

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

GRAND CANYON UNIVERSITY

and

EDMOND BARDWELL, an Individual

Case 28-CA 22938

and

JOHN YOUNG III, an Individual

Case 28-CA-23035

and

SHELLY CAMPBELL, an Individual

Case 28-CA-23038

and

GLORIA JOHNSON, an Individual

Case 28-CA-23336

RESPONDENT'S ANSWERING BRIEF
TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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On November 18, 2011, the Acting General Counsel filed limited Exceptions to the Decision of the Administrative Law Judge in this case. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (hereinafter referred to as the “NLRB” or the “Board”), Respondent Grand Canyon University (hereafter “GCU” or “Respondent”) files this Answering Brief to the Acting General Counsel’s Exceptions and Brief in Support of Exceptions.

I. INTRODUCTION

GCU is a private, accredited, Christian university located in Phoenix, which was founded in 1949. GCU offers online and campus-based Bachelor's and Master's degree programs through the Ken Blanchard College of Business, College of Education, College of Nursing and Health Sciences, and College of Liberal Arts.

GCU is heavily regulated by the U.S. Department of Education (“DOE”), as well as state agencies. The DOE has implemented numerous rules and regulations to eliminate potential fraud in the enrollment process, with which GCU must strictly comply. [TR 510-11; 534-35] During the relevant time period, Sarah Boeder (“Boeder”), GCU’s Vice President of Operations, was responsible for overseeing GCU’s compliance with the DOE’s regulatory framework. In this role, Boeder developed a comprehensive compliance program, which included regular training of GCU’s enrollment counselors. [TR 470, 534-35] As part of the compliance program, GCU trained its enrollment counselors on what they could and could not do and regularly reminded them of their compliance obligations. Additionally, because certain

compliance violations could have serious consequences for the University, Boeder and GCU treated certain misconduct as zero tolerance violations. [TR 470, 534-35]

On March 11, 2011, the Regional Director issued an Order Further Consolidating Cases and Second Amended Consolidated Complaint (the “Complaint”) alleging GCU violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.¹ The Complaint included claims based on charges filed by three former GCU employees: Shelly Campbell (“Campbell”), Edmond Bardwell (“Bardwell”), Gloria Johnson (“Johnson”). A hearing was held on the Acting General Counsel’s unfair labor practice claims before Administrative Law Judge Meyerson over several days throughout the months of March, April, May and June 2011.

At the hearing, the Acting General Counsel’s case focused primarily on the terminations of Bardwell, Campbell, and Johnson. Significantly, Bardwell, Campbell and Johnson were terminated for completely different reasons at different times over a six month period. The only common thread between them is that the evidence demonstrated overwhelmingly that all three were terminated based solely on legitimate business reasons. Beyond that, although the Acting General Counsel presented evidence that Bardwell, Campbell and Johnson had engaged in activity protected under Section 7, there was no meaningful evidence introduced at the hearing of any causal connection between such activity and any decision to terminate. Nor did the Acting General Counsel present any evidence to establish that Bardwell was terminated for filing his unfair labor practice

¹ Counsel for the AGC amended Paragraphs 4(d), (i), and (k) of the Second Amended Complaint at the Hearing.

charge with the Board. In fact, the Acting General Counsel did not even attempt to establish that the individual who made the decision to terminate each of the three Alleged Discriminatees, Sarah Boeder, had any knowledge of their protected concerted activity. Other than establishing that Campbell, Bardwell and Johnson all raised concerns about various aspects of their employment – like hundreds of other employees in enrollment counselor positions at GCU – there was no evidence introduced at the hearing to establish a causal connection between that activity and the decisions to terminate them.

On the other hand, the record is replete with evidence that several other enrollment counselors also engaged in essentially the same protected concerted activity without suffering any adverse impact whatsoever, in addition to evidence that GCU encouraged (and still encourages) its enrollment counselors to raise any concerns they may have. Indeed, the primary concerted activity cited by ALJ Meyerson took place at numerous meetings scheduled and conducted by Assistant Vice President, Chanelle Ison, for the very purpose of giving the enrollment counselors the opportunity to speak up concerning what practices they wanted GCU to start, stop or continue. Finally, even if Acting General Counsel had met his initial burden (which he did not), the evidence presented left no question that Campbell, Bardwell and Johnson each were discharged for engaging in misconduct, which posed serious compliance risks to GCU.

