

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

GRAND CANYON UNIVERSITY

and

EDMOND BARDWELL, an Individual

and

JOHN YOUNG III, an Individual

and

**SHELLY CAMPBELL, an Individual
and**

GLORIA JOHNSON, an Individual

Case 28-CA 22938

Case 28-CA-23035

Case 28-CA-23038

Case 28-CA-23336

BRIEF IN SUPPORT OF RESPONDENT
GRAND CANYON UNIVERSITY'S LIMITED CROSS-EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S OCTOBER 21, 2011 DECISION

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INTRODUCTION

Respondent Grand Canyon University (hereinafter referred to as “Respondent” or “GCU”) submits this brief in support of its limited Cross-Exceptions to the Administrative Law Judge’s Decision in the above-captioned matter. The Administrative Law Judge (“ALJ”) concluded, in part, that Respondent violated Section 8(a)(1) of the National Labor Relations Act (hereinafter referred to as the “NLRA” or the “Act”) by the following acts:

- Orally promulgating and maintain an overly-broad and discriminatory rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling sessions; and
- Orally referencing a written rule in its Electronic Communications Policy that Respondent is disparately enforcing in order to prohibit its employees’ use of emails to engage in protected concerted activities.

Although the ALJ properly concluded that the terminations of Shelly Campbell (“Campbell”) and Edmond Bardwell (“Bardwell”) were not unlawful, he initially found that the Acting General Counsel had established *prima facie* showings that both terminations were motivated, in part, by their participation in protected concerted activity under Section 7 of the Act. The ALJ reached these conclusions despite a dearth of evidence that Respondent had acted with an unlawful motivation in either terminations and his failure to properly apply the relevant law.

With respect to Gloria Johnson (“Johnson”), the ALJ incorrectly concluded not only that the Acting General Counsel had established a *prima facie* showing that her termination was discriminatory, but also that Respondent’s proffered reason for her

termination was pretext for an unlawful motive. In doing so, the ALJ again clearly failed to base his finding on the evidence contained in the record.

Because the Administrative Law Judge's Decision with regard to the above-referenced issues is not based on a preponderance of the credible evidence, and because it is unsound as a matter of law, Respondent files these Cross-Exceptions. The National Labor Relations Board (the "Board" or the "NLRB") should sustain Respondent's limited Cross-Exceptions and reverse the Administrative Law Judge's findings and conclusions only as it relates to those findings and conclusions addressed in these Cross-Exceptions.

STATEMENT OF PROCEEDINGS

As recounted by Administrative Law Judge Gregory Z. Meyerson in his Decision,¹ and as more fully set forth in the record, this case arises from the following proceedings:

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.² The Complaint included claims based on several charges filed by the following former GCU employees: Shelly Campbell ("Campbell"), Edmond Bardwell ("Bardwell"), Gloria Johnson ("Johnson"), and John Young III ("Young"). A hearing was held on the Acting

¹ Citations to pages of the ALJ's Decision are indicated by the reference "(ALJD at p. ____)." Citations to pages of the transcript of the hearing in this case are indicated by the reference "(TR ____)." References to Exhibits introduced at the hearing are as follows: General Counsel's exhibits "(GC Exhibit ____)" and Respondent GCU's Exhibits "(R Exhibit ____)."

² Counsel for the AGC amended Paragraphs 4(d), (i), and (k) of the Second Amended Complaint at the Hearing.

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. 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 of the decisions to terminate. Nor did the Acting General Counsel present any evidence to establish that Bardwell was terminated for filing his unfair labor practice 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, Vice President of Operations Sarah Boeder, had any knowledge of their protected concerted activity. Other than establishing that the Alleged Discriminatees 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 the Acting General Counsel's case.

On the other hand, the record is replete with evidence that several other enrollment counselors, including everyone on the same team as Campbell, Bardwell, and Johnson, also engaged in the same protected concerted activity without suffering any adverse

impact whatsoever on their employment, in addition to evidence that GCU actively encourages its enrollment counselors (as well as all of its employees) to raise any concerns they may have. Finally, even if Acting General Counsel had met his initial burden (which he did not), the evidence presented left no doubt about the fact that each of the Alleged Discriminatees was discharged for engaging in misconduct, which posed serious compliance risks to GCU.

