

**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 CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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**I. CROSS-EXCEPTIONS:**

Administrative Law Judge Arthur J. Amchan issued a Decision and Recommended Order in this case on September 2, 2011.

Respondent filed exceptions and a brief in support of its exceptions on October 21, 2011.

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, the General Counsel hereby takes cross-exceptions to the Administrative Law Judge's failure to find and conclude that:

1. On the morning of October 9, 2010, prior to the Facebook posting at issue in this case, discriminatees Mariana Cole-Rivera and Damicela Rodriguez discussed the following:
  - a. Cole-Rivera informed Rodriguez that she had been receiving recent communications from co-worker Lydia Cruz-Moore criticizing the job performance of Respondent's employees.
  - b. Cole-Rivera informed Rodriguez that Cruz-Moore had stated to Cole-Rivera that Cruz-Moore intended to speak with Lourdes Iglesias on October 12, 2010.

c. Rodriguez urged Cole-Rivera to meet with Executive Director Lourdes Iglesias on October 12, 2010, to discuss Cruz-Moore's criticisms of employees' work-performance, before Cruz-Moore had an opportunity to meet with her. (4 ALJD 22-35).<sup>1</sup>

2. Based upon the October 9, 2010 urging of co-worker Damicela Rodriguez, Cole-Rivera intended to meet with Executive Director Lourdes Iglesias on October 12, 2010, regarding Cruz-Moore's criticism of Respondent's employees' work performance. (4 ALJD 22-35).

## II. FACTS

It is respectfully submitted that the Administrative Law Judge failed to find that on the morning of October 9, 2010, discriminatees Mariana Cole-Rivera and Damicela Rodriguez held a discussion prior to Cole-Rivera's 10:14 a.m. posting on Facebook, GC Exh. 7. The record, specifically the testimony of Cole-Rivera and Damicela Rodriguez at the hearing, reflects that this concerted discussion occurred, and the record includes no testimony to the contrary. (Tr. 251-254, 303-304, 351-352, 383, 403-404). It is respectfully submitted that the Administrative Law Judge failed to find that after her October 9 discussion with co-worker Rodriguez, Cole-Rivera intended to meet with Lourdes Iglesias on October 12, 2010 to discuss Cruz-Moore's criticisms of employees' work performance. (Tr. 253-254, 257, 267, 303-304, 351-352).

The record reflects that on the morning of October 9, Cole-Rivera talked with coworker Damicela Rodriguez, who had stayed overnight at Cole-Rivera's home. Cole-Rivera informed Rodriguez that she had been receiving recent communications from Cruz-Moore criticizing the

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<sup>1</sup> The reference to the Administrative Law Judge's Decision is ALJD, with the page number preceding ALJD, and the line number after ALJD. Because General Counsel's cross-exception is to the ALJ's failure to find a particular fact, the line references refer to the location in the decision where chronologically it could have been placed.

job performance of Respondent's employees and assistance provided to clients, and that Cruz-Moore had stated she was going to talk to Lourdes Iglesias on Tuesday morning, October 12, to settle the matter. (Tr. 251-254, 308, 383, 403-404).

The record reflects that Damicela Rodriguez told Cole-Rivera what Cruz-Moore was doing was "not correct." (Tr. 303). As Cole-Rivera testified, and Damicela Rodriguez corroborated, Rodriguez urged Cole-Rivera to discuss the issues relating to Cruz-Moore's criticisms with Executive Director Iglesias immediately upon returning to work on Tuesday, October 12. (Tr. 254, 303-304, 383, 403-404). Rodriguez wanted Cole-Rivera to preemptively discuss the issues with Iglesias before Cruz-Moore discussed the matter with Iglesias. (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 her decision to speak with Iglesias. (Tr. 303-304, 351-352).<sup>2</sup> The ALJ failed to comment upon this conversation between Cole-Rivera and Rodriguez, as well as Cole-Rivera's intention to meet with Iglesias.<sup>3</sup>

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<sup>2</sup> According to Cole-Rivera, Damicela Rodriguez said "you know what, that's really not correct what she's doing. You really need to talk to Lourdes." Cole-Rivera testified that Rodriguez stated that she needed to talk to Iglesias on Tuesday because she needed to know what Cruz-Moore was saying. (Tr. 251-254, 303).

