicela Rodriguez. (Tr. 251).

that Cole-Rivera's testimony in all respects should be disregarded. Respondent goes so far as to claim that Cole-Rivera fabricated testimony to justify the Facebook posts and that she never had any intention to meet with Iglesias.

While Counsel for General Counsel respectfully disagrees with the ALJ's finding that Cole-Rivera did not attempt to speak with Iglesias the morning of October 12,<sup>11</sup> this finding does not reflect adversely on all of her testimony. Credibility findings need not be all-or-nothing propositions -- indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. Daikichi Sushi, 335 NLRB 622, 623 (2001). The ALJ otherwise found, based upon record evidence, that Cole-Rivera was credible on other points, including Cruz-Moore criticizing employees' job performance, and that Cruz-Moore informed Cole-Rivera that she intended to raise concerns with Iglesias. (4 ALJD note 4; 4 ALJD 21-22). These credibility resolutions should be afforded deference. Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

The ALJ appropriately concluded that even discrediting Cole-Rivera's testimony on this one point, did not materially affect the outcome of the case, and the overall legal conclusion that the discriminatees engaged in concerted and protected activity. (6 ALJD 5; R Exc. 8). Legally, whether Cole-Rivera actually spoke with Iglesias the morning of October 12, is of no moment, in analyzing whether the October 9 Facebook comments were concerted. As already mentioned, the meeting does not need to come to fruition for the preparation to be considered "concerted." Circle K Corp., 305 NLRB 932, 933-934 (1991). See also Whittaker Corp., 289 NLRB 933, 934

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<sup>11</sup> It is respectfully submitted that the ALJ improperly failed to properly credit Cole-Rivera regarding her attempt to speak with Iglesias the morning of October 12, based upon Ortiz's testimony on cross-examination. (6 ALJD note 5; Tr. 265, 339; 436-437). However, Counsel for General Counsel is not filing a cross-exception over this finding. Cole-Rivera testified, consistently with her affidavit, that she saw Lourdes Iglesias going up the stairs and followed her and said she needed to talk with her. Cole-Rivera testified that she arrived at the facility at 8:30 and saw Lourdes Iglesias at around 8:45 am. (Tr. 265; 328, 331-335, 339; GC Exh. 35, para. 20).

(1988) (“an employee does not have to engage in further concerted activity to ensure that his initial call for group action retains its concertedness.”).

The record also clearly establishes that Cole-Rivera on many occasions expressed to other co-workers, her intentions to meet with Iglesias on October 12. As already discussed, at least one other discriminatee, Damicela Rodriguez, had intimate knowledge of Cole-Rivera’s plans to meet with Lourdes Iglesias on Tuesday, October 12. (Tr. 265, 339). Likewise, in unrebutted testimony, Cole-Rivera testified, during the evening of October 9, she informed employee Andrea Padilla, in the presence of admitted agent and Business Manager/Human Resources Magalie Lomax and other employees, about her intention to speak with Lourdes Iglesias on October 12, about the Facebook posting. (Tr. 316-317). Notably, Respondent did not call its agent Lomax, nor employee Padilla, to rebut this testimony. In addition, the record reflects that in her termination meeting, Damicela Rodriguez testified that she informed Iglesias that she (D. Rodriguez) had previously told Cole-Rivera to meet with Iglesias that morning to inform Iglesias about what had been occurring. (Tr. 387).

It is undisputed that Respondent was aware of the concerted activity, the October 9 Facebook posting, at the time the employees were terminated, and that the five discriminatees were, in fact, terminated for the Facebook comments, the concerted activity at issue. Meyers I, *supra*, at 497. (Tr. 172, 266, 386-387, 413, 432; GC Exh. 9, para. 4). Moreover, the ALJ correctly found that Respondent’s treatment of all five discriminatees as a group for the same offense supports an inference the employer believed the employees engaged in concerted activity. Mike Yurosek & Son, Inc., 306 NLRB 1037, 1039 (1992); Whittaker Corp., 289 NLRB 933 (1988). (9 ALJD 7-10).

2. The discriminatees were engaged in protected activity.

Concerted activity is protected if it is for “mutual aid or protection.” In Meyers II, the Board discussed the meaning of the “mutual aid or protection clause,” stating that the Supreme Court regarded “proof that an employee action inures to the benefit of all” is “proof that the action comes within the ‘mutual aid or protection clause’” of Section 7. Meyers II, 281 NLRB 882, 887 (1986). In order to be protected, activity must involve terms and conditions of employment, and must involve a collective goal. Eastex, Inc., v. NLRB, 437 U.S. 556, 563-568 (1978); Waters of Orchard Park, 341 NLRB 642, 643-644 (2004); Meyers II, *supra*.

The Board has found employee statements relating to employee workload and staffing issues to be protected, where it is clear from the context of the statements that they implicate working conditions. For example, in Brockton Hospital, 333 NLRB 1367, 1367 and n.5, 1374-75 (2001), the Board found that the distribution of articles to nursing employees addressing the use of non-professional staff, and the adverse impact of staff downsizing and restructuring on patients, was protected, because the subject matter concerned terms and conditions of employment.

Also, in Misericordia Hospital Medical Center, 246 NLRB 351, 356 (1979), the Board adopted an ALJ’s decision finding that preparation of a report of serious deficiencies in the quality of care was related to staffing levels and the number of patients requiring care at a hospital. The ALJ found that since staffing levels and the number of patients assigned to staff, were matters “intimately related” to working conditions, the report was protected. Misericordia, *supra*.

The ALJ, in the instant case, correctly concluded that the Facebook communications were protected. (8 ALJD 10-12; R Exc. 13). As in Misericordia, *supra*, and Brockton Hospital, *supra*,

just as discussions surrounding staffing levels and assignments of patients are protected, discussions regarding relative workloads to assist clients are protected as well. Hence, the October 9 Facebook chain implicated working conditions and involved a shared perceived threat to the discriminatees' employment, thereby rendering it protected.

First, an examination of the Facebook posting reveals that it implicated terms and conditions of employment. Cole-Rivera's initial solicitation regarding Cruz-Moore's criticism of work performance, elicited highly emotional responses from her coworkers relating to their working conditions, i.e., their relative workload, as follows: (D. Rodriquez: Try doing my job, I have five programs; L. Rodriquez: we don't have a life as it is; Campos: ...c if I don't do enough; Cole-Rivera: it is difficult for someone that is not at HUB 24-7 to really grasp and understand what we do ...). Ortiz' comments regarding clients describe how much work the employees actually perform, and that they spend a tremendous amount of work time assisting clients with daily living. Cole-Rivera also commented about clients' requests for services from HUB. The discriminatees expressed their frustration with their working levels and responsibilities, which is clearly related to their terms and conditions of employment. (GC Exh. 7, 9, Attachment I).

As in Misericordia Hospital Medical Center, 246 NLRB 351, 356 (1979), the Facebook comments were "intimately related" to working conditions. In order to fully understand the October 9 Facebook comments, it must be put in context of an ongoing employee dialogue regarding working conditions. The record reflects that Cole-Rivera's October 9 solicitation of comments from her coworkers and the discriminatees' responses occurred in the context of prior discussions regarding work-related topics between Cruz-Moore and Cole-Rivera (4 ALJD 18-22; R Exc. 3):

- clients' criticism of work-performance deficiencies (Tr. 237-245);
- clients' preference for Cruz-Moore's assistance over other employees (Tr. 237-238, 241);
- policy discussions regarding utilization of orders or protection (Tr. 239-240);
- comparable workload responsibilities, in light of community walk-in service obligations (Tr. 233-235, 244, 293-294, 425);
- impact of staffing and workload upon employees' abilities to assist clients (Tr. 240-245).

The Facebook comments also occurred in the context of prior complaints from Cruz-Moore to other discriminatees regarding perceived deficiencies in employees' work-performance. (4 ALJD 24-32; Tr. 165, 168-169, 198, 382, 427-428; R Exc. 4-6). Specifically, Cruz-Moore had been criticizing the work performance of Respondent's housing department, in particular, and in general, that of Respondent's employees. Prior to October 9, Cruz-Moore's shared her criticisms directly with discriminatees Ludimar Rodriguez and Carlos Ortiz. In addition, in September, Damicela Rodriguez had been apprised, by Cole-Rivera, for the first time, of Cruz-Moore's criticisms. (Tr. 165, 128-169, 199, 382, 427-428). Ludimar Rodriguez and Damicela Rodriguez, (and Yaritza Campos previously) worked in the Housing Department, which had been specifically targeted for criticism by Cruz-Moore. (Tr. 39-45, 165-166, 168-169, 198, 378, 382, 408, 427-428; 4 ALJD 24-32).

The October 9 Facebook comments emerge out of a context of prior text messages and private Facebook communications between Cruz-Moore and Cole-Rivera that implicated terms and conditions of employment. Contrary to Respondent's mischaracterizations, an October 8 text message, GC Exh. 33, and an October 8 private Facebook message exchange, R Exh. 12, reflected the ongoing and pre-existing dialogue among co-workers regarding working conditions. In the October 8 text message, GC Exh. 33, (as discussed *supra*, in the Facts section), Cruz-Moore states, "mira mami calm down it has nothing 2 do w dv *its jobs housing I told them w r short staffed ...*" [emphasis added]).

Contrary to Respondent's contentions, (Respondent's Brief, p. 22), this message, which was sent at 4:00 a.m. by Cruz-Moore, in response to a 1:00 am text message, and a subsequent text message exchanged between Cruz-Moore and Cole-Rivera regarding clients' complaints and staffing levels, implicates working conditions. (Tr. 240-243, 245). In the message, Cruz-Moore linked staffing levels with her comments regarding employees' ability to assist clients, and relative job performance in particular departments, such as the housing department. Respondent, in its brief, (p. 22), only quotes from the end of the message, which is clearly a figure of speech being used by Cruz-Moore, not an actual threat of physical harm, as argued by Respondent: "don't get ghetto on me, because, [in Spanish], I am going to get the belt and hit you." (GC Exh. 33; Tr. 241, 243-247; Respondent's Brief, p.22).