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

ARGUMENT

I. THERE IS NO SUPPORT IN THE RECORD FOR THE ALJ'S FINDING THAT CAMPBELL, BARDWELL OR JOHNSON COMPLAINED ANY MORE THAN THE HUNDRED OF OTHER ENROLLMENT COUNSELORS AT GCU WHO RAISED SIMILAR ISSUES ABOUT VARIOUS ASPECTS OF THEIR EMPLOYMENT.

The Acting General Counsel's case is premised on the argument that Campbell, Bardwell and Johnson engaged in protected concerted activity, which was a motivating factor in Respondent's decision to terminate their employment. While it is undisputed that Bardwell, Campbell and Johnson raised numerous concerns about issues affecting their employment, there is no evidence in the record to distinguish the conduct of these three former employees from the hundreds of other enrollment counselors that raised these issues relating to their employment.”³ [ALJD at p. 7:5-6; 39:5-6] The Alleged

³ During the relevant period, Respondent split its enrollment counselors into “teams” with each team focused on enrolling students in certain degree programs. During the relevant period, the Alleged Discriminatees – Campbell, Bardwell, and Johnson – were all members of

Discriminatees themselves testified that *everybody* raised these issues and even acknowledged that their complaints were not unique. [TR 1012] Moreover, other witnesses testified that it was common for enrollment counselors to complain about leads, as well as other terms and conditions of their employment. [TR 1056:11-25] Assistant Vice President Chanelle Ison (“Ison”) testified that several other members of the grad team were very vocal and all but, Bardwell and another employee who had resigned for another job, remained employed at GCU. [TR 371:9-372:1]

The Acting General Counsel presented no evidence to distinguish the Alleged Discriminatees’ complaints from “everybody” else’s. There is simply no basis for any such finding and, to the extent it contributed to the ALJ’s other conclusions, the Board should reject those conclusions as well.

II. THE ALJ ERRED IN CONCLUDING THAT KNOWLEDGE BY LOWER LEVEL SUPERVISORS OF THE ALLEGED DISCRIMINATEE’S PROTECTED CONCERTED ACTIVITIES SHOULD BE IMPUTED TO THE DECISIONMAKER, SARAH BOEDER.

A. The ALJ’s Finding is Not Consistent with Board Case Law.

In his analysis of the Campbell termination, the ALJ summarily concluded that the knowledge of supervisors Schnell and Rosa of Campbell’s protected concerted activity “is considered to be imputed to and possessed by the Respondent as an institution.” [ALJD at p. 40:30-35] Without citing to any cases, and while disregarding the numerous cases cited by Respondent in its Post-Hearing Brief, the ALJ stated that it was “well established Board law that information known to lower level managers, such as Schnell

the “grad team” in the College of Liberal Arts and were permitted to enroll students seeking graduate degrees in either criminal justice or Christian Studies.

and Rosa, is presumed also known to upper management.” [ALJD at p. 40:28-30] However, this is not an accurate statement of the law. The Board has refused to impute knowledge from a supervisor to a decisionmaker when there was credible evidence introduced that the knowledge was not passed on to the decisionmakers. *See e.g., Ellison Media Co.*, 344 NLRB 1112 (2005) (“A manager's or supervisor's knowledge of an employee's protected concerted activities may be imputed to the employer, but if such knowledge is denied, and the denial is credible in the context of all of the circumstances of the case, knowledge of protected activity will not be imputed to the employer.”); *Dr. Philip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983)(“Benson and Lynes were the only supervisors shown to have had knowledge of Prestidge's connection with the Union. Having credited both their denials that they discussed this subject with Megdal prior to Prestidge's discharge, the Administrative Law Judge could find no reasonable ground on which to impute their knowledge to Megdal.”); *see also Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493 (7th Cir. 2003)(denying enforcement of Board’s order against employer and finding that “[f]or purposes of the prima facie case under §§ 158(a)(1) and (a)(3), an employer can only be said to know of the employee's protected activities through the decisionmaker...As to Graettinger, the decisionmaker who fired Hepburn, nothing in the ALJ's opinion (or the record, as far as we can tell) provides any indication that he knew that Hepburn made any pro-union comments at the meeting.”)

