

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

**GRAND CANYON EDUCATION, INC.,
d/b/a GRAND CANYON UNIVERSITY**

and

**Cases 28-CA-22938
28-CA-23239**

EDMOND BARDWELL, an Individual

and

Case 28-CA-23035

JOHN YOUNG, III, an Individual

and

Case 28-CA-23038

SHELLY CAMPBELL, an Individual

and

Case 28-CA-23336

GLORIA JOHNSON, an Individual

**ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND BRIEF IN SUPPORT**

Chris J. Doyle
Counsel for the Acting General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2198
Facsimile (602)-640-2178
Email: christopher.doyle@nlrb.gov

**ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Acting General Counsel (the General Counsel) excepts to the Decision of Administrative Law Judge Gregory Z. Meyerson (the ALJ) [JD(SF) 42-11], issued on October 21, 2011(the ALJD), as follows:

1. The ALJ's failure to find that Grand Canyon Education, Inc. d/b/a Grand Canyon University (Respondent) violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals because they engaged in concerted activities and threatening its employees by informing them that their concerted activities were disrespectful to the Respondent. (ALJD 34:34-40; 35:35-36) In support of this exception, General Counsel relies on the ALJ's findings of fact (ALJD 33:50-51; 34:10; 34:14; 34:25; 34:12-13; 36:24-26; 34:35-36; 36:44-53; 37:2-4) and the testimony of Edmond Bardwell (Bardwell), Gloria Johnson (Johnson) and Chanelle Ison (Ison). (Tr. 279:9-16; 890:10-19; 280:16-23; 891:14-22; 897:14-898:14; 899:12-900:22).

2. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their concerted activities. (ALJD 35:33-36) In support of this exception, General Counsel relies upon the on the ALJ's findings of fact (ALJD 34:48-35:5; 35:7-15; 35:16-17; 35:51-36:3) and the testimony of Johnson. (Tr. 761:19-22; 763:5-9; 894:13-16; 762:4-25)

3. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by discharging its employee Shelley Campbell (Campbell) because of her concerted activities. (ALJD 43:13-18) In support of this exception, General Counsel relies upon the on the ALJ's

findings of fact (ALJD 38:48-53; 38:53-39:3; 40:25-35; 39:37-39; 41:14-18; 41:6-7; 29:5-8; 41:9-12) and the testimony of Campbell. (Tr. 658:9-659:13; 667:16-669:2; 669:23-670:25)

4. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by discharging its employee Campbell because she violated Respondent's Electronic Communications Policy. (ALJD 43:13-20) In support of this exception, General Counsel relies upon the on the ALJ's findings of fact (ALJD 8:33-36; 29:5-8; 41:9-12; 41:6-7) and the testimony of Campbell. (Tr. 667:16-669:2; 669:23-670:25)

5. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by discharging its employee Bardwell because of his concerted activities. (ALJD 50:51-51:4) In support of this exception, General Counsel relies upon the on the ALJ's findings (ALJD 46:12-14; 46:14-18; 46:18-20; 22:44-46; 20:44-21:24) and the testimony of Bardwell and Sarah Boeder (Boeder). (Tr. 882:12-883:10; 916: 6-18; 916:21-920:10; 586:24-587:7; 501:8-19; 505:12-506:12; 584:7-590:1; 922:4-924:23; 927:10-928:22; 882:12-883:10; 1022:22-1023:25; 1024:1-1025:18)

6. The ALJ's failure to find that Respondent violated Section 8(a)(1) and (4) of the Act by discharging its employee Bardwell because he filed an unfair labor practice charge and gave testimony to the National Labor Relations Board (the Board) in Case 28-CA-22938. (ALJD 51:4-7) In support of this exception, General Counsel relies upon the on the ALJ's findings of fact (ALJD 44:18-45:4) and the testimony of Bardwell. (Tr. 901:20-902:23; 907:25-911:23; 912:19-913:18)

BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S EXCEPTIONS

I. INTRODUCTION

The ALJ had little difficulty in finding that Respondent's employees Bardwell, Campbell, and Johnson engaged in concerted activities during their employment as Online Enrollment Counselors. As the record shows, these three employees frequently discussed among themselves and with other employees on their Grad Team their concerns and complaints about the quality of sales leads, the lack of sufficient degree programs in which to enroll students, the unreasonable quotas set by Respondent, and other terms and conditions of employment. Though the ALJ also had little difficulty in finding that Respondent had knowledge of their concerted activities, that their concerted activities were a motivating factor in their terminations, and that Respondent violated the Act by discharging Johnson, the ALJ failed to find that Respondent's discharge of Bardwell and Campbell also violated the Act. This is despite the fact that the ALJ also found that Respondent repeatedly violated the Act in its attempt to silence employees' concerted activities. Specifically, the ALJ properly found that Respondent promulgated overly-broad and discriminatory rules prohibiting its employees from discussing their terms and conditions of employment; interrogated its employees about their concerted activities; threatened its employees with discharge and other unspecified reprisals because of their concerted activities; and disparately enforced its e-mail policy in response to employees' use of Respondent's e-mail system to engage in concerted activities. Despite these significant findings, it is striking that the ALJ nonetheless failed to find that Campbell and Bardwell's terminations violated Section 8(a)(1) of the Act, that Bardwell's discharge also violated Section 8(a)(4) of the Act, and other independent Section 8(a)(1) violations, especially where his own findings of fact would compel such conclusions. The

Board should correct these oversights, as described more fully below, and enter an appropriate order.

II. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING ITS EMPLOYEES WITH UNSPECIFIED REPRISALS AND BY INFORMING THEM THAT THEIR CONCERTED ACTIVITIES WERE DISRESPECTFUL

The Order Further Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing (the Complaint) (GCX 1(ad)) alleges that, in or about late-April 2010 and again in or about July 2010, Respondent, by Ison, threatened its employees with unspecified reprisals because they engaged in concerted activities and threatened its employees by informing them that their concerted activities were disrespectful to the Respondent. (Complaint paragraphs 4(h)(1) and (2); 4(j)(1) and (2)) Though, as discussed below, the evidence establishes such violations, the ALJ failed to so find.

In terms of the facts surrounding the April 2010 threats, the ALJ found that during Assistant Vice President Ison's meeting at that time with employees on the Grad Team, Bardwell, Johnson, and other employees voiced their frustrations over the "perennial issue" of the poor quality of available leads. (ALJD 33:50-51) Bardwell proposed the idea that Online Enrollment Counselors be allowed to conduct a "peer review" of their managers, and subsequently submitted such a sample questionnaire to Ison. (ALJD 33:53-34:3)

When Ison later met with the Grad Team, in late-April or early-May, she informed Bardwell and the others that Respondent had rejected the idea of such a peer review. The ALJ found that Bardwell, during this "open forum" voiced his displeasure over that decision (including getting "a little loud and insistent") because Bardwell believed such a review would "help improve morale" in the workplace. (ALJD 34:10; 34:14; 34:25) After Ison ended the meeting, she confronted Bardwell and said he had spoken to her in a

“disrespectful” way. (ALJD 34:12-13) Bardwell told her that his comments were not meant to be disrespectful and that he thought that the meeting was an “open forum,” in any event, at which point their conversation ended. (Tr. 891:14-22)

As to the July 2010 allegations, the ALJ found that when Ison and Director of Enrollment Nicolette Boessling (Boessling) met with the Bardwell, Johnson, and the other Grad Team members at that time, Ison informed the employees that their work quotas would not be changed, nor would the Grad Team get additional degree programs to supplement the existing criminal justice and Christian studies programs. (ALJD 36:14-15) Adding insult to injury, Ison also informed the Grad Team of a new scheduling policy under which one or two team members were to cover late-night shift hours every night. Ison flatly rejected Johnson’s suggestion that team members split up the night shifts so that no team member would need to work the night shift for more than 2 or 3 days. (ALJD 36:16-22) As the ALJ found, at that point the discussion became “somewhat heated,” with Bardwell voicing his displeasure (being “loud and inappropriate,” according to the ALJ) at Ison’s adamant refusal to allow employees to split the schedules. (ALJD 36:24-26; 34:35-36)

The next day, Bardwell met privately with Ison in her office to resume their discussion about splitting up schedules, and informed Ison that he had only good intentions when he spoke at the meeting. Ison again told Bardwell that he acted disrespectfully, and also raised Bardwell’s behavior at the meeting which had been conducted in late-April or early-May 2010 meeting. (ALJD 36:44-53) Ison ended the discussion by observing that the Grad Team was “the most opinionated team.” (ALJD 37:2-4)

Despite the evidence to the contrary, the ALJ found that Ison’s comments to Bardwell at both the late April/early May meeting, and at the July meeting, did not violate the Act.

