The Roomstores of Phoenix, LLC d/b/a The Roomstore *and* Diane Passafiume *and* Bruce Kiraly.
Cases 28–CA–22404 and 28–CA–22633

December 20, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On April 16, 2010, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order as modified.[4]

[1] No exceptions were filed to the judge's findings in sec. III.B.1 of his decision and his Conclusions of Law pars. 2(a), (b), (c), and (d), that the Respondent violated Sec. 8(a)(1) of the Act by (a) maintaining or enforcing rules in its Personnel Handbook prohibiting employees from: trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records for employees' own personal use; or engaging in any outside activity that would conflict in any way with the interest of the Company or could result in criticism or have an adverse effect on the Company; and (b) maintaining or enforcing rules in its Sales Associates Agreement that: prohibit employees from disclosing any confidential information to anyone outside of the company without the company's written permission; require employees to recognize the confidentiality of company information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, selling prices, the names of its personnel, the financial affairs of the company, and all records and materials pertaining to the company's operations; and prohibit employees from attempting to induce or encourage other employees to terminate their employment, or attempt to induce or influence any prospective employees to decline employment with it.

We agree with the judge that it is unnecessary to address the Acting General Counsel's alternate theory with respect to the discharges of Diane Passafiume and Virginia Gabrielson, discussed in fn. 15 of the judge's decision. We note that no exceptions were filed to the judge's finding that it is unnecessary to address the Acting General Counsel's alternate theory with respect to the discharge of Bruce Kiraly. ALJD fn. 18.

Member Hayes does not rely on the fact that the Respondent changed its sales expectation from a companywide figure to a store-specific average in adopting the judge's finding the Respondent unlawfully discharged Passafiume and Gabrielson.

[2] The Respondent and the Acting General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent's maintenance and enforcement of its handbook rule prohibiting "[a]ny type of negative energy or attitudes" violated Sec. 8(a)(1), we emphasize that the rule cannot be considered in isolation. As a general matter, rules prohibiting employees from engaging in protected discussions with their coworkers concerning working conditions violate Sec. 8(a)(1). *Claremont Resort & Spa,* 344 NLRB 832, 832 (2005) (rule prohibiting "'negative conversations' about associates or managers" violated Sec. 8(a)(1) because employees would reasonably construe the prohibition to bar them from discussing concerns about working conditions, and would thereby cause employees to refrain from engaging in protected activities); accord: *SNE Enterprises,* 347 NLRB 472 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Here, as in 8(a)(1) cases generally, our task is to determine how a reasonable employee would interpret the action or statement of her employer, see *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and such a determination appropriately takes account of the surrounding circumstances. Given the Respondent's repeated warnings linking "negativity" to the employees' protected discussions concerning the effect of the commission discounts on their terms and conditions of employment, we find that the employees would reasonably interpret the "negativity" rule as applying to protected activity.

Hyundai America Shipping Agency, 357 NLRB No. 80 (2011), cited by our colleague, is distinguishable from the instant case. The rule in *Hyundai* was limited by its reference to "losing interest in your work assignment," and, unlike here, there was no evidence in that case that the employer had previously linked the requirements set forth in the written rules at issue with workplace discussions protected by Sec. 7 of the Act. As a result, it was unlikely that employees in that case would have interpreted the rule as applying to protected activity.

Contrary to the judge's suggestion, Member Hayes would find that the Respondent's written rule against "[a]ny type of negative energy or attitudes" does not on its face explicitly interfere with, restrain, or coerce employees in the exercise of Sec. 7 rights. Accord: *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (2011). However, in light of unlawful instructions to employees by the Respondent's officials not to talk negatively about their paychecks, the managers' coupons, or "anything else," Member Hayes agrees that the rule is unlawful because it has been applied to restrict the exercise of Sec. 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

[4] In fn. 21 of his decision, the judge denied the Acting General Counsel's request that backpay be paid with interest compounded quarterly, on the basis that, as of the time he issued his decision, the Board had "declined to deviate from its current practice of assessing simple interest." Subsequent to the issuance of the judge's decision, the Board issued *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), in which the Board announced a requirement that backpay be paid with interest compounded on a daily basis. In accordance with *Kentucky River*, we shall modify the judge's remedy to require that backpay in this case be paid with interest compounded on a daily basis. We shall also modify the judge's recom-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Roomstores of Phoenix, LLC d/b/a The RoomStore, Mesa, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(h).

"(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Diane Passafiume and Virginia Gabrielson, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the following for paragraph 2(j).

"(j) Within 14 days after service by the Region, post at all of its stores in the State of Arizona, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of its stores located in the State of Arizona, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at said store or stores at any time since September 25, 2008."

Dated, Washington, D.C. December 20, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

mended Order to conform to the Board's standard remedial language, including for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Further, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Mary Davidson, Esq. and *David Kelly, Esq.,* for the General Counsel.

D. Samuel Coffman, Esq. and Tricia Schafer, Esq., of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, from January 12 to 15, 2010. This case was tried following the issuance of an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (the complaint) by the Acting Regional Director for Region 28 of the National Labor Relations Board (the Board) on October 9, 2009. The complaint was based on unfair labor practice charges filed, respectively, in Case 28–CA–22404 by Diane Passafiume (Passafiume), an individual, and in Case 28–CA–22633 by Bruce Kiraly (Kiraly), an individual (hereafter referred to collectively as the Charging Parties). The complaint alleges that The RoomStores of Phoenix, LLC d/b/a The RoomStore (the Respondent, the Employer, or the RoomStore) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

Counsel for the General Counsel and counsel for the Respondent appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.

[1] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. In its answer, the Respondent admits the various dates on which the enumerated charges were filed, respectively, by Passafiume and Kiraly and served on the Respondent as alleged in the complaint.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent, an Arizona limited liability company, with offices and places of business located in Mesa, Arizona,[3] has been engaged in the business of operating a chain of retail furniture stores within the State of Arizona. Further, I find that during the 12-month period ending March 23, 2009, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000; and during the same period of time, also purchased and received at its stores in Mesa, Arizona, goods valued in excess of $50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging three of its salespersons, Bruce Kiraly, Diane Passafiume, and Virginia Gabrielson, because they engaged in protected concerted activities with each other and/or with other employees for the purpose of mutual aid and protection regarding the wages, hours, and working conditions of the Respondent's employees. Among other complaints and issues that these employees allegedly raised were unfair treatment and physical abuse by managers, compensation, unionization, and their rights under the Act, and under a Board Settlement Agreement previously entered into by the Respondent. Further, it is alleged that the Respondent took this action against Kiraly, Passafiume, and Gabrielson, because they violated a number of the Respondents written and oral policy rules, which rules unlawfully restricted its employees from engaging in protected concerted activity. These rules as maintained and promulgated are alleged to constitute independent violations of Section 8(a)(1) of the Act. The complaint also alleges that the Respondent violated Section 8(a)(4) of the Act by discharging Kiraly because he had previously filed unfair labor practice charges against the Respondent.

The Respondent denies that it discharged Kiraly, Passafiume, or Gabrielson because they engaged in protected concerted activity or, in the case of Kiraly, because he previously filed charges with the Board. It is the Respondent's position that it fired Passafiume and Gabrielson strictly because of their allegedly poor sales performance over an extended period of time, and discharged Kiraly because he engaged in certain misconduct at work. The Respondent contends that it does not restrict, limit, or prohibit its employees from engaging in legitimate protected concerted activity. Further, the Respondent denies that its policies and work rules as written or applied constituted a violation of the Act.

[3] At the hearing, counsel for the Respondent orally amended his answer to admit that the Employer does have offices and places of business in Mesa, Arizona.

B. Background Facts

The Respondent operates a chain of ten retail furniture stores in Arizona, with nine locations in the Phoenix metropolitan area, and one store in Prescott, Arizona. The two stores that are the locations for most of the events in this case are the Superstition Springs Store (Store 6) and the Fiesta Store (Store 8), both of which are located in Mesa, Arizona. The head of the Respondent's state-wide operation is Daniel Selznick, whose title is marketing manager, and who is a "member" of the Respondent's ownership group. While Selznick establishes state-wide company policies, the individual store managers exercise considerable autonomy in operating their individual stores, including hiring, firing, and disciplining employees. Although there is considerable movement through transfers of managers and employees between the various stores, during many of the events in question, the manager of the Superstition Springs Store was Sid Serda, while the manager of the Fiesta Store was Justin Stacey. Virginia Gabrielson and Diane Passafiume both worked as sales associates at the Superstition Springs Store, from which they were terminated. Bruce Kiraly was a sales associate at the Fiesta Store at the time of his termination.

New sales associates receive one week of training from the Respondent and then have a three-month probationary period, during which they accumulate customers and sales into what is referred to as a "book of business." In order to be released from probation, new sales associates need to have sold merchandise that is actually delivered to customers of at least $55,000 in a given month. The Respondent closely tracks the sales written and sales delivered by its associates every month. For the Respondent, the more important figures are the sales delivered, as the Respondent does not get fully paid until the merchandise is delivered to the customer. However, while the sales associates certainly have some control over the sales they write for customers, they have much less control over if and when the merchandise is actually delivered.

The Respondent has a company-wide general standard requirement that sales associates are expected to produce at least $55,000 of merchandise delivered to customers each month. However, the individual store managers have considerable discretion in this area. They may set the performance goal at a different level, typically at the "store average" for merchandise delivered every month. The store average figure tends to be higher then the company-wide $55,000 figure. At the hearing there was much disagreement among the various witnesses as to which performance standard was more appropriate to use for evaluating an employee's job performance. The various stores vary greatly in size, amount of merchandize, and sales volume. Further, the sales for an individual store may also vary greatly from month to month. However, regardless of which method is a more accurate reflection of a sales associate's performance, it is the individual store managers who ultimately makes that determination.

The sales associates are paid approximately 5% commission on their sales. They are guaranteed a base pay rate of $350 a week, which is then deducted from their total commissions for

the week. Obviously, each associate's pay is very heavily dependent on commissions. Those commissions are reduced by certain discounts that the Respondent requires its sales associates to give to customers. These discounts are also referred to as manager's coupons or "MCRs." The Respondent has a company-wide discount policy, which in March of 2009, required that sales associates give discounts to customers in 85% of their sales. There were various discounts involved, and they ranged up from a minimum of $25. The discounted amount would normally be subtracted from the sales associate's commission. This practice was a source of constant complaint by the associates, who felt the system of requiring discounts was unfair, as they could often close a sale without offering a discount. From the witness testimony it seems that not only did sales associates complain about these discounts among themselves, but also to the store managers and their assistant managers.

Passafiume started her employment for the RoomStore at the Superstition Springs location in August of 2007. She was already an experienced sales person with many years of retail sales in the furniture business. Gabrielson was transferred to the Superstition Springs Store around October of 2008, from the Fiesta Store, where she had worked since the summer of 2007. As noted, Sid Serda was the manager of the Superstition Springs Store, which had two assistant sales managers, Jim Struensee and Joe Smith. Assistant sales managers are admitted supervisors, but also sell merchandise.

1. Concerted activity at the Superstition Springs store

There 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. A number of employee witnesses, including Passafiume, Gabrielson, and sales associate Susan Taylor, testified regarding comments made by Serda at his weekly sales staff meetings where he criticized employees for complaining. Gabrielson mentioned a meeting Serda held in November of 2008 where he told the sales staff that he "did not want to hear any more negative talk . . . did not want us to talk about our paychecks, the MCRs or anything else. . . . He didn't want to hear anymore, and there was the door if we didn't like it." Passafiume testified that at a meeting in the second half of 2008 that Serda said the discounts were "Danny's rule," referring to owner Danny Selznick. Sales associate Susan Taylor recalled the comment and indicated that Serda added that as it was Danny's rule, the employees should "not talk about it." Further, Taylor testified that Serda told the employees at one of those meetings that he "did not want [them] talking with other stores." She construed this comment as being directed specifically to her, as she was well known to talk with a friend at the Alma School Store about employee concerns, and then report back to her fellow employees at Superstition Springs. Additionally, Taylor testified that on a number of occasions in 2008, Serda spoke with her privately about her contacts with the Alma School Store. He told her, "I don't want you talking to people from other stores. What goes on in our store needs to stay in our store. . . ."

Regarding Serda's attitude about employee complaints, the evidence shows that the employees at Superstition Springs received a Store 6 handbook, which contained various rules of conduct. (GC Exh. 21.) Those rules included the following: "Absolutely NO confrontation on the floor. Any type of negative energy or attitudes will not be tolerated you will be sent home for THREE days and terminated of it happens again. If you cannot be a positive part of the team I don't want you on the team." Passafiume testified that she received these rules when her employment at the Superstition Springs Store began.

Further, Gabrielson testified that she recognized Serda's handwriting on a white board in the break room around November of 2008, with a message saying that he "would not tolerate any more negative talk of paychecks, working conditions, or MCRs." These rules of the store were also enforced by the assistant managers. Passafiume recalled a conversation with assistant sales manager Joe Smith in December of 2008, during which Smith was commenting about another sales associate, Susie Westervelt. In reference to Westervelt Smith said, "She's always negative and I'm tired of her negativity and, you know, always complaining and if she keeps it up, I'm going to send her home for three days." He warned Passafiume that, "If anybody is negative on the floor, I'm going to send them home for three days."

Serda testified at the hearing and generally 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, working conditions, or MCRs. However, he admitted that employees complained about the mandatory discounts and that in response he told them that it was a company-wide policy, which he had no discretion to alter. Further, he admitted that the store handbook contained work rules that prohibited "negative energy or attitudes" as quoted above, even acknowledging that he and another store manager co-authored these rules.

The record contains numerous contradictions between what Serda alleges that he said or did, and what various sales associates contend that he said or did. The above disputes constitute only a limited number of such examples. After considering the evidence, the demeanor of the witnesses, and the inherent consistencies of the testimony or lack thereof, I am of the view that Serda is not a credible witness. It is apparent to me that he ran the Superstition Springs Store with an iron fist. He tolerated no dissent and was unforgiving regarding employee complaints. The employee witnesses' stories, specifically those told by Passafiume, Gabrielson, and Taylor, all corroborate each other and are inherently consistent with the undisputed evidence. Clearly, store 6 had a written policy, which strongly discouraged "negative energy or attitudes," threatening to send employees home for three days or to terminate them for a violation of the policy. What could Serda have meant by this language if not employee complaints regarding wages, hours, and working conditions, or, in other words, protected concerted activity? I believe that the answer is obvious, namely that he could have meant nothing else.

