

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

**THE ROOMSTORES OF PHOENIX, LLC  
d/b/a THE ROOMSTORE**

**and**

**Case 28-CA-22404**

**DIANE PASSAFIUME, an Individual**

**and**

**Case 28-CA-22633**

**BRUCE KIRALY, an Individual**

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

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**ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

**I. OVERVIEW**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), the General Counsel submits this Answering Brief to the Exceptions filed by The RoomStore of Phoenix, LLC, d/b/a The RoomStore (Respondent or RoomStore) to the Decision of Administrative Law Judge (ALJ) Gregory Z. Meyerson, which issued on April 16, 2010 (the ALJD). As correctly found by the ALJ, Respondent maintained myriad rules, both written and orally promulgated, in violation of § 8(a)(1) of the Act. In addition, the ALJ correctly found that two of the three discriminatees were discharged in violation of Section 8(a)(1) of the Act because they engaged in protected concerted activities.

Confronted with this well-reasoned adjudication of its wrongdoing, Respondent now demands that the Board rewrite decades of case law to excuse its actions. In essence, granting Respondent's Exceptions would require that the Board cast aside many of the ALJ's credibility determinations, the Act's protections for employees engaged in protected concerted activity, and destroy long-standing protections against employer rules that limit or prohibit protected concerted activity. As discussed in more detail below, these findings and the ALJ's

proposed order, other than as cross-exceptions to this date by Counsel for the Acting General Counsel, are appropriate, proper, and amply supported by the credible record evidence. Accordingly, the Board should sustain the ALJ's findings of fact, conclusions of law, proposed remedy and recommended order with respect to these violations, but should modify the ALJ's Decision and recommended Order as set forth in the Acting General Counsel's Cross-Exceptions and supporting brief.

## **II. PROCEDURAL BACKGROUND**

On April 16, 2010, the ALJ issued his Decision and recommended Order in this matter, in which he found and concluded that Respondent violated § 8(a)(1) of the Act by maintaining the following unlawful rules:

- a. ambiguous and overly broad Personnel Handbook rules that prohibit employees from:
  - trespassing on company property when off duty;
  - collusion with another employee in order to violate company policy;
  - using information obtained from company records, vendor records or customer records; and
  - engaging "in any outside activity that would conflict in any way with the interests of the company" or that "could result in criticism of or have an adverse effect on the company";
- b. rules in its Salesperson Agreement that prohibit employees from:
  - disclosing confidential information to anyone outside of the Company including sales data, training materials, customer lists, sales invoices, and names of personnel; and
  - inducing current or prospective employees not to work for the RoomStore;
- c. rules at its Superstition Springs Store that prohibit employees from exhibiting "any type of negative energy or attitudes" and from discussing their terms and conditions of employment with co-workers;

d. reinforcing the rule against negativity at the Superstition Springs Store and impliedly threatening to suspend employees for violating the policy against “negative energy or attitudes.”

(See ALJD at 22-27) In addition, the ALJ found that all three discriminatees -- Diane Passafiume (Passufiume), Virginia Gabrielson (Gabrielson), and Bruce Kiraly (Kiraly) -- engaged in protected concerted activities (See ALJD at 19-21), and that Passafiume and Gabrielson were discharged in violation of § 8(a)(1) of the Act. (See ALJD 29-32) In its exceptions, Respondent takes issue with the ALJ’s findings regarding the terminations of Passafiume and Gabrielson as well as several rule violations at the Superstition Springs Store where Passafiume and Gabrielson worked. As discussed below, the record and the law fully support the ALJ’s findings that Respondent violated § 8(a)(1) of the Act by its promulgation and maintenance of several store rules and by its discharges of Passafiume and Gabrielson. Accordingly, Counsel for the Acting General Counsel urges the Board to adopt the ALJ’s findings, conclusions, and recommended order with respect to these findings.

### **III. THE RECORD EVIDENCE**

#### **A. Respondent’s Business; Background**

Respondent is engaged in the business of operating a chain of 10 furniture stores in the Phoenix, Arizona metropolitan area and in Prescott, Arizona. (ALJD at 3; Tr. 671-671) The events involving Passafiume and Gabrielson occurred in Respondent’s Superstition Springs Store, located in Mesa, Arizona. (ALJD at 3; Tr. 34, 130, 223) Passafiume began working for Respondent at the Superstition Springs Store in August 2007, and Gabrielson worked at the Superstition Springs Store beginning in October 2008, after transferring from Respondent’s Fiesta Store where she had worked since mid-2007. (ALJD at 4; Tr. 222, 129-130) Sid Serda (Serda) is store manager of the Superstition Springs Store and made the decision to fire Passafiume and Gabrielson in March 2009. (ALJD at 3; Tr. 32, 34) The

Superstition Springs Store has two assistant sales managers, Jim Struensee (Struensee) and Joe Smith (Smith), who both sold furniture in addition to their supervisory duties. (ALJD at 4) Smith was by far the top sales writer at the Superstition Springs Store. (See GC 4)

New sales associates receive one week of training by Respondent whether they have prior sales experience or not. (ALJD at 3; Tr. 85) They go through a three-month probationary period while they build a book of business. (ALJD at 3; Tr. 38, 39) To be released from probation, new sales associates must have a minimum of \$55,000 in merchandise delivered to customers in a given month. (ALJD at 3; Tr. 40, 41:9-10, 260; GC 7, p. 1, GC 12) Respondent's sales associates receive approximately 5% commission on their sales, with some variation on certain merchandise. (ALJD at 3; Tr. 136-137) Sales associates are guaranteed a base pay rate of approximately \$350 a week, which is then deducted from their total commissions for that week. (ALJD at 3; Tr. 136) Their paychecks are further reduced by the various discounts (also referred to as manager's coupons and "MCRs") that Respondent requires sales associates give to customers. (ALJD at 3-4; Tr. 137, 139, 214)

By March 2009, Respondent required sales associates to give discounts in connection with 85% of their sales, and those discounts ranged from \$25 and up. (ALJD at 4; Tr. 137) The percentage of the discount for which sales associates had to reimburse the Respondent varied; nevertheless, the discount came out of the employees' own pockets. (ALJD at 4; Tr. 137-138, 214) Sales associates complained about the discounts being unfair, particularly when they could close sales without giving a discount. (ALJD at 4; Tr. 139, 214) Sales associates were never sure how much they would receive in their weekly paychecks because of the discounts and because they did not receive their commission until merchandise was actually delivered to a customer, which was not under the associate's control. (ALJD at 3-4; Tr. 149-150)

## **B. Protected Concerted Activity at the Superstition Springs Store**

As the ALJ found, “[t]here is no question that the employees at the Superstition Springs Mesa Store, including Passafiume and Gabrielson, complained among themselves about the required discounts. These complaints were well known to management.” (ALJD at 4) Contrary to Respondent’s assertions, the ALJ’s findings and conclusions concerning such conduct, as well as the unlawful rules promulgated and maintained by Respondent, are fully supported by the record.

