

Docket No. 19-70392

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NATURAL LIFE, INC. D/B/A HEART AND WEIGHT INSTITUTE,

Respondent

Appeal from National Labor Relations Board Decision

Board Case No. 28-CA-181573

**Respondent Natural Life, Inc. D/B/A Heart and
Weight Institute's Reply Brief**

Robert L. Rosenthal, Nevada State Bar #7136
Jennifer R. Lloyd, Nevada State Bar #9617
Johnathan W. Fountain, Nevada State Bar #10351

HOWARD & HOWARD ATTORNEYS, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169

Attorneys for Natural Life, Inc., D/B/A Heart and Weight Institute

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PRELIMINARY STATEMENT

The Board's opposition relies on legal technicalities to argue that Natural Life should not be able to defend itself against the Section 8(a)(1) findings concerning whether Natural Life, through its non-supervisory employee Guggia, created an impression of surveillance and whether Natural Life, again through non-supervisor Guggia, made a coercive statement to discourage its employees from complaining about the terms and conditions of their employment. The record, however, establishes that Natural Life did, in fact, raise these issues below and, therefore, the Court has jurisdiction to consider them.

Next, the Board argues that Natural Life terminated its sales staff because of animus towards their ongoing complaints about their workplace and the terms and conditions of their employment. The record, however, contains insufficient evidence to show that Natural Life possessed animus towards its sales staff and that it fired its sales staff *because* of such animus. Indeed, members of Natural Life's sales staff complained about their workplace and the terms and conditions of their employment over the course of several years but were not fired for doing so. To overcome this lack of evidence, the Board relies upon a multitude of legal technicalities and nested layers of inferences to try and establish both animus and causation.

To make this argument, while the Board concedes that Guggia was not a supervisor at the time of the July 27 terminations, the Board argues that Guggia acted as Natural Life's agent. There is no dispute that Guggia was given authority by Stoyanov to communicate Natural Life's decision to terminate its sales staff to its sales employees on July 27, but that is where Guggia's authority ended. Guggia's communication of her own personal opinions concerning the circumstances and reasons for why Natural Life terminated its sales staff were, given the language she used, her own opinions, and not the opinions of the company. Under *Idaho Falls, infra*, Guggia's own statements of opinion cannot bind Natural Life.

Finally, the Board's erroneous application of the missing witness rule was, in fact, prejudicial to Natural Life. The Board's finding of harmless error was based upon its *erroneous* conclusions that: (a) Guggia spoke for the company when she stated her personal beliefs about why the office was closing, and that Natural Life had stipulated that protected concerted activity had occurred when, in fact, Guggia's comments were unauthorized and Natural Life had not so stipulated. (Opening Br. at 44.) Without these *erroneous* conclusions supporting the Board's decision, the only support for the decision comes from the adverse inference. Therefore, the Board's error was prejudicial as it resulted in a decision against Natural Life in the absence of substantial evidence.

ARGUMENT

I. THE BOARD IS NOT ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER REGARDING THE ALLEGED IMPRESSION OF SURVEILLANCE AND COERCIVE STATEMENT VIOLATIONS BECAUSE THE ISSUES WERE RAISED BELOW.

The Board argues that, “the Court should summarily enforce the *uncontested* portions of the Board’s Order finding that Natural Life violated Section 8(a)(1) by (1) creating an impression that it was surveilling its employees’ protected concerted activities and (2) coercively telling employees that they were being discharged, and would not be rehired, because of those activities.” (Ans. Br. at 20) (emphasis added).

The Board cites 29 U.S.C. § 160(e), which states that, “[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). “The purpose of this provision is to ensure that the Board is given the opportunity to bring its expertise to bear on the issue presented so that [the Court] may have the benefit of the Board’s analysis when reviewing the administrative determination.” *N.L.R.B. v. Int’l Bd. of Elec. Workers, Local 952*, 758 F.2d 436, 439 (9th Cir. 1985).