He acknowledges that employees frequently complained about the Employer's discount policy, but would have us be-

lieve that he was not concerned about these complaints and tried to pacify the sales associates by merely stating that he had no control over this company-wide policy. I do not believe it. His 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. I am convinced that he made the statements and threats that he is accused of, all in an attempt to put a stop to employee efforts to improve their wages, hours, and working conditions, which he perceived as "negative energy or attitudes."

Accordingly, unless specifically indicated otherwise, throughout the balance of this decision, whenever there is a discrepancy between the testimony of Serda and that of employee witnesses, I will credit the employees. Further, whenever there is an issue of whether assistant sales manager Joe Smith said or did something as alleged by sales associates who have testified, I will accept their testimony as credible, unless specified otherwise. Joe Smith did not testify at the hearing. This was so, even though he is apparently still employed by the Respondent as a supervisor, and was in several instances alleged to have been complicit in the furtherance of Serda's campaign against "negative energy or attitudes." Under these circumstances, I believe it to be appropriate to draw an adverse inference from Smith's failure to so testify. *See International Automated Machines,* 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (". . . when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.")

Serda's actions and statements against what he considered to be "negative attitudes and energy" continued unabated. Gabrielson credibly testified that on a Friday payday in December of 2008, she and Passafiume were talking with other sales associates while they were opening their pay checks, which they had just received. They were comparing pay checks and trying to determine how much money had been deducted from their checks for having to offer discounts to customers. Serda approached and ordered them to "put those away," referring to the paychecks. Further, he said that they were "not allowed to be sharing that information," and that they were "not allowed to be talking about this."

According to Gabrielson, thereafter she continued to talk with the other employees about the discounts, and she complained directly to Joe Smith on several occasions. She told Smith that it was unfair to require that employees give customers discounts when they did not need to do so to consummate a sale. Further, she told him that the employees could not live on what they were making, and that they needed representation from a union or a group of people acting together. In that way, they could protect themselves. Smith's response to Gabrielson was that she was "not allowed to talk about these things." She testified that she told Smith she was allowed to talk about such matters, but he again repeated, "No, you're not."

As I have indicated, I find Gabrielson credible, all the more so because she explained how she came to understand that she did have the right to discuss such matters. She knew Bruce Kiraly from having worked with him at the Fiesta Store. After she transferred to the Superstition Springs Store, she met with Kiraly at a Dunkin Donuts shop, where he gave Gabrielson a copy of a Board Settlement Agreement[4] that the Respondent had signed. He told her about her right to talk with employees about her pay and other working conditions. Kiraly asked her to make copies of the Settlement Agreement and distribute them to her fellow employees at the Superstition Springs Store. She testified that she did so. Further, Gabrielson testified that she had previously spoken with Kiraly about unions, and had more recently discussed them with Passafiume, Taylor, and other of her fellow sales associates.

Gabrielson also complained to management about the conduct of her assistant sales manager, Joe Smith, especially towards the female employees in the store. According to Gabrielson, Smith was known to block the passage of employees as they traveled through the store, sneaking up behind women and tipping their chairs backward, tapping his pen in an annoying manner, and pushing employees. She complained to store manager Serda on a number of occasions, including in December of 2008, but Smith's behavior continued. She was joined in her complaints by Passafiume, who Smith seemed to especially like to harass.

On February 28, 2009, both Smith and Passafiume were at work. The last day of the month is significant, since it is the final opportunity for the sales associates to meet their monthly sales goals. Both Passafiume and Gabrielson testified that in the afternoon, as Passafiume was walking down an aisle in the store, Smith blocked her passage and hit her in the face with a "bunch of rolled up paperwork." Passafiume told Smith not to ever do that to her again, at which point he hit her a second time. Gabrielson came to her co-worker's defense, telling Smith to "stop it," but undeterred, he hit Passafiume several more times. Store manager Serda observed the incident, and was heard to tell Smith, "bad behavior" and "not very professional," but there was apparently no further action taken against him. After comforting Passafiume, who indicated that Smith had hurt her, Gabrielson complained to Smith and told him that his conduct "was totally uncalled for." It appears that Smith simply enjoyed harassing the employees. Smith did not testify, and Serda testified regarding the incident between Smith and Passafiume that, "I have no recollection of that situation happening." However, for the reasons previously stated, I credit Passafiume and Gabrielson and discredit Serda.[5]

Passafiume continued to have problems with Smith, who the next day voided a sale that she had made earlier in the month for $2,000. This was an extremely important matter to Pas-

[4] Later in this decision, more will be said about this Settlement Agreement and its connection with Kiraly and his termination.

[5] Passafiume filed a police report with the City of Mesa 12 days after the incident with Smith, and 5 days following her termination, claiming that he had assaulted her. Ultimately, the investigating officer indicated that he could not establish "probable cause," and would, therefore, not be filing a formal charge. (R. Exh. 6.) However, 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 this incident.

safiume, as she was trying to make her sales quota for the month.[6] Upon learning of the voided sale, Passafiume complained to office employee Jessica Leona, to Serda, and to the other assistant sales manager in the store, Jim Struensee. During her conversation with Struensee, Passafiume complained about Smith's conduct the previous day, and predicted that she would be "retaliated against" because she had criticized Smith. Shortly thereafter, Passafiume was called into Serda's office where he angrily accused her of being on the sales floor talking with other employees about her fear of losing her job. She admitted talking with Struensee about her concerns. Serda then admonished her not to talk with other employees about the fear of losing her job, and that such matters were to "stay in here," meaning his office.

When she left Serda's office, Passafiume complained to sales associate Anthony Champaign about being "hushed" by Serda, and mentioned that this was the reason "why we have labor unions in Ohio and Michigan. That way . . . people can't get away with this kind of stuff." Campaign and Passafiume were both from the mid-west. According to Passafiume, this conversation occurred just outside Serda's office and his door was open. Of course, she is implying that Serda overheard her comments.

Gabrielson was fired on March 4, 2009. Passafiume was fired two days later on March 6, 2009. I will discuss the alleged reasons for their discharges immediately below.

2. The alleged reasons for discharging Gabrielson and Passafiume

As counsel for the General Counsel states in her post-hearing brief, quoting Mark Twain, there are "lies, damned lies, and statistics." My efforts to see through the various statistical arguments made by the parties in this case, leads me to concur with Twain's thoughts. As will be obvious from the following analysis, in this case there exist statistics, which can be used to support both the General Counsel's and the Respondent's arguments surrounding the discharge of Gabrielson and Passafiume.

As I noted earlier, the Respondent's company-wide performance standard for sales associates to meet each month is $55,000 in merchandise delivered. However, the individual store managers have substantial discretion in this area and may use a different performance standard. In a number of stores the managers use the monthly store average of merchandise delivered as the standard. This is usually a number greater than the company-wide standard. Statistics are closely kept and monitored on the sales written and sales delivered for the individual sales associates. It is the Respondent's position that Passafiume and Gabrielson were fired solely because of their poor sales performance, specifically in the months of December 2008, and January and February 2009.

Regarding Passafiume, counsel for the General Counsel had admitted into evidence an employee warning record dated February 2009, which was allegedly issued in January 2009, and is for the month of December 2008. It shows that Serda gave Passafiume a "Verbal warning about low volume for the month of December 2008. Failed to produce expected and required sales volume of $55,000. Wrote $38,173 & Delivered $40,947." It appears that at least at that time, Serda was applying the company-wide standard of $55,000 a month to Passafiume. The warning further indicates that unless Passafiume meets or exceeds the "Required Sales Volume" for the month of January, she will receive a three day suspension, with continued poor sales to result in termination. (GC Exh. 8.) There is some dispute over when Passafiume actually received the written memorialization of the verbal reprimand, with mid-February appearing most likely. In any event, she was aware of the problem with her sales numbers, and the General Counsel did not challenge the accuracy of the figures.

Despite the warning, Passafiume's sales figures continued to be low in January 2009. She was given a written warning dated February 2009 for the month of January. The warning shows, "Volume for Jan. 2009, written $47,806, down 20%. Delivered $36,003, down 32% against *store average*." (Emphasis added by the undersigned.) Interestingly, while Passafiume's sales written were significantly improved over the previous month, she was now suddenly being evaluated against the store-wide average, a higher figure. Apparently, this was done without first informing Passafiume in December that the sales figures that she was expected to meet for January were the store-wide average figures.

Regarding the action to be taken, the written warning indicates that unless Passafiume was at least at the "store average" for February, she would be terminated. (GC Exh. 13.) The warning was signed by Serda, who testified that he did not suspend Passafiume for three days as had previously been threaten, because he did not want to do anything that would cause her to have more difficultly making her monthly goal. Again, there is some disagreement over when she received this warning, with mid-February appearing most likely. But, the exact date is not significant as Passafiume was aware of the continuing problem with her sales, and, once again, the General Counsel did not challenge the accuracy of the figures. However, it is very significant to note that Serda was now formally increasing the goal for Passafiume, requiring her to achieve at least the store average in sales for February, which would likely be a higher amount than the company-wide $55,000 figure. Having previously increased her goal without first telling Passafiume, Serda now informed her in writing that she must meet the store-wide average. According to Serda, he increased the goal amount because he was getting pressure from his boss to increase store sales.

Passafiume failed to meet the required standard. In February 2009, the store average for written business was $58,651, whereas Passafiume's written sales were $56,098. The store average for delivered business was $59,972, whereas her delivered sales were $57,330. (GC Exhs. 11 and 15.) However, as pointed out by counsel for the General Counsel, this was a significant improvement by Passafiume. She had surpassed Serda's former requirement of the company-wide standard ($55,000), and for the month, her delivered sales of $57,330 were the 5th highest out of 14 sales people at the store. (GC Exh. 11, column "Feb-09 Deliver.") Had Serda not suddenly

[6] Subsequently, on the day of her discharge, Passafiume learned that Serda had also voided a sale that she had made in February, this sale in the amount of $6,000.

changed the ground rules for Passafiume, she would have been well within the company-wide standard. In any event, as she failed to meet the standard that he had set for the month, Serda discharged Passafiume for having received a "third consecutive warning" for poor sales performance. She was terminated effective March 6, 2009. (GC Exh. 15.)

As I mentioned earlier, in late February 2009, assistant sales manager Joe Smith voided a $2,000 sale made by Passafiume. Earlier that same month, Serda had voided a $6,000 sale made by Passafiume. Had these sales been included in her February figures, Passafiume's monthly figures would have been that much better. While the managers in the Respondent's individual stores have virtually unfettered discretion over which sales to void and when to void them, Passafiume argued that there was no good reason to have done so in these two instances. The Respondent's managers apparently felt that the two customers did not put sufficient funds down on the deals to warrant the processing of the sales. Of course, counsel for the General Counsel is suggesting that Serda and Smith made their decisions to void Passafiume's sales in an effort to reduce her monthly sales figures, and, in so doing, to have a pretextual basis to fire her.

Regarding Gabrielson, Serda gave her an oral warning in January 2009, for the previous month's sales. This verbal warning was memorialized in written form in January 2009. In the warning, she was told that her December sales of $41,557 (written) and $47,208 (delivered) were not acceptable, and that she needed to bring her sales figures up to $55,000 (the company-wide standard), or she would be suspended for three days. (GC Exh. 9.) The General Counsel does not dispute these figures.

In January, Gabrielson's sales written had improved to $49,389, but her sales delivered were only $27,323. Although Serda had in the December warning indicated that in the following month Gabrielson must meet the company-wide standard, he issued a written warning to Gabrielson for the month of January that compared her numbers for the month to the higher store average. In doing so, he made Gabrielson's figures look even worse.[7] The written warning for January was dated February 2009. It stated: "Volume for Jan 2009 written $49,389 down 17% & delivered $27,323 down 51% against store ave[rage]. Virginia has until 2/28/09 to be at least store ave[rage] w[ritten] + d[elivered] or termination will occur and any further complete months more than 10% below store average will result in termination." (GC Exh. 14.) However, Serda did not suspend Gabrielson for three days, as he had threatened to do in the December oral warning, as he testified that to do so, would have made it more difficult for her to pull her sales numbers up.

For the month of February 2009, Gabrielson's sales were $35,341 written and $49,075 delivered. (R. Exh. 2.) This was below the company-wide standard, and even further below the store-wide average for the month. As a result, she was terminated on March 4, 2009, with the termination notice reading: "Low volume written & delivered against store average 3 months in a row." (GC Exh. 16.) This is no question that Gabrielson's sales were lower than the company-wide average, and certainly lower that the store-wide average. However, Gabrielson has an excuse.

In November 2008, Gabrielson fell in the break room at the Superstition Springs Store and injured her back and foot. She testified that she was in considerable pain, and needed to take time off from work for doctor's appointments and physical therapy over the next two months. She remained in pain, and by February 2009 her doctor diagnosed a stress facture in her foot and prescribed a "boot" for her to wear. At the time that she was fired, Gabrielson was still wearing the boot. According to Gabrielson, wearing the boot made it difficult for her to walk the sales floor, and although she continued to work full time, Serda did not pro-rate her sales volume for that month, or any of the months when she was working while in considerable pain.

Serda testified that it was his practice to pro-rate the required sales volume when a sales associate was on vacation, injured, or sick. However, he did not do so for Gabrielson. She testified that when he gave her the verbal warning for her December 2008 sales, Gabrielson told Serda that she was working in pain, and if he could "find a way to help me work without pain it would be beneficial." Serda did apparently make one accommodation for Gabrielson, as he allowed her to sit on the showroom furniture when she was waiting in the "point position"[8] for customers. Sales associates are not normally permitted to sit on the showroom furniture.

Gabrielson contends that her injured foot affected her "mobility," made it "very difficult to get around," and because of the pain, "made it a little harder to think." It is apparently counsel for the General Counsel's contention that Serda treated Gabrielson in a disparate fashion by not pro-rating her sales volume, since he had done so previously for other sales associates who were absent on vacation, injured, or sick. On the other hand, the Respondent contends that Gabrielson was not entitled to any such adjustment in her sales figures as she continued to be employed full time for the Respondent, and was, in fact, also employed part time at another job during this period.

