Hispanics United of Buffalo, Inc. *and* Carlos Ortiz.
Case 03–CA–027872

December 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 2, 2011, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order.

At issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by discharging five employees for Facebook comments they wrote in response to a coworker's criticisms of their job performance. Although the employees' mode of communicating their workplace concerns might be novel, we agree with the judge that the appropriate analytical framework for resolving their discharge allegations has long been settled under *Meyers Industries*[5] and its progeny. Applying *Meyers,* we agree with the judge that the Respondent violated 8(a)(1) by discharging the five employees.

The relevant facts are as follows. Marianna Cole-Rivera and Lydia Cruz-Moore were coworkers employed by the Respondent to assist victims of domestic violence. The two employees frequently communicated with each other by phone and text message during the workday and after hours. According to Cole-Rivera's credited testimony, Cruz-Moore often criticized other employees during these communications, particularly housing department employees who, Cruz-Moore asserted, did not provide timely and adequate assistance to clients. Other employees similarly testified that Cruz-Moore spoke critically to them about their work habits and those of other employees.

This "criticism" issue escalated on Saturday, October 9, 2010, a nonworkday, when Cole-Rivera received a text message from Cruz-Moore stating that the latter intended to discuss her concerns regarding employee performance with Executive Director Lourdes Iglesias. Cole-Rivera sent Cruz-Moore a responsive text questioning whether she really "wanted Lourdes to know . . . how u feel we don't do our job. . . ." From her home, and

[1] The Respondent has requested oral argument. The request is denied, as the record, exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent excepts to several of the judge's evidentiary and procedural rulings, including (1) his revocation of its subpoena to Region 3 of the Board, seeking documents regarding "speakers, meetings, presentations, in-service, conferences and/or seminars presented by Board agents to the Respondent's employees at its main facility"; (2) his revocation of its subpoenas to the five discharged employees, seeking information such as communications among themselves, applications, if any, to the State for unemployment benefits and/or moneys received from the State, and any complaints or inquiries to State or Federal agencies seeking statutory relief; and (3) his denial of its request for the names and contact information of current and former employees that had been redacted from emails the Board agent investigating the underlying charge allegations had supplied the Respondent.

The Board accords judges' rulings substantial deference and sets them aside only where they constitute an abuse of discretion. *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. 1 fn. 3 (2011). A "high burden" is imposed to make this showing. *Aladdin Gaming, LLC*, 345 NLRB 585, 588 (2005), petition for review denied sub. nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). Having carefully reviewed the record, we find that the Respondent has failed to meet this burden.

First, the judge's revocation of the subpoena to Region 3 accords with longstanding precedent prohibiting Board agents from producing materials relating to the investigation of unfair labor practice charges. *G. W. Galloway Co.,* 281 NLRB 262 fn. 1 (1986), vacated on other grounds 856 F.2d 275 (D.C. Cir. 1988); see also *Earthgrains Co.,* 351 NLRB 733, 739 (2007). Second, as to the information subpoenaed from the discriminatees, the Respondent failed to show that it was relevant to any issue in dispute. Accordingly, the subpoena was properly revoked as an unwarranted "fishing expedition." *Santa Barbara News*, supra, slip op. fn. 3, citing *Parts Depot, Inc.,* 348 NLRB 152 fn. 6 (2006). Finally, with respect to its request for the redacted names and contact information referenced in emails, we agree with the judge that there is no merit to the Respondent's argument that it was entitled to the information because these individuals were "potential witnesses" who might have relevant information about the case. The redacted information includes nondiscoverable information gathered by the Board agent during his investigation, and the request constituted further "fishing" for potentially relevant evidence.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.3d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] For the reasons stated by the judge, we adopt his analysis and conclusion that the Board properly asserted jurisdiction over the Respondent.

[5] *Meyers Industries*, 268 NLRB 493 (1983)(*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986)(*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

using her own personal computer, Cole-Rivera then posted the following message on her Facebook page:

> Lydia Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?

Four off-duty employees—Damicela Rodriguez, Ludimar Rodriguez, Yaritza Campos, and Carlos Ortiz—responded by posting messages, via their personal computers, on Cole-Rivera's Facebook page; the employees' responses generally objected to the assertion that their work performance was substandard.

Cruz-Moore also responded, demanding that Cole-Rivera "stop with ur lies about me." She then complained to Iglesias about the Facebook comments, stating that she had been slandered and defamed. At Iglesias' request, Cruz-Moore printed all the Facebook comments and had the printout delivered to Iglesias. On October 12, the first workday after the Facebook postings, Iglesias discharged Cole-Rivera and her four coworkers,[6] stating that their remarks constituted "bullying and harassment" of a coworker and violated the Respondent's "zero tolerance" policy prohibiting such conduct.[7]

In *Meyers I*, the Board held that the discipline or discharge of an employee violates Section 8(a)(1) if the following four elements are established: (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity. 268 NLRB at 497. See also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2 (2010). Only the first and third elements are in dispute here: whether the employees' Facebook comments constituted concerted activity and, if so, whether that activity was protected by the Act.[8]

The Board first defined concerted activity in *Meyers I* as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. In *Meyers II*, the Board expanded this definition to include those "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887.

