

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ABC HOME FURNISHINGS, INC.

and

Case No. 2-CA-34376

JAMES DINSMORE

Simone-Jon Koike, Esq., for the General Counsel.
Nathan L. Kaitz, Esq., Morgan, Brown and Joy,
for the Respondent.
Denise K. Bonnaig, for the Charging Party.

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on July 15 and 26, 2002 in New York, New York.

On February 11, 2002, James Dinsmore, an individual filed an unfair labor practice charge against ABC Home Furnishings, Inc., herein called ABC, or Respondent. On April 30, 2002 a complaint issued alleging that Respondent had discharged Dinsmore in violation of Section 8(a)(1) and (3) of the Act.¹

Based upon the record herein, including my observation of the demeanor of the witnesses, and the briefs submitted by Counsel for General Counsel and Counsel for Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

Respondent, is a New York corporation, with an office and place of business in New York, New York, herein called Respondent's facility, has been engaged in retail sale of rugs, furniture and other home furnishings. Annually, in the course and conduct of its business operations, Respondent derives gross revenues in excess of \$500,000. Annually, in the course and conduct of its business operations described above, Respondent sells and ships from its New York, New York facility, goods valued in excess of \$50,000 directly to points outside the State of New York.

¹ On July 3, 2002 the Regional Director for Region 2 issued an Order Severing Cases, Approving Request to Withdraw Charges and Dismissing Complaint in Case No. 2-CA-34134 which case had been consolidated with the instant complaint.

It is admitted and I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5 It is also admitted, and I conclude that, Local 1-S, Department Store Workers Union, RWDSU, UFCW, AFL-CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

10 Evan Cole is the owner of ABC and its CEO, Paulette Cole, his wife is CO-CEO. The next highest officer is Michael McDonough, the Chief Operating Officer. He was responsible for the day to day operations until December, 2001. Reporting to McDonough were Leslie Ferrier, Director of Human Resources, Skye Kirby, General Manager, and Ezra Yanowitz, Vice President. It is admitted that all of the above individuals are supervisors and agents of ABC within the meaning of the Act.

15 ABC's Manhattan store sells furniture and other home furnishings and has six retail floors. ABC sells furniture on the first, second, fourth and fifth floors. The furniture salespeople are assigned to a particular floor and work on commission. There were a total of 26
20 commissioned furniture salespeople on all floors. The floors differ with respect to the style and price of the items available for sale. For example, ABC sold new furniture on the second floor and antiques on the fourth floor. As to price, the items increase in value with each floor. Thus, the furniture items sold on the second floor are less expensive than those sold on the fourth floor. Organizationally, the furniture salespeople are in the Furniture Department, which falls under merchandizing.

25 James Dinsmore was hired in January 1991 as a furniture salesperson. He had previous experience selling antiques. At that time, he was offered a four day per week schedule selling furniture on the second floor. Approximately one year later, Dinsmore was transferred to the fourth floor. He continued to work a four-day schedule, which included weekends. The salespeople were permitted to show customers items on all the furniture floors, and Dinsmore
30 regularly sold items from the second and fifth floors. Some floors, however, do require greater qualifications. It is admitted that selling antiques on the fourth floor requires an expertise in those items, whereas the second floor requires only general retail skills. Thus, "a second floor person couldn't easily go up to the fourth floor because that requires a lot of experience." Dinsmore, was a highly experienced salesman.

35 In late 1999, ABC informed its entire staff, employee of a reduction in benefits. The employees requested a meeting with management to discuss these changes. At the meeting, McDonough and Mark Levine, an ABC vice-president, told their employees that the new policy was not open for discussion, and bluntly, that "if they didn't like it they knew where the front door
40 was." After the meeting, Dinsmore and George Steros, another employee, contacted the Union. Over the course of the following months, Dinsmore, the main employee Union organizer spoke with other furniture salespeople, scheduled meetings at the Union, wrote an anonymous pro-union open letter to ABC employees and solicited signatures on authorization cards. One of the employees Dinsmore gave an authorization card to Edward O'Halloran.

45 O'Halloran held the title of Manger of the Dux Bed Department but was, in fact, a member of the bargaining unit. O'Halloran and McDonough, both Irish-American New Yorkers and graduates of the same college, became close friends and spoke frequently about sports and other matters at work. The men would stop and talk in front of the Dux Bed Department,
50 which is located near McDonough's office at the rear of the second floor, or in the office areas. Both men were extremely anti-union in their political beliefs.

