

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

HISPANICS UNITED OF BUFFALO, INC.

and

Case 3-CA-27872

CARLOS ORTIZ, AN INDIVIDUAL

**RESPONDENT, HISPANICS UNITED OF BUFFALO, INC.'S
BRIEF IN OPPOSITION TO THE CROSS-EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Respondent, Hispanics United of Buffalo, Inc., by and through its Counsel at LoTempio & Brown, P.C., hereby respectfully submits this Answering Brief in Opposition to the Cross-Exceptions to the Administrative Law Judge's Decision as filed by Counsel for the Acting General Counsel.

I. INTRODUCTION

The Cross-Exceptions filed by Counsel for the Acting General Counsel are not supported by the facts in the record. The ALJ properly determined that Mariana Cole Rivera was lying about her intention to bring issues to management's attention and that she came to work early on Tuesday, October 12, 2010, to meet with Executive Director, Lourdes Iglesias. Respondent does not agree with the ALJ's conclusion that this lie was irrelevant to the matter, and to the contrary, this lie wholly undermines the claims asserted herein of an unfair labor practice.

II. FACTS

The main witness in this matter was Mariana Cole-Rivera¹, the essential "glue" to the tale spun by Counsel for the Acting General Counsel in an attempt to prove an unfair labor practice. In an attempt to establish concerted activity towards a "group" goal, Mariana made the outrageous statement during her testimony that the reason why she initially posted the comment about Lydia Cruz-Moore (hereinafter referred to as "Lydia") was to take a survey of her co-workers. However, the first time this claim ever arises is after she meets with Counsel for the General Counsel to provide an affidavit about the termination. All of her statements, in letters, and communications with Hispanics United of Buffalo, Inc. (hereinafter referred to as "HUB") and the other terminated employees never mention anything about a survey, nor attempt to bring

¹ The five terminated employees, Mariana Cole-Rivera, Ludimar Rodriguez, Yaritza Campos, Carlos Ortiz and Damicela Rodriguez, will be referenced herein by first name.

issues to the attention of management.

Mariana never told her co-workers or HUB she was taking a survey

The credibility of Mariana's testimony must be weighed against the timing of her claims and what was said before and after she crafted her story to fit the requirements of an alleged unfair labor practice. Mariana never advised HUB before, or after her termination, about her Facebook posts being a survey of her co-workers. In fact, Mariana never even advised HUB her posts were about any issues pertaining to hours, wages, or working conditions. Lourdes Iglesias, the Executive Director of HUB, testified to the following:

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

In addition, Mariana's fellow terminated co-workers never knew anything about a survey being taken by her.

Damicela, who was with her on the morning she made the initial Facebook post, was unaware she was even making the post, nonetheless taking a survey. Damicela testified to the following:

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

Carlos never knew why Mariana made the Facebook post and was unaware of her trying to take a survey, either before, or after, being fired. Carlos testified as follows:

- "Q. Have you ever – did you ever talk to Mariana about being fired after you were fired?

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

Yaritza was completely unaware that Mariana was trying to take a survey, and testified as follows:

- “Q: Now, after you were terminated you had an opportunity to have discussion with Mariana Cole-Rivera about the firing; correct?
A. Yes.
Q. Did Mariana ever tell you she was trying to take a survey of employees?
Mr. Sukert: Objection, Your Honor.
Judge Amchan: Overruled.
The Witness. What do you mean a survey of employees?
Judge Amchan. Well, he’s just saying did Mariana ever tell you that.
Q. Right, did she ever tell you that when she made her Facebook post she was trying to make a survey of employees?
A. I don’t think so, no.” Tr. pg. 421

Mariana never intended nor attempted to find Mrs. Iglesias on October 12th

The foundation of Mariana’s testimony is based on the premise she made the Facebook posts as a survey of her co-workers in anticipation of bringing the issue of working conditions at HUB to the attention of management. However, Mariana’s claim it was her intent to show up on Tuesday morning, October 12th, to raise the issues with Mrs. Iglesias was a lie, which the ALJ appropriately concluded in his decision, notwithstanding his opinion it was irrelevant.

Mariana testified during her direct examination by Counsel for the Acting General Counsel to the following:

- “Q. Turning your attention to October 12th of 2010, what, if any, plans did you have that day?
A. I planned to talk to Lourdes about what had happened on Saturday.
Q. And turning your attention to October 12th of 2010, what, if anything, happened on that date?