Applying these principles, as the judge did, there should be no question that the activity engaged in by the five employees was concerted for the "purpose of mutual aid or protection" as required by Section 7. As set forth in her initial Facebook post, Cole-Rivera alerted fellow employees of another employee's complaint that they "don't help our clients enough," stated that she "about had it" with the complaints, and solicited her coworkers' views about this criticism. By responding to this solicitation with comments of protest, Cole-Rivera's four coworkers made common cause with her, and, together, their actions were concerted within the definition of *Meyers I*, because they were undertaken "with . . . other employees." 268 NLRB at 497. The actions of the five employees were also concerted under the expanded definition of *Meyers II*, because, as the judge found, they "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."[9]

Our dissenting colleague contends that the employees' Facebook discussions about Cruz-Moore's criticisms were not undertaken for the purpose of their "mutual aid and protection." Specifically, he states that a group action defense to Cruz-Moore's criticisms could not have been intended because Cole-Rivera failed to tell her co-

[6] The judge noted that Jessica Rivera, Iglesias' secretary, was not discharged even though she also posted a responsive Facebook comment. The Respondent excepts, stating that it no longer employed Rivera at the time of the discharges. The record, however, shows otherwise.

[7] Although Cruz-Moore informed Iglesias on October 10 that she had suffered a heart attack as a result of the Facebook comments, the judge found that there was no record evidence of a heart attack, nor was there any evidence establishing a causal relationship between the comments and Cruz-Moore's health. In addition, although Iglesias informed the five employees when discharging them that they were responsible for Cruz-Moore's heart attack, we agree with the judge that Iglesias had no reasonable basis for making that statement.

[8] The Respondent does not, and could not, deny that it knew of the concerted nature of the employees' action, as Iglesias showed the five employees printouts of their October 10 Facebook comments during their discharge interviews. See, e.g., *Dresser-Rand Co.,* 358 NLRB No. 34, slip op. at 26 (2012) (the "most obvious evidence" of employer knowledge was respondent's possession of a voice recording containing evidence of concerted activity). With respect to the fourth element, the judge found and the Respondent agrees that the Facebook postings were the sole reason for the discharges. Because this is a single-motive case where there is no dispute as to the activity for which discipline was imposed, the dual-motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is not applicable. See, e.g., *Dresser-Rand Co*., 358 NLRB No. 97, slip op. at 25 (2012); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000).

[9] The Acting General Counsel cross-excepts to the judge's failure to find—based on Cole-Rivera's testimony, corroborated by Damicela Rodriguez—that Cole-Rivera also intended to meet with Iglesias about Cruz-Moore's criticisms of employees. Because the group action objective of the Facebook postings was demonstrated, in part, by Cole-Rivera's knowledge that Cruz-Moore intended to meet with Iglesias about her workplace complaints, we find it unnecessary to address and resolve the Acting General Counsel's argument that Cole-Rivera also intended to meet with Iglesias about the issue.

workers that Cruz-Moore was going to voice her criticisms to Iglesias. We disagree.

In *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 17 (2012), the Board reiterated established precedent that the "object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate," citing *Whittaker Corp.*, 289 NLRB 933, 933 (1988). Even absent an express announcement about the object of an employee's activity, "a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions . . . ." Id. Relying on this authority, the Board in *Relco* found unlawful the discharge of two employees for discussing among themselves and other employees their "concern" about the rumored discharge of a fellow employee. Notwithstanding that the two never "talk[ed] specifically about working together to address their concerns about [the employee's] termination," the Board adopted the judge's finding that they "engaged in concerted activities when they communicated with other employees about their concern . . .[and i]t matter[ed] not that [they] had not yet taken their concerns to management—their discussions with coworkers were indispensable initial steps along the way to possible group action" Id., slip op. at 17.

Here, too, Cole-Rivera's Facebook communication with her fellow employees, immediately after learning that Cruz-Moore planned to complain about her coworkers to Iglesias, had the clear "mutual aid" objective of preparing her coworkers for a group defense to those complaints. Contrary to our colleague, Cole-Rivera was not required under *Relco* to discuss this object with coworkers or tell them it was made necessary by Cruz-Moore's impending visit with Iglesias. Her "mutual aid" object of preparing her coworkers for group action was implicitly manifest from the surrounding circumstances. *Timekeeping Systems, Inc.*, 323 NLRB 244, 248 (1997).[10]

As to the third element of the violation, whether the employees' concerted activity was protected, we find that the Facebook comments here fall well within the Act's protection. The Board has long held that Section 7 protects employee discussions about their job performance,[11] and the Facebook comments plainly centered on that subject. As discussed, the employees were directly responding to allegations they were providing substandard service to the Respondent's clients. Given the negative impact such criticisms could have on their employment, the five employees were clearly engaged in protected activity in mutual aid of each other's defense to those criticisms.[12]

The Respondent does not argue that the employees' comments were unprotected because they were made via Facebook. To the contrary, the Respondent asserts that, "regardless of where the comments and actions of the five terminated at-will employees took place, the result herein would have been the same." According to the Respondent, it was privileged to discharge the five employees because their comments constituted unprotected harassment and bullying of Cruz-Moore, in violation of its "zero tolerance" policy. The judge rejected this argument, and so do we.