While the Board is entitled to summary enforcement of unchallenged rulings, *N.L.R.B. v. Advanced Stretchforming Int’l, Inc.*, 233 F.3d 1176, 1180 (9th

Cir. 2000), the rulings the Board takes issue with were, in fact challenged by Natural Life, even though the Board did not recognize as much in its order. Natural Life filed written exceptions to both issues. It argued both issues in its post-hearing brief. It also argued that, Guggia lacked actual or apparent authority to make the portion of her statement that the Board relies upon to argue Natural Life violates Section 8(a)(1) by (1) creating an impression that it was surveilling its employees' protected concerted activities and (2) coercively telling employees that they were being discharged, and would not be rehired, because of those activities. Absent such authority from Natural Life, Guggia's off-script remarks cannot bind Natural Life.

Nevertheless, in its order, the Board stated the following:

The Respondent also excepts to the judge's findings that it violated Sec. 8(a)(1) by creating an impression of surveillance on July 27 and by telling employees that they were terminated and would not be rehired because of their protected concerted activities. However, the Respondent presents no argument in support of these exceptions. In accordance with Rule 102.46(a)(1)(ii), we shall therefore disregard them. *See Holsum de Puerto Rico, Inc.*, 344 N.L.R.B. 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by surveilling employees on July 27 and August 3 by creating the impression of surveillance on August 3.

(ER 1, n. 3.)

The Board argues that it is entitled to summary enforcement because,

“Natural Life cursorily excepted to the administrative law judge’s impression of surveillance and coercive statement findings.” (Ans. Br. at 23.) But that was not the case at all. Natural Life’s exceptions to the ALJ’s decision stated, among others, the following:

Exception No. 19: Natural Life excepts to the ALJ’s finding that “by stating that the Company was constantly listening in and recording employees’ conversations about taking legal action, Guggia gave employees the reasonable impression that their protected activities were under surveillance and the Respondent thereby violated Section 8(1)(1). *See* Decision p. 17:25-28.

Grounds: The ALJ’s finding is not supported by the record as a whole and is contrary to the Board’s Rule and Regulations and Board precedent.

Exception No. 30: Natural Life excepts to the ALJ’s finding that the Respondent independently violated Section 8(a)(1) of the Act when Guggia told employees that they were being terminated and would not be rehired because of their protected concerted activities. *See* Decision p. 20:40-42.

Grounds: The ALJ’s finding is not supported by the record as a whole.

Exception No. 33: Natural Life excepts to the ALJ’s finding that “Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act” by: discharging Strain, Boyd, Findley, Frenzel, Martin, McCawley, Pappan, Smith and Thompson on July 27, 2016; refusing and failing to recall Strain, Frenzel, Martin, McCawley and Thompson on or after August 1, 2016; gave employees the impression that their protected concerted activities had been under surveillance; and, told employees that they were being discharged and would not be rehired because of their protected concerted activities. *See* Decision p. 22:20-35.

Grounds: The ALJ's conclusions of law are not supported by the record as a whole and are contrary to Board precedent and case law.

(SER 4-5, 7-8.) Exception 19 explicitly identified the impression of surveillance issue and exception No. 30 explicitly identified the coercive statement issue. (*Id.*)

The Board also argues that Natural Life waived its ability to challenge the Board's order because Natural Life did not comply with the Board's rules for asserting exceptions. (Ans. Br. at 23.) The Board cites, 29 C.F.R.

§§102.46(a)(1)(i)-(ii), which states, in most relevant part, the following:

- (a) Exceptions and brief in support. [A]ny party may . . . file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision . . . together with a brief in support of the exceptions . . .
 - (1) Exceptions.
 - (i) Each exception must:
 - (A) Specify the questions of procedure, fact, law, or policy to which exception is taken;
 - (B) Identify that part of the Administrative Law Judge's decision to which exception is taken;
 - (C) Provide precise citations of the portions of the record relied on; and
 - (D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief . . .

- (ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

29 C.F.R. §§102.46(a)(1)(i)-(ii).

Natural Life's exceptions substantially complied with the requirements of the rule. The exceptions identified the impression of surveillance and coercive statement issues to which exception was taken, cited to the relevant portions of the ALJ's decision, and concisely stated the grounds for the exception. In the case cited by the Board in its order, *Holsum de Puerto Rico, Inc.*, "[t]he Respondent merely recite[d] the findings excepted to and cite[d] to the judge's decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned." 344 N.L.R.B. at 694 n. 1. That is not the case here. Here, Natural Life concisely identified the grounds for each exception as required by the rule.