Moreover, Respondent's Exh. 12, the October 8 private message between Cruz-Moore and Cole-Rivera implicates terms and conditions of employment. Specifically, the text of the messages reveals the impact of relative workload (such as community service walk ins) and staffing upon employees' effectiveness in assisting clients, and overall job performance. (R Exh. 12; Tr. 372-372). Contrary to Respondent's assertions, (Respondent's Brief, pp.6-7), although there are some personal jibes mentioned by both parties, R Exh. 12 reflects an exchange primarily focused upon work-place issues. Cole-Rivera's Facebook message to Cruz-Moore, on October 8, addresses Cruz-Moore's criticism and clients' criticisms of the effectiveness of Respondent's other employees. Cole-Rivera reacts to Cruz-Moore's claim that she does a better job than the employees who work primarily at Respondent's facility. Cole-Rivera complains that she also has to assist walk in clients through community service, which impacts her effectiveness. Cole-Rivera's message states, in part:

“... i sd that u guys get do yor job for 8 hours we at [Respondent] don’t we have to do community service which is why you and norma are more effective than we at 254 virginia [Respondent’s facility]....” (R Exh. 12)

Cole-Rivera’s message further states:

“ 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.” (R Exh. 12)

Cruz-Moore in her preceding private message to Cole-Rivera at 5:53 a.m., on October 8, discussed the work she performs as Respondent’s family court advocate, implicating terms and conditions of employment. Cruz-Moore specifically addressed a prior debate she had with Cole-Rivera regarding Respondent’s employees obtaining Family Court orders of protections for clients, telling Cole-Rivera to contact another individual if clients don’t get an order of protection.<sup>12</sup>

Cole-Rivera testified that R Exh. 12 was a continuation of discussions from in or about June through October, between Cole-Rivera and Cruz-Moore, regarding clients obtaining orders of protection from Family Court. (Tr. 372-373). Cruz-Moore also refers to criticism of the performance of Respondent’s employees in her private Facebook message. Cruz-Moore, discussing relative workloads, stated in her message:

“Carmen told me Im suppose to fax over everything to DV [domestic violence department] and be available for court. I was *faxing referrals to housing and other septs cuz I know you guys work ur asses off*. Carmen told me no she wants everything to go to DV. *That I was doing too much going beyond what Im suppose to do..You think I do nothing come to my office and I will show you all the freaking clents I have taken since May and all I have done with them*. So pleasem do not give me no more grief ...” (emphasis added; misspellings kept; definition of term inserted).

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<sup>12</sup> Cruz-Moore, in her October 8, 5:53 a.m. message, states “But FYI I do not have a luxury job. [...]” and proceeds to describe assistance she provides to clients and job duties: “[...] Im helping clients find appts, housing, make appts for them for counseling, translate letters, call lawyers, and so much more .. That is why she is giving codes to those names of people I see more than 3 times. [...]” Cruz-Moore discusses that Cole-Rivera could have applied for a job at the FJC. Cruz-Moore also discusses the utilization of orders of protections to assist clients: “When clients dont get OP [order of protection] u ask me why. They don’t need a FC [Family Court] OP if they r getting a criminal OP. It just makes their life miserable going to two courts n then who goes with them me. OP does not mean they r safe. From now if they don’t get an OP at FJC call Christina directly not me. I don’t run the FJC or work for them. As for HUB Im sick n tired of people talking bad about the place I work for. [...]” In the next paragraph, Cruz-Moore discusses assignments from her supervisor Carmen Gallardo, faxing referrals, how hard Cole-Rivera’s department works, and her own relative workload.

Thus, the ALJD correctly found that issues between Cole-Rivera and Cruz-Moore implicated working conditions. (6 ALJD 25-26). These issues provided the overall background and context to the October 9 Facebook comments.

Respondent contends that the purpose and effectuation of the Facebook communication at issue, emerged solely from a context of personal antipathy between Cole-Rivera and Cruz-Moore, rather than a discussion about working conditions, and thus was simply a conspiracy to ridicule and humiliate Cruz-Moore. (Respondent's Brief, pp. 6, 12-13, 20-24).

Contrary to Respondent's contentions, the context of the Facebook posting did not center around a personal dispute or animosity between Cruz-Moore and Cole-Rivera. Rather, as discussed, it involved pre-existing disagreements and employee dialogue regarding the perceived deficiencies in employees' work performance, effectiveness assisting clients, and relative workload. (R Exh. 21, p.3, [10:23 am forwarded message; see note 6, *supra*]; R Exh. 12; Tr. 241, 237, 243-245, 247, 293, 372-373). These issues had no relation whatsoever to an alleged deterioration of a personal relationship between Cruz-Moore and Cole-Rivera.

In fact, Cole-Rivera testified that she had never stopped being Cruz-Moore's friend. (Tr. 294, 304). Cole-Rivera invited Cruz-Moore to Magalie Lomax's house, for a party, in the Facebook postings at issue, and thereafter texted her Lomax's phone number. (Tr. 363; GC Exh. 7). The ALJ correctly found that it was not clear why Cruz-Moore would have held any animosity toward the other discriminatees, most of whom did not even mention her name in the Facebook posts. (6 ALJD 26-27; R Exc. 7). Even Iglesias' accounts of the termination meetings, reflect that the other discriminatees had no history of problems with Cruz-Moore. (Tr. 524 [L. Rodriguez said "she never had a problem" with Cruz-Moore]; Tr. 528 D. Rodriguez [nothing against Cruz-Moore]). Contrary to Respondent's contentions, the discriminatees even

expressed sympathy, as fellow human beings, toward Cruz-Moore's alleged hospitalization. (Tr. 268, 361). Overall, the issues in the October 9 Facebook posting related to terms and conditions of employment that had been previously expressed by Cruz-Moore to other coworkers (Carlos Ortiz, Ludimar Rodriguez), and thus the issues were broader than any particular personal dispute. (Tr. 165, 168-169, 199, 427-428).

Second, throughout the decision, the ALJ appropriately found that the discriminatees had a protected right to discuss matters affecting their employment among themselves. Specifically, the ALJ correctly found that the discriminatees' Facebook communications with each other, in reaction to a co-workers' criticism of job-performance, were protected. (R Exc. 13, 16, 20, 22, 23; 8 ALJD 10-12; 8 ALJD 19-20; 9 ALJD 18-20; 9 ALJD 39-41).

The ALJ appropriately concluded, based upon the record evidence and caselaw, that the protected nature of the discriminatees' conduct did not depend upon whether the discriminatees were attempting to change any working conditions. (8 ALJD 13-44; 9 ALJD 16; R Exc. 14, 16, 19; Respondent's Brief, pp. 25, 31-35; R Exc. 14-16).

The Board often finds that communications among employees constitutes protected concerted activity without employees seeking to change terms and conditions of employment. In Aroostook County Regional Ophthalmology Center, 317 NLRB 218, 220 (1995), the Board held that employee complaints to each other regarding schedule changes constituted protected activity. The ALJ properly analogized the activity in Aroostook, *supra*, with employees discussing complaints about work performance, and relative workloads. (8 ALJD 15-20; R Exc. 15). The ALJ also properly referenced Parexel International, LLC, 356 NLRB No. 82 (2011), slip op. at 4, n.8, for the proposition that employees' discussions of possible discrimination in the setting of terms and conditions of employment are protected and concerted. (8 ALJD 22-24; R

Exc. 16). Moreover, the ALJ properly relied upon Automatic Screw Products Co., 306 NLRB 1072 (1992) and Triana Industries, 245 NLRB 1072 (1979), for the proposition that employers violated Section 8(a)(1) by promulgating a rule prohibiting employees from discussing their wages. (8 ALJD 37-44; R Exc. 16). See also Arostock, *supra*, at 219 (rule prohibiting grievance discussions near patients violates Section 8(a)(1)). The ALJ expresses the axiom discussed in Automatic Screw, *supra*, that an employer violates 8(a)(1) by disciplining employees for exercising the right to discuss wages or other terms and conditions of employment. Automatic Screw, *supra* at 1072 (“It is axiomatic that it is an unfair labor practice to discipline an employee for breaking a rule that itself is unlawful ...”) (8 ALJD 40-44).

In Jhirmack Enterprises, 383 NLRB 609 (1987), an employee was not seeking to change terms and conditions of employment, but merely to safeguard another employee’s job, and protect employees’ ability to obtain production awards. Jhirmack Enterprises, 283 NLRB 609, 612, 615 (1987). The ALJ appropriately relied upon Jhirmack Enterprises, where the Board found that an employee was unlawfully terminated for advising a coworker that employees had discussed the coworker’s slow job performance which was impacting all of the employees’ ability to reach production awards, and which increased the possibility of overtime work. Jhirmack, *supra*, at 609 n. 2, 612-615. (8 ALJD 29; R Exc. 16). The conversation was an attempt to protect the coworker’s job, and to encourage him to obtain a better work performance. Jhirmack, *supra*, at 614 n.9, 615. The Board found that the employee engaged in concerted activity for “mutual aid and protection,” by engaging in concerted activity in aid of a fellow employee. *Id.*, at 609, 612-615.