In this connection O'Halloran informed McDonough that he had been asked by Dinsmore to sign a Union card that there was a ground swell among the employees to start a union at ABC. On February 4, McDonough wrote a memo to ABC employees notifying them that the Union had requested recognition. O'Halloran returned it to McDonough with the notation: "Mike – Great Letter." The Union's request was refused and, on February 22, 2000, the Union filed a representation case petition in Case 2-RC-22206.

The Union organizing effort became a regular topic of conversation between O'Halloran and McDonough. During the period between January and May 25, 2000 they had almost daily conversations about the Union's organizing drive. McDonough admits to having approximately a dozen conversations with O'Halloran about the Union.

Region 2 of the National Labor Relations Board conducted a pre-election hearing in Case 2-RC-22206 on March 6, 7 and 13, 2001. ABC's officials were present. Dinsmore attended these proceedings as an advisor to the Union president. On May 3, 2000, the Regional Director issued a Decision and Direction of Election in Case No. 2-RC-22206. ABC thereafter conducted a comprehensive anti-union campaign. Between February 4 and May 23, 2001, ABC distributed twenty-three different campaign memorandums to employees. ABC management also presented their position to employees in person. Vice President Yanowitz met with groups of 5 to 6 employees and attempted to dissuade them from supporting the union. McDonough and Yanowitz told O'Halloran that they were getting legal advice on how to behave and what they could and couldn't do during a union organizing campaign. In connection with this aspect of the anti-union campaign, it is not alleged that ABC committed an unfair labor practice, or objectionable conduct.

However, in private conversations with O'Halloran, McDonough was less circumspect. O'Halloran credibly testified to some of McDonough's comments. On one occasion, McDonough told O'Halloran that "this group of union organizers were a cancer in ABC that had to be cut out." McDonough then specifically mentioned Dinsmore and ABC employees Constance Apikos, George Steros and John Carty as the main Union organizers.² McDonough also said that the Union was detrimental to the success of ABC and a burr under McDonough's saddle and that "the sooner we get this finished with and they were out of here, things would be good." McDonough also stated that Evan Cole was so angry at what he felt was a betrayal by employees that he wanted to fire all the employee Union organizers.

O'Halloran, as an anti Union employee, assisted ABC management by giving them copies of all Union literature. One of the documents O'Halloran forwarded to McDonough was a copy of Dinsmore's anonymous letter. McDonough admitted that O'Halloran told him that Dinsmore wrote the letter. McDonough admitted that he "possibly spoke" with O'Halloran about the names of people who were actively involved in the union organizing campaign including Apikos, Steros and Ward. McDonough also admitted he asked O'Halloran to take an active role for the company. O'Halloran testified that McDonough told him "Dinsmore is a bright guy, he's a friend of yours, can't you talk some sense into his head about this union?"

O'Halloran credibly testified that he spoke also about the Union with Yanowitz. O'Halloran testified that in February 2000, Yanowitz told him that "once this is over, we're going to clean house." Yanowitz admits that O'Halloran gave him copies of union literature and told him about Dinsmore's support for the union.

² George Steros was terminated in either January or early February 2000. Constance Apikos was terminated in the summer of 2001.

The National Labor Relations Board election took place on May 25 – 27, 2000. Dinsmore served as an election observer for the Union. The tally of ballots at the election was 116 votes against the Union and 88 votes for the Union with 2 challenged ballots. McDonough testified that, after the Union was defeated, O'Halloran gave him a bottle of wine with a note attached to it about a good job done well.

On June 2, 2000, the Union filed objections to conduct affecting the results of the election. The Regional Director issued a Supplemental Decision and Notice of Hearing on June 14, 2001, dismissing all but two of the Union's objections. Hearings were held on the Union's objections on June 29, July 9 and August 31, 2001. The Objections concerned alleged threats of discharge and the conferral of a lunch benefit during the period between the filing of the petition and the election.

O'Halloran credibly testified that he continued to speak with McDonough about the Union on a weekly basis after the May election. He testified that McDonough was angry and resentful that the Union was still there. McDonough told O'Halloran that ABC had to get rid of these people so they could move on with a good store.