Regarding the former, the ALJ ruled there was “no reason to make a ‘Federal case’” over Ison’s comment toward Bardwell describing his actions as having been “disrespectful.” The ALJ noted that after Ison told Bardwell that his actions were “disrespectful,” she ended the conversation and that her conduct did not amount to either a threat to take adverse action against him. (ALJD 34:34-40)

As to the July 2010 meeting, the ALJ focused on three facts. First, Bardwell, on his own, sought out Ison to explain his actions and demeanor. (ALJD 36:44-47) Second, Ison testified she was not going to take adverse employment action against Bardwell for his conduct. (ALJD 38:9-13) Third, there was no credible evidence that Ison harbored any animosity towards the Grad Team because its members were vocal and active in registering their complaints. (ALJD 37:42-43) Moreover, the ALJ did not believe that Ison’s statements about Bardwell being disrespectful or that the Grad Team was opinionated were intended to be a reflection on Bardwell’s or other team members’ concerted activities. (ALJD 37:31-33)

Thus, the ALJ incorrectly incorporated and relied upon a subjective test in determining that Respondent did not violate Section 8(a)(1). The ALJ focused more on the intent and actions of Bardwell and Ison instead of applying the applicable objective standard used by the Board to determine whether a violation under Section 8(a)(1) occurred, i.e., whether, in light of the totality of the circumstances, Respondent’s statements reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (8th Cir. 2001). Given the fact that adjectives like “disrespectful” and “opinionated” are commonly understood as code words conveying displeasure with employees’ protected activities, an application of the objective standard to the record facts warrants a finding that Ison’s comments to Bardwell violated the

Act. “It is well settled that statements equating union activity with disloyalty to the employer constitute coercion in violation of Section 8(a)(1) of the Act ... as well as an implicit threat of repercussions for union loyalty, as opposed to company loyalty.” *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996); *Hialeah Hospital*, 343 NLRB 391, 391 (2004). See also *Rock Valley Trucking Co.*, 350 NLRB 69, 70, fn. 6 (2007) (“It is well settled that an employer’s reference to an employee’s ‘attitude’ can be a disguised reference to the employee’s protected concerted activity.”); *Boddy Construction Co.*, 338 NLRB 1083 (2003) (“[E]mployer complaints about ‘bad attitude’ are often euphemisms for prounion sentiments, particularly where there is no alternative explanation for the perceived ‘attitude’ problem.”) (citing *James Julian, Inc. of Delaware*, 325 NLRB 1109 (1998)).

Accordingly, it is respectfully submitted that the Board should find that Respondent violated Section 8(a)(1) by threatening its employees with unspecified reprisals because they engaged in concerted activities and threatened its employees by informing them that their concerted activities were disrespectful.

III. RESPONDENT VIOLATED SECTION 8(a)(1) BY INTERROGATING ITS EMPLOYEES

The Complaint alleged that in or about late-May or early-June 2010, Respondent, by Rhonda Pigati (Pigati), interrogated its employees about their concerted activities. (GCX 1(ad)) More specifically, around the second week of June 2010, Pigati, Respondent’s Human Resources Manager, interviewed Grad Team employees to get their evaluation of their immediate supervisor, Ellen Rosa (Rosa). The ALJ found that Pigati, prior to questioning each employee, did not inform them that their participation was voluntary or that there would be no reprisals for refusing to cooperate. (ALJD 34:48-35:5) When Pigati interviewed Johnson -- alone in Pigati’s office -- Johnson stated that her co-workers had come to her and

complained about Rosa as a supervisor. Pigati asked for the names of those co-employees, and as Johnson named names, Pigati typed Johnson's answers into her computer. (ALJD 35:7-15) Pigati ended the interview by telling Johnson she would be contacting Johnson's co-workers and to not to talk to anybody else on the Grad Team. (ALJD 35:16-17)