First, as the judge found, the Facebook comments cannot reasonably be construed as a form of harassment or bullying within the meaning of the Respondent's policy.[13] Second, even assuming that the policy covered the comments, the Respondent could not lawfully apply its policy "without reference to Board law." *Consolidated Diesel Co.,* 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). As the Board explained in *Consolidated Diesel*, "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity." Id. Here, as in *Consolidated Diesel*, the Respondent applied its harassment policy to the discharged employees based solely on Cruz-Moore's subjective claim (in a text message) that she felt offended by the Facebook comments. As the United States Court of Appeals for the Fourth Circuit noted in enforcing the Board's decision, "[s]uch a wholly subjective notion of harassment is unknown to the Act," 263 F.3d 354, and discipline imposed on this basis violates Section 8(a)(1).

[10] *Daly Park Nursing Home*, 287 NLRB 710 (1987), relied on by our colleague, bears no resemblance to this case. Rather than preparing for group action in that case, employee Heard and her coworkers essentially agreed that group action in aid of a terminated fellow employee would be futile.

[11] *Praxair Distribution, Inc.,* 357 NLRB No. 91, slip op. at 11 (2011); *Jhirmack Enterprises*, 283 NLRB 609 fn. 2 (1987).

[12] In affirming the judge's finding that the employees' activity was protected, we find it unnecessary to rely on his analysis under *Atlantic Steel Co.,* 245 NLRB 814 (1979). That analysis typically applies when determining whether activity that is initially protected has been rendered unprotected by subsequent misconduct. See, e.g., *Crowne Plaza LaGuardia*, 357 NLRB No. 95 (2011). Here, however, where the Respondent contends that the Facebook postings were unprotected from the outset, an *Atlantic Steel* analysis is unnecessary.

[13] As found by the judge, there was no evidence that any of the five employees harassed Cruz-Moore by their comments, or that any purported harassment was covered by the zero tolerance policy, which refers to "race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis."

In sum, because we have found that the Facebook postings were concerted and protected, and because it is undisputed that the Respondent discharged the five employees based solely on their postings, we conclude that the discharges violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hispanics United of Buffalo, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 14, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I agree with my colleagues and the judge that *Meyers Industries*[1] and its progeny control in determining whether the Respondent violated Section 8(a)(1) of the Act by discharging five employees for their Facebook postings about a coworker's criticisms of their work. Correctly applied, however, the *Meyers* test mandates dismissal of the complaint. This is so because "[i]n order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.' These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1)."[2] In this case, the colloquy around the Facebook "virtual water cooler" may have been concerted, in the sense that it was actual group activity, but the Acting General Counsel has failed utterly to prove that it was activity undertaken for "mutual aid and protection." As a result, I would find that the Respondent lawfully discharged the employees for their unprotected Facebook comments.[3]

Not all shop talk among employees—whether in-person, telephonic, or on the internet—is concerted within the meaning of Section 7, even if it focuses on a condition of employment.[4] With respect to the second element of the Acting General Counsel's burden, the *Meyers* test expressly incorporates the requirement of *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), that for conversations among employees to fall within the definition of concerted activity protected by Section 7 "it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."[5] Absent evidence of a nexus to group action, such conversations are mere griping, which the Act does not protect.

Here, the group griping on Facebook was not protected concerted activity because there is insufficient evidence that either the original posting or the views expressed in response to it were for mutual aid or protection. Specifically, in her initial Facebook post, Marianna Cole-Rivera informed her coworkers that Lydia Cruz-Moore had complained that "we don't help our clients enough," and solicited her coworkers' views about this criticism. Four coworkers posted responses on Cole-Rivera's Facebook page, generally objecting to Cruz-Moore's claims that their work performance was deficient. Cole-Rivera posted another comment, essentially agreeing with her coworkers' posts. Subsequent posts diverged to discussion of a party planned for that evening.

My colleagues find that the employees' conduct was concerted because, in responding to Cole-Rivera's initial Facebook post, her four coworkers made "common cause" with her. They did not. As previously stated, the mere fact that the subject of discussion involved an aspect of employment—i.e., job performance—is not enough to find concerted activity for mutual aid and protection. There is a meaningful distinction between sharing a common viewpoint and joining in a common cause. Only the latter involves group action for mutual aid and protection. While the Facebook posts evidenced the employees' mutual disagreement with Cruz-Moore's criticism of their job performance, the employees did not

[1] *Meyers Industries*, 268 NLRB 493 (1983)(*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986)(*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[2] *Hollings Press, Inc.*, 343 NLRB 301, 302 (2004).