On October 21, 2011, ALJ Meyerson issued his Decision² in this matter. The Acting General Counsel filed limited Exceptions to the ALJ's Decision on November 18, 2011.

I. THE ALJ PROPERLY CONCLUDED THAT BARDWELL'S TERMINATION DID NOT VIOLATE SECTIONS 8(a)(1) OR 8(a)(4) OF THE ACT.

Although the ALJ found that Respondent's decision to terminate Bardwell was motivated, in part, by Bardwell's protected concerted activity, he properly concluded that the termination did not violate the Act. With this Answering Brief, Respondent only addresses the Acting General Counsel's misplaced argument that the ALJ incorrectly concluded that Respondent rebutted the Acting General Counsel's *prima facie* evidence by producing evidence that it would have discharged Bardwell even if he had not engaged in protected concerted activity.³ As explained below, the ALJ properly concluded that, in light of Bardwell's serious misconduct, the Acting General Counsel failed to prove that the decision to terminate Bardwell was unlawful.

A. The Evidence Fully Supports the ALJ's Conclusion that Respondent Did Not Violate the Act.

In his Brief in support of his Exceptions, the Acting General Counsel argues that despite the substantial evidence offered by Respondent at the hearing that Bardwell

² Citations to pages of the ALJ's Decision are indicated by the reference "(ALJD at p. __)."

³ GCU has filed Cross-Exceptions and has excepted to the ALJ's finding that the Acting General Counsel established even a *prima facie* case under Section 8(a)(1) because the record lacks any evidence to support a finding that Respondent's decision was in anyway motivated by any protected concerted activity.

committed serious compliance violations in connection with his interactions with a prospective student, Reverend Gary Dean, “the record fails to establish that Bardwell committed either infraction.” [Acting General Counsel’s Brief at p. 13] The ALJ specifically considered these same arguments made in the Acting General Counsel’s Post-Hearing Brief and rejected them. The Acting General Counsel does not even argue that a clear preponderance of all the relevant evidence in the record demonstrates that the factual findings concerning Bardwell’s termination are incorrect – the standard that the Acting General Counsel must, but clearly cannot meet.

Moreover, in order to accept the Acting General Counsel’s arguments, the Board would have to reject the many credibility determinations made by the ALJ in his analysis of Bardwell’s termination. However, the Acting General Counsel has not specifically filed exceptions to these credibility determinations. Therefore, those credibility determinations should not be disturbed. The fact is that even if the Acting General Counsel had challenged the ALJ’s credibility determination, under long-established Board policy, the Board will not “overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence” demonstrates that the determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf’d* 188 F.2d 362 (3d Cir. 1951). The Acting General Counsel has not pointed to any evidence – let alone a clear preponderance of the evidence – to demonstrate that any credibility determinations made by ALJ Meyerson were incorrect.

Not surprisingly, based on his analysis of Bardwell’s testimony and other relevant evidence, the ALJ repeatedly found that that Bardwell’s description of events

simply could not be believed. Some examples of the ALJ's specific credibility determinations include:

Bardwell's testimony that he had the authority to speak at churches and before church groups regarding student enrollment at the University *was simply not credible.*

Bardwell was simply incredible when he testified that he retained 'dual authority,' and had never seen nor signed the documents in question.

Bardwell's testimony that 'he made no promises' to Dean regarding the establishment of a satellite campus, and that he never told Dean that he had the authority to establish one *simply does not "ring true."*

It would seem that Bardwell's use of the number 30 was either a figment of his imagination, or his effort to give Dean a figure he assumed that Dean could never reach.