The ALJ readily found that Pigati violated the Act by telling Johnson not to discuss with other employees anything that was said during their interview. (ALJD 35:51-36:3) Notwithstanding that, the ALJ concluded that Pigati's questioning Johnson and asking her to identify other employees who had concertedly discussed Rosa did not amount to an interrogation. (ALJD 35:33-36) The ALJ relied on the fact that Johnson did not indicate that she felt uneasy, frightened, or apprehensive in meeting with Pigati and answering her questions, or in naming employees who complained to her about supervisor Rosa. (ALJD 35:18-19; 35:28-29)

Again, the ALJ erroneously analyzed the particular employees' subjective responses in finding no violation. It is well settled that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test and not a subjective test having to do with whether the employee in question was actually intimidated. *Multi-Ad Services, supra*. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), *aff'd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), *enfd. in part* 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include (1) the background of the parties' relationship; (2) the nature of the information sought; (3) the identity of the

questioner; and (4) the place and method of interrogation; and (5) the truthfulness of the reply. Westwood Health Care Center, 330 NLRB 935 (2000), applying the “Bourne factors.” *Bourne v. NLRB*, 332 F.2d 47 (3d Cir. 1964).

An application of the *Bourne* factors establishes that Respondent’s inquiry was, in fact, a violation of Section 8(a)(1) of the Act. The record shows that by its questioning, Respondent specifically sought the names of employees who engaged in protected activities; the questioner was a high-ranking supervisor of Respondent; that Johnson was alone with Pigati when the questioning took place, and occurred in a coercive environment (i.e., the ALJ found that during the same meeting, Respondent violated the Act by Pigati’s directive to not discuss with anything that was discussed during the meeting with other employees.

Accordingly, it is respectfully submitted that the record establishes that Respondent unlawfully interrogated its employees about their concerted activities, as alleged.

IV. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING CAMPBELL

As noted above, the ALJ concluded that Campbell (as well as Bardwell and Johnson) engaged in concerted activities during their employment. Specifically, they “frequently discussed among themselves and with other members of the team their concerns and complaints about the quality of leads they were receiving, about the lack of sufficient degree programs in which to enroll students, about unreasonable quotas, and other subjects.”

(ALJD 38:48-53) The ALJ further found that these three Grad Team members brought such complaints directly to the attention of Respondent’s managers. (ALJD 38:53-39:3)

Moreover, the ALJ specifically found that Respondent’s Senior Vice-President of Operations Sarah Boeder (Boeder) -- the individual who made the final decision to terminate Campbell (and Bardwell) -- had knowledge of the employees’ concerted activities. (ALJD 40:25-35)

The record fully supports the ALJ conclusion that the General Counsel established a *prima facie* case that Campbell's concerted activities was a motivating factor in Respondent's decision to terminate her. (ALJD 39:37-39)

One concerted activity in particular that the ALJ found to be a "motivating factor" was Campbell's January 20, 2010, e-mail to her co-workers (and a student) criticizing Respondent's policy on the transfer of leads to international students. (ALJD 41:14-18) In fact, this e-mail listed in Campbell's final Termination Request form as a basis for her termination (GCX 7), but Respondent also specifically raised this e-mail to Campbell during her termination meeting on February 23, 2010. Campbell's immediate supervisor, Rosa, told her that the e-mail violated Respondent's Electronic Communications Policy because "[counselors are] not allowed to ever send out non-business related emails." (ALJD 41:6-7) The ALJ found that Respondent's practice did not reflect such a rule, as employees frequently used Respondent's e-mail system for personal communication, and Respondent "was well aware" of such practice. (ALJD 41:7-9) More importantly to an analysis of Campbell's discharge, the ALJ found that Respondent, by Rosa's statement to Campbell during the February 23 termination meeting violated Section 8(a)(1), e.g., that such a statement was an "unlawful disparate application and enforcement of the Electronic Communications Policy" because Campbell's use of the e-mail system to comment to other employees about issues related to leads was protected and concerted. (ALJD 28:41-29:8; 41:9-12)