A year after the May 2000 election, while the objections were pending at the Region, the Union began soliciting cards for a second attempt. Dinsmore, as the main employee organizer, again spoke to employees about the Union and tried to convince them of its importance. Dinsmore distributed ten to fifteen authorization cards at work. The Union also posted its representatives on the corner outside ABC. Dinsmore frequently stopped to talk with these representatives. He was the only employee who talked to the Union representatives on the street. Dinsmore credibly testified that on one occasion, while he was speaking to the Union representative, Yanowitz walked by. Dinsmore stated that Yanowitz was close enough to brush against him. Yanowitz admitted that he observed the Union representatives outside the store three or four times a week during the summer of 2001, and made a practice of walking up to them and greeting them. However, he denies seeing any employee talk to the Union representatives. Dinsmore, however, credibly testified that Yanowitz looked at him and then walked on.

Leslie Ferrier was hired after the first union election. She met with Cole and McDonough. McDonough told her the names of the employees who were actively organizing on behalf of the Union. McDonough admitted that he had "firm" knowledge of only three people actively engaged in the Union campaign: Apikos, Dinsmore and, as a result of his participation in a rally, James Ward. As set forth above, both Apikos and Dinsmore were terminated.

I conclude Dinsmore and O'Halloran were entirely credible witnesses.

I was impressed with their demeanor. Both witnesses testified on direct examination in a detailed testimony. Their testimony was extremely forthright. Further their cross-examination was consistent with their direct testimony. Dinsmore's testimony was unrebutted, except for his testimony that Yanowitz saw him speaking to the Union organizers outside, on the corner of ABC. However, I discredit Yanowitz's testimony in view of his admission that he made a point of greeting the Union organizers every day when they were outside the building. Moreover, I was not impressed with Yanowitz's overall demeanor.

I conclude that O'Halloran's testimony was entirely credible. O'Halloran left the employ of ABC voluntarily long prior to his trial testimony. He was not terminated, but rather left on "fair" terms. Therefore he had no direct interest in the outcome of this case. Moreover, he and McDonough were close friends and most importantly, both individuals were strongly opposed to

the Union’s campaign, and worked together to defeat the Union’s organization. There is absolutely no reason to discredit his testimony. Moreover, as set forth above McDonough’s admissions concerning his conversations with O’Halloran substantially corroborate O’Halloran’s testimony. McDonough on the other hand, though no longer employed by ABC, proved himself
 5 an interested and dissembling witness. McDonough at times testified confidently when denying matters that might lead to liability. For example, although he conceded to speaking with O’Halloran about the Union, he qualified the substance of such conversations. Thus, he “possibly” discussed which employees were active in the union campaign and it “wouldn’t be impossible” that he asked O’Halloran to try speaking to Dinsmore about the latter’s support for
 10 the Union.

Under the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983), General Counsel must make a prima facie showing of sufficient evidence to
 15 support the inference that protected conduct was a motivating factor in the employer’s decision to terminate, suspend or otherwise discipline an employee. Once this is established the burden then shifts to the employer to demonstrate that the same action would have been taken even in the absence of protected conduct. The question, then, is not whether the employer could have taken the adverse action, but whether it would have done so in the absence of the
 20 discriminatee’s union activities. *Standard Sheet Metal, Inc.*, 326 NLRB No. 35 (1998). Thus, Respondent must persuade by a preponderance of the credible evidence that it would have taken the actions described herein in the absence of each discriminatee’s protected activities in support of the Union. *T & J Trucking, Co.*, 316 NLRB 771 (1995).

The record establishes that Dinsmore engaged in protected activity in his support for the Union as his collective bargaining representative. Dinsmore was one of the two employees who first contacted the Union. Subsequently, Dinsmore spoke with other furniture salespeople, scheduled meetings at the union, wrote campaign literature for the union and solicited
 25 signatures on authorization cards. Then, once the Union filed the petition in case 2-RC-22206, Dinsmore attended the pre-election proceedings as an advisor to the union president, with ABC official present, and later served as a Union election observer in the May 2000 election. After the Union lost the election, and while the Union’s objections were pending at the Region, Dinsmore again solicited ten to fifteen authorization cards at work for a second election. He again spoke to employees about the Union and tried to convince them of its importance.
 30 Dinsmore was also one of the rare employees who stopped to talk with the union representatives on the street outside ABC.
 35

