

**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 ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS**

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I. PRELIMINARY STATEMENT¹

In his decision, Administrative Law Judge Gregory Z. Meyerson (ALJ) found that Grad Team Online Enrollment Counselors Edmond Bardwell, Shelly Campbell, and Gloria Johnson engaged in concerted activities during their employment, frequently discussing amongst themselves, and with other Grad Team members, 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.

¹ Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX" and "RX" respectively, with the appropriate number or numbers for those exhibits. Reference to the transcript and the Administrative Law Judge's Decision will be designated as "Tr." and "ALJD" respectively.

The ALJ also found that, during the period Bardwell, Campbell, and Johnson were engaging in concerted activities, Respondent repeatedly violated the Act. For example, Respondent interrogated employees about their involvement with e-mails that criticized Respondent and its policies, maintained an overly-broad and discriminatory rule, orally promulgated overly-broad and discriminatory rules prohibiting employees from discussing their terms and conditions of employment, and threatened employees with discharge and unspecified reprisals because they engaged in concerted activities. Respondent did not file exceptions to these clear violations.²

More importantly, the ALJ found that Respondent had knowledge of Bardwell's, Campbell's, and Johnson's concerted activities at the time of their terminations. The ALJ further found that Respondent's decision to discharge Bardwell, Campbell, and Johnson, was motivated by employees' concerted activities, and that Johnson's termination violated the Act. These findings by the ALJ are the crux of Respondent's cross-exceptions, none of which has merit. And a common theme throughout these cross-exceptions is Respondent's contention that Senior Vice-President of Operations Sarah Boeder – the individual who terminated Bardwell, Campbell, and Johnson - had no knowledge of the discriminatees' concerted activities. That argument was rejected by the ALJ in his decision, and Respondent has not cited to any new evidence for the Board to find otherwise.

II. RESPONDENT'S SUGGESTION RELATED TO THE ALJ FINDING THAT HR MANAGER PIGATI TESTIFIED THAT GRAD TEAM ONLINE ENROLLMENT COUNSELORS GARRET, BENDER, AND PADAGAONKAR WERE ALSO VOCAL IN EXPRESSING CONCERNS ABOUT LEADS AND OTHER ISSUES

² The ALJ also found that Respondent violated the Act by (1) orally promulgating and maintaining an overly-broad and discriminatory rule prohibiting employees from talking about their terms and conditions of employment, including counselings about quality assurance issues, and (2) disparately enforcing its Electronics Communications Policy.

Respondent's Cross-Exception 1 is difficult to discern because Respondent does not address in its Supporting Brief why it excepts to this finding by the ALJ. The General Counsel, in its best Carnac The Magnificent imitation, can only speculate that Respondent highlights this finding to demonstrate that other employees, besides Bardwell, Campbell, and Johnson, expressed work-related issues to management. Indeed, Respondent raised that argument in Cross-Exception 2, addressed below.

In responding to Cross-Exception 1, the General Counsel incorporates its answer to Cross-Exception 2. To summarize that answer, the ALJ specifically found that Bardwell, Campbell, and Johnson were the most vocal employees of the Grad Team when it came to complaining about work-related issues to Respondent, and that is why Respondent discharged them.

III. RESPONDENT'S CLAIM THAT THERE IS NO SUPPORT IN THE RECORD FOR THE ALJ'S FINDING THAT CAMPBELL'S, BARDWELL'S OR JOHNSON'S COMPLAINTS ABOUT WORKPLACE ISSUES WERE DISTINGUISHABLE IN ANY WAY FROM THE COMPLAINTS MADE BY OTHER ENROLLMENT COUNSELORS

The ALJ found that "some members of the [Grad] [T]eam were certainly more vocal than others[]" when raising workplace issues with management. (ALJD 39:5) Relying upon Johnson's testimony that "not everyone on the team would speak up about their work related frustrations[]" and, instead, spoke to Bardwell, Johnson, and Campbell, the ALJ found that "the Charging Parties were the most vocal employees on the team." (ALJD 6:53-7:6) The ALJ found that the General Counsel established a *prima facie* case that Respondent terminated Bardwell, Campbell, and Johnson because of their concerted activities and, in each case, that their concerted activities were a "motivating factor" in their discharge.

