

**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 REPLY BRIEF TO
RESPONDENT'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS**

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I. BACKGROUND:

On November 4, 2011, Counsel for the Acting General Counsel filed Cross-Exceptions to the Decision of Administrative Law Judge Arthur J. Amchan in the above-captioned matter. On November 17, 2011, Respondent filed an Answering Brief. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, General Counsel, by the undersigned, submits this Reply Brief.

II. CROSS-EXCEPTIONS:

Counsel for the Acting General Counsel respectfully took 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-Móore 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).¹

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)."

III. ARGUMENT

It is respectfully submitted that the ALJ failed to make a finding of fact concerning the October 9, 2010 conversation between Cole-Rivera and Damicela Rodriguez. (Tr. 253-254, 303-304, 351-352, 383, 403-404). The undisputed record establishes that based upon her conversation with a fellow co-worker, Cole-Rivera planned to meet with Respondent's Executive Director. (Tr. 253-254, 257-258, 267, 303-304, 351-352, 383, 404).

The arguments contained in Respondent's Answering Brief should be disregarded.

¹ 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. __). Counsel for Acting General Counsel's Answering Brief to Respondent's Exceptions will be referred to as General Counsel's Answering Brief, p. _____. Likewise, Counsel for Acting General Counsel's Brief in Support of Cross-Exceptions will be referred to as General Counsel's Brief in Support of Cross-Exceptions, p. _____. Respondent's Answering Brief to General Counsel's Cross-Exceptions will herein be cited as Respondent's Answering Brief, p. __. All references to Counsel for Acting General Counsel's and Respondent's exhibits will herein be GC Exh. __, and R Exh. __, respectively.

Respondent's Answering Brief fails to address General Counsel's first Cross-Exception, misstates and misinterprets Acting General Counsel's second Cross-Exception, mischaracterizes the ALJ's factual findings, and raises issues outside the scope of Acting General Counsel's Cross-Exceptions, in contravention of the Board's Rules and Regulations, Section 102.46 (f)(1).

Acting General Counsel's first Cross-Exception involves the ALJ's failure to find that on the morning of October 9, 2010, discriminatees Mariana Cole-Rivera and Damicela Rodriguez held a discussion before Cole-Rivera's 10:14 a.m. Facebook posting, GC Exh. 7. Likewise, this first Cross-Exception involves the ALJ's failure to describe the contents of that discussion, as described in the first Cross-Exception. Notably, Respondent completely ignores this Cross-Exception and fails to address it anywhere in its Answering Brief. Acting General Counsel's Brief in Support of Cross-Exceptions, pp. 2-3, addresses the undisputed record evidence supporting this conversation, and the contents of this conversation. This October 9 conversation among two discriminatees is relevant as to whether the discriminatees engaged in protected concerted activities, and is discussed in Acting General Counsel's Brief in Support of Cross-Exceptions, pp. 4-5.

Respondent's main argument in its Answering Brief misrepresents and confuses Acting General Counsel's second Cross-Exception with the ALJ's particular finding in 6 ALJD note 5. Acting General Counsel filed its second Cross-Exception over the ALJ's failure to discuss Cole-Rivera's expressed intentions to pre-emptively meet with Executive Director Iglesias prior to Cruz-Moore doing so. The ALJ's finding in 6 ALJD note 5, pertains only to whether Cole-Rivera on October 12, actually had a preliminary conversation with Executive Director Lourdes Iglesias prior to her termination meeting. Respondent confuses Cole-Rivera's expressed desire or "intention" to meet with Iglesias, with whether Cole-Rivera actually attempted to meet with

Iglesias on Tuesday, October 12. Acting General Counsel in its Brief in Support of Cross-Exceptions, p. 3, note 3, and in its Answering Brief, p. 19, note 11, explicitly states it is not filing a cross-exception on the factual question or credibility determination regarding whether on the morning of October 12, Cole-Rivera attempted to speak with Iglesias.

Contrary to Respondent's misrepresentation in its Answering Brief, pp. 1, 3-7, the ALJ made no finding whatsoever regarding Cole-Rivera's "intentions" from October 9 through October 12, to meet with Iglesias. Rather, the ALJ narrowly found that Cole-Rivera on the particular date of Tuesday, October 12, did not attempt to speak with Iglesias prior to the termination meeting. Notwithstanding Respondent's contention in its Answering Brief, pp. 1, 9, the ALJ appropriately declared that this finding did not materially affect the outcome of the case, or the ALJ's determination that the Facebook postings were protected.² (6 ALJD note 5).

Moreover, Respondent's attempt to generally discredit Cole-Rivera, in its Answering Brief, pp. 1, 9, should be rejected as well. As discussed in Acting General Counsel's Answering Brief to Respondent's Exceptions, p. 19, the ALJ otherwise specifically found, based upon record evidence, that Cole-Rivera was credible on numerous other points, including that Cruz-Moore had criticized employees' job performance, (4 ALJD note 4; 4 ALJD 18-33; Tr. 168-169, 198, 237-242, 382, 427-428); and that Cruz-Moore informed Cole-Rivera that she intended to raise concerns with Iglesias. (Tr. 250-254, 303, 383, 404; 4 ALJD 21-22; 4 ALJD note 5). See

² As discussed in Acting General Counsel's Answering Brief, p. 19, whether Cole-Rivera actually spoke with Iglesias the morning of October 12, is of no legal import, in analyzing whether the October 9 Facebook comments were concerted. The meeting itself did not need to come to fruition for the October 9 Facebook posting to be considered "concerted." Circle K Corp., 305 NLRB 932, 933-934 (1991). See also Whittaker Corp., 289 NLRB 933, 934 (1988) ("an employee does not have to engage in further concerted activity to ensure that his initial call for group action retains its concertedness.").

