UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EF INTERNATIONAL LANGUAGE SCHOOLS, INC. Petitioner, v. NATIONAL LABOR RELATIONS BOARD Respondent.	)	PETITION FOR REVIEW 15-1349

PETITION FOR REVIEW OF DECISION OF
THE NATIONAL LABOR RELATIONS BOARD

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, Local Rule 15 and 29 U.S.C. § 160(f), Petitioner EF International Language Schools, Inc. hereby petitions for review of the October 1, 2015 Decision and Order of the National Labor Relations Board in EF International Language Schools, Inc. *and* Andrea Jesse, Case No. 20-CA-120999, a copy of which is attached hereto at Exhibit A. EF International Language Schools, Inc. hereby petitions to have the foregoing Decision and Order set aside.

ORIGINAL

EF INTERNATIONAL
LANGUAGE SCHOOLS, INC.
By its attorneys,

Robert A. Fisher (D.C. Cir. No. 49556)
rfisher@foleyhoag.com
James W. Bucking (D.C. Cir. admission pending)
jbucking@foleyhoag.com
Lyndsey M. Kruzer (D.C. Cir. admission pending)
lkruzer@foleyhoag.com

Exhibit A

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

USCA Case #15-1349 Document #1578198 Filed: 10/14/2015 Page 3 of 19

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EF INTERNATIONAL LANGUAGE SCHOOLS, INC.	)
Petitioner,	)
v.	)
NATIONAL LABOR RELATIONS BOARD	)
Respondent.	)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Circuit Rule 26.1, EF International Language Schools, Inc. hereby makes the following corporate disclosure:

EF Education BV is the corporate parent of EF International Language Schools, Inc. No publicly held company owns 10% or more of EF International Language Schools, Inc.'s stock.

ORIGINAL

EF INTERNATIONAL
LANGUAGE SCHOOLS, INC.
By its attorneys,

Robert A. Fisher (D.C. Cir. No. 49556)
rfisher@foleyhoag.com
James W. Bucking (D.C. Cir. admission pending)
jbucking@foleyhoag.com
Lyndsey M. Kruzer (D.C. Cir. admission pending)
lkruzer@foleyhoag.com
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000

Date: October 14, 2015

CERTIFICATE OF SERVICE

I, Lyndsey M. Kruzer, Esq., hereby certify under the pains and penalties of perjury that on October 14, 2015, I caused to be served by overnight mail, postage prepaid, a copy of the foregoing document to all counsel of record in the agency proceeding, listed below:

Jason Wong, Esq.
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735
Counsel for the General Counsel of the National Labor Relations Board

Andrea Jesse
1921 Fulton Street #5
San Francisco, CA 94117
Charging Party

Lyndsey M. Kruzer

B4466697.1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

EF International Language Schools, Inc. *and* Andrea Jesse. Case 20–CA–120999

October 1, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 15, 2014, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, EF International Language Schools, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Andrea Jesse full reinstatement to her former job or, if

---

[1] For the reasons set forth in Administrative Law Judge Gerald Etchingham's prehearing order and in Administrative Law Judge Cracraft's decision, we affirm her finding that the use of videoconference technology for taking the testimony of teacher Galin Franklin did not deny the Respondent due process. We specifically note that, contrary to the Respondent's argument, Sec. 102.30 of the Board's Rules and Regulations does not preclude the taking of oral testimony by videoconference. Moreover, we reject the Respondent's argument that *Westside Painting*, 328 NLRB 796 (1999), forecloses the use of videoconference technology. In that case the Board held that Sec. 102.30 does not permit a witness to testify by telephone, relying on the importance of the judge and the parties being able to observe the witness for credibility, due process, and other reasons. None of those concerns is present in this case, where the videoconferencing technology used enabled observation of the witness at all material times.

We also find no merit in the Respondent's contention that the judge erred by excluding evidence of the "state of mind" of managers Haviva Parnes and Meghan Conway, including their subjective reactions to Charging Party Jesse's December 18 email, thereby allegedly precluding them from testifying regarding their motivation for terminating Jesse. Conway and Parnes were able to, and did, testify regarding their motives for the discharge. Additionally, Conway and Parnes were able to, and did, testify regarding what they said and did in reaction to Jesse's December 18 email. Although the Respondent asked to question Parnes regarding her subjective reaction to the December 18 email, it did not ask to question Conway on this issue. A proffer of the excluded evidence was received in the form of testimony by Parnes. This proffer consisted of answers that are repetitive of Parnes' other testimony on this issue. Even viewing the excluded evidence in the light most favorable to the Respondent, Parnes' testimony fails to show that the Employer would have discharged Jesse regardless of her protected activity. Therefore, at most, the judge's exclusion of the additional testimony was harmless error.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Charging Party Jesse's discharge violated Sec. 8(a)(1), we rely on the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). We find the judge's alternative analysis under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), inapplicable because the Respondent does not contend that it discharged Jesse because it had a good-faith belief that she engaged in unprotected misconduct in the course of otherwise protected conduct.

Further, although the judge found that the General Counsel proved that the Respondent had a particularized motivating animus against Jesse's protected activity, we emphasize that such evidence is not required in order for the General Counsel to meet the initial burden under *Wright Line*. See, e.g., *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011).

The Respondent contends in exceptions that the Sec. 8(a)(1) threat allegations contained in the General Counsel's complaint are barred under Sec. 10(b) as they are not "closely related" to the sole allegation in the charge that Jesse's discharge violated Sec. 8(a)(1). See *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988); see also *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927, 928 (1989). We find no merit to this contention. As an initial matter, the Respondent waived this argument by failing to raise it in its answer to the complaint or at the hearing. See, e.g., *Paul Mueller Co.*, 337 NLRB 764, 764–765 (2002). Even if the Respondent's 10(b) argument were properly before us, we would find that it lacks merit. The threat allegations and the discharge allegation concern the same general legal issues, stem from the same sequence of events, and involve the same actors. Accordingly, we find that the threat allegations are closely related to the discharge allegation and thus were properly included in the complaint. See *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 1–2 (2014).

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and to the Board's standard remedial language.

that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Andrea Jesse 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 decision.

(c) Compensate Andrea Jesse for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Andrea Jesse, it will be allocated to the appropriate calendar quarters.

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

(e) 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.