In Cross-Exception 2, Respondent would have the Board ignore all of these findings and have the Board believe that "*everybody*" (emphasis supplied) on the Grad Team raised

work-related issues. Resp't Brief, at 4-5. While that may be true, the ALJ found that Bardwell, Campbell, and Johnson were the most vocal employees on the team. And because of their vociferous and repeated complaints to management, Respondent terminated them. Finally, the Board and the Courts have long held that an employer's failure to discriminate against everyone engaged in Section 7 activity does not bar the finding of a violation.

Zurn/NEPCO, 345 NLRB 12, 46 (2005); *Fluor Daniel*, 333 NLRB 427, 440, 455 (2001); *KRI Constructors, Inc.*, 290 NLRB 802, 812 (1988) (the fact an employer did not discriminate against all union applicants does not preclude a violation). *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents). *NLRB v. Nabors*, 196 F.2d 272, 276 (5th Cir. 1952) (The fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged).

IV. RESPONDENT'S CONTENTION THAT THE ALJ ERRED BY FINDING THAT BOEDER AND SCHNELL ORALLY PROMULGATED AN UNLAWFUL RULE PROHIBITING EMPLOYEES FROM TALKING WITH EACH OTHER REGARDING THEIR TERMS AND CONDITIONS OF EMPLOYMENT

The ALJ found that on December 16, 2009, Boeder and supervisor Helen Schnell met with Shelly Campbell and informed her that she would receive an Employee Counseling Statement because of alleged infractions Campbell committed during a phone conversation with a prospective student. (ALJD 30:19-22) According to Campbell's "unrebutted and credible testimony[,]" as found by the ALJ, Boeder and Schnell told Campbell not to discuss with anyone the alleged violations Respondent raised with Campbell or her impending discipline. (ALJD 30:22-25; Tr. 651:14-22) The ALJ found Boeder's and Schnell's admonition to Campbell violated the Act (ALJD 30:42-45), and found an additional violation

when this prohibition was reduced to writing on Campbell's Employee Counseling Statement, which Campbell signed for two weeks later. (ALJD 30:11-14)³

Dispersed throughout Respondent's brief in support of Cross-Exception 3 are attacks on Campbell: "unreliable testimony of Campbell[.]" "Campbell's web of inaccuracies[.]" and "Campbell's serious credibility issues[.]" Resp't Brief, at 23-24. However Respondent's attacks on Campbell's testimony, which was the ALJ credited, are nothing more than ad hominem attacks that ring hollow. In its brief Respondent does not point to any evidence in the record whatsoever, let alone evidence that would discredit Campbell. As Respondent failed to produce any witnesses to rebut Campbell's version of events, Campbell's testimony is unrebutted, inherently credible, and the ALJ's findings should be adopted by the Board.

V. RESPONDENT'S CLAIM THAT THE ALJ ERRED BY FINDING THAT RESPONDENT UNLAWFULLY APPLIED ITS ELECTRONICS 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)

More importantly, the ALJ found that Campbell engaged in protected concerted activity when she forwarded to her co-workers an e-mail criticizing Respondent's policy on the transfer of leads for international students, because such leads "clearly involved wages and working conditions". (ALJD 28:49-29:3; 41:14-18) Not only was this e-mail cited in

³ The document stated, in pertinent part, "[a]lthough I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with any other current or former employee of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources." (GCX 6)

Campbell's final Termination Request form as a basis for her termination (GCX 7), but Respondent specifically raised this e-mail to Campbell during her termination meeting on February 23, 2010. Campbell's immediate supervisor, Ellen 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) Accordingly, the ALJ correctly found that Respondent, by Rosa's statement to Campbell during the February 23 termination meeting, violated Section 8(a)(1), i.e., 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)

Respondent's Cross-Exception 4 is difficult to discern because Respondent does not address in its Supporting Brief exactly how the ALJ erred. Respondent offers no arguments, nor any evidence, in its Supporting Brief to justify filing this Cross-Exception. Accordingly, the Board should reject it.