The undisputed evidence demonstrated that Vice President of Operations Sarah Boeder (“Boeder”) was the ultimate decisionmaker for the terminations of Campbell, Bardwell, and Johnson. [ALJD at p. 41:28-29; 50:5-10; 54:24-25] However, he

incorrectly disregarded the evidence presented at the hearing that Boeder was unaware of any complaints made by the Alleged Discriminatees concerning the terms and conditions of their employment. [TR 479-80, 487, 533, 544] For example, with respect to Johnson, Boeder testified:

Q: And this is the termination request for Ms. Johnson, correct? General Counsel's 20?

A: Yes.

Q: Okay. Were you the final person or the person who had the final say on approval or disapproval of this termination?

A Yes, it appears.

Q: Had you had interaction with Gloria Johnson before you got the term packet?

A: No.

Q: Did you know who she was?

A: No. [TR 487, 533 (emphasis added)]

In light of the evidence presented by Respondent demonstrating that Boeder had no direct contact with the Alleged Discriminatees (other than her December 16, 2009 meeting with Campbell concerning a compliance issue), the ALJ's decision to impute the knowledge of their protected concerted activities on to Boeder cannot be sustained. Despite having Boeder testify at great length during the hearing, the Acting General Counsel did not produce any evidence that she was aware of the Alleged Discriminatees' protected concerted activities – either at the time the activities were engaged in or at some later date through a discussion with one of their supervisors. Therefore, the ALJ's

finding that the knowledge of the lower level supervisors should be imputed on to Boeder as the decisionmaker is inconsistent with Board case law and should be rejected.

B. The ALJ Failed to Make Specific Findings Regarding the Decisionmaker's Knowledge of the Protected Concerted Activities of Bardwell or Johnson.

In the Decision, the ALJ only considered the question of whether the knowledge of protected concerted activity by lower level managers should be imputed to the decisionmaker, Boeder, in analyzing Campbell's termination. With respect to the terminations of Bardwell and Johnson, the ALJ did not even go that far. In the Decision, the ALJ failed to make any specific findings as to whether there was a basis to impute the knowledge of Bardwell and Johnson's protected concerted activities on to decisionmaker Boeder. In fact, nowhere in his Decision does he identify which supervisors were aware of Bardwell and Johnson's protected concerted activities or provide any basis to explain why such knowledge should be considered imputed to Boeder. This failure is significant in light of the clear testimony that Boeder had little or no contact with either of these individuals prior to their terminations.

There is absolutely no evidence in the record to demonstrate that Boeder had any knowledge of either Bardwell or Johnson's protected concerted activities, and as the Court recognized in *Sears, Roebuck & Co. v. NLRB*, knowledge of the decisionmaker is a necessary element of the Acting General Counsel's *prima facie* case. Because the ALJ failed to even analyze this issue, his conclusion that the Acting General Counsel had established a *prima facie* case for the terminations of Bardwell and Johnson should be reversed.

III. EVEN THOUGH THE ALJ PROPERLY CONCLUDED THAT CAMPBELL AND BARDWELL’S TERMINATIONS WERE NOT UNLAWFUL, HE ERRED IN FINDING THAT PROTECTED CONCERTED ACTIVITY WAS A “MOTIVATING FACTOR” IN THEIR TERMINATIONS.

Contrary to the ALJ’s conclusion, the Acting General Counsel failed to satisfy its burden of demonstrating a *prima facie* case of discrimination under *Wright Line* and its progeny for any of the Alleged Discriminatees. *Wright Line*, 251 NLRB 1083 (1980), *enf’d* 662 F.2d 899 (1st Cir. 1981). While Respondent does not dispute the fact that the Alleged Discriminatees engaged in certain activity that was protected under Section 7 of the Act, that fact alone is not sufficient to satisfy the Acting General Counsel’s burden. The NLRB clearly requires the Acting General Counsel do more than demonstrate the existence of protected concerted activity, which is followed by some type of adverse action.⁴ Under *Wright Line*, the Acting General Counsel must produce some evidence to establish an unlawful motive for Respondent’s decision, as well as causation. In the instant case, there absolutely no evidence in the record to establish either of these elements of the Acting General Counsel’s *prima facie* case.