Rodriguez testified that Cole-Rivera informed her about the texts that she had been receiving from Cruz-Moore that Respondent wasn't providing services to clients the right way. Cole-Rivera informed Rodriguez that Cruz-Moore had stated she was going to speak to Iglesias on Tuesday morning. Rodriguez testified that she told Cole-Rivera "the first thing on Tuesday she should go see Lourdes" because Lourdes "should know exactly what's going on" before Lydia got there, regarding the exchange of text messaging and Cruz-Moore's criticism of the staff, and the "whole story." (Tr. 383, 404).

<sup>3</sup> General Counsel is not excepting to the ALJ's credibility finding that on the morning of October 12, 2010, Cole-Rivera did not attempt to meet with Iglesias by speaking with her. (6 ALJD note 5). General Counsel argues in its Answering Brief that particular credibility finding does not legally impact the conclusion that the discriminatees engaged in protected concerted activity through their Facebook postings.

### III. ARGUMENT:

The discussion between Cole-Rivera and Damicela Rodriguez on October 9 establishes that Cole-Rivera planned to meet with Executive Director Iglesias at another co-worker's suggestion. The finding of the October 9 discussion assists in the analysis of whether Cole-Rivera's and the other discriminatees' October 9 posting on Facebook constituted protected concerted activity.

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 Industries (Meyers II), 281 NLRB 882, 887 (1986), *affd. sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988), citing Mushroom Transportation v. NLRB, 330 F.2d 683, 685 (3<sup>rd</sup> Cir. 1964). The Board's definition of concerted activity encompasses employee preliminary 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 (1989).

The Supreme Court has held that a single employee's appeal for help from other employees implicates "mutual aid or protection," where the employee "seeks 'aid or protection' against a perceived threat to his employment security." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975).

The ALJ found that Cruz-Moore had indicated to Cole-Rivera she was going to raise concerns about employees' job performance with Executive Director Iglesias. (4 ALJD 21-22). Cole-Rivera sought input and guidance from co-worker Damicela Rodriguez about her dispute with Cruz-Moore after Cruz-Moore indicated she was going to have Iglesias settle their

differences. Cole-Rivera had come to believe that Cruz-Moore's action would result in, at a minimum, a discussion with management about employees' responsibilities and performance, and could result in discipline to herself and her co-workers. (4 ALJD 21-22; 8 ALJD 49; 9 ALJD 5-6). Rodriguez suggested that Cole-Rivera seek her own meeting to discuss these work-related concerns with Iglesias on October 12, 2011.

Hence, Cole-Rivera invoked the assistance of her coworkers in anticipation of her meeting with Iglesias to discuss workload and job performance criticisms. As such, Cole-Rivera's initial Facebook posting was seeking to prepare for the group action of defending the employees against accusations against their work-performance, and in preparation for the concerted action of meeting with Iglesias on October 12, 2010. Meyers II, *supra*, at 887. Through the Facebook posting, Cole-Rivera was seeking "mutual aid or protection" NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975), and thus the conduct was protected. See General Counsel's Answering Brief for further discussion of the concerted and protected nature of the Facebook posting.

#### **IV. CONCLUSION:**

It is respectfully submitted that the ALJ failed to make a finding of fact concerning the October 9, conversation between Cole-Rivera and Damicela Rodriguez. The undisputed record establishes that based upon her conversation with a fellow employee, Cole-Rivera planned to meet with Respondent's Executive Director on October 12, 2010, and engaged in protected concerted activities.

**DATED** at Buffalo, New York, this 4th day of November, 2011.

Respectfully submitted,

/s/ Aaron B. Sukert

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## STATEMENT OF SERVICE

I hereby certify that on November 4, 2011, copies of Counsel for the Acting General Counsel's Cross-Exceptions and Brief in Support in Case 03-CA-27872 were served by electronic mail upon:

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Dated November 4, 2011

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