VI. RESPONDENT'S CLAIM THAT THE ALJ ERRED BY FINDING THAT THE GENERAL COUNSEL ESTABLISHED A *PRIMA FACIE* SHOWING THAT CAMPBELL'S PROTECTED CONCERTED ACTIVITY WAS A MOTIVATING FACTOR IN RESPONDENT'S DECISION TO TERMINATE HER EMPLOYMENT

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 co-employees 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 Acting 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 41:14-18), (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), (4) supervisor Rosa informed Campbell at her termination meeting that her forwarding the e-mail was a reason for her termination (ALJD 13:43-14:2), and (5) Respondent violated the Act, as it pertained to Campbell, by disparately enforcing its e-mail policy.

Notwithstanding all of these findings by the ALJ, Respondent, in support of Cross-Exception 5, baldly states “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* [emphasis supplied].” Resp’t Brief, at 11. Because the ALJ credited Campbell’s un rebutted testimony as to Rosa’s statement (28:24-31), and Respondent has not shown that this credibility determination should be overturned, the ALJ’s finding should be adopted by the Board.

VII. RESPONDENT’S CONTENTION THAT THE ALJ ERRED IN IMPUTING KNOWLEDGE AND AWARENESS TO SARAH BOEDER OF THE DISCRIMINATEES’ CONCERTED ACTIVITIES

According to Respondent, the supervisor who was the “ultimate decision-maker” to terminate Bardwell, Campbell, and Johnson was Vice-President of Operations Sarah Boeder. In its Brief to the ALJ, Respondent begged the ALJ to find that Boeder was oblivious to the discriminatees’ concerted activities when she fired them, even though the supervisors underneath Boeder knew. The ALJ flatly rejected that plea:

Additionally, I do not accept the Respondent’s defense that the ultimate decision maker for the discharges of the three Charging Parties, senior vice president of operations Sarah Boeder, was personally unaware of the concerns of the concerted activity engaged in by Campbell, Bardwell, and Johnson. It is well established Board law that information known to lower level managers, such as [Helen] Schnell and [Ellen] Rosa, is presumed also known

to upper management. Schnell and Rosa were admitted supervisors of the Respondent and their knowledge is considered to be imputed to and possessed by the Respondent as an institution.

(ALJD 40:25-32)

Now, Respondent takes a second bite at the apple, hoping the Board ignores the ALJ's findings.

A. The ALJ's Finding is Consistent with Board Case Law

The Board has consistently held that knowledge of an employee's protected activities acquired by a lower level foreman may be imputed to the higher managerial decision-maker. *Martech MDI*, 331 NLRB 487, 501 (2000); *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1110 (1999); *GATX Logistics, Inc.*, 323 NLRB 328, 333 (1997). Furthermore, the employer bears the burden of proof to demonstrate that the decision-maker lacked such knowledge. *Vulcan Waterproofing Co.*, *supra*; *GATX Logistics, Inc.*, *supra*, *Dr. Philip Medal D.D.S., Inc.*, 267 NLRB 82 (1983).

The ALJ found that Boeder was aware of Campbell's concerted activities at the time of her discharge. Specifically, the ALJ found that Campbell's immediate supervisors Schnell and Rosa – both of whom were admitted supervisors - were personally aware of Campbell's activities because they held group meetings with the Grad Team wherein Campbell voiced work-related concerns. (ALJD 40:28-32). Moreover, Campbell's Termination Request Form reflects that Rosa, Campbell's immediate supervisor at the time of her discharge, reviewed, approved, and signed the Termination Request form. (GCX 7) Thus, Rosa participated in the decision-making process to terminate Campbell. Accordingly, the ALJ correctly imputed Rosa's (and Schnell's) knowledge of Campbell's concerted activities to Boeder.