Despite these findings, the ALJ concluded that Respondent rebutted the General Counsel's *prima facie* case and would have terminated Campbell even in the absence of her concerted activities. (ALJD 43:13-18). In so doing, the ALJ concluded that Campbell's termination was based on her "pattern of conduct," most notably two violations that were

also listed in her Termination Request form (related to a call to a prospective student and assistance given another student).¹ (ALJD 43:2-5)

In adopting Respondent's proffered defense, the ALJ failed to take into sufficient account the fact that Respondent, in December 2009 -- when the call with the prospective student occurred -- specifically elected not to discharge Campbell. Respondent did not discharge Campbell at the time because of Boeder's concern that the conduct attributed to Campbell was widespread among other employees at Respondent.² (ALJD 11:36-40; 12:5-8) Despite this fact, the ALJ found that Respondent met its *Wright Line* burden, notwithstanding Respondent's reliance on this incident as a basis for discharge. By allowing Respondent to resurrect this incident, which Respondent understood involved conduct that was widespread among employees who were not shown to have been disciplined and which Respondent had already rejected as a basis for discharge, the ALJ gives credence to Respondent's dredging of Campbell's personnel file in search of pretextual bases to mask the retaliatory basis of her discharge.

The second incident attributed to Campbell and asserted by Respondent as a basis for her discharge occurred around February 9, 2010, when Campbell sent to a student she enrolled an e-mail that gave the student instructions for accessing a weekly homework assignment. The student contacted Campbell, stating she was unable to log on to her online account, which was necessary to get the weekly class assignments. Campbell realized that the

¹ The Termination Form also mentioned Respondent counseling Campbell in July and August 2009 for sending two e-mails that Respondent deemed offensive and constituted inappropriate use of Respondent's e-mail system.

² As to the December 2009 phone call, Respondent did not discharge Campbell, but elected merely to issue her an Employee Counseling Statement. That document itself contained confidentiality language found by the ALJ to violate the Act. Moreover, both Boeder and Helen Schnell, Campbell's immediate supervisor at the time, reaffirmed this confidentiality clause to Campbell when she was handed the discipline in December 2009. The ALJ found both the confidentiality language and Boeder's and Schnell's reaffirmation of the confidentiality provision as violations of Section 8(a)(1). (ALJD 30:11-14; 30:42-45)

student could suffer significant repercussions if she was unable to log into the system and into her class, including potentially being dropped from the class. (ALJD 12:30-37)

The ALJ's reasoning that these two violations -- and not Campbell's January 20 protected and concerted e-mail to employees criticizing Respondent's international lead policy -- were the real reasons for Campbell's termination cannot be reconciled with the ALJ's findings of fact. The ALJ found the e-mail was a "motivating factor" in Campbell's discharge, and that Respondent violated the Act by disparately enforcing and reaffirming its e-mail policy because Campbell used the e-mail system to engage in concerted activities. It is important to note that in finding that Respondent met its *Wright Line* burden, the ALJ elected to discard or simply ignore some of Respondent's stated reasons for discharge set forth in Campbell's termination papers -- including conduct the ALJ specifically found to be protected and concerted -- and chose instead to cherry-pick unprotected conduct emphasized by Respondent's witnesses. The ALJD points to no sufficient basis for doing so. It is only through tortured analytical gymnastics that the conclusions set forth in the ALJD concerning the discharge of Campbell may be reached.

Moreover, Respondent failed to show that the type of conduct engaged in by Campbell upon with the ALJ's findings are based has been the basis for prior discharges or serious discipline. Against this backdrop, the disparate treatment of Campbell is striking.

In addition, though Respondent cobbled together professed bases for her discharge, Campbell's alleged "pattern of conduct" (over a seven-month period) proffered by Respondent as the purported bases for her discharge pales in comparisons to other cases where the Board has found that a respondent rebutted the General Counsel's *prima facie* case.

Stated differently, the scale laden with General Counsel's *prima facie* showing should have but budged as a result of the accumulated weight of Respondent's purported bases for discharge. For example, Campbell's purportedly offending behavior did not consist of creating hostile working environment, making sexual comments in the workplace, or using marijuana in the workplace, all of which occurred in the weeks leading up to the alleged discriminatee's discharge in *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 1, 2 (August 26, 2011) To the contrary, Campbell's infractions, as stated in the Termination Form, consisted of three e-mails (including the January 20 e-mail), and the two incidents addressed above that the ALJ concludes were the driving force behind Campbell's termination.