[3] For purposes of this opinion, I assume, arguendo, that the judge correctly found the Board has jurisdiction over the Respondent.

[4] See, e.g. *Adelphi Institute, Inc.*, 287 NLRB 1073, 1074 (1988).

[5] 330 F.2d at 685.

suggest or implicitly contemplate doing anything in response to this criticism. The five employees were simply venting to one another in reaction to Cruz-Moore's complaints. This does not constitute concerted activity under the precedent set forth above.

In the alternative, my colleagues agree with the judge's finding that the five employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." The record fails to support this conclusion. There is no credible evidence that Cole-Rivera made her initial posting with the intent of promoting a group defense, or that her coworkers responded for this purpose.[6] Although Cruz-Moore texted Cole-Rivera that she was going to voice her complaints about housing department employees to Executive Director Iglesias, Cole-Rivera made no mention of this message in her initial posting about these complaints and the four employees who responded to the posting were undisputedly not aware of this message. This would be a different case if Cole-Rivera had informed her coworkers that Cruz-Moore intended to discuss her complaints with management and asked them how they should respond. But on this record, there is no evidence that these employees were preparing for group action.[7]

Jhirmack Enterprises, 283 NLRB 609 fn. 2 (1987), and *Praxair Distribution, Inc.,* 357 NLRB No. 91, slip op. at 11 (2011), cited by my colleagues, are distinguishable. In *Jhirmack*, the Board found that an employee was engaged in protected concerted activity when she advised a coworker that other employees had complained to management about his slow job performance. The Board noted that the employee complaints were prompted by their concern that their coworker's performance adversely affected their chances of getting more money. The employee told her coworker about the complaints to encourage him to take corrective action to protect his job. Thus, the Board found that the employee's conduct was taken for the mutual aid and protection of a coworker and therefore was concerted activity. In *Praxair Distribution*, supra, the Board adopted the judge's finding that two employees engaged in protected concerted activity where they brought their grievances to the attention of management. 357 NLRB No. 91, slip op at 19. In both *Jhirmack* and *Praxair*, unlike here, there was clear evidence of group action.

The facts of this case far more closely resemble those in cases where the Board has found no protected concerted activity in the absence of evidence of a nexus between employee discussions and group action. *Daly Park Nursing Home,* 287 NLRB 710 (1987), is illustrative of this precedent. There, the Board found that an employee's discussion with coworkers about another employee's discharge did not constitute concerted activity because there was no evidence that any of the employees had contemplated doing anything about the discharge. Id. at 711. According to the Board, "there [was] nothing more than a conversation between employees relating their opinion on matters of interest to the employees" and the conversation "[did] not indicate that 'group action of any kind [was] intended contemplated, or even referred to.'" Id. (quoting *Mushroom Transportation*, 330 F.2d at 685).

Here, as in *Daly Park*, there is no evidence that the five employees "contemplated, or even referred to," doing anything as a group in response to their coworker's criticism. My colleagues' contrary view cannot be reconciled with this extant precedent following and applying the *Meyers* test. Accordingly, I dissent from their adoption of the judge's finding that the employees were engaged in concerted activity for mutual aid and protection.

Inasmuch as the Acting General Counsel has failed to meet his initial burden of proving that the alleged discriminatees were engaged in concerted activity protected by the Act, I need not address whether the Respondent correctly relied on its zero tolerance no-harassment policy in discharging them. It is well

[6] The judge specifically discredited Cole-Rivera's testimony that she sought to speak with Executive Director Lourdes Iglesias about Cruz-Moore's criticisms. For that matter, Cole-Rivera testified that she advised Cruz-Moore against taking her complaints to Iglesias because Cole-Rivera believed Iglesias would not be receptive to hearing such complaints.

[7] Contrary to the majority, I agree that the intent to engage in group action need not be expressly stated. It can be inferred. Unlike in *Relco Locomotives, Inc.*, 358 NLRB No. 37 (2012), however, I find not record basis for inferring that a call to group action in defense against a coworkers' job performance criticisms is implicit in either Cole-Rivera's initial posting or in any of the responses to that posting.

established that an employer may discharge an employee "for good cause, bad cause, or no cause at all, without violating the Act as long as his motivation is not anti-union discrimination and the discharge does not punish activities protected by the Act."[8] I would therefore dismiss the complaint.

Dated, Washington, D.C. December 14, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Aaron B. Sukert. Esq., for the General Counsel.
Rafael 0. Gomez and *Michael H Kooshoian, Esqs. (Lo Tempio & Brown. P.C).* of Buffalo, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York, on July 13–15, 2011. Charging Party, Carlos Ortiz, filed the charge on November 18, 2011, and the General Counsel issued the complaint on May 9, 2011, and an amended complaint on May 27.

Respondent, Hispanics United of Buffalo, Inc. (HUB), is a not-for-profit corporation which renders social services to its economically disadvantaged clients in Buffalo, New York. Its services include housing, advocacy for domestic violence victims, translation and interpretation services, a food pantry, senior and youth services, and employment assistance.