In support of its contention, Respondent cites to Boeder's testimony that she was unaware of the identity of Johnson, and cites *Ellison Media Co.*, 344 NLRB 1112 (2005), for the proposition that the Board will not impute knowledge to the employer where such knowledge is credibly denied in the context of the circumstances of the case. Resp't Brief at 6-7. However, the ALJ specifically noted that, where witnesses have testified in contradiction to his findings, he has discredited their testimony "as being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of disbelief." (ALJD 2, fn.2) Because Boeder's testimony, denying knowledge of employee protected activities, was discredited by the ALJ, to overturn the ALJ's credibility resolution Respondent must show that the clear preponderance of all the relevant evidence shows that these resolutions were incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent has not, and cannot, do so.

Moreover, rather than marshalling record evidence to overturn the ALJ's finding, Respondent simply relies on Boeder's discredited testimony. Significantly, at the time the original charge in this matter was filed and served upon Respondent's Human Resources Department, in early March 2010, Boeder was transitioning from directly overseeing the Human Resources Department to her new position as Senior Vice President of Online Operations. (GC. 1(a), 1(b); Tr. 471) In this position, Boeder was specifically responsible for the enrollment counseling positions. (Tr. 472). It is inconceivable that Boeder had no knowledge that Respondent's enrollment counselors were engaged in concerted activities and had filed charges with the Board regarding their concerted conduct during this time-frame. The ALJ properly discredited her testimony.

B. The ALJ Made Specific Findings Regarding Boeder's Knowledge of the Protected Activities of Bardwell or Johnson

The ALJ found that Boeder was the ultimate decision maker for the discharges of Bardwell and Johnson, and was aware of their concerted activities. (ALJD 40:25-28) The ALJ further found that Assistant Vice-Principal Chanelle Ison, an admitted supervisor, held “acrimonious” meetings with the Grad Team in April/May and July 2010 wherein Bardwell and Johnson voiced work-related complaints. (ALJD 43:44-44:5; 44:10-38; 51:36-38) Moreover, both Johnson’s and Bardwell’s Termination Request Form reflects that Ison, reviewed, approved, and signed the Termination Request forms. (GCX 20 and 23)⁴ Thus, Ison participated in the decision-making process to terminate Johnson and Bardwell. Accordingly, Ison’s knowledge of Bardwell’s and Johnson’s concerted activities were imputed to Boeder.

Despite these findings of fact and unrebutted evidence, Respondent argues that the ALJ failed to identify which supervisors were aware of Bardwell’s and Johnson’s concerted activities that are to be imputed to Boeder. Resp’t Brief at 8. Respondent’s argument should be rejected.

VIII. RESPONDENT’S CLAIM THAT THE ALJ ERRED BY FINDING THAT CAMPBELL’S FORWARDING THE JANUARY 20, 2010 “SARCASTIC E-MAIL” WAS MENTIONED IN HER TERMINATION REQUEST FORM “AS ANOTHER EXAMPLE OF MISCONDUCT ON CAMPBELL’S PART”

Like Respondent’s Cross-Exception 1, Cross-Exception 7 is difficult to discern because Respondent does not address in its Supporting Brief why it excepts to this finding by the ALJ. Shelly Campbell’s Termination Request form, which Respondent created, list Campbell’s misconducts during her employment that justify her discharge, including Campbell forwarding an e-mail on January 20, 2010 “which was a parody of recently

⁴ Ray Akers, the immediate supervisor of Johnson and Bardwell at the time of their discharges, also reviewed, approved, and signed the Termination Request forms. Respondent admitted to Akers’ supervisory status. (GCX 57)

announced GCU policy changes[.]” (GCX7 and RX 1) The ALJ’s findings that this e-mail was “sarcastic” and “another example” of Campbell’s misconduct came directly from the document Respondent introduced into evidence and cited in its Brief to the ALJ to argue why Respondent terminated Campbell. Respondent now excepts to the ALJ making these findings. Accordingly, the Board should reject this Cross-Exception.