Contrary to the ALJ’s conclusion concerning the motivation behind both Campbell and Bardwell’s termination, the evidence demonstrated that Respondent did not harbor

⁴ The Board has regularly made clear that “unwise and even unfair decisions to discharge employees,” *if not based on an unlawful motive under the Act*, do not constitute unfair labor practices. *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983)(If an improper motive is not involved, the question of proper discipline of an employee is a matter “left to the discretion of the employer” which may discharge an employee for “a good reason, a bad reason, or no reason at all.”); *See also, Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) (“[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participating in union activities”); *West Covina Disposal*, 315 NLRB 47, 64 (1994) (deferring to employer’s “business judgment” that employee should be discharged).

any animus towards either Campbell or Bardwell because of their protected concerted activities. As explained above, the Acting General Counsel made no effort to demonstrate that the decisionmaker for all three of the terminations, Sarah Boeder, was even aware of the Alleged Discriminatees' protected concerted activities and, in fact, the evidence demonstrates that she was not. However, the ALJ found that even with respect to several of the non-decisionmakers that there was no unlawful animosity towards the Alleged Discriminatees for raising various workplace complaints. Specifically, the ALJ found that there was *no* credible evidence that Chanelle Ison – the Assistant Vice President of the College of Business and Liberal Arts who was *not* the decisionmaker – “harbored any animosity towards the grad team because its members were vocal and active in registering their complaints.” [ALJD at p. 37:42-43] Nor did the Acting General Counsel produce any evidence that any of the other supervisors harbored any animosity towards the Alleged Discriminatees for making workplace complaints. To the contrary, there was testimony from the Alleged Discriminatees that their supervisors agreed with several of the issues raised and empathized with the Alleged Discriminatees.⁵ Finally, one of the supervisors, Ray Akers, even testified about that he also had made several similar complaints in the years prior to becoming an enrollment manager. [TR 1056:11-25]

⁵ As the ALJ noted in his Decision, “[m]anagers were aware of these complaints and several of them promised to try and improve the situation by furnishing the team with better leads.” [ALJD at p. 40:17-19]

As more fully explained below, there is simply no evidence in the record to support the ALJ's conclusion that Bardwell and Campbell's terminations were motivated at all by a discriminatory motive.

A. The ALJ Erred in Finding that the Acting General Counsel Established a *Prima Facie* Showing that Campbell's Protected Concerted Activity Was a Motivating Factor in GCU's Decision to Terminate Her Employment.

Even though the ALJ correctly concluded that Campbell's termination did not violate the Act, the ALJ improperly found that the Acting General Counsel had established a *prima facie* case regarding Campbell's termination based on an erroneous review of the evidence. In the Decision, the ALJ states:

...I believe that the General Counsel has offered sufficient to meet his burden of establishing that Campbell's discharge was in part retaliation for her protected concerted activity in forwarding an e-mail *to a fellow counselor* that criticized the University's policy on the transfer of leads for international students. I believe that this was a "motivating factor" in Respondent's decision to fire her.

[ALJD at p. 41:14-18 (emphasis added)] However, as will be explained below, there is absolutely no evidence in the record to support the ALJ's finding that the decision to terminate Campbell was in anyway related to her forwarding of an email *to a fellow counselor*.

Contrary to the ALJ's findings, there is absolutely no evidence in the record to establish that Campbell's forwarding of a January 20, 2010 email critical of Respondent's policy regarding leads to international students *was ever addressed with her*. Although the ALJ relies on a reference to the January 20, 2010 e-mail contained in the Termination Request prepared for Campbell (a document that was not provided to her), he fails to

recognize that the relevant portion of the Termination Request addressed the fact that she forwarded the email *to a student* and *then called the student* and made “comments that were unprofessional and did not reflect upon GCU in a positive manner.” [R Exhibit 1]

Specifically, the Termination Request form states in relevant part:

On January 20, 2010, Shelly’s acting manager, Erin Hernandez, suspected Shelly had improperly advised a student regarding Financial Aid, and alerted Quality Assurance to ask for assistance in locating the call. Quality Assurance was not able to locate the call, but in the process discovered another call where *Shelly had called a student* to tell her that she had accidentally copied the student on a personal “joke” email that she’d forwarded to two other GCU employees. During the call, Shelly told the student how to find the email – which was a parody of a recently announced GCU policy changes – then asked the student to read it. They both laughed about it, *then Shelly proceeded to make disparaging remarks to the student* about changes in GCU’s lead policy relative to international and degree program leads that had been announced by GCU management that morning. Quality Assurance commented that *Shelly’s comments* were unprofessional and did not reflect upon GCU in a positive manner.