Furthermore, the ALJ appropriately relied upon Akal Security, Inc., 354 NLRB No. 11, slip op. at 5-6 (2009), where the Board found a meeting between employees to discuss concerns

about the work performance of another employee was protected by the Act. (8 ALJD 30-35; R Exc. 16). See also Tracer Protection Services, Inc., 328 NLRB 734, 741 (1999) (the Board approved an administrative law judge's decision holding "that a communication from one employee to another in an attempt to protect the latter's employment constitutes protected concerted activity.").

As in Jhirmack, *supra*, and Akal Security, *supra*, the employee-only discussion of criticism of other employees' work performance constituted protected and concerted activity.<sup>13</sup> The ALJ correctly found that the discriminatees were seeking to defend themselves against the accusations that at least some of them (Mariana Cole-Rivera and Damicela Rodriguez) could reasonably believe Cruz-Moore was going to make to management. (8 ALJD 48; 9 ALJD 5-6; 9 ALJD 21-22; R Exc. 17; R Exc. 21). The ALJ properly noted that concerted activity for employees' mutual aid and protection that is motivated by a desire to maintain the status quo may be protected by the Act to the same extent as activity seeking changes in wages, hours or working conditions. Five Star Transportation, Inc., 349 NLRB 42, 47 (2007). (8 ALJD 24-27; R Exc. 16). Cole-Rivera and Damicela Rodriguez had reason to believe that Cruz-Moore's threat that she would go to Executive Director Iglesias to "settle" their differences would result in, at a minimum, a discussion with management about employees' responsibilities and performance, and could result in the discipline of coworkers. The other discriminatees similarly had mutual concern regarding Cruz-Moore's criticisms of their work performance, and the need to defend

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<sup>13</sup> Board law recognizes that an employer's discipline or discharge of an employee "discussing with other employees subjects affecting employment interferes with, restrains, and coerces each discussant in the exercise of his or her right to engage in concerted activity for mutual aid or benefit." Cadbury Beverages, Inc., 324 NLRB 1213, 1220 (1997) (employee engaged in concerted act with another employee for purpose of mutual aid or protection, by warning coworker about matter affecting her employment); see also Express Messenger Systems, 301 NLRB 651, 655 (1991) (employees' remarks to coworker seeking to induce her to remain on job to secure benefits constituted protected concerted activity); see Scientific Atlanta, 278 NLRB 622, 624-626 (1986) (conversations discussing wage rates are concerted and protected activity).

themselves against such criticism.

In NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975), the Supreme Court reiterated its recognition that a single employee's appeal for help from other employees implicates "mutual aid or protection," "even though the employee alone may have an immediate stake in the outcome" where the employee "seeks 'aid or protection' against a perceived threat to his employment security."<sup>14</sup> Contrary to Respondent's contentions in its Brief, p.35 and in R Exc. 16, the ALJ correctly relied upon Five Star Transportation, Inc., 349 NLRB 42, 47 (2007), for the proposition that the employees had a right to defend their current terms and conditions (as long as they did not otherwise lose the protection of the Act. (8 ALJD 24-27). In Five Star Transportation, the Board held that the employer violated Section 8(a)(1) by refusing to consider for hire and hire six drivers who expressed a common desire to retain negotiated terms and conditions, and who did not significantly disparage the employer. The Board held that their conduct was protected. Id. at 46-47.

Thus, the discriminatees' discussion herein, relating to defending their job performance, constituted concerted activity that was protected by the Act. The record reflects that all of the discriminatees testified that they were defending their jobs from criticism.<sup>15</sup> (Tr. 173, 198-200, 268, 341-342, 366, 394-395, 429, 432, 436; Respondent's brief, p.25). Hence, there was a shared perceived threat by the discriminatees regarding Cruz-Moore's criticisms of work performance,

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<sup>14</sup> See also Circle K Corp., 305 NLRB 932, 933-934, 933-934 n. 9 (1991) (the Board noted that even if the employee's objective was in part, to insulate herself from discipline, the evidence still supported that she engaged in concerted action).

<sup>15</sup> Cole-Rivera testified that she was defending the agency with her comments. (Tr. 268, 341-342, 366). Ludimar Rodriguez testified that she made her comment on Facebook because she was "defending [her] job" from a co-worker's criticism that she was not doing enough to assist clients, and informed Iglesias during her termination meeting that she was "defending [her] job." (Tr. 173, 198-200). Likewise, Damicela Rodriguez testified that she posted her comment because she was "defending [her] job" and to express that the agency is effective. (Tr. 394-395). In addition, Carlos Ortiz testified that he posted his comments with the aim to defend his job and explain that he was doing all he could do for his clients. (Tr. 429, 431, 436). Finally, Yaritza Campos testified that she posted her comments to show that Respondent's employees work very hard performing their job duties. (Tr. 419).

and the need to “defend” their jobs. As such, their comments, which directly related to terms and conditions (relative work load, work performance), were protected. (Tr. 173, 198-200, 394-395, 419, 429, 431, 436). NLRB v. Weingarten, *supra*; Five Star Transportation, *supra*.

Although the discriminatees testified on cross-examination that they were not seeking to change terms and conditions, it does not impact whether the appeal made to them, and their responses, constituted concerted activity for mutual aid or protection. See Jhirmack, *supra*, at 609, 612-615. The comments are protected, as discussed above, because they involved terms and conditions of employment, and sought to diffuse criticism by a co-worker of their work performance. Listeners or other parties in a communication do not have to seek a particular change to working conditions, for the activity to be deemed concerted. Nor do listeners have to accept an individual’s invitation to engage in concerted activities. Whittaker Corp., 289 NLRB 933, 934 (1988); See El Gran Combo, 284 NLRB 1115, 1117 (1984) (“[Employees’] inability to sway their coworkers does not change the concerted nature of their activity ...”). Moreover, the Facebook string speaks for itself as an unfiltered gauge of the employees’ sentiments about their workload and their desire to defend their work performance from criticism.<sup>16</sup>

In addition, the ALJ properly concluded that the determination of whether the Facebook comments are protected does not depend upon whether the discriminatees could have otherwise brought their concerns to management. (8 ALJD 14-15; 9 ALJD 13-15; R Exh. 14, 19). As found by the ALJD and discussed in Respondent’s Brief (p.46), Respondent concedes that regardless where the communication took place, the result would have been the same. (8 ALJD

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<sup>16</sup> Prior to the Facebook posting, Cole-Rivera, on various occasions, expressed to Cruz-Moore, her concern about the amount of community services she had to provide for walk-in clients on top of her regular responsibilities, as well as being short-staffed. (Tr. 233-235, 241, 244, 293-294; R Exh. 12). Cruz-Moore herself acknowledged that some departments were short-staffed. (Tr. 241, GC Exh. 33). All of the discriminatees testified about their considerable job responsibilities. Carlos Ortiz testified he considered himself “pretty busy,” and that he assisted walk-in clients daily. (Tr. 166-167, 379-381, 408-409, 425). Thus, notwithstanding many of the discriminatees’ general contentment with their jobs, they still expressed work-related sentiments that were concerted and protected.

6-8). Respondent's argument, in its Brief, pp. 21 and 49, and in its exceptions (R Exc. 14, 19) that the discriminatees should have contacted management directly regarding any issues related to terms and conditions, and availed themselves of its "open door policy," instead of utilizing Facebook, should be soundly rejected. Respondent does not have the right to dictate the forum for employees' protected concerted activities. An employer may not interfere with an employee's right to engage in Section 7 activity by requiring the employee to take all work-related concerns through a specific internal process. See Valley Hospital Medical Center, 351 NLRB 1250, 1254 (2007) (rejecting employer's argument that rather than making statements public, the employee should have complained internally to the employer); Eastex, Inc., v. NLRB, 437 U.S. 556, 565 (1978) (the protection afforded by Section 7 extends to employees utilizing channels outside the immediate employee-employer relationship); Allied Aviation Service, 248 NLRB 229, 231 (1980) (an employee's "right to appeal to the public is not dependent on the sensitivity of the [employer] to his choice of forum").

3. The discriminatees' conduct did not forfeit the protection of the Act

The ALJ correctly concluded that the five discriminatees did not engage in conduct which forfeited the protection of the Act. (9 ALJD 26; 9 ALJD 28-47; 10 ALJD 5-29; R Exc. 23). Although there was some swearing and sarcasm in a few of the Facebook posts, the discriminatees did not lose the Act's protection.

The Board follows an extremely high standard in analyzing whether conduct loses the protection of the Act. Dreis & Krump, Mfg., 221 NLRB 309, 315 (1975) (offensive or opprobrious remarks do not remove activities from the Act's protection unless they are so flagrant, violent or extreme as to render the employee unfit for service). The Board grants employees leeway when otherwise protected comments contain offensive language. See, e.g.,

Nor-Cal Beverage Co., 330 NLRB 610, 610-612 (2000) (employer violated Section 8(a)(1) and (3) by disciplining employee under its no-harassment policy for calling a coworker a “scab” in the workplace; the employee did not accompany the use of the commonplace term with any kind of threat); see also American Hospital Association 230 NLRB 54, 57 (1977) (finding that the mere fact that an employee may have been sarcastic or insulting when pursuing otherwise protected activity, did not render his otherwise protected activity unprotected where the statements were neither “flagrant” nor “fraught with malice”). The Facebook conversation was objectively innocuous, and therefore, it remained protected under the Act. Here, the discriminatees’ conduct was not so opprobrious as to cause the discriminatees to lose the protection of the Act. Nor-Cal Beverage Co., *supra*; American Hospital, *supra*.

The ALJ correctly applied Atlantic Steel, Inc., 245 NLRB 814 (1979) in concluding that the discriminatees’ Facebook communication did not lose protection of the Act. (9 ALJD 28-43). The Board considers four factors, under the Atlantic Steel test, when determining whether an employee who is engaged in protected concerted activity has, by opprobrious conduct, lost the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. Atlantic Steel Co., 245 NLRB 814, 816 (1979) (test typically applied to employees disciplined for public outbursts against supervisors).