More specifically, toward the end of 2008, sales associates were complaining on an almost daily basis about the discounts and MCRs that Respondent required them to give to customers. (Tr. 140, 141, 214, 253) At one of store manager Serda’s weekly meetings in November 2008, Serda told his sales staff that he “did not want to hear any more negative talk.” (ALJD at 4; Tr. 140:23-24) Gabrielson testified that Serda “didn’t want us to talk about our paychecks, the MCRs or anything else. You know, lack of customers. He just wanted us to stop it. He didn’t want to hear anymore, and there was the door if we didn’t like it.” (ALJD at 4; Tr. 140:24-141:3; see also Tr. 140:11-15, 167:21-25)

Under Serda’s directive, “[w]e weren’t allowed to talk about paychecks. We weren’t allowed to talk about the working conditions. We weren’t allowed to talk about the MCRs. We weren’t allowed to talk about the lack of customers.” (Tr. 147:12-15) Serda told employees the discount requirement was “Danny’s rule,” referring to a Respondent owner, and marketing manager, Danny Selznick. (ALJD at 3-4; Tr. 254:2; see also Tr. 168) Passafiume also testified that Serda told employees at a meeting in the second half of 2008 that “[t]his is Danny’s rule. This is the way Danny wants it.” (ALJD at 4; Tr. 254:2-3) Serda told a salesman at the meeting who was “complaining big time” about the money deducted from their paychecks, “I want to talk to you after this meeting.” (Tr. 254:4) A sales associate

who worked with Passafiume and Gabrielson, Susan Taylor (Taylor), also recalled Serda telling employees at a weekly meeting that the discounts were “Danny’s thing” and “[n]ot to talk about it[.]” (ALJD at 4; Tr. 215:2, 8)

Taylor testified that when Serda told employees at one of his weekly meeting that the discounts were “Danny’s thing,” he also said “I don’t want you talking to other stores.” (ALJD at 4; Tr. 215:10-11) Taylor was friends with sales associate Vicki Quinn (Quinn) who worked at Respondent’s Alma School Store. Taylor used to talk to Quinn and they would compare notes about how the two stores handled such things as sales requirements, punishment for not meeting sales requirements, discounts, and manager coupons. (Tr. 210-211) Taylor would tell sales people in the Superstition Springs Store what she had learned about the Alma School Store’s practices. (Tr. 211) Taylor testified that at one point in 2008, Serda called her into his office and told her, “I know you’ve been talking to the Alma School store. You know, I don’t want you talking to the other stores about what goes on in our store.” (Tr. 212:6-8) Starting in about the middle of 2008, Serda told Taylor several times that he did not want her talking to people from other stores. (Tr. 212) These conversations sometimes occurred on the sales floor and sometimes in Serda’s office. (Tr. 212) On one occasion, Serda told Taylor, “I don’t want you talking to people from other stores. What goes on in our store needs to stay in our store and I don’t want you talking to anyone from other stores.” (ALJD at 4; Tr. 213:12-15)

Serda reinforced these verbal rules in writing. Gabrielson testified that Serda, whose handwriting she recognized, wrote on the white board in the break room around November 2008, that he “would not tolerate any more negative talk of paychecks, working conditions, or MCRs.” (ALJD at 4; Tr. 147:23-24, 148) Assistant sales manager Smith also enforced Serda’s rules. In December 2008, Smith was questioning Passafiume about what she thought

of a former sales associate named Jeannette and a current sales associate named Susie Westervelt (Westervelt). (ALJD at 4-5; Tr. 259, 264) In reference to Westervelt, Smith said, “She’s always negative and I’m tired of her negativity and, you know, always complaining and that if she keeps it up, I’m going to send her home for three days, or I’m going to send her home.” (ALJD at 5; Tr. 260:1-4; 264:16-18) Smith went on to warn Passafiume, “If anybody is negative on the floor, I’m going to send them home for three days.” (ALJD at 5; Tr. 260:8-9) Whenever a sales associate was sent home, Passafiume explained, “Smith made more money” because there were fewer sales people competing for customers. (Tr. 260)

**C. Passafiume’s and Gabrielson’s Protected Concerted Activity**

Contrary to Respondent’s suggestions, the record fully supports that ALJ’s findings and conclusions that Passafiume and Gabrielson, as well as Kiraly, engaged in significant protected conduct, that Respondent was well aware of such conduct, and that Respondent harbored hostility toward such conduct.

More specifically, and despite Serda’s and Smith’s prohibitions on “negativity” or discussions of MCRs and general working conditions, Passafiume and Gabrielson continued to talk about those issues. (ALJD at 6) One Friday in December 2008, Gabrielson and Passafiume were talking with a group of sales people while they were opening and discussing the paychecks they had just received. (ALJD at 6; Tr. 148, 149, 254) This discussion occurred in an area on the sales floor where sales people discussed a wide range of issues when customers were not around. (Tr. 150-151) The sales people were comparing paychecks and asking each other about how much had been deducted from their paychecks for discounts and how much they had “given away for the year.” (ALJD at 6; Tr. 148:23) Serda came up to the sales people and told them “put those away,” referring to their paychecks. (ALJD at 6;

Tr. 148:25) Serda said the employees are “not allowed to be sharing that information” and they are “not allowed to be talking about this.” (ALJD at 6; Tr. 148:25-149:2)

Gabrielson continued to talk to “probably ever[y] employee that worked” in her store about the discounts and related those concerns directly to assistant sales manager Smith on at least two occasions in November and December 2008. (ALJD at 6; Tr. 142-143) During one of their conversations, in the front of the showroom during a lull, Gabrielson complained to Smith about the amount of money taken out of employees’ paychecks for discounts. She told him that “it was unfair” and asked Smith why they needed to give discounts when they “didn’t need to give that money away.” (Tr. 144:2-4) Gabrielson asked Smith, “how can they do this, how can we live on this[?]” (Tr. 143:13-14) Smith told Gabrielson that she was not “allowed to talk about these things.” (ALJD at 6; Tr. 144:5-6) Gabrielson also said to Smith, “we need[] to have somebody that represents us. You know, we need to get a union or a group of people together. That’s the only way that we can protect ourselves.” (ALJD at 6; Tr. 144:9-13) Smith again told Gabrielson that she is “not allowed to talk about it”, and she responded, “yes, I am,” to which Smith replied, “no, you’re not.” (ALJD at 6; Tr. 144:17)

Gabrielson testified that she knew she could discuss matters like the discounts and unions because she had conversations about unions with Kiraly and her coworkers when she worked at the Fiesta store. (ALJD at 6; Tr. 151) After Gabrielson moved to the Superstition Springs Store in October 2008, she met with Kiraly at a Dunkin Donuts, where Kiraly gave Gabrielson a copy of the informal Board Settlement Agreement he had just entered into with Respondent. Kiraly asked Gabrielson to make copies to distribute at the Superstition Springs Store, and he told Gabrielson about her rights, including the right to talk about her pay and other working conditions. (ALJD at 6; Tr. 145) Gabrielson distributed the Board Settlement Agreement to sales people at the Superstition Springs Store, including Taylor, Westervelt, and