Accordingly, the record provides a solid and persuasive basis upon which the Board should find that Respondent discharged Campbell because of her concerted activities.

V. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING CAMPBELL BECAUSE CAMPBELL VIOLATED RESPONDENT'S ELECTRONIC COMMUNICATIONS POLICY.

Since November 1, 2008, Respondent has maintained its Electronic Communications Policy. This policy prohibited employees from sending e-mails that were not "for the purposes of University business." (ALJD 8:20; GCX 5) The ALJ found that, despite this stated policy, Respondent permitted its employees to send and receive e-mails that were non-business related (including humorous e-mails and those of a personal nature), as well as business related. (ALJD 8:33-36)

The ALJ further found that Respondent violated the Act by disparately enforcing and reaffirming its Electronic Communications Policy, as it pertained to Campbell, because Campbell used the e-mail system to engage in concerted activities. (ALJD 29:5-8; 41:9-12)

Despite the foregoing, the ALJ nonetheless concluded that Respondent lawfully terminated Campbell, and dismissed paragraph 4(p) of the Complaint (which alleges that Respondent terminated Campbell for violating the Electronic Communications Policy). (ALJD 43:13-20)

The ALJ's conclusion is incongruous to his findings that Respondent disparately enforced its e-mail policy because Campbell used the e-mail system to engage in concerted activities. In *The Guard Publishing Company d/b/a The Register Guard*, 351 NLRB 1110 (2007), affirmed in part, reversed in part, remanded in part, 571 F.3d 53 (DC Cir. 2009), the Board held that an employer "may lawfully bar employees' non-work-related use of its e-mail system, unless the [employer] acts in a manner that discriminates against Section 7 activity." 351 NLRB at 1116. The Board further held that "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful." *Register Guard*, 351 NLRB at 1118, fn. 18. At Campbell's termination meeting, supervisor Rosa told her she was being terminated for sending the January 20th e-mail, and that the e-mail violated Respondent's Electronic Communications Policy because "[counselors are] not allowed to ever send out non-business related emails." (ALJD 41:6-7) As a result, it is reasonable to conclude that Respondent's motive for terminating Campbell was because she utilized the e-mail system to engage in concerted activities.

Accordingly, the Board should find and conclude that Respondent violated Section 8(a)(1) by discharging Campbell because she violated the Electronic Communications Policy.

VI. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING BARDWELL BECAUSE OF HIS PROTECTED CONDUCT

The ALJ found that the General Counsel established a *prima facie* case that Bardwell's concerted activities were a motivating factor in Respondent's decision to fire him.

(ALJD 46:12-14) The ALJ found that Bardwell engaged in significant concerted activity, complaining over an extended period of time to Campbell and Johnson and to others in Respondent's management regarding poor quality leads, too few degree programs in which to enroll students, unreasonable quotas, and other matters of concern to the Grad Team employees. (ALJD 46:14-18) The ALJ further found that some of Bardwell's "most vocal and heated discussions with management over issues of concern to the Grad Team occurred reasonably close in time to the date of his termination," (ALJD 46:18-20), specifically noting Bardwell's April and July 2010 meetings with Ison. (ALJD 43:44-44:5; 44:10-38) Moreover, the ALJ, citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004), noted that the Board "has frequently considered close proximity in time between concerted activity and termination to constitute sufficient evidence of a nexus between those events." (ALJD 46:20-22)

Despite these findings, the ALJ concluded that Respondent would have terminated Bardwell even in the absence of his concerted activities. (ALJD 50:51-51:4) The ALJ found that Respondent terminated Bardwell because of his interactions with Gary Dean, a pastor from Texas (and a student of Respondent) concerning the creation of a satellite campus in Dean's church in Texarkana, Texas. Specifically, the ALJ found that Respondent discharged Bardwell because: (1) he failed to follow procedures used to establish a satellite campus, and (2) he made numerous misstatements to Dean, including by telling Dean that Bardwell had authority to set up a satellite campus and that doing so would be no problem once Dean enrolled as a student. (ALJD 50:7-12) Despite Respondent's proffer of these reasons, the record fails to establish that Bardwell committed either infraction.