HUB's executive director, Lourdes Iglesias, terminated the employment of Carlos Ortiz, Mariana Cole-Rivera, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos on October 12, 2010. The General Counsel alleges that the five alleged discriminatees were terminated because they engaged in protected concerted activity and that therefore these terminations violated Section 8(a)(1) of the National Labor Relations Act (the Act).

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent disputes whether the discriminatees' activity was protected and also disputes whether the Board has jurisdiction over it. With regard to jurisdiction, HUB points to the fact that it renders its services only in Buffalo and purchases goods and services only from companies which have facilities in New York State, mostly near Buffalo. Moreover, Respondent uses such goods and services only in the Buffalo, New York area.

The record establishes that in 2010, HUB had grant income of $1,184,197. $115,637 of this income came directly from the U.S. Department of Housing and Urban Development. Another $38,657 came from a Community Development Bloc Grant. Although received directly from the city of Buffalo, this money also emanates from the Federal Government (GC Exh. 27, p. 8; Tr. 65–66; GC Exh. 4). The relevant figures for 2009 are similar and HUB continues to receive Federal grant funds in 2011 (GC Exh. 4).

Respondent admits that it derives gross revenues in excess of $250,000. I find that the Board has jurisdiction over Respondent solely on the basis of its annual revenue and the amount of Federal funds it receives.

Moreover, assuming that its Federal funding was insufficient to give the Board jurisdiction, Respondent purchased more than $60,000 annually from entities which are engaged in interstate commerce. This is also sufficient to give the Board jurisdiction over Respondent. For example, HUB purchases services from Otis Elevator, which maintains the elevators at Respondent's facility, Verizon, Allied Waste Services, National Fuel, and National Grid. I rely on the following cases in concluding that the Board has jurisdiction over Respondent.

In *St. Aloysius Home*, 224 NLRB 1344 (1976), the Board reversed its prior policy of declining jurisdiction over charitable organizations. This decision was based in part on the 1974 health care amendments to the Act. These amendments deleted the only reference to the exclusion from Board jurisdiction of charitable organizations.

The Board established a jurisdictional standard of $250,000 annual revenue for all social service organizations other than those for which there existed a standard specifically applicable to the type of activity in which they were engaged, *Hispanic Federation for Social Development*, 284 NLRB 500 (1987). The specific standards range from $50,000 for nonretail nonprofit organizations to $500,000 for apartment houses, and $1 million for art museums, cultural centers, libraries, colleges, and universities, *Latin Business Assn*., 322 NLRB 1026 (1997). HUB does not dispute that the $250,000 standard applies it and I so conclude.

In *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1101 (2000), the Board found that it had jurisdiction over an employer very similar to HUB. That employer provided nutrition and other services to a housing project in the Bronx, and received most of its funding from New York State agencies. The Board asserted jurisdiction solely on the basis that the employer's gross revenues exceeded $250,000.

The Board asserted jurisdiction in *Catholic Social Services*, 225 NLRB 288 (1976), over a charitable social service agency

[8] *L'Eggs Products v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980).

[1] The General Counsel has submitted a motion to correct errors in the transcript. I have reviewed the motion and the transcript (vol. 1 as corrected by the reporting service) and am satisfied that the motion accurately captures what was said at the hearing. I therefore grant the motion and incorporate it as part of the record in this matter. I do note, however, the following corrections should be modified as follows: p. 52, L. 13, should be p. 52, L. 12; p. 143, L. 1, should be p. 142, L. 24; p. 171, L. 21, should be p. 170, L. 21; and p. 180, L. 4, should be p. 179, L. 20. Also the name of the case I mentioned at Tr. 153 and 157 is *Parexel*.

similar to HUB, which had an annual income of $412,000. The Board noted that the employer received $24,000 from the Federal Bureau of Prisons and paid in excess of $13,000 to Pacific Telephone and Telegraph, "an instrumentality of interstate commerce." Similarly, in *FiveCAP, Inc.,* 332 NLRB 943, 948 (2000), the Board asserted jurisdiction by virtue of the fact that the Respondent, a local community action agency, had gross revenues of over $1 million and received Federal funds in excess of $50,000 from outside of Michigan.[2]

In several cases, the Board has focused on the Federal Government as a source of the employer's revenue. In *Community Services Planning Council*, 243 NLRB 798, 799 (1979), the Board asserted jurisdiction because the greatest portion of the employer's revenues ultimately came from the Federal Government (75 percent).[3] Later in the decision the Board indicated that it would assert jurisdiction over an employer whenever "a substantial portion of its moneys," are received from the Federal Government. In *Bricklayers & Allied Craftsmen Local 2*, 254 NLRB 1003 (1981), the Board asserted jurisdiction on the basis of the fact that the employer's $1 million contract with the Los Angeles County Department of Roads was funded through the Federal Government.

