

Grand Canyon Education, Inc. d/b/a Grand Canyon University and Edmond Bardwell and John Young, III and Shelly Campbell and Gloria Johnson. Cases 28–CA–022938, 28–CA–023035, 28–CA–023038, 28–CA–023239, and 28–CA–023336

February 2, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On July 12, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 1481. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB 1481, which is incorporated herein by reference.¹ The judge's recommended Order, as further modified herein, is set forth in full below.²

¹ In affirming the Board's finding in the vacated Decision and Order that the December 16, 2009 statements by Senior Vice President of Operations Sarah Boeder and Enrollment Counselor Manager Helen Schnell to Charging Party Shelly Campbell constituted the oral affirmation of an existing unlawful written rule, rather than the oral promulgation of a new rule, we rely on *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243–244 (2014).

² In ordering the tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We modify the judge's recommended Order to include a remedial provision that was inadvertently omitted. We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

We agree with the analysis in the vacated Decision and Order regarding Human Resources Business Partner Rhonda Pigati's questioning of employee Gloria Johnson, and we find that it violated Section 8(a)(1) of the Act for the reasons stated therein. We further find, contrary to the judge, that whether Pigati had a nefarious purpose in asking for the names of employees who had complained about Supervisor Ellen Rosa is immaterial in assessing the lawfulness of the inquiry. Rather, our analysis properly focuses on whether the questioning would reasonably tend to coerce the employee in exercising her Section 7 rights. *Hanes Hostery, Inc.*, 219 NLRB 338, 338 (1975). Nor does Johnson's volunteering that some employees had voiced similar complaints about their supervisor privilege Pigati's request that Johnson identify those employees. See *Belle of Sioux City, L.P.*, 333 NLRB 98, 105 (2001) (questioning employee about identities of other employees to whom she had referred regarding protected concerted activity unlawful); see also *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990) (questioning employee beyond the scope of her volunteered statement about another employee's union activities unlawful). What our dissenting colleague characterizes as Pigati's "logical" question in response to Johnson's statement, in actuality unlawfully sought specific information about the protected activities of other employees beyond what Johnson had offered. Accordingly, we find the interrogation unlawful.

ORDER

The Respondent, Grand Canyon Education, Inc. d/b/a Grand Canyon University, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing an overly broad written rule in its employee counseling statement that requires employees to agree to the following:

Although 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 employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

(b) Orally affirming an overly broad written rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling sessions.

(c) Interrogating employees about their involvement with emails criticizing the Respondent and its policies as they affect terms and conditions of employment.

(d) Orally promulgating, maintaining, or enforcing an overly broad and discriminatory rule prohibiting employees from discussing their terms and conditions of employment with other persons, including fellow employees.

(e) Threatening its employees with discharge and other unspecified reprisals because they engaged in protected concerted activities.

(f) Disparately enforcing its electronic communications policy in order to prohibit its employees' use of emails to engage in protected concerted activities.

(g) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activities.

(h) Coercively interrogating employees regarding their protected concerted activities or those of other employees.

(i) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revise or rescind the rule contained in the employee counseling statement described in paragraph 1(a) above, and furnish employees with written notice that this rule has been rescinded or with a revised document that does not contain this rule.

(b) Within 14 days from the date of this Order, offer Gloria Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Gloria Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Gloria Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days of this Order, remove from its files any reference to the unlawful discharge of Gloria Johnson, and within 3 days thereafter notify her in writing that this has been done and that her discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records

and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its campus in Phoenix, Arizona, and its other locations copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with the judge's rulings, findings,¹ and conclusions in this multiple-issue case. For the reasons stated

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ Many of the judge's findings were not the subject of exceptions. Thus, there were no exceptions to the judge's dismissal of allegations that Respondent violated Sec. 8(a)(1) by (i) statements allegedly made by Human Resource Manager Linda Lair to employee John Young in January 2010 and on March 3, 2010, and (ii) maintaining its electronic communications policy. There were also no exceptions to the judge's findings that Respondent violated Sec. 8(a)(1) by (i) coercively interrogating employees Gloria Johnson and Edmond Bardwell about an email critical of two managers, Assistant Vice President of the College of Business and Liberal Arts Chanelle Ison and Assistant Director of Enrollment Chris Landauer; (ii) orally promulgating a rule to Johnson, Bardwell, and other members of the "grad team" (enrollment counselors assigned to Respondent's graduate degree programs in Christian studies and criminal justice) that they could not read or forward the email critical of Ison and Landauer; (iii) threatening Johnson, Bardwell, and other members of the grad team with discharge if they read or

in the judge's decision, as supplemented below, I concur with my colleagues' decision to uphold the judge's decision as to most issues, and I respectfully dissent as to one aspect of the judge's decision that my colleagues reverse.