Regarding the first factor, the discussion occurred on Facebook, during non-working time, outside the workplace, and without utilizing any of Respondent’s computer systems. (9 ALJD 37-40; Tr. 169, 258, 384, 410-411, 429, 569, 570). For the second factor, the ALJ found that the subject matter of the discussion involved terms and conditions of employment – a coworker’s criticisms of other employees’ job performance, a matter that discriminatees had a

protected right to discuss. The ALJ found the fourth factor was irrelevant to the case. (9 ALJD 39-43).

Regarding the third factor, the ALJ found that there were no “outbursts.” (9 ALJD 40). The alleged discriminatees did not utilize defamatory or derogatory terms, toward Cruz-Moore, or Respondent. The discriminatees, in reacting to Cruz-Moore’s criticisms, did not threaten or personally attack Cruz-Moore. Nor-Cal Beverage Co., Inc., 330 NLRB 610, 610-612 (2000).

As the ALJ properly noted, several discriminatees, such as Ludimar Rodriguez and Carlos Ortiz did not even mention Cruz-Moore, in their particular postings. (6 ALJD 26-27; 9 ALJD 40-41; Respondent’s brief, p.36; R Exc. 7). Respondent admonishes Cole-Rivera for identifying Cruz-Moore by name in her initial post. (BSE, p. 36). However, Cole-Rivera’s identification of Cruz-Moore as the source of the criticisms is of no import, because at least three of the discriminatees besides Cole-Rivera (D. Rodriguez, Carlos Ortiz and L. Rodriguez) were already aware of Cruz-Moore’s prior complaints relative to Respondent’s employees’ work performance and thus would have known the likely source. (Tr. 165, 168-169, 199, 303-304, 351-352, 382-383, 427-428). Ludimar Rodriguez testified that she was more concerned about responding to the criticism itself of her job performance, than that the source of the criticism was from Cruz-Moore (Tr. 199-200). It is also noted that Nanette Dorrios, a member of Respondent’s own Board of Directors, and an admitted agent, participated in the Facebook string; yet, she did not admonish the employees on Facebook, nor express at any point that the contents of the conversation was inappropriate. (GC Exh. 7).

While the Facebook postings contain some profanity, it is restricted to expressions, not directed toward Cruz-Moore personally. The occasional usage of profanity in the Facebook string occurred in general expressions (ie., “what the f ...,” “come do mt [sic] fucking job”) and

was not focused on attacking Cruz-Moore personally. In one instance, Campos refers to Cruz-Moore's criticism as "dum" ("that is just dum"), but again, her comment is not directed at Cruz-Moore personally, but rather at her statements. Severance Tool Industries, 301 NLRB 1166, 1170 (1990) (Board affirmed ALJ finding that an employee calling the company president a "son of a bitch" and threatening to discredit the president's personal reputation while protesting a vacation pay issue remained protected); Stanford Hotel, 344 NLRB 558, 558-559 (2005) (employee did not lose the Act's protection although he called a supervisor a "liar," a "bitch," and a "fucking son of a bitch").

Furthermore, there is no evidence that the discriminatees made maliciously false statements (with knowledge of their falsity or reckless disregard for the truth); nor did they unlawfully disparage clients with any malicious motive. See Valley Hospital Medical Center, 351 NLRB 1250, 1252, 1252 n. 7 (2007) (to lose the Act's protection as disloyal, a statement must evidence a "malicious motive," and there must be evidence to "harass, disparage or harm the employer"); see also Mount Desert Island Hospital, 259 NLRB 589, 593 (1981). As the ALJ found, the discriminatees did not criticize Respondent in the postings. (9 ALJD 41; GC Exh. 7).

Furthermore, Respondent's assertion that it terminated the discriminatees in accordance with its anti-harassment policy should not be considered, where, as here, it admittedly took action against employees based on their protected concerted activity involving the Facebook

postings.<sup>17</sup> Respondent's contention in its Brief (pp. 44-48), that the ALJ improperly failed to examine whether Respondent had knowledge of the protected nature of the alleged conflict, and failed to fully examine Respondent's motivation, relies primarily upon inapplicable Federal court cases.

Respondent in its Brief, p.45, misinterprets the standard requiring Employer knowledge of concerted activity, as it incorrectly argues that General Counsel has the burden to prove that Respondent was legally aware of whether discriminatees' activity is "protected" under the Act. In response to Respondent's assertion of a lack of knowledge of the facts evidencing the protected nature of the conduct at the time it terminated the discriminatees, the Board has held that evidence of such employer knowledge is not necessary to establish a Section 8(a)(1) violation. See Alliance Steel Products, 340 NLRB 495, 495 (2003) ("[I]t is well established that evidence of employer knowledge is not a necessary element of an 8(a)(1) violation. Rather, the test is whether the conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights."); Meijer, Inc., 344 NLRB 916, 917 (2005).

Contrary to Respondent's contentions, Respondent's motivation is not an issue, and it is not necessary to engage in a Wright Line analysis. Wright Line, 251 NLRB 1083 (1980), *enfd.*

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<sup>17</sup> The reason for the terminations was the Facebook postings, as conceded by Iglesias at hearing, and as found by the ALJ. Notably, Respondent did not file an exception over that finding. (130-131, 151, 155, 160; GC Exh. 9, para. 3; 8 ALJD 5-6). Even if Iglesias decided to terminate discriminatees based upon R Exh. 12 (10/8/10 exchange between Cole-Rivera and Cruz-Moore), R Exh. 21 (text messages) and R Exh. 22 (private message between Cruz-Moore and Iglesias), as well as the October 9 Facebook postings, Respondent can not argue that it terminated the discriminatees for some other reason besides the Facebook postings. R Exh. 21, and R Exh. 22, which post-date the October 9 conduct, also pertain to the October 9 Facebook chain as their subject matter. However, R Exh. 12, which predates the Facebook comments and which only pertains to Cole-Rivera and Cruz-Moore, was never mentioned by Lourdes Iglesias during her termination meeting with Cole-Rivera, nor any of the other termination meetings with other discriminatees; nor in Iglesias' own affidavit. During the termination meetings, Respondent did not claim any other basis for termination other than the Facebook comments. Respondent did not discuss any other prior misconduct by the discriminatees as a reason for their termination during the meetings. (Tr. 174, 265-270, 388, 415, 433, 520-522, 525-526, 532; GC Exh. 9). As discussed *supra*, R Exh. 12 provides the background for the disagreements related to terms and conditions of employment which fueled the Facebook discussion. Iglesias had already decided the Facebook comments justified termination on October 11, before receiving R Exh. 12. (Tr. 132; 506, 549, 574, 576, 578; GC Exh. 9, para. 4 (provided Attachment I on October 12)).

662 F.2d 889 (1st Cir. 1981). Respondent clearly knew about the October 9, 2010 Facebook communications, and the contents therein, inasmuch as that was the sole reason for its decision to terminate employees. The causal connection between the alleged protected concerted activity and the disciplinary action is not disputed here. (8 ALJD 5-6). Nor-Cal Beverage Co., 330 NLRB 610, 611, 612 (2000) (a Wright Line analysis is not used where the causal connection between alleged protected concerted activity and discipline is undisputed). In these circumstances, the only issue to be addressed is whether the activity is protected. (8 ALJD 8-10; R Exc. 12). Allied Aviation Fueling of Dallas, LP, 347 NLRB 248, 254 (2006).<sup>18</sup> In Nor-Cal Beverage Co., *supra*, at 612, involving employee conversations using the word “scab” in discussing a strike, the Board refrained from considering evidence of the employer’s application of its no-harassment policy, because as in this case, the employer disciplined employees for alleged protected activity.

Even if a Wright Line analysis is used, the result is the same. Respondent failed to sustain its burden. Thus, notwithstanding, whether Respondent’s harassment policy should even be considered, the ALJ correctly concluded that discriminatees did not violate any harassment policies or any of its other policies or rules. (9 ALJD 45; 10 ALJD 23; R Exc. 23). Respondent has no social media policy rules. (Tr. 118). Respondent contends that the Facebook comments violated its Zero Tolerance Harassment policy, and excepts to the ALJ’s contrary findings. (9 ALJD 45-47; 10 ALJD 5-29; R Exc. 23; BSE, pp.44-49). Respondent asserts it terminated the

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<sup>18</sup> See also Valley Hospital Medical Center, Inc., 351 NLRB 1250, 1251 n. 5 (2007) (finding administrative law judge erroneously applied Wright Line, where the motive for the challenged employment action was not in dispute; employee was discharged for statements, and sole issue was whether in making the statements, employee enjoyed Act’s protection); Circle K Corp., 305 NLRB 932, 934 (1991) (since employee’s concerted activity was the sole motivating factor in the employer’s decision to discharge, a Wright Line analysis was not required). Winston-Salem Journal, 341 NLRB 124, 133 (2004) (the case was properly analyzed under Atlantic Steel, instead of Wright Line). See also Mast Advertising & Publishing, 304 NLRB 819 (1991) (Board held that motivation is not an issue where an employee has been discharged for conduct that is found to be a part of a course of protected concerted activities).

discriminatees because the Facebook comments constituted harassment, and in part, because of the severity of Cruz-Moore's alleged physical reaction to the Facebook comments.