(f) Within 14 days after service by the Region, post at its San Francisco, California facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 November 20, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

Dated, Washington, D.C. October 1, 2105

Mark Gaston Pearce,	Chairman
Kent Y. Hirozawa,	Member
Lauren McFerran,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 threaten you with unspecified reprisals if you engage in protected concerted activities.

WE WILL NOT discharge you for engaging in protected concerted activities.

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, within 14 days from the date of the Board's Order, offer Andrea Jesse full reinstatement to her former job or, if that job no longer exists, to a substantially

[4] 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."

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

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

WE WILL compensate Andrea Jesse for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Andrea Jesse, it will be allocated 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 Andrea Jesse, 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.

EF INTERNATIONAL LANGUAGE SCHOOLS, INC.

The Board's decision can be found at www.nlrb.gov/case/20-CA-120999 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Jason P. Wong, Esq., for the General Counsel.
James W. Bucking, Esq., and *Lyndsey M. Kruzer, Esq.*, for the Respondent.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. The amended complaint[1] alleges that Charging Party Andrea Jesse (Jesse), after being threatened with unspecified reprisals for helping coworkers and sending group emails addressing employees' terms and conditions of employment, was discharged by her employer EF International Language Schools, Inc. (Respondent) because she engaged in protected, concerted activity. I find the violations as alleged.

On the entire record, and after considering the briefs filed by counsel for the General Counsel and by counsel for the Respondent, I make the following

FINDING OF FACTS

JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a privately held global company which provides language instruction as well as travel and cultural exchange program assistance. Respondent admits that it satisfies the Board's jurisdictional standard for private schools and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).[2] Thus this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.[3]

CREDIBILITY AND VIDEO TESTIMONY

Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

At the time of the hearing, former teacher Galin Franklin (Franklin) was employed in Madrid, Spain. The legality of Franklin's departure from Respondent's employment was not at issue in the unfair labor practice proceeding. In a pre-hearing motion, the General Counsel sought permission to take Franklin's testimony by videoconference from Madrid, where Franklin resided at the time of the hearing, further averring that Franklin had no plans to return to the United States at the time of hearing. Respondent opposed the request asserting that video testimony would not allow adequate opportunity for assessment of credibility and might not be trustworthy, therefore constituting a denial of due process. Respondent's argument was based on the NLRB's stated preference for live testimony as set forth in *Westside Painting*, 328 NLRB 796 (1999). Respondent further noted a fundamentally different trial dynamic in federal court in that pretrial discovery, including depositions, reveals a witness' testimony in advance. Thus there is no element of surprise involved in federal court while in NLRB proceedings there is no discovery so the testimony of each opposition witness has not been heard before. Due to this different dynamic, Respondent argues for precluding application of Federal Rule of Civil Procedure 43(a) in NLRB proceedings. Finally, Respondent set forth numerous safeguards which should be in place citing the NLRB Division of Judges Bench Book, §11-620.

After carefully considering all of these arguments, by unpublished order dated May 23, 2014, Associate Chief Adminis-

[1] The charge was filed on January 21, 2014. The amended complaint issued on May 16, 2014. The hearing was held on June 10 and 11, 2014, in San Francisco, California.

[2] 29 U.S.C. §152(2),(6), and (7).

[3] 29. U.S.C. §160(a).

trative Law Judge Gerald Etchingham granted the motion to take Franklin's testimony by videoconference over the objection of Respondent on due process grounds. The order required a number of safeguards, which were utilized at the hearing. These included:

- A representative for Respondent was present at the remote location at the U.S. Embassy in Madrid, Spain, and observed all proceedings.
- The reporter was present in San Francisco and was able to transcribe the testimony.
- The reporter and all participants were able to hear all speakers without regard to where they were located.
- Cameras were adjustable at both the San Francisco and Madrid locations in order to provide not only a close-up view of counsel and the witness but also a panoramic view of the entire room.
- All exhibits were exchanged in advance of the video session.
- Both in San Francisco and Madrid video technicians were present throughout Franklin's testimony to attend immediately to any technical difficulties, should they have arisen.

I find that Respondent was not denied due process by utilization of videoconferencing technology for Franklin's testimony. Rule 102.30 of the Board's Rules and Regulations provides, inter alia, that "Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition." In *Westside Painting,* supra, 328 NLRB at 796–797, the Board reversed the administrative law judge and held that telephonic testimony did not comply with Board Rule 102.30 which "expresses a preference for oral testimony" and requires "the physical presence in the hearing room of the witness being examined." The Board further noted that the sole exception to the preference for oral testimony was deposition testimony when the witness was unavailable for the hearing. Id. Finally, the Board noted that the Federal Rules of Civil Procedure are not controlling in Board proceedings. Id., 328 NLRB at 797 fn. 7.

However, *Westside Painting* dealt with telephonic testimony only and is therefore distinguishable from the instant videoconferencing situation. Indeed, the NLRB subsequently instituted a pilot project in 2008 for use of video testimony in representation cases when warranted.[4] Although the Board has not ruled on the use of video testimony in unfair labor practice cases, the Board's pilot project in 2008 indicates that it did not feel bound by *Westside Painting* regarding video testimony, at least in the representation context. Thus, it is reasonable to find that *Westside Painting* is not directly dispositive of the issue of video testimony.

Further, although not controlling, the Board has often referred to the Federal Rules of Civil Procedure for useful guidance.[5] FRCP 43(a) provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." FRCP 43(a).

The 1996 Advisory Committee Notes to FRCP 43(a) stress that,

> The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

See also, In re *Vioxx Products Liability Litigation,* 439 F.Supp.2d 640, 644 (E.D. La. 2006) (stressing importance of live testimony particularly in making credibility resolutions).

However, in *F.T.C. v. Swedish Match North America, Inc.,* 197 F.R.D. 1 (D. D.C. 2000), the district court stated that courts are generally more receptive to use of videoconference testimony than the Advisory Committee and opined that videoconference testimony is equivalent to live testimony. Moreover, federal courts have permitted videoconference testimony for witnesses particularly in cases involving international travel which is lengthy, expensive, and subject to bureaucratic restrictions such as visa requirements. See, e.g., *Virtual Architecture, Ltd. v. Rick,* 2012 WL 388507 (S.D.N.Y. 2012 at *2 (collecting cases); cf. *SEC v. Yang,* 2014 WL 1303457 at *5-6 (N.D. Ill. 2014) (denying motion to permit testimony by videoconference where witness residing in China did not show insurmountable obstacles to obtaining a visa to enter the United States stating the party seeking to present the testimony should have taken the witness' deposition during the discovery period).