The Board further argues that, "Natural Life . . . made no argument regarding the relevant exceptions in its supporting brief, as required by the Board's Rules and Regulations." (Ans. Br. at 23) (citation omitted). That argument is misleading. Natural Life's brief in support of its exceptions listed four "ISSUES PRESENTED." (ER 87, ER 88.) Issues 1 and 4 explicitly referred to Natural Life's Exception Nos. 19 and 30 regarding the impression of surveillance and

coercive statement questions. (*Id.*)

In addition, the Board ignores the fact that Natural Life argued, *in detail*, that it did not create an impression of surveillance in its post-hearing brief. (ER 102, 126-128.) Natural Life also argued in its post-hearing brief that there was no evidence that Strain (or any other employee) was not rehired due to her/his or their protected activities (ER 123-124), and that there was no evidence of the existence of a rule prohibiting employees from complaining about the terms and conditions of their employment (ER 128-129).

The crucial question in a section 160(e) analysis is whether the Board “received adequate notice of the basis for the objection.” *FedEx Freight, Inc. v. N.L.R.B.*, 816 F.3d 515, 521 (8th Cir. 2016) (quoting *Nathan Katz Realty, LLC v. N.L.R.B.*, 251 F.3d 981, 985 (D.C. Cir. 2001)). Here, there can be no question that the Board received adequate notice of Natural Life’s objections to the Board’s findings that Natural Life violated Section 8(a)(1) by: (1) creating an impression that it was surveilling its employees’ protected concerted activities; and (2) coercively telling employees that they were being discharged, and would not be rehired, because of those activities. These issues were not and are not “uncontested” as the Board claims. Accordingly, the Board is not entitled to summary enforcement of these findings. If anything, the Court should reject these findings because they were not supported by substantial evidence.

A. The Board’s Finding that Natural Life Violated Section 8(a)(1) by Creating an Impression of Surveillance is Not Supported by Substantial Evidence.

On July 27, Guggia made the following statement:

[T]his is what happens when you have angry people all the time, and you have QA constantly listening to what we say behind closed doors, behind. . . . to each other, side by side; they have recordings of people saying things that are just horrible. They have a whole conversation of people talking about a lawsuit like, like, half an hour long.

(ER 11.) The Board’s order concludes that, “by stating that the Company was constantly listening in and recording employees’ conversations about taking legal action, Guggia gave employees the reasonable impression that their protected activities were under surveillance, and the Respondent thereby violated Section 8(a)(1).” (ER 11.)

As Natural Life argued in its post-hearing brief, the Board was required to prove that an employee hearing such a statement would *reasonably* and *objectively* believe that the employer is conducting surveillance of his or her *protected* activities. (ER 126.) “The test for determining whether an employer . . . unlawfully creates the impression of surveillance, involves the determination of whether the employer’s conduct, under all of the circumstances, was such that would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.” (ER 126-127) (citing *Broadway*, 267 N.L.R.B. 385, 400 (1983)).

Natural Life argued below that, “[t]he statements giving the impression of ‘surveillance’ testified about at trial were Guggia’s remarks that Quality Assurance was listening to salespeople’s conversations and it had recordings of people talking about lawsuits and saying horrible things.” (ER 127.) Natural Life also argued that:

It is absurd that this would give the impression of surveillance [of protected activities] since the salespeople worked for a telemarketing company wherein they sold products to customers over the phone, and knew or had reason to know that Quality Assurance recorded phone calls to prevent mistakes and research customer related complaints or issues concerning their orders. (Tr. p. 518-519.) Recording salesperson’s phone calls on company phones in the workplace is routine and not out of the ordinary.

(*Id.*) (citing *Aladdin Gaming, LLC*, 345 N.L.R.B. 585-86 (2005), *petition denied*, 515 F.3d 942 (9th Cir. 2008); *see also Lechmere, Inc.*, 295 N.L.R.B. 92 (1989) (installation of cameras on retail store did not violate the Act, even though protected concerted activity was recorded, where security purposes justified the surveillance)). It is one thing to record employees’ activities because doing so is necessary to the successful operation of a telemarketing business. It is quite another thing to record employees’ activities occurring outside the performance of their work for the purpose of monitoring protected activities.