The ALJ appropriately found that there was no evidence that the employees discriminated against, or harassed Cruz-Moore on the basis of race, gender or other status listed in Respondent's employment policy. (10 ALJD 16-18). Respondent's policy prohibits 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 [...]" (R Exh. 10, p. 50 {quoted in part}). The ALJ also found that there was no evidence that the comments would have impacted Cruz-Moore's job performance, as she rarely interacted with the discriminatees. (10 ALJD 19-20).<sup>19</sup> The ALJ properly found that there was no rational basis for Respondent's conclusion that the discriminatees violated its zero tolerance or discrimination policies. (10 ALJD 20-22; R Exc. 23).

Moreover, the Board's finding of protected activity does not change based upon the method of communication. The ALJ properly rejected Respondent's argument that because non-employees saw the October 9 posts on Facebook, the communication lost its protection. (9 ALJD note 8). Respondent argues that by virtue of selecting Facebook to engage in their communications, which could be seen by Cole-Rivera's extensive number of Facebook friends, the discriminatees were publicly harassing Cruz-Moore. (Respondent's Brief, pp. 32-34). The method of communication is irrelevant to the analysis of whether the conduct is concerted and protected. See Endicott Interconnect Technologies, Inc., 345 NLRB 448, 449-452 (2005). Specifically, this finding of protected activity does not change if employee statements are communicated electronically via the internet, or Facebook. See, e.g., Valley Hospital Medical

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<sup>19</sup> The ALJ correctly noted that Cruz-Moore had limited contact with the discriminatees. (10 ALJD 19-20; 168, 410, 426).

Center, 351 NLRB 1250, 1252-54 (2007) (finding employer violated Section 8(a)(1) by discharging employee for, among others, website statements regarding patient staffing levels that disparaged the level of patient care because those statements related to terms and conditions of employment and a labor dispute and therefore were protected).

In Endicott Interconnect Technologies, Inc., 345 NLRB 448, 449-452 (2005), the Board found that an employer violated Section (8)(a)(1) by discharging an employee who asserted on a public-forum website and otherwise in the press, that layoffs would “tank” the employer’s business by depriving it of experienced workers. See also Timekeeping Systems, Inc., 323 NLRB 244, 246-250 (1997) (sending of an e-mail was concerted and protected activity despite its sarcastic and hostile tone).

The Facebook communications at issue are no different than if there were discussions at a party thrown by Cole-Rivera, where some employees and some non-employees attended, and both groups heard the comments. The Board finds statements to third parties or the public, are protected if the statements are not disloyal, reckless or maliciously untrue to lose the Act’s protection. See MasTec Advanced Technologies, 357 NLRB No. 17, slip op. at 6 (2011) (the Board will not find a public statement unprotected unless it is flagrantly disloyal, wholly incommensurate with any grievances [...]).

Respondent argues in its Brief (pp. 46-47) and R Exc. 11 and 23, that the ALJ improperly disregarded the alleged hospitalization of Cruz-Moore in assessing the discriminatees’ conduct. The ALJ properly found that there was no probative evidence as to the nature of Cruz-Moore’s health problems after the posting, whether she actually had a heart attack or stroke, any causal connection between the posting and any heart attack or stroke, and any of her pre-existing health conditions. (6 ALJD 40-44; 7 ALJD note 6; 10 ALJD 25-29). While, as

explained below, it is legally irrelevant to consider the severity of Cruz-Moore's reaction (her hospitalization) in analyzing the case, there are numerous factual questions, as conceded by Respondent, regarding the intervening time and factors between the October 9 Facebook comments and her October 11, 2010 hospitalization. For example, it is undisputed that Cruz-Moore attended a community gathering with the New York State Governor on Sunday, October 10, between the time of the Facebook comments and her hospitalization on October 11. (Tr. 562). The record fails to disclose any definitive medical proof as to the impact of the Facebook comments on the hospitalization of Cruz-Moore; and whether any intervening factors, events, or pre-existing medical conditions played any role in her hospitalization, instead of the October 9 Facebook postings.<sup>20</sup> (Tr. 173, 268, 387, 389, 413, 415 432, 521-522, 533, 525, 526, 532, 558-559, 561, 564-567).

In addition, Board caselaw establishes that Cruz-Moore's medical condition on October 11, 2010 was irrelevant to an analysis of whether the Facebook comments were concerted and protected. Indeed, Cruz-Moore's subjective perception of the Facebook conversation and the

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<sup>20</sup> Respondent in its Brief, pp. 42-44, contends that the collaborative post-termination letters sent by the discriminatees to Respondent on October 13 (R Exh. 10(a)), and hand delivered to the Board of Directors on October 18 (R Exh. 11), should have been considered by the ALJ. The ALJ appropriately expressed that they were irrelevant to his consideration at the hearing, because it did not reflect what Respondent considered at the time of its terminations. (Tr. 359-361).

Respondent implies in its Brief that the discriminatees reference in R Exh 10 and 11, to an apology for the Facebook comments and their argument that a suspension rather than termination would have been more appropriate, amounts to an admission of guilt in harassing Cruz-Moore. Nowhere do the discriminatees admit that they unlawfully harassed Cruz-Moore; they simply apologized if Cruz-Moore was physically ill, because that was the "normal" thing to do. (Tr. 361). Respondent fails to quote fully from the entire sentence which is, in R Exh. 11 as follows:

"As stated in the previous letter we apologized for the comments but we feel that a written warning or a suspension at the most would have been fair given that Mrs. Cruz-Moore did not get neither a warning nor terminated when she placed her comment on Facebook about an agency we get help and assistance from our clients."

Thus, R Exh. 11 also points out alleged disparate treatment by Respondent toward Cruz-Moore for Facebook activity. R Exh. 10(a) corroborates that Respondent told them the reason for their termination was solely for the Facebook comments, and discusses Cruz-Moore's pre-existing serious medical conditions. R Exh. 11 stresses that the comments did not threaten Cruz-Moore based upon any prohibited reason, describe Cruz-Moore being seen at a public event on October 10, further describes Cruz-Moore's pre-existing medical conditions, and describes an example of disparate treatment involving Cruz-Moore calling another agency employee a racist on Facebook.

effect the Facebook comments may have had on her do not alter an objective analysis of the protected nature the Facebook comments. Consolidated Diesel Co., 332 NLRB 1019, 1020 (2000) (an employer violated Section 8(a)(1) by subjecting employees who engaged in protected concerted activity to investigation and possible discipline, pursuant to its broad harassment policy, on the basis of subjective claims of harassment); Nor-Cal Beverage Co., 330 NLRB 610, 611 n. 5, 612 (2000).<sup>21</sup> Legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights, by disciplining or discharging employees on the basis of the subjective reactions of others to their protected activity.

Consolidated Diesel Co., *supra*.

The record establishes that the discriminatees engaged in concerted activity, Respondent knew of the concerted nature of that activity, and the concerted activity was protected. The record further establishes that the discriminatees did not otherwise lose the protection of the Act. Atlantic Steel Co., 245 NLRB 814, 816 (1979). Therefore, the ALJ appropriately found that Respondent violated Section 8(a)(1) of the Act by terminating the five discriminatees for their protected concerted activities. (9 ALJD 22-24; 10 ALJD 33).

**B. THE ALJ CORRECTLY FOUND THAT THE BOARD CAN ASSERT JURISDICTION OVER RESPONDENT, A NOT-FOR-PROFIT AGENCY THAT ENGAGES IN INTERSTATE COMMERCE. (1 ALJD – 4 ALJD; R Exc. 1-2).**

The ALJ correctly found that Board has jurisdiction over Respondent on the basis of its annual revenue and the amount of Federal funds it receives. (2 ALJD 26-27; R Exc. 1). The

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<sup>21</sup> In Nor-Cal Beverage Co., *supra*, the Board noted that an employer's discipline of an employee for engaging in Section 7 activity cannot be justified by an assertion that another employee considered nonthreatening language to constitute "harassment." Nor-Cal, *supra*, at 611 n. 5. See also cases cited by Consolidated Diesel Co., *supra*, at 210: Greenfield Die & Mfg., Corp., 327 NLRB 237, 237-238 (1998); Handicabs, Inc., 318 NLRB 890, 896 (1995); Arcata Graphics, 304 NLRB 541, 541-542 (1991); Bank of St. Louis, 191 NLRB 669, 673 (1971).

ALJ also appropriately found that Respondent's purchases of more than \$60,000 annually from entities which are indisputably engaged in interstate commerce constituted another basis for asserting jurisdiction. (2 ALJD 29-31; R Exc. 2).

Respondent concedes that it meets the \$250,000 discretionary standard for annual revenue for not-for-profit social service agencies. In fact, Respondent far exceeds the standard with an annual income of greater than \$1 million. (2 ALJD 25; 3 ALJD 5-6; Tr. 26, 28, 49-51; GC Exh. 1(i), para. 2(b); (GC Exh. 27, p.11, [\$1,336,380 for 2010; and \$1,119,613 for 2009]); see also GC Exh. 3, 5).<sup>22</sup> Hispanic Federation for Social and Economic Development, 284 NLRB 500, 501 (1987).

The ALJ correctly found that Respondent's receipt of Federal funds establishes a basis for assertion of statutory jurisdiction (R Exc. 1; 2 ALJD 18-23; 2 ALJD 26-27). The Board has held that receiving revenue from the Federal government establishes sufficient impact on commerce to serve as a basis for asserting statutory jurisdiction. (3 ALJD 26-27).<sup>23</sup> The ALJ accurately found that Respondent received \$115,637 from the United States Department of Housing and

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<sup>22</sup> As in those cases where the Board has asserted statutory jurisdiction based upon levels of Federal funding, Respondent has received annual revenue amounts, in excess of \$1 million, which are substantially greater than the established discretionary jurisdictional standard of \$250,000. Saratoga County Economic Opportunity Council, 249 NLRB 453, 455, 455 n. 13 (1980).