In its posthearing brief, the Respondent does not specifically reassert its objection to Franklin's video testimony or contend that the safeguards were inadequate. However, Respondent argues repeatedly that Franklin's testimony should be discredited. In any event, I find that the safeguards utilized at hearing amply ensured that due process was not denied to Respondent.[6] During the video transmission, which had been tested prior to the hearing, the audio and video quality was flawless, the witness' demeanor, i.e., his appearance, attitude and manner, was easily observable. Certainly, any hesitation, discomfort, arrogance, or defiance would have been easily discerned. The entire

[4] See OM 08-20, January 2008, Associate General Counsel Richard Siegel.

[5] *Brink's Inc.,* 281 NLRB 468 (1986). See also, e.g., *Flaum Appetizing Corp.,* 357 NLRB No. 162, slip op. at 7–8 (2011); *San Luis Trucking,* 352 NLRB 211, 212 (2008), reaffd., 356 NLRB No. 36 (2010), enfd. mem. 479 Fed.Appx. 743 (9th Cir. 2012); *Central Telephone Co. of Texas,* 343 NLRB 987, 988 (2004); *Kaiser Aluminum,* 339 NLRB 829 (2003); and *Clinton Food 4 Less,* 288 NLRB 597 fn. 2, 618–619 (1988).

[6] Another safeguard utilized in federal courts is that if audio or video is lost three times, the video conference will be terminated and all testimony stricken. See, e.g., *Monserrate v. K.K. Machine Co.,* 2013 WL 1412194 (E.D.N.Y 2013), and *Sawant v. Ramsey,* 88 Fed.R.Evid.Serv. 429 (D. Conn. 2012).

proceeding was as spontaneous as live testimony. There was little or no audio delay between the questions and answers. Thus, Franklin's testimony by video may be evaluated on an equal footing with the testimony of witnesses appearing in person at the hearing. See, e.g., *F.T.C. v. Swedish Match North America, Inc.*, supra.

ALLEGED UNFAIR LABOR PRACTICES

The San Francisco School

Respondent operates 14 schools in the United States. At its San Francisco school, Respondent teaches English to students who come to the United States to learn English as a foreign language. Respondent's San Francisco teachers are not represented by a labor organization.

The events in this case are clustered in the months of November and December 2013[7] which was a transitional time in the top tier of administration at the San Francisco school. School director Robert Miller left in September. This was followed by a period of time when the school functioned without a director. In the absence of a school director, Denver-located Meghan Conway, director of operations for the west coast, visited the school several times during late 2013. Haviva Parnes, director of academic management for North America, officed in Boston, also visited the San Francisco school in November.

Then on November 18, Steve Reilly took over as the school director replacing former Director Robert Miller. Erin Freeny became academic director that same date, replacing Mike Serangeli, but spent her first week on the job in training in Boston. A subtext to the transition, voiced by new director Reilly, was to bring the San Francisco school into nationwide conformance with corporate policies.

Other levels of administration had been in place for some time by mid-November. Mike Serangeli was academic director. Stephanie Eto was the academic coordinator and academic manager was Sendy Ramos. Completing the administrative ranks in San Francisco, the university preparations program managers were Pamela Astarte and Heidi Briones.

Jesse, one of 20–30 teachers at the San Francisco school, began teaching for Respondent at the San Francisco school in July 2011. Jesse was discharged on December 20. At the time of her termination, Jesse was the third most senior teacher and taught about 35 hours per week. In order to be considered full time, a teacher must, among other things, work at least 30 hours per week.

Management personnel utilize employer email accounts. Teachers do not have employer email accounts and thus use their personal email accounts for work-related matters.

Meeting of Friday, November 1, regarding Healthcare, Corporate Citizenship, and Student Survey Evaluation System

At approximately 1 p.m. on Friday, November 1, a regular weekly meeting of employees, teachers, and administrators took place on the second floor in the Dolores Park room. Fifteen or twenty teachers attended in addition to then-academic director of the school, Mike Serangeli. Other administrators attending included academic manager Sendy Ramos and university preparation program manager Pamela Astarte.

Serangeli spoke about employer-provided health care coverage for teachers explaining that in order to obtain this coverage, a teacher must work more than 30 hours a week, must continue to do so without more than 2 consecutive weeks of vacation, must maintain a 4.0 student survey rating average or higher, and must be a good corporate citizen. Serangeli stated that the school's program was in line with the Affordable Care Act.

There is no dispute that prior to the fall of 2013, teachers at the San Francisco school were not routinely apprised of their student survey evaluation ratings. The first reference to these ratings occurred in August when Parnes named three teachers, including Jesse, as the three highest rated teachers at the San Francisco school. At this time, teachers knew little or nothing about how the scores were calculated and what scores were expected of them. Moreover, they had never seen a student evaluation form.

In any event, Respondent typically distributed evaluations forms to students at the beginning, middle, and end of each 5 or 6-week course. Completion of the survey was not mandatory. The first survey was given during the first week of the course. The school did not use this first survey for teacher evaluation purposes. The second survey was distributed 2–3 weeks into the course, about halfway through the course. It was not used for teacher evaluations either but was relevant as a benchmark. The last survey was distributed during the last week of the course and it was the survey utilized by Respondent to rate individual teacher's performances.

The surveys stated the teacher's name and asked that the students rate the teacher on a scale of one to five—one being the lowest score and five, the highest. The students did not always complete these surveys. If there were fewer than 17 responses, the rating was not utilized. The average of all final survey scores was the teacher's rating. For instance, if 20 students were surveyed and 10 responded with a 5 while the other 10 responded with a 4, the teacher's evaluation would be 4.5.

Jesse's November 2, 4, 6, 8, and 10 Emails regarding Healthcare, a 401(k) Plan, Corporate Citizenship, and Student Survey Evaluation System

On the following day, November 2, Jesse initiated a group email concerning healthcare—specifically, her disagreement with Serangeli's statement that the school's policy for health insurance eligibility was in line with the Affordable Care Act. She sent this email to Serangeli, Ramos, and Astarte as well as 24 teachers. In the email, Jesse asserted that the number of hours required to receive health insurance coverage under the federal program was based on an average number of hours and would offer more employees coverage than Respondent's program which required maintaining at least 30 hours each week.[8]

[7] All dates are in 2013 unless otherwise referenced.