It is undisputed that ABC knew about all of Dinsmore’s Union activities. Dinsmore attended the pre-election hearing and was an election observer for the union in May 2000. Moreover, O’Halloran credibly testified that he spoke with McDonough about Dinsmore or other union organizers on a daily basis. McDonough admits that O’Halloran told him that Dinsmore wrote the pro-union open letter to ABC employees. O’Halloran also credibly testified that McDonough specifically referred to Dinsmore when he described the Union organizers as “a
 40 cancer in ABC that had to cut out.” McDonough also named three other employees in that conversation. Two of those employees – Constance Apikos and George Steros – have since been fired and no longer work at ABC. In addition, Ferrier admitted that when she was hired in November 2000, McDonough told her which employees, which included Dinsmore, Apikos and Ward, were active on behalf of the Union. Finally, ABC had evidence that Dinsmore’s central role continued unabated throughout his tenure. Dinsmore was one of the few, if not the only,
 45 employee seen talking to Union representatives in front of ABC in the summer of 2001, a period Ferrier described as “very quiet period of time from a union activity standpoint.”
 50

The credible evidence also establishes ABC's animus against union. McDonough disclosed to O'Halloran that Evan Cole, the owner of ABC, was so angry at what he felt was a betrayal by employees that he wanted to fire all the union organizers. He eventually took this action. While the election process was pending, ABC confined itself to a vigorous anti-union campaign. ABC distributed twenty-three different campaign memorandums to employees and Vice President Yanowitz met with groups of 5 to 6 employees and attempted to dissuade them from supporting the Union.³ It is also undisputed that McDonough wanted O'Halloran to convince Dinsmore to stop supporting the Union. Moreover, McDonough and Yanowitz revealed their intent about ABC's plans for when public scrutiny subsided. McDonough told O'Halloran that "this group of union organizers were a cancer in ABC that had to be cut out." Yanowitz told him that "once this is over, we're going to clean house." This intent continued after the May 2000 election. McDonough told O'Halloran after the election that ABC had to get rid of these people so they could move on with a good store. Thus, nineteen months after the Union filed the RC petition, the election procedures were still pending and the anti-union animus continued. In sum, the credible record evidence amply demonstrates animus and intent to unlawfully terminate Union adherents.

Finally, the weight of the evidence compels a finding that Dinsmore's protected activity was a motivating factor in ABC's decision to fire him. Evan Cole, the owner of ABC, believed that, by seeking Union representation, the employees had betrayed him. His response: "to fire all the union organizers." McDonough believed that the Union adherents had to be removed from ABC. As he admitted to O'Halloran, the Union organizers were a "cancer in ABC that had to be cut out." Yanowitz was of the same mind. He confided to O'Halloran that "once this is over, we're going to clean house." ABC's strategy appeared to pay off. In May 2000, a majority of its employees voted against union representation. The election, however, did not end this chapter for ABC. The Union filed objections to conduct affecting the results of the election.

As a result, McDonough remained angry and resentful. He again stated that ABC had to get rid of these people so they could move on with a good store. The objections were still pending before the Region in September 2001. In the interim, Dinsmore had begun soliciting authorization cards for a second election. At that time, ABC had already discharged George Steros and Constance Apikos. ABC was already collecting information in anticipation of firing Dinsmore. Then, as the executive committee considered whom to lay off after September 11, names were added and removed from the list for many different reasons. Dinsmore's name, however, remained on the list and he was in fact "permanently" laid off, another term for a discharge, rather than an economic layoff. This is established by the fact that ABC later advertised salesperson positions and hired three new, untested furniture salespeople – two more than were laid off. ABC, which had rehired other laid off employees after September 24, did not recall Dinsmore.

General Counsel has established a massive weight of evidence in support of its case. The burden has shifted to ABC who now has to establish a defense which will tilt the scale in its favor.