<sup>23</sup> See International Brotherhood of Electrical Contractors, Local 48 (Kingston Constructors, Inc.), 332 NLRB 1492, 1497 (2000) (the Board found sufficient impact on interstate commerce where operations were of sufficiently large size and supported by substantial amounts of Federal funds) (3 ALJD note 3); Keyway, a Division of Phase, Inc., 263 NLRB 1168, 1171 (1982) (non-profit received \$482,597 in gross revenues, and statutory jurisdiction was established based upon revenues derived from Federal sources); Saratoga County Economic Opportunity Council, 249 NLRB 453, 455 and 455 n. 13 (1980) (receipt of substantial federal funds constitutes "commerce," and "budgeted funds exceed[ed] any applicable monetary standards."); Garfield Park Comprehensive Community Center, 232 NLRB 1046, 1046-1047 (1977) (non-profit's gross annual revenues exceeded the \$250,000 discretionary standard, and it received money through federally supported health care programs); Mon Valley United Health Services, Inc., 227 NLRB 728 (1977) (the transfer of federal funds across state lines constitutes commerce more than sufficient to establish legal jurisdiction); See other cases cited in 3 ALJD note 2. In addition, the ALJ appropriately relied upon Bricklayers & Allied Craftsmen, Local No. 2 (E.J. Harris Construction), 254 NLRB 1003 (1981) (jurisdiction was asserted based upon the licensed engineering contractor's contract with Los Angeles County Department of Roads, in excess of 1 million, funded by the Federal government). (3 ALJD 31-34).

Urban Development (HUD) in 2010, pursuant to its transitional housing program grant,<sup>24</sup> and considerable Federal funding administered by the City of Buffalo community development block grant (CDBG).<sup>25</sup> In total, Respondent received in 2009, \$221,955 total in Federal funds, from HUD, HUD/CDBG, and OSHA; and \$154,294, in 2010, in total federal funds, from HUD, HUD/CDBG. (GC Exh. 3, 27). The ALJ found that Respondent continued to receive considerable Federal funding from HUD in 2011. (2 ALJD 23; GC Exh. 4; GC Exh. 3, p.8; GC Exh. 27, p.8). In 2009, Respondent received \$32,500 in Federal funding from OSHA. (GC Exh. 27, p.8; GC Exh. 3, p.8; Tr. 66-68; 2 ALJD 22-23).

Overall, Respondent has received federal funding per year in greater amounts than in other Board cases where such funding has served as a basis for asserting jurisdiction. (GC Exh. 3, 4, 27). See, e.g., FiveCAP, Inc., 332 NLRB 943, 948 (2000) (Board upheld an ALJ's finding of jurisdiction over a nonprofit corporation that received annually gross revenues in excess of \$1 million, and received Federal funds directly from outside the state in excess of \$50,000) (3 ALJD 21-24); Upstate Home for Children, Inc., 309 NLRB 986, 987 and 987 n. 2 (1992) (affirming Regional Director's decision and order holding that jurisdiction could be asserted over entity because it had gross revenues in excess of \$5 million, and received an amount in excess of \$75,000 from Federal funds). (3 ALJD note 2).

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<sup>24</sup> On May 20, 2010, Respondent renewed a Supportive Housing Program Grant Agreement with HUD for its transitional housing program, for an allocated amount of \$493,323, for 2010-2011. For testimony and record evidence regarding HUD funding see: Tr. 51-53, 66, 78-79; 82-83 88-97; GC Exh. 1(i), para. 2(c); GC Exh. 3, p.8; GC Exh. 4 [declaration from HUD Associate Regional Counsel and certified records of Respondent's disbursement or "draw down history"]; GC Exh. 27, p.8; Combined Financial Statements, GC Exh. 3, p.8; and GC Exh. 27, p.8, show Respondent received \$171,083 in 2009 from HUD, and \$115,637 from HUD in 2010 (which also matches GC Exh. 4, for 2010); GC 28, 29).

<sup>25</sup> Because this funding originated from the Federal Government, and is considered by HUD as its own funding administered by the City of Buffalo, it constitutes Federal funds. (GC Exh. 4; 2 ALJD 20-23). See East Oakland Community Health Alliance, Inc., 218 NLRB 1270, 1271 (1975). For testimony regarding the CDBG, see: Tr. 79, 86-87, 90, 92-94, 481-482; GC Exh. 4 [HUD's certified records show Respondent withdrew \$20,744.69 as of May 25, 2011]; GC Exh. 27, p.8 (showing \$18,522 for 2009 and \$38,657 for 2010, for CDBG funds); GC Exh 3, p. 8; GC Exh. 47, pp.1-3.

Likewise, the ALJ properly found that Respondent's purchases from entities that indisputably engage in commerce served as another basis for asserting statutory jurisdiction (R Exc. 2; 2 ALJD 29-35). Respondent contends that any purchases it makes are from companies that have offices locally in Buffalo, New York, notwithstanding that those same companies indisputably engage in interstate commerce. (Respondent's Brief, pp.14-15; R Exc. 2). However, Respondent's argument is not supported by Board law, as discussed below.

Respondent's purchases of utility services from entities that indisputably engage in interstate commerce, as well as its receipt of revenue from outside of the State, establishes statutory jurisdiction.<sup>26</sup> The ALJ appropriately found that Respondent purchased utility services from Verizon, Allied Waste Services, National Fuel and National Grid, finding that those entities engage in interstate commerce. (2 ALJD 32-34). Respondent purchased more than de minimis amounts of utility and telephone services, in calendar years 2009 and 2010, and in the annual period prior to the filing of the charge, from companies that indisputably engage in interstate commerce, a basis for the assertion of statutory jurisdiction. (Tr. 56-57, 101, 449; GC Exh. 2, Form 990, p.10, line 24a; GC Exh. 5; GC Exh. 36 [National Fuel]; 38 [National Grid]; GC Exh. 39 [Verizon]; GC Exh. 40 [Verizon Wireless]; GC Exh. 41 [Cricket]; GC Exh. 43 [T Mobile]; and GC Exh. 37 [Allied Waste Services]).

The ALJ appropriately relied upon Catholic Social Services, 225 NLRB 288, 289 n. 4 (1976), where the Board found that it could establish statutory jurisdiction over a nonprofit

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<sup>26</sup> In Hudelson Baptist Children's Home, 276 NLRB 126, 126-127 (1985), the nonprofit charitable employer received revenues of over a million dollars, with at most \$10,000 originating from out of state. (3 ALJD note 2). The Board utilized services purchased from the Illinois Power Company, an entity indisputably (and previously found to have) engaged in interstate commerce, along with the out of state revenues, to establish the statutory, *de minimis* standard. In addition, in Mount St. Joseph's Home, 227 NLRB 404, 404-405 (1976), utilizing indirect inflow, the Board asserted statutory jurisdiction over a nonprofit corporation that operated a licensed child welfare facility solely on the basis of its purchases of \$30,772 worth of utility services, and \$9,000 worth of telephone services from vendors that were engaged in interstate commerce.

charitable religiously oriented social service agency, where it received approximately \$24,000 out of its total revenue of \$412,000 (only 5.8% of its total revenue) from the Federal Bureau of Prisons, and where it paid in excess of \$13,000 for telephone services from a company, that was an instrumentality of interstate commerce. (3 ALJD 17-20). Here, Respondent's Federal funds constituted a greater percentage of funding than in Catholic Social Services, and also, as in that case, paid for telephone services from a vendor that engaged in interstate commerce. Catholic Social Services, 225 NLRB 288, 289, n. 4 (1976).

Moreover, as in United Way of Howard County, Inc., 296 NLRB 987, 988 n.2 (1988), and Hudelson Baptist Children's Home, *supra*, at 126-127, Respondent's receipt of revenues or contributions from outside of the State, combined with its purchases of telephone/utility services, establishes statutory jurisdiction.<sup>27</sup>

Moreover, Respondent's purchases of other goods or services from companies that engage in interstate commerce, also serve as an additional basis for assertion of statutory jurisdiction. (2 ALJD 31-32; Tr. 58, 101-102, 110-112, 116-117, 277, 475-476, 480-481, 485-488; GC Exh. 2, Form 990, p. 10, 24c; GC Exh. 5, 30, 31, 42, 44-46, 50-52, 54-55, 60).

The ALJ properly rejected Respondent's arguments, which it reiterates in its Brief (pp.13-17) and exceptions (R Exc. 1, 2), that jurisdiction can not be asserted on the basis of receipt of Federal funds, or any other basis, because Respondent performs its services only in Buffalo and it uses any purchased goods or services in the Buffalo, New York area. (2 ALJD 13-16; 3 ALJD 36-41). Respondent primarily relies upon Ohio Public Interest Campaign, 284

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<sup>27</sup> In United Way of Howard County, Inc., 296 NLRB 987 (1988), the Board noted that the indirect and direct effect of an employer's operations on interstate commerce may be considered in analyzing statutory jurisdiction, relying in part upon the receipt of out of state donations as a direct effect on interstate commerce. The Board noted that the nonprofit charitable employer's annual revenues far exceeded the minimum jurisdictional amount of \$250,000. *Id.*, at 988. The Board has found \$2500 of revenue to constitute a sufficient statutory *de minimis* amount. Atlantic Pacific Construction Co., Inc., 312 NLRB 242 (1993). (GC Exh. 2, Schedule B, 990 Form, p.1).

NLRB 281 (1987) (where the Board found that the nature of the employer’s operations and its impact were “almost, if not exclusively limited to matters concerning issues of public concern affecting Ohio residents and without a general impact on interstate commerce”). Respondent also relies upon a Regional Director’s decision, Hartford Areas Rally Together, Inc., 34-RC-1996 (2002), (over which no request for review had been filed, and which is of no precedential value), to argue that if a not for profit has a local impact upon commerce, then the Board can not assert jurisdiction. The ALJ appropriately distinguished Ohio Public Interest Campaign, from the instant case, pointing out that there was no evidence that the consumer lobbying not-for-profit received any Federal funding. (3 ALJD 36-40).