IX. RESPONDENT’S CLAIM THAT THE ALJ ERRED BY FINDING THAT THE GENERAL COUNSEL OFFERED SUFFICIENT EVIDENCE TO MEET HIS BURDEN OF ESTABLISHING THAT SHELLY CAMPBELL’S DISCHARGE WAS UNLAWFUL

In Cross-Exception 8, Respondent fails to address in its Supporting Brief why it excepts to this finding by the ALJ, except to suggest the ALJ was wrong. The ALJ found that Respondent, both in Campbell’s Termination Request form and at her termination meeting, cited Campbell’s e-mail as one of the reasons for her discharge. Furthermore, the ALJ found Respondent disparately enforced its e-mail policy towards Campbell. All of these findings led the ALJ to conclude, without difficulty, that the General Counsel established that Respondent discharged Campbell because she forwarded the January 20, 2010 e-mail to her co-employees.

X. RESPONDENT’S CLAIM THAT THE ALJ ERRED BY FINDING THAT THE GENERAL COUNSEL ESTABLISHED A *PRIMA FACIE* CASE RELATED TO BARDWELL’S PROTECTED CONCERTED ACTIVITY AND RESPONDENT’S DECISION TO TERMINATE HIM

The ALJ found that Bardwell engaged in significant concerted activities, complaining over an extended period of time to Campbell and Johnson and to Respondent 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 Assistant Vice-Principal Chanelle 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)

In its attempt to discredit the ALJ’s findings, Respondent, in Cross-Exceptions 9 and 10, argues that Bardwell’s concerted activities - notably his meetings with Ison - were too remote in time to his discharge. Resp’t Brief, at 15-16. This argument ignores the facts that Bardwell’s concerted activities occurred throughout his employment, including up to the time that Respondent discovered Bardwell’s alleged significant misconduct in late August/early September. (Tr. 617:19-22; 643:10-644:23; 726:4-18; 731:1-732:15; 734:5-20; 735:10-15; 741:13-22; 742:3-13; 745:2-14; 755:19-756:4; 758:18-759:8; 769:17-770:8; 885:4-11; 886:5-23; 915:5-10) The ALJ merely highlighted two meetings Bardwell had with Ison, a member of upper management, which evinced Bardwell being extremely vocal about working conditions that he and the Grad Team shared. As such, there is ample record evidence to support a finding of a nexus between Bardwell’s protected activity and his termination.

Additionally, Respondent contends that Sarah Boeder was unaware of Bardwell’s concerted activities when she terminated him. Thus, the General Counsel failed to establish that Respondent had knowledge of Bardwell’s activities and failed to prove a *prima facie* case. That argument is flawed because Boeder had knowledge of Bardwell’s concerted activities because admitted supervisor Chanelle Ison, Respondent’s Assistant Vice-Principal, conducted “acrimonious” meetings with the Grad Team in April/May and July 2010 wherein Bardwell voiced work-related complaints (ALJD 43:44-44:5; 44:10-38).

XI. RESPONDENT’S CONTENTION THAT THE ALJ’S CONCLUSION REGARDING GLORIA JOHNSON’S TERMINATION WAS UNSUPPORTED BY THE RECORD OR RELEVANT CASE LAW

In Cross-Exceptions 11-13, Respondent excepts to the ALJ’s credibility findings regarding the testimony of Johnson’s immediate supervisor, Ray Akers. In finding that Johnson’s discharge violated the Act, the ALJ painstakingly examined the testimonies of Johnson and Akers concerning their conversations on July 15 and 16, 2010, about Akers twice granting Johnson permission to write the correct information on student Bessie Miller’s transcript request form. The ALJ found Johnson “much more credible” and “accepted Johnson’s version” because “[h]er story made sense, it was logical, and she delivered her testimony in a calm, straight forward manner[.]” (ALJ 53:52-54:3)