On September 9, 2001, Kirby, the store's General Manager, wrote Ferrier, Human Resources Director and McDonough an email referring to a previous meeting and requesting detailed information on 12 employees, including Dinsmore. The printed copy of the email, produced at trial pursuant to subpoena, includes extensive notes in Ferrier's handwriting about the employees and the words "permanent layoff." Ferrier testified that the meeting must have

³ An employer's expressions of its views or opinions against a union are evidence of anti-union animus. See *Sunrise Health Care Corp.*, 334 NLRB No. 111 (2001).

occurred before September 9, but that she could not remember any talk about layoffs before September 11, the date of the attack on the World Trade Center, or whether ABC considered terminating Dinsmore before September 11. Kirby testified that there were discussions about a layoff in the commission sales area prior to September 11 because of a decrease in sales. The record does not establish, however, ABC's sales figures for any period. However, in this connection, Dinsmore testified that his sales in 2001 were up over the previous year.

Ferrier testified that, in the first week after September 11, ABC's sales were down by 70 percent. Kirby initially testified that she decided to cut from the commissioned sales area - "based purely on sales figures." Thus, "if they were commissioned, it was based entirely on performance." ⁴ Kirby testified that she made her decisions based on the sales figures for the period January 1 to September 9, 2001.⁵ Ultimately, she decided to lay off two of ABC's twenty-six furniture salespeople.

ABC did not lay off any salespeople from the first floor or second floors. Kirby testified that she needed all three furniture department salespeople assigned to the first floor in order to staff that area. As to the second floor, Kirby testified that the two salespeople with the lowest sales – Judith Verbenec and Dean Howe – were also necessary for coverage on the floor and in the fabric department. Ferrier testified that Verbenec had come from the fabric department and that, because that is a difficult area to recruit for, ABC transferred her back. Ferrier thought that Howe may have been retained because discussions had stated with Innovations, a company leasing a retail space at ABC, to have Howe work for that company directly.

Dean Howe, a current ABC employee, credibly testified that he was approached about working for Innovations by the owner of Modern Link in November or December 2001. He then met with the owner of Innovations in December and offered the position. Howe did not discuss the matter with Kirby until January 2002. Howe also testified that Verbenec never worked in fabrics before September 11, 2001.

ABC laid off one furniture salesman on the fourth floor: James Dinsmore. Kirby testified that, when she decided to select one of the eight salespeople on that floor for lay off, she did not rely on sales numbers per se. Instead, she "guesstimated" a number based on their individual circumstances.

The salesperson with the lowest documented sales on the fourth floor was Ranjit. Kirby, however, did not lay off Ranjit. Kirby explained that he had only been a commissioned salesperson for three months and that she decided that his average performance in those three months was better than Dinsmore. As to Dinsmore, Kirby considered his reduced schedule of four days per week, whereas, the other salespeople all worked five day weeks. However, Dinsmore did work on weekends which were the busiest days. However, Kirby still decided that he had the lowest sales. Kirby testified that although she calculated what Dinsmore would have earned in a 5 day week, she couldn't recall how she made such calculation. Kirby also distinguished the next lowest selling salesperson, Beth Erdman, who had sold a mere \$4,259 more than Dinsmore. Kirby testified that Erdman had been out for a "considerable period of time" due to a personal operation. The record does not, however, establish when or for how

⁴ Dinsmore finished second in a furniture sales department sales contest in March 2001. The contest measured each salesperson's improvement over sales from the previous March.

⁵ The sales figures for the furniture salespeople on the fourth floor are: Jim B. (\$652,980); Maureen (\$692,561); Jim D. (\$564,135); Dilek (\$762,875); Beth (\$568,394); Neal (\$716,772); Ranjit (\$322,872); and James (\$683,307).

long Erdman was absent. Kirby also decided to lay off Katherine Lockwood, a furniture salesperson on the fifth floor. Lockwood had the lowest sales on that floor.

5 Kirby considered the sales numbers for an employee who worked a four-day week in one other department. Kirby testified that Bernard in the basement department worked three or four days a week. Kirby testified that, based on Bernard's reduced schedule, and the fact that Tony was new to the department, she selected Jeff Valley for layoff.

10 After Kirby decided whom to lay off, the Executive Committee reviewed her list. Then, on September 24, ABC informed the chosen employees of the layoff. Kirby and Ferrier met with Dinsmore that day and informed him of his termination.

15 On September 25, the day after Dinsmore's layoff, ABC transferred Aristo Babene from the Linen's Department to the Furniture Department on the second floor. Kirby testified that the transfer had been offered in mid August. ABC has since placed advertisements for salesperson positions and hired three new furniture salespeople. However, Dinsmore, considered as a "permanent layoff", was not considered for those jobs. Ferrier explained that some of the new hires were in anticipation of transfers to new stores in the New York City area.

