

**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 REPLY BRIEF

The RoomStores of Phoenix, LLC, d/b/a/ The RoomStore (Respondent), in its Answering Brief, fails to respond to most issues raised in the Cross-Exceptions and Brief in Support of Cross-Exceptions of Counsel for the Acting General Counsel (CAGC), and attempts to divert the Board's attention by relying on irrelevant information and evidence admitted into the record for limited purposes, including information that was supposed to be expunged from an employee's personnel record pursuant to a prior informal Settlement Agreement to which Respondent is a party. CAGC's Cross-Exceptions are supported by the record and extant case law, while, as discussed below, Respondent's attempts to buttress the ALJ's conclusions at issue are without merit.

- I. Respondent's Answering Brief Fails to Support the ALJD or Rebut CAGC's Cross-Exceptions Regarding the Discharge of Alleged Discriminatee Kiraly**
 - A. Respondent's Attempt to Use Its Position Statement From A Prior Unfair Labor Practice Case In a Manner Contrary To A Prior Board Settlement and a Specific Ruling of the ALJ Should be Rejected**

It is respectfully submitted that CAGC's Cross-Exceptions show that the record

supports a finding that Respondent violated § 8(a)(1) and (4) of the Act by firing its employee, Bruce Kiraly (Kiraly). There is no doubt that Kiraly was engaged in protected concerted activities when he filed two Board charges against Respondent in 2008, that he entered into an informal Board Settlement Agreement in October 2008, resolving one of those Board charges (Case 28-CA-22067)¹, and that he discussed that Settlement Agreement with co-workers and supervisors up until March 2009 the month he was fired. Instead of responding to the arguments and citations to the record set forth in CAGC's Cross-Exceptions, Respondent's Answering Brief instead points to irrelevant aspects of the record, including documents that Respondent agreed to expunge from its files as part of a prior informal Board Settlement Agreement.

More specifically, in 2008, Respondent agreed, by the terms of the prior Board Settlement Agreement with Kiraly, that it would remove from its files "any reference to the February 10, 2008, written disciplines issued to Rhonda Kelly and Kaben Starre" and that it would "notify them in writing that this has been done and that these disciplines will not be used against them in any way." (Resp. Ex. 24) Despite such unambiguous terms of the agreement, Respondent nonetheless references both disciplines in its attempt to discredit Kiraly. (See Respondent's Answering Brief at 8 (referencing Resp. Ex. 21, in particular Exhibits 10-11 attached thereto)). Respondent's Exhibit 21 is a copy of Respondent's Position Statement with exhibits, submitted in response to the 2008 charge (28-CA-22067) that resulted in the informal Settlement Agreement. Respondent relies heavily on Resp. Ex.

¹ The charge 28-CA-22067, filed by Kiraly on August 6, 2008, states, in part: "During the past six months, the above named employer discriminated against employees, including Rhonda Kelly, because these employees engaged in protected concerted activities." (GC 25)

21 in its Answering Brief, despite the fact that its use is contrary to the terms of the prior settlement.

Moreover, Respondent's relies on such documents in a manner contrary to a specific ruling made by the ALJ when admitting them into evidence. More specifically, when the ALJ admitted Resp. Ex. 21 into evidence (over CAGC's objection), the ALJ did so with the following caution: "I'm not accepting the accuracy of any statements made therein. It's -- we all know what a position statement is. It's a representation by counsel. It's not evidence. . . . As I said, I'm not accepting it for any of the truth of the statements asserted therein." (Tr. 458-59)

The ALJ's admonition that he is not accepting the Position Statement and attached exhibits for their truth is especially critical here where that charge, and the evidence presented in the Position Statement responding to that charge, were never litigated. Nevertheless, Respondent, in its Answering Brief, repeatedly cites to Resp. Ex. 21 and its exhibits, which include the expunged disciplines as well as self-serving affidavits of supervisors who never testified in this proceeding, as if such material was admitted for all purposes, including the truth of the matters asserted. Accordingly, CAGC respectfully submits that the Board should disregard Respondent's Answering Brief insofar as it attempts to rely on such materials in support of its contentions.²

As to Respondent's contentions themselves, Respondent relies heavily on the hearsay statements in Resp. Ex. 21 in its attempt to place the blame on Kiraly for problems in Respondent's Prescott store back in 2007. Even then, Respondent's arguments miss the mark. For example, as at trial, Respondent suggested that Kiraly's relationship with Rhonda Kelly

² Respondent's later admission that it agreed to remove the disciplines from Kelly's and Starre's files (Answering Brief at 11) does not excuse its blatant misuse of the disciplines earlier in its brief.

was the source of the other employees' anonymous complaints about managers at the Prescott location. (See Respondent's Answering Brief at 7, 9 (citing Resp. Ex. 21 and owner Danny Selznick's self-serving affidavit attached to the 2008 Position Statement)). Yet, there is no record support for Respondent's bald assertion that the anonymous complaints from Prescott employees were about Kiraly. Rather, the record establishes that the complaints at issue were about the two assistant managers allegedly stealing commissions from other sales associates. (See Tr. 554; ALJD at 11) When the sales associates told Kiraly about the assistant managers taking their commissions, Kiraly advised them to take their complaints to management, and Kiraly himself talked to the Prescott store manager and assistant managers on several occasions. (Tr. 575)

Moreover, despite Respondent's baseless suggestion to the contrary, Kiraly was not a manager at the time he worked in Prescott in the fall of 2007, and had not been a manager for Respondent since 2006. (Tr. 442; ALJD at 10) More to the point, in the fall of 2007, Kiraly was in Respondent's Prescott store to train new sales associates and to sell furniture after the Prescott store's grand opening. (Tr. 538-39; ALJD at 11) As the corporate trainer, Kiraly did not have the authority to hire, fire, schedule or discipline employees. (Tr. 693) Owner Selznick agreed that Kiraly had no management authority when he was working in Prescott and that, as corporate trainer, Kiraly worked primarily as an independent contractor. Finally, the ALJ found that Selznick removed Kiraly from his position as corporate trainer shortly after working in Prescott precisely because Kiraly was "encouraging Prescott Store employees to complain to management about commissions" and not because Kiraly was romantically involved with Kelly. (ALJD at 11)

Accordingly, Respondent's suggestion that Kiraly's relationship with Kelly was the source of all discontent in the Prescott store is a red herring and intended to draw attention away from the fact that Kiraly encouraged employees to follow the chain of command and voice their complaints, including concerted complaints, about what was happening to their commissions. In addition, Kiraly's work as corporate trainer and salesperson at the Prescott store in 2007, was never raised by Respondent as a basis for his termination in 2010, further calling into question why Respondent devoted so much of its Answering Brief in support of what appears to be a shifting defense based on facts dredged up from that period of Kiraly's employment with Respondent.

B. Respondent's Contentions About the Nature of the Animus Required to Establish a Violation, And to the Record Evidence Establishing Respondent's Animus Toward Kiraly's Protected Concerted Activities, Are Without Merit

Kiraly continued his protected concerted activities even after he entered into the informal Board Settlement Agreement with Respondent in October 2008. When discussing this time period, Respondent switches modes and asserts that all evidence of animus and retaliation for Kiraly's protected concerted activity must come solely from the store manager who fired Kiraly, Justin Stacey. Respondent completely fails to address the fact that Respondent, by its assistant store manager at the same store, Ashley Ryan, who was present at Kiraly's termination meeting, exhibited substantial animus toward Kiraly's protected activity beginning the day after Kiraly signed the Settlement Agreement in October 2008.