The Board has repeatedly rejected the argument that it cannot assert jurisdiction over an entity which only provides local services. In Montgomery County Opportunity Board, Inc., 249 NLRB 880 (1980), the Board rejected the nonprofit corporation’s argument that the Board could not assert jurisdiction because the employer’s operations were essentially “local in character,” providing services to Montgomery County, Pennsylvania, and not engaged in interstate commerce. In Southeast Works Training Center, 251 NLRB 487, 488-489 (1980), the Board asserted jurisdiction over a non-profit corporation, where the employer had asserted that its operations were “local in character,” based upon the indirect outflow standard.<sup>28</sup>

Hence, the ALJ appropriately found that Respondent is an employer engaged in commerce, and is subject to the Board’s jurisdiction, based upon meeting the \$250,000 discretionary standard, and statutory standard. (2 ALJD 27-35; 3 ALJD 40-41).

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<sup>28</sup> See also YMCA of The Pikes Peak Region, Inc., 291 NLRB 998 (1988) (applying a retail standard to the non-profit employer which receives membership dues and contributions from the United Way, even though it provides services and local community programs primarily to residents of El Paso County, Colorado; employer had argued it had a “purely local character”); Superior Travel Service, Inc., 342 NLRB 570, 571 (2004) (following the “essential links” standard for this travel agency, and rejecting employer’s argument that its business is essentially “local in character”).

**C. THE ALJ'S RULINGS SHOULD BE AFFIRMED. (R Exc. 28-32).**

The Board's Rules and Regulations, Section 102.35 provides, in pertinent part, that a judge should "regulate the course of the hearing" and "take any other action necessary" in furtherance of the judge's stated duties and authorized by the Board's Rules. Thus, the Board affords judges significant discretion in controlling the hearing and directing the creation of the record. Oaktree Capital Management, LLC, 353 NLRB No. 127 (2009); Parts Depot, Inc., 348 NLRB 152, 152 n. 6 (2006) (respondent failed to show judge's rulings resulted in prejudice or denial of due process). It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes abuse of discretion. 300 Exhibit Services & Event, Inc., 356 NLRB no. 66 n. 1 (2010); Aladdin Gaming, LLC, 345 NLRB 585, 587 (2005). There is no evidence that the ALJ abused his discretion in any of his evidentiary rulings.

The ALJ appropriately revoked Respondent's subpoena duces tecum served on the non-existent "Speaker's Bureau" of the National Labor Relations Board.<sup>29</sup> (Tr. 20-22; R Exc. 28; GC Exh. 24 (Order Referring Respondent's Subpoena and General Counsel's Petition to Revoke); Section 102.118(a)(1) of the Board's Rules and Regulations). Likewise, the ALJ appropriately revoked Respondent's subpoenas duces tecum served on discriminatees.<sup>30</sup> (Tr. 22-25; GC Exh.

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<sup>29</sup> It is the General Counsel's policy, absent a showing of most unusual circumstances, not to permit Board agents to provide information concerning investigative documents relating to the processing of unfair labor practice or representation cases. See Sunol Valley Golf and Recreation Co., 305 NLRB 493 (1991), supplemented by 310 NLRB 357 (1993); G.W. Galloway Company, 281 NLRB 262, n. 1 (1985); Palace Club, 229 NLRB 1128 n. 3 (1997). Respondent failed to serve the subpoena pursuant to the Board's Rules and Regulations, by failing to secure written consent from the Acting General Counsel. Section 102.118 of the Board's Rules and Regulations. NLRB v. Sears Roebuck & Co., 421 U.S. 132 at 149-152 (1975). See other cases cited in GC Exh. 24, Exhibit 1, p. 5.

<sup>30</sup> Subpoenas may be revoked if they are invalid for any other reason sufficient in law. Board's Rules and Regulations, Section 102.31(b); Brink's Inc., 281 NLRB 468 (1986). In its subpoenae to discriminatees, Respondent sought irrelevant information at the unfair labor practice stage of the proceeding, such as unemployment applications or documents related to payments for work or services, as well as documents related to discriminatees' exploration of available statutory relief from other agencies. Respondent issued overly-broad requests for communications between discriminatees, which encompassed personal and unrelated communications, amounting to a "fishing expedition." See Kentucky River Medical Center, 352 NLRB 194, 199 (2008).

25 (Order Referring Respondent's Subpoena and General Counsel's Petition to Revoke).

Respondent in effect sought impermissible discovery through these subpoenas. Contrary to Respondent's contentions, the unavailability of discovery in Board administrative proceedings is not a prejudicial denial of due process. (Brief, pp. 19-20, pp.48-49). See, e.g. NLRB v. Robbins Tire and Rubber Company, 437 U.S. 214 (1978).

In addition, there is no evidence that the ALJ abused his discretion in any of his rulings on objections.<sup>31</sup> (R Exc. 30-31). 300 Exhibit Services & Event, Inc., 356 NLRB No. 66 n. 1 (2010); Oaktree Capital Management, LLC, 353 NLRB No. 127 (2009).

Respondent also excepts to the ALJ's rulings regarding the excision of the identities and contact information for non-discriminatee employees or former employees in e-mails turned over to Respondent pursuant to Jencks v. U.S., 353 U.S. 657, 672 (1957) and Section 102.118(b)(2) of the Board's Rules and Regulations. (Tr. 175-179, 270-276, 277-280, 417-418, 601-602; R Exc. 32; ALJ Exh. 1-5; Section 102.118(b)(2); Section 10394.8 of the Board's Casehandling Manual, Unfair Labor Practices). Notably, Respondent did not raise the ALJ's rulings regarding ALJ Exh. 1-5, in its Brief to the Administrative Law Judge. ALJ Exh. 1-5 contain e-mails submitted by the discriminatees to the Region during the course of the investigation. ALJ Exh. 2 and 5 contain redactions of the identities of witnesses who expressed trepidation at retaliation: "fear of

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<sup>31</sup> Respondent excepts to ALJ sustaining General Counsel's objections in two instances. In its exception, R Exc. 31, Respondent does not even quote from the entire passage at issue, in its exception, but does cite to it. The full exchange at Tr. 318-319, reveals the basis for General Counsel's objection was that Respondent was asking for witness Cole-Rivera's legal conclusion as to her definition as to what constitutes working conditions. Respondent also excepts to the ALJ's finding that Respondent did not terminate Jessica Rivera for her post. (6 ALJD 33-35). However, Jessica Rivera was a former secretary and not an employee at the time. The ALJ's finding in this regard was harmless error, as it does not impact upon the analysis of whether the discriminatees engaged in protected concerted activity. See Roman, Inc., 335 NLRB 234 (2002).

being terminated,” and other expressed apprehension of retaliation (ALJ Exh. 2); “fear of being fired if Lourdes were to find out that she was friends with her.”<sup>32</sup> (ALJ Exh. 5).

The excision of contact information and identities of other potential witnesses presented to the Region during the investigation, who were not called to testify, did not preclude evidence necessary for the full litigation of the complaint. See Aladdin Gaming, *supra*, at 587-888 (upholding an ALJ’s revocation of a subpoena for names and contact information for an unsolicited customer complaint, holding that the marginal relevance did not outweigh the substantial privacy interests involved, including a customer’s stated fear of retaliation). The ALJ properly conducted in camera inspections and ruled regarding the redaction/excision in each of the e-mails, along with the considerable number of other documents turned over to Respondent pursuant to Jencks, *supra*. (Tr. Tr. 175-179, 270-276, 277-280, 389, 417-418, 434, 601-602). Hence, the ALJ appropriately followed Section 102.118(b)(2), and there is no evidence that he abused his discretion, or that Respondent was otherwise prejudiced by his ruling. 300 Exhibit Services, *supra*. Respondent was not prejudiced by any of the ALJ’s evidentiary rulings, and it would not effectuate the policies of the Act to overturn them. Proctor & Gamble Manufacturing Co., 160 NLRB 334, 334 n.2 (1966).

Additionally, Respondent’s Motion for Oral Argument should be dismissed. It is respectfully submitted that the case can be decided upon the record, exceptions, and briefs which adequately present the parties’ issues and positions. Wal-Mart Stores, Inc., 343 NLRB 1287 n. 2 (2004).

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<sup>32</sup> It should be noted that ALJ Exh. 3 and 4 appear to be the same e-mail. Pursuant to Section 102.118(b)(2), General Counsel has provided to the Board only, and not the other parties, the unredacted version of ALJ Exh. 1-5, for the Board’s determination.

**D. THE ALJ FASHIONED AN APPROPRIATE REMEDY AND ORDER (10 ALJD – 12 ALJD; R Exc. 24-27)**

Board precedent supports that the ALJ fashioned an appropriate remedy and order requiring Respondent to offer full reinstatement to the five discriminatees to their former positions, or substantially equivalent positions; to make the discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them;<sup>33</sup> to remove from its records all references to the unlawful discharges of the discriminatees; and to post a notice physically and electronically. (10 ALJD 33-45; 11 ALJD 5-45; 12 ALJD 5-13). Parexel International, LLC, 356 NLRB No. 82, slip op. at 6-7 (2011); MasTec Advanced Technologies, 357 NLRB No. 17, slip op. at 7-8 (2011); J. Picini Flooring, 356 NLRB No. 9 (2010).

**III. CONCLUSION**

**WHEREFORE**, for the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's exceptions to the ALJ's Decision and adopt the findings of fact and conclusions of law reached by the ALJ.