3. Concerted activity involving Kiraly

At the time of his termination on March 30, 2009, Kiraly was employed at the Respondent's Fiesta Store. He was employed as a sales associate under the direction of store manager Justin Stacey. However, Kiraly had previously been employed at a number of the Respondent's stores and in a number of different job classifications. He began his employment as a sales associate with the Respondent on September 10, 2001. In March 2004, Kiraly was promoted to sales manager at the Respondent's Ahwatukee Store. A few months later he added the position of corporate sales trainer. In this position, he trained new sales associates for the entire company in the Respondent's philosophies, policies, techniques, and ethics. Throughout most of his time as corporate sales trainer, he functioned as an independent contractor. In January 2006, Kiraly was promoted to store manager at Ahwatukee. However, his tenure as store

[7] This was precisely what Serda had also done to Passafiume.

[8] The "point position" is the location where the sales associate is stationed who is first in rotation to greet and assist the next customer who walks into the showroom.

manager did not last long, and in May 2006, Danny Selznick replaced him with Cindy Gregory. Kiraly reverted back to sales associate at the Ahwatukee store, but continued on as the corporate sales trainer.

It was well known that Kiraly and Cindy Gregory did not get along. They apparently had a mutual dislike of each other, although the exact cause is unclear. In any event, for several years their paths seemed to cross regularly, with Gregory being transferred as a store manager to a number of stores where Kiraly was employed, or vice versa. When this happened, Kiraly would be transferred to a different store. Neither Gregory nor Kiraly was interested in working with the other.

In the fall of 2007, Kiraly was sent to the new Prescott store to train their sales staff. He worked as a trainer during August, September, and October. There is some dispute as to whether Kiraly was also functioning as a sales associate in Prescott, but it is not a critical issue. Clearly, his principal responsibility in Prescott was to train new staff. It was not a tranquil time at the store. Some of the new sales associates were unhappy about the way commissions were being split. They came to Kiraly to complain, as he had recently been their trainer. Kiraly encouraged them to report their concerns to company management, which some of them did in the form of anonymous letters. Further, Kiraly was involved romantically with one of the sales associates, who he had recently trained. In any event, on December 28, 2007, Ahwatukee store manager Gregory informed Kiraly that he was no longer the corporate trainer because of his "antics up in Prescott, the riling up of fellow employees, and so forth." She told him that he had been "stirring the pot" in Prescott, and that her message to him from Danny Selznick was to "keep your nose out of other stores, and if you don't keep it clean, you'll be terminated." Shortly thereafter, in January 2008, Kiraly was transferred from Gregory's store to the Fiesta Store.

Cindy Gregory did not testify at the hearing. Selznick did testify and indicated that Kiraly was removed as corporate trainer because he was romantically involved with a former trainee in Prescott, and also because Selznick had been told by a number of store managers that Kiraly was not giving adequate training to new sales associates. As Gregory did not testify at the hearing, I will draw an adverse inference that had she done so, her testimony would not have been favorable to the Respondent. *See International Automated Machines,* supra. In this particular instance, I credit Kiraly's story regarding what Gregory told him that Selznick had said. It simply has the ring of authenticity to it. On the other hand, Selznick's stated reasons for removing Kiraly as corporate trainer seem inadequate, and my sense is that something is missing. I believe that the missing part was Selznick's unhappiness with Kiraly for encouraging Prescott Store employees to complain to management about commissions.

After his removal as corporate trainer, Kiraly continued to work as a sales associate at the Ahwatukee and Fiesta Stores, being transferred back and forth all in an effort to avoid working with Gregory, who was also transferred back and forth. As was mentioned earlier, it was apparently not unusual for managers and sales associates to be transferred with regularity between the Respondent's various stores because of either the Respondent's business needs or the desires of the individual employees.

In June and August 2008, Kiraly filed two separated unfair labor practice charges with the Board. Kiraly filed the June charge on his own behalf,[9] and it was later withdrawn. He filed the August charge[10] on behalf of other employees, including Rhonda Kelly, the Prescott Store employee with whom he had been romantically involved. This charge ultimately resulted in an informal Settlement Agreement entered into between the Respondent, Kiraly, as the Charging Party in that case, and the General Counsel, through the Regional Director. (GC Exh. 26.)

On the date that he signed the Settlement Agreement, October 24, 2008, Kiraly was employed at the Fiesta Store where Gregory was the manager. He testified that the following day he was called into the office by the assistant sales managers, Ashley Ryan[11] and Ed Sackett, and given a write-up signed by Gregory alleging that he had threatened two female employees. Kiraly testified that Ryan said the write-up was issued because Kiraly had been "bad rapping me [Ryan] behind my back." A RoomStore employee, Jeri Johnson, did subsequently testify that Kiraly had told her and another female employee that Ryan had treated another sales associate, Victor Lopez, unfairly. However, Johnson indicated that she did not feel threatened by Kiraly during the conversation. Apparently, this was the incident referenced in the write-up. In any event, Ryan sent Kiraly home for two days causing him to lose potential sales commissions. Kiraly testified that it was during his conversation with Ryan and Sackett that he told them that he "would be attempting to form a union at the RoomStore or a grievance committee specifically to deal with this kind of railroad job." As Ryan did not testify at the hearing, I will draw an adverse inference that had he done so, he would have admitted that Kiraly made the statement about forming a union. Accordingly, in this instance, I will credit Kiraly's testimony that he made such a statement.

In November 2008, after the Settlement Agreement was signed, Kiraly began handing out copies to employees at the Fiesta store, where he was working, and then to employees who worked at various other stores. In total, he distributed approximately 30 copies of the Settlement Agreement to sales associates and assistant sales managers, including Mark Elliot, Ashley Ryan, and John Marovich. Kiraly gave Virginia Gabrielson a copy while meeting with her at a Dunkin Donuts shop, and asked her to make copies and hand them out to employees at the Superstition Springs Store. Further, he distributed copies to employees at both the Paradise Valley and Ahwatukee Stores. He testified that while handing out copies of the Settlement Agreement, he would tell the employees that the Agreement gives them "the right to talk about their working conditions, hours, wages, commissions, [and] adjustments amongst themselves or to management without fear of retaliation. . . ." Further, he told them that "you have protected rights and, you know, if you have a complaint, take it to them, but if you don't, you know, feel it's being handled, the government's there for you."

[9] 28–CA–21991; (GC Exh. 24.)

[10] 28–CA–22067; (GC Exh. 25.)

[11] Ashley Ryan is an admitted supervisor.

According to Kiraly, when he gave his assistant sales manager, Ryan, a copy of the Agreement, he told him, "This was the reason, you know, that we need to form a union at the RoomStore or a grievance committee, one of the two, and that [I] would be working on that as long as I was at the RoomStore." He testified that when giving a copy of the Settlement Agreement to the individual employees, he also mentioned to them about forming a union. Once again, as Ryan did not testify, I will draw an adverse inference and conclude that Kiraly did in fact mention to him about forming a union or a grievance committee.

The Notice To Employees (GC Exh. 22.), which was part of the Settlement Agreement, was posted in the Prescott Store for 60 days, beginning in November 2008. Justin Stacey was the store manager of the Prescott Store at the time the Notice was posted. Kiraly contends that in early December of 2008, Stacey met him and Ronda Kelly at a restaurant in Prescott for dinner. During their time together at the restaurant, they allegedly discussed the Settlement Agreement and Notice. Kiraly testified that he told Stacey that the Settlement Agreement "protects the employees' rights, you know, not to be retaliated against." According to Kiraly, Stacey replied, "You're not going to have a problem with me. I treat people fairly." Stacey testified at the hearing and denied that he ever had a conversation with Kiraly about the Notice, the Settlement Agreement, or about unions. Further, he indicated that he was unaware that Kiraly had ever distributed copies of the Settlement Agreement to other employees.

There are many instances where the testimony of Kiraly and Stacey are in conflict. It is, therefore, necessary for me to assess their respective credibility. In general, I found Stacey to be a credible witness. I observed him when testifying and he impressed me as an intelligent, sincere, young man, who testified in a straight forward unemotional manner. Stacey was calm, appeared to be candid, recalled most events, but was not so dogmatic as to hesitate to indicate when he did not recall an event. He did not seem to harbor any personal animosity towards Kiraly, and while his loyalty would naturally be with his employer, I did not get the sense that he would, therefore, be untruthful. His testimony was inherently plausible and generally consistent with the other individuals involved in the various incidents. I found him believable as his testimony had the "ring of authenticity" to it.

However, the same can not be said of Kiraly. In observing his testimony, I found Kiraly to be overly emotional, hostile, and with a self appointed air of righteousness. He clearly seemed to have a large "chip on his shoulder." While this attitude might in part be explained by his residual distress at having been terminated, I found his entire manner overblown. I believe that in many instances he embellished and exaggerated the events in question so as to place himself in the best possible light. Further, I frequently found his testimony to be inherently implausible, and, as will be more apparent later in this decision, it was often at variance with the testimony of other witnesses. Kiraly seemed impressed with his own perceived self importance and rigidly adhered to his positions, no matter how incredible they seemed. He appeared to me to be on a crusade to make his former employer look as malevolent as possible, and he was not unwilling to create facts to achieve this end.

In many instances, I simply did not believe that Kiraly was credible. Therefore, unless stated otherwise, where his testimony is in conflict with that of other witnesses, I will discredit Kiraly and credit those other witnesses. Such is the case regarding Stacey and his denial that he ever discussed the Notice, the Settlement Agreement, or unions with Kiraly. Counsel for the General Counsel did not call Ronda Kelly to testify, and I will draw an adverse inference that had she been called, she would not have supported Kiraly's version of the conversation.

In March 2009, Kiraly transferred to the Fiesta Store, where Stacey had become store manager. Kiraly testified that during that same month he gave a copy of the Settlement Agreement to Diane Passafiume when she visited the store seeking employment following her discharge from the Superstition Springs Store. During their conversation, Passafiume mentioned to Kiraly that she had been physically assaulted by Joe Smith, and that management had reprimanded her for complaining about reduced commissions and other issues of concern to the employees. Kiraly walked Passafiume over to his car, which was parked in front of the store's showroom window, and gave her a copy of the Settlement Agreement. Kiraly testified that it was just at that moment that he noticed a group of the store employees, including assistant sales manager Ryan, looking at him. Passafiume essentially confirmed Kiraly's testimony, and so I will accept it as accurate.

4. The alleged reasons for discharging Kiraly

Kiraly was discharged from the Fiesta Store on March 30, 2009. It is the Respondent's contention that Kiraly was discharged for cause, specifically due to three altercations that he had with employees Andrew McCormack, P.V. George, and Tiffany Carraway, collectively within a six day period. Justin Stacy was the person who fired Kiraly.

a. Altercation with McCormack

On approximately March 22, 2209, Kiraly was working at the point position, Gerald Limbrick was in the second position, and Andrew McCormack was in the third position, all waiting their turns to greet customers. Kiraly testified that he received a cell phone call from his daughter that he needed to take, but under the Respondent's no-cell phone policy on the sales floor, he left the floor to take the call and asked Limbrick to cover the point position. A moment later he returned to the sales floor and Limbrick indicated that he had no problem with Kiraly reoccupying the point position. However, McCormack apparently did have a problem with Kiraly going back to point, and he began to loudly complain about it. Kiraly, who now had a customer, moved away from McCormack. When the customer left the store, McCormack allegedly began in a loud voice to again say that Kiraly was "cheating," and "It's not your fucking turn and you're a fucking thief for taking it." According to Kiraly, he merely told McCormack that, "We'll take this up with management later," to which McCormack allegedly said, "Chill the fuck out dude." Kiraly claims that the store manager was busy at the time, and so he decided to ignore the incident.

Neither McCormack nor Limbrick testified at the hearing. However, Stacy did testify and said that on March 23, McCor-

mack provided him with a written complaint claiming that Kiraly had physically threatened him the previous day. According to McCormack's statement, he questioned Limbrick regarding what Kiraly was doing back on the point, after which Kiraly told him in a loud voice that it was none of his business. Kiraly approached him to within seven feet, and with his voice rising, said that McCormack was still learning the business and not to dictate. At this point McCormack tells Kiraly to "Chill out," which allegedly enrages Kiraly, who with "hands flailing" shouts, "You wanna tell me to chill out? How about you tell me to chill out outside." McCormack repeats himself, telling Kiraly to "Chill the fuck out," with Kiraly also repeating himself saying, "You don't tell me to chill the fuck out." As Kiraly walks away, he allegedly said, "You aren't as big or as tough as you think you are." In his written statement, McCormack intimates that he is afraid of Kiraly and what he might do next.[12] (R. Exh. 7.)

Stacey testified that he read McCormack's statement and relied on the information contained therein. He was concerned about the potential for physical violence and decided to conduct an investigation. As part of that investigation, he received a written statement from Gerald Limbrick, who seemed to indicate that while both Kiraly and McCormack had been verbally aggressive, that he was concerned that Kiraly "might just take a swing at [McCormack]." (R. Exh. 9.)

Then, on about March 26, Stacey met with Kiraly and questioned him about the incident. According to Stacey, Kiraly admitted the substance of the argument with McCormack, but did not want to get into the specifics of the incident, and declined to write a statement about what had occurred. Stacey testified that he explained to Kiraly that both his and McCormack's behavior was wrong, and that they must not engage in such activity on company premises. He reminded Kiraly that it was against the RoomStore's policy to threaten people, and that instead Kiraly should have come and talked with him as the store manager. According to Stacey, he specifically told Kiraly, "This is your warning." Thereafter, Stacey went back to McCormack and told him essentially the same thing, that he had handled the incident in the "wrong" way, and that, "This is your warning." After his meetings with McCormack and Kiraly, Stacey felt that he had "neutralized" the situation.

Not surprisingly, Kiraly's version of his conversation with Stacey is very different. According to Kiraly, Stacey was upset about being contacted by "corporate" regarding the incident, but when Kiraly asked Stacey if he (Kiraly) needed to write a response to corporate, Stacey said no. Further, he claims that he asked Stacey several times whether he was being warned, and that Stacey specifically said no.

[12] Counsel for the General Counsel objected to the admission of this statement into evidence, as well as other such statements, on the basis of hearsay. I overruled her objection, finding that this statement, and others like it, was not being offered for the "truth of the matter asserted," but rather for the purpose of determining what impact the statement had on the recipient of the document, Stacey, who subsequently took a certain course of action based in part on the receipt of the document. As the document was not being offered for the truth of the matter asserted, it did not constitute hearsay, and was admissible.