Michael Erbstoesser (Erbstroesser). (ALJD at 6; Tr. 145, 147) Gabrielson also discussed needing a union with Passafiume, Taylor, Cheri Tedder (Tedder), and Erbstoesser. (ALJD at 6; Tr. 151)

In addition to talking to other employees and management about pay issues and unions, Gabrielson also complained about the way her immediate supervisor, assistant sales manager Smith, treated employees. (ALJD at 6) In particular, she complained about his immature and childish behavior, which included blocking employees when they sought to pass, or sneaking up behind women as they were sitting on a barstool, “grab[bing] hold of the back of the barstool and very quickly tip[ping] you backwards . . . so that the person would be startled.” (ALJD at 6; Tr. 152:14-17) Gabrielson told Smith to “stop it” after seeing him do it to female employees Tedder and Passafiume, telling him “you’re going to hurt somebody some day. What’s going to happen when that chair leg breaks or it flips and you get somebody hurt?” (Tr. 152:21-24) She also complained to Serda about Smith’s tipping the barstool, pushing people and “blocking their way,” tapping his pen in a manner designed to annoy others, and his conduct towards Tedder in December 2008. (ALJD at 6; Tr. 153-154) Gabrielson specifically told Serda in December that “you’ve got to get him to stop, this is getting ridiculous.” (Tr. 153:25-154:1) Serda “just kind of sighed, you know, rolled his eyes and said, I know, that’s Joe. I’ll talk to him.” (Tr. 154:1-3) Smith’s behavior did not stop, however. (ALJD at 6; Tr. 154)

Coincidentally, it was only after Gabrielson challenged assistant sales manager Smith in December 2008 about her right to discuss union and pay issues, and after she complained about Smith’s conduct towards sales associates, that she received her first employee warning for her December sales, signed by Serda and Smith. (GC 9)

On February 28, 2009, Smith, Gabrielson, and Passafiume were at work in the Superstition Springs Store. It was the last day of the month for Gabrielson and Passafiume to make their sales goals for the month. (ALJD at 6) Around early to mid-afternoon that day, as Passafiume was walking down a narrow aisle at the store, Smith blocked Passafiume's passage, took "a bunch of rolled paperwork," and hit Passafiume in the face. (ALJD at 6; Tr. 250) Humiliated, Passafiume told Smith, "[d]on't you ever do that to me again." (ALJD at 6; Tr. 251:3) Smith then "whacked" Passafiume again, hurting her eyes. (ALJD at 6; Tr. 251:4-6) Gabrielson, who was nearby and saw the entire event, tried to help Passafiume by telling Smith to "stop it." (ALJD at 6-7; Tr. 154) Despite their protests, Smith hit Passafiume at least twice more. (ALJD at 7; Tr. 155) Tellingly, store manager Serda, who was sitting nearby, merely commented to Smith "bad behavior" and "not very professional." (ALJD at 7; Tr. 155:17, 251:9)

Gabrielson later found Passafiume crying in the break room. Passafiume was looking for eye drops and told Gabrielson, "My eye really hurts. He hurt me. Why does he keep doing this to me? I can't take it any longer." (Tr. 155:24-156:1) Concerned, Gabrielson complained to Smith about the incident later that day, told him that he had hurt Passafiume, and stated that his conduct toward her fellow employee "was totally uncalled for." (ALJD at 7; Tr. 156:6) That evening, after Gabrielson's complaint, Smith refused to enter one of Passafiume's final sales for the day and the month. (Tr. 328) Although Smith eventually told Passafiume that he would allow that sale, she learned the very next day that Smith had suddenly decided to void another sale, in the amount of \$2,000, she had made earlier that month. (ALJD at 7; Tr. 329)

Upon learning of this void, Passafiume, in violation of Serda and Smith's orders not to talk about pay issues, spoke to office employee Jessica Leone (Leone) about the void. (ALJD

at 7; Tr. 238) She also spoke to Serda and assistant sales manager Struensee. (ALJD at 7) When she spoke to Struensee on the sales floor, Passafiume also complained about Smith's conduct the previous day when he hit her, and predicted "[n]ow I'm sure I'm going to be retaliated against" because she stood up to Smith. (ALJD at 7; Tr. 243:19-10) Ten to thirty minutes later, Serda paged Passafiume to his office. Serda, who was angry and whose voice was raised, demanded to know, "[w]ere you out there talking about being in fear of losing your job, you know, to people on the -- you know, to people out there?" (ALJD at 7; Tr. 246:24-247:1) Passafiume didn't know what to say because Serda was angry and he demanded a second time, "Were you or were you not?" (Tr. 247:4) Passafiume then confirmed, "Well, yes, I was talking to my assistant manager that I was worried about my job." (Tr. 247:5-6) Serda told Passafiume, "From now on, I don't want you, you know, out there talking about being, you know, in fear of losing your job. It . . . stays in here." (ALJD at 7; Tr. 247:7-9)

When she left Serda's office, Passafiume saw another sales associate, Anthony Champaign (Champaign), outside Serda's office. (Tr. 247) She told Champaign, "I've been hushed." (ALJD at 7; Tr. 248:13) She also told Champaign, who's from Michigan, "Well, that's why we have labor unions in Ohio and Michigan. That way, you know, people can't get away with this kind of stuff." (ALJD at 7; Tr. 249:9-11) Serda was still in his office with the door open when Passafiume spoke to Champaign. (ALJD at 7; Tr. 249)

Gabrielson was fired on March 4, 2009, four days after she stood up for Passafiume. (ALJD at 7) Passafiume was fired two days later, on March 6, 2009. (ALJD at 7)

The day she was fired, March 6, 2009, Passafiume discovered that Serda had voided another large sale she had made the prior month in February.<sup>1</sup> (Tr. 229) Passafiume had already confirmed with the customer that the sale for approximately \$6,000 worth of merchandise was good. (Tr. 229) This void, and the \$2,000 void from March 1, lowered Passafiume's total written sales volume for February 2009, to \$56,098, and her delivered sales volume to \$57,330. (GC 15) Even with these sudden voids, however, Passafiume was fifth out of 14 sales people in delivered sales for the month of February 2009, and she was sixth out of 14 in written sales. (See GC 11) Despite Passafiume's high ranking among the sales people that month, and despite the fact that she had met the Respondent's stated \$55,000 minimum sales standard, Serda fired her for low volume. (Tr. 36)

After she was fired, Passafiume went directly from her store to corporate headquarters to speak with owner Danny Selznick (Selznick), but was not allowed to meet with Selznick. (Tr. 272) Passafiume did speak with Selznick's assistant and told him that a lot of things were occurring at the Superstition Springs Store that she wanted to discuss with Selznick, and that assistant sales manager Smith had hit her at work. (Tr. 273) Later that day, the assistant left a voicemail message for Passafiume telling her that she could check with other of Respondent's stores to see if a different manager would hire her. Nothing was said about her complaints concerning Smith. (Tr. 274)

Passafiume visited several stores that same day to try to obtain a job. One of those stores was the Respondent's Fiesta Store, where Kiraly worked. Passafiume told Kiraly she had been fired, that she had been physically assaulted by Smith, and she spoke about "her commission adjustments and such and her being told that she wasn't allowed to talk about it. And when she did, she felt she was being reprimanded." (ALJD at 13; Tr. 463:1-5)

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<sup>1</sup> Both Serda and Passafiume testified that Serda has virtually unfettered discretion over which sales to void and when he will void sales. (Tr. 229, 656)

An assistant sales manager, Ashley Ryan (Ryan), was watching as Kiraly gave Passafiume a copy of the Board Settlement Agreement as he talked to her about her rights under the Act. (Tr. 464).