[R Exhibit 1 (emphasis added)] There is nothing in the Termination Request to indicate that GCU had any problem with the fact that Campbell forwarded the e-mail *to a fellow co-worker*, as the ALJ found in his Decision. The fact that she forwarded the email to “two other GCU employees” is only included in the entry to describe what Campbell told the student on the call. It is clear from the entry in the Termination Request form that the concerns raised by Quality Assurance relate to Campbell’s “unprofessional” comments to the student⁶ and not her forwarding of the e-mail to her co-workers. There was

⁶ It does not appear that the General Counsel is arguing that Campbell’s forwarding of the email to the student, or her subsequent call to the student in which she made “disparaging remarks” about GCU, are protected under Section 7 of the NLRA. However, even if it had, such an argument should clearly be rejected. *See, e.g. NLRB v. Electrical Workers Local 1229 (1953)* (“Section 7 of the Act ... does not immunize an employee from discharge for acts of

absolutely no evidence adduced at the hearing that anyone at GCU was upset because she forwarded the email to co-workers. This is a critical distinction that the ALJ failed to recognize.⁷

Moreover, there was also testimony that the discussion of the call to the student was only included on the Termination Request form as background. Boeder clearly testified that she considered two incidents in deciding to terminate Campbell's employment in February 2010: Campbell's December 2009 "bad call," which had been played by the new quality assurance department and the February 2010 incident in which Campbell improperly assisted the student, which was the proverbial straw in her decision to terminate Campbell's employment. [TR 527:18-528:13] There was no evidence that she considered Campbell's forwarding of the email to fellow co-workers at all.⁸ Moreover, even though it was widely known who authored the satirical email regarding the lead policy that Campbell forwarded, the Counsel for the Acting General Counsel tellingly presented no evidence to demonstrate that the author of the email (or any other employee who sent or received the email) was subjected to any type of discipline.

disloyalty or misconduct merely because those acts were associated with protected activity"); *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972) (recognizing that "unlawful interference with the employer's commercial interests has been recognized as presenting grounds for discharge...")

⁷ Again, as noted above, it does not appear that the Acting General Counsel argued that Campbell's forwarding of the email *to the student* or her subsequent telephone conversation *with the student* are protected by the Act.

⁸ Boeder testified that the only she remembered about the January 20, 2010 incident was that it involved Campbell saying "something inappropriate to either a student or a prospect." [TR 527:4-17]

There is simply 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 was critical of GCU's policy on the transfer of leads for international student. Therefore, even though the ALJ properly concluded that Campbell's termination was lawful, GCU asks that the Board reverse the ALJ's finding that the Acting General Counsel established a *prima facie* case that Respondent was motivated to discharge Campbell, at least in part, because of her protected concerted activity.

IV. THE ALJ ALSO ERRED IN FINDING THE ACTING GENERAL COUNSEL ESTABLISHED A *PRIMA FACIE* SHOWING THAT BARDWELL'S PROTECTED CONCERTED ACTIVITY WAS A MOTIVATING FACTOR IN GCU'S DECISION TO TERMINATE HIS EMPLOYMENT BASED ON CLOSE PROXIMITY ALONE.

As with Campbell, the ALJ properly concluded that Bardwell's termination did not violate either Sections 8(a)(1) or 8(a)(3) of the Act. Nonetheless, before reaching that conclusion, the ALJ improperly found that Respondent's decision to terminate Bardwell was, in part, motivated by Bardwell's protected concerted activity. [ALJD at p. 46] The ALJ based this finding *entirely* on the close proximity between some of Bardwell's "most vocal" protected concerted activity and his subsequent termination. [ALJD at p. 46:19-22] Specifically, the ALJ found:

...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. The Board has frequently considered close proximity in time between concerted activity and termination to constitute sufficient evidence of a nexus between those events.

[*Id.*] However, in the instant case, the ALJ's reliance on temporal proximity alone as the basis to find that the Acting General Counsel established a *prima facie* case ignores two critical pieces of evidence: (1) that the Acting General Counsel completely failed to demonstrate that the decisionmaker was aware of Bardwell's protected concerted activity; and (2) the timing of Respondent's discovery of Bardwell's significant misconduct, which the ALJ agreed was the true reason for his termination.