1. *The Johnson Discharge.* I agree with the judge's findings, pursuant to *Wright Line*,² that the Respondent violated Section 8(a)(1) by discharging employee Gloria Johnson. I believe it is significant that (i) the Respondent did not except to the judge's findings that it committed several 8(a)(1) violations against Johnson, including threatening her with discharge if she engaged in protected concerted activity; (ii) the Respondent discharged Johnson just 2 weeks after she (and other employees on the grad team) engaged in protected concerted activity during a "heated and acrimonious" meeting with a manager; and (iii) the judge found, and the record supports the judge's finding, that Respondent's asserted reason for discharging Johnson was pretextual, and accordingly, the record is insufficient to establish Respondent's *Wright Line* burden of proving that it would have discharged Johnson in the absence of her protected activity.

2. *The Bardwell and Campbell Discharges.* I agree with the judge's findings that Respondent did not violate Section 8(a)(1) by discharging employees Edmond Bardwell and Shelly Campbell. Preliminarily, I agree with the judge's statement of the *Wright Line* standard and the elements the General Counsel must establish to sustain his burden under *Wright Line*, including the requirement that the General Counsel establish a link or nexus between the employee's protected activity and the

forwarded the email critical of Ison and Landauer; (iv) including an overly broad confidentiality requirement in its employee counseling statement; and (v) admonishing Johnson, by Human Resources Business Partner Rhonda Pigati, to keep confidential everything talked about during the June 2010 meeting between Pigati and Johnson, which included discussion of employees' terms and conditions of employment.

The Respondent did except to the judge's finding that it violated Sec. 8(a)(1) by disparately applying its electronic communications policy. However, it did not state, in either its exceptions or its supporting brief, on what grounds the assertedly erroneous finding should be reversed. Under these circumstances, our rules provide that the Respondent's exception "may be disregarded." Board's Rules and Regulations Sec. 102.46(b)(2); see *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). Thus, I believe that a bare exception—one that lacks any explanation or support either in the exception or the supporting brief—should be disregarded, absent unusual circumstances. Here, the Respondent has not pointed to any unusual circumstances, and my review of the record discloses none. Accordingly, I believe it is appropriate to disregard this exception.

The Respondent also excepted to some of the judge's credibility findings. I find there is no basis for reversing the judge's credibility findings under *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

² *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

employer's adverse employment action. See *Libertyville Toyota*, 360 NLRB 1298, 1306 (2014) (Member Miscimarra, concurring in part and dissenting in part). As to the merits of Campbell's discharge, I agree with the judge's rationale for dismissing the unlawful discharge allegation. As to Bardwell's, I do not reach or rely on the judge's finding that the General Counsel met his burden under *Wright Line*. Rather, I find, for the reasons stated by the judge, that the record establishes that—even if the General Counsel could satisfy his initial *Wright Line* burden—the Respondent met its *Wright Line* burden to show it would have discharged Bardwell even in the absence of his protected activities.³

3. *The "Not to Discuss" Instruction.* I agree with the judge that Respondent violated Section 8(a)(1) when Senior Vice President of Operations Sarah Boeder and Enrollment Counselor Manager Helen Schnell told Campbell that she was not to discuss her counseling meeting with anyone. However, I also agree with my colleagues that Boeder and Schnell did not promulgate a new rule but, rather, Respondent orally reiterated an existing written rule—the confidentiality requirement in Respondent's employee counseling statement—which was found unlawful by the judge with no exceptions.

4. *The Alleged Unlawful Interrogation Regarding Complaints about Supervisor Rosa.* Unlike my colleagues, I would affirm the judge's dismissal of the allegation that the Respondent, through Human Resources Business Partner Pigati, unlawfully interrogated Johnson. As part of her job duties, Pigati listened to complaints from a number of grad team counselors. In June 2010, Pigati held one-on-one meetings with some members of the grad team to discuss their concerns. Specifically, Pigati wanted to hear the employees' evaluations of Team Supervisor Ellen Rosa, as well as to determine the level of team morale.

One of the employees Pigati met with was Johnson.⁴ Pigati began the interview by stating that she "was meeting with everyone on the team and that whatever we

³ I also agree with the judge's dismissal of two other allegations related to Bardwell. First, I agree that Respondent did not impliedly threaten unspecified reprisals when Ison told Bardwell that the grad team was "opinionated" and "a hard case" and that Bardwell had acted disrespectfully towards Ison. Second, I agree that Bardwell's discharge did not violate Sec. 8(a)(4). The General Counsel cites no evidence that Respondent harbored animus against Bardwell because he filed an unfair labor practice charge and gave testimony in Case 28-CA-022938. Moreover, as I have found above, the Respondent demonstrated it would have discharged Bardwell regardless of his protected activities.