By contrast, the ALJ did “not find Akers’ story credible” because it was “very inconsistent and illogical.” (ALJD 53:42) The ALJ found that Akers admitted giving Johnson permission, twice, to write on Miller’s transcript form (ALJ 53:42-45), but then sang a different tune “to cover for himself” after his superiors “questioned[] his conduct and displayed an interest in terminating Johnson.” (ALJD 53:47-49)

Now Respondent seeks to convince the Board to ignore the ALJ’s careful, well-supported determinations, ignore the credible testimony, and instead credit Akers’ version of events. Again, the Board will not overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence shows that these resolutions were incorrect. *Standard Dry Wall Products*, supra. Here, Respondent has not provided any concrete examples, or otherwise marshaled record evidence, to show that the ALJ’s credibility findings were glaringly erroneous. Instead, Respondent simply claims that Akers never testified that he had given Johnson permission to write on the transcript request

form. Resp't Brief, at 17. But Respondent does not cite the specific page and line(s) in the transcript that support its contention.⁵

Moreover, the preponderance of the relevant record evidence supports the ALJ's findings. Johnson, as credited by the ALJ, testified that she received permission from Akers to write on the transcript request form. (Tr. 800-801) Despite Respondent's claim to the contrary, Akers testified that he looked at the transcript request form, which had the student's school name filled in with purple ink, as opposed to the rest of the form which was in black ink, and told Johnson "it looks fine." (Tr. 1061, 1070-71) He then told Johnson again "it should be fine, won't have a problem submitting it." (Tr. 1061) The clear preponderance of the relevant evidence supports the ALJ's credibility resolutions.

Similarly, Respondent disputes the ALJ's finding that Akers, after granting Johnson permission, changed his story to protect himself after his supervisors questioned him and showed a desire to discharge Johnson. Again, Respondent fails to provide evidence in its Brief that would disprove these findings of fact, instead offering up theories as to which supervisor would want to terminate Johnson because of her concerted activities.

Resp't Brief, at 18-19. As noted by the ALJ, Akers' testimony was inherently inconsistent and supports the ALJ's conclusion that Akers was trying to cover for himself. Akers admitted that, when students submit forms to Respondent, either via email or fax, they are black and white; printed on white paper with black ink. (Tr. 1070-71). Akers also testified that, when Johnson initially showed him Miller's application it contained purple ink, presumably the part filled-in by Johnson, and he told Johnson the form "looks fine . . . should be fine, won't have a problem submitting it." (Tr. 1061) Even assuming that Akers' testimony was true, seeing

⁵ Respondent instead cites to Transcript page 106, where Chanele Ison, not Akers, is testifying. Resp't Brief at 17.

the purple ink on the form, Akers clearly knew that Johnson had filled-in part of the form, and told her it was fine. As the ALJ noted, it was only after speaking to his superiors, that Akers tried to blame Johnson for supposed misconduct.

Because Respondent has not, and cannot, show that the ALJ's credibility resolutions were clearly erroneous, the Board should adopt the ALJ's findings. *Standard Dry Wall Products*, supra.; *Painters and Allied Trades District Council No. 51*, 321 NLRB 158 (1996).

A. There was Sufficient Evidence Even to Show a *Prima Facie* Case

There was "no doubt" in the ALJ's mind that Johnson engaged in protected concerted activities (ALJD 38:48-49), a fact that not even Respondent disputed. (ALJD 51:19-21) The ALJ further found that Respondent was aware of Johnson's concerted activities, and these activities were a motivating factor in Respondent's decision to terminate Johnson. (ALJD 51:32-36)

Specifically, the ALJ found that two weeks prior Johnson's discharge, Assistant Vice-Principal Chanelle Ison had a "very heated and acrimonious meeting" with Johnson and the Grad Team (ALJD 51:36-38), wherein Ison informed the Grad Team that: (1) their work quotas would not be changed; (2) they would not get additional degree programs to supplement the existing criminal justice and Christian studies programs; (3) there was a new scheduling policy under which one or two team members were to cover late-night shift hours every night;⁶ and (4) Grad Team members could not - as requested by Johnson - 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 36:14-22)