**D. Respondent's Alleged Reasons for Discharging Passafiume and Gabrielson**

Respondent asserts that it had legitimate, non-discriminatory reasons for discharging Passafiume and Gabrielson. Contrary to Respondent's assertions, the bases proffered by Respondent are shown by the credited record evidence as being sham and mere pretext. Moreover, as found by the ALJ, the record shows that Respondent treated Passafiume and Gabrielson in a manner disparate from its treatment of others.

More specifically, Serda's sole stated reason for firing Passafiume and Gabrielson was for low sales volume in December 2008, and January and February 2009. (ALJD at 8; Tr. 36, 38) Serda's written warning to Passafiume and Gabrielson for their December 2008 sales said they failed to meet the \$55,000 corporate requirement, and that they must meet the corporate requirement in January or they could be terminated. (ALJD at 8-9; GC 8, GC 9) Serda, however, did not actually give Passafiume the written warning for her December and January sales until much after the fact, i.e., mid-February 2009. (ALJD at 8; Tr. 226) Passafiume did not write anything in response to the untimely write ups because she "was afraid" and "didn't want to go against the person that had the power to fire" her. (Tr. 325:25, 26:9-10)

Passafiume delivered over \$57,000 in total sales for the month of February 2009, making her the fifth highest seller for the month out of 14 sales people at the store. (ALJD at 8-9; GC 11 (see column "Feb-09 Deliver")) That month, however, Respondent, by Serda, changed the ground rules. (ALJD at 9) He upped the sales requirement that Passafiume and Gabrielson had to meet from the \$55,000 company average to "store average," which turned out to be over \$59,000. (ALJD at 8; GC 15, GC 16) Because Respondent arbitrarily raised

the sales goal for that month, and because Serda voided several of Passafiume's large sales, neither woman met the goal and Serda fired both of them.<sup>2</sup> (ALJD at 9; Tr. 36; GC 15, GC 16) As the ALJ correctly observed, "Serda could certainly have allowed Gabrielson and Passafiume to continue working at the store, had he wanted to do so. But he did not choose to do so. Rather, he appeared to intentionally make it more difficult for them to achieve goal, raising the standard to the higher store average. He did so just at the time that Passafiume's sales figures were rising to the point that she was meeting the lower company-wide goal." (ALJD at 32)

At the hearing, in an attempt to make it appear that Respondent was simply following a long-standing practice with respect to underperforming sales associates, Serda testified that it is his practice to give sales people at least a verbal warning if their sales for a given month fall below the \$55,000 corporate standard. (Tr. 42) Serda also testified that he makes a written note of any verbal warnings he gives sales associates, and that he gives a written warning to any sales associate with sales below \$55,000 for two months in a row. (Tr. 42, 57) Serda swore that he "most definitely" gives a written warning to sales people whose volume falls below the \$55,000 minimum requirement three months in a row. (Tr. 45:23)

Respondent's disparate treatment of the discriminatees is established by the credible record evidence, including Respondent's own documents. Notwithstanding the stated practice of warning sales people whenever their volume falls below \$55,000, no other sales people with low sales in Serda's store received warnings of any kind for their December 2008, and

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<sup>2</sup> Passafiume testified that "store average" is not a good indicator of a sales associate's performance because "there could be deals that were written which would boost the store average up that weren't truly deals. They could get cancelled later on or there could be a layaway that was a large amount—a dollar amount that never materialized." (Tr. 267:23 - 268:1) She explained there were sales people who would make "dummy sales" in order to look good "knowing that the deal would never transpire." (Tr. 268:4-5) Moreover, the store manager reserved unfettered discretion as to which of those sales to allow, and which to void. The result is that the Manager has the ability to manipulate store numbers for any purpose he sees fit, and that employees cannot predict in advance the level of sales required to meet store average.

January and February 2009 sales. In December 2008, six sales people, including Passafiume and Gabrielson, had delivered sales below \$55,000, the standard the two women were required to meet. (ALJD at 31; Tr. 50:17-20; GC 11 (See “Dec-08 Deliver” column and initials “CDT” (\$47,573), “MAE” (\$43,448), “SMT” (\$51,187) and “WFS” (\$53,468)) None of the other four sales people received written or verbal warnings for December 2008. (ALJD at 32; Tr. 59-61; GC 17 (Subpoena Request 7(a)); GC 18 (Respondent’s Response to Subpoena Request 7(a)) In January 2009, six sales people again fell below the \$55,000 average, but only Passafiume and Gabrielson received written warnings. (ALJD at 31; GC 11 (See “Jan-09 Deliver” column and initials “ALC” (\$45,384), “GAB” (\$41,945), “JJS” (\$34,809), “RLD” (\$48,980); GC 17; GC 18)) In February 2009, when Passafiume and Gabrielson were held to the store average standard (\$59,972), seven other sales people fell below that standard. (ALJD at 31-32; GC 11 (See “Feb-09 Deliver” column and initials “ALC (\$55,496), “APV (\$51,520), “GAB” (\$56,253), “JMG” (\$56,546), “JPS (\$52,557), “SCW” (\$41,617), “SMT” (\$54,548) and “WFS” (\$50,743)) None of those seven sales associates received warnings for their below average sales. (GC 17, GC 18)

Counsel for the Acting General Counsel subpoenaed all documents, including written warnings and written memorializations of verbal warnings, for any sales associate at any of Respondent’s stores who failed to meet Respondent’s sales criteria from November 2007 to the present. (GC 17, p. 1 and 4, Request 7(a)) In response, Respondent provided documents that revealed that only one other employee of the Superstition Springs Store (Store 06) was ever issued a warning for low volume during that two-year period, contrary to Serda’s sworn testimony that it was his standard practice to issue warnings to employees who missed the minimum sales standard. (ALJD at 32; GC 18, 25<sup>th</sup> page, employee Jeanette Johnson) This is despite the fact that other sales people at the Superstition Springs Store missed the sales target

as often as five months in a row. (ALJD at 32; Tr. 47:13-48; 26; GC 10 (initials “MAE” had sales below \$55,000 in April, May, June, July, and August 2007)). Serda did not warn or terminate that employee who had sales below \$55,000 for five months in a row. (Tr. 48:13-16) Moreover, Respondent’s records demonstrated numerous employees who had failed to meet corporate minimum for consecutive months. (ALJD at 32; GC 19, 5<sup>th</sup> page, 2008 (Business Delivered table showing the following sales associates below \$55,000 for consecutive months: “ALC,” “APV,” “CCK,” “GAB,” “JMG,” “JPS,” “MAE,” and “UGM”)) Serda did not issue warnings to any of these associates either.