**DATED** at Buffalo, New York this 4<sup>th</sup> day of November, 2011.

Respectfully submitted,

/s/ Aaron B. Sukert

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<sup>33</sup> Backpay should be made in accordance with the manner prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987) and compounded on a daily basis as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010). (10 ALJD 34-37).

## STATEMENT OF SERVICE

I hereby certify that on November 4, 2011, copies of Counsel for the Acting General Counsel's Answering Brief in Case 03-CA-27872 were served by electronic mail upon<sup>1</sup>:

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Dated November 4, 2011

/s/ Aaron B. Sukert, Esq.\_\_\_\_\_

Aaron B. Sukert, Esq.  
Counsel for the Acting General Counsel  
[Aaron.Sukert@nlrb.gov](mailto:Aaron.Sukert@nlrb.gov)

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<sup>1</sup> In accordance with Section 102.118(b)(2) of the Board's Rules and Regulations, Acting General Counsel attached Exhibit A, a copy of unredacted versions of ALJ Exhibits 1-5, with the Answering Brief filed with the Board. Acting General Counsel has not submitted Exhibit A to the other parties.

**EXHIBIT A: VERSIONS OF  
ALJ EXHIBITS 1-5  
WITHOUT REDACTIONS**

**Sukert, Aaron**

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**From:** Mariana Cole-Rivera [mcole14222@hotmail.com]  
**Sent:** Monday, January 10, 2011 11:26 AM  
**To:** Sukert, Aaron  
**Subject:** another contact

Good Morning:

Yesterday while at the supermarket I came across one of my ex co-workers he's willing to talk to you his name is Nelson Ortiz and his cell phone number is 716-348-6092.

Hope this helps.

*Mariana Cole-Rivera*

## Sukert, Aaron

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**From:** Mariana Cole-Rivera [mcole14222@hotmail.com]  
**Sent:** Thursday, December 23, 2010 4:02 PM  
**To:** Sukert, Aaron  
**Subject:** RE: Hispanics United of Buffalo, 03-CA-27872

Good afternoon:

Let me know if you need any additional information.

Thank you very much.

*Mariana Cole-Rivera*

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**From:** Aaron.Sukert@nlrb.gov  
**To:** mcole14222@hotmail.com; carlosodj@gmail.com; ludahy@live.com  
**Date:** Thu, 23 Dec 2010 15:38:19 -0500  
**Subject:** Hispanics United of Buffalo, 03-CA-27872

Dear Ms. Mariana Cole-Rivera, Mr. Carlos Ortiz and Ms. Ludimar Rodriguez (and Ms. Yaritza Campos and Ms. Damicela Rodriguez):

(I do not appear to have the e-mail addresses for Yaritza Campos and Damicela Rodriguez; if you could please forward this e-mail to them, and if you could notify me that you have done so, I would appreciate it. Thank you very much. I will otherwise attempt to contact them, as well).

I had some follow up questions for each of you related to the above-referenced case.

If you could please comment on the following. Please e-mail me back any responses or send by fax at (716) 551-4972. Please respond if at all possible by mid-day on Monday, December 27, 2010.

1. Whether any of you have spoken with any current employees at Hispanics United of Buffalo (HUB) who might consider answering some questions from me about the case; and whether you can provide me their contact information (address and phone number and possibly e-mail, if available).

I spoke briefly with Adriana Gonzalez about it her cell phone number is 585-704-7225, also with my ex-coworker Kelly Hernandez 716-812-7702 they may be willing to answering questions about it.

2. Whether any of you have any knowledge regarding any perceived "chill" on HUB employee's communications as a result of the facebook incident and your subsequent termination on October 12, 2010?

I was told by Ludimar Rodriguez that Adriana Gonzalez did not feel "free" to visit Ludimar at her house for fear of being fired if Lourdes were to find out that she was friends with her.

- a. Specifically, whether you have any knowledge regarding any current employees' unwillingness to discuss matters related to any terms and conditions of employment, by e-mail, by internet, on facebook, by text messaging, by telephone, or by direct in person communications, as a result of the October 9, 2010 facebook incident and your October 12,

2010 termination?

The unwillingness is not so much by the incident itself but by fear of the consequences if they kept communication with us. everyone is afraid that they are going to loose their jobs eventhough everyone is in agrees that the firing was unjustified. I have preety much lost contact with most of the employees at HUB.

Please provide any specific details in answering this question.

- b. Specifically, whether you have any knowledge regarding any current employees' unwillingness to discuss any matters as a result of your termination?  
as I stated before they are afraid to loose their job.

Please provide any specific details in answering this question.

3. Please respond as to whether you would accept/seek reinstatement at HUB?  
Given that I'm paid all the time that I have been out, yes.
4. If you do not desire reinstatement, why not?
5. Any additional information you have since your affidavit, regarding interim employment you have obtained?  
no employment yet, still looking.
6. Whether any of you have any knowledge regarding whether any current employees have expressed dissatisfaction with the Employer as a result of the termination of you five discriminatees on October 12, 2010?

Susan Santiago expressed that she was depressed for couple of days with the decision and said that she had express her concerns to Lourdes Igleasias, the majority of the employees at HUB feel that the firing was unnesessary, that a suspension at best would had suffice.

Please provide any specific details in answering this question.

7. Any knowledge you have regarding the number of employees currently employed at HUB?  
I believe they may be down to 11 since the pre-employment program closed in DEC
8. Whether you have any knowledge, or can identify any potential current employee witnesses, who can testify regarding what if anything Lourdes Iglesias or other Employer (HUB) representatives have told current employees about the October 12, 2010 termination?  
She had a Staff meeting where she informed the remainder of the employees why we were let go.

Please provide any specific details you have in answering this question.

9. Whether the Employer has had any discussions with any current employees regarding Facebook usage, or other means of communications, since the October 12, 2010 termination?  
unknown

Please provide any specific details you have in answering this question.

10. Whether the Employer has instituted any new rules regarding communications, or harassment or terms and conditions of employment since the October 12, 2010 termination?  
unknown

Please provide any specific details you have in answering this question.

Thank you for answering these questions. Please provide any responses, if at all possible, by mid-day on Monday, December 27, 2010.

12/27/2010

Thanks again.

Sincerely,

Aaron B. Sukert  
Attorney  
NLRB, Region Three

## Sukert, Aaron

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**From:** Ludahy Rodriguez [ludahy@live.com]  
**Sent:** Monday, December 27, 2010 8:44 PM  
**To:** Sukert, Aaron  
**Subject:** RE: Hispanics United of Buffalo, 03-CA-27872

I spoke with Kelly Hernandez she used to work for HUB but quit. She told me she would be happy to answer questions so please call her. 716-812-7702

Thanks  
Ludimar Rodriguez

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**From:** Aaron.Sukert@nlrb.gov  
**To:** mcole14222@hotmail.com; carlosodj@gmail.com; ludahy@live.com  
**Date:** Thu, 23 Dec 2010 15:38:19 -0500  
**Subject:** Hispanics United of Buffalo, 03-CA-27872

Dear Ms. Mariana Cole-Rivera, Mr. Carlos Ortiz and Ms. Ludimar Rodriguez (and Ms. Yaritza Campos and Ms. Damicela Rodriguez):

(I do not appear to have the e-mail addresses for Yaritza Campos and Damicela Rodriguez; if you could please forward this e-mail to them, and if you could notify me that you have done so, I would appreciate it. Thank you very much. I will otherwise attempt to contact them, as well).

I had some follow up questions for each of you related to the above-referenced case.

If you could please comment on the following. Please e-mail me back any responses or send by fax at (716) 551-4972. Please respond if at all possible by mid-day on Monday, December 27, 2010.

1. Whether any of you have spoken with any current employees at Hispanics United of Buffalo (HUB) who might consider answering some questions from me about the case; and whether you can provide me their contact information (address and phone number and possibly e-mail, if available).
2. Whether any of you have any knowledge regarding any perceived "chill" on HUB employee's communications as a result of the facebook incident and your subsequent termination on October 12, 2010?
  - a. Specifically, whether you have any knowledge regarding any current employees' unwillingness to discuss matters related to any terms and conditions of employment, by e-mail, by internet, on facebook, by text messaging, by telephone, or by direct in person communications, as a result of the October 9, 2010 facebook incident and your October 12, 2010 termination?

Please provide any specific details in answering this question.

- b. Specifically, whether you have any knowledge regarding any current employees' unwillingness to discuss any matters as a result of your termination?

Please provide any specific details in answering this question.

3. Please respond as to whether you would accept/seek reinstatement at HUB?

ALJ 3  
ALJ 4

12/28/2010

## Sukert, Aaron

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**From:** Yaritza Campos [ycampos@medaille.edu]  
**Sent:** Monday, December 27, 2010 4:13 PM  
**To:** Sukert, Aaron  
**Cc:** ycampos@medaille.edu

Good afternoon Mr. Sukert,  
am sending you this email because I know of some people who are willing to speak that have worked there in the past, there names are as follow: Tarma Felix 787-619-6386, Jose Latalladi (716) 440-2120 and Rody Torres. I don't have Mrs. Torres phone number but I will attempt to obtain it. Mr. Latalladi and Mr. Torres were executive directors at the agency. They can all tell you off the wrongful termination the agency has had throughout the years there. I also want to emphasize that Mrs. Cruz herself was not given a warning when she spoke badly of another employee from another agency but we were terminated on the spot. Unfortunately, the current employees wont speak on this issue due to fear of being terminated and Mrs. Iglesias niece works there who wont speak on issue either because thats her aunt. If you have any further questions feel free to contact me at (716) 573-6943. Thank you!!