Moreover, as the ALJ clearly recognized both at the hearing and in his Decision, Bardwell's attempt to defend his interactions with the prospective student demonstrated clearly that that he had gotten caught red-handed engaging in serious misconduct. In addressing Bardwell's attempt to explain why he used his cell phone rather than his GCU work phone for some of the conversations with the prospective student, the ALJ noted:

Bardwell appeared rather nervous and uncomfortable when testifying about his conversations with [the prospective student] Dean on his cell phone, and why he used his own personal phone rather than the University's phone system. There is no question in my mind that he did so merely because he did not want his words recorded by the University. His reason was obvious. He did not want the University to learn that he had deceived Dean into registering for classes with a promise, which he had no authority to make, for establishment of a satellite campus at Dean's church...

[ALJD at p. 49:22-28]

While the Acting General Counsel argues that the record shows that Bardwell's efforts to assist a prospective student set up a satellite campus were "in keeping with Respondent's policies," the ALJ specifically considered and rejected this argument. The ALJ specifically found that "[n]ot only did Bardwell lack the authority to make such proposals [regarding the establishment of a satellite campus], but he knew how very difficult it was" and "[t]his is why he needed to avoid having some of his conversations with Dean recorded, and why he used his personal cell phone." [ALJD at p. 49:29-33(emphasis added)] Therefore, the ALJ once again concluded that "Bardwell's protestations to the contrary are simply *not credible*." [ALJD at p. 49:32 (emphasis added)]

The Acting General Counsel does nothing to justify ignoring the significant credibility findings relied on by the ALJ to reach his decision. Rather, the Acting General Counsel merely argues in support of its contention that Bardwell's termination was unlawful, that the Respondent conducted a "slipshod investigation." Once again, there is no evidence in the record to support the Acting General Counsel's argument, while there is overwhelming evidence demonstrating the severity of Bardwell's misconduct, which mandated that he be terminated. The evidence in the record fully supports the ALJ's conclusion that Bardwell was terminated "for cause" and not in violation of Section 8(a)(1) of the Act.

B. The Acting General Counsel Did Not Even Attempt to Offer Any Evidence to Demonstrate that the Decision to Terminate Bardwell Was Because He Filed His Unfair Labor Practice Charge or Provided Testimony to the NLRB.

Because the Acting General Counsel made no effort to produce any evidence to support its Section 8(a)(4) retaliation claim at the hearing, it appeared as though the Acting General Counsel had chosen to abandon this claim. Incredibly, however, the Acting General Counsel filed Exceptions on this claim although he cited no evidence to support the claim in his Post-Hearing Brief. His Brief in support of his Exceptions also cites no evidence on this claim and is based on pure speculation. Significantly, the Acting General Counsel did not even attempt to prove that Sarah Boeder, GCU's Vice President of Operations and the person who made the decision to terminate Bardwell, even knew that Bardwell had had any contact whatsoever with the NLRB.

The ALJ properly concluded that the Respondent did not terminate Bardwell because he filed an unfair labor practice charge or gave testimony to the Board.

II. THE ALJ PROPERLY CONCLUDED THAT CAMPBELL'S TERMINATION DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT.

The ALJ properly found that Respondent did not terminate Campbell in violation of Section 8(a)(1) of the Act.⁴

⁴ In its Cross-Exceptions, GCU has excepted to the ALJ's finding that the Acting General Counsel established even a *prima facie* case under Section 8(a)(1) because the record lacks any evidence to support the ALJ's finding that Respondent's decision was in anyway motivated by any protected concerted activity.

A. The Evidence in the Record Fully Supports the ALJ's Finding that Respondent Terminated Campbell for Cause.

While the Acting General Counsel attacks Respondent's proffered reason for Campbell's termination, this argument fails for many of the same reasons that his arguments on Bardwell fail. Once again, the Acting General Counsel asks the Board to overturn ALJ Meyerson's factual findings and credibility determinations. However, as explained above, the Board may only do so in very limited circumstances in which the ALJ's findings are contrary to the "clear preponderance of all the relevant evidence." The Acting General Counsel does not even attempt to make such a high showing, but rather seeks to rehash many of the arguments asserted in his Post-Hearing Brief.