Most importantly, in this case, there does not appear to exist any evidence whatsoever (other than the statement itself) of surveillance that occurred outside the context of Natural Life’s quality assurance department listening in on sales

calls in the regular and ordinary course of business. Absent such evidence, the Board's finding that Natural Life created an impression of surveillance based solely on Guggia's statement is not objectively reasonable and is not supported by substantial evidence. Rather, absent evidence of surveillance occurring outside the context of sales calls—calls the sales employees knew were monitored—it appears that Guggia was simply speaking imprecisely and that she exaggerated the nature and extent of the alleged “surveillance.” Finally, it is important to note that Guggia's statement occurred on July 27 *at the time of termination* and not before termination. *A fortiori*, Guggia's statement could not have created an impression of surveillance because the employment relationship ended at the very same time she made the alleged statement. Any impression of surveillance created by her imprecise and unauthorized statement was immediately moot.

B. The Board's Finding that Natural Life Violated Section 8(a)(1) by Telling Employees They Were Being Discharged and Would Not be Rehired Was Not Supported by Substantial Evidence or the Cited Authorities.

On July 27, Guggia made, among others, the following statements:

I want the best team. I want the best people. **I don't want people who want to sue.** I don't want people who are gonna [sic] constantly nag. . . . And if you ever want to be on my team again one day, I would love to have you if you fit into that criteria. If you're a negative person that's not willing to grow or learn, or deal with the hard times, I don't want to work with you. . . .

(ER 9) (emphasis added).

In his order, Judge Sandron stated the following: “Inasmuch as all of the employees were actually discharged that day, it well could be argued that any threat to discharge them is essentially subsumed by the issue of the legality of the discharges themselves.” (ER 11.) Judge Sandron concluded that because the employee discharges violated Section 8(a)(1), that Ms. Guggia’s statement about not wanting “people who want to sue” independently violated Section 8(a)(1). In reaching his conclusion, Judge Sandron relied on *Triple Play Sports Bar & Grill*, 361 N.L.R.B. 308, 308 n. 2 (2014), *aff’d. sub nom. Three D, LLC d/b/a Triple Play Sports Bar 7 Grille v. N.L.R.B.*, 629 Fed. App’x. 33 (2d Cir. 2015) (“*Triple Play*”), and *Benesight, Inc.*, 337 N.L.R.B. 282, 283–284 (2001). (ER 11.)

These cases, however, are distinguishable. In *Triple Play*, the employer threatened employees participating in a Facebook discussion about the terms and conditions of their employment with termination and *explicitly* told the terminated employee that her termination was the result of her participation in the Facebook discussion. *Triple Play*, 361 N.L.R.B. at 308 n. 2 (“We agree with the judge that the Respondent separately violated Sec. 8(a)(1) of the Act by telling Sanzone and Spinella that their Facebook activity was the reason for their discharges.”). Similarly, in *Benesight*, the manager *explicitly* told the terminated employee that she was fired because of her protected activity. *Benesight*, 337 N.L.R.B. at 283 (“Manager Potestio told Mercado on April 11 that, based on Mercado's

participation in the previous day's work stoppage, she had been insubordinate and was terminated.”).

Here, Guggia did not *explicitly* tell Strain or any other employee that the reason they were fired was because they had been discussing suing Natural Life or complained about aspects of their workplace or terms of employment. As set forth more fully below, at most, Guggia indicated that she personally did not want to work with employees who want to sue the company. Accordingly, the Board's finding that Natural Life violated Section 8(a)(1) by telling employees they were being discharged and would not be rehired was not supported by substantial evidence or the cited authorities, but rather, by inference upon inference, and leaps of logic unsupported by record facts.

C. Respondent Argued Below That Guggia Was Not its Agent.

The Board argues that Natural Life challenged Guggia's authority to make the statements the Board used to show animus for the discharge decision, but claims that Natural Life did not “link” its agency arguments to the two allegedly “uncontested” Section 8(a)(1) violations. (Ans. Br. at 24 n. 5.) There is, however, no need to “link” Guggia's lack of authority to the two allegedly “uncontested” Section 8(a)(1) violations. The Board relied on only Guggia's statements as evidence of these Section 8(a)(1) violations. As argued in Part II.C., *infra*, because Guggia lacked authority to make the statements she made, her statements cannot be

attributed to Natural Life.