20 ABC's defense is essentially that the layoffs were made because business was slow. In other words, it was strictly an economic layoff. Kirby testified that the employees laid off were selected "based purely on sales figures."

25 Right off the bat, it is clear that Dinsmore was discharged rather than laid off for economic reasons. This is established by ABC's characterization of his layoff as a "permanent layoff". It is further established by the fact that subsequently ABC hired three new untested furniture salesmen and did not offer a position to Dinsmore, a highly experienced furniture salesman.

30 As to Kirby's contention that employees were laid off "purely on sales figures" there were more exceptions to this contention than leaves on a tree.

35 It is not disputed that ABC's underlying decision to layoff employees in September was motivated by business necessity. That defense, however, does not shield ABC from a finding that its selection of Dinsmore for layoff was discriminatorily motivated. The Board has found violations of Section 8(a)(3) and (1) where the employees' union activity was the motivating factor in the selection for layoff even though the employer had valid economic reasons for its decision to implement the layoff.⁶ Thus, an examination of the circumstances surrounding the selection of Dinsmore is appropriate here.

40

45 ⁶ See, *Merrill Iron and Steel, Inc.*, 335 NLRB No. 11, slip op. 5 (2001) (Citing at fn. 21 *Hinkle Metal Supply*, 305 NLRB 522, 523 (1991) ("although the [r]espondent had valid economic reasons for effecting a layoff, its motivating factor for the selection, layoff, and discharge of employees Hall, Waldrop, Wise, Hines, Stephens, and Simmons was their union activities."); *JAMCO*, 294 NLRB 896 (1989), enf'd. 927 F. 2d 614 (11th Cir. 1991): cert. denied 501 U.S. 1253 (1991) (the employer's decision to implement a layoff was not unlawful, but its selection of certain employees for layoff was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act); *Sumco Mfg. Co.*, 251 NLRB 427 (1980), enf'd 678 F.2d 46 (6th Cir. 1982) (while the layoff of employees was prompted by a large inventory and a slowdown in orders, the selection of certain employees for layoff was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.)

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Kirby testified initially that she decided to cut from the commissioned sales area “based purely on sales figures.” Thus, she terminated Katherine Lockwood because Lockwood had the lowest sales on the fifth floor. When it came to the fourth floor, Kirby testified that she considered Dinsmore’s reduced schedule. Unfortunately, she could not remember how much she decided Dinsmore would have earned had he worked a five-day week. The arithmetic, however, is really simple. If one were to adjust Dinsmore’s earnings up by 25%, to account for a fifth day of work, then Dinsmore would have earned \$705,169. This would make him the third highest salesperson on the fourth floor. Kirby noted that Dinsmore worked weekends, which are the busies days, implying that he had an advantage over the other salesmen. The schedule, however, establishes that, excluding Ranjit, the other six salespeople worked weekends as well. Thus, Dinsmore did not have the high sales figures, and “based purely on sales figures, he should not have been laid off.”

It also bears noting that Erdman, a five day employee, earned a mere \$4,259 more than Dinsmore. While Kirby explained that Erdman had been absent due to medical reasons, it would, again, be simple arithmetic to calculate her earnings if one knew how long she was absent. I draw an adverse inference because of ABC’s failure to show the duration of Erdman absences.

Kirby testified that she adjusted for a four-day week schedule in one other department. She testified that Bernard in the Dungeon or basement worked a three or four day week. The other seven employees presumably worked five day weeks. Based on Bernard’s reduced schedule, and because Tony was new to the department, Kirby selected Jeff Valley for layoff. If, as with Dinsmore, one were to adjust Bernard’s earnings by 25%, then he would have earned \$319,760. This would have put him ahead of Valley, who was ranked number six in that department at \$311,373.

It is also worth noting that Kirby gave similarly detailed explanations for why she laid off Nathan Babaev, a commissioned salesperson in the first floor linen’s department. Kirby testified to a variety of special circumstances warranting his lay off when there were four individuals with lower sales. In Nathan’s case, contrary to Kirby’s testimony, Ferrier had a much simpler explanation. She testified that Nathan was discharged for cause and would have been terminated anyway.