The record shows that Respondent had -- and utilized -- means and methods by which to insure that sales associates’ sales numbers were fairly calculated, though it elected not to extend the same to Gabrielson. For example, Serda also testified that he would pro-rate the required volume when his sales people are on vacation or sick or injured. (ALJD at 32; Tr. 42) However, despite his stated practice of pro-rating a sales associate’s volume when they are sick or injured, Serda did not pro-rate Gabrielson’s volume. (ALJD at 32)

Specifically, in December 2008, Gabrielson fell in the break room at the Superstition Springs Store and injured her back and foot. (ALJD at 32; Tr. 134:4-9) Gabrielson was in pain and had to take time off from work for doctors’ appointments and physical therapy twice a week for the next two months. (ALJD at 32; Tr. 134–135) By February 2009, Gabrielson was still in pain and her doctor diagnosed a stress fracture in her foot. (ALJD at 32; Tr. 136) The doctor ordered Gabrielson to wear a “CAM” boot for the next 10 weeks, which she was wearing when she was fired. (ALJD at 32; Tr. 136, 159) The CAM boot was a removable cast that went from Gabrielson’s foot to her knee and made it difficult for her to walk around at work, especially given the pain she was in. (ALJD at 32; Tr. 159) Nevertheless, Gabrielson continued working full time until she was fired, but Serda did not pro-rate her

required sales volume for the months she was recovering from the injury. (ALJD at 32; Tr. 183) When Gabrielson received a write-up for her sales volume in December 2009, the month she fell in the break room, she had told Serda she “was working in pain” and told him “if he could find any way to help me work without pain it would be beneficial.” (ALJD at 32; 183:3-5)

The ALJ properly found that “Serda treated Passafiume and Gabrielson in a disparate fashion, certainly more harshly than he treated other employees who also had a difficult time meeting goals. The sales figures do not support Respondent’s defense by a preponderance of the evidence.” (ALJD at 32) Accordingly, the ALJ found that Respondent “failed to rebut the General Counsel’s prima facie case by the requisite standard of evidence,” that Respondent’s defense “is nothing more than a pretext” and that Respondent’s “true motive was unlawful,” i.e., “because Passafiume and Gabrielson engaged in protected concerted activity.” (ALJD at 32)

#### **IV. RESPONDENT’S SPECIFIC EXCEPTIONS LACK MERIT**

##### **A. The ALJ Properly Refused to Credit Serda and Made Other Appropriate Credibility Resolutions**

Respondent first takes exception to the ALJ’s finding the Serda lacked credibility and to the ALJ’s crediting the testimony of employee witnesses when in conflict with Serda’s testimony. (See ALJD at 5) The ALJ found in the record “numerous contradictions between what Serda alleges that he said or did, and what various sales associates contend that he said or did.” (ALJD at 5) While Serda denied ever telling employees that they could be disciplined for complaining about discount coupons, and denied writing any message on a white board in the break room that prohibited negative talk about paychecks, workings, or MCRs,” the ALJ found Serda not to be a credible witness because the testimony of the employee witnesses “all corroborate each other and are inherently consistent with the undisputed facts.” (ALJD at 5)

In support of his finding, the ALJ noted the undisputed fact that Serda admitted authoring a policy that prohibits “negative energy or attitudes” and that employees would be sent home for three days or terminated if they violated the policy. (ALJD at 5)

The ALJ made very clear and well-supported findings regarding Serda’s credibility. For example, the ALJ notes that while “Serda testified that ‘it is very important’ for sales associates to be at the store average,” “in Serda’s own store, the records show that he has retained sales associates who repeatedly failed to make store average.” (ALJD at 31) The ALJ did not believe Serda’s testimony that he tried “to pacify the sales associates” who complained about the discount policy. (ALJD at 5) Rather, the ALJ properly found that Serda “ran the Superstition Springs Store with an iron fist” and “tolerated no dissent and was unforgiving regarding employee complaints.” (ALJD at 5).

The ALJ appropriately found Serda’s “testimony and demeanor was such that it was clear to me that he took great pride in being the person in charge, and having almost total control over his store and employees. I do not believe that he would have well tolerated dissent from sales associates in the form of protected concerted activity or otherwise.” (ALJD at 5) In support of his findings and conclusions, the ALJ noted numerous instances of Serda not tolerating dissent or classic protected activity such as when he told employees to put their paychecks away, that they “were not allowed to be sharing that information,” that he did nothing when employees complained about Joe Smith’s behavior, that he admonished Passafiume “not to talk with other employees about the fear of losing her job,” that such matters “stay in here,” meaning his office, and that he wrote the store policy prohibiting “negative energy or attitudes” and threatening to send home employees for violating his policy. (ALJD at 6-7)

Respondent also asserts that “General Counsel utterly failed to present any evidence that Mr. Serda had any anti-union animus” or “that he was aware of protected activity of any significance.” (Respondent’s Brief in Support of Exceptions (Respondent’s Brief) at 15) Respondent apparently believes there are differing levels of protected activity, or that some such protected conduct is not, in fact, protected by the Act. The record is replete with evidence of protected activity and the ALJ made significant findings regarding this activity. (See ALJD at 4-7, 28-30). Moreover, the record is replete with evidence of Serda’s awareness of, and animus towards, protected activity, which the ALJ also found. (See ALJD at 4-7, 30) In addition, the record contains abundant evidence of assistant sales manager Smith’s awareness of, and hostility towards, employees’ protected activity as well as toward unions.<sup>3</sup> (See ALJD at 4-7) What Respondent fails to address is the ALJ’s finding that “there is no doubt that *management* officials at the Superstition Springs Store were acutely aware of this [protected concerted] activity, in many instances directly responding to it in a very negative way.” (ALJD at 20, emphasis added) (citing *East Buffet and Restaurant, Inc.*, 352 NLRB No. 116 (2008)) The ALJ clearly found that Respondent, by Serda, along with other managers, particularly Smith, had knowledge of and did not tolerate protected activity of any kind, notwithstanding Serda’s denial of such animus.

Respondent also takes issue with Passafiume’s credibility, arguing that her testimony about being assaulted by assistant sales manager Smith “bordered on silly,” apparently believing that a supervisor hitting an employee in the workplace is nothing to take seriously.<sup>4</sup>

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<sup>3</sup> Smith, a current supervisor for Respondent, did not testify at trial, and the ALJ properly drew an adverse inference from this fact and credited the testimony of the employee witnesses concerning Smith’s statements and actions. (ALJD at 5) Respondent does not take exception to this credibility finding.

