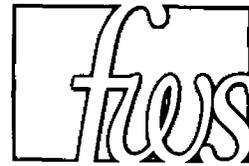


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May 19, 2011

VIA FEDERAL EXPRESS

Mr. Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570

**Re: The TM Group, Inc. and Kimberly Grover
Case 7-CA-52730**

Dear Mr. Heltzer:

Enclosed for filing in the above-referenced matter are eight (8) copies of the Respondent's Brief and Exceptions. Please file in your usual manner.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

SIMCHA SHAPIRO, P.C.

Simcha Shapiro

SS/lrt
Enclosure

cc: The TM Group (w/encl.)
Patricia A. Fedewa, Esq. (w/encl.)
Darlene Haas Awada, Esq. (w/encl.)
Kimberly Grover (w/encl.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

THE TM GROUP, INC.,

Respondent,

and

Case 7 – CA – 53730

S2730

KIMBERLY GROVER, an Individual,

Charging Party.

*Patricia A. Fedewa, Esq. and
Darlene Haas Awada, General Counsel*

Simcha Shapiro, Esq., for the Respondent

Kimberly Grover, Charging Party, Pro Se

_____ /

RESPONDENT'S EXCEPTIONS

TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND

OTHER PARTS OF RECORD AND PROCEEDINGS

Respondent propounds the following exceptions to the Administrative Law Judge's Decision and part of the record and proceedings in the above matter. For purposes of these exceptions, "ALJ" shall mean the Administrative Law Judge; "ALJD" shall mean the Administrative Law Judge's Decision; and "TR" shall mean the Transcript of the proceedings in this matter. "Grover" shall mean the Charging Party; "Judy" shall mean Judy Thomas, officer, director and shareholder of Respondent; "Mark" shall mean Mark Thomas, officer, director and shareholder of Respondent; and "Scott" shall mean J. Scott Thomas, officer, director and shareholder of Respondent. "Keller" shall mean Kim Keller, and "Kountouriotis" shall mean

Periklis Kountouriotis, both of whom are employed by Respondent and testified as witnesses for the General Counsel.

A. **Exceptions to Findings Expressed in Decision:**

1. **ALJD, p. 6, lines 27-29:** Statement attributed to Grover based on hearsay statement of Keller as to existence of a promissory note for advances made by Respondent to Scott, which Keller did not corroborate in testimony.

2. **ALJD, p. 6, lines 32-39:** Statement attributed to Grover based on hearsay that other employees expressed concerns about advances to Scott, including two employees, Shannon Erisman and Lynn Kozoro, who did not testify in the proceedings.

3. **ALJD, p. 6, lines 41-44:** Statements attributed to Grover based on hearsay as to knowledge of employees as to welfare of company.

4. **ALJD, p.7, line 11:** Testimony of Grover on issue of employees who had been told of reduction in hours being told not to discuss the matter with other employees. This statement is incomplete. Grover admitted on cross-examination that the employees were requested not to discuss the matter with other employees until management had an opportunity to meet with the other employees. TR, p. 98, lines 7-9, and p.99, lines 10-12.

5. **ALJD p.7, lines 19-20:** Statements attributed to Grover based on hearsay statement of Kathy McDonald, an administrative employee, that she could not complete her work on a 4-day week, and McDonald was not called to corroborate the statement.

6. **ALJD p.7, footnote 9:** Grover's testimony was entirely contradicted by Keller as to Grover's statements that Keller would lose her job. Keller testified that Grover repeatedly told her that Keller was to be fired (TR p. 162, lines 15-

16; TR p. 163, lines 4, 8-12). Grover's statements, as related by the ALJ, are hearsay and not corroborated.

7. **ALJD p.8, lines 1-10**: Summary of Grover's statements allegedly made by other employees who did not testify is uncorroborated hearsay.

8. **ALJD, p.8, lines 15-18**: Hearsay statements attributed to Kountouriotis by Grover as to his opinions and concerns which were not corroborated by Kountouriotis in his testimony.

9. **AJLD, p.8, lines 41-42**: Hearsay statements attributed to "employees" by Grover without corroboration.

10. **AJLD, p.9, lines 2-5**: Hearsay statement attributed to Keller by Grover as to Scott's advances and observation of entry on the Respondent's general ledger; and Keller's fear of losing job if went to Mark with information, not corroborated by Keller in her testimony.

11. **ALJD, p.9, lines 20-21**: Statements allegedly made by Mark as to Scott's alleged personal matters, objected to as hearsay and irrelevant, but allowed as an admission against interest because Mark is an officer of the Respondent, although his "admission" did not deal with something Mark may have done, but rather involved Scott, who did not testify. Mark was not examined on the issue.