While the Board and courts often view the close temporal proximity between protected activity and an adverse action as evidence of an unlawful motive, it is not relevant where the decisionmaker is not aware of the protected activity. As explained above, the Acting General Counsel offered no evidence to demonstrate that the decisionmaker, Sarah Boeder, was aware of any protected activity engaged in by Bardwell, let alone that she was specifically aware of this participation in the meetings in "either late April or early May 2010" with Chanelle Ison upon which the ALJ relies. There is also no evidence that Ison (or anybody else) discussed Bardwell's conduct during these meetings with Boeder at anytime. Moreover, as the ALJ noted, there was substantial evidence introduced at the hearing demonstrating that Ison was unaffected by Bardwell's "vocal and heated discussions" during these meetings and she testified that she specifically did not harbor "any animosity towards the grad team because its members were vocal and active in registering their complaints." [ALJD at p. 37:42-43]

Moreover, the ALJ's reliance on temporal proximity is also inconsistent with the evidence, and the ALJ's own findings, relating to the events leading up to Bardwell's termination. There was substantial evidence in the record, which was accepted by the

ALJ, that Bardwell engaged in serious misconduct relating to the events surrounding his enrollment of Reverend Gary Dean, which Respondent discovered at some point at “the end of August or early September” when his supervisor and another manager listened to one of his randomly selected calls. [ALJD at p. 49:47-50] Following discovery of Bardwell’s conduct and further additional investigation, Sarah Boeder (at that time the Senior Vice President of Online Operations) reviewed the information and made the decision to terminate because, as the ALJ found:

(1) Bardwell failed to follow the extensive process needed to establish a satellite campus, and (2) he had made numerous misstatements to Dean, even though all enrollment counselors, including Bardwell, had recently completed a compliance training program.

[ALJD at p. 50:7-10] The timing of Respondent’s discovery of Bardwell’s misconduct was fortuitous and its proximity to his earlier protected concerted activity (of which the decisionmaker was unaware) cannot be the basis upon which the Acting General Counsel establishes a *prima facie* case.

The Board should sustain the ALJ’s conclusion that Bardwell’s termination did not violate Sections 8(a)(1) and 8(a)(3) of the Act, but for the reasons explained above, reverse the Decision to the extent the ALJ found Respondent was motivated to discharge Bardwell, in least in part, because of his protected concerted activity.

V. THE ALJ’S CONCLUSION THAT THE UNIVERSITY’S DECISION TO TERMINATE GLORIA JOHNSON WAS UNLAWFUL CANNOT BE SUPPORTED BY THE EVIDENTIARY RECORD OR THE RELEVANT CASE LAW.

In concluding that Gloria Johnson’s termination was motivated by the fact that she engaged in protected concerted activity which was not disputed, the ALJ ignored well-

established law concerning five different legal principles. In addition, he misunderstood, and therefore flat-out mis-stated in his Decision, testimony by a manager, Ray Akers, that appears to be the primary basis for the ALJ's conclusion. Finally, related to his misstatement of Akers testimony, the ALJ appears to have misunderstood the significance of other testimony by Akers.

The ALJ's finding that Akers was not credible is based on the fact that he simply heard incorrectly Aker's testimony on a critical point. The core of the transcript request form that was to be submitted as part of the application process. While ALJ Meyerson found Akers' testimony "difficult to comprehend," that is not at all surprising, in light of the fact that he states twice in his decision that Akers admitted during his testimony that he told Johnson that she could write the name of the school to which the transcript request was going to be sent on the request form. Had Akers made such an admission, the testimony would have been in conflict with other portions of his testimony, which is what the ALJ found. The fact is, however, that Akers never testified that he had given Johnson permission to write on the transfer request form, with or without the student's permission. Akers described what had happened in precisely the same way that he had reported it to his manager and to Human Resources representative Rhonda Pigati. He was on his way to a meeting when Johnson approached him with a student transcript request form and explained that when the student had filled out the form online, there wasn't the ability to fill in the school online. Johnson showed him the form, which had the school handwritten on it, and asked him if he thought it would be accepted by the records specialist. Akers testified that he had seen several like that over the years "that had been

filled out by the student” and told Johnson that it should be fine. [TR 106:16-19]. Akers also testified that it was common for students to ask if they could write on an application form, since the information was typically filled in entirely [TR 1073:18-21]. Thus, while Akers did go to his manager and later Rhonda Pigati to advise them that he had told Johnson the form was okay, he always has taken the position that he thought it was the student who had written on the form. That is hardly an admission that he told Johnson that she could write in the school for the student.

