

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**DALTON SCHOOLS, INC. D/B/A/ THE DALTON
SCHOOL**

And

Case 02-CA-138611

DAVID BRUNE, an Individual

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

Dated at New York, NY
This 21st day of August 2015

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I. STATEMENT OF THE CASE

Deputy Chief Administrative Law Judge Arthur Amchan accurately set for the statement of the case in his decision, issued June 1, 2015.

On July 20, 2015, Respondent timely filed exceptions to Judge Amchan's findings of fact and law. The Board granted Counsel for the General Counsel's extension of time request to file the answering brief and cross exceptions until August 21, 2015.

The General Counsel submits this answering brief to Respondent's exceptions pursuant to Section 102.46 of the Board Rules and Regulations. It is the General Counsel's position that Judge Amchan's decision was correct as to matters of law and fact, and that the Board should reject Respondent's exceptions and adopt the Decision and Recommended Order in its entirety.

II. STATEMENT OF THE ISSUES

Respondent filed 97 separate exceptions to Judge Amchan's Decision and Recommended Order. Respondent's exceptions can be summarized into the following issues:

- A. Whether the ALJ properly concluded that David Brune ("Brune") was engaged in protected concerted activity when he emailed his coworkers on February 6.
- B. Whether the ALJ properly concluded that Respondent had knowledge of the concerted nature of Brune's February 6 email.
- C. Whether the ALJ properly concluded that Respondent rescinded Brune's employment contract in retaliation for his protected concerted activity.
- D. Whether the ALJ properly concluded that comments in Brune's February 6 email did not lose the protections of the Act.
- E. Whether the ALJ properly concluded that Respondent violated the Act by interrogating Brune about his protected concerted activity.

III. STATEMENT OF THE FACTS

A. Respondent's business operations

Respondent is an independent, private, co-educational school in New York City. Tr. 17:

16-18. Respondent's administration includes:

1. Ellen Stein ("Stein"), head of school. Tr. 16: 21.
2. Jim Best ("Best"), associate head of school. Tr. 146: 16.
3. Lorri Hamilton Durbin ("Durbin"), director of the middle school. Tr. 164: 3.

Stein, Best, and Durbin are collectively referred to herein as "the administration." Brune was the technical director and technical theater teacher in Respondent's Theater Department from September 2001 until August 31, 2014. Tr. 30: 8-9.

Respondent renews employment contracts on an annual basis in February each year. Tr. 18: 16, 18. Respondent renewed Brune's contract on February 3, 2014, offering him employment for the 2014-2015 school year. GC Exh. 2. Brune signed and accepted his contract a few days after he received it. Tr. 31: 8-11. Brune's contract had been renewed every year for the past 13 years. Tr. 27: 15.

B. The Theater Department staff members write each other emails about the extra hours and stress caused by the administration's handling of changes to the middle school play and consider asking the administration for an apology or recognition.

On February 6, 2014, Robert (Bob) Sloan, chairman of the Theater Department, wrote to his colleagues via email to the Theater Department listserv. GC Exh. 4. The Theater Department email listserv consists of: Sloan, Brune, Meg Zeder, Kevin Gallagher, and Allen Kennedy, all department instructors with the exception of Zeder, who is a designer. Tr. 25: 10-13. Stein testified that these are the five individuals on the Theater Department listserv. Tr. 25: 10-13. The administration is not on this listserv, nor are any parents, students, or members of the public. Tr. 25: 15-25. Sloan's email was in reference to the administration's handling of the changes to the

middle school theater production, *Thoroughly Modern Millie* (“TMM”), and the effect the administration’s actions had on the Theater Department Staff.¹

In this email, entitled “first draft of letter,” Sloan sent his colleagues in the Theater Department a draft letter he thought they should send to the administration. GC Exh. 4.² In the letter, Sloan proposed that the Theater Department make the administration aware of the “tremendous amount of extra time, energy, and artistry that we as a department exerted to make each incarnation of the production function....” GC Exh. 4. Sloan explained that being in limbo for days at a pivotal point in the process was difficult for the Theater Department staff. GC Exh. 4. He concluded by suggesting he and his colleagues tell the administration that the Theater Department staff felt taken for granted and that they deserved some recognition for their extra effort. GC Exh. 4.

On the same day, Allen Kennedy, a teacher in the Theater Department, responded to Sloan’s email and to the entire Theater Department listserv. GC Exh. 5. He wrote, “A good start, Bob” and wrote some suggestions for language to add to the letter. GC Exh. 5. Kennedy suggested telling the administration that the “school’s leaders must be unaware of the excruciating personal costs of this recent debacle on the theater faculty and production team.” GC Exh. 5.

¹ Parents had raised concerns about Asian stereotypes portrayed in *TMM*, so after nearly eight months of preparation for the play, the administration ordered the Theater Department staff to stop work on the play. Tr. 39: 12-15; Tr. 39: 19-20. In the approximately 10 days that followed, the Theater Department prepared the play as a modified, shortened revue. Tr. 40: 20-25; Tr. 41: 1-5. Brune and his coworkers finally learned that the play would open in a modified format, however, they learned this only three days before opening night. Tr. 40: 19. When the staff learned that the modified version of the play would premier three days before the play was to open, Brune testified that they had to make many changes quickly because in the weeks they had stopped preparing for the play, they had worked to modify the play into a shortened revue, and were then being asked to make it a full production again in just three days. Tr. 41: 15. Respondent Exceptions No. 1, 2, 3, 4.

² GC Exhibits 4-7 provide the factual support in the record for Respondent’s Exception No. 5, 6, 7, 33, 52. Respondent maintains throughout its exceptions that the judge made factual findings that are not supported by the record. The General Counsel has endeavored to match these exceptions with the factual support in the record by citations in footnotes throughout its reply brief. For further explanation of the General Counsel’s approach to addressing Respondent’s exceptions, please see Section IV. A of the Argument section, *infra*.

Brune responded to this email chain after Kennedy responded. Brune responded twice on February 6. GC Exh. 6 and 7. In his first email (GC Exh. 6), he suggested not sending Sloan's letter as drafted, but if they did, to take out the last sentence. GC Exh. 6. In his second email (GC Exh. 7), Brune replied again to the same email chain, and addressed the email to "People." GC Exh. 7. In the body of his email, he wrote, "We are seeking redress of grievances." GC Exh. 7. He said the administration should apologize for not trusting "us to be adults, to be teachers and to be committed professionals. Apologize for issuing directives to middle school advisors on exactly what to say and what not to say to their students about the situation." GC Exh. 7. He further wrote, "What we need is a strong letter from all of us demanding an apology." GC Exh. 7; *see also* ALJD 4 for the complete text of Brune's email.³

On February 7, 2014, Kevin Gallagher, instructor, responded to the email chain. GC Exh. 8. Gallagher thanked his coworkers for their support and willingness to speak out about injustice, but said he believed the administration would not be receptive to a letter asking for an apology. GC Exh. 8.⁴

Sloan forwarded Brune's email (GC Exhibit 7 only, not GC Exhibits 6 or 9) to Ellen Stein on February 11, 2014. In his email to her, Sloan copied only the text of Brune's email and removed the information to show that he sent the email to the others in the Theater Department. Sloan did not testify at the hearing.