II. THE BOARD’S FINDINGS THAT NATURAL LIFE VIOLATED SECTION 8(a)(1) WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. There is Insufficient Evidence that Natural Life Fired its Sales Staff for Engaging in Protected Activities

The Board argues that, Natural Life’s stipulations, witness testimony, and Guggia’s July 27 recorded remarks provide ample record support for the Board’s finding that Natural Life knew that its sales employees were engaged in protected concerted activity. (Ans. Br. at 27.)

First, with respect to the stipulation that “‘there were complaints about . . . office negativity and employee complaints about other terms and conditions of employment’ during that same period,” while it is true that Natural Life entered into the stipulation, the stipulation does not say that the complaints were *group* complaints, evidence of concerted activity, or that the complaints were anything other than *individual* employee complaints. (ER 349-350.) Natural Life did not stipulate that protected concerted activities occurred between February 5, 2016 and August 3, 2016. The Board’s argument assumes too much.

Second with respect to the stipulation that, at various times from the end of 2013 to 2015, Strain and other employees engaged in concerted activities by making complaints to human resources and management regarding racism and sexism in the workplace, (ER 392), to the extent the Board relied on this

stipulation to establish the existence of animus towards concerted activities within the 10(b) period, the stipulation only proves that concerted activities occurred, not that Natural Life displayed any animus towards them or that it continued any animus into the 10(b) period. In addition, any consideration of Spencer's alleged acts of racism and sexism in 2013-2015 was improper because those events are unrelated to the allegations in Strain's complaint. *See Queen Mary Rest. Corp. v. N.L.R.B.*, 560 F.2d 403, 407 (9th Cir. 1977). Strain's Complaint alleges that, "from about July 8, 2016 through about August 3, 2016, Respondent's employees . . . engaged in concerted activities with each other for the purpose of mutual aid and protection by complaining about Respondent's pay system and charging its employees for canceled customer orders." (ER577.) Spencer's alleged conduct was unrelated to this alleged concerted action. Spencer's alleged conduct predated these complaints by months or years. Accordingly, there was no concerted activity related to Spencer's alleged conduct.

Third, with respect to the alleged "testimony" the Board cites to Stoyanov's testimony that employees complained daily about money, leads, and management. (Ans. Br. at 29; ER 204, ER 206.) The Board also cites the ALJ's findings that complaints were made. (*Id.*) (citing ER 8, ER 12)). At best, this evidence shows that complaints were made, not that Natural Life harbored any animus towards the employees making them or that the employees' terminations were due to this

animus.

B. The “Direct” Evidence the Board Points to is Insufficient

There is no substantial evidence that Natural Life disciplined or terminated any of the employees because of their complaints about the terms and conditions of their employment. There are, in fact, only three items of evidence the Board points to: (a) Strain’s testimony that Guggia told her that Natural Life knew “people [had] been complaining,” (ER 517); (b) Guggia’s statement of opinion that she did not want to work with “people who want to sue” (ER 580); and (c) her statement about not wanting to work with people who are “gonna constantly nag.”¹ (*Id.*) These vague statements are insufficient, even against a backdrop of employee complaints because they fail to demonstrate Natural Life’s animus or that animus was the reason why Natural Life terminated its sales staff. *See Wright Line*, 251 N.L.R.B. 1083 (1980) (the General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, *the employer harbored animus, and the employer took action because of such animus*); *see also Triangle Elec. Co.*, 335 N.L.R.B. 1037 (2001). Reaching the conclusion the Board urges requires

¹ The Board frames Guggia’s statement as referring to people “‘who are gonna constantly nag’ *about those issues*” (Ans. Br. at 33) (emphasis added), but the Board exaggerates the record. Guggia’s statement did not connect “nagging” to any specific issue. (*See* ER 580.)

inference upon inference and leaps of logic that simply cannot be reconciled with the record evidence.

C. Guggia's Comments Were Unauthorized and Her Personal Animus Cannot be Imputed to Natural Life

Guggia's statements are only chargeable to Natural Life if she was either a supervisor or an agent of Natural Life. *See Idaho Falls Consol. Hosps., Inc. v. N.L.R.B.*, 731 F.2d 1384, 1387 (9th Cir. 1984). The Board does not contest Natural Life's argument that Guggia was not a *supervisor* at the time of the July 27 discharge. Accordingly, the Board argues that Guggia was Natural Life's *agent* and that because she allegedly had actual and apparent authority, her off script statements are binding on Natural Life.