12. **ALJD, p.9, line 36**: Reference to a bank audit. ALJ ruled that reference to a bank audit that may or may not have happened after August 31, 2009, was irrelevant, and then recites the issue in his findings.

13. **ALJD, p.9, lines 39-40**: The date of the conversation between Grover and Mark was testified to as being the last day before Grover went on vacation (presumably August 14, the day before her vacation began). Later, on cross-examination, she contradicted herself by saying that the conversation occurred at some

time during the week before August 15, when she left on vacation, and then said she didn't remember the date. TR, p.99, lines 16-19.

14. **ALJD, p.10, footnote 16**: Grover's belief, expressed on several occasions in the hearing (TR p. 64, lines 22-25; TR p. 65, lines 1-6; TR p.108, lines 10-11) that her complaint to Mark about Scott's advances led to her discharge is not controlling.

15. **ALJD, p.16, line 5**: Finding that Respondent purchased Scott's car, modified by "actually," when in fact Judy testified that Scott had terminated the car lease, and bought the car personally (TR p. 188, line 25, page 189, lines 1 – 8) to save money.

16. **ALJD, p. 18, lines 40-41**: Finding that Judy acknowledged that subject of Grover's advocacy of reductions in various company expenses was also discussed in a management meeting on August 19, 2009, is inaccurate. She testified just the opposite (TR p. 216, lines 15-23).

17. **ALJD, p. 29, lines 5-15**: ALJ's finding that the "trigger event" for this dispute was the reduction of hours for 4 administrative staff people (actually 12 people across the board) on July 16, 2009, when Grover had previously advocated cuts in expenses since January of 2009.

18. **ALJD, p.29, lines 30-32**: Findings that Grover was an eminently credible witness and the substance of her testimony was corroborated by other witnesses.

19. **ALJD, p.29, footnote 46**: Finding that Grover's statement to the Michigan Unemployment Insurance Agency on her application for unemployment benefits that her employment with Respondent was terminated because of "lack of work," which she then believed to be inaccurate, according to the Charge, does not in any way diminish her credibility.

20. **ALJD, p.30, lines 25-6:** Finding that Judy stated that Respondent was facing a bank audit that especially required Grover's services upon Grover's return from vacation, when the statement was not made by Judy. She testified that there was no imminent audit, and the only person to say otherwise was Grover.

21. **ALJD, p. 30, Footnote 47:** Finding that Judy said she made the decision to discharge Grover on the morning of August 14, when the testimony was that she made the decision on August 10, 2009, and decided not to inform Grover of the decision on August 14, 2009, so Grover could go on her paid vacation.

22. **ALJD, p. 30, footnote 48:** Finding that both Judy and Mark testified that they conducted an investigation of sorts to determine if Grover had actually made the statements attributed to her by Kountouriotis to determine if she made the remarks. Judy did not so testify. She stated she was delegated to speak to the employees, but not in an investigatory manner. She spoke to them to quell the unrest caused by the statements alleged to have been made by Grover, not to determine if they had been made by Grover. TR, p. 213, lines 1-13.

23. **ALJD, p.31, lines 34-37:** Finding that defense of Respondent was a pretext. (See Brief).

24. **ALJD, p.31, lines 45-47:** Finding that Judy changed her testimony by stating that she arrived at the decision to lay Grover off on August 14, 2009, after having stated on other occasions that it was August 10, 2009, as a result of which her credibility suffered.

25. **ALJD, p.32, lines 3-4:** Finding that Judy seemingly had no actual plans to discharge Grover, especially with the impending bank audit. There was only a statement from Grover that there was an impending bank audit, and Judy never stated there was one. Mark testified that an audit occurred later in the fall. The ALJ specifically

ruled that he did not want evidence of events that happened after August 31, 2009, but now uses the putative event to justify his position.

26. ALJD, p.32, lines 16-21: Finding that the “investigation” conducted about Grover’s remarks was inadequate, and related to Respondent’s *bona fides*. See exception 22. Further, there is no legal obligation to make an investigation, nor did anyone from management testify that a formal investigation was contemplated or authorized.

27. ALJD, p.32, footnote 50: Finding that spreadsheets were not disclosed to nonmanagement employees, most notably Grover, implying that there was some duty to do so. There is no notice requirement of impending discharge, and there are no work rules, no law, or any other duty to divulge management tools to any employee.

B. Exception as to Findings the ALJ Failed to Find or Conclude. Respondent further takes exception to the failure of the ALJ to find the following in his Decision:

28. Grover knew the Respondent was facing serious financial problems in January, 2009, right after the company took on new space and after losing Demmer and TUI. TR p.113, lines 12-25

29. Grover testified that by July, 2009, the financial problems of the Respondent had reached a pressure point. TR, p.113-114, lines 24-25;1-15.