[8] At a later meeting, Conway, director of operations for the West Coast explained that Respondent would comply with the Affordable

Jesse also stated her understanding that Respondent's health care eligibility standards required maintaining a student survey evaluation score of 4.0 or above. Jesse criticized this eligibility requirement as a precarious criteria based on the subjective whims of students. Finally, she noted that the requirement of good corporate citizenship was understandable although she observed that many of the "corporate citizenship" virtues involved teachers expending their free, uncompensated time for school activities.

In response, Serangeli suggested that Jesse come to speak with him. Jesse declined by a group email of November 4 noting that at least half of the teachers responded to her email and fully supported her statements. Jesse concluded, "It's not about me. It's about us." Serangeli responded that he would address the concerns in the next meeting. On November 6, Jesse sent a group email to administrators and teachers summarizing information about the Affordable Care Act.

At the next meeting, November 8, Serangeli told the teachers, including Jesse, who continued to express concerns about healthcare, to save their questions for Director of West Coast Operations Conway, who would meet with employees on November 13. After the November 8 meeting, Jesse sent an email to 20 or more teachers. She asserted that "sticking up for what's best for ALL teachers" was the best avenue for success. The email solicited questions regarding healthcare in advance of the November 13 meeting and suggested questions as follows:

1. What is the pathway for new teachers to acquire more classes/hours (if wanted)?
2. Once a teacher has received full-time hours, what is the pathway to getting health care paid by [Respondent]?
3. Are 401Ks offered by [Respondent]?
4. Soon to be former director Mike [Serangeli] told the teachers that it is important to be a good "corporate citizen." Can you describe what being a "good corporate citizen" means being as specific as possible?
5. Teachers have also been told that (average) student evaluation scores are important to their standing at [Respondent]. We are rarely shown these scores, so it's hard to know where we stand. Can you describe how teachers can learn these scores on a regular basis?

Jesse forwarded the email to Serangeli on Sunday, November 10, asking that he provide email addresses for Conway and Reilly so she could forward the questions to them in preparation for the November 13 meeting. Serangeli did not respond.

Wednesday, November 13, Meeting regarding Pay Raise, Hiring of New Teachers, a 401(k) plan, Corporate Citizenship, the Student Survey Evaluation System, and More Computers for Teachers

Fifteen to 20 teachers attended the November 13 meeting. Conway introduced Reilly, who would begin serving as the director of the San Francisco school on the following Monday, November 18. In addition to Conway and Reilly, administrators Serangeli, Astarte, Ramos, and Eto were also presented. There is little discrepancy between Jesse's testimony and that of Conway and Eto regarding this meeting. However, Jesse's testimony is much more detailed and I credit her testimony to the extent there are any discrepancies. In any event, there is no dispute that during this meeting, Jesse advocated an increase in the administrative rate of pay for teachers, questioned the efficacy of hiring new teachers when existing teachers wanted to teach more classes, asked if teachers were eligible for a 401(k) plan, asked about corporate citizenship expectations, questioned usage of the student survey evaluation system, and requested more computers for teachers. These topics were discussed in addition to Conway's explanation of Respondent's healthcare system and its interface with the Affordable Care Act, which would be implemented by Respondent in 2015.

Pay Raise: All parties agree that Conway announced that there would be a 2 percent raise for teachers who started before a certain date. Both Conway and Jesse agree that Jesse asked if the raise applied to both the "teacher" pay rate and the "administrative" pay rate. Conway clarified that the raise applied only to the "teacher" pay rate. A general discussion ensued about the high expense of living in San Francisco and criticism of the administrative pay rate as just barely above the San Francisco minimum wage rate. Conway addressed Jesse asking, "[W]hat do you think [the administrative wage rate] should be, Andrea?" After further discussion, Conway agreed to look into adjustment of the administrative pay rate. Eventually in February 2014, the administrative rate was raised by $1 per hour.

Hiring of New Teachers: After the discussion about wages, Jesse asked why new teachers were constantly being hired when existing teachers wanted more hours so they could qualify for health care insurance. Conway addressed this issue telling the group that hiring new teachers was necessary for succession planning.

401(k) plan: In response to Jesse's question regarding eligibility for a 401(k) plan, Conway turned to the 401(k) issue and told the group that "timesheet" employees were not eligible for this program.[9]

Corporate Citizenship: Jesse then pointed to her badge and noted that Serangeli had told employees that wearing a badge was a part of being a good corporate citizen. Jesse asked what else was involved. Conway responded that corporate citizenship involved "looking sharp, keeping your room tidy, getting to your class on time." Conway's testimony, in basic agreement was that she told the employees it meant wearing your name tag, showing up on time to work, and following the Respondent's dress code.

Student Survey Evaluation Scores: Jesse told Conway that student survey evaluation scores were "kind of a mystery to us." Jesse explained that teachers did not regularly receive this

Care Act, as required, beginning in January 2015 and that Respondent's healthcare coverage was a separate item.

[9] An explanation for the term "timesheet" employee is not contained in the record. Sarah Cady from corporate human resources in Boston specifically addressed employee benefits, including health care, sick leave, and 401(k) benefits in meetings held in San Francisco in early December. Some teachers were eventually found eligible to participate in the 401(k) plan.

information. Other teachers asked questions about the evaluations too. Conway stated that student survey evaluations were important and announced that with the addition of academic director Freeny to the staff, Freeny would be able to sit down with each teacher on a quarterly basis to review scores. Conway said the student survey evaluation system would be revamped by spring 2014 because there were questions about it. Conway explained that these scores were "nothing to panic about, that if they were low that they would lead to a conversation . . . to bring them back up." Conway recalled telling employees that in order to qualify for healthcare coverage, teachers needed a bare minimum of 4.0 "but we look for 4.2." Teacher Franklin recalled that Conway said the evaluation scores would not lead to termination. I credit Franklin's testimony regarding evaluation scores not leading to termination and note that various administrators, including Conway, agreed.