For the reasons that I previously expressed, I credit Stacey's version of this conversation and discredit Kiraly. It only makes sense that Stacey would "warn" both McCormack and Kiraly about any such further inappropriate conduct, as it did seem from the information that he had received that both men were somewhat in the wrong. Further, it makes sense that having received a written statement from both McCormack and Limbrick, that Stacey would have requested one from Kiraly as well. The evidence indicates that Stacey was meticulous in documenting the file regarding this incident and his investigation of it, and, so, it is simply illogical that he would not have made an effort to get a statement from Kiraly. (R. Exhs. 7–11.)

Having observed Kiraly's demeanor while testifying, I am fully convinced that he could have easily lost his temper, as alleged by McCormack and Limbrick in their written statements, and could have suggested to McCormack that they take their dispute "outside." I certainly do not believe that it was unreasonable for Stacey, based on the information that he had received concerning the incident, to be concerned that Kiraly might become physical with McCormack, although, as mentioned, he orally warned both men. Accordingly, I am of the view that Stacey's role in the investigation of this altercation occurred substantially as he testified.

b. Altercation with P.V. George

Kiraly was working the sales floor on the evening of March 27, 2009. Another sales associate, P.V. George was also working that night. According to Kiraly, he was servicing a couple of customers when he left them to check on inventory for items that they were interested in buying. From a distance, he observed George approach them, sit down, and start talking with them. This is known in the Respondent's stores as "crashing" another associate's sale and is a prohibited practice. In Kiraly's opinion, there could have been no doubt in George's mind that the couple were already being waited on by a sales associate as they had bottles of water with the RoomStore labels on them, which could only have been given to them by an associate. George then saw Kiraly walking nearby and called out to him to come over saying that the customers had "many question." However, according to Kiraly, the customers denied having any questions.

Later that evening, Kiraly spoke with assistant sales manager Ryan and complained about George crashing his sale. Ryan paged store manager Stacey and, along with Kiraly, they discussed the situation. Stacey told Kiraly that he would "take care of it." Shortly thereafter, Kiraly heard George being paged and observed him go into a meeting with Stacey and Ryan. George came out about an hour later, after which he left the store 90 minutes early, which led Kiraly to assume that George had been disciplined for crashing his sale.

The following day, Kiraly arrived at work, but was surprised to see George there as well, expecting that his discipline would have extended for some time. Kiraly went to Ryan and said that allowing George to remain at work and not be further punished would create a discipline problem because it was contrary to the Employer's stated no-tolerance policy for crashing. Ryan simply responded that they would talk later. As the store had still not opened for customers, Kiraly went into the break

room to clock in for the day and to get some coffee. At that point George walked into the break room. Kiraly and George disagree as to what next transpired.

According to Kiraly, George started into a "tirade," saying, "You lied last night to get me in trouble." Allegedly George called him a "fucking liar" in a loud voice. Kiraly responded, "Well, the truth hurts, pal," also in a loud voice. Kiraly testified that George responded that he would make sure and "take care" of Kiraly, but Kiraly also testified that he considered this to be a comment about business affairs and not a personal threat. Kiraly also mentioned that during the argument, he called George a "fucking thief," again in a loud voice. The outburst lasted approximately 60 to 90 seconds. It came to an end when two female employees, Rosie Castro and Sharon Walker, entered the break room.

George's version of this incident is somewhat different. According to George, he greeted Kiraly with a "Good Morning," following which Kiraly said, "If I had my way, you wouldn't see anymore mornings." George alleges that he did not make any responding comment, but that Kiraly "continued using obscenities and talking about you're a thief and I'll see that you won't be here."

Rosie Castro, who was present in the break room during part of this confrontation, testified that she heard George say "Good Morning," followed by Kiraly "in a really loud voice shouting" that George was "an F-liar." At that point she was embarrassed by the language and left the room. Castro testified that she then approached Ashley Ryan and suggested to him that he go into the break room as Kiraly was "pretty hot."

Also testifying was Sharon Walker, another employee who was present in the break room during part of the confrontation. According to Walker, both George and Kiraly were equally loud during their argument. She said that "they were both going back and forth with each other" saying the same kind of things. As examples, she testified that they "exchanged words with each other," like, "You're the thief. You're the liar. You're dishonest. You take people on the floor." Walker indicated that she did hear some profanity, specifically a reference to "Fucking liar." She further testified that during the incident she never felt threatened, and that there was nothing physical between the two men. However, she did not stay for the entire altercation, leaving before it concluded so that she would not become involved.

Justin Stacey testified that he first became aware of a problem between George and Kiraly the evening that Kiraly came to complain to him about George crashing his customers. Shortly thereafter, Mark Elliot and Ashley Ryan brought to his attention an altercation between George and Kiraly. He was told that Kiraly had started "a fight" and that the two men had been "shouting" at each other. Stacey then proceeded to investigate the incident.

According to Stacey, George told him that while in the break room Kiraly had approached him about what had happened the night before on the salesroom floor. Kiraly was accusing him of crashing Kiraly's customers. George allegedly told Stacey that there had been a lot of shouting, Kiraly had called him a liar, and Kiraly had said that George would not see the next morning. Further, George told Stacey that he felt physically threatened by Kiraly. Apparently on his own initiative, George furnished Stacey with a written statement regarding what had transpired on the evening of March 27 and the following day. (R. Exh. 13.) Stacey testified that he subsequently requested that Kiraly furnish a statement as to what had transpired with George, however, Stacey could not recall just when he made that request of Kiraly.

Stacey further testified that he interviewed Rosie Castro regarding the incident. According to Stacey, Castro told him that George had not responded to Kiraly yelling at him, that Kiraly threatened George, and that she felt that Kiraly might hit George. In response to Stacey's request, Castro furnished a written statement regarding the incident. (R. Exh. 14.) Stacey also interviewed the second witness to the event, Sharon Walker. She was reluctant to say much, other than she heard arguing and yelling, but really did not hear the specifics of what was being said. She declined to provide a written statement, but Stacey himself prepared a written statement to the file regarding his conversation with Walker. (R. Exh. 15.)

Finally, it should be noted that the parties stipulated that George's personnel file did not contain any reference to the altercation with Kiraly of March 27 and 28, 2009. At the time of the trial and his testimony, George was still an employee of the RoomStore.

c. Altercation with Tiffany Carraway

On approximately March 25 or 26, Kiraly was completing a sale and was turning in a credit application to get financing approved. Tiffany Carraway was a member of the Respondent's office staff whose job it was to help process this type of paper work. When Kiraly handed her his paper work, she declined to process it because it allegedly lacked the identification (ID) verification form. The ID verification form requires the sales associate to list certain information from the customer's credit card, driver's license, utility bill, and also the customer's home phone number. According to Kiraly's testimony, he told Carraway that he never uses the form and asked her to process the credit application without it. He claims that in a loud voice Carraway said that she could not take the credit application without the form. Allegedly this embarrassed the customer, and Kiraly apologized to him for the situation. At that point, another office clerical employee named Allison took the application and processed it.

Carraway testified differently regard the incident with Kiraly. She recalled that he had given her a customer's credit application to process, but had neglected to include the ID verification form. The company policy required that the form be included with any credit application. According to Carraway, when she asked Kiraly for the form, he responded that "he had been running $9 million sales for as long as he's been working for the RoomStore, longer than I'd been at the RoomStore, and he's never had to write one of those before." She testified that by his voice she could tell that he was getting angry. Carraway replied that her boss, Aaron, the office manager, at a recent meeting told the office staff that the store manager, Justin Stacey, was getting strict and wanted the ID verification form filled out at the time the credit application was processed. Stacey claimed that Kiraly was starting to get very mad and he

walked towards her and yelled that, "Aaron is not my f-ing boss, Justin is." She indicated that Kiraly had used the full obscenity, and not just the abbreviation. She felt threatened and uncomfortable because of how angry Kiraly was getting, and retreated back into the office and away from the counter. Subsequently, she reported the incident to her boss, Aaron, who asked her to write a statement, which she then did.

For the reasons that I previously expressed, I do not find Kiraly's version of this incident credible. Additionally, I do find Carraway credible, and I accept her version of the incident. This young woman seemed without guile, simple, quite, and direct. I believe that she was genuinely frightened by Kiraly's demeanor towards her. It was obvious to me from watching him testify, and he himself acknowledged, that he tends to be loud and demonstrative. He also appears to have a temper, which lurks just under the surface of his persona. Further, from various conversations that he had with other employees, he is apparently very proud of having sold 9 million dollars worth of inventory at his time with the RoomStore. I have no doubt that he mentioned that figure to Carraway as a reason why the Employer's policy should not apply to him. This is merely another example of Kiraly's self professed importance manifesting itself in his interaction with other employees. His attitude was condescending, and designed to convey his opinion that the company rules, which applied to other employees, did not apply to him.

According to Stacey, he learned of the incident between Kiraly and Carraway from Ashley Ryan and from Carraway herself. She explained to him what had happened, specifically that Kiraly had refused to fill out the ID verification form, had been abusive, and had cursed at her. At his request, Carraway furnished Stacey with a written statement. (R. Exh. 17.)

Stacey testified that he actually spoke to Kiraly about the Carraway incident at the same time that he spoke with him about the P.V. George incident. It appears that this conversation occurred on March 29, and that Stacey called Kiraly into his office and indicated that he was considering what punishment to give Kiraly for his improper behavior, specifically the three recent altercations with McCormack, George, and Carraway. According to Stacey, Kiraly did not admit cursing in the presence of Carraway, but acknowledged "going off" on her. Further, while he also admitted "going off" on George, he told Stacey that his confrontation with George in the break room occurred when he "wasn't on the clock," and, when not on company time, "I can say whatever I want, whenever I want." Again, I credit Stacey. The words attributed to Kiraly by Stacey certainly appear consistent with his personality and general attitude. Further, while the men disagreed over whether Kiraly had been "warned" at the time of the McCormack incident, as noted earlier, I credit Stacey's assertion that he had so warned Kiraly.

According to Stacey, he reminded Kiraly again that these types of confrontations with other employees were not acceptable. He testified that in response, Kiraly asked if Stacey would "let him off the hook on this, [and said] that it would never happen again."

Following his meeting with Kiraly on March 29, Stacey decided to fire him. According to Stacey's testimony, his "thought process was enough is enough." Stacey was upset that Kiraly had three altercations with separate employees, all within a period of approximately six days, and after having been warned by Stacey following the incident with McCormack. Allegedly, the cumulative effect of Kiraly's three altercations was the factor that most influenced Stacey. He felt that "it was time to terminate [Kiraly]."

Stacey testified that he alone made the decision to discharge Kiraly, without consultation with his boss, Danny Selznick. He met with Kiraly on March 30, calling him into his office. Stacey handed Kiraly a termination statement that explained the reasons for his termination, specifically that Kiraly was terminated for having three confrontations with fellow employees, the latter two after having been warned about not having altercations at work. (GC Exh. 23.) However, Stacey testified that still another reason for his decision to fire Kiraly was his concern that Kiraly might actually get into a physical fight in some future altercation with another employee.

Kiraly's testimony was somewhat different. Allegedly, upon being told that he was terminated immediately and being given the written termination statement, he was "shocked and confused," as Stacey had written that Kiraly had been "warned" following the McCormack incident, but, Kiraly contends that Stacey had specifically not so warned him. According to Kiraly, he asked Stacey whether his termination "had anything to do with me talking about a union or trying to organize people about their working conditions." He claims that Stacey replied that Kiraly "wasn't being loyal to him or the company." Further, Kiraly contends that Ashley Ryan, who was also present at the time of the termination, said, "You're causing trouble with all the employees and, you know, your day's finally come."

In response to his termination, Kiraly wrote a long, detailed statement attempting to refute the contention that he had, at least in part, been responsible for the three altercations with fellow employees. The statement is dated April 7, 2009, is entitled "rebuttal," and was presumably presented to the Employer at some location. It is interesting to note that while the document concludes with the statement, "I believe my termination was wrongful and excessive in light of fairness and balance," no where in the document is there the slightest mention of Kiraly's contention made at trial that he was fired for "talking about a union or trying to organize people about their working conditions." (GC Exh. 28.)

For the reasons that I have specified above a number of times, I find Stacey to be credible, but not Kiraly. I believe that Stacey testified credibly when he earlier indicated that Kiraly had never discussed with him the subject of unions or organizing the employees regarding their working conditions. However, as Ryan did not testify, I will give Kiraly the benefit of the doubt and assume that Ryan said, as Kiraly alleges, that he had been "causing trouble with all the employees and, you know, your day's finally come." But, as I will discuss later in this decision, that statement may well support the Respondent's defense, rather than the General Counsel's position.

III. ANALYSIS AND CONCLUSIONS

A. The Protected Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978); *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001); *Meyers Industries,* 268 NLRB 493, 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in protected concerted activity. *Rinke Pontiac Co.,* 216 NLRB 239, 241, 242 (1975)

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc.,* 281 NLRB 882 (1986), affirmed, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); *See Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or . . . it had some relation to group action in the interest of the employees"). See also *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

In the matter before me, there is no doubt that Passafiume, Gabrielson, and Kiraly were all engaged in concerted activity. As is set forth in detail in the fact section of this decision, the sales associates at the Superstition Springs Store, including Passafiume and Gabrielson, complained among themselves and to management about being required to give customers discounts, which then reduced the commissions paid to the sales associates on their sales. Management was well aware of these complaints, and clearly did not appreciate them. Store manager Serda went so far as to tell the associates at a meeting in November 2008 that he did not want to hear any negative talk, including conversations about the required discounts, and that if any employee did not like the policy, he pointed out the door to them. Further, Serda was recognized, through his handwriting, as the author of a similar threat found on a white board in the store break room during that same month. Also, Passafiume had a conversation with assistant sales manager Smith in December 2008, where he told her that he was tired of negativity and complaints, and that if he heard any such talk on the sales floor that he would send that person home for three days.

However, Passafiume and Gabrielson were undissuaded by their manager's threats. In December 2008, on a Friday pay day, they were opening their pay checks and engaged in conversations with other employees who were comparing pay checks in an attempt to determine how much money had been deducted from their checks for having to offer discounts to customers. They were then approached by Serda who told them to put away their checks, as they were "not allowed to be sharing that information."