- A. I saw Lourdes going up the stairs and I followed her and I said that I needed to talk to her.
- Q. And did there come a point in time when you spoke with Lourdes?
- A. Yeah, at the time she said she was going to be in meeting, that she was going to call me.” Tr. pg. 265

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

- “Q. While you were sitting at the reception desk did you ever seek Lourdes Iglesias?
- A. I did. I saw her, you know, walk in and that’s when I, you know, asked somebody to stay at reception and follow her - - and I told up the stairs that I needed to talk to her.
- Q. Okay. So you saw her at the reception desk first?
- A. Yeah, walking in, I believe. Yes.
- Q. All right. Isn’t it true that you indicate in your statement you saw her actually going up the stairway?
- A. Well, I followed her ‘cause I had to find somebody to sit at reception before I went after her. So by the time I got to her she was going up the stairs.” Tr. pg. 336

Mariana’s claimed activities that morning was not supported by her prior version of what occurred when she arrived at work. Mariana provided Counsel for the Acting General Counsel with an affidavit prior to the Complaint being filed herein. GC Ex. 35. In that affidavit she made the following statement regarding the circumstances on October 12, 2010:

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

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

the reception desk because there was nobody there. Tr. pg. 333. She claimed to have continued to sit at the reception desk until 9:00 a.m. Tr. pgs. 334-335. Mariana then added on to her testimony and made the following claim:

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

A. I - -

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

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

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

It is respectfully submitted that the relevance of this line of questioning is that what Mariana testified to under oath never happened. She never spoke, nor saw, Mrs. Iglesias prior to being called in to her termination meeting, nor did she ever intend on bringing any issues to Mrs. Iglesias' attention that morning. The point of this line of questioning was to demonstrate her lack of credibility, and her attempt to try and make her Facebook posts seem as if they pertained to working conditions and not her animosity towards Lydia. Mariana testified to the following:

"Q. And the stairway that would take you to Lourdes' office, the quickest way would be on the other end of the building past a door that you couldn't see through at the reception desk; correct?

A. Correct.

Q. What time was it that you saw Lourdes going up the stairway?

A. I'm thinking it had to be between 8:45 and 9:00. I'm not sure. I know I saw her at the reception desk, I mean at the - - when I talked to Lourdes and I told her that I needed to speak to her we were standing at the stairs, that - - yes. I - - specifically at what time by the second, millimeter, second, I cannot say. I'm under oath so I cannot give you a time because I truly do not remember the exact time." Tr. pgs. 339-340

The curtain was pulled back on Mariana's deception when Mrs. Iglesias testified to her activities prior to the termination meetings on the morning of October 12, 2010. Mrs. Iglesias

testified to the following:

- “Q. All right. Let’s talk about the day that you fired the five employees, October 12th of 2010. What time did you get to work?
- A. I got to work about 8:00 o’clock.
- Q. And you indicated earlier that that was your usual time for going to work?
- A. Yes.
- Q. And describe for me from when you first arrived at Hispanics United until you got to wherever you were going?
- A. I got into the Agency at about 8:00 o’clock and I come in through the side door. I don’t come in - -
- Q. Well, hold on. Where’s the side door?
- A. It’s a distance away from the main door.
- Q. And does the main door - - where does the main door take you?
- A. The main door takes you to the reception area and then into the general offices.
- Q. And you were here during the testimony of Mariana Cole-Rivera, correct?
- A. That’s correct.
- Q. And she made an indication about sitting at a reception desk. Where would that be located?
- A. In the front entrance.
- Q. And is that the doorway that you used to go into HUB that morning?
- A. No, I did not.
- Q. So you go in through the side entrance, as you described, what happens next?
- A. I go upstairs, open up my door and I take - - put down my purse. And the first thing I do is listen to any messages. I turn on my computer. And this day, I went on to my Facebook to see if I had heard anything or, you know, from Lydia because I was very concerned.” Tr. pgs. 511-512
- “Q. Now, I want to back up and just talk about your actual physical path from when you walked in the door till you got to your office. When you came in through that side door, what does that take you into?
- A. It’s a hallway and it goes up to the stairs going on to the second floor. And as you - -
- Q. Hold it. Where’s your office?
- A. It’s on the second floor to the right.
- Q. So when you go through the side door and you walk into this hallway, is it a closed hallway? Is it open into a room? How does that work?
- A. No, it’s a closed hallway and there is an entrance to go into the main - - the first floor where all the offices are.
- Q. When you opened the side door that morning and walked into that hallway was there anyone in there?
- A. No, sir.
- Q. And are there stairs in the hallway?