The Acting General Counsel first argues that the ALJ failed to sufficiently take into account the fact that Respondent chose not to terminate Campbell following a December 2009 incident in which GCU discovered a call she had made to a student that violated numerous compliance guidelines. Contrary to the Acting General Counsel's argument, the ALJ considered and found credible the testimony of Sarah Boeder who explained that she "considered Campbell's misrepresentations of the University's policies and procedures severe enough to warrant termination," but personally made the decision not to terminate her at the time based on Campbell's claim that such violations were widespread. However, as the ALJ recognized in his Decision, following their December 2009 counseling meeting and before Campbell's termination for another policy violation, Boeder instructed Quality Assurance to investigate Campbell's claim that the problems were widespread and concluded that there were not "any calls that were 'even close' to

the egregious call that Campbell had made on December 2.” [ALJD at p. 42:15-25] In light of Boeder’s un rebutted testimony concerning the results of her investigation, the ALJ properly rejected the Acting General Counsel’s argument that Respondent’s decision to terminate Campbell for a combination of the December 2009 and her February 2010 improper assistance of a student was evidence of pretext.

Not surprisingly, the Acting General Counsel also ignores the ALJ’s rejection of Campbell’s testimony concerning the February 2010 incident, which led to her termination. At the hearing, Campbell testified that she sought approval of her supervisor, Ellen Rosa, and two other managers before sending an email to a student with a link and instructions in violation of a GCU policy prohibiting assistance to students. However, following her testimony, each one of the managers she identified testified and denied that she sought their permission. As he did elsewhere in the Decision, the ALJ simply discredited Campbell’s testimony. [ALJD at p. 42:39-43; 42:49-50]

The Acting General Counsel has failed to provide any grounds upon which the Board should reject the ALJ’s conclusion regarding the reasons for Campbell’s termination.

B. The ALJ Properly Concluded that the Respondent Did Not Terminate Campbell Because She Violated its Electronic Communications Policy.

As explained in Respondent’s Cross-Exceptions, there is no evidence in the record to support the ALJ’s finding that Campbell’s discharge was in part retaliation for her protected concerted activity “in forwarding an email to a fellow counselor that criticized the University’s policy on the transfer of leads for international students.” However,

even considering this unsupported finding, the ALJ properly concluded that Respondent did not terminate Campbell because she violated its Electronic Communications Policy.

In his Brief, the Acting General Counsel offers nothing but speculation to support this claim. The ALJ found compelling the testimony from the decisionmaker, Sarah Boeder, concerning the legitimate reasons for Campbell's termination. There is no evidence that Boeder considered Campbell's forwarding of the January 20, 2010 email to a co-worker or any other violation of the Electronic Communications Policy in her decision. [ALJD at p. 43] Finally, the Acting General Counsel's reliance on Campbell's own testimony concerning a statement that supervisor Ellen Rosa purportedly made relating to the January 20, 2010 e-mail during her termination meeting is completely misplaced. It is undisputed that Rosa was not the decisionmaker on Campbell's termination and the comment, if made at all, came *after* the decision to terminate her employment.

For these reasons, the Board should accept the ALJ's finding that Respondent did not terminate Campbell because she violated its Electronic Communications Policy.

III. THE ALJ PROPERLY CONCLUDED THAT THE ACTING GENERAL COUNSEL OFFERED NO EVIDENCE TO ESTABLISH SEVERAL OF HIS ALLEGATIONS OF INDEPENDENT VIOLATIONS OF SECTION 8(a)(1) OF THE ACT.

A. The ALJ Properly Concluded that Respondent Did Not Violate Section 8(a)(1) of the Act When Manager Chanelle Ison Told Bardwell That He Was Acting "Disrespectful."

The Acting General Counsel incredibly argues that the ALJ improperly concluded that Chanelle Ison's statement to Bardwell that he was acting "disrespectful" was not

unlawful. In doing so, the Acting General Counsel mischaracterizes the relevant evidence, disregards the ALJ's factual findings, and ignores the overwhelming evidence that Bardwell was talking to Ison in a "loud and animated" manner.