<sup>4</sup> Later in its Brief, Respondent suggests that Passafiume and Gabrielson made up this incident because the police officer who investigated the assault charge found no corroborating witnesses. As the ALJ properly found, “the mere fact that the police decided there was insufficient evidence to establish the commission of a crime does not alter my view that Passafiume and Gabrielson testified credibly regarding the incident.” (ALJD at 7)

Respondent also attempts to undermine Passafiume's testimony by arguing she "claimed [that she] did not read the written warnings" Serda presented to her in mid-February 2009 and which she signed. (Respondent's Brief at 15) Respondent's re-characterization of Passafiume's testimony is contrary to the record. Passafiume testified that the meeting with Serda, when he presented these write-ups, lasted less than five minutes and he put both write-ups on the desk and said, "I need you to sign these." (Tr. 227) Passafiume stated she read the write-ups "very quickly" but she did not read them in detail. (Tr. 310) Nor did she claim, as Respondent asserts, that she "was somehow tricked by Mr. Serda" before signing the write-ups. (Respondent's Brief at 16; Tr. 227) Passafiume simply testified that she knew these were "write-ups for volume" but she did not write anything in response to the write-ups because she was "afraid" and "didn't want to go against the person that had the power to fire" her. (Tr. 325-326)

Respondent also tries to undermine Gabrielson's credibility by arguing that Respondent somehow accommodated her for her workplace injury. What Respondent fails to note, however, is that while Gabrielson was working in pain with an injured foot, Serda did not pro-rate her sales requirements, even though he testified he pro-rated other sales associate's sales requirements for similar issues, and even when they were on vacation. Respondent also tries to cast doubt on Gabrielson's assertion that she was in pain while at work during her last three months by inflating the fact that Gabrielson had a job on the side. What Respondent fails to tell the Board, however, is that this side job took only three or four a week working as a "mystery shopper" for a marketing company. (See Tr. 161) Sitting in a restaurant or entering a bank to prepare a review is hardly the strenuous and onerous time commitment Respondent attempts to portray in its brief.

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Further, Passafiume explained at trial that the people interviewed by the police officer "weren't the team that was there that saw it." (Tr. 315)

Credibility determinations are based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. See *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 664 (1996). Accord *Warren L. Rose Castings, Inc.*, 231 NLRB 921, 913 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978). Here, the ALJ amply justified his reasons for crediting the testimony of employee witnesses where they conflicted with Serda’s testimony. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all relevant evidence shows that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) *enfd.* 188 F.2d 362 (3rd Cir. 1951). With regard to the exceptions of Respondent that challenge the credibility resolutions made by the ALJ, the Board should follow this long-standing policy and uphold the ALJ’s credibility resolutions based on the preponderance of all relevant evidence.

**B. The ALJ Properly Found that Respondent Violated § 8(a)(1) by Discharging Passafiume and Gabrielson**

Respondent next takes issue with the ALJ’s finding that Respondent violated § 8(a)(1) of the Act by terminating Passafiume and Gabrielson. Again, Respondent suggests, without authority, that certain kinds of protected activities are in fact protected by the Act while other protected activities are not. For example, Respondent argues that “[t]he testimony of protected activity engaged in during the relevant time period was minimal at best and wholly inadequate to in any way connect with the Claimants’ ultimate discharges.” (Respondent’s Brief at 19, emphasis in original). Thus, Respondent admits that employees engaged in protected activity, just not enough of it in Respondent’s view. The ALJ properly found, however, that the “many conversations that Passafiume and Gabrielson had with each other, with fellow employees, and with management, regarding their wages, hours, and working

conditions, beyond question constituted protected activity.” (ALJD at 20) Further, the ALJ found that management was “acutely aware of [Passafiume’s and Gabrielson’s protected] activity, in many instances directly responding to it in a very negative way.” (ALJD at 20)

Contrary to Respondent’s suggestions, it is undisputed that Gabrielson and Passafiume complained about wages, the MCRs, discounts, their sales, and other terms and conditions of employment in violation of Respondent’s unlawful rules prohibiting employees from complaining about those issues and negativity in general. In particular, the evidence shows that Gabrielson and Passafiume complained to other sales associates about wages while at work; that store manager Serda told them, and the other employees to stop talking about their wages; that Gabrielson continued to do so with “probably ever[y] employee that worked” in her store; that, in November and December 2008, she complained to assistant sales manager Smith about the low wages Respondent paid its employees and told him that was why employees needed to be represented; and that she was again instructed by Smith not to talk about such issues.

Further, the evidence shows that Gabrielson complained to Serda about the way Smith treated employees, including his “whacking” Passafiume. Similarly, Passafiume complained to other employees and assistant sales manager Struensee about Smith’s conduct and about wages; was told not to discuss such matters in December 2008, under penalty of being sent home for three days; and yet she continued to do so. As a result of her activities, Serda specifically “hushed” Passafiume, instructing her that “[i]t . . . stays in here.” Although he was called to testify, Serda did not deny making any of the unlawful rules attributed to him.

The protected concerted activities engaged in by the discriminatees in this matter far exceeded what Respondent was willing to tolerate. Respondent’s animus towards Gabrielson’s and Passafiume’s concerted activities is amply demonstrated by its repeated

written and verbal admonitions to them, and other employees, that such discussions were forbidden. See *Sunrise Health Care Corp.*, 334 NLRB 903, 906 (2001) (independent Section 8(a)(1) violations constitute evidence of animus). Indeed, the extreme level of hostility is highlighted by the timing of Respondent's actions against these two employees. In November and December 2008, Gabrielson argued with assistant sales manager Smith about her right to discuss MCRs and forming a union. Shortly after this event, she was written up for her December sales. During this time, Serda also refused to accommodate Gabrielson's injury, contrary to his stated practice of pro-rating the required sales volume for employees who were sick, injured, or even on vacation.

In the ensuing two months, Gabrielson violated Smith's and Serda's rule to not discuss paychecks, MCRs or unions; stood up for other employees and told Smith to stop harassing Passafiume and other female employees; complained to Serda about Smith's behavior; and, finally, confronted Smith on February 28, 2009, to tell him to stop hitting Passafiume. Only days later, she was fired.

Similarly, Respondent's final straw with regard to Passafiume occurred when she sought to discuss the terms and conditions of her employment with other employees, contrary to Serda's express orders. It was only then that Serda, who according to Respondent has unfettered discretion over sales voids, decided to void one of Passafiume's large sales so that she would just barely miss the store average. Before her attempt to talk to other employees, Passafiume was well on her way to meeting her sales goals and, in fact, was one of the top performers in the store that month, even with the several voids by Serda and Smith.

In meeting its burden of persuasion, the General Counsel must establish that the discriminatee engaged in protected activity, that the employer had knowledge of this activity, and that the employer carried out the adverse employment action because of the protected

activity. See *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). To establish that an employer’s adverse action has violated § 8(a)(1) of the Act, *Wright Line* requires the General Counsel to initially prove by a preponderance of the evidence that the employee’s protected activities were a motivating factor in the employer’s decision to take the adverse employment action. *Id.* “It is well settled that the timing of an employer’s action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.” *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). The Board has long held that suspicious timing, along with compelling evidence of animus, strongly indicates an unlawful motivation. *In re Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Here, the timing could not be more clear, and the evidence overwhelmingly indicates that the only credible reason for issuing warnings to Gabrielson and Passafiume and then firing them was to rid itself of employees who regularly expressed their opinions about working conditions and stood up for other employees.

Moreover, the causal link between the protected activity and the adverse employment action may be sustained with evidence that is short of direct evidence of motivation.

*Roadway Express*, 327 NLRB 25, 26 (1998); *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1109-1110 (1999); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital Del Maestro, Inc.*, 291 NLRB 198, 204 (1988); *Abbey’s Transp. Servs.*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988). For example, a discriminatory motive or animus may be established by: (1) the timing of the employer’s adverse action in relationship to the employee’s protected activity, see *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (“timing alone may suggest anti-union animus as a motivating factor in an employer’s action”); (2) the presence of other unfair labor practices,

see *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 N.2, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993); (3) statements and actions showing the employer's general and specific animus, see *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-74 (6th Cir. 1993) (statements even if lawful, serve as background evidence of animus); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); (4) the disparate treatment of the discriminatees, see *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); (5) departure from past practice, see *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir.), cert. denied 502 U.S. 814 (1991); (6) failing to adequately investigate whether the discriminatee engaged in the alleged misconduct, see *W.W. Grainger, Inc., v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext, see, e.g., *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB at 26. Finally, the Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Elec.*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Here, the ALJ properly found that General Counsel met its burden of persuasion and that the discharges of Passafiume and Gabrielson were "directly related to the concerted activities engaged in by the two employees." (ALJD at 30) The ALJ found that "[t]his Employer repeatedly showed, through its written and oral statements, its unwillingness to tolerate even a limited amount of concerted activity." (ALJD at 30) In support of this finding, the ALJ noted Respondent's numerous "written policies and the oral statements of its supervisors [that] have restrained and coerced the employees in the exercise of their Section 7 rights, and as such, to constitute violations of Section 8(a)(1) of the Act." (ALJD at 30) The

ALJ found the timing of their discharges to be suspect, noting that just days before their terminations, both Passafiume and Gabrielson confronted Smith for hitting Passafiume with his paperwork. (ALJD at 30)

The ALJ also observed that just a few days before he fired Passafiume, Serda reprimanded her for expressing to her coworkers and supervisor her fears about losing her job and her voided sales. (ALJD at 30) (citing *In re Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)). Because of the compelling evidence of animus and the suspicious timing, the ALJ found that General Counsel established a direct link or nexus between Passafiume's and Gabrielson's protected concerted activities and their discharges. (ALJD at 30) Thus, the ALJ properly found that "Respondent's action in terminating Gabrielson and Passafiume was motivated, at least in part, by the Respondent's animus towards them because of their protected concerted activity." (ALJD at 30)

Moreover, the record establishes that Respondent treated the discriminatees in a manner that was disparate from the way it treated other employees, as discussed more fully above.

The ALJ also properly dismissed Respondent's stated reasons for discharging Passafiume and Gabrielson and found those reasons to be "nothing more than a pretext." (ALJD at 32) The ALJ thoroughly analyzed the sales figures used by Respondent to justify terminating Gabrielson and Passafiume, and he observed that Serda chose only to discipline Passafiume and Gabrielson for low sales in their final months even though "lots of sales associates at the Superstition Springs store were not making goal during the months in question." (ALJD at 32) Further, the ALJ found that Serda "appeared to intentionally make it more difficult for [Passafiume and Gabrielson] to achieve goal, raising the standard to the higher store average," which was above the usual corporate average of \$55,000. (ALJD at

32) Also, while Serda appeared to rationalize not disciplining other employees for low sales when they were on vacation, sick or injured, the ALJ found that Serda did not accord the same treatment to Gabrielson, who was working with an injured back and foot in her final months. (ALJD at 32) Accordingly, Respondent's exceptions to the ALJ's finding and concluding that Respondent unlawfully discharged Passafiume and Gabrielson should be rejected by the Board.

**C. The ALJ Properly Found that Respondent Violated § 8(a)(1) by Its Promulgation and Maintenance of Rules at the Superstition Springs Store**

Respondent takes exception to the ALJ's finding that Respondent promulgated and maintained rules at its Superstition Springs Store in violation of § 8(a)(1) of the Act. Without citation to any authority, Respondent demands that the Board ignore long-established precedent as to why these particular rules violate the Act.

**1. Rule Against Negative Energy or Attitudes**

The first rule, written by Superstition Springs Store manager Sid Serda, states, in relevant part:

Absolutely NO confrontations on the floor. Any type of negative energy or attitudes will not be tolerated you will be sent home for THREE days and terminated if it happens again. If you cannot be a positive part of the team [I] don't want you on the team.

The Board has found that a rule prohibiting "negative conversation" about associates or managers violates the Act. See *Claremont Resort and Spa and Hotel*, 344 NLRB 832 (2005). In so finding, the Board applied the three-part test in *Lutheran Heritage Village-Livonia*, 344 NLRB at 832, to find that "the rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities." *Id.* See also *Central*

*Hardware Co*, 407 U.S. at 542-543 (1972) (citing *Peyton Packing Co.*, 49 NLRB 828 (1943), *enfd.*, 142 F.2d 1009 (5th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944)). “The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.” *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). However, “[n]o restrictions may be placed on the employees’ right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). “The Respondent may not prohibit discussions about a union during work time while permitting discussions about other nonwork subjects.” *M.J. Mech. Servs., Inc.*, 324 NLRB 812, 814 (1997) (citing *Williamette Indus., Inc.*, 306 NLRB 1010, 1017 fn. 2 (1992)).

The ALJ here properly found that the rule “was on its face unlawful as restraining and coercing employees in the exercise of their Section 7 rights. The language specifically prohibiting employees from having ‘negative energy or attitudes’ could reasonably chill the willingness of its employees to engage in protected concerted activities.” (ALJD at 26) The ALJ found the term “negative energy or attitudes” to be “very ambiguous” and agreed with Counsel for the General Counsel “that one person’s negative comment may well be another person’s concerted activity.” (ALJD at 25)

Respondent argues that this rule was intended to only apply to disputes on the sales floor. However, the ALJ found that “there is nothing in the above quoted language of the rule limiting its application to the sales floor, and nothing to suggest that it is intended to prevent fighting over customers.” (ALJD at 25) As the ALJ correctly observed, “[c]ertainly, if this was the Respondent’s intent, narrowly drafted, specific language could have been used. But, such was not the case.” (ALJD at 25) Instead, the ALJ found that “maintaining a rule that so

broadly and ambiguously prohibited ‘negative energy or attitudes,’ the Respondent might cause employees to reasonably assume this included discussions, perhaps even heated discussions, regarding their terms and conditions of employment.” (ALJD at 26) Nor did the ALJ find that Respondent made the necessary demonstration that such a broad restriction on employee rights “‘is necessary to maintain production or discipline.’” (ALJD at 26 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 113)).

## **2. Smith’s Orally Promulgated Rule Against Negativity**

Respondent’s prohibition against negativity was orally re-promulgated on several occasions by its managers. Passafiume testified that during the first half of December 2008, assistant sales manager Smith was talking about sales associate Westervelt and said Westervelt is “always negative and I’m about tired of her negativity” and “always complaining[.]” Smith continued, “if she keeps it up, I’m going to send her home for three days, or I’m going to send her home.” (Tr. 260:1-4) Smith went on to warn Passafiume, “If anybody is negative on the floor, I’m going to send them home for three days.” (Tr. 260: 8-9) Smith never testified at the trial to refute Passafiume’s testimony, and the ALJ properly drew an adverse inference from Respondent’s failure to call the one witness, currently a supervisor for Respondent, who could refute Passafiume’s testimony. (ALJD at 5 (citing *Int’l Automated Machs.*, 285 NLRB at 1122-23))

An employer violates Section 8(a)(1) when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of employment. In *SNE Enterprises, Inc.*, 374 NLRB 472 (2006), the Board affirmed the ALJ’s finding that the employer violated Section 8(a)(1) by prohibiting an employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that prohibition. *Id.* at 472. See also *Caesar’s Palace*, 336 NLRB 271, 272 (2001) (“employees have a Section

7 right to discuss discipline or disciplinary investigations involving fellow employees” and that the employer’s “rule prohibiting discussion of the ongoing drug investigation adversely affected employees’ exercise of that right”); *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003) (employer violated Section 8(a)(1) of the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints amongst themselves); *Westside Cmty. Mental Health Ctr.*, 327 NLRB 661, 666 (1999) (employer’s instruction not to discuss an employee’s suspension with anyone violated the Act, particularly when the prohibition restricted employees “from possibly obtaining information from their coworkers which might be used in their defense”). “Once it is established that the employer’s conduct adversely affects employees’ protected rights, the burden falls on the employer to demonstrate ‘legitimate and substantial business justifications’ for his conduct.” *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976) (citing *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967)).

Respondent argues that “[a]t most, the evidence showed Mr. Smith’s passing reference to a dislike for negativity on the sales floor.” (ALJD at 21) Respondent is playing loose with the evidence because Smith never testified so his intention can never be known. Respondent provides no other justification for maintenance of this orally-promulgated rule, and the ALJ properly found that “Smith’s conduct in reaffirming the unlawful store rule against ‘negative energy or attitudes,’ and by threatening Passafiume and other employees with suspension if they engaged in negative conversations regarding their terms and conditions of employment would certainly restrain and coerce employees who might otherwise engage in such concerted activity.” (ALJD at 27) Accordingly, the ALJ properly found that Smith’s instruction to Passafiume and warning that he will send her or anyone else home for three days for being negative is a violation of Section 8(a)(1) of the Act.

### **3. Respondent's Orally Promulgated Rule Prohibiting Employees from Discussing Terms and Conditions of Employment and Other Issues**

Respondent also objects to the ALJ's finding that Respondent, by Serda, orally promulgated and maintained a discriminatory rule that prohibits employees from talking with fellow employees about their terms and conditions of employment, including their work situations and fears about being fired, and that he threatened to suspend employees who did so." (ALJD at 27)

This particular promulgation occurred around March 1, 2009, when Passafiume was discussing her fear of losing her job with a coworker, Leone, and her supervisor, Struensee. (Tr. 238, 243) Within 10 to 30 minutes of that conversation with Struensee, store manager Serda paged Passafiume to his office. Serda was angry and demanded to know, "[w]ere you out there talking about being in fear of losing your job, you know, to people . . . out there?" (Tr. 246:24-247:1) When Passafiume hesitated, Serda demanded, "[w]ere you or were you not?" (Tr. 247:4) When Passafiume admitted to this conversation with her coworker and supervisor, Serda decreed, "[f]rom now on, I don't want you, you know, out there talking about being, you know, in fear of losing your job. . . . It stays in here." (Tr. 247:7-9) Notably, Serda was clearly angry at Passafiume during this conversation, and he and assistant sales manager Smith had recently threatened to suspend her for failing to meet sales volume and for being negative.

The ALJ properly observed that "an employer can not, without a demonstrated legitimate and substantial business justification, lawfully instruct employees not to discuss among themselves issues relating to their terms and conditions of employment." (ALJD at 37 (citing *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) ("employer's instruction not to discuss employee's suspension with anyone violated the Act, particularly

when the prohibition restrict employees ‘from possibly obtaining information from their coworkers which might be used in their defense.’”) Respondent’s rule restricted employees, especially Passafiume, from discussing the terms and conditions of their employment with other employees. In Passafiume’s case, discussions with other employees concerning the sudden imposition of rigid sales performance goals on her, under penalty of discharge, would likely have allowed her to learn that these goals were not uniformly applied, and that Respondent had singled her out. The ALJ found that Respondent failed to present “any business justification for admonishing her not to do so,” thus making promulgation and maintenance of this rule unlawful. (ALJD at 27)

Moreover, the ALJ appropriately found that Serda’s statement to Passafiume that “everything stays in here” constituted “an implied threat to enforce the store managers’ often expressed discipline of suspending her for three days for violating the policy against having ‘negative energy or attitudes.’” (ALJD at 27) Again, Respondent presented no legitimate business justification for this rule, and the ALJ properly found that Respondent, in this respect, violated § 8(a)(1) of the Act.

**D. The ALJ’s Remedy is Proper and in Accordance with Established Board Policy**

Respondent’s final exception relates to the reinstatement remedy for Passafiume and Gabrielson with back pay, as recommended by the ALJ. The ALJ recommended the standard Board remedies for violations of the Act. The only argument presented by Respondent is the circular and “re-tread” assertion that it had a legitimate reason for firing Passafiume and Gabrielson, therefore, there was no violation of the Act, and the remedy is not appropriate.

However, as fully discussed above, the ALJ properly found that a motivating factor in Respondent’s decision to fire Passafiume and Gabrielson was their protected concerted activities and that Respondent’s stated justification for their terminations was pretextual.

Accordingly, the ALJ properly found that Respondent violated § 8(a)(1) of the Act.

Respondent has failed to present any reason the Board should deviate from the ALJ's findings in this regard and the recommended standard Board remedies. Therefore, the remedies recommended by the ALJ are just and proper and should not be disturbed.

**V. CONCLUSION**

With respect to the allegations subject to Respondent's Exceptions, the ALJ's decision was wholly correct and in accord with well-established Board law. Based upon the foregoing, it is respectfully submitted that, with respect to those allegations, the Board should adopt and affirm the ALJ's findings of fact, conclusions of law, and recommended Order.

Dated at Phoenix, Arizona, this 9<sup>th</sup> day of July 2010.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in THE ROOMSTORES OF PHOENIX, LLC d/b/a THE ROOM STORE, in Cases 28-CA-22404 et al., was served by E-Gov, E-Filing, E-Mail and regular mail on this 9<sup>th</sup> day of July 2010, on the following:

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