The ALJ suggested two contradictory motives for Akers changing his story (which he did not do). First, he stated “I am of the view that Akers is merely trying to cover for himself.” Without pointing to any evidence that would support what amounts to pure speculation, however, the ALJ later found that Akers changed his story to assist his superiors who wanted to terminate Johnson because she engaged in protected activity.

The suggestion that Akers was trying to cover himself for a screw-up—giving Johnson permission to write on the transcript form—makes little sense, since it was Akers who voluntarily reported what had occurred, rather than letting sleeping dogs lie. But if that was Akers motive, there still would be no violation of Section 7, because the relevant question is whether Rhonda Pigati, who initiated the termination request, and ultimately Sarah Boeder, believed that Johnson had written on the form on her own.

The ALJ’s suggestion that superiors wanted to terminate Johnson because she had raised workplace issues that all the enrollment counselors had raised for a very long time, has no factual support whatsoever. Who was supposedly orchestrating this move to terminate? Chanelle Ison, who regularly scheduled meetings so that the enrollment

counselors could raise their concerns and voice their complaints? Rhonda Pigati, an HR representative as to whom there was no evidence that she knew anything about Johnson before Akers approached her? Sarah Boeder, who also knew nothing about her? And why were they anxious to terminate Johnson, but not the other enrollment counselors, including some that even Johnson admitted were very vocal in complaining about leads or schedules.

Based on the ALJ's comments that Johnson's violation was "virtually nothing", it seems obvious that this decision is simply a statement that it was unfair to terminate Johnson. Obviously, that is not the role of the ALJ and a relevant inquiry under the Act. In any event, what requires no speculation at all is the fact that the evidence in this case does not reasonably allow a finding that Johnson was terminated because she engaged in protected concerted activity, rather than because GCU determined that she had violated a compliance policy that was on the University's zero tolerance list.

A. There was Insufficient Evidence Even to Support a *Prima facie* case.

During the entire hearing, there was no evidence whatsoever that, prior to the single act for which she was terminated in July 2010, any GCU manager had had any problem with Gloria Johnson at all, let alone because she raised concerns about work-related issues. Although Johnson, along with virtually all of the other enrollment counselors, continued to complain about the number and quality of their leads for months, the fact is that Johnson received a raise approximately two months before she was terminated. [TR 821:13-20]. She previously had received no discipline. [TR 821:4-12. She always got along well with her managers, Helen Schnell and then Ellen Rosa, to

whom she and the other counselors had complained about leads all the time. [TR 832:22-25. Prior to Akers becoming her manager only weeks before her termination, Johnson had not had any contact with him, except for one discussion about another employee. [TR 834:11-22].

In addition as, the ALJ specifically noted, the management team was sympathetic to the counselors' complaints about leads and tried to improve the situation. Yet, the ALJ found that the Acting General Counsel had met his burden of proving a causal connection, based merely on the fact that the last meeting held with Chanelle Ison and all the enrollment counselors, in order to get feedback from them, took place only two weeks before Johnson's termination.

Although the Board and appellate courts have, of course, held that in many cases "timing may serve as evidence of a nexus," one clear-cut exception to that is when a significant intervening act of misconduct has occurred which would provide a legitimate basis for the termination decision. *See, e.g., Scroggins v. University of Minn.*, 221 R.3d 1042, 1045 (8th Cir. 2000), (Scroggins' "intervening unprotected conduct eroded any causal connection that was suggested by the temporal proximity of his protected conduct and his termination); *Davis v. Time Warner Cable of Southeastern Wis., L.P.*, 651 F.3d 664, 675 (7th Cir. 2011) (an inference of causation based on suspicious timing was not warranted where there was a "significant intervening event," plaintiff's violation of its employee guidelines, separating the plaintiff's termination from his complaints of harassment fifteen days earlier); *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 594 (7th Cir. 2008) (finding the plaintiff unable to make a causal connection even though she was

disciplined and terminated shortly after her injury where there were several intervening events, including a series of unexercised absences, leading to her termination.)