In the fall of 2013, in order to maintain full-time status, full-time teachers were actually expected to maintain a 4.2 average or higher on the third student survey evaluation—not a 4.0 as Serangeli stated in the meeting. Conway testified that in order to maintain full-time status, teachers must have a 4.0 minimum but Respondent preferred 4.2.[10] Parnes explained that the 4.2 score is an expectation—"what we're shooting for"—but it is not a requirement either for maintaining employment or for maintaining full-time status. Rather, Respondent works with teachers who fall below 4.2 and, according to Respondent's witnesses, no one has been terminated for falling below 4.2 or 4.0.

The employee handbooks for 2012 were in effect in 2013 but do not contain a policy concerning the relationship between evaluation scores and ability to maintain full-time status. There is no description of the evaluation system in the handbooks. However, another of Respondent's publications, the Teacher Book, contains a description of the student survey evaluation system and provides for a performance improvement plan when a teacher's evaluation falls below 4.0:

> For those full-time teachers with a score that has fallen below 4.0; we will provide observation, assistance and coaching. Our goal is to support the development of our teachers. A performance improvement plan will be developed by the Academic Director for those teachers with continued low evaluation scores and classroom observations.

Computers for Teachers: Finally, Jesse asked if more computers could be made available for teachers and Conway agreed to look into this request. At a later date, another computer was made available to teachers.

Following the meeting, several teachers thanked Jesse for advocating for them. Jesse sent a series of three emails to about 20 teachers—those who had not been able to attend as well as those who were in attendance. She included program manager Astarte on one of these emails. Jesse attached her minutes and observations of the November 13 meeting to these emails.

Jesse's Dissatisfaction with A2-1 Assignment

In the fall of 2013, with no academic director in place, visiting academic directors from other schools rotated in and out of San Francisco on a weekly basis. None of them recommended reduction in the number of classes even though student enrollment was falling. Because none of the rotating academic directors had told her to do otherwise, Eto continued to schedule the same number of classes without reduction. Finally, in mid to late November, as the school's enrollment continued to decrease, a visiting academic director noticed the need to reduce classes and closed down a number of classes. Ramos and Eto worked together to reassign the remaining classes.

An email of Saturday, November 16 from Ramos to all teachers attached new teacher schedules. Jesse was assigned to teach two general education classes (A2-1 and B1-3) and one elective course, an idiom class. Although Jesse had taught A2-1 in September or October, Jesse was upset that she did not have an assignment to teach A2-2. She felt she had mastered that course and had never received any complaints. Additionally, as she examined other teachers' schedules, Jesse noticed that Galin Franklin and Sandy Teixeira had each lost one of their general education courses thus reducing them from full-time status to part-time status.

About an hour and one-half after receiving the new schedule, Jesse emailed Ramos asking that her A2-1 class be reassigned. She noted her seniority and her success with A2-2. Jesse predicted that "whoever teaches [the A2-2 class] is likely not to have my high student evals. Bad student evals are bad for the whole school." Jesse further noted the presence of a student in the assigned A2-1 class whom Jesse had attempted to hold back due to her belief that he was cheating. She felt she should not have to teach this student. Ramos did not respond.

After waiting 30 minutes for Ramos to respond and receiving no response, Jesse forwarded the Ramos email to Reilly asking that he step in and diplomatically resolve the issue of her being assigned A2-1 for the next round of classes. Jesse attached her earlier email to Ramos. In addition to her earlier reasons for seeking to be relieved of the A2-1 assignment, Jesse also noted that many of the students in the assigned A2-1 class were resentful because the prior teacher had failed the entire class.[11]

Still later on November 16, teacher Teixeira emailed Jesse stating that one of her general education classes had been taken away. Teixeira and Jesse discussed Teixeira taking Jesse's idiom course but ultimately decided not to do that. Teacher Galin Franklin reviewed the new schedule and noted that he had been reduced from 24 blocks (an hour and twenty minute period) a week to 14 blocks per week thus converting his status from full-time to part-time status. On the following day, Sunday,

[10] In 2011, teachers were expected to maintain a score of 3.6 to 3.8. Because higher scores were routinely maintained, the score expectation was raised to 4.2 in the fall of 2012.

[11] On the following day, teacher Hesse explained to Jesse that the existing A2-1 class was not composed of students who remained at the same level. Rather, these students, including the one Jesse had attempted to hold back, were now in the A2-2 class that he was teaching.

November 17, teacher Franklin called Jesse and they discussed his losing a general education course. Franklin recalled that they also discussed Jesse's assignment to teach A2-1 as well as the fact that a substitute teacher who had quit some weeks before had been given a full-time schedule as a substitute teacher.

On Sunday, November 17, Reilly, whose first day of work would be the following day, checked with academic assistants Ramos and Eto before responding to Jesse. Reilly learned that the previous week, 60 students had departed leading to a low volume of student enrollments. Consequently, in formulating the new schedule, various classes were closed. Reilly responded to Jesse stating the school would adhere to the schedule as issued.

Jesse quickly responded to Reilly stating,

> It still hasn't been explained to me why I had to switch out my A2-2 class which I have been teaching since I started at [Respondent] 2.5 years ago. Normally (during [Miller's] tenure) teachers are asked what they want before scheduling takes place and then are given what they want based on seniority. I thought seniority had it's [sic] privileges, but I guess that's only true for some teachers.

Jesse also offered to give the A2-1 class to Franklin who had lost a class. In a follow-up email, Jesse offered to give her idiom class to Teixeira. Reilly responded to the first email recommending speaking with Eto and explaining that Jesse could lose her full-time status by giving a class to Franklin. Responding to the second email, Reilly stated,

> Thanks for the follow up. I just replied to your other email explaining that we can't maintain your [full-time] status without hitting the required teaching hours. I really appreciate the teamwork, but if other teachers have concerns I do think it's best that they approach [Ramos or Eto] directly to work out their individual situations.
>
> We're going to consider this closed for now and can certainly follow up with affected teachers throughout the week. Enjoy the rest of your Sunday!

Jesse responded immediately asking what hours were necessary to maintain full-time status. She also requested a link to the employee handbook and suggested piecemeal substitution of one teacher for another for a few weeks.