But that is not always the case. When an agent exceeds his or her authority, the principal is not bound by the agent's actions. *See, e.g., The Sally Magee*, 740 U.S. 451, 457 (1865) ("When an agent exceeds his authority, the principal is not bound unless he ratifies."); *Duree v. Wabash R. Co.*, 241 F. 454, 458 (8th Cir. 1917) ("Authority, either express or implied, to do an act, is always the test of the master's liability, and when an employe [sic] exceeds that authority, and does an act resulting in injury to another, he is not in the doing of that act the agent of his employer."). With respect to Guggia's authority, Natural Life does not contest that Stoyanov vested Guggia with actual authority to communicate the termination of the sales staff to the sales staff. However, to the extent the Board contends that

Guggia had authority to explain the company's reasons for the decision, Natural Life disagrees.

In *Idaho Falls*, this Court stated that, “[a]n employer may be held responsible for anyone acting as its agent if employees could reasonably believe that the agent was speaking for the employer.” 731 F.2d at 1387. In this case, because Finley had told the employees that Guggia was in charge for the day, Natural Life's employees could reasonably believe that Guggia was speaking for Natural Life when she announced the termination of the sales staff. However, Natural Life's employees could not reasonably believe that Guggia was speaking for Natural Life when she offered her own personal opinions about the circumstances surrounding the terminations including the reasons why the sales staff was being terminated.

Guggia's statements at the July 27 meeting clearly show that she was expressing her own *personal opinion* about what needed to happen at Natural Life:

[Linda Guggia] Yeah, I will be back on Monday from my cruise. Um, again, I mean this is not, this is not, this is what I, **this is not anything that I would ever want to do or anything**. But since he won't be back here either, then I . . . we have to be the ones to say something, because, that's it, you know, I mean it's sad, it's messed up. But it doesn't mean that you don't have a future with the company. **It just means that we just need to close the doors and we need to just not do this for now**. It's gonna, you just have to.

[Shawn Hensley] It needs to be restructured.

[Linda Guggia] It needs to be restructured. **Everything needs to be**

done in the favor of the agents. Everything has to be redone where everybody's happy again. He only did everything that he did because John pushed that man over the edge. I talked to Kony, and he was like, "Make sure that they all have a home to go to." And I was like, okay, I can offer up my services to them if they want me to help them to work in other places, I could do that. But they're their own people. **I don't feel that it's right.** And you know what he told me? He goes, he goes, "You know what I'm trying to say." **To me,** I knew what he was saying. We just need to fix, we need to fix this place, that's all. And he's right. **I don't want** to work like this anymore either. We can't take it. Can you take it? Can you work like this?

[Linda Guggia] **I want** the best team. **I want** the best people. **I don't want** people who want to sue. **I don't want** people who are gonna constantly nag. **I wanna** work with a team of people and give them a base. **I wanna** work with a team of people that will appreciate the Openers in Cebu. **I wanna** work with people that we're giving spiffs and they are happy and are smiling again. **That's what I want.** So if you ask what **I want**, I'm telling you, **that's what I want.** And if you ever want to be on my team again **one day wherever I am or whatever I'm doing,** you know, I would love to have you if you fit into that criteria. If you're a negative person that's not willing to grow, or learn, or deal with the hard times, **I don't want** to work with you. You know. But I love everybody here, and it was my pleasure working with all of you. And I know I'm rough around the edges, but we really do love you guys. It's just an unfair situation.

(ER 579-580) (emphases added). Guggia speaks about what she *herself* "wants" and doesn't "want." Her language shows that she was speaking on behalf of *herself*, making aspirational, hypothetical, statements, and discussing what she wanted for herself in the future. She states, "[a]nd if you ever want to be on my team again **one day wherever I am or whatever I'm doing,** you know, I would love to have you if you fit into that criteria." (*Id.*) (emphasis added). A reasonable employee would not interpret these statements of personal opinion as expressing

the reasons for Natural Life's decision to terminate the sales staff.