I would also note that in the only Board decision relied upon by Respondent, *Ohio Public Interest Campaign,* 284 NLRB 281 (1987), the Board affirmed the judge's finding at page 286, that "there is no evidence of OPIC receiving grants from any Federal, state, or local governmental unit source." Thus, that decision is materially distinguishable from the facts of the instant case. In sum, I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Alleged Protected Concerted Activity

Relevant Events Prior to October 9, 2010

Respondent hired Lydia Cruz-Moore in May 2010 as a domestic violence (DV) advocate pursuant to a 1-year grant from Erie County. Her job was primarily to accompany victims of domestic violence to hearings at the city of Buffalo's Family Justice Center. One day each week Cruz-Moore worked at HUB's offices doing such tasks as finding employment for HUB clients or insuring that their rent was paid. A number of other HUB employees were at the main office every day and generally performed different tasks than Cruz-Moore.

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

Several others of the discriminatees also had conversations or text message exchanges with Cruz-Moore, in which Cruz-Moore criticized HUB employees. On August 2, 2010, Cruz-Moore told discriminatee Ludimar Rodriguez that a client had been waiting for Rodriguez for 20 minutes and criticized Rodriguez' job performance.

Discriminatee Damicela Rodriguez had a conversation with Cruz-Moore in late September or early October in which Cruz-Moore complained that HUB staff members were not doing their jobs. Cruz-Moore also complained to Carlos Ortiz about the job performance of employees in Respondent's housing department.

The Facebook Postings on which Respondent Relies in Terminating the Five Alleged Discriminatees

On Saturday, October 9, 2010, at 10:14 a.m., Mariana Cole-Rivera posted the following message on her Facebook page from her home:

> Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?[4]

The following employees responded by posting comments on Cole-Rivera's Facebook page:

> At 10:19, Damicela Rodriguez (also known as Damicela Pedroza Natal) posted the following response:
>
> What the f. .. Try doing my job I have 5 programs
>
> At 10:26, Ludimar (Ludahy) Rodriguez posted:
>
> What the Hell, we don't have a life as is, What else can we do???
>
> At 11: 11, Yaritza (M Ntal) Campos posted:
>
> Tell her to come do mt [my] fucking job n c if I don't do enough, this is just dum
>
> At 11:41, Carlos Ortiz de Jesus posted:
>
> I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)

[2] For other cases in which the Board has asserted jurisdiction over similar employers, see *East Oakland Community Health Alliance*, 218 NLRB 1270, 1271 (1975); *Saratoga County Economic Council*, 249 NLRB 453, 455 (1980); *Upstate Home for Children*, 309 NLRB 986, 987 (1992); *Hudelson Baptist Childrens Home*, 276 NLRB 126 (1985); *Garfield Park Health Center,* 232 NLRB 1046 (1977); *Mon Valley United Health Services,* 227 NLRB 728 (1977).

[3] A similar case is *Electrical Workers Local 48 (Kingston Constructors),* 332 NLRB 1492, 1497–1498 (2000).

[4] Respondent argues at p. 32 of its brief that this statement is a lie and suggests therefore, the discriminatees are not entitled to protection of the Act. First of all, Cruz-Moore did not testify at the instant hearing, thus, I cannot credit what Respondent's brief characterizes as her "vehement denial." Moreover, I credit Cole-Rivera's testimony, which is corroborated by other discriminatees, that Cruz-Moore had repeatedly criticized the job performance of HUB employees, and Cole-Rivera's testimony, at Tr. 251, that Cruz-Moore had told her that she was going to go to Iglesias with her complaints.

Mariana Cole-Rivera posted again at 11:45:

> Lol. I know! I think it is difficult for someone that its not at HUB 24-7 to really grasp and understand what we do ..I will give her that. Clients will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at HUB and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys

Nannette Dorrios, a member of the Board of Directors at HUB posted at 12:10:

> Who is Lydia Cruz?

Yaritza Campos posted a second time at 12:11:

> Luv ya too boo

Mariana Cole-Rivera at 12:12 responded to Dorrios by the following post:

> She's from the dv program works at the FJC [Family Justice Center] at hub once a week.

Jessica Rivera, the Secretary to HUD Director Iglesias, posted at 1: 10 p.m.

> Is it not overwhelming enough over there?

At 2:27 Lydia Cruz-Moore posted:

> Marianna stop with ur lies about me. I'll b at HUB Tuesday..

Cole-Rivera responded at 2:56:

> Lies? Ok. In any case Lydia, Magalie [Lomax, HUB'S Business Manager] is inviting us over to her house today after 6:00 pm and wanted to invite you but does not have your number i'll inbox you her phone number if you wish.

Carlos Ortiz posted at 10:30 p.m.

> Bueno el martes llevo el pop corn [Good, Tuesday, I'll bring the popcorn].

Saturday, October 9, was not a workday for any of HUB's employees. None of the discriminatees used HUB's computers in making these Facebook posts.