Finally, according to Kirby, ABC’s goal was to retain the best salespeople during a downturn in business. She also testified, however, that the fourth floor requires a “lot of experience” and that a second floor salesperson “couldn’t easily go up to the fourth floor.” Dinsmore was thus more qualified than the second floor furniture salespeople. He also sold, while working one day less per week, more than two of the second floor salespeople. Neither of them, however, was laid off. Then ABC transferred Aristo Babene into the furniture department the day after Dinsmore was fired. ABC’s decision to lay off Dinsmore while transferring a person with no furniture experience into the department and keeping less skilled employees is irreconcilable with its stated goal, “based purely on sales figures.”

Respondent argues that Kirby was not employed by ABC until June 2001 and, by inference, contends that the layoff decision-maker was unaware of Dinsmore’s union activities. The Board, however, does not require General Counsel to specifically prove that the person conducting the layoff knew of the union activity. See, *Van Dyke Crotty Co.*, 297 NLRB 899, fn. 4 (1990) “Absent specific evidence to the contrary, a supervisor’s knowledge of union activity is imputed to the employer.”

5 If the reasons advanced by the employer for its actions are a pretext – that is, if the reasons either did not exist or were not in fact relied upon – the Board may conclude that the false reason was proposed to mask its unlawful reason. The Board may rely upon such evidence to find a violation of the Act. *Fluor Daniel*, 311 NLRB 498 (1993). In the instant case, the evidence establishes that ABC’s proffered defense is a pretext. The false reason is further evidence that Dinsmore was discharged in violation of Section 8(a)(1) and (3).

10 I find Respondent’s defense entirely without merit. In any event it is crystal clear that Respondent failed to meet its *Wright Line* burden. Accordingly, I conclude Respondent discharged Dinsmore in violation of Section 8(a)(1) and (3) of the Act.

Remedy

15 Having found that the Respondent has engaged in a violation of Section 8(a)(1) and (3) of the Act, I find that Respondent must be ordered to cease and desist therefrom, and take affirmative action designed to effectuate the policies of the Act.

20 I have concluded that Respondent discharged James Dinsmore in violation of Section 8(a)(1) and (3) of the Act. I therefore recommend he be reinstated to his former position of employment, or if such position no longer exist to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed by him.

25 I also conclude that Dinsmore must be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with back pay for the period of his unlawful discharge, from the date of his unlawful discharge, until Respondent offers them unconditional reinstatement as defined by Board authority.

30 Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent must be ordered to remove from its files any reference of such action and notify Dinsmore that this has been done, and the personnel action will not be used against him in any way.

35 Based upon the findings of facts, and conclusions of law as described above, I issue the following recommended

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁷

ORDER

45 The Respondent, ABC Home Furnishings, Inc., its officers, successors, and assigns, shall

1. Cease and desist from

50 ⁷ 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.

(a) Discharging, or unlawfully laying off its employees because of their membership in, or activities on behalf of Local 1-S, Department Store Workers Union, RWDSU, UFCW, AFL-CIO, herein called the Union, or any other labor organization.

5 (b) In any like or related manner, Interfere, restrain or coerce its employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

10 (a) Within 14 days from the date of this ORDER, offer to James Dinsmore his former position of employment or if such position no longer exists, an equivalent position of employment, without prejudice to his seniority or other rights and privileges he previously enjoyed.

15 (b) Within 14 days of this ORDER make whole in the manner set forth in the Remedy provisions of this decision James Dinsmore, from the date of his discharge, until the date of a valid offer of employment or reinstatement.

20 (c) Within 14 days of this ORDER, expunge from Dinsmore’s files any reference to the unlawful layoff or discharge, refusal to employ and notify him in writing that this has been done and that this personnel action will not be used against him in any way.

25 (d) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other
30 material.

Dated, Washington, D.C.

35

Howard Edelman
Administrative Law Judge

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50 ⁸ If this Order is enforced by a Judgment of the 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.”

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 unlawfully layoff our employees because of their membership in and or their activities on behalf of the Union.

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

WE WILL reinstate James Dinsmore and make him whole for any loss of earnings and other benefits he may have incurred, and reimburse him for any federal and/or state income taxes that would or may result from the lump sum payment of his back pay award.

ABC HOME FURNISHINGS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.