In *Idaho Falls*, two competing unions sought to represent employees of Idaho Falls Consolidated Hospitals. 731 F.2d at 1385. Thirty employees and several doctors attended a meeting. *Id.* at 1387. The doctors were all members of the employer's staff. *Id.* One doctor opened the meeting by explaining that he and the other doctors did not represent the medical staff but were there to express their personal opinions on the unions' organizing efforts. *Id.* One doctor said the employees should form their own union. *Id.* Several doctors indicated that joining a union would give the employees the power to shut down the hospital and that the doctors would consider leaving the hospital if that happened. *Id.* The Board found that the doctors were managerial employees who committed unfair labor practices by threatening to close the hospital and by soliciting the employees to form an independent union. *Id.* This Court noted that, "[s]tatements prefaced with remarks that they represent personal opinion are not conclusive of whether the statements are made on behalf of management, *id.* (citation omitted), however, this Court refused to attribute the doctors' statements to their employer, stating the following:

We find no substantial evidence in the record to support the Board's findings that the doctors' statements were made on behalf of the employer. We agree with the ALJ that the evidence "strongly supports" the conclusion that the physicians were expressing their personal preferences rather than the administration's. The employees did not have reasonable cause to believe otherwise.

Id.

This case is virtually identical to *Idaho Falls*. 731 F.2d at 1387. While the Board tries to distinguish *Idaho Falls* by arguing that Guggia did not explicitly state that she was expressing her personal opinion like the doctors in *Idaho Falls*, (Ans. Br. at 39 n. 12), the language Guggia used in her July 27 statement about what she wanted and did not want speaks for itself, and clearly indicated that she was stating her personal opinions about the circumstances surrounding the terminations and the reasons for them.

The Board also tries to show that Guggia was expressly authorized by Stoyanov to explain to Natural Life employees the reasons *why* the sales staff was being terminated. (Ans. Br. at 37-38.) To support this argument, the Board cites a single question asked to Stoyanov, and his two word response:

Q. And did Linda represent you on July 27th as far as why the room was closing?

A. Yes. Yes.

(ER 294.)

This question, however, is far too vague to support the Board's far-reaching conclusion that Stoyanov authorized Guggia to provide her personal opinions about why the sales staff was being terminated or to go entirely off script and imply that the sales staff was being fired for complaining. This single question and this two word answer is the only evidence the Board offers for the proposition

Stoyanov granted actual authority to Guggia to explain the reasons for the termination. This vague question and Stoyanov's two word answer, however, can hardly be considered "substantial evidence" supporting the Board's conclusion.

Accordingly, except with respect to her statements conveying the terminations, and except for her statements where she is directly repeating what Stoyanov said, (*e.g.*, about making sure the employees could all find other employment), Board should not attribute Guggia's personal statements of opinion about why the sales staff was being terminated, to Natural Life.

III. THE ALJ'S FINDING OF AN ADVERSE INFERENCE BASED ON THE MISSING WITNESS RULE WAS NOT HARMLESS ERROR

The Board argues that Natural Life "fails to explain how the evidentiary ruling was prejudicial." (Ans. Br. at 61.) That is false. Natural Life explained in its opening brief that the Board's finding of harmless error was based upon its *erroneous* conclusions that: (a) Guggia spoke for the company when she stated her personal beliefs about why the office was closing, and that Natural Life had stipulated that protected concerted activity had occurred when, in fact, Guggia's comments were unauthorized and Natural Life had not so stipulated. (Opening Br. at 44.) Without these *erroneous* conclusions supporting the Board's decision, the only support for the decision comes from the adverse inference. Therefore, the Board's error was prejudicial as it resulted in a decision against Natural Life in the absence of substantial evidence. The Court should hold that this error was not

harmless.

CONCLUSION

The Board's decision should not be enforced and should instead be reversed.

Dated: June 5, 2020

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Jonathan W. Fountain

Robert L. Rosenthal

Jennifer R. Lloyd

Jonathan W. Fountain

Attorneys for Respondent Natural Life, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Ninth circuit Rule 32-1, I hereby certify that the attached Respondent's Reply Brief is proportionally spaced, has a typeface of 14 point in Times New Roman font, and contains 6,347 words as counted by Microsoft Word – Office 16 Word Processing Program used to generate the Brief. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains no more than 6,500 words, excluding the parts of the Brief exempted by Fed. R. App. P 32(a)(7)(B)(iii).

Dated: June 5, 2020

By: /s/ Jonathan W. Fountain
Robert L. Rosenthal
Jennifer R. Lloyd
Jonathan W. Fountain

Attorneys for Respondent Natural Life, Inc.