Lydia Cruz-Moore complained to HUB Executive Director Lourdes Iglesias about the Facebook posts. Her text messages to Iglesias suggest that she was trying to get Iglesias to terminate or at least discipline the employees who posted the comments on Facebook. She appears to have had a dispute with Mariana Cole-Rivera, which was at least in part work related. It is not clear why she bore such animosity against the other employees, most of whom did not mention her name in their posts.

Tuesday, October 12, 2010

On October 12, Lourdes Iglesias met individually with five of the employees who had made the Facebook posts on October 9 and fired each one of them.[5] She told them that the posts constituted bullying and harassment and violated HUB's policy on harassment. Iglesias did not terminate the employment of her secretary, Jessica Rivera, who had also entered a post on Cole-Rivera's Facebook page on October 9.

Each of the meetings was very short. Iglesias told each of the employees that Cruz-Moore had suffered a heart attack as a result of their harassment and that Respondent was going to have to pay her compensation. For these reasons, Iglesias told each one that she would have to fire them. It is not established in this record that Cruz-Moore had a heart attack, nor whether there was any casual relationship between whatever health problems Cruz-Moore may have been experiencing and the Facebook posts. Furthermore, the record establishes that when Iglesias decided to fire the five discriminatees she had no rational basis for concluding that their Facebook posts had any relationship to Cruz-Moore's health.

It has also not been established why Respondent or its insurance carrier would have had to compensate Cruz-Moore. Typically, a workers' compensation claimant has to show some relationship been their physical ailment and their employment. This is often difficult in cases in which the ailment, particularly something like a heart attack or a stroke, manifested itself when the employee was not at work.[6]

Several employees were handed termination letters at their meeting with Iglesias; others received them in the mail a few days later. Respondent has not replaced the five alleged discriminatees. It has given their work responsibilities to other employees and has operated with five fewer employees (25 as opposed to 30).

Analysis

The Discriminatees Engaged in Protected Concerted Activity. Respondent Terminated their Employment in Violation of Section 8(a)(1) of the Act.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . . [Emphasis added.]"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." How-

[5] I do not credit Mariana Cole-Rivera's testimony that she attempted to speak to Iglesias on October 12, prior to the meeting in which she was terminated. Iglesias denies any such contact with Cole-Rivera and Carlos Ortiz' testimony leads me not to credit Cole-Rivera's testimony on this point. However, since I find that the October 9 Facebook postings were protected, this finding does not materially affect the outcome of this case.

[6] Under New York Workers' Compensation Law, there is a rebuttable presumption that an employee's death from a heart attack or stroke is compensable-if it occurs at work. However, even in cases in which an employee dies of a heart attack while at work, the death is not necessarily compensable in New York State. The presumption may be rebutted by medical evidence, particularly where the decedent had a preexisting medical condition, see, e.g., *Schwartz v. Hebrew Academy of Five Towns*, 39 A.D.3d 1134, 834 N.Y.S. 2d 400, N.Y.A.D. 3 Dept., 2007.

ever, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683,685 (3d Cir. 1964). The object of inducing group action need not be express.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

Respondent concedes that the sole reason it discharged the five discriminatees is the October 9 Facebook postings. It also concedes that regardless of whether the comments and actions of the five terminated employees took place on Facebook or "around the water cooler" the result would be the same. Thus, the only substantive issue in this case, other than jurisdiction, is whether by their postings on Facebook, the five employees engaged in activity protected by the Act. I conclude that their Facebook communications with each other, in reaction to a coworker's criticisms of the manner in which HUB employees performed their jobs, are protected.

It is irrelevant to this case that the discriminatees were not trying to change their working conditions and that they did not communicate their concerns to Respondent. A leading case in this regard is *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996),[7] in which the Board held that employee complaints to each other concerning schedule changes constituted protected activity. By analogy, I find that the discriminatees' discussions about criticisms of their job performance are also protected.

Likewise in *Parexel International, LLC,* 356 NLRB No. 82, slip op. at 3 and fn. 3 (2011), the Board found protected, employees' discussions of possible discrimination in setting the terms or conditions of employment. Moreover, concerted activity for employees' mutual aid and protection that is motivated by a desire to maintain the status quo may be protected by Section 7 to the same extent as such activity seeking changes in wages, hours, or working conditions, *Five Star Transportation, Inc.,* 349 NLRB 42, 47 (2007).

Other cases similar to the instant matter are *Jhirmack Enterprises,* 283 NLRB 609, 615 (1987), and *Akal Security, Inc*., 355 NLRB 584 (2010). In *Akal Security*, the Board reaffirmed the decision by a two-member Board at 354 NLRB 122 (2009). The Board dismissed the complaint allegation that Akal had terminated the employment of two court security officers in violation of Section 8(a)(1). However, the Board found that the discriminatees' conversations with a coworker about his job performance constituted concerted activity protected by Section 8(a)(1).