- A. Yes, there is.
- Q. And did you go up those stairs?
- A. Yes, I did.
- Q. And in the course of walking up from the first floor to the second floor that morning to go to your office, did you see anybody?
- A. No.
- Q. Did you see Mariana Cole-Rivera?
- A. No, sir.
- Q. Then you get to the second floor. Tell me what you did?
- A. I go and I open up my door and I close the door behind me and I sit at my desk.
- Q. At any time from when you got into the building until you got into your office on October 12th of 2010, did you see Mariana Cole-Rivera?
- A. No, I did not.” Tr. pgs. 512-514
- “Q. Who was the first person you spoke to?
- A. Mariana.
- Q. And how was it that Mariana came to your office?
- A. Carmen had called her.
- Q. And did you have any communication with Mariana Cole-Rivera before she came into your office after you asked Carmen to go get her?
- A. No, I did not.
- Q. Did she attempt to contact you in any way that you’re aware of?
- A. No, sir.
- Q. Had you seen her at all prior to that?
- A. No, sir.
- Q. So the first time you see her is when she comes into the office for the meeting?
- A. That’s correct.” Tr. pgs. 519-520

Mariana’s testimony was further undermined by the testimony of her fellow terminated employee, Carlos, who testified that on the morning of October 12, 2010, he arrived at work at 8:45 a.m. Tr. pg. 436. He walked into HUB through the main door, but could not remember if he saw anyone at the reception desk. Tr. pg. 436. However, when asked if he had seen Mariana at all that morning, he testified to the following:

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

If Mariana had been working the reception desk at the time claimed, then Carlos would

have seen her. He did not see her, because she was not looking for Mrs. Iglesias, and had no reason to be at the receptionist desk. In fact, if she had been working at the reception desk that morning, (an important fact in believing her story), then she would have put it in her affidavit to Counsel for the Acting General Counsel. The affidavit was wholly devoid of this concocted story which was testified to in the hopes of supporting a claim that is not true.

***Letters to HUB Board never reference survey
or attempted meeting with Management***

The five terminated employees prepared and sent two letters to HUB's Board of Directors which were drafted, prepared and signed by Mariana, and the other four terminated employees. Neither of these letters mentions anything in support of the arguments asserted by Counsel for the Acting General Counsel and Mariana's claims about why she made the Facebook posts.

On October 13, 2010, the day after being fired, the five terminated employees, led by Mariana, prepared a letter for the HUB Board. Resp. Ex. 10A. This two page letter purports to tell the Board members their "side of the story" regarding their termination. Curiously missing from this two page letter is any mention of wages, hours, working conditions, a survey of the employees, or anything else that could potentially support the claim they were engaged in protected concerted activity.

A second letter dated October 18, 2010, was drafted by Mariana, and once again signed by all five terminated employees. Resp. Ex. 11. This letter was also directed to the HUB Board for the purpose of advising them of the grievance which they had about their termination. Completely missing from this two page letter is any mention of hours, wages, working conditions, a survey of employee opinions, or anything else that could potentially support the claim they were engaged in protected concerted activity.

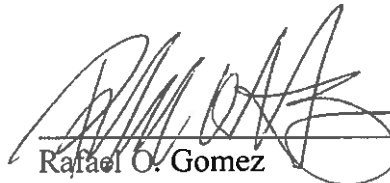
The terminated employees took the time to prepare two letters, within a week of their termination, outlining their opinions on the Facebook posts, and their feelings regarding why they were terminated. However, there is no mention of a survey, attempted meeting with management, hours, wages, policies of HUB, terms of employment, or any other work condition.

III. CONCLUSION

The ALJ was correct in his finding that Mariana did not try to meet with Mrs. Iglesias during the morning of October 12th. The finding that this was irrelevant was completely misplaced based on the evidence and the significance of this lie. However, to the extent this finding established the lack of credibility in Mariana's claims the Cross-Exceptions should be denied.

Dated: November 17, 2011
Buffalo, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Brief in Opposition to the Cross-Exceptions was electronically served on November 17, 2011, on the following:

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