Regarding Respondent's process in establishing a satellite campus, the evidence demonstrated that Bardwell complied with Respondent's established procedure. Boeder testified that Respondent had a rigorous, multi-step standard operating procedure for creating a satellite campus. First, Online Enrollment Counselors, like Bardwell, would engage in fact-finding missions regarding the viability of a satellite campus.³ Based on their fact-finding, counselors would notify Respondent's academic compliance team about the possibility of a satellite campus in a particular city.

The record shows that in keeping with Respondent's policies, Bardwell engaged in a fact-finding mission. Bardwell asked Dean for the names of individuals who would enroll as students and attend class at any potential satellite campus. Only after Dean provided the names would Bardwell present to Respondent's executive team (which included Chief Executive Officer Brian Mueller and Ison) the idea of a establishing a satellite campus in Dean's church. (Tr. 922:4-924:23) The record shows, however, that because Dean never furnished Bardwell with the names of potential students, Bardwell did not advance his fact finding mission to the next level.⁴

Regarding Bardwell's alleged misstatements to Dean, the ALJ found that Bardwell and Dean had communicated via e-mail and had multiple telephone conversations (on Bardwell's work phone and personal cell phone) from February 25 through August 30, 2010.

³ Boeder testified at trial that "many times" Online Enrollment Counselors have engaged in fact-finding missions concerning the creation of a satellite campus. (Tr. 586:24-587:7) Respondent presented no evidence that any of those counselors were disciplined in any manner.

⁴ According to Boeder, the second step is that Respondent's academic compliance team would investigate the viability of a satellite campus and submit its recommendation to Respondent's business development team. If the business development team determined that a satellite campus was not viable, all investigations regarding the satellite campus ceased. However, if the business development team concluded that a satellite campus was viable, the business development team conducted a site-approval process to determine the location for the satellite campus, which Respondent had to approve. If the site location was approved, the final step involved creating a faculty to teach the curriculum at the satellite campus. (Tr. 584:7-590:1)

(ALJD 18:44-21:24) Even though Bardwell had authority to engage in fact-finding missions,⁵ Bardwell went out of his way to constantly remind Dean that Respondent's executive team had the final authority to approve the plan of placing a satellite campus in Dean's church. (Tr. 927:10-928:22)

Despite the extensive communications between Bardwell and Dean, the ALJ found that Respondent, in its investigation into Bardwell's conduct, "made no effort to contact Dean" and listened to only two tape recorded telephone conversations involving Bardwell and Dean. (ALJD 22:44-46; 20:44-21:24) Respondent fired Bardwell on September 2. (ALJD 22:15-17)

Respondent's slipshod investigation demonstrates that Respondent's intent from the get-go was to produce a basis to mask its true motivation for removing Bardwell, i.e., the fact that Bardwell was a vocal and persistent advocate on behalf of employees' concerted concerns. Respondent's rush to judgment is exemplified by the fact that it failed to listen to six months worth of tape recorded conversations Bardwell had with Gary Dean. Instead, and despite the fact that it had such an abundance of recordings, Respondent listened to two conversations, neither of which demonstrated Bardwell promising Dean *anything*.

Accordingly, it is respectfully submitted that the record fails to support the ALJ's conclusion that Respondent met its *Wright Line* burden. As with Campbell, the record establishes a strong *prima facie* case, yet fails to support the findings and conclusions necessary to carry lift Respondent's heavy burden over the hill. As a result, it is respectfully submitted that the record supports a finding and conclusion that Respondent violated Section 8(a)(1) by discharging Bardwell because he engaged in concerted activities.