Email of November 17

In a separate November 17 email, Jesse wrote to Eto, Ramos, and Astarte as well as about 20 teachers expressing her dissatisfaction with her assignment to teach A2-1. Jesse asserted that although Ramos sent out the schedule, she could see Eto's "handy-work" in them. Jesse accused Eto of allowing her personal feelings to influence scheduling by giving full-time hours to a substitute teacher who was a friend of Eto's. Jesse stressed her seniority and success as an A2-2 teacher, reiterated her concerns for Franklin and Teixeira, and requested a meeting with Eto on the following day. Jesse urged solidarity among teachers on the scheduling issue and noted their success in getting a pay raise and a new computer. Eto did not respond to this email.

Meetings of Monday, November 18

On Monday, November 18, Eto told Franklin and Jesse that she would like to talk to them one-on-one. They stated a preference to meet with her together and she complied with their request. Referencing a list of questions given to her by Franklin and Jesse, Eto attempted to answer some but not all of the questions. Regarding the question, "Why did you choose to hire a sub . . . over giving available hours to [Franklin] and [Teixeira]?" Eto explained that the substitute teacher was given a full-time load because he was substituting for a full-time teacher on vacation.

After further protestation from Jesse and Franklin regarding Franklin's loss of full-time status, Eto said, "I didn't want to have to tell you this but it's because of evaluation scores, poor evaluation scores." Eto explained that the substitute teacher had higher evaluation scores than Jesse, Franklin, and Teixeira. Jesse and Franklin asked what the specific scores were and how long the practice of awarding classes by evaluation scores had been in place. Eto did not recall the specific scores but stated that evaluation scores had always been used to award class assignments. Eto did not complete the list of questions but told Jesse and Franklin that she felt they were bullying her and asked if they could continue the meeting in Reilly's office.

Ashley Weitman, director of the San Diego school, was present at the San Francisco school for Reilly's first few days. Weitman and Reilly met with Eto, Franklin, and Jesse and the conversation continued regarding how Eto and Ramos had assigned teachers to the reduced number of classes. Once again, Jesse asserted that she did not want to teach the A2-1 class she was assigned. Reilly told Jesse that the schedule would remain as issued.

Jesse took the position that it was outrageous that Franklin's hours were reduced based on poor evaluation scores. She stated as far as she and Franklin were concerned, "this whole [evaluation score] policy . . . came out of nowhere."

Franklin mentioned that an opportunity for shared sacrifice had been lost. He opined that the reduction in schedule could have been shared equitably without anyone experiencing too much pain. Franklin and Jesse asked further questions about the evaluation process. Reilly responded that it was his first day on the job and he did not have the answers. Two days later, Franklin was laid off.

Meeting of November 20 Admonishing Jesse to be Careful about Speaking on Behalf of Others

On November 20, Reilly conferenced with Conway regarding Jesse. Conway advised Reilly to meet with Jesse about policies and procedures. At the meeting with Jesse later that day, in Weitman's presence, Reilly indicated, according to Jesse, that he was aware that Jesse wanted to help Franklin "but you really need to focus on your teaching and not get involved. Reilly testified he told Jesse that full-time teachers were expected to maintain their required hours each week and be available to teach any class at any level. Reilly told Jesse he was concerned with the list of questions presented to Eto because it made Eto feel attacked. In addition, Reilly testified that he

thanked Jesse for her concern and advised her to "be careful about speaking on behalf of others" adding that "all teachers can speak to us directly with any concerns they may have."

Email of November 20 Cautioning Jesse regarding Speaking on Behalf of Colleagues

Reilly followed up with an email later that evening stating that he appreciated Jesse's openness to his feedback. Reilly noted that in planning teaching schedules, the school utilized student volumes, student survey evaluation scores, and worked to keep full-time teachers at their required teaching level. Reilly acknowledged that there might be changes from past administration's practices and asked for patience in bringing San Francisco into nationwide conformation. Reilly concluded:

> I know you have been with us for a long time, and I appreciate that you are looking out for your colleagues. That being said, we also want to maintain a high degree of professionalism at the school. While you should certainly feel free to voice your concerns, how you go about this is very important. It is not appropriate to jump to conclusions about how and why decisions are made, and certainly not acceptable to speculate about the personal relationships of our staff. In addition, I would caution you from speaking on behalf of colleagues and instead redirect them to the academic team or myself. This will help us resolve situations more quickly and efficiently with less confusion all around.

December 6 and 7 Emails Requesting additional Computers

In response to a work-related December 6 email to all teachers from Freeny, Jesse replied to all on December 7 suggesting that additional computers and a printer be made available to teachers. By email of December 9, Freeny thanked Jesse for the suggestion and more computers were provided.

December 16 Email Admonishing Group Email Usage

Reilly was out of the country during the December 6 and 7 email exchange. However, on December 16, Reilly responded to Jesse's December 6 email stating,

> As we've discussed before, please come and speak with one of us in person about any questions or concerns you may have. Unfortunately, sending out a group email like this [December 6 email] is not a professional or effective way to resolve your concerns. Please keep this in mind for the future, and our door is always open if you do need to chat.

Jesse replied asserting that she and other employees often sent group emails and defending her use of group emails:

> I'm sure you can appreciate that we (teachers) were without an Academic Director for some time and have resorted to email to communicate with one another about keeping things running smoothly without a leader. This is the most efficient way for us to communicate as we are not all in the teachers' room at the same time.

The Very Blue Book, utilized and distributed by Respondent for orientation, specifies, "When a matter is urgent and you are unable to resolve it in person, pick up the phone. Don't send an email." Jesse recalled receiving this book at a meeting in January. One of twelve tips for success states, "Pick up the phone." The book further provides,

> Email.etiquette@ef
>
> - Avoid sending angry emails; words [obliterated] they are written down.
> - Sometimes it's helpful to write the email but not send it. If you're angry, wait. Then pick up the phone or, better yet, talk to the person face-to-face.
> - Avoid blaming people for not having important information by saying "but I copied you on that email" or "it was in one of the attachments of that email I sent you." If it's important, don't cut and paste or attach. Pick up the phone

Despite these policies, I find that Respondent's teachers and administrators routinely utilized group emails in order to discuss employment-related matters. Teachers Jesse, Franklin, and Teixeira recalled specific group emails to and from teachers and administrators regarding attendance lists, time sheets, Miller's departure in September, requests for substitute teachers, a football pool, get-togethers outside of work, and locating missing books or property. Administrators were routinely included on these emails. These three witnesses, including Franklin via videoconferencing, were highly credible, corroborated each other, and were not contradicted by witnesses for Respondent regarding the use of group emails for employment-related matters. Moreover, the record contains numerous such emails.