Equally relevant are the Board decisions in *Automatic Screw Products Co*., 306 NLRB 1072 (1992), and *Triana Industries*, 245 NLRB 1258 (1979). In those cases the Board found that the employers violated Section 8(a)(1) by promulgating a rule prohibiting employees from discussing their wages. It stands to reason that if employees have a protected right to discuss wages and other terms and conditions of employment, an employer violates Section 8(a)(1) in disciplining or terminating employees for exercising this right—regardless of whether there is evidence that such discussions are engaged in with the object of initiating or inducing group action.

However, assuming that the decision in *Mushroom Transportation,* supra, is applicable to this case, I conclude that the Facebook postings satisfy the requirements of that decision. The discriminatees herein were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management. By discharging the discriminatees on October 12, Respondent prevented them by taking any further group action vis-à-vis Cruz-Moore's criticisms. Moreover, the fact that Respondent lumped the discriminatees together in terminating them, establishes that Respondent viewed the five as a group and that their activity was concerted, *Whittaker Corp.,* supra.

In sum, I conclude that the above cases control the disposition of the instant case. Just as the protection of Sections 7 and 8 of the Act does not depend on whether organizing activity was ongoing, it does not depend on whether the employees herein had brought their concerns to management before they were fired, or that there is no express evidence that they intended to take further action, or that they were not attempting to change any of their working conditions.[8]

Employees have a protected right to discuss matters affecting their employment amongst themselves. Explicit or implicit criticism by a coworker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7. That is particularly true in this case, where at least some of the discriminatees had an expectation that Lydia Cruz-Moore might take her criticisms to management. By terminating the five discriminatees for discussing Cruz-Moore's criticisms of HUB employees' work, Respondent violated Section 8(a)(1).

The Five Discriminatees did not Engage in Conduct which Forfeited the Protection of the Act

If an employer asserts that an employee engaged in misconduct during the course of otherwise protected activity, the Board looks to the factors set forth in *Atlantic Steel Co.,* 245 NLRB 814 (1979), to aid in determining whether the employee's conduct became so opprobrious as to lose protection under the Act. The *Atlantic Steel* factors are: (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

[7] The court of appeals denied enforcement regarding the termination of Aroostook's employees primarily on the grounds that their complaints were made in patient care areas.

[8] Respondent argues that the Facebook postings were not protected in part because persons other than HUB employees may have seen them. I find this irrelevant. Cole-Rivera's initial post asked for responses from coworkers about Cruz-Moore's criticism of HUB employees job performance.

was, in any way, provoked by an employer's unfair labor practice. Applying these factors, there is no basis for denying any of the five discriminatees the protection of the Act.

As to factor 1, the "discussion," the Facebook posts were not made at work and not made during working hours. As to (2) the subject matter, the Facebook posts were related to a coworker's criticisms of employee job performance, a matter the discriminatees had a protected right to discuss. As to factor (3) there were no "outbursts." Indeed, several of the discriminatees did not even mention Cruz-Moore; none criticized HUB. Regarding *Atlantic Steel* factor (4), while the Facebook comments were not provoked by the employer, this factor is irrelevant to the instant case.

Additionally, Respondent has not established that the discriminatees violated any of its policies or rules. It relies on an assertion that it was entitled to discharge the five pursuant to its "zero tolerance" policy regarding harassment. Respondent has a policy against sexual harassment which has no relevance to this case. It also has a policy against harassment of other sorts, which states as follows:

> Hispanics United of Buffalo will not tolerate any form of harassment, joking remarks or other abusive conduct (including verbal, nonverbal, or physical conduct) that demeans or shows hostility toward an individual because of his/her race, color, sex, religion, national origin, age, disability, veteran status or other prohibited basis that creates an intimidating, hostile or offensive work environment, unreasonably interferes with an individual's work performance or otherwise adversely affects an individual's employment opportunity.

There is nothing in this record that establishes that any of the discriminatees were harassing Lydia Cruz-Moore, and even if there were such evidence, there is no evidence that she was being harassed on the basis of any of the factors listed above. Finally, there is no evidence that the comments would have impacted Cruz-Moore's job performance. She rarely interacted with the discriminatees. In summary, Lourdes Iglesias had no rational basis for concluding that the discriminatees violated Respondent's zero tolerance or discrimination policy. For reasons not disclosed in this record, Respondent was looking for an excuse to reduce its work force and seized upon the Facebook posts as an excuse for doing so.

The terminations are also not justified by the alleged relationship between the Facebook posts and Cruz-Moore's health. There is no probative evidence as to the nature of Cruz-Moore's health problem following the Facebook posts nor is there any probative evidence as to a causal relationship between Cruz-Moore's heart attack (assuming she had one) or other health condition and the Facebook posts.

REMEDY

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Hispanics United of Buffalo, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees due to their engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos full reinstatement to their former jobs or, if any of those jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Buffalo, New York office copies of the attached notice marked "Appendix"[10] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 12, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 2, 2011.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours, and other terms and conditions of your employment, including criticisms by coworkers of your work performance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez, and Yaritza Campos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

HISPANICS UNITED OF BUFFALO, INC.