⁶ The ALJ found that Johnson expressed her unhappiness over the new scheduling policy at the meeting. (ALJD 51:26-27)

All of these findings led the ALJ to conclude the General Counsel established a *prima facie* case, especially the close proximity in time between Johnson’s concerted activity and her discharge. But Respondent hopes, in Cross-Exceptions 14 and 15, that the Board pays no attention to these findings. Instead Respondent wants the Board to believe that a *prima facie* case does not exist because it never disciplined Johnson prior to her discharge. Ergo, Respondent never harbored any animus towards Johnson or her concerted activities. Resp’t Brief, at 19-20. To accept that premise would require the Board to reject the ALJ’s finding that Respondent’s justification for firing Johnson – falsification of a student’s transcript request form – was “pretext” and Respondent “manufactur[ed] ‘something out of virtually nothing’ in an effort to terminate Johnson.” (ALJD 54:46-47)

B. The ALJ Did Not Error in Concluding that Respondent’s Explanation for the Decision to Terminate Johnson was a Pretext and that She Was Terminated Because of Her Protected Concerted Activity.

The ALJ found that Respondent’s excuse for terminating Johnson - falsification of a student’s transcript request form - was pretext because (1) the “simple rudimentary” information Johnson wrote on Bessie Miller’s transcript request form was “correct” (i.e. not false), (2) the information Johnson wrote down were the name of the university and the campus location, neither of which was “sensitive, confidential or private[.]” and (3) supervisor Akers twice granted Johnson permission the change information on Bessie Miller’s transcript request form (despite Respondent’s alleged zero-tolerance policy on counselors making changes to such forms).⁷ (ALJD 54:38-44)

Contrary to Respondent’s argument in Cross Exception 16, the ALJ did not find Johnson’s termination pretext because he disagreed with Respondent’s zero-tolerance policy on non-compliance issues. Resp’t Brief, at 22. Rather, the ALJ concluded that Respondent

⁷ ALJ also found that Miller granted Johnson permission to make the changes. (ALJD 54:40-41)

twice granted Johnson permission to write non-confidential, truthful information on a university-generated document, yet fired Johnson for falsification of that document, and that Johnson's discharge occurred two weeks after she had participated in an "acrimonious meeting" with Assistant Vice-Principal Ison. (ALJD 54:50-55:2)

XII. RESPONDENT'S CLAIM THAT THE ALJ ERRED BY INCLUDING LANGUAGE IN THE NOTICE TO EMPLOYEES THAT INFORMS EMPLOYEES OF THEIR RIGHTS TO ENGAGE IN CONCERTED ACTIVITIES

Notice to Employees contains the heading "FEDERAL LAW GIVES YOU THE RIGHT TO" and, underneath it, are four boilerplate sentences⁸ that inform employees of their rights under the Act. Below the fourth sentence, the ALJ wrote the following paragraph:

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including complaints regarding the quality of leads given to enrollment counselors, quotas enrollment counselors must meet, and degree programs available in which to enroll students.

Respondent's Cross-Exception 17 is difficult to discern because Respondent does not address in its Supporting Brief why it excepts to this paragraph in the Notice. General Counsel speculates that Respondent's objection to the paragraph is that it informs its enrollment counselors of their right to engage in the same protected concerted activities as Bardwell, Campbell and Johnson: discuss and complain about the quality of leads, quotas enrollment counselor must meet, and degree programs available in which to enroll students.

⁸ "Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities"

XIII. CONCLUSION

Based upon the foregoing and the record as a whole, the General Counsel submits that the ALJ correctly found that Respondent repeatedly violated Section 8(a)(1). Accordingly, General respectfully urges the Board to reject Respondent's Cross-Exceptions and to adopt the ALJ's findings and recommended order pertaining to these meritorious unfair labor practices.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS 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 23rd day of December 2011, on the following:

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