Gabrielson went so far as to meet Kiraly at a Dunkin Donut shop where he gave her a copy of the Board Settlement Agreement that he had been a party to. They discussed her right to talk with fellow employees about pay and other working conditions, and she agreed to make copies of the Settlement Agreement to distribute to employees at her store, which she subsequently did. Gabrielson also talked about unions with Passafiume, Kiraly, Taylor, and other employees.

Both Gabrielson and Passafiume complained about the aggressive and obnoxious conduct of assistant sales manager Smith, especially as it was directed towards the female employees in the store. They complained to Serda, and to Smith himself. However, their complaints were to no avail, only seeming to further enrage Smith, and culminating in his assault on Passafiume with a "bunch of rolled up paperwork" in February 2009. They continued to complain about his conduct, although the tenure of their employment was soon to end.

Even when Passafiume expressed to fellow employees and to assistant sales manager Jim Struensee about her problems with Smith and fear of losing her job, she found herself being called into Serda's office and told not to talk with other employees about such matters. Such issues were to "stay in here," meaning his office. But Passafiume could not be kept quiet, immediately suggesting to fellow employee Anthony Champaign that such threats by management would not be made if the employees had unions, such as existed in Ohio and Michigan.

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 concerted activity. See *Champion Home Builders Co.,* 343 NLRB 671, 680 (2004). Further, there is no doubt that management officials at the Superstition Springs Store were acutely aware of this activity, in many instances directly responding to it in a very negative way. See *East Buffet & Restaurant, Inc.,* 352 NLRB 975 (2008). However, what remains to be determined is whether the Respondent discharged Passafiume and Gabrielson for having exercised their right to engage in that protected activity.

Turning our attention to the Fiesta Store, it is equally clear that Kiraly exercised a considerable amount of concerted activity. For a period of time, Kiraly had been transferring back and forth between the Fiesta and Ahwatukee Stores, principally in an effort to avoid having to work with store manager Cindy Gregory, who also transferred back and forth, and with whom he did not get along. As noted earlier, Kiraly filed two unfair labor practice charges against the Respondent, one of which resulted in a Settlement Agreement that included a Notice to Employees. Kiraly signed the Settlement Agreement as the Charging Party at the time he was employed at the Fiesta Store being managed by Gregory. It was around the same time that Kiraly was disciplined for allegedly threatening two female employees. While being advised of a two day suspension,

Kiraly told assistant manager Ashley Ryan that he would be attempting to form a union or a grievance committee to deal with unfair treatment, which was what he considered his suspension to be.

In November 2008, following the signing of the Settlement Agreement, Kiraly was very active in talking with numerous employees and supervisors at a number of the Respondent's stores about the terms of Settlement Agreement, and the protected rights that the employees had under the Act to organize and voice complaints. He showed the Agreement and Notice to a considerable number of employees, gave copies to some of them, and asked others to in turn make copies and distribute them at their respective stores. As I noted earlier, I did credit Kiraly's contention that he gave a copy of the Settlement Agreement to his assistant manager at the Fiesta Store, Ashley Ryan, and discussed with him Kiraly's desire to either form a union or a grievance committee to safeguard employee rights under the Act. It is obvious to me that the Respondent was well aware of Kiraly's concerted activity in filing charges with the Board and, further, in disseminating to employees copies of the Settlement Agreement and Notice, along with his explanation as to what rights they had under the Act.

Kiraly's concerted activity continued into March 2009, the month that he was discharged. When Passafiume appeared at the Fiesta Store looking for work, just after her discharge from the Superstition Springs Store, Kiraly took her over to his car and showed her the Settlement Agreement and Notice. During the conversation, Passafiume mentioned to Kiraly that she had been assaulted by Joe Smith and had been reprimanded by management for complaining about reduced commissions and other issues of concern to the employees. Kiraly and Passafiume both testified that Ashley Ryan observed their conversation together at Kiraly's car, and I have accepted this testimony as credible.

As with Passafiume and Gabrielson, I have concluded that Kiraly, by his conversations with fellow employees and managers about the Settlement Agreement, his expressed desire to form a union or a grievance committee, and his explanations concerning employee rights under the Act, was certainly engaged in protected concerted activity. See *Champion Home Builders Co.,* supra. Further, the evidence establishes that management was aware of his activities, and was unhappy with them. See *East Buffet and Restaurant, Inc.,* supra. However, what remains to be determined is whether the Respondent discharged Kiraly for having engaged in that protected activity, and/or because he had filed charges with the Board.

B. Unlawful Rules and Statements

1. Written company-wide rules

It is alleged in complaint paragraphs 4(b) and (c) that since September 25, 2008, the Respondent has maintained provisions in its Personnel Handbook entitled, respectively, Rules of Conduct and Business Ethics. Further, it is alleged in complaint paragraph 4(e) that since that same date, the Respondent has maintained in its Salespersons Agreement several quoted passages regarding disclosure of confidential information, confidential company records, and inducement of others not to work for the Employer.[13] It is the position of the General Counsel that the mere existence of these rules violates the Act. In its answer, the Respondent admits the existence of these rules as set forth in the complaint, but denies that the language is unlawful. Therefore, it is necessary to determine whether the language as set forth in those written rules is unlawful on its face.

The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of discipline at work, with the right of employees to engage in Section 7 activity. There exists a natural dichotomy between the two. I am mindful of this dichotomy, and in reviewing the Respondent's rules, an effort has been made not to look at the questionable statements in isolation, but, rather, to view them in the context in which they were written.

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, the Board has held that, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Id. See also *Blue Cross-Blue Shield of Alabama,* 225 NLRB 1217, 1220 (1976).

Similarly, the Board has held that "confidentiality" rules, which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment, restrain and coerce employees in violation of the Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated, or ever enforced. See *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004); *Double Eagle Hotel & Casino,* 341 NLRB 112, 115 (2004) (handbook provision a violation on its face where confidential information is defined as "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations, [and] salary information"); *Flamingo Hilton-Laughlin,* 330 NLRB 287, 288 fn. 3, 291 (1999) (handbook provision prohibiting employees from disclosing "confidential information regarding . . . fellow employees" a violation). Further, the Board has held that even "[i]f the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *NLS Group,* 352 NLRB 744 (2008) (applying the Board's standard in *Lutheran Heritage Village,* supra at 647).

The complaint alleges in paragraphs 4(b) and 6 that a rule of conduct in the Personnel Handbook that prohibits "[t]respassing

[13] In her post-hearing brief, counsel for the General Counsel has withdrawn paragraph 4(d) from the complaint.

on company property when off duty" is unlawful. I agree, as the rule on its face is ambiguous and overly-broad. The Board has held that "a rule denying off-duty employees access to parking lots, and gates, and other outside non-working areas is invalid unless sufficiently justified by business reasons." *TeleTech Holdings,* 333 NLRB 402, 404 (2001). Any ambiguity in a no-loitering rule "must be construed against the [employer] as the promulgator of the rules." *Ark Las Vegas Restaurant Corp.,* 343 NLRB 1281, 1282 (2004). Since the handbook in question does not explain the terms "trespassing," "company property," or "off duty," employees would reasonably find these terms vague and ambiguous, and might construe the rules to prohibit them from access to even the Respondent's parking lots and other non-working areas. As such, the rule is overly-broad and an unreasonable restriction on employees' Section 7 rights. See *TeleTech Holdings,* supra at 404. The Respondent has not offered any business justification for such a broad rule. Accordingly, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 4(b) and 6 of the complaint.

Also alleged in complaint paragraphs 4(b) and 6 as unlawful is another of the Respondent's Personnel Handbook Rules of Conduct, namely "[c]ollusion with another employee in order to violate company policy," which may result in discipline. Again, the Respondent does not deny that the language as quoted exists in its handbook.

Counsel for the General Counsel cites Merriam Webster's Collegiate Dictionary for the definition of "collusion, which means "secret agreement of cooperation." In my view, it is axiomatic that such language is on its face a violation of the Act. As will be obvious from a reading of this decision, I have found that the Respondent engaged in a pattern and practice, both by written rules and oral pronouncements, of prohibiting its employees from engaging in protected concerted activity. This included prohibitions against discussions of wages, commissions, mistreatment by managers, and other terms and conditions of employment. Its "trespassing" rule, discussed immediately above, made the discussions of such matters on the employees' own time while still on company property a cause for discipline. These are protected rights that employees can lawful engage in, however, under the Respondent's rule, by so doing they may become subject to punishment for acting in "collusion."

Such a threat can have no more direct consequence than to chill employees in the exercise of their Section 7 rights. The maintenance of this rule alone, even absent any evidence of enforcement, serves to restrain and coerce employees in the exercise of their rights. *Lafayette Park Hotel,* supra; see also *Blue Cross-Blue Shield of Alabama,* supra. Accordingly, I conclude that the Respondent, by maintaining such a rule, has violated Section 8(a)(1) of the Act, as alleged in paragraphs 4(b) and 6 of the complaint.

The complaint alleges in paragraphs 4(c) and 6 that certain language in the Respondent's Personnel Handbook under the heading Business Ethics constitutes a violation of the Act. The first questionable passage states: "As an employee of the RoomStore you must not use information obtained from company records, vendor records or customer records for your own personal use." I agree with counsel for the General Counsel that this passage is so broadly written as to prohibit employees' use of any information obtained from company records. The rule is unlawful because employees reasonably could construe the language to prohibit them from obtaining payroll information, wage rates, names of employees, discipline, sales data, and other information that employees are entitled to know and to share with co-workers. Such a broad prohibition could reasonably chill Section 7 rights. It is on its face unlawfully broad. Therefore, I conclude that as worded, the language constitutes an unlawful restriction of employee rights under Section 8(a)(1) of the Act.

Also under the heading Business Ethics, the General Counsel challenges the following language in the Personnel Handbook: "You should not engage in any outside activity that would conflict in any way with the interests of the company or could result in criticism or have an adverse effect on the company." Such language is dramatically over broad and ambiguous. What outside activity is the Respondent referring to, and what conflicts of interest? This is language without limits. As counsel for the General Counsel points out, employees might reasonably believe that union activity could constitute an "outside activity that would conflict… with the interests of the company . . . result in criticism or have an adverse effect on the company." The Respondent fails to explain what would be permissible conduct, leaving it up to the employees to guess. And, employees do so at their own peril, as the handbook language continues with the admonition: "When a Conflict of Interest is found to exist, or a Conflict of Interest arises later, the conflict may result in discipline, or the termination of employment." This language is equally unlawful, as it constitutes an open ended threat without limit to time.

Employees who have the right under the Act to engage in union activity or other protected concerted activity, which may certainly lead to "criticism" of the Respondent, or whose activities may potentially "conflict" with the Employer, should not have to fear running afoul of the Rules of Conduct and being subjected to discipline. Even employee conduct disparaging management officials or the employer's business may be protected activity if the remarks or conduct relate to employee interests or working conditions and are not egregious in nature. See *Mountain Shadows Golf Resort,* 330 NLRB 1238 (2000); *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229 (1980); *Community Hospital of Roanoke Valley, Inc.,* 220 NLRB 217 (1975).

These are the rights provided to employees by the Act, and yet language such as this can reasonably be expected to infringe on these rights. This handbook language chills the employees' Section 7 right to engage in union activity and/or to collectively discuss issues involving wages, hours, and working conditions. *Double Eagle Hotel & Casino,* supra at 115. Accordingly, I conclude that as worded, this language constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(c) and 6.

Complaint paragraph 4(e) sets out in detail provisions from the Employer's company-wide Sales Persons Agreement, which the General Counsel contends are on its face unlawful. The Respondent acknowledges the existence of this language

but denies that it is unlawful. By these provisions, sales associates agree "not to disclose to anyone outside of the Company or use in other than company business any confidential information relating to the business of the Company. . . ." Further, sales associates agree that "all of its information, sales data, training materials, customer list, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the name of its personnel or the financial affairs of the company, and other information is confidential. . . ."

Once again, I believe that the Respondent's language, this time contained in its Sales Persons Agreement, is overly broad. Much of this information is of the type that affects employees' wages, hours, working conditions, or other terms and conditions of employment, and, as such, may be shared by employees, provided to unions, or given to governmental agencies. Clearly training materials, the names of co-workers, and wage/commission structure, the latter of which may fall under the heading of "financial affairs of the company," constitute such information. Further, sales invoices, sales reports, and comparisons of associates' monthly sales figures may directly relate to employee compensation and are specifically the type of information useful to employees engaged in protected concerted activity.

The Respondent casts too wide a net. By causing its prohibition on disclosure of "confidential information" to be so all encompassing it has restricted its employees from engaging in activities that are obviously lawful. It has chilled its employees' right to engage in Section 7 activity. It is the Respondent's responsibility to limit any prohibition on the disclosure of information to those matters that are clearly "confidential," and do not involve terms and conditions of employment. The sales associates should not have to decide at their own peril which items are not lawfully subject to such prohibition. Unless the Respondent does so, the entire provision must be considered a violation of the Act. Accordingly, I find that the language from the Respondent's Sales Persons Agreement, as set forth in paragraph 4(e) of the complaint, and as discussed above, is on its face a violation of Section 8(a)(1) of the Act.

Also alleged in complaint paragraphs 4(e) and 6 to be unlawful is language from the Sales Persons Agreement requiring that sales associates "will not attempt directly or indirectly to induce or encourage other Company employees to terminate their employment or attempt to induce or influence an[y] prospective employees to decline employment." Again, the Respondent admits the existence of this language, but denies its illegality.

However, in my view, such language is an attack directed at the very heart of protected concerted activity. Traditionally, a union or a group of employees acting in concert may, in order to exert economic pressure on an employer, seek to have employees withhold their services or seek to have job applicants decline employment. But this protected conduct might reasonably be construed as in violation of the Sales Persons Agreement. Further, such a prohibition as contained in the Agreement may inhibit existing employees from discussing their wages, hours, and working conditions with prospective employees, or inhibit departing employees from discussing with co-workers their reasons for leaving. As such, the language is ambiguous, overly broad, and shockingly restrictive of Section 7 rights. Therefore, I find that the language as discussed above, and set forth in paragraph 4(e) of the complaint, is a violation of Section 8(a)(1) of the Act.