Jesse's December 18 Email to Freeny Opining that any Drop in her Student Survey Evaluation System Rating was due to a "Complainy" Student Demographic, the A2-1 Assignment, and Large Class Size

Jesse was named in August as a top performing teacher with a 4.35 student survey evaluation. For the period July 1 to October 24, Jesse had an evaluation of 4.04. On Tuesday, December 17, Freeny emailed all teachers announcing the four teachers who had achieved the highest average student survey evaluation scores for the year. Jesse's name was not on the December 17 list.

By email of December 18, Jesse responded to Freeny only. This was not a group email. Jesse noted that apparently her evaluation score had fallen. She asked that her current score be sent to her and then opined that any decrease in her score could be due to three different factors:

> 1. I taught 2 terms of (young group) B1-3 in which the class was more than 50% French speaking. The students complained saying their agents had promised them something different.[12] I didn't have a good answer for them other than it

[12] In other words, the optimal situation is that the students in each class be so mixed in languages that the students are forced to speak

> was up to them not to speak their language in class. This demographic is very "complainy" about a lot of things. I am sure everything about the school "took a hit" from these guys.
> 2. I had mastered the art of teaching A2-2. This class was given to Logan. I was given A2-1 instead. A2-1 is really a mixed class of A1-2, A1-3, A2-1 and there were at least two students in there that could have been in A2-2; one student in there was placed in B1-1 by Stephanie (unbeknownst by me).
> 3. Last week I was teaching three classes. One had 20 students and the other two each had 18. Personally, I don't mind teaching these larger classes. Often the class with 20 (A2-1) was scheduled to be in some of the smaller classes [classrooms] (e.g. Ghirardeli [sic] Square, Fisherman's Wharf). The students complained. I was puzzled considering the admin was both aware of the student numbers and classroom size and they are the ones doing the scheduling. A large number of students in a class means students don't get as much individual attention during class time. It also means the teacher has to do more homework, test and essay correction outside of class.

Freeny responded with Jesse's student survey evaluation information for calendar year 2013 showing that Jesse had an annual evaluation score of 4.02 with 166 students responding. Freeny's statistics also indicated that for weeks 41–50 of 2013, Jesse's score was 4.0

Like all statistics, Respondent's student survey evaluation scores are capable of various analyses. On December 20, in responding to Jesse's request for her evaluation score, Freeny utilized 10-week periods to determine that Jesse's average score for 2013 was 4.02. At hearing, Parnes decried the use of 10-week periods as a result of Freeny's lack of experience and testified that the evaluations are based on class periods. Thus, Parnes and Conway agreed that Jesse's actual student survey evaluation for July 1 to October 24 was 4.04 and for the period October 27 to December 19 was 3.89. In any event, the evidence overwhelmingly indicates that student evaluation scores are not utilized to discharge teachers. Respondent does not contend otherwise.

Decision to Discharge

Freeny forwarded Jesse's December 18 email to Reilly and Reilly forwarded the email to Conway. Freeny, Reilly, and Conway subsequently discussed their concerns that Jesse continued to protest teaching a specific course after numerous prior conversations on the subject and that Jesse placed responsibility for her student evaluation scores on a particular demographic which she characterized as "complainy." These concerns were shared by Freeny with Haviva Parnes, director of academic management. Parnes recalled the discussion with Freeny as one of frustration. "We couldn't praise her and we couldn't give her constructive feedback." Parnes and Conway spoke further and determined that Jesse should be terminated due to her inflexibility to teach assigned courses. Another reason for the termination was a decline in Jesse's ratings. Further, her blaming "complainy" French-speaking students for the poor ratings was troubling. Conway characterized this as a "slur against French people, which is not something that we wanted of an employee in an international school."

Conway made the decision to discharge Jesse after consulting with Parnes. The reasons for discharging Jesse, according to Conway, were her refusal in November and December to teach anything other than A2-2 level courses, the derogatory comment in the December 18 email about a specific group of students based on their national origin, and a falling teacher evaluation of 3.85 for the last term.[13] Conway told Reilly to discharge Jesse because

> [S]he only wanted to teach one specific class, that that was not an expectation that we have of all the EF teachers. Again, that she was calling the French students a very demographic complainee group of people. And, you know, that in conjunction with at the same time her evaluation scores were dropping and dropping and dropping, so it was sort of the combination of all of those things together.

Termination of Jesse

On December 20, Jesse was discharged during a meeting with Reilly and Freeny. According to Jesse, Reilly told her, "[Y]ou're not a good fit, we didn't like the group emails, you're not a corporate citizen." Thus, according to Jesse, she was told that she was discharged, at least in part, because of her group emails. This testimony is credited for the reasons that follow.

According to Reilly, he told Jesse he appreciated her hard work but it seemed like this was not the right fit because we continued to discuss the same issues of being available to teach the different levels that were assigned her. This was the totality of the conversation according to Reilly.

Freeny recalled that Reilly did the speaking and said that Jesse was terminated and he wished her the best of luck. Jesse asked for details and Reilly responded it was because of "recent events that had occurred." When asked to explain what Riley meant by "recent events," Freeny responded "these series of emails." When asked for further clarification: "And just to be clear for the record, when you say this series of emails you're referring to the emails in [General Counsel Exhibit16]?" Freeny responded, "Yes, 16, yes."

General Counsel Exhibit 16 contains an initial email from Freeny to all teachers and administrators dated December 17 announcing teachers with the top scores for the past year pursuant to student evaluation surveys. The exhibit also contains Jesse's reply, which was only to Freeny, dated December 18 in which Jesse characterized French-speaking students as "complainy," requested her evaluation scores, and continued to assert that she should not be assigned to teach A2-1. Jesse's December 18 response to Freeny was not a group email string originated by Jesse to teachers and administrators.

English to communicate with each other. A class with 50 percent speaking the same non-English language makes it more probable that the second common language will be utilized rather than English, thus failing to provide the student with immersion in English.

[13] The 3.85 score differs from the 4.02 annual score sent to Jesse by Freeny. According to Parnes, Freeny utilized a 10-week average when she sent the score to Jesse. Parnes explained that Respondent does not utilize a 10-week basis for averaging evaluations.