C. The administration calls meetings with Brune and other staff members to discuss their concerns over the *TMM* controversy.

³ With regard to Respondent Exception No. 11, Brune additionally sent a final email to the Theater Department on February 9, 2014 (GC Exh. 9) – a few days after this email – in which he came up with a plan to avoid these issues in the future (e.g., the administration will review the contents of the play earlier), but there is no evidence that the administration viewed this email.

⁴ Respondent Exception No. 10.

On January 29, 2014, Lorri Durbin called a meeting with the middle school staff. She called this meeting via email, telling employees that they could come to the meeting to ask questions and “express concerns” about *TMM*. Tr. 172: 2-5. Durbin testified that she was aware that staff members had expressed concern about the administration’s handling of *TMM*. Tr. 175: 14-17 (“Q: Isn’t it true that you were aware that some members of the faculty had complained about the administration’s handling of Thoroughly Modern Millie? A: Yes.”); Tr. 170: 24-25; Tr. 174: 8-10.⁵

On March 11, 2014, Stein, Best and Durbin called a meeting with Brune to further discuss *TMM*. Tr. 67: 20-21; Tr. 127: 24-25; Tr. 128: 1-2.⁶ Brune testified that in this meeting, he told the administration that the way they handled the *TMM* controversy caused a “tremendous amount of extra work to deal with the various changes in production strategy.” Tr. 68: 20-23. Brune told the administration that he and his coworkers were “upset, angry” and that they felt disrespected. Tr. 69: 7-9.⁷ Stein, Best, and Durbin testified that during this meeting, they asked Brune if he said anything negative about the administration, such as calling the administration immoral or unwise, and that Brune denied saying these things. Tr. 128: 1-2, 18-20; Tr. 151: 17-18. Stein, Best, and Durbin testified that they had read Brune’s February 6 email before they met with him on March 11 and that they were referencing the email when they questioned Brune on March 11, though that they did not produce the email during this meeting. Tr. 128: 6.⁸

D. Respondent rescinds Brune’s employment contract.

On April 17, Respondent rescinded Brune’s contract, which it had offered to him on February 3, 2014, and which he had already accepted. Tr. 27: 2, 5-13. That day, Stein called

⁵ Respondent Exception No. 42.

⁶ Respondent Exception No. 12.

⁷ Respondent Exception No. 44.

⁸ Respondent Exception No. 74, 75.

Brune to a meeting. Tr. 69: 25; Tr. 70: 4. At this meeting, Stein handed Brune a copy of the February 6 email and asked if he wrote it. Brune said that he did. Tr. 70: 6-8.⁹ Stein told Brune she was rescinding his employment contract for the 2014 to 2015 year. Tr. 71: 3-4.¹⁰

Stein testified that Brune was terminated because he wrote an “unprofessional” email to the Theater Department staff¹¹ and because he lied about making negative statements about the administration when he was questioned about this on March 11. Tr. 137: 25; Tr. 138: 4. Notably, Stein testified that she knew Brune’s email was distributed to his Theater Department colleagues. Tr. 24: 23-25; Tr. 25: 1-3 (“Q: And you knew that David had sent this email to members of the Theater Department; isn’t that right? A: Correct. Q: And the Theater Department includes Mr. Brune’s colleagues, correct? A: And supervisor, correct”).¹² Similarly, in her affidavit, dated November 14, 2014 (GC Exh. 10), Stein testified, “on February 6, 2014, Mr. Brune sent an unprofessional e-mail to the Theater Department.” GC Exh. 10.

Similarly, Jim Best testified that Brune was terminated for writing the unprofessional email on February 6¹³ and for lying on March 11 when the administration allegedly asked him whether he made any negative comments about the administration. Tr. 153: 6-8. In Best’s affidavit, dated November 14, 2014, he testified that Brune “sent an unprofessional e-mail to the Theater Department” and that this, along with his “uncollegial and uncooperative behavior” was the reason for his termination. GC Exh. 11.

⁹ Respondent Exception No. 15.

¹⁰ Respondent Exception No. 8, 15, 27, 80.

¹¹ Respondent Exception No. 8, 9.

¹² Respondent Exception No. 34, 36, 37, 38.

¹³ Respondent Exception No. 8, 9.

IV. ARGUMENT

A. Respondent's exceptions brief should be stricken in its entirety, as it does not conform to Rule 102.46(c) of the Board's Rules and Regulations.

Rule 102.46(c)(2) of the Board's Rules and Regulations provides:

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

Respondent's brief in support of its exceptions contains no reference to the specific exceptions to which their arguments relate, as required by Rule 102.46(c). In fact, Respondent's brief is devoid of any reference to any exception.

It is difficult for the General Counsel to reply to the 97 exceptions and the accompanying brief, as the brief is substantially unrelated to the exceptions and since there is no reference in the brief to the exceptions. As a result, the General Counsel asserts that it has been prejudiced in responding. *See, e.g., Jhp & Associates, LLC*, 338 NLRB 1059 (2003) (noting respondent's noncompliance with Section 102.46(c) of the Board's Rules, stating the Board would be justified in disregarding respondent's brief and exceptions, but ultimately accepting respondent's argument and rejecting it on the merits); *Id.* (citing *LIR-USA Mfg.*, 306 NLRB 298, 298 n.1 (1992)). Despite this, the General Counsel will address arguments in Respondent's brief and will cite in footnotes which exceptions it believes the arguments refer to, where possible. The General Counsel has also cited in footnotes, where possible, the record support for factual findings that Respondent claims were not supported by the record.

B. The ALJ properly concluded that Brune was engaged in protected concerted activity.

Respondent objects to the ALJ's finding that Brune was engaged in protected concerted activity on February 6 when he sent an email to his colleagues in the Theater Department. ALJD 7: 22-24. The record evidence and established Board law supports the ALJ's conclusion that Brune's email was protected and concerted.

1. Brune's email was protected.

The ALJ correctly found that the email that led to Brune's termination was in direct response to an email chain initiated by his coworker Bob Sloan. In the email, Sloan solicited responses from the Theater Department staff members to a draft letter he proposed sending to the administration, in which the Department would seek an apology for the "tremendous amount of extra time, energy, and artistry that we as a department exerted...." GC Exh. 4 (referring to the administration's handling of *TMM*). In response to Sloan's email, Brune wrote, "we are seeking redress of grievances. We have been grievously wronged and we should like an apology, a direct sincere apology from all of them to all of us..." GC Exh. 4.

In its exceptions brief, Respondent argued that Brune's email did not relate to terms and conditions of employment because it did not relate to wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities and the like, and that it was simply a criticism of management. R. Br. p. 13. However, it is well-settled Board law that concerted employee protests of supervisory conduct are protected under Section 7 where such protested conduct affects the employees' working conditions. *Trompler, Inc.*, 335 NLRB 478, 479 (2001) (employees asking for removal of a supervisor or protesting the discharge of a friendly supervisor); *see also Pacific Coast International Co.*, 248 NLRB 1376 (1980) ("The law is well settled that the quality of supervision which has a direct impact on employees' job interests and ability to perform are legitimate employee concerns and group action in bringing

these concerns to the attention of management is protected concerted activities.”). It is also well-settled that an employee engages in protected activity by speaking up about allegedly unfair treatment employees have received. *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (Dec. 30, 2010).

For example, the Sixth Circuit upheld the Board’s decision that an employee walkout was protected where it was found that a supervisor’s “rude, belligerent and overbearing behavior” directly impacted employees’ jobs. *Arrow Electric Co. v. NLRB*, 155 F.3d 762, 766 (6th Cir. 1998). Similarly, in *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984), the Board held that the discharge of two employees who jointly complained about their supervisor violated the Act. There, the judge found evidence that the two employees discussed their problems with their supervisor and that the complaints included matters such as being blamed for mistakes of others, hostility or rudeness in the way job assignments were made, and other actions by the supervisor indicating hostility toward them. *Id.* Likewise, in *Pier Sixty, LLC*, 362 NLRB No. 59 (Mar. 31, 2015), the Board held an employee’s activity to be protected where he posted comments about management’s treatment of employees on his Facebook page. There, the employees were upset that managers repeatedly treated the staff in a disrespectful and undignified manner. *Id.* Finally sick of the bad treatment, and after discussing the matter with his coworkers, one employee wrote on his Facebook page that this particular manager “don’t know how to talk to people.” *Id.* The Board found this Facebook post to be protected and concerted. *Id.*¹⁴ Moreover, as a general matter, the Board has found that employee communications about working conditions are protected when directed at other employees. *See Craig Hospital*, 308 NLRB 158, 165 (1992), citing *Waco, Inc.*, 273 NLRB 746 (1984) and *Heck’s, Inc.*, 293 NLRB 111 (1989).¹⁵

¹⁴ Respondent Exception No. 50.

¹⁵ The foregoing cases are distinguishable from situations where employees’ concerted activity is designed solely to effect or influence changes in the management hierarchy, which is not protected activity, and which was

Thus, the record and applicable law fully support the ALJ's finding that Brune's email to his coworkers was protected because it related to terms and conditions of employment. Like the employees in the above-cited cases, the Theater Department staff was discussing group grievances regarding treatment from their superiors during preparation for the *TMM* production, which is undisputed protected activity.

2. Brune's email was concerted.

Respondent also excepts to the judge's finding that Brune's February 6 email was concerted, but the judge's conclusion is fully supported by the record and applicable law. First, Respondent, in its brief, makes the weak argument that Brune's email did not intend to incite group action and that he was engaged in personal griping. Respondent cites narrow portions of Brune's email out of context, without reference to the whole email, and paints an incomplete and inaccurate picture of the record evidence. R. Br. p. 15, 18. Overall, Respondent's contention is contrary to the record evidence.¹⁶

Second, Respondent argues in its exceptions brief that the administration gave Brune an opportunity to bring any group complaints to the administration's attention, but that he declined to do so, and that therefore, he did not intend to incite group action. R. Br. p. 20. This, again, is

not the situation in the instant case. *Senior Citizens Coordinating Council of Riverbay Cmty. Inc.*, 330 NLRB 1100, 1115 (2000).

¹⁶ Respondent refers to GC Exh. 6 in support of its contention that Brune did not intend to incite group action. In that email, Brune wrote, "I really don't think the department should send this letter to the administration." However, Respondent's reliance on GC Exhibit 6 is misplaced for two reasons. First, until the hearing, there is no evidence that Respondent knew GC Exhibit 6 existed. In particular, Respondent only admits to terminating Brune for writing GC Exhibit 7 and maintained throughout the hearing that it only saw that one email. Thus, whether Brune intended to incite group action in GC Exhibit 6 is irrelevant, since he was terminated for writing GC Exhibit 7. Furthermore, even if the Board deemed it appropriate to examine GC Exhibit 6, Respondent takes GC Exhibit 6 out of context. The text of the section of GC Exhibit 6 that Respondent relies on reads as follows: "I really don't think the department should send this letter to the administration. *Or if you do, take out the last sentence...*" GC Exh. 6 (emphasis added). Brune then went on to explain why the letter was not strong enough and the reasons the administration handled the *TMM* situation incorrectly. Thus, the record evidence in no way supports a conclusion that Brune did not intend to incite group action. In any case, as stated above, GC Exhibit 6 is irrelevant to this inquiry because it did not inform Respondent's decision to terminate Brune.

an inaccurate recitation of the facts. Incredibly, Respondent is referring to Brune's refusal to provide Stein with the names of the other Theater Department staff members on the email chain when she solicited this information from him after she already terminated him for writing the February 6 email. Resp. Br. p. 20 (citing Tr. 75: 22-25; Tr. 76: 1). The fact that Brune refused to "rat out" his coworkers for engaging in the same behavior for which he was terminated does not thereby result in a failure to present a group complaint to Respondent. Additionally, it is unimportant that Brune did not share this information after his termination, as the termination already occurred. Here, the evidence establishes that Brune and his coworkers were participating in group action by emailing each other about suggested revisions to Sloan's proposed letter to the administration seeking an apology for the way management treated them.

Respondent erroneously relies on *Daly Park Nursing Home*, 287 NLRB 710 (1987) to support its position that Brune did not intend to incite group action. However, Respondent's reliance on this case is misplaced. There, the discriminatee told a former coworker that she thought it was "unfair" that the coworker was terminated and that it was a shame the former coworker could not hire a lawyer to fight the discharge. *Id.* Another coworker said that the former employee would lose a legal fight and the discriminatee agreed. *Id.* Thereafter, the employer transferred the discriminatee to a different shift and reduced her work hours. In determining that this was not concerted activity, the Board relied on the fact that the employees were simply discussing matters of interest to them, but that there was no evidence that they actually intended to do anything about the coworker's termination, and therefore, did not intend to incite group action. *Id.*

Daly Park is easily distinguishable from the instant case. In particular, Brune and his coworkers were speaking about negative treatment they received from the administration. Sloan

drafted an email seeking an apology from the administration and solicited responses, which he received from coworkers Brune, Gallagher, and Kennedy. Brune and his coworkers were not simply talking about their discontent with the administration or their feelings that the administration's actions were unfair. Rather, they submitted suggested changes to Sloan's proposed letter they planned to send to the administration. *See Cadbury Beverages, Inc. v. N.L.R.B.*, 160 F.3d 24, 28 (D.C. Cir. 1998) (distinguishing *Daly Park*, stating that when discussion among employees about subjects affecting their employment is directed toward future action, it is protected concerted activity). Thus, by contrast to *Daly Park*, the Theater Department was clearly engaging in group action.

Respondent also argues on page 21 of its exceptions brief that because Brune apologized on May 21 for writing the February 6 email, that he did not intend to incite group action. However, Respondent does not clarify how Brune's apology in May – one month after his termination – relates to whether he intended to incite group action on February 6. It is clear, however, that this email in May has no bearing on whether Brune was engaged in protected concerted activity on February 6 and whether Respondent rescinded his contract because of this activity.

Based on the above, Respondent's exceptions have no merit and should be rejected. The ALJ's conclusion that Brune was engaged in protected concerted activity when he emailed his coworkers on February 6 is supported by the record and applicable case law.

C. The ALJ correctly determined that the Employer knew of the concerted nature of Brune's email.

The ALJ properly concluded that the testimony and the documentary evidence established that Respondent knew that Brune's February 6 email was concerted in nature. First, the ALJ correctly held that Stein admitted on 611(c) that she knew Brune sent the email to

members of the Theater Department. ALJD 8: 1-15. Stein even confirmed the names of the individual staff members on the Theater Department listserv during her testimony. ALJD 8: 7-9; Tr. 24: 23-25; Tr. 25: 1-3. In addition to this admission, both Stein and Best admitted in their affidavits (GC Exhibit 10 and 11) that they terminated Brune because “on February 6, 2014, Mr. Brune sent an unprofessional email *to the Theater Department...*” GC Exh. 10 (emphasis added); GC Exh. 11 (“[O]n February 6, 2014, Mr. Brune sent an unprofessional email *to the Theater Department.*”) (emphasis added).

In addition to Stein and Best’s admissions, Durbin testified that she was aware of the general concerns of the Theater Department employees regarding Respondent’s handling of the *TMM* situation at an early stage, and that she called a meeting so employees could voice these concerns on January 29.¹⁷ Thus, the ALJ correctly found that when Durbin later viewed Brune’s February 6 email and then joined in the decision to terminate him, she was already well-aware of the concerted nature of his email due to her general knowledge of the Theater Department’s dissatisfaction with the administration’s handling of the *TMM* situation. ALJD 8: n.8.

Additionally, the ALJ correctly found that Brune told the administrators on March 11 that the way they handled the changes to *TMM* caused extra work for the Theater Department and that he and his coworkers were “upset, angry” and felt disrespected. Tr. 69: 7-9; ALJD 8: 21-23.

In addition to direct testimony regarding Respondent’s knowledge of the concerted nature of the email, the ALJ correctly held that the context of Brune’s emails clearly indicated to Respondent that Brune was responding to communications from other employees. ALJD 7: n.7. The judge’s conclusion is supported by Board law. For example, in *Hitachi Capital Am. Corp.*, 361 NLRB No. 19 at *2 (Aug. 8, 2014), the Board held that respondent should have known that the employee’s email was concerted based on the contents of the email. There, the employee

¹⁷ Respondent Exception No. 42, 43.

told respondent that its new policy should have been “explained to us earlier” and that “we be comped 3.5 hours.” *Id.* at *2; *Colders Furniture*, 292 NLRB 941, 942 (1989) (noting use of pronoun “we” at a meeting with management clearly apprised management that the employee was speaking not solely on his own behalf, but also on behalf of other employees); *see also Jim Causley Pontiac v. NLRB*, 722 F.2d 322, 323 (6th Cir. 1983) (noting that despite the lack of direct evidence of actual knowledge in the record, “The use of the term ‘we’ [in the employee's OSHA complaint] clearly indicated to the petitioner that at least two employees were involved.”). Similarly, Brune addressed his email to “People” and used multiple pronouns like “us,” “we,” and “our” throughout his email. He said the administration should trust “us...to be teachers and committed professionals” and he wrote that “what we need is a strong letter from all of us demanding an apology.” GC Exh. 7. Thus, the ALJ’s determination that Respondent knew of the concerted nature of the email from the text of the email is supported by the weight of the evidence and established Board law.¹⁸

1. The ALJ correctly decided that Sloan was not a supervisor, but that even if he was, this would only lend more support to a finding that Respondent was aware of the concerted nature of Brune’s February 6 email.

¹⁸ Any argument by Respondent that no teacher complained to the administration directly about *TMM* is irrelevant to whether Respondent knew that Brune’s February 6 email was concerted. Resp. Br. pg. 24-25. First of all, this statement is not entirely accurate, since as stated above, Durbin testified that she was aware that middle school teachers were upset about the way the administration handled the *TMM* situation as early as January 29 and since the evidence establishes that Brune told the administration on March 11 that he and his coworkers were angry about the situation. Thus, whether or not the Theater Department staff shared their emails with Stein or emailed her directly misses the point. To be sure, the inquiry is whether Respondent knew that Brune’s February 6 email – for which he was terminated – was concerted. The judge properly relied on Stein’s testimony as well as the contents of the email to conclude that Respondent knew the email was concerted. Thus, it does not matter whether anyone else complained directly to Stein or other members of the administration about *TMM*. Overall, the record establishes that Stein knew Brune sent the email to his colleagues in the Theater Department, but nevertheless, terminated him for doing so. As a result, the judge properly concluded that Respondent violated the Act.

Throughout its exceptions brief, Respondent argued that Sloan was Brune's supervisor.¹⁹ However, the ALJ properly concluded that Respondent failed to meet its burden of proving Sloan's supervisory status. ALJD 8: n.8 (finding Sloan's exercise of authority "too isolated" to qualify him as a Section 2(11) supervisor). To be sure, Respondent only presented general and conclusory evidence on this topic through Stein.²⁰ Stein testified generally about a department chair's duties, and said Sloan had on occasion reviewed resumes and interviewed potential candidates. In fact, Stein was not even aware if Sloan received a one-class release – something which might serve as secondary indicia of his supervisory status. Tr. 180: 9-10. Overall, Respondent's evidence on this matter was insufficient and the ALJ correctly decided that it did not meet its burden of proving that Sloan was a supervisor.²¹

Even if the Board were to find that Respondent established its burden of proving Sloan's supervisory status, then as the ALJ recognized, Sloan's intimate knowledge of the concerted nature of the email chain would be imputed to the Respondent. *Dobbs Int'l Servs., Inc.*, 335

¹⁹ Respondent relies on this argument, purportedly, because it believes Sloan flagged Brune's email as particularly inappropriate and against the code of conduct. As discussed herein, as well as the in the judge's decision, Respondent did not meet its burden of proving Sloan's supervisory status, and furthermore, did not call this purported supervisor to the stand to testify. If we are required to speculate as to Sloan's reasons for singling out Brune's email over those of his other colleagues on the same email chain – which we are required to do since Respondent did not call him to testify – one can invent many reasons why Sloan might single out Brune over others (for example, Sloan might have been angry that Brune did not think Sloan's initial draft of the email was good enough, or maybe Sloan was jealous of Brune's performance or relationship with other staff members). Without Sloan's testimony, we will never know, but we certainly cannot rely on Respondent's word that Sloan forwarded Brune's email because it was so "opprobrious" in his mind, as there is no evidence in the record on this matter. GC Exh. 3 (showing the only communication between Stein and Sloan on this matter is Sloan saying, "Here [are] David's thoughts on the apology from the administration.") and Stein's hearsay testimony that Sloan thought Brune's email was "unpleasant." Tr. 144: 13.

²⁰ In its brief to the ALJ, the General Counsel noted that Respondent recalled Stein to the stand after she had already testified on direct in order to elicit this additional, albeit weak, testimony regarding Sloan's supervisory status. To the extent that the Board would make a finding contrary to the ALJ and find Sloan to be a 2(11) supervisor or agent under Section 2(13), the General Counsel contends it was improper for Respondent to recall Stein in this respect. She was not called to rebut any testimony, but rather, to put on new testimony about Sloan that she could have testified to on direct examination the first time. *See, e.g., Bethlehem Temple Learning Ctr., Inc.*, 330 NLRB 1177, 1178 n.1 (2000) (upholding judge's decision not to allow respondent to proffer evidence on surrebuttal late in trial) citing *U.S. v. Mitani*, 966 F.2d 1165, 1176 (7th Cir. 1992) (citing Fed. R. Evid. 611(a) that trial court has broad discretion to reject rebuttal and surrebuttal testimony and does not abuse power where party had an opportunity to introduce the evidence at an earlier point).

²¹ Respondent Exception No. 39, 41.

NLRB 972, 973 (2001) (“It is well-established that a supervisor's knowledge of union activities is imputed to the employer.”); *see also State Plaza, Inc.*, 347 NLRB 755, 756-57 (2006) (supervisor’s knowledge of union activities imputed to the employer unless credited testimony establishes to the contrary); *Hy's of Chicago, Ltd.*, 276 NLRB 1079, 1081 (1985). In particular, Sloan started the email chain himself and solicited responses from Brune and the other Theater Department staff regarding his draft of an email to the administration, seeking an apology and noting the “tremendous amount of extra time, energy, and artistry that we as a department exerted...” GC Exh. 4.²² Thus, if Sloan is a supervisor, he was intimately aware of the concerted nature of the email chain – as he started it himself and received responses from three of his colleagues – and his knowledge would indisputably be imputed to Respondent as a whole. ALJD 8: n.8.²³

Additionally, if the Board found Sloan to be a supervisor, Brune’s email to Sloan constitutes a group complaint to a supervisor or agent. In particular, concerted activity encompasses those circumstances where individuals bring truly group complaints to the attention of management. *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). Here, the staff was discussing the administration’s handling of issues affecting their terms and conditions of employment. When Brune responded to Sloan, at least two other employees had already voiced their opinions on the matter. Thus, Brune’s email to Sloan on this subject would qualify as bringing a group complaint to the attention of alleged management. Thus, if the Board were to determine that Sloan is a supervisor, Brune’s email is evidence of group action brought to a supervisor.

²² The fact that Sloan initiated the draft letter seeking an apology from the administration provides further evidence of his non-supervisory status and further separates him from management and aligns him with the rank-and-file.

²³ Respondent Exception No. 40.

Based on the foregoing, regardless of whether Sloan is classified as an employee, an agent, or supervisor, Respondent will not be successful in arguing that it was unaware of the concerted nature of Brune's email. Respondent's reliance on Sloan's alleged supervisory status is neither supported by the record, nor critical to the inquiry of whether Respondent violated the Act.

D. The ALJ properly concluded that Respondent rescinded Brune's employment contract in retaliation for his protected concerted activity.

The judge properly concluded that Respondent rescinded Brune's employment contract in retaliation for writing the February 6 email. At the hearing, Stein and Best testified that they terminated Brune for two reasons: 1) because his February 6 email was offensive and violated standards of conduct at the school, and 2) because Brune lied on March 11 when asked if he made any negative comments about the administration. Tr. 137: 25; Tr. 138: 4. Thus, by Respondent's own admission, it rescinded Brune's contract because he wrote the email and the judge correctly arrived at this conclusion.²⁴

Respondent takes exception to the ALJ's decision that any disciplines of Brune prior to 2014 are irrelevant. R. Br. p. 37.²⁵ In particular, Respondent argued at the hearing that in addition to the February 6 email and Brune's lying on March 11, his prior conduct also led it to rescind his contract. In particular, Respondent pointed to a 2010 letter from Jim Best to Brune in which he asks Brune to be a better communicator when it comes to writing his student evaluations. Respondent also referred to Respondent's decision to hire a consultant in 2010 to meet with the Theater Department regarding their communications with one another. Finally,

²⁴ Respondent Exception No. 28, 68, 80.

²⁵ Respondent Exception No. 26.

Respondent refers to a 2013 email from Brune to a coworker as evidence of Brune's inappropriate communications.

The ALJ properly concluded that any warnings from prior to 2014 were irrelevant to the instant matter. The judge correctly reasoned that Respondent renewed Brune's employment contract on February 3, 2014, but rescinded the offer after it read Brune's February 6 email. Respondent admitted at the hearing, in affidavits, and in its position statement that the offer was rescinded because of the February 6 email. Thus, the ALJ correctly discredited testimony from Respondent's witnesses suggesting any conduct by Brune prior to February 3, 2014 had anything to do with the rescission of his contract. The ALJ soundly reasoned that since Respondent renewed Brune's contract despite any issues it had with him prior to February 3, 2014, those issues could not have played a part in its decision to rescind his contract in April of 2014. ALJD 6: 25-28, n. 5.

Even if the Board deems it appropriate to give weight to Respondent's argument that the ALJ should have considered warnings prior to February 3, 2014, the record establishes that Respondent's reliance on these incidents is pretextual. In particular, it referred to two incidents from 2010, yet it renewed Brune's employment contract four times since. Furthermore, Respondent failed to prove that the 2010 letter from Best related to Brune's communications with the administration or coworkers, but rather, the evidence only established that the letter referred to Brune's drafting of student evaluations, which is really irrelevant to the instant case. Tr. 149: 2-4. Respondent similarly failed to prove that Respondent hired the consultant to address any communications issues related to Brune directly. Rather, the record evidence suggested that the consultant was hired to speak to the Theater Department as a group after Kennedy and Sloan were arguing over the chairman position. Tr. 120: 22; Tr. 122: 1-3. Finally,

Respondent referenced the 2013 email from Brune to a coworker in which Brune purportedly cursed at the coworker, but the record testimony established that Respondent never counseled, disciplined, or even spoke to Brune about this email prior to the hearing. Tr. 122: 18-22.

Overall, the judge correctly applied law and reasoning to disregard Respondent's post-hoc, pretextual rationalizations for its decision to discharge Brune.²⁶

E. The ALJ properly concluded that the statements in Brune's February 6 email did not lose the protections of the Act.

1. The ALJ properly applied the totality of the circumstances approach.

The ALJ correctly applied the totality of the circumstances approach in holding that the statements in Brune's February 6 email did not lose the protections of the Act. ALJD 8: 1-4. The ALJ held that *Atlantic Steel Co.*, 245 NLRB 814 (1979) is generally applied to direct confrontations between employees and managers, but is not well suited to off-duty, off-site communications to other employees or third parties. ALJD 8: 30-33; ALJD 9: 1-3 (citing *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014); *Pier Sixty, LLC*, 362 NLRB No. 59 (March 31, 2015)). Thus, the judge held that the totality of the circumstances approach applied in *Pier Sixty* was the correct framework to apply in this case, where comments were made only to colleagues and not to any managers or supervisors.²⁷

²⁶ Respondent also argues in its exceptions brief that the administration has the right to address concerns of parents without input from the Theater Department staff. Resp. Br. pg. 15. However, this argument is irrelevant to whether the administration terminated Brune in retaliation for writing the February 6 email. The General Counsel does not contend that the administration must consult with the staff before making decisions. However, whether or not the administration has the right to change the play has nothing to do with the situation that ensued. In particular, the teachers were upset with the way the administration handled the changes, and this is what led to the Theater Department's email chain. Thereafter, the administration terminated Brune for writing the email. As a result, the judge correctly concluded that the administration terminated Brune in retaliation for his protected concerted activity.

²⁷ When employees speak about their employers to the public or third parties, the Board has applied the *Jefferson Standard* approach set forth in *NLRB v. Electrical Workers (IBEW) Local 1229*, 346 U.S. 464 (1953) and in *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966). The Board applied *Jefferson* and *Linn* in *Triple Play*. *Triple Play*, *supra*, at *4. Here, because Brune did not direct his comments at the public or third parties, the *Jefferson Standard* and *Linn* analyses are inapplicable.

Respondent has argued that the facts of *Triple Play*²⁸ and *Pier Sixty* are distinguishable, and that therefore, the totality of the circumstances approach is inapplicable. Resp. Br. p. 27-28. Respondent relies on the fact that the comments in those cases were made while off-duty and off-site and involved social media, and that here, the comments were sent from a work computer during duty hours. However, there is no evidence in the record to support this assertion. In fact, on page 27 of its brief, Respondent erroneously cites GC Exhibits 4 and 5 – emails from Sloan and Kennedy – in support of its position that Brune sent emails during working hours. The time of day that Kennedy and Sloan sent their emails has no bearing on when Brune sent his email (4:38 p.m.). Further, there was no testimony in the record about what hours the employees work, what time they take breaks and lunch time, and therefore, no evidence to establish that anyone sent any emails during working hours. Moreover, though email is not social media per se, email is similar in many ways in that it is a form of digital communication with others.

Further, Respondent argues that the facts of *Pier Sixty* are distinguishable because in that case, there was no confrontation with a supervisor, but here, there was. Respondent erroneously argues that because Sloan – an alleged supervisor – received Brune’s February 6 email, there was a confrontation with a supervisor as contemplated by *Atlantic Steel*. Respondent’s position is incorrect for a number of reasons. First, the ALJ correctly decided that Respondent did not meet its burden of establishing Sloan’s supervisory status. Second, it is clear that *Atlantic Steel* contemplates a “confrontation” with management – not a mere discussion. *Triple Play*, 361 NLRB at *5 (“The clear inapplicability of *Atlantic Steel*’s ‘place of discussion’ factor supports our conclusion that the *Atlantic Steel* framework is tailored to workplace confrontations with the employer.”). To be sure, if a manager’s mere involvement in a discussion with employees

²⁸ To the extent Respondent argues *Triple Play* is distinguishable, this is unimportant, since totality of the circumstances was not applied there, but rather, *Linn* and the *Jefferson Standard* were. *Triple Play* is informative because of its discussion regarding the appropriateness of *Atlantic Steel*’s application in various situations.

implicated *Atlantic Steel*, any conversation an employee had with a manager would be subject to the test. This obviously was not what the Board contemplated in fashioning this test. Rather, the Board applies *Atlantic Steel* to decide whether comments made to a supervisor by an employee are of a nature that warrants stripping the employee of the protection of the Act. In the instant case, no confrontation occurred. Rather, Sloan, as a disgruntled Theater Department staff member, solicited responses from his colleagues on a matter of group concern, and received Brune's response, among others. Overall, Respondent misreads the *Atlantic Steel* analysis and application.

Based on well-settled Board law, the ALJ correctly identified the totality of the circumstances approach as the appropriate test in this situation and properly applied the test to find that the comments in Brune's February 6 email did not remove him from the protection of the Act.²⁹ It is worth noting that Respondent did not argue in its exceptions that the judge reached the wrong conclusion under the totality of the circumstances approach; rather, it just argued that the framework is inapplicable. Thus, to the extent that Respondent did not except to the judge's conclusion that Brune's email would not lose protection under the totality of the circumstances analysis, it has waived its right to file an exception on this point. In any case, *Atlantic Steel* factors are necessarily encompassed by the totality of the circumstances approach. *See Pier Sixty, supra* at *3 (discussing totality of circumstances approach and analyzing whether respondent provoked the comment, the subject matter of the comment, the location of the comment, whether the comment was impulsive, and more).

2. Even under *Atlantic Steel*, Brune's email would still be protected.

²⁹ Respondent Exception No. 48, 49, 50, 53.

In any case, Respondent's argument is of no moment since the ALJ concluded he would have reached the same result even if he applied *Atlantic Steel*, and this is the correct conclusion. ALJD 9: 14.³⁰ Thus, even if the Board deems it appropriate to apply *Atlantic Steel*, Brune's email would still be protected.³¹ In particular, *Atlantic Steel* sets forth the following four factors in deciding the issue: 1) the place of the discussion, 2) subject matter, 3) nature of the employee outburst, and 4) whether the outburst was provoked by the employer's ULPs. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

a. Place of the discussion

Here, Brune's comments were made on an email chain to coworkers. They were not made in a confrontation with managers or in view of customers, nor were they made to third parties. *Compare Plaza Auto Ctr., Inc.*, 360 NLRB No. 117 (May 28, 2014) (obscene and denigrating remarks were uttered in face-to-face meeting with management). Finally, his comments certainly did not disrupt the workplace. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (holding location of outburst in employee break room was in a location that would not disrupt respondent's work process). In fact, if the email was so disruptive, Respondent knew about the email as early as February 11 and did nothing about it. Had this email actually affected staff or the workplace, Respondent would have responded earlier and removed Brune immediately. Rather, he was allowed to work without incident for more than two months before he was confronted about the email, and was allowed to remain on staff for six months after Respondent discovered the email. As a result, there is no evidence of any negative

³⁰ Respondent Exception No. 53 and 56.