⁴ Rosa was Johnson's immediate supervisor. Pigati did not directly supervise Johnson.

talked about in that office, to keep it confidential.”⁵ Pigati then asked Johnson what she thought about Rosa as a manager. Johnson replied that Rosa was trying her best but had not been given “a fair chance to even learn, you know, [how to] be a manager,” and “that [Rosa] was doing her best. . . with what she had.” Johnson also volunteered to Pigati that “some of the other people had come to [her] and complain[ed] about [Rosa] as a manager.” Pigati asked Johnson who those people were, Johnson named three employees, and Pigati took notes on her computer. As Johnson was leaving the meeting, Pigati stated that she would “be contacting everybody else and just keep this, you know, don’t talk to anybody else on the team.”

The judge found that Pigati did not unlawfully interrogate Johnson. He found that it would have been obvious that the purpose of the meeting was to find out what kind of a job Rosa was doing as a supervisor. The judge also pointed out that Johnson volunteered to Pigati that others had complained to her about Rosa, and it was only then that Pigati asked Johnson for the names of those employees. The judge found that Johnson appeared to have no reluctance in giving those names to Pigati, and that “there was no reason to believe that Pigati wanted the names for any nefarious purpose.” The judge found that there was nothing coercive or confrontational about the meeting, in which “Pigati was simply trying to determine how the employees felt about Rosa as a manager.”

I believe there is no merit in the General Counsel’s exception to the judge’s dismissal of this allegation. An employer’s questioning of an employee violates Section 8(a)(1) only when it tends in some manner to restrain, coerce, or interfere with employee rights under the Act.⁶ Here, the record establishes, in my view, that Pigati’s questions could not possibly have had such a tendency. Most important, her questions had nothing whatsoever to do with the protected activities of Johnson or anyone else. Pigati asked Johnson about Rosa’s performance as a supervisor. Johnson candidly replied, and volunteered that some employees had complained to her about Rosa.⁷

⁵ Again, there are no exceptions to the judge’s finding that Respondent violated Sec. 8(a)(1) when Pigati admonished Johnson to keep everything talked about during the interview confidential.

⁶ *Rossmore House*, 269 NLRB 1176, 1177 (1984) (citing *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁷ There is no allegation, and the majority points to no evidence, that any employees who complained to Johnson about Rosa had the object, in doing so, of initiating, inducing, or preparing for group action. Accordingly, I disagree with my colleagues’ unsupported contention that Pigati “sought specific information about the *protected* activities of other employees beyond what Johnson had offered” (emphasis added). See *Meyers Industries*, 281 NLRB 882, 887 (1986), *affd.* sub nom. *Prill*

Pigati logically asked who they were. Earlier, Pigati had told Johnson that she was meeting with everyone on Johnson’s team. When an employer conducts investigations that relate in part to the effectiveness (or lack of effectiveness) of a particular supervisor, and when the employer is informed that other employees complained about the supervisor, nothing in the Act makes it unlawful to ask for the names of these other employees. It is self-evident in these circumstances that the employer has a legitimate business reason for seeking this information. It is significant, in this regard, that inappropriate or ineffective actions by supervisors can adversely affect all employees, including those protected by the Act, in addition to exposing the employer to liability for any actions by supervisors that violate the Act. Here, the record establishes that Pigati wanted the names of other employees who had raised complaints about Rosa in connection with Respondent’s inquiry into Rosa’s performance, and there is no evidence that would support any reasonable belief by Johnson or anyone else that Pigati threatened or intended to take adverse action against those employees. Therefore, I would affirm the judge’s dismissal of this allegation. My colleagues reverse. As to this issue, therefore, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- 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.

WE WILL NOT maintain or enforce an overly broad rule in our employee counseling statement that requires you to agree to the following:

Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confiden-

v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

tial and may not be discussed with other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

WE WILL NOT tell you that you are prohibited from talking to fellow employees about your terms and conditions of employment, including counseling sessions.

WE WILL NOT coercively interrogate you about your involvement with emails criticizing us and our policies as they affect terms and conditions of employment.

WE WILL NOT orally announce, maintain, or enforce an overly broad and discriminatory rule prohibiting you from discussing your terms and conditions of employment with other persons, including fellow employees.

WE WILL NOT threaten you with discharge and other unspecified reprisals if you engage in protected concerted activities.

WE WILL NOT inconsistently enforce our electronic communications policy in order to prohibit your use of emails to engage in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT coercively interrogate you about your protected concerted activities or those of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL revise or revoke the rule contained in our employee counseling statement described above; and WE WILL furnish you with written notice that this rule has been rescinded, or furnish you with a revised document that does not contain this rule.

WE WILL, within 14 days from the date of the Board's Order, offer Gloria Johnson full reinstatement to her former job or, if that job no longer exists, to a substan-

tially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Gloria Johnson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Gloria Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gloria Johnson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

GRAND CANYON EDUCATION, INC. D/B/A
GRAND CANYON UNIVERSITY

The Board's decision can be found at www.nlr.gov/case/28-CA-022938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