Specifically, on that day, assistant manager Ryan gave Kiraly a write up because Kiraly was talking to co-workers about Ryan's unfair treatment of another co-worker. Ryan told Kiraly the write up was for "bad rapping me behind my back," and Kiraly responded that he had signed the Settlement Agreement the day before and would be trying to form a union

“or a grievance committee specifically to deal with this kind of railroad job.” (Tr. 458; ALJD at 11-12) Respondent also overlooks and fails to address its hostility toward Kiraly’s protected conduct as exhibited by store manager Cindy Gregory, who signed the illegitimate write-up presented by Ryan. Neither Gregory nor Ryan testified at the hearing, and the ALJ properly credited Kiraly’s testimony about their conversations regarding unions and other protected concerted activities. (ALJD at 11-12)

In addition, the ALJ credited Kiraly’s testimony that Respondent, by Ryan, told Kiraly a few months later at his termination meeting that, “you’re causing trouble with all the employees and, you know, your day’s finally come basically.” (Tr. 500; ALJD at 19)

Finally, Respondent asserts that “no testimony was given that Mr. Stacey ever disciplined anyone for protected activity[.]” (Answering Brief at 22) This again ignores the fact that Gregory and Ryan, both supervisors, did discipline Kiraly for his protected activity. In addition, the ALJ credited Kiraly’s testimony about giving Ryan a copy of the Settlement Agreement in February 2009, and telling Ryan “I hope this helps you better manage the store” and that he would working on forming a union or grievance committee “as long as I was at the RoomStore.” (Tr. 478; ALJD at 12)

Respondent apparently believes this history of animus exhibited by its managers and assistant managers, who knew each other and often rotated between Respondent’s various stores in Arizona, had no bearing on Kiraly’s termination, simply because the final blow was delivered by store manager Stacey. The evidence, however, presents a clear pattern of continued hostility toward Kiraly’s protected concerted activities. Respondent even asserts that one of CAGC’s witnesses, Jeri Johnson, “offered nothing to suggest that Mr. Stacey ever interfered or disciplined employees for engaging in protected activity.” (Answering Brief at

18) That is simply not true. Johnson credibly testified that shortly after he fired Kiraly, Stacey told employees on at least two occasions “not to talk about [Kiraly] and discuss him.” (Tr. 590-591)

II. Respondent’s Failure to Answer CAGC’s Contentions Regarding Other Cross-Exceptions

Respondent’s Answering Brief fails to address CAGC’s Cross-Exceptions concerning store manager Stacey’s promulgation of an overly-broad rule and threat to discharge Kiraly the day before he fired Kiraly. Instead, Respondent focuses on Stacey’s notes for an employee meeting that had nothing to do with such allegations. It is respectfully submitted that Respondent’s failure to address or respond to the cross-exceptions regarding the alleged overly-broad rule and threat by Stacey highlights the absence of record evidence in support of Respondent’s defense with regard to these allegations.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should find that the Respondent violated the Act as described in CAGC’s Cross-Exceptions, as well as the violations found by the ALJ in his Decision, and to issue an order so finding and which provides for an appropriate remedy.

Dated at Phoenix, Arizona, this 13th day of August 2010.

Respectfully submitted,

/s/Mary G. Davidson
Mary G. Davidson
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY 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 overnight delivery via United Parcel Service on this 13th day of August 2010, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

Via E-mail:

D. Samuel Coffman, Attorney at Law
Mariscal, Weeks, McIntyre &
Friedlander, PA
2901 North Central Avenue, Suite 200
Phoenix, AZ 85012
E-mail: Sam.coffman@mwmf.com
Tricia.schafer@mwmf.com

Via overnight delivery:

The Room Store
6315 East Southern Avenue
Mesa, AZ 85206

The Room Store
3011 East Broadway, Suite 100
Phoenix, AZ 85040

Ms. Diane Passafiume
2773 South Arroyo Lane
Gilbert, AZ 85295
E-Mail: Konczpass1@yahoo.com

Mr. Bruce E. Kiraly
885 North Granite Reef Road, Unit #59
Scottsdale, AZ 85257-4583
E-Mail: curly711@hotmail.com

/s/ Mary Gray Davidson

Mary Gray Davidson
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178
E-mail: Mary.Davidson@nlrb.gov