³¹ Respondent Exception No. 46.

effect from Brune’s email or his continued presence at the school on Respondent’s workplace.³² Thus, the place of the discussion weighs in favor of protection.

b. Subject Matter

The subject matter of Brune’s email concerned terms and conditions of employment. Specifically, Brune was responding to an email chain in which the Theater Department employees were discussing whether to ask the administration for an apology for the way the administration treated them during the *TMM* situation, including the stress they experienced and the extra hours they worked without acknowledgement. Thus, this factor also weighs in favor of protection.

c. Nature of the outburst

The nature of the outburst weighs in favor of protection. Brune’s email was in direct response to an email chain with his coworkers, and was not profane or egregious. In fact, the content of Brune’s email pales in comparison to comments the Board has found protected under *Atlantic Steel*. See, e.g., *Union Carbide Co.*, 331 NLRB 356, 360-61 (2000) (calling supervisor a “fucking liar” protected); *CKS Tool & Engineering*, 332 NLRB 1578, 1583, 1586 (2000) (employee stated “don't you think we give a f... about our work?goddam it, don't you think we are human beings” found protected); *Neff Perkins Co.*, 315 NLRB 1229, 1233 (1994) (employee interrupted supervisor, told him to “hush-up and sit down,” and called something “shitty” and said something “sucks” protected); *United Enviro Systems*, 301 NLRB 942, 943, 944 (1991) (“This goddam paperwork is a pain in the ass. I don't have fucking time for it” found protected); *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991); *enfd.* 953 F.2d 1384 (6th Cir. 1992) (employee called supervisor a “son of a bitch” didn’t lose protection of the Act);

³² Respondent Exception No. 47.

Burle Industries, 300 NLRB 498, 504 (1990) (employee called supervisor a “fucking asshole” and did not lose protection).

Respondent continues to refer to Brune’s email as “opprobrious” as further justification for why it should lose the Act’s protection. However, the Board, with court approval, has set a high standard to justify removing an employees’ otherwise concerted speech from the protections of the Act. *See, e.g., Dreis & Krump Mfg.*, 221 NLRB 309 (1975), *enf’d Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). Thus, “offensive, vulgar, defamatory, or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act’s protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.” *Dreis*, 221NLRB at 315.

The ALJ properly concluded that Brune’s comments were not “opprobrious” at all. Here, Brune, understandably upset and in response to other coworkers’ concerns over treatment by the administration, called for the administration to apologize to employees for not being “honest, forthright, upstanding, moral, considerate, much less intelligent or wise.” GC Exh. 7. This is a far cry from language that the Board has found unprotected, and a far cry from Respondent’s characterization of “opprobrious.” To be sure, there was no threat of violence and no profanity. Rather, this case involves high school teachers who were contemplating asking management for an apology and for better treatment in the future.³³

d. Whether the employee was provoked by the employer’s ULP

Finally, as the ALJ correctly held in his decision (ALJD 9: n.11), the final factor of *Atlantic Steel* might weigh in favor of protection. In particular, though Brune’s email was not provoked by an unfair labor practice, he was provoked generally by Respondent’s behavior. The

³³ Respondent Exception No. 66, 67.

ALJ cited *Battle's Transportation*, 362 NLRB No. 17 (February 24, 2015), where the Board affirmed the ALJ's reasoning that the employee's outburst, while not provoked by a ULP, was provoked when respondent told the employee to shut up, and that this was relevant in determining that his actions did not lose the protections of the Act. *Id.*

Similarly, Brune's email was in direct response to administration's treatment of employees during the *TMM* controversy. Additionally, as the ALJ noted, if Respondent had carried its burden of proving Sloan was a supervisor, his email soliciting responses from the Theater Department staff might serve as the provocation under factor four of the *Atlantic Steel* test. ALJD 9: n.11.³⁴

Moreover, even if the Board decides that the fourth factor does not directly weigh in favor of protection, the other three factors certainly do, and *Atlantic Steel* is a balancing test. *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (Board "is correct" in observing that it may deem conduct protected as a result of its overall balancing of the four factors even if the nature-of-the-outburst factor weighs against protection); *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117 (May 28, 2014) (holding employee action protected even where one *Atlantic Steel* factor weight against protection, but where three weighed in favor of protection).

3. Respondent's reliance on Eight Circuit law is misplaced and irrelevant.

Additionally, Respondent's continued reliance on *Carleton College v. N.L.R.B.*, 230 F.3d 1075, 1076 (8th Cir. 2000) is misplaced and the ALJ appropriately declined to follow this Eight Circuit ruling. ALJD 9: n. 12. The ALJ correctly stated that there is no reason or Board precedent on which to conclude that the Section 7 rights of teachers, who are protected by the Act, are any less than those of other employees. ALJD 9: n.12. Respondent argues that its

³⁴ Respondent Exception No. 54.

academic environment, which requires teachers be “collegial,” somehow sets a different standard by which Brune and his coworkers should be judged when engaging in Section 7 activity.

First of all, *Carleton College* is an Eight Circuit decision and is not binding on the Board. See *Four Seasons Hotel*, 2005 WL 2323364 (Sept. 16, 2005) (ALJ noting he is not bound by the Eighth Circuit’s decision in *Carleton College*, but rather, by the Board’s decision in that case, where the Board found the activity protected).³⁵ Additionally, the Board has found faculty complaints and criticism of school administrations to be protected. For example, in *Philander Smith College*, 246 NLRB 499, 508 (1979), the Board affirmed the ALJ’s decision that two professors at the college were engaged in protected concerted activity when they went to the school board and described the president of the school as a “dictator,” “reign of terror,” “lied” and “doubt of his ability and credibility.” *Id.* There, the faculty complaints were about the president’s handling of faculty pay, promotions, hiring, and firing. *Id.* Therefore, the Board found that the discharges of the faculty members were in violation of Section 8(a)(1). *Id.* Similarly, in *La Film School, LLC*, 358 NLRB No. 21 (Mar. 26, 2012), the Board dismissed the school’s argument that it was justified in terminating an employee for writing an insubordinate email. There, the employee wrote an email to her supervisor about a candidate for hire, describing the candidate as unqualified, and using capitalization, bolding, italicizing, underlining, and limited sarcasm in her email. *Id.* The Board said that while her comments were “less than diplomatic,” they did not constitute insubordination and conveyed a legitimate opinion. *Id.* The Board further opined on the academic setting, writing that one would assume that “ideas could be honestly debated without the fear of discipline” there. *Id.*

³⁵ The Board has a well-established principle of non-acquiescence. See, e.g., *Robert King*, 225 NLRB 961, 961 n.2 (1981) (Board disavowed ALJ’s reliance on Sixth Circuit decision because ALJs are required to apply established Board precedent that has not been reversed by the Board or Supreme Court); see also *Tim Foley Plumbing Serv., Inc.*, 337 NLRB 328, 339 n.5 (2001) (these considerations “make it, as a practical matter, impossible for the Board to acquiesce in every contrary decision by the Federal court of appeals.”).