Acting General Counsel's Answering Brief, pp. 15-17.³

Respondent improperly focuses considerable emphasis in its Answering Brief on matters not even contemplated by Acting General Counsel's Cross-Exceptions, namely: 1) whether Cole-Rivera was trying to conduct a "survey" among fellow employees through the October 9 Facebook chain; 2) whether she informed other discriminatees and Respondent that she was seeking to take a "survey;" and 3) whether the discriminatees mentioned a survey or other concerns about terms and conditions to demonstrate that they had been engaged in protected concerted activities, in post-termination letters dated October 13 and October 18, 2010. (R Exh. 10(a), R. Exh. 11). See Respondent's Answering Brief, pp. 2-3 and 8-9. These matters are clearly outside the scope of Acting General Counsel's Cross-Exceptions, and should not be considered. Board's Rules and Regulations, Sections 102.46(f)(1), 102.46 (c). Acting General Counsel's Cross-Exceptions themselves and Brief in Support of Cross-Exceptions do not even mention the word "survey" and do not mention the post-termination letters, R Exh. 10(a), and R Exh. 11. These portions of Respondent's Answering Brief should be stricken, as they raise arguments unrelated to the particular Cross-Exceptions at issue. See Board's Rules and Regulations, Section 102.46(f)(1); See Indianapolis Mack Sales and Service, Inc., 288 NLRB 1123, n. 3 (1988) (the Board granted a motion to strike an answering brief to cross-exceptions, noting that Section 102.46(f)(1) of the Board's Rules and Regulations provides that an answering brief to cross-exceptions must address only the questions raised in the cross-exceptions); See

³ Furthermore, while Acting General Counsel did not file a cross-exception regarding whether Cole-Rivera spoke with or attempted to speak with Iglesias on October 12, prior to the termination meeting, Acting General Counsel rejects Respondent's claim in its Answering Brief, pp. 4-5, that Cole-Rivera did not testify consistently with her affidavit and throughout the hearing. Cole-Rivera testified, consistent with her affidavit, that she observed Iglesias going up the stairs, followed her and said she needed to talk with her. Cole-Rivera testified consistent with her affidavit, that she arrived at the facility at 8:30 a.m., signed in at 8:45 a.m., and saw Lourdes Iglesias at around 8:45 a.m. (Tr. 265; 328, 330-335, 339; GC Exh. 35, para. 20).

also Thermo-King Corp., 247 NLRB 296, n.2 (1980) (answering brief to cross-exceptions not considered to the extent it exceeded the scope of cross-exceptions).

Nonetheless, Respondent's contention that Cole-Rivera did not truly seek to conduct a survey of her fellow employees should be soundly rejected. The record evidence establishes that Cole-Rivera drew upon a recent college course that she had taken 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. (Tr. 254, 257-258, 267, 367). The language of the Facebook posting itself shows that Cole-Rivera wanted to find out how her coworkers felt- "My coworkers how do u feel?"

Regarding its arguments in its Answering Brief, pp. 8-9, pertaining to the discriminatees' post-termination letters, it is important to note that these post-termination letters were not even considered or relied upon by the ALJ in his decision. In addition, the ALJ appropriately expressed at the hearing that R Exh. 10(a) and R Exh. 11, were irrelevant, because they did not reflect what Respondent considered at the time of its terminations.⁴ (Tr. 360-361).

IV. CONCLUSION:

Counsel for the Acting General Counsel respectfully requests that the Board find in favor of its Cross-Exceptions. 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

⁴ Respondent in its Answering Brief, p.8, emphasizes Cole-Rivera's involvement with both post-termination letters, over any other discriminatee, when the ALJ appropriately ruled at the hearing on an objection, that it does not matter who drafted the documents; but rather, it matters that all five discriminatees signed both letters. (Tr. 344). The undisputed record evidence establishes that both letters resulted from a collaborative effort. (Tr. 202-203, 207, 345, 358-359). Respondent in its Answering Brief, pp. 8-9, claims that the letters do not support the discriminatees' position. However, that is not the case either. R Exh. 10(a) corroborates that Respondent told the discriminatees that the reason for the terminations was solely based upon the Facebook comments, (the alleged protected concerted activity), and that the comments were to "defend what [the discriminatees] do for the agency." R Exh. 11 stresses that the comments did not threaten Cruz-Moore based upon any prohibited reason, which attacks Respondent's position that the discriminatees engaged in harassment under Respondent's policies.

Rodriguez held a discussion, and that the Administrative Law Judge failed to discuss the nature of that discussion. In addition, 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 to discuss Cruz-Moore's criticisms of employees' work performance.

DATED at Buffalo, New York, this 1st day of December, 2011.

Respectfully submitted,

/s/ Aaron B. Sukert

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STATEMENT OF SERVICE

I hereby certify that on December 1, 2011, copies of Counsel for the Acting General Counsel's Reply Brief to Respondent's Answering Brief to Acting General Counsel's Cross-Exceptions in Case 03-CA-27872 were served by electronic mail upon:

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Dated December 1, 2011

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