2. Written rules at the Superstition Springs store

Superstition Springs store manager Serda testified that he helped author a provision in that store's handbook. This provision is as follows: "Absolutely NO confrontations on the floor. Any type of negative energy or attitudes will not be tolerated [and] 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." (GC Exh. 21.) Complaint paragraphs 4(f) and 6 allege this language to be unlawful. While the Respondent acknowledges the existence of this language, counsel for the Respondent refers to it in her post-hearing brief as the "Treat everyone with respect" memo. The Respondent denies that this language is in any way a violation of the Act.

Serda testified that the memo was never intended to preclude employees from complaining about workplace conditions away from the sales floor, but, rather, intended to preclude fighting on the sales floor over customers. He asserts that in the retail business, they must above all else accommodate the needs of their customers, and, so, can not tolerate any confrontations on the sales floor.

However, in my view, the term "negative energy or attitudes" is very ambiguous, and I agree with counsel for the General Counsel's contention in her post-hearing brief that one person's negative comment may well be another person's concerted activity. Further, 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. Certainly, if this was the Respondent's intent, narrowly drafted, specific language could have been used. But, such was not the case.

The Board has held that a rule that prohibits "negative conversations" about associates or managers violates the Act. *Claremont Resort & Spa,* 344 NLRB 832 (2005). In so finding, the Board applied the three-part test in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), 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." *Claremont Resort* at 832.

It is a long held principle in labor law that, "[t]he 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, in the matter at hand, by 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. It is equally well established that "[n]o restrictions may be placed on employees' right to discuss self-organization among themselves unless the em-

ployer 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 has made no such demonstration. Further, while the Respondent apparently allows its sales associates to discuss virtually whatever subject they want, as long as customers are not present, the "negative energy or attitudes" language could reasonably be assumed to prohibit certain controversial subjects, such as disagreements with management about commissions or other terms and conditions of employment. But, this is not an acceptable prohibition, as the Board has repeatedly held that an employer "may not prohibit discussions about a union [and presumably other protected concerted activity] during work time while permitting discussions about other nonwork subjects." *MJ Mechanical Services,* 324 NLRB 812, 814 (1997) (citing *Williamette Indus., Inc.,* 306 NLRB 1010 fn. 2, 1017 (1992).

Also, as I will discuss in detail below, Serda and his assistant sales manger, Joe Smith, actually applied the rule by directing employees not to talk about matters that they considered to be negative. Not surprisingly, these matters were related to employee concerns about their terms and conditions of employment. So, the Respondent can not reasonably claim that it did not enforce the rule in question.

In summary, the rule contained in a handbook or memo maintained at the Respondent's Superstition Springs Mesa Store, and enforced by its managers at that store, 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. Therefore, I find that it constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(f) and 6.

3. Oral rules and threats at the Superstition Springs store

It is alleged in complaint paragraphs 4(g)(1), (2), and 6 that the Respondent violated the Act through the actions of its assistant sales manager at the Superstition Springs Mesa Store, Joe Smith, during the first half of December 2008, by reaffirming the store rule prohibiting "negative energy or attitudes," and by threatening employees with suspension for engaging in negative conversations regarding their terms and conditions of employment. Diana Passafiume testified about a conversation that she had with Smith in December 2008, during which he commented about another sales associate, Susie Westervelt. In reference to Westervelt, Smith said, "She's always negative and I'm tired of her negativity and, you know, always complaining and if she keeps it up, I'm going to send her home for three days." Smith then warned Passafiume that, "If anybody is negative on the floor, I'm going to send them home for three days." For the reasons that I expressed earlier in this decision, I credit Passafiume's testimony in this regard. Smith did not testify at the hearing, and I draw an adverse inference from his failure to do so. Smith's statement fits a pattern established by the store manager, Sid Serda, who made similar statements.

Virginia Gabrielson testified that at his weekly sales meetings with the associates held in November 2008, Serda said that he "did not want to hear any more negative talk . . . did not want us to talk about paychecks, the MCRs, or anything else . . . . He didn't want to hear anymore, and there was the door if we didn't like it." Her testimony was support by Diana Passafiume and Susan Taylor, who testified that during this period of time, at his weekly sales meetings, Serda would criticize employees for complaining about such matters as commissions and the company required discounts (MCRs). Also, for the reasons that I expressed earlier in this decision, I credit the testimony of Gabrielson, Passafiume, and Taylor over that of Serda. Serda's reported statements demonstrate his animus towards employees who had the "audacity" to complain about their working conditions, and his intention of enforcing the Respondent's policies against such employees with an iron fist. Smith dutifully followed his manager's lead.

It is a long, well established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to co-workers about discipline and other terms and conditions of employment. See *SNE Enterprises, Inc.,* 347 NLRB 472 (2006). Smith's conduct in reaffirming the unlawful store rule against "negative energy or attitudes," and by threatening Gabrielson 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. Accordingly, I find that the Respondent's conduct violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(g)(1), (2), and 6.

The complaint alleges in paragraphs 4(h)(1) and (2) that on about March 1, 2009, Sid Serda, at the Superstition Springs Store, promulgated and maintained a discriminatory rule that employees are prohibited 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. This allegation arises from Passafiume's testimony that following the voiding of a large sale by Joe Smith on February 28, 2009, she complained to office employee Jessica Leona and to assistant sales manager Jim Struensee about what had happened and her fear of being fired because of her low sales numbers. Shortly thereafter, she was called into Serda's office and questioned vigorously about whether she had been on the sales floor complaining about a fear of losing her job. Serda was angry with her, admonished her not to talk with other employees about her fear of being fired, and told her that such matters were to "stay in here," meaning his office. As noted earlier, I credit Passafiume over Serda, and accept her testimony regard this conversation.

It is well established 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. See *Westside Community Mental Health Center,* 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"). Passafiume, fearful of losing her job, was well within her rights under Section 7 to discuss such concerns with fellow employees, and the Respondent offers no business

justification for admonishing her not to do so. Serda's conversation with her constituted the promulgation and maintenance of an unlawful rule, which restricted Passafiume's ability to engage in protected concerted activity, and his statement that "everything stays in here" was 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." Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(h)(1), (2) and 6.

4. Alleged unlawful statements at the Fiesta store

The General Counsel alleges in complaint paragraphs 4(i)(1), (2), and 6 that on March 29, 2009, the Respondent, through Justin Stacey, threatened Bruce Kiraly with discharge for having engaged in protected concerted activity, and promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing terms and conditions of employment. However, I find no such violations.

For the reasons that I expressed earlier in detail, I credit Justin Stacey and discredit Bruce Kiraly whenever they dispute the facts of an incident or conversation. At the time the Notice to Employees was posted at the Prescott Store involving the earlier charges filed by Kiraly, Stacey was the manager of that store. I credit his testimony that he actually posted that Notice, had discussed the meaning of the Notice with his boss Danny Selznick, understood the rights employees have to engage in concerted activity, was comfortable with those rights, and took no action to infringe on those rights. Further, as will be obvious later in this decision, I have concluded that Stacey discharged Kiraly for cause, unrelated to Kiraly's protected concerted activity or his actions in previously filing unfair labor practice charges with the Board.

Kiraly testified that when he was informed on March 30, 2009, that he was being fired for having been involved in altercations with three separate employees within a short period of time, he asked if the real reason for his termination was his having informed other employees about their rights under the Act, or his interest in having a union or committee of employees represent the sales associates. However, as noted above, I credited Stacey's testimony that Kiraly said no such thing. Also, as I have mentioned, Kiraly's detailed written rebuttal to the Respondent regarding his termination fails to mention any such contention. (GC Exh. 28.)

Kiraly contends that Ashley Ryan, who was present at the termination, said, "You're causing trouble with all the employees and, you know, your day's finally come." Ryan did not testify at the hearing. Even assuming such a statement was made by Ryan, unlike counsel for the General Counsel, I do not believe that the word "trouble" was a reference to Kiraly's protected concerted activity. Rather, it appears obvious to me that the reference was to Kiraly's inability to get along with fellow employees, specifically his altercations with three separate employees within a six day period. That was the apparent reason for his discharge.

Finally, in her post-hearing brief, counsel for the General Counsel makes a short reference to the testimony of sales associate Jeri Johnson, who cryptically claimed that at a Saturday sales associates' meeting following Kiraly's discharge that Stacey said he did not want them talking about Kiraly or his discharge. While her claim was not directly challenged, it was such a fleeting reference that I simply do not believe the evidence is sufficient upon which to premise a violation of the Act. Further, having found Stacey credible, I accept his general statements that he understood the rights employees have under the Act, and took no action to infringe on those rights. Therefore, I am of the view that the credible, probative evidence fails to shows that Stacey operated the Fiesta Store in any way, other than a lawful manner. Accordingly, I hereby recommend that complaint paragraphs 4(i)(1), (2), and 6, but only as it relates to Kiraly, be dismissed.

C. The Discharges of Passafiume and Gabrielson

It is the Respondent's position that Passafiume and Gabrielson were terminated because of their poor sales performances. At first blush, it does appear that their sales figures were rather low for the three months upon which they were evaluated prior to termination, December 2008 and January to February 2009. However, as will be seen later in this decision, the sales figures can be interpreted and explained in a number of different ways. To once again quote Mark Twain, there are "lies, damned lies, and statistics." Of course, the General Counsel contends that Passafiume and Gabrielson were terminated because of their protected concerted activities, and that their sales numbers were merely used as a pretext for firing them. Therefore, it is obviously necessary for me to determine the Respondent's motivation in discharging Passafiume and Gabrielson.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that the protected concerted activity of Passafiume and Gabrielson was a motivating factor in the Respondent's decision to terminate each of them. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the judge held that the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must

establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.[14] To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1966); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communications between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit System,* 337 NLRB 510 (2002), citing *Container Corp. of America,* 244 NLRB 318, 322 (1979).

As I have already found, there is no doubt that Passafiume and Gabrielson were engaged in protected concerted activities by: complaining among themselves and with other sales associates, as well as directly to management, about being required to give customers discounts, which reduced their sales commissions; by comparing pay checks to determine whether the correct amount of sales commissions were being paid; by complaining among themselves and to management about the conduct of assistant sales manager Joe Smith; and by mentioning the need for a union. Further, the evidence clearly establishes that the Respondent's supervisors, including store manager Serda and assistant sales manager Smith, were well aware of the continuing concerted activities of Passafiume and Gabrielson, and had repeatedly expressed their unhappiness with those activities.

Obviously, the discharges of Gabrielson on March 4, and Passafiume on March 6, 2009, constituted adverse employment actions. Those discharges were, I believe, directly related to the concerted activities engaged in by the two employees. This Employer repeatedly showed, through its written and oral statements, its unwillingness to tolerate even a limited amount of concerted activity. As described above, I have found a number of the Respondent's written policies and the oral statements of its supervisors to 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. At the Superstition Springs Store, both Serda and Smith made oral statements and enforced written policies that were intended to prevent the employees from acting in concert with each other to address common concerns such as required customer discounts that lowered sales commissions, the mistreatment of employees by managers, and the need for a union. These were obvious examples of animus by the Respondent directed towards its employees for engaging in protected conduct.

Further, the timing of the discharges is suspect. As is detailed above, it was during the latter part of 2008 and early months of 2009 that Gabrielson and Passafiume's concerted activities accelerated. After all, it was on February 28, 2009, mere days before their terminations, that, in the presence of store manager Serda, assistant sales manager Smith hit Passafiume with rolled up paper work, after which both she and Gabrielson confronted Smith about his recurring improper behavior. Further, the very next day, Passafiume expressed her concerns to fellow employee Jessica Leona and to assistant sales manager Struensee about Smith's conduct and having had certain of her sales voided, and, immediately thereafter, she was called into Serda's office and reprimanded for having done so. The Board has stated that, "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). By analogy, the same would be true for any sort of protected concerted activity, such as that repeatedly engaged in by Gabrielson and Passafiume. It has been the Board's long held opinion 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).

While it may not be essential to establish, as an independent element, a direct link or nexus between the protected concerted activities engaged in by Gabrielson and Passafiume and their discharges, I believe that counsel for the General Counsel has done so by showing both animus and suspicious timing. Based on the above, I believe that the General Counsel has met her burden of establishing that the 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.[15] The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* 310 NLRB 865, 871 (1993). However, I am of the view that the Respondent has failed to meet this burden.

It now becomes necessary to statistically analyze closely the sales figures that the Respondent uses in order to justify its termination of Gabrielson and Passafiume. In the December 2008 to February 2009 time frame, store manager Serda went from requiring that Gabrielson and Passafiume meet the company-wide sales figure of $55,000 of merchandise delivered, to the higher figure of store average for merchandise delivered.

[14] More recently, the Board has indicated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB No. 815, 815 fn. 5 (2008); citing *Gelita USA Inc.,* 352 NLRB No. 59 fn. 2 (2008); *SFO Good-Nite Inn, L.L.C.,* 352 NLRB No. 42 slip op at 2 (2008).

[15] As an alternate theory, counsel for the General Counsel argues that the evidence also establishes that the Respondent discharged Gabrielson and Passafiume because they violated the Respondent's unlawful rules prohibiting them from talking about their terms and conditions of employment with other employees. It is not feasible to separate such alleged conduct from what, I have concluded, was the Respondent's obvious discrimination based on the employees having engaged in protected concerted activity. Both theories are premised on the same set of facts. As the evidence clearly establishes that the Respondent's action in discharging Gabrielson and Passafiume was motivated, at least in part, on their concerted activity, it is unnecessary to address the General Counsel's alternate theory of the case, and I will, therefore, not further do so.

Why did he do so? He was certainly not required to make it more difficult for Gabrielson and Passafiume to reach the designated goal. The decision as to which standard to use was left up to the discretion of the individual store managers. Surely he realized that it would be more difficult for them to reach the higher store average figure, yet he did so anyway. Because Serda had arbitrarily raised the sales goal, Passafiume's sales delivered in February of over $57,000, which were less than the store average of over $59,000, continued to be below goal. Still, despite not achieving this new higher goal, her sales delivered for the month were the fifth highest out of 14 sales associates at the store.