30. Grover changed her testimony concerning the date she had her critical conversation with Mark concerning Scott’s advances and other cost concerns, first stating it was right before she left on vacation, which would have made it August 14, 2009 (TR p. 57, lines 21-23), and then on cross examination, stating that it was late July (TR p. 97, line 9); within a week of leaving, she didn’t know the exact date (TR p. 99, lines 14-19).

31. Grover was a law student while working for Respondent, and when she testified, at which point she had taken a labor relations law course before filing her charge. TR p.68, l 5-25, p.69, l.1-14.

32. Grover was not the only employee discharged by Respondent in the same time frame. Tammy Cowart was let go on August 19, 2009, as an economic move (one which Grover had advocated for) while Grover was on vacation. TR p.76, lines 4-8; TR p.204, lines 10-12.

33. Grover was evasive about specifying the number of employees whose hours were reduced on July 16, 2009, even though she did the Respondent's payroll. TR p.79, lines 13-25, p.80, lines 1-20.

34. Grover advocated for breaching contracts to which Respondent was bound (e.g., lease for additional space, coffee contract), TR p.88, lines 22-25; p. 89, lines 1-7.

35. Grover guessed that the lease for additional space was, which she felt was a bad idea, was signed between January and May, 2009. TR p. 89, lines 20-25. She then later testified that about Christmas time 2008 she advised Judy not to take it on. TR p. 92, lines 4-8.

36. The Lease was actually signed December 1, 2008 (Judy Thomas testimony, TR p. 185, line 25) and Respondent moved into the additional space on January 17 or 18, 2009. TR p.186, line 2.

37. The additional space was committed to and taken before the clients Demmer and TUI terminated the services of Respondent.

38. Grover admitted that the Respondent purchased the Detroit Tiger tickets complained of by Grover to get business from the Tigers. TR p.93, lines 8-12.

39. Grover thought Scott owed Respondent more than \$18,000 on loans, but the amount was actually 7,000 based on the spreadsheet Grover had prepared. TR p. 95, lines 17-25; p.97, lines 12-15.

40. Grover testified that she only told Kim Keller that Keller was going to be fired once. She confirmed the number. TR p. 102, lines 2-6. Keller stated that Grover gave told Keller that Keller was going to be fired on an ongoing basis the entire time that Grover worked for Respondent. TR p. 162, lines 9-25; TR p. 163, lines 1-12. Kountouriotis testified that he had been told by Keller at least a couple of times that Keller was upset because Grover had told Keller that she was to be fired. TR p. 130, lines 24-25; TR p.131, lines 1-4. Kountouriotis found Keller crying in her office on Aug 14 because Grover had told her she would be fired. TR p. 129, lines 7-9.

41. Grover was the highest paid administrative employee at about \$67,000 costing company more than \$70,000 when benefits and taxes were added. TR p.102, lines 7-15. Of the other administrative staff, Keller earned between \$45,000 and \$50,000, Shannon Erisman earned in the mid-\$40,000's, and Kathy McDonald in the high \$30,000's, according to Grover's estimates. TR p. 102, lines 17-18.

42. Grover did not receive admonitions or repercussions from talking to members of management about how they were spending money and taking advances. She wasn't threatened or told to stop. TR 105, pages 3-15. There was no adverse reaction to her discussions concerning expenditures of company funds which she questioned. TR 112, pages 13-25; p. 113, lines 1-25; p. 114, lines 1-5. She discussed cost cutting from January onward.

No one ever threatened her job for any reason. TR p. 106, lines 4-5.

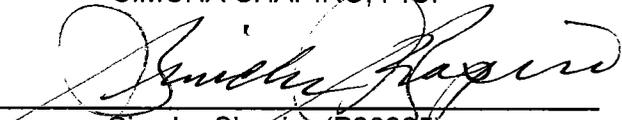
43. However, Grover feared for her job. She thought she could lose it at any time. TR p. 106, 9-15. Grover knew she was an employee at will. TR p.103, lines 15-17.

44. Respondent's motive for avoiding layoffs, notwithstanding the fact that its personnel expense was 70% of its total expenses, was that it is difficult to find qualified people for its business, whose employees require a skill set of a particular kind which is even enhanced over that of a CPA. Employees have to have technologically savvy people at all times, in multiple environments. Hiring is a very difficult and time-consuming task. Respondent had a team it did not want to disrupt. TR p.195, lines 16-22.

45. The purported Rebuttal of General Counsel did not provide any further information in rebuttal of anything propounded by Respondent. TR, pp. 292-305. Its only purpose was to add emphasis to prior testimony, should not have been allowed, and should now be stricken from the record.

Respectfully Submitted,

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Dated: May 18, 2011

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