⁵ In June 2009, Jacob Mayhew, then the Director of the College of Business, authorized Bardwell to continue speaking to church pastors about possible satellite campuses. (Tr. 882:12-883:10) Bardwell sent contracts to out-of-state churches regarding the establishment of satellite campuses. (GCX 52; Tr. 1022:22-1023:25) The general language found in these standard contracts was provided to Bardwell by Jacob Mayhew. (Tr. 1024:1-1025:18)

VII. RESPONDENT VIOLATED SECTION 8(a)(1) AND (4) OF THE ACT BY DISCHARGING BARDWELL

Because the ALJ found that Respondent would have discharged Bardwell even in the absence of his concerted activities, the ALJ concomitantly dismissed paragraph 4(q) of the Complaint, which alleges that Respondent violated Section 8(a)(4) of the Act by discharging Bardwell. (ALJD 51:4-7) The ALJ found that Bardwell's concerted activities included, among the other conduct described above, filing that charge in Case 28-CA-22938, giving testimony in the charge, and filing two charges with the Equal Employment Opportunity Commission. All three of these charges were pending before these federal agencies at the time Respondent terminated Bardwell (and are still pending). (ALJD 44:18-45:4) Respondent's animosity towards Bardwell for his "disrespectful" behavior (i.e., engaging in concerted activities) was heightened by Bardwell filing charges with federal agencies against Respondent, particularly the Board, which issued the instant Complaint against Respondent.

The Board goes out of its way to protect its processes and those who turn to the Board for help. See *General Services, Inc.*, 229 NLRB 940, 941 (1977) ("if the Board is to perform its statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings." To this end, "[t]he approach to Section 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose." Id. (quoting *NLRB v. Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117, 124 (1972)).

The General Counsel submits that the record fully supports the finding that Bardwell engaged in protected concerted activities and, specifically, conduct protected by Section 8(a)(4) of the Act, and a finding that the General Counsel established a strong *prima facie*

case regarding Bardwell's discharge under both Section 8(a)(1) and (4). As discussed more fully above under Section VI of this brief, it is respectfully submitted that Respondent has failed to meet its significant *Wright Line* burden in either case.

Accordingly, the General Counsel requests that the Board find that Respondent discharged Bardwell because he filed the unfair labor practice charge and gave testimony to the Board in Case 28-CA-22938.

VIII. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) by threatening its employees with unspecified reprisals because they engaged in concerted activities and threatening its employees by informing them that their concerted activities were disrespectful to the Respondent; by interrogating its employees about their concerted activities; discharging its employee Campbell because of her concerted activities and because she violated Respondent's Electronic Communications Policy; and by discharging its employee Bardwell because of his concerted activities, and violated Section 8(a)(1) and (4) by discharging Bardwell because he filed an unfair labor practice charge with and gave testimony to the Board, and that the Board issue an order providing a full and appropriate remedy for such violations.

Dated at Phoenix, Arizona, this 18th day of November 2011.

Respectfully submitted,

/s/ Chris J. Doyle_____

Chris J. Doyle

Counsel for the Acting General Counsel

National Labor Relations Board

Region 28

2600 North Central Avenue, Suite 1800

Phoenix, AZ 85004-3099

Telephone: (602) 640-2198

Facsimile (602)-640-2178

Email: christopher.doyle@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in GRAND CANYON EDUCATION, INC. d/b/a GRAND CANYON UNIVERSITY, Cases 28-CA-22938 et al., was served by E-Gov, E-Filing, and E-Mail, on this 18th day of November 2011, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Jeffrey W. Toppel, Attorney at Law
Rick S. Cohen, Attorney at Law
Jackson Lewis, LLP
2390 East Camelback Road, Suite 305
Phoenix, AZ 85016-3466
E-Mail: toppelj@jacksonlewis.com
cohenr@jacksonlewis.com

Ms. Gloria Johnson
2719 East Corona Avenue
Phoenix, AZ 85040
E-Mail: [gdjohnson8@gmail.com](mailto:gjohnson8@gmail.com)

Mr. Edmond Bardwell
4541 North 77th Drive
Phoenix, AZ 85033
E-Mail: edbardwell2005@aol.com

Ms. Shelly Campbell
21826 North 34th Lane
Phoenix, AZ 85027
E-Mail: shellyc@cox.net

Mr. John Young, III
7635 West Wagoneer Road
Glendale, AZ 85308
E-Mail: jey@cox.net

/s/ Chris J. Doyle
Chris J. Doyle
Counsel for the Acting General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2198
Facsimile (602)-640-2178
Email: christopher.doyle@nlrb.gov