Serda testified that "it is very important" for sales associates to be at the store average. Yet, in Serda's own store, the records show that he has retained sales associates who repeatedly failed to make store average. For the seven months, September 2008-March 2009, the Employer's records show that six sales associates failed repeatedly to meet the business delivered average. Using the employees' initials, the records show that: "ALC" fell below store average four out of seven months; "GAB" fell below store average five out of seven months; "JMG" fell below store average four out of seven months; "MAE" fell below store average four out of seven months; "SCW" fell below store average four out of seven months; and "WFS" fell below store average five out of seven months. (GC Exh. 11.) Apparently, none of these under performing sales associates received any sort of written warning, no oral warning was memorialized in writing, and none was terminated, as in response to counsel for the General Counsel's subpoena, the Respondent produced no such documents.

Analyzing the individual monthly records for December 2008, January 2009 and February 2009, it is obvious that regardless of whether the standard used was the company-wide $55,000, which it was for December and January,[16] or the higher store average of $59,972, which it was for February, that Gabrielson and Passafiume were not the only sales people to fail to make goal. Not including Gabrielson and Passafiume, in December four people failed to make goal, in January four people failed to make goal, and in February eight people failed to make goal. (GC Exh. 11, Deliver columns) Again, it is important to emphasize that while lots of sales associates at the Superstition Springs store were not making goal during the months in question, Gabrielson and Passafiume were apparently the only employees that Serda saw fit to discipline and ultimately terminate. In fact, looking at the more than two year period, from November 2007 to the time of the trial, pursuant to subpoena, the Respondent was only able to show that one other employee at the Superstition Springs Store was ever disciplined for poor sales. (GC Exhs. 17, and 18, 25th page, employee Jeanette Johnson.) This despite the fact that during the five month period from April-May 2007, employee "MAE" failed to make the company-wide goal for all five of those months (GC Exh. 10), and that during calendar year 2008, eight employees had failed to meet the company-wide goal for at least two or more consecutive months. (GC Exh. 19, page 5, 2008, business delivered table.)

Serda testified that he would pro-rate the required sales volume when a sales associate was on vacation, sick, or injured. That seemed to be his rational for not disciplining these many associates who had failed to make goal over the months and years that he was a store manager. However, it is very significant to note that he was apparently not willing to do the same for Gabrielson who had fallen in the break room in December 2008, and who was in significant pain and subsequently diagnosed with a stress fracture of the foot. She missed work for doctors' appointments and physical therapy, was for part of the time medically required to wear a boot, and had trouble with mobility. When Gabrielson received the warning regarding low sales figures for December 2008, she told Serda that "she was working in pain," but other than allowing her to sit on the furniture when at the point, he made no other accommodation for her. He certainly did not pro-rate the sales volume that she was required to meet.

After reviewing the various figures, tables, averages, and standards, it is apparent to me that the sales figures for Gabrielson, Passafiume, and the other associates can be used to support either the General Counsel's or the Respondent's position. Based on those figures, I have no doubt that 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.[17] Also, as noted above, for the month of February 2009, several of her sales were voided by management, for what appear to be questionable reasons, which if allowed to be added to her monthly totals, could well have placed her at or above the store average. Further, he was not willing to pro-rate Gabrielson's sales numbers or to make a significant accommodation for her foot injury.

As I view his actions, Serda treated Passafiume and Gabrielson in a disparate fashion, certainly more harshly than he treated other employees who also had a difficult time meeting goal. The sales figures do not support the Respondent's defense by a preponderance of the evidence. It has failed to persuade me that it would have discharged Passafiume and Gabrielson even in the absence of their protected concerted activity. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by the requisite standard of evidence. I find that the Respondent's defense is nothing more than a pretext. It is therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because Passafiume and Gabrielson engaged in protected concerted activity. *Williams Contracting, Inc.,* 309 NLRB 433 fn. 2 (1992);

[16] For January 2009, both Passafiume and Gabrielson were reasonably under the impression that their sales delivered goal was the company-wide figure of $55,000. It was not until mid-February 2009, when they received a warning notice, that they learned Serda had, without first informing them, actually rated their sales delivered performance for January based on the higher store-wide average.

[17] For February 2009, Passafiume's written sales were $56,098, and her delivered sales were $57,330. (GC Exhs. 11 and 15.) The company-wide goal remained at $55,000.

Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966).

I, therefore, find that the Respondent has violated Section 8(a)(1) of the Act by discharging Virginia Gabrielson on March 4, 2009, and Diane Passafiume on March 6, 2009, as alleged in complaint paragraphs 4 (j), (k), (n), and 6.

D. The Discharge of Kiraly

It is the General Counsel's position that the Respondent discharged Kiraly because he engaged in protected concerted activity and/or because he previously filed unfair labor practice charges with the Board. On the other hand, the Respondent takes the position that Kiraly was fired because he was involved in altercations at work with three fellow employees all within a short period of time. As the facts will show, Kiraly was a disruptive influence at work. However, the question remains whether his disruptive influence was the result of his protective concerted activity, or whether it involved his inability to get along with other employees, or both.

I have concluded that under a *Wright Line,* supra, analysis, the General Counsel has made a prima facie showing that Kiraly's protected concerted activities and his having previously filed charges with the Board were a motivating factor in the Respondent's decision to terminate him. While Kiraly was a very good salesman, he was, from the Employer's view point, a problem employee.

Using the framework set forth in *Tracker Marine,* supra, there is no question that Kiraly engaged in protected conduct. As noted in detail above, he previously filed unfair labor practice charges with the Board, one of which resulted in a Settlement Agreement between the parties requiring the posting of a Notice in the Respondent's Prescott Store. Kiraly was outspoken about employee rights under the Act, having advised assistant sales manager Ashley Ryan at the Fiesta Store that he would be attempting to form a union or a grievance committee to deal with unfair treatment. He showed the Settlement Agreement and Notice to many employees at different stores, explained their rights under the Act, gave them copies of the Agreement, and asked some of them to make copies and distribute the copies to other employees at their respective stores. Further, following Passafiume's discharge, he met her at the Fiesta Store, showed her a copy of the Settlement Agreement and Notice, and discussed with her the circumstances surrounding her termination. He did this in open view of other employees, including Ashley Ryan. This conduct obviously constituted protected concerted activity. See *Champion Home Builders Co.,* supra. Further, the evidence establishes that management was well aware of Kiraly's activities. See *East Buffet & Restaurant, Inc.*

Kiraly was discharged on March 30, 2009. His concerted activity was of long standing, beginning in the fall of 2007, when he was sent to the new Prescott Store to train employees. He advised a number of the sales associates at that store to complain to management about their unhappiness with how sales commissions were being divided and allocated, which a number of them subsequently did. This apparently did not please management, as Ahwatukee store manager Gregory passed along a comment to him from Danny Selznick, an owner, that he should not involve himself in such matters, or he would be fired. Gregory accused him of "stirring the pot" in Prescott.

As noted above, Kiraly filed two charges with the Board in June and August 2008. He signed the Settlement Agreement on October 24, 2008. It was the very next day that he had the conversation with Ashley Ryan during which he told Ryan that he would be attempting to form a union or a grievance committee to protect employees from a "railroad job." In November 2008 he handed out copies of the Notice to employees at various stores, explained employee rights under the Act, and encouraged these employees to pass the information on to others. He spoke to a number of these employees about starting a union, including Ryan. Finally, in March 2009, after Passafiume's discharge from the Superstition Springs Store, Kiraly met her at the Fiesta Store, gave her a copy of the Notice and discussed her discharge, all in the view of Ryan.

I previously concluded that a number of the Respondent's written policies and the oral statements of its supervisors have restrained and coerced the employees in the exercise of their Section 7 rights, and, as such, constitute violations of Section 8(a)(1) of the Act. These are demonstrations of animus by the Respondent directed towards its employees for engaging in protected activity. Such animus and the timing of Kiraly's termination make the Respondent's action in discharging him suspect.

Kiraly's protected conduct continued unabated up until the month of his discharge. I believe that under *Wright Line* and *Tracker Marine*, this constitutes a sufficient link or nexus to establish that the Respondent was motivated, at least in part, to terminate him because he engaged in such protected conduct. After all, store manager Gregory had warned him that Danny Selznick was unhappy with his actions in Prescott, and that he would be fired if he did not "keep [his] nose out of other stores."

Having found that the General Counsel has established a prima facie case that the Respondent was motivated to discharge Kiraly, at least in part, because of his protected concerted activity[18] and for having previously filed charges with the Board, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* supra; *Regal Recycling, Inc.,* supra. The Respondent must persuade by a preponderance of the evidence. *Peter*

[18] As an alternate theory, counsel for the General Counsel argues that the evidence also establishes that the Respondent discharged Kiraly because he violated the Respondent's unlawful rules prohibiting him from talking about terms and conditions of employment with other employees. It is not feasible to separate such alleged conduct from what, I have concluded, was the Respondent's obvious discrimination based on Kiraly having engaged in protected concerted activity. Both theories are premised on the same set of facts. As I have concluded that the evidence establishes that the Respondent's action in discharging Kiraly was motivated, at least in part, because of his concerted activity and the filing of charges with the Board, it is unnecessary to address the General Counsel's alternate theory of the case, and I will, therefore, not further do so.

Vitalie Company, Inc., supra. I am of the view that the Respondent has met this burden.

For the reasons that I previously gave, I credit store manager Justin Stacey. He testified that the decision to fire Kiraly was his alone, and that he did not seek advice or approval from other company managers. Further, he testified credibly that he had never had a conversation with Kiraly about unions, or specifically about the Settlement Agreement, and did not know that Kiraly was distributing copies of the Agreement to other employees. However, Stacey acknowledged knowing about the Settlement Agreement, as he himself had posted the Notice at the Prescott Store when he was its manager, and Danny Selznick had discussed the Agreement with all the store managers.

Earlier in this decision, I explained in detail my reasons for crediting Stacey over Kiraly and for finding Stacey to be a credible witness. Accordingly, I believe his testimony that Kiraly was terminated only for his actions at the Fiesta Store where Stacey was the manager and Kiraly a sales associate. Further, I accept Stacey's testimony that Kiraly's termination was the result of his altercations with three fellow employees in the course of approximately six days.[19]

The first of these incidents occurred on March 22, 2009, when Kiraly and Andrew McCormack had an argument over whether Kiraly was entitled to reassume the point position after having vacated it to make a cell phone call outside the store. Both men apparently got loud, and there was an exchange of words with some profanity. McCormack provided a written statement to Stacey, who decided to conduct an investigation. Not surprisingly, McCormack placed the blame for the incident on Kiraly, and the one witness who also provided a statement, Gerald Limbrick, indicated that he was concerned that Kiraly "might just take a swing at [McCormack]."

According to Stacey, whose testimony I credit over Kiraly, he met with Kiraly, who admitted the substance of the argument with McCormack, but did not want to get into specifics and declined to give a written statement. Stacey specifically gave Kiraly a "warning," and told him that his behavior was wrong, and not to engage in loud, angry arguments with fellow employees or similar activity on company premises again. Stacey went to McCormack and essentially told him the same thing, also issuing him a warning.

Stacey testified that based on his conversations with McCormack, Kiraly, and Limbrick, that he had some concern that if not neutralized, Kiraly's argument with McCormack might escalate and become physical. I do not agree with counsel for the General Counsel's contention that this was a specious fear, as Stacey allowed Kiraly to continue to work, which he allegedly would have been unlikely to do had his fear been genuine. To the contrary, as Stacey believed that by warning both men that he had "neutralized" the situation, there would have been nothing unreasonable in allowing Kiraly to continue to work.

Another incident[20] occurred on the evening of March 27 and the morning of March 28, 2009. This time the employee with whom Kiraly was involved was sales associate P.V. George. According to Kiraly, during the evening encounter, George had attempted to "crash" or steal one of his customers. Kiraly complained to Stacey and assistant sales manager Ryan and was assured that they would take care of the matter. However, the following morning Kiraly noticed that George was at work, and was apparently surprised and disappointed that George had not been suspended. Kiraly and George then exchanged words in the break room, where several other employees observed the altercation.

According to George, who testified at the hearing, Kiraly was the aggressor, responding to a good morning greeting with a threat. He contends that Kiraly was loud, used obscenities towards him, called him a thief, and told George that he [Kiraly] would see to it that George was replaced, or words to that effect. Not surprisingly, Kiraly paints George as the aggressor, alleging that George was loud, obscene, and threatening.

Stacey testified that he first became aware of the incident the evening before when Kiraly had complained to him that George was trying to "crash" his customers. Next, he was informed by Ashley Ryan that George and Kiraly had an argument in the break room, which had gotten loud, and that Kiraly had started "a fight." Stacey investigated the incident by talking with George, and the two witnesses, Rosie Castro and Sharon Walker. Of course, George blamed the argument on Kiraly, and indicated that he felt physically threatened by Kiraly. Castro told Stacey that Kiraly had yelled at George and had threatened George, and that she felt that Kiraly might hit George. Both George and Castro gave Stacey written statements. However, Sharon Walker simply indicated that both men had been arguing and yelling back and forth, but declined to give Stacey a written statement.

Still another incident occurred on about March 25 or 26, 2009, on the sales floor. This involved a dispute between Tiffany Carraway, an office worker, and Kiraly regarding an identification verification form that Kiraly had failed to fill out. Carraway told him that she could not process his customer's credit application without the form, and Kiraly argued that he had never before been required to fill out such a form and should not have to do so now. Carraway testified that Kiraly had spoken to her in a loud, angry voice, had used an obscenity, and that she felt intimidated by him. In Kiraly's testimony, it was Carraway who spoke in a loud voice and embarrassed his customer. He contends that Carraway's demand that the identi-

[19] Initially, it would appear that there is some inconsistency between my finding that protected activity was a motivating factor in the Respondent's decision to fire Kiraly, and my subsequent conclusion that Stacey fired Kiraly solely based on his altercations in the Fiesta Store. However, under the *Wright Line* analysis, the necessary elements are present to enable the General Counsel to establish a prima facie case. Never the less, the weight of the credible, probative evidence is such that when Stacey's role in the termination is considered, the Respondent is able to rebut that finding by the necessary preponderance of the evidence.

[20] There is some confusion among the various witnesses as to the precise dates of the second and third altercation. However, the exact sequence of events is not significant. Kiraly's altercation with P.V. George and with Carraway both occurred within a few days of each other. Whether the incident with George occurred first, or that with Carraway, is of no real importance. Rather, it is the number of altercations that occurred between Kiraly and fellow employees within a short period of time that is of significance.

fication form be filled out was unreasonable, and that another office worker was willing to process the credit application without the disputed form. He does not specifically deny that store policy requires that this form be filled out by the sales associate asking for the credit application to be processed, just that in the years that he has been with the RoomStore, while accumulating $9 million dollars in sales, he has never personally been required to fill out the form.