None of the versions of the discharge conversation mirror the corporate reasons for discharge enunciated at the hearing. Further, there is little agreement between the three witnesses at the discharge conversation regarding what was said. On the whole I find Jesse's testimony to be more complete and more inherently believable. Reilly's testimony lacked detail and appeared abbreviated rather than drawn from his recollection. Freeny was a hesitant witness whose demeanor exemplified an unwilling witness carefully trying not to say the "wrong" thing. Strangely, though, Jesse's rendition is supported in part by Reilly and in part by Freeny.

Thus, Reilly and Jesse agreed that Jesse was told that she was terminated because she was not a good fit or not the right fit. Freeny's testimony indicates that Jesse was told she was discharged due to "these recent events," by which Freeny testified Reilly meant emails. Freeny's conjecture is, of course, notable only because Freeny appears to recall that emails were a stated basis for the discharge. I find Freeny's reference to emails includes all emails including those which Respondent had counseled Jesse about—the group emails of November 17 and December 7. Due to the leading nature of the questions, I discredit the attempt to limit Freeny's testimony that she thought "these series of emails" was solely limited to Jesse's December 18 email to Freeny. Freeny was led to respond with this limitation and I discredit it. Thus, I credit Jesse's testimony that she was told she was discharged because she was not a good fit, Respondent did not like her group emails, and she was not a good corporate citizen.

Analysis

Alleged Threats

The amended complaint alleges that on November 20, Reilly threatened employees with unspecified reprisals by telling employees to focus on teaching and not get involved in helping coworkers. Reilly's testimony is that on the advice of Conway, he met with Jesse on November 20 to clear up policies and procedures. He advised Jesse "to be careful about speaking on behalf of others" and his follow-up email of the same date provides, "I would caution you from speaking on behalf of colleagues. . . ."

The amended complaint further alleges that on December 16 Reilly threatened employees with unspecified reprisals by stating that employees should not send out group emails discussing employees' terms and conditions of employment. Reilly's December 16 email responded to a group email sent by Jesse requesting more computers. In his response, Reilly stated:

> As we've discussed before, please come and speak with one of us in person about any questions or concerns you may have. Unfortunately, sending out a group email like this is not a professional or effective way to resolve your concerns. Please keep this in mind for the future, and our door is always open if you do need to chat.

Section 8(a)(1) of the Act[14] provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]. Section 7 protects the right of employees to engage in "concerted activity" for, inter alia, their "mutual aid or protection." The Board assesses the objective tendency of statements to coerce employees rather than utilizing employees' actual subjective reactions. *Miller Electric Pump,* 334 NLRB 824, 825 (2001). Under this objective standard, the Board determines whether a statement would reasonably tend to interfere with the free exercise of employee rights. See, *Miller Electric Pump,* supra, 334 NLRB at 825 (rejecting judge's finding based on employee's reaction to statement and finding statement, when considered objectively, tended to interfere with protected right to discuss union on nonworking time). Similarly, the Board does not consider the motivation behind the remark. *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) ("The test of interference, restraint, and coercion does not turn on the employer's motive or on whether the coercion succeeded or failed . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.") Thus, it is irrelevant that Reilly's motivation in telling Jesse to be careful about speaking on behalf of others was that Eto told him that Teixeira did not want to be involved with Jesse and Franklin in class swapping.

Respondent's statements to Jesse warned her under threat of unspecified reprisals that she should not attempt to assist her coworkers and should not utilize group emails to discuss work-related matters. A reasonable construction of Reilly's statements is as a warning to refrain from assisting coworkers and to refrain from group emails to coworkers about terms and conditions of employment. By virtue of these statements to Jesse, Respondent threatened Jesse if she continued to engage in protected, concerted activity of speaking on behalf of others and speaking to groups of employees about their terms and conditions of employment. Thus I find the violations as alleged.

Alleged Discharge for Protected, Concerted Activity

The amended complaint alleges that Jesse was discharged on December 20 because of her protected, concerted activity as follows:

- Challenging Respondent's eligibility policy for its health insurance in group emails and at employee meetings;
- Demanding a wage increase, a 401(k) program, and opposing hiring of new teachers when current teachers wanted more teaching hours at employee meetings;
- Challenging Respondent's decision to reduce the hours of two teachers while simultaneously rehiring another teacher with full-time hours in group emails and employee meetings;
- Questioning Respondent's policy of reducing teachers' hours based on low evaluation scores in group emails and employee meetings; and

[14] 29 U.S.C. §158(a)(1).

- Demanding more computers for teachers in group emails and employee meetings.

An employee's discharge independently violates Section 8(a)(1) of the Act when it is motivated by employee activity protected by Section 7. "[A] respondent violates Section 8(a)(1) if, having knowledge of an employee's concerted activity, it takes adverse employment action motivated by employee's protected, concerted activity." *CGLM, Inc.*, 350 NLRB 974, 979 (2007), enfd. mem. 280 Fed.Appx. 366 (5th Cir. 2008), quoting *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Jesse was engaged in protected activity. Employees who seek to improve wages, benefits, working hours, their physical environment, dress codes, assignments, responsibilities, and other similar employment-related items are dealing with conditions of their employment as set forth in Section 7. *New River Industries v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991); see generally, *Eastex v. NLRB*, 437 U.S. 556, 563–568 (1978); *CGLM, Inc.*, supra, 350 NLRB at 979.[15]

By sending group emails to her coworkers and speaking at employer meetings about various terms and conditions of employment such as eligibility for health insurance, a wage increase for "administrative" pay, a 401(k) program, hiring of new teachers when existing teachers were willing to teach additional hours, utilization of the student survey evaluation method to award classes, and requesting additional computers for teachers, Jesse was engaged in protected, concerted activity with 20 or more coworkers. Examples of this behavior are her group emails of November 2, 4, 6, 8, 10, and 17; her questions and comments at the November 13 meeting; and her insistence on meeting Eto with Franklin rather than one-on-one on December 18 all with an object of inducing group action.

Although it is unnecessary to express the object of inducing group action,[16] Jesse's statements clearly contain calls for group action. On November 4, in response to Serangeli's offer to talk with Jesse one-on-one about healthcare, Jesse declined by replying to all noting that half the teachers had emailed agreement with her position and concluded, "It's not about me. It's about us." By email to 20 teachers on November 10 (later forwarded to Serangeli), Jesse urged her coworkers that "sticking up for what's best for ALL teachers is the best avenue for success." In seