

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

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

and

**Cases 28-CA-022938
28-CA-023239**

EDMOND BARDWELL, an Individual

and

Case 28-CA-023035

JOHN YOUNG, III, an Individual

and

Case 28-CA-023038

SHELLY CAMPBELL, an Individual

and

Case 28-CA-023336

GLORIA JOHNSON, an Individual

ACTING GENERAL COUNSEL’S REPLY BRIEF

Counsel for the Acting General Counsel (General Counsel) submits the following Reply Brief. For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the Acting General Counsel’s Exceptions.

I. RESPONDENT VIOLATED SECTION 8(a)(1) BY TERMINATING SHELLY CAMPBELL BECAUSE OF HER PROTECTED CONCERTED ACTIVITIES

The ALJ found “there was no doubt that Campbell was engaged in protected concerted activity” (ALJD 40:13-14), which included Campbell forwarding to her coworkers the January 20, 2010 e-mail that criticized Respondent’s policy on the transfer of leads for international students. (ALJD 41:14-17) Furthermore, the ALJ found: (1) the General Counsel established a *prima facie* case (ALJD 39:37-39); (2) Campbell forwarding the e-mail

was a ““motivating factor”” in Respondent’s decision to fire her (ALJD 41:17-18); (3) Senior Vice-President of Operations Sarah Boeder - the “ultimate decision maker” in Campbell’s termination - was aware of that concerted activity (ALJD: 40:25-35);¹ and (4) supervisor Ellen Rosa informed Campbell at her termination meeting that her forwarding the e-mail was a reason for her termination. (ALJD 13:43-14:2) Finally, Respondent cited Campbell’s forwarding the January 20 e-mail as a reason for her discharge in Campbell’s Termination Request Form. (GCX 7)

Notwithstanding these significant findings of fact, Respondent would have the Board believe that it terminated Campbell for other reasons - specifically: (1) a telephone call Campbell had with a prospective student in December 2009; and (2) Campbell forwarding a link in February 2010 to a student she enrolled because the student was unable to access the link to complete her homework assignment. Resp’t Br., at 10-11 Both of these incidents are feeble excuses.

Regarding Campbell’s December 2009 telephone call, Sarah Boeder elected not to discharge Campbell for her alleged misconduct, even though she considered Campbell’s actions serious enough to warrant termination. Instead, Boeder issued Campbell an Employee Counseling Statement, a minimal discipline. Only after Campbell forwarded the e-mail criticizing Respondent’s policy on the transfer of leads for international students to her coworkers did Boeder and Respondent resurrect Campbell’s telephone call to justify her termination.

Similarly, Respondent uses Campbell’s forwarding a link to a student in early February 2010, as a disguise to divert attention from the inescapable fact that Campbell’s

¹ The ALJ also found that Boeder - the “ultimate decision maker” for the discharges of Edmond Bardwell and Gloria Johnson – was also aware of their concerted activities. (ALJD 40:25-35)

concerted activity on January 20, was, as the ALJ found, a ““motivating factor”” in Respondent’s decision to terminate her. (ALJD 39). Significantly, Respondent’s associate vice-president Chanelle Ison testified that any enrollment counselor who sent a homework assignment link to a student would be fired only if there were “multiple infractions.” (ALJD 42; Tr. 225) Campbell did not have “multiple infractions.” As such, the ALJ erred by finding that Respondent had rebutted the General Counsel’s prima facie case. Accordingly, the Board should overturn the ALJ and find that Respondent terminated Campbell because she engaged in protected, concerted activities.

II. RESPONDENT TERMINATED CAMPBELL BECAUSE SHE VIOLATED RESPONDENT’S ELECTRONIC COMMUNICATIONS POLICY

Even though Respondent’s Electronic Communications 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 Respondent freely 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)

Respondent argues that Boeder never considered Campbell’s January 20 e-mail, or any other violation of the Electronics Communications Policy, in her decision to terminate Campbell. Resp’t Br., at 12. That contention flies in the face of these undisputed facts: Respondent specifically referenced Campbell’s e-mail in her Termination Request Form, and supervisor Ellen Rosa informed Campbell at her termination meeting that her forwarding the January 20 e-mail was a reason for her termination.

The Board specifically addressed situations like the one here, where Respondent disparately enforced its e-mail policy because of Campbell's concerted activity, in *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. More importantly, the Board 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. Based on the ALJ's finding that Respondent disparately enforced its Electronics Communications Policy, the Board should find that Campbell's discharge also violated the Act.

III. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING BARDWELL

Respondent contends that the General Counsel failed to establish a *prima facie* case that its decision to terminate Edmond Bardwell "was in anyway motivated by any [of Bardwell's] protected concerted activity." Resp't Br., at 5, fn 3. However, the ALJ properly had no difficulty in finding 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 properly found that Bardwell engaged in significant concerted activities, 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 also properly 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 Assistant Vice President Chanelle Ison. (ALJD 43:44-44:5; 44:10-38) Simply put, Bardwell was the most vocal member of the three discriminatees with Respondent.

Where the ALJ erred was in his finding that Respondent showed it would have discharged Bardwell despite his protected, concerted activities. (ALJD 46) Instead, the evidence shows, and the Board should find, that Respondent sought quickly to terminate Bardwell, and contrived a reason to do so. Significantly, in investigating Bardwell his communications with Gary Dean regarding a satellite campus, Respondent failed to listen to six months worth of tape recorded conversations Bardwell had with Dean and, as the ALJ found, Respondent "made no effort to contact Dean." Instead, Respondent cherry-picked two conversations, occurring less than two weeks prior to Bardwell's discharge. (ALJD 22:44-46; 20:44-21:24) Neither phone conversation reflected Bardwell promising Dean a satellite campus in his church, or anything else of value.

Respondent's slipshod investigation demonstrates that Respondent's intent, from the outset, 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. An employer's failure to conduct a fair and complete investigation of allegations of employee misconduct suggests that the employer is not genuinely interested in knowing the underlying facts and circumstances of the event but, rather, is looking for a pretext. See, *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Burger King Corp.*, 279 NLRB 227, 239 (1986). 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*, and relied upon these two conversations to fire Bardwell. Accordingly, the Board should overturn the ALJ and find that Respondent terminated Bardwell because of his protected, concerted, activities.

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

Respondent would have the Board believe that there was no evidence presented at trial supporting a retaliation claim. Resp't Br., at 9. But that is not what the record showed or what the ALJ found. The ALJ found that Bardwell's concerted activities included, among the other conduct described above, filing the 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), and the charge in Case 28-CA-22938 resulted in a Complaint being issued against Respondent. And for Respondent to claim that Boeder, its Vice President of Operations, never "even knew that Bardwell had had any contact whatsoever with the NLRB" is preposterous. Resp't Br. at 9. Bardwell's original charge in Case 28-CA-22938 was served upon Respondent's Human Resources Department (GCX 1(a), 1(b)) in early March 2010, within the same time frame that Boeder was transitioning from overseeing the Human Resources Department, to her new position as Senior Vice President of Online Operations. (Tr. 471) Clearly Respondent, including Boeder, had knowledge of Bardwell's charge.

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)). Respondent clearly knew that Bardwell had filed charges and cooperated with the Board, and the ALJ erred by failing to find that Bardwell’s termination violated Section 8(a)(1) and (4) of the Act.

V. RESPONDENT VIOLATED OF THE ACT BY THREATENING EMPLOYEES AND TELLING THEM THEIR ACTIVITIES WERE DISRESPECTFUL

Respondent’s desperate attempts to paint the General Counsel as “mischaracteriz[ing]” the evidence surrounding Ison’s conversations with Bardwell in late April/early May and in July 2010– which are the substance of these allegations – are without merit. The ALJ found that when Ison met with Bardwell and his coworkers in late April/early May, Bardwell voiced his displeasure over Respondent’s decision to deep-six his suggestion of a management peer review. (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)

At the July meeting between Ison, Bardwell, and his co-employees, the ALJ found that Ison informed employees that one or two team members were to cover late-night shift hours every night and the employees could not 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) The ALJ found that Bardwell voiced 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) When Bardwell met privately with Ison in her office to resume their discussion about splitting up schedules the next day, 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)

Such findings of fact by the ALJ are not mischaracterizations. Rather, the facts paint the picture that Ison resented Bardwell for voicing his concerns at both meetings and labeled his behavior as "disrespectful." Applying a totality of the circumstances test, there can be no doubt that Ison's statements to Bardwell reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (8th Cir. 2001).

VI. RESPONDENT VIOLATED THE ACT BY INTERROGATING EMPLOYEES

The ALJ found that Human Resources Manager Rhonda Pigati, prior to questioning each employee around the second week of June 2010, never informed them that their participation was voluntary² or that there would be no reprisals for refusing to cooperate. (ALJD 34:48-35:5) The ALJ further found that Respondent violated the Act when Pigati told Gloria Johnson not to discuss with other employees anything that was said during their interview. (ALJD 35:51-36:3) And during that interview, Johnson stated that her co-workers had come to her and complained about Ellen Rosa as a supervisor. Pigati asked for the names of those coworkers, and as Johnson named names; Pigati typed Johnson's answers into her computer. (ALJD 35:7-15)

² Respondent states that the ALJD indicates that Pigati's meetings with employees were "not mandatory." Resp't Brief., at 15. The ALJ never made any such finding.

Respondent asserts that the ALJ properly found that Pigati's questioning did not violate the Act. However, an application of the *Bourne*³ 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; Johnson was alone with Pigati when the questioning took place, and the questioning 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).

The ALJ erred and did not properly apply the *Bourne* factors. Specifically, there is no evidence to support the ALJ's conclusion that "[w]hile Pigati did not specifically tell Johnson the purpose of the meeting, it should have been immediately obvious to her." (ALJD at 35) The ALJ does not explain just how Johnson should have "immediately" known the purpose of the meeting. Similarly, the ALJ erred by relying upon the fact that, while "Rosa was Johnson's immediate supervisor," Pigati did not directly supervise Johnson. (ALJD at 35). As Human Resources Manager, Pigati was one of Respondent's highest-level supervisors, which is much more relevant in applying the *Bourne* factors, than whether Pigati directly oversaw Johnson's work. In sum, the ALJ erred in applying the *Bourne* factors, and the Board should find a violation as urged by the General Counsel.

Finally, for Respondent to assert that even under a subjective standard Pigati's actions do not amount to a violation misstates the law. 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.

³ *Bourne v. NLRB*, 332 F.2d 47 (3d Cir. 1964).

Multi-Ad Services, supra. And applying the objective standard would result in a finding that Pigati's questioning amounted to an unlawful interrogation.

VII. CONCLUSION

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

Dated at Phoenix, Arizona, this 23rd day of December 2011.

Respectfully submitted,

/s/Chris J. Doyle

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in GRAND CANYON EDUCATION, INC. d/b/a GRAND CANYON UNIVERSITY, Cases 28-CA-022938 et al., was served by E-Gov, E-Filing, and E-Mail, on this 23rd day of December 2011, on the following:

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