Stacey learned of the incident from Ryan and from Carraway herself. She explained what happened and at Stacey's request, Carraway furnished a written statement. Once again, Stacey conducted an investigation. On March 29 Stacey called Kiraly into his office and indicated that he was considering what punishment to give Kiraly for the three altercations with McCormack, George, and Carraway. He spoke with Kiraly about the incident with Carraway, and, at the same time, about the incident with P.V. George. Kiraly defended his actions, although admitting "going off" on both George and Carraway. Kiraly denied using obscenities in the presence of Carraway, and argued that what he had said to George was done before being "on the clock," which meant that he could say whatever he wanted to say.

Stacey and Kiraly disagreed as to whether Kiraly had been warned following the McCormack incident, with Kiraly alleging that he had specifically not been given a warning. Kiraly asked Stacey if he would let him "off the hook on this," and said that "it would never happen again."

According to Stacey's testimony, he had to consider the cumulative effect of these three incidents. Each incident amounted essentially to a "he said, she said" type of dispute. Stacey was not present at any of them. However, he conducted what appears to me to have been a fairly complete, impartial inquiry. Further, from the information that he received from McCormack, P.V. George, Carraway, Limbrick, Castro, and Walker, it is not surprising that he concluded that Kiraly was the aggressor at each altercation. Further, I accept his contention that he had a genuine concern that Kiraly might lose his temper in some future altercation, which then might become physical. For the reasons that I stated earlier, I generally credited the testimony of the witnesses who testified about these confrontations with Kiraly, and I can appreciate the fact that Stacey did as well.

The following day, March 30, 2009, Stacey called Kiraly into his office, and in the presence of Ashley Ryan, terminated him. Again, I credit Stacey's version of this conversation with Kiraly. Stacey told Kiraly that he was being terminated for having three altercations with fellow employees, the latter two following his warning about having such incidents while at work. Kiraly testified that Ryan made the comment that, "You're causing trouble with all the employees and, you know, your day's finally come." Assuming Ryan made this comment, it appears to me to be nothing more than a reference to the three altercations with McCormack, George, and Carraway, which lead to Kiraly's discharge.

Of course, Kiraly is suggesting that by making this comment, Ryan was referencing Kiraly's protected concerted activity. In this regard, it is important to note that Kiraly wrote a long, detailed statement to the Respondent dated April 7, 2009, in which he attempts to refute the contention that he had, at least in part, been responsible for the three altercations with fellow employees. The document concludes with the statement, "I believe my termination was wrongful and excessive in light of fairness and balance." However, no where in the document is there the slightest mention of Kiraly's contention made at trial that he was fired for "talking about a union or trying to organize people about their working conditions." (GC Exh. 28.)

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Kiraly was terminated for cause, namely having engaged in three separate altercations at work, all within a short period of time. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have discharged Kiraly even in the absence of his having engaged in protected concerted activity and having previously filed charges with the Board.

Therefore, I shall recommend that complaint paragraphs 4(l), 5, and 7, as well as 4(n) and 6, but only as they relate to Kiraly, be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, The RoomStores of Phoenix, LLC d/b/a The RoomStore, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Maintaining or enforcing rules in its Personnel Handbook that threaten employees with discipline, up to and including termination, for trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records, vendor records or customer records for employees own personal use; or engaging in any outside activity that would conflict in any way with the interest of the company or could result in criticism or have an adverse effect on the company;

(b) Maintaining or enforcing rules in its Sales Associates Agreement that prohibit employees from disclosing to anyone outside of the company, or using in other than company business, any confidential information, either during or after employment with the company except with its written permission;

(c) Maintaining or enforcing rules in its Sales Associates Agreement that require employees to recognize that unless and until published by it for public use, all of its information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the names of its personnel or the financial affairs of the company, and other information is confidential; further that require its employees to recognize that all records and materials pertaining to its operations are kept in confidence and shall remain its property exclusively, and that employees will keep such records and materials in the custody of the company at the time of their termination;

(d) Maintaining or enforcing rules in its Sales Associates Agreement that prohibit employees from attempting to induce or encourage other employees to terminate their employment, or attempt to induce or influence any prospective employees to decline employment with it;

(e) Maintaining or enforcing rules in its Superstition Springs Mesa Store Handbook that prohibit any type of negative energy or attitudes at the store and threatens employees with suspension if they violate the rule;

(f) Informing employees in its Superstition Springs Mesa Store that they cannot talk to fellow employees about their terms and conditions of employment, and threatening to suspend, discharge, or take other disciplinary action against them for doing so;

(g) Threatening to suspend employees in its Superstition Springs Mesa Store for engaging in negative conversations with supervisors or employees regarding their terms and conditions of employment; and

(h) Discharging its employees Diane Passafiume and Virginia Gabrielson because they engaged in protected concerted activity.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employees Diane Passafiume and Virginia Gabrielson, my recommended order requires the Respondent to offer them immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exists, to substantially equivalent positions, without loss of seniority and other privileges. My recommended order further requires that the Respondent make Passafiume and Gabrielson whole for any loss of earnings, commissions, and other benefits, computed on a quarterly basis from the date of their discharges to the date the Respondent makes a proper offer of reinstatement to them, less any net interim earnings as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[21]

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Diane Passafiume and Virginia Gabrielson, and to provide them with written notice of such expunction, and inform them that the unlawful conduct will not be used as a basis for further personnel actions against them. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Passafiume or Gabrielson in any other way.

Also, having found various provisions in the Respondent's Personnel Handbook, Sales Associates Agreement, and Superstition Springs Mesa Store Handbook unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rules, and advise its employees in writing that said rules have been so revised or rescinded.

Finally, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. As certain provisions in the Respondent's Personnel Handbook and Sales Associates Agreement were found to be unlawful, which Handbook and Agreement were distributed to its employees working at all its stores throughout the State of Arizona, the Respondent will be required to post this notice at all its stores within the State.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, The RoomStores of Phoenix, LLC d/b/a The RoomStore, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing rules in its Personnel Handbook that threaten employees with discipline, up to and including termination, for trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records, vendor records or customer records for employees own personal use; or engaging in any outside activity that would conflict in any way with the interest of the company or could result in criticism or have an adverse effect on the company;

(b) Maintaining or enforcing rules in its Sales Associated Agreement that prohibit employees from disclosing to anyone outside of the company, or using in other than company business, any confidential information, either during or after employment with the company except with its written permission;

(c) Maintaining or enforcing rules in its Sales Associates Agreement that require employees to recognize that unless and until published by it for public use, all of its information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the names of its personnel or the financial affairs of the company, and other information is confidential; further that require its employees to recognize that all records and materials pertaining to its operations are kept in confidence and shall remain its property exclusively, and that employees will keep such records and materials in the custody of the company at the time of their termination;

(d) Maintaining or enforcing rules in its Sales Associates Agreement that prohibit employees from attempting to induce or encourage other employees to terminate their employment,

[21] In her post-hearing brief, counsel for the General Counsel requests that simple interest on backpay and other monetary awards be replaced by compounding interest on a quarterly basis. A similar request is made in the complaint. However, the Board has repeatedly declined to deviate from its current practice of assessing simple interest. See *Sawgrass Auto Mall,* 353 NLRB No. 40 fn. 3 (2008), citing to *Carpenters Local 687 (Convention & Show Services),* 352 NLRB No. 119 fn. 2 (2008). Accordingly, I deny the General Counsel's request.

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

or attempt to induce or influence any prospective employees to decline employment with it;

(e) Maintaining or enforcing rules in its Superstition Springs Mesa Store Handbook that prohibit any type of negative energy or attitudes at the store and threatens employees with suspension if they violate the rules;

(f) Informing employees in its Superstition Springs Mesa Store that they cannot talk to fellow employees about their terms and conditions of employment, and threatening to suspend, discharge, or take other disciplinary action against them for doing so;

(g) Threatening to suspend employees in its Superstition Springs Mesa Store for engaging in negative conversations with supervisors or employees regarding their terms and conditions of employment;

(h) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activities; and

(i) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Within 14 days of the Board's Order, revise or rescind the rules in its Personnel Handbook that threaten employees with discipline, up to and including termination, for trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records, vendor records or customer records for employees own personal use; or engaging in any outside activity that would conflict in any way with the interest of the company or could result in criticism or have an adverse effect on the company;

(b) Within 14 days of the Board's Order, revise or rescind the rules in its Sales Associates Agreement that prohibit employees from disclosing to anyone outside of the company, or using in other than company business, any confidential information, either during or after employment with the company except with its written permission;

(c) Within 14 days of the Board's Order, revise or rescind the rules in its Sales Associates Agreement that requires employees to recognize that unless and until published by it for public use, all of its information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the names of its personnel or the financial affairs of the company, and other information is confidential; further that requires its employees to recognize that all records and materials pertaining to its operations are kept in confidence and shall remain its property exclusively, and that employees will keep such records and materials in the custody of the company at the time of their termination;

(d) Within 14 days of the Board's Order, revise or rescind the rules in its Sales Associates Agreement that prohibits employees from attempting to induce or encourage other employees to terminate their employment, or attempt to induce or influence any prospective employees to decline employment with it;

(e) Within 14 days of the Board's Order, revise or rescind the rules in its Superstition Springs Mesa Store Handbook that prohibits any type of negative energy or attitudes at the store and threatens employees with suspension if they violate the rule;

(f) Within 14 days of the Board's Order, offer Diane Passafiume and Virginia Gabrielson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed;

(g) Make Diane Passafiume and Virginia Gabrielson whole for any loss of earnings, commissions, and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision;

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Diane Passafiume and Virginia Gabrielson, and inform them in writing that this has been done, and that their discharges will not be used against them as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them;

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

(j) Within 14 days after service by the Region, post at all its stores in the State of Arizona, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of its stores located in the State of Arizona, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at said store or stores at any time since September 25, 2008; and

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

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. April 16, 2010

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, and WE WILL NOT try and stop you from engaging in these activities.

WE WILL NOT maintain or enforce rules in our Personnel Handbook that threaten you with discipline, up to and including termination, for trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records, vendor records or customer records for your own personal use; or engaging in any outside activity that would conflict in any way with the interest of the company or could result in criticism or have an adverse effect on the company.

WE WILL NOT maintain or enforce rules in our Sales Associate Agreement that prohibit you from disclosing to anyone outside of the company, or using in other than company business, any confidential information, either during or after your employment with the company except with our written permission.

WE WILL NOT maintain or enforce the following rule in our Sales Associate Agreement: "I recognize that unless and until published by the Company for public use, all of its information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the names of its personnel or the financial affairs of the company, and other information is confidential. I recognize that all records and materials pertaining to the Company operations [sic] in confidence and shall remain the property of the RoomStore exclusively. I will keep same in custody of the company such records and materials that are in my possession at the termination of my employment; and. . . ."

WE WILL NOT maintain rules in our Sales Associate Agreement that prohibit you from attempting to induce or encourage other employees to terminate their employment, or attempt to induce or influence any prospective employee to decline employment with us.

WE WILL NOT maintain rules in our Superstition Springs Mesa Store Handbook that prohibit any type of negative energy or attitudes at the store and threaten you with suspension if you violate this rule.

WE WILL NOT tell you that you cannot talk to fellow employees about your terms and conditions of employment; and WE WILL NOT threaten to suspend, discharge, or take other disciplinary action against you if you violate this rule.

WE WILL NOT threaten you with suspension if you engage in negative conversations with supervisors or employees regarding terms and conditions of employment.

WE WILL NOT discharge you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL revise or rescind the rules contained in our Personnel Handbook that threaten you with discipline, up to and including termination, for trespassing on company property when off duty; colluding with another employee in order to violate company policy; using information obtained from company records, vendor records or customer records for you own personal use; or engaging in any outside activity that would conflict in any way with the interest of the company or could result in criticism or have an adverse effect on the company; and WE WILL furnish you with inserts for your Personnel Handbook that advise you that these rules have been rescinded, or provide the language of the revised rules; or furnish you with a revised Handbook that does not contain these rules.

WE WILL revise or rescind the rules contained in our Sales Associates Agreement that prohibit you from disclosing to anyone outside of the company, or using in other than company business, any confidential information, either during or after your employment with the company except with our written permission; and WE WILL furnish you with written notice that advises you that these rules have been rescinded; or furnish you with a revised Agreement that does not contain these rules.

WE WILL revise or rescind the rules contained in our Sales Associate Agreement that state: "I recognize that unless and until published by the Company for public use, all of its information, sales data, training materials, customer lists, sales invoices, reports, formulas, costs, the prices it obtains or has obtained or at which it sells or has sold its services or products, the names of its personnel or the financial affairs of the company, and other information is confidential. I recognize that all records and materials pertaining to the Company operations [sic] in confidence and shall remain the property of the RoomStore exclusively. I will keep same in custody of the company such records and materials that are in my possession at the termination of my employment . . ." and WE WILL furnish you with written notice that advises you that these rules have been rescinded; or furnish you with a revised Agreement that does not contain these rules.

WE WILL revise or rescind the rules contained in our Sales Associate Agreement that prohibit you from attempting to induce or encourage other employees to terminate their employ-

ment, or attempt to induce or influence any prospective employee to decline employment with us; and WE WILL furnish you with written notice that advises you that these rules have been rescinded, or furnish you with a revised Agreement that does not contain these rules.

WE WILL revise or rescind the rules in our Superstition Springs Mesa Store Handbook that prohibit any type of negative energy or attitudes at the store and threatens you with suspension if you violate this rule; and WE WILL furnish you with inserts for your Store Handbook that advise you that these rules have been rescinded, or provide the language of the revised rules; or furnish you with a revised Handbook that does not contain these rules.

WE WILL within 14 days from the date of the Board's Order, offer Diane Passafiume and Virginia Gabrielson full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Diane Passafiume and Virginia Gabrielson whole for any loss of earnings, wages, commissions, bonuses, and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Passafiume and Gabrielson, and WE WILL within 3 days thereafter, notify Passafiume and Gabrielson in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

THE ROOMSTORES OF PHOENIX, LLC D/B/A THE ROOMSTORE