Thus, the academic environment that Respondent describes does not require an intolerant, stifling atmosphere where employees cannot speak freely. As a matter of policy, such environment would be in direct contravention of what academic institutions stand for. *See, e.g., Northeastern University*, 218 NLRB 247, 257 (1975) (M. Kennedy, concurring) (stating that a faculty members' criticism of administration's policies should not be viewed as a breach of loyalty, but rather, as an exercise of academic freedom). Certainly, Respondent can expect colorful and dramatic language from the faculty in the Theater Department, if not from any of its other well-educated, open-minded faculty members. Overall, Respondent asks that we curtail the rights of employees in schools just because they work in schools. However, the right of employees under Section 7 to engage in protected concerted activity can and does coexist with the values of an academic institution. To argue that teachers have to work as a team and be collegial, and so they cannot have Section 7 rights, is to sweep an entire category of employees outside of the protections of the Act. As the ALJ noted, where Congress has sought to restrict the Section 7 rights of a class of employees, it has done so explicitly. ALJD 9: n.12. Moreover, Respondent's argument could be made for many workplaces, such as hospitals, where it is critical to the lives of patients that staff work together in a collegial environment. However, nurses and doctors alike are still entitled to the protections of Section 7.

Based on the above, Respondent's argument that the academic environment prohibits employees from speaking freely and engaging in Section 7 activity with their coworkers must fail.³⁶

F. The ALJ properly concluded that Respondent violated Section 8(a)(1) by interrogating Brune about his protected concerted activity.

³⁶ Respondent Exception No. 57, 58, 59, 60, 61.

The ALJ correctly found that on March 11, the administration unlawfully interrogated Brune about his protected concerted activity. ALJD 10. Respondent argues that because this was not alleged in the Complaint, its due process rights were violated because the issue was not fully litigated. This assertion, however, is unsupported by the record and must be rejected.

During the course of the hearing, Respondent's witnesses asserted that the Respondent rescinded Brune's employment contract because he lied in a March 11 meeting with management about whether he said anything negative about the administration, such as calling the administration immoral or unwise.³⁷ Respondent's three witnesses testified that this question referred directly to the February 6 email, though Respondent did not produce the email during the March 11 meeting. Thus, based on Respondent's own admissions and defense, the General Counsel asked that the ALJ find that Respondent unlawfully interrogated Brune on March 11 about his protected concerted activities, and the ALJ appropriately found a violation.³⁸

The ALJ correctly relied on *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd 920 F.2d 130 (2d Cir. 1990) in finding that there was a close connection between the Complaint allegation regarding the discharge and Respondent's interrogation regarding the protected concerted activity for which Brune was discharged. ALJD 11: 6-10.³⁹ Moreover, the ALJ concluded that Respondent relied on the March 11 interrogation as a defense for Brune's termination, finding the legality of the interrogation was fairly and fully litigated. ALJD 11: 3-10. As a result, the issue has been fairly and fully litigated and the Board should uphold the ALJ's decision to find this additional violation of Section 8(a)(1).

³⁷ This is Respondent's second explanation for Brune's termination. Respondent's first explanation is that it terminated Brune for writing the February 6 email to the Theater Department. Tr. 137: 25; Tr. 138: 4.

³⁸ Respondent Exception No. 78.

³⁹ Respondent Exception No. 77, 79.

Legal support for the interrogation violation can be found in *United Service Automobile Ass'n*, 340 NLRB 784, 786 (2003). There, the Board found the employer violated Section 8(a)(1) by questioning an employee about her protected concerted activity and then terminating her for lying about her protected concerted activity when asked about it. *Id.* There, an employee handed out fliers to coworkers, asking them to wear a ribbon in support of laid off coworkers. *Id.* at 784-85. The employer questioned the employee about the fliers and she denied handing them out. *Id.* The employer then terminated her – not for handing out the fliers – but for lying to human resources when asked about the fliers. *Id.* The Board found that the employee was engaged in protected concerted activity when she distributed fliers and was under no obligation to discuss her activity with the employer when asked about it. *Id.* at 786. Further, the Board found it unlawful for the employer to terminate her for lying since the entire line of questioning was unlawful. *Id.*⁴⁰

To the extent Respondent continues to argue that it has the right to enforce rules that prevent employees from speaking negatively about the administration, the ALJ correctly decided that if Respondent maintains such rule, the rule would violate Section 8(a)(1).⁴¹ ALJD 10: 28-33; *see, e.g., Hills & Dales Gen. Hosp.*, 360 NLRB No. 70 (Apr. 1, 2014) (finding unlawful rule that employees will “not make negative comments about fellow team members [which included coworkers and managers]”); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting negative conversations about managers unlawful because employees would construe this as barring them from discussing with coworkers complaints about their managers that affect

⁴⁰ Respondent Exception No. 20, 21, 22, 23, 24, 25, 71, 72, 73, 81.

⁴¹ Respondent cites cases that are clearly inapplicable in the instant case. For example, Respondent cites the following: *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (holding employee engaged in a boycott of his employer’s products after the close of a labor dispute was disloyal); *N.L.R.B. v. Local Union No. 1229, Intern. Broth. of Elec. Workers*, 346 U.S. 464 (1953) (upholding district court decision that discharge of technicians lawful where technicians sponsored/distributed handbills that publicly and sharply disparaged the employer and its product, and which made no reference to a union or labor dispute, collective bargaining, and was done in a manner calculated to harm the employer’s reputation and reduce its income).

working conditions, thereby causing them to refrain from engaging in protected activity).⁴²

During the hearing, Respondent pointed to no specific rule in its handbook prohibiting employees from saying negative things about the administration or faculty, but rather, only relied on a claim that Brune violated the code of conduct generally, and that he was not collegial. To the extent such rule exists, the ALJ properly concluded that it would be unlawful under well-settled Board law.

Based on the above, the ALJ correctly found that by Respondent's own admission, it unlawfully interrogated Brune on March 11 regarding his protected concerted activity. To the extent that Respondent continues to raise a defense that it was entitled to question Brune about whether he said anything negative about the administration because such comment violates an unidentified policy in Respondent's employee code of conduct, such policy would violate Section 8(a)(1) of the Act.

V. CONCLUSION AND REMEDY

For the foregoing reasons, the Counsel for the General Counsel urges that the Board uphold the ALJ's decision and find that Respondent's exceptions and brief in support of its exceptions are without merit. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by rescinding David Brune's employment contract on April 17, 2014 in retaliation for his protected concerted activity and by interrogating him about his protected concerted activity on March 11, 2014.

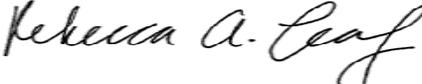
Accordingly, the Board should adopt the ALJ's decision, findings, conclusions of law, and recommended remedy.⁴³

⁴² Respondent Exception No. 69, 70.

⁴³ Respondent Exception No. 82 to 92.

Dated at New York, New York
This 21st day of August 2015

Respectfully submitted,

A handwritten signature in black ink that reads "Rebecca A. Leaf". The signature is written in a cursive style with a large, looping initial 'R'.

Rebecca A. Leaf
Counsel for the General Counsel