As discussed fully below, the overwhelming evidence here demonstrates that the person who decided to terminate Johnson, Sarah Boeder, strongly believed that Johnson had committed a serious violation of the compliance rules. Johnson was terminated only 2 days after a violation had been reported to Human Resources representative, Rhonda Pigate was reported. Under these circumstances, there simply is no basis to conclude that there was a causal connection to a meeting that was held so that the counselors could express their concerns.

It was also undisputed that the decision maker had no knowledge of any protected activity in which Johnson may have engaged. In fact, prior to receiving the report that Johnson had written on a student document that was part of the application process, Boeder did not even know who Johnson was. [TR 487, 533]. Other than when a compliance issue was implicated, as the Vice President of Operations, Boeder's job had no connection to the activities of the enrollment counselors. Boeder's lack of knowledge of any protected activity was irrelevant to the ALJ, however, because he held that knowledge of a manager is imputed to the Respondent. As previously discussed, the ALJ cited no case support for this broad proposition and there is no legal basis to impute another manager's knowledge to Sarah Boeder.

And absent Boeder's knowledge as the decisionmaker, there could be no causal connection to Johnson's termination.

B. In Addition to His Error In Finding That a *Prima Facie Case Had Been Established*, The ALJ Plainly Erred in Concluding That GCU's Explanation for the Decision To Terminate Johnson Was a Pretext and that She Had Been Terminated Because of Her Protected Concerted Activity.

The ALJ's conclusion of pretext appears to be based on two factors: (1) the ALJ's personal belief that what Johnson did was no big deal and did not warrant termination and (2) his belief that Ray Akers testimony was not credible.

With respect to the first factor, the ALJ's personal opinion is frankly difficult to understand, in light of the testimony from numerous witnesses regarding the seriousness of Johnson's misconduct. Enrollment counselors were specifically trained that they could not write anything potential on a document that was part of the application process, even if they had the student's permission. Moreover, under well-settled law, ALJ's disagreement with the University generally as to the severity of rule violation was plain error, especially in light of the fact that Sarah Boeder had been trained on compliance matters.

VI. THE ALJ ERRED IN FINDING RESPONDENT PROMULGATED AN OVERLY-BROAD ORAL RULE ON DECEMBER 16, 2009 PROHIBITING EMPLOYEES FROM DISCUSSING THE TERMS AND CONDITIONS OF THEIR EMPLOYMENT.

In his Decision, the ALJ found that Respondent, through the statements of Boeder and supervisor Helen Schnell ("Schnell"), orally promulgated an overly-broad rule prohibiting employees from talking with each other regarding their terms and conditions

of employment during a December 16, 2010 counseling meeting with Campbell.⁹ [ALJD at p. 30:42-45] The only evidence offered by the Acting General Counsel in support of this allegation was the inherently unreliable testimony of Campbell that both Boeder and Schnell told her she could not discuss her December 2009 counseling regarding compliance issues with other employees. The weight of credible evidence establishes that no such “rule” was imparted to Campbell. As explained above, the ALJ found that Campbell had fabricated critical pieces of her testimony. This was just one more piece of Campbell’s web of inaccuracies.

Moreover, Campbell’s story makes little sense given the context in which the alleged oral rule was given. As detailed in the ALJ’s decision, Boeder testified at length concerning her strong position on compliance issues and her concerns with Campbell’s compliance violations, which was the subject of their December 16, 2009 meeting. In light of Boeder’s concern about the problems with Campbell’s call with a prospective student, Campbell undoubtedly would be welcomed to spread the word that such comments to prospective students were not prohibited under GCU’s compliance guidelines. Finally, even if such a “rule” was promulgated (which it was not), there was no evidence presented that Campbell reasonably believed this “rule” restricted the exercise of her Section 7 rights. To the contrary, the evidence demonstrates that Campbell continued to raise issues that concerned her.

⁹ The corresponding allegation in the Acting General Counsel’s Complaint differs slightly from the Acting General Counsel’s contention in his Post-Hearing Brief. In Paragraph 4(d) of the Complaint, the Acting General Counsel only identifies Boeder as the manager who orally promulgated the rule and more specifically alleges that employees were prohibited from talking about counselings “about quality assurance issues.”

CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF RESPONDENT GRAND CANYON UNIVERSITY'S LIMITED CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S OCTOBER 21, 2011 DECISION 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.**

Via E-Gov, E-Filing to:

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