The ALJ fully analyzed the facts and properly concluded that Ison's comments to Bardwell that she felt he had acted "disrespectfully" towards her did not constitute a threat or otherwise unlawfully interfere with Bardwell's right to engage in protected concerted activity. Significantly, during her nearly two days of testimony, Ison testified at length concerning her efforts to encourage enrollment counselors to provide input concerning a wide variety of issues affecting their employment. As the ALJ recognized in his decision, Ison organized "Start, Stop, and Continue" meetings to obtain input from the "grad team." [ALJD at p. 33] She further testified that she "understood [the enrollment counselors'] complaint [regarding leads] and was doing what she could to get the team better leads." [*Id.*] She also testified regarding Bardwell's involvement, at her request, in preparing a "peer review," a concept that was ultimately rejected (not by Ison). Based on the evidence, the ALJ concluded that there was "no credible evidence that Ison harbored any animosity towards the grad team" of which Bardwell was a member. [ALJD at p. 37:42-43]

Additionally, the Acting General Counsel ignores the evidence concerning the nature of Bardwell's comments leading up to Ison's statement that he was acting "disrespectful." As Ison testified at the hearing, on one occasion Bardwell loudly voiced his displeasure with her decision not to proceed with the peer review. As they were walking out one day, Ison indicated to Bardwell that she felt he had spoken to her in a

“disrespectful” way. Clearly, unaffected by Ison’s comment, Bardwell went to Ison’s office on another occasion to apologize to Ison for his behavior during another “start, stop and continue” meeting. During this encounter, Bardwell shut the door and began speaking to Ison “loudly” and “in a booming voice.” [ALJD at p. 37] Another supervisor, Ray Akers, testified that Ison’s assistant heard Bardwell yelling and asked him to stand by the door “just in case he was needed.” [Id.] It was during this interaction that Ison told Bardwell, based on the manner in which he was acting, he was being “a little disrespectful.” [Id.]

The ALJ specifically distinguished Ison’s two comments from the cases cited by the Acting General Counsel in his Post-Hearing Brief, and again here, where an employer makes a statement equating union activity or concerted activity with disloyalty to the employer. In light of the context in which the statements were made, and weighing the credibility of the witnesses, the ALJ properly concluded that Ison’s statements do not constitute a threat or unspecified reprisal for engaging in concerted activity.

B. The ALJ Properly Found that Rhonda Pigati’s Meetings with Members of the Grad Team in June 2010 Did Not Constitute Unlawful Interrogation.

ALJ Meyerson analyzed the evidence presented concerning Rhonda Pigati’s meetings with members of the “grad team” in June 2010 and properly concluded that those meetings did not constitute unlawful interrogation under Section 8(a)(1) of the Act. The Acting General Counsel argues that the ALJ erroneously applied a subjective, rather than an objective test in analyzing whether Pigati’s conduct was unlawful. Under either

standard, the evidence in the record does not demonstrate that an unlawful interrogation occurred.

The Acting General Counsel disregards the testimony introduced at the hearing concerning the interviews. As the ALJ recognized in his Decision, based on the testimony of Pigati and Johnson, it was clear that the meeting was “rather routine, non-confrontational, and with no tension or animosity.” [ALJD at p. 35:26-27] As noted in the Decision, the purpose of the meetings, which were not mandatory, was to allow the employees to comment on concerns that were expressed during a counselor meeting regarding supervisor, Ellen Rosa. [ALJD at p. 35:9-11] Moreover, the ALJ also noted that Pigati only sought the names of other enrollment counselors *after* Johnson volunteered to Pigati that other counselors had come to Johnson with concerns about Rosa.

The Board should reject the Acting General Counsel’s argument and accept the ALJ’s conclusion that a violation did not occur with respect to Rhonda Pigati’s June 2010 meetings with members of the grad team.

CONCLUSION

For the reasons set forth in this Brief, Respondent Grand Canyon University respectfully requests that the Acting General Counsel’s Exceptions be denied.

DATED: December 9, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a copy of RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Cases 28-CA-22983, et al., was served by **E-Gov, E-Filing, E-mail and U.S., Mail on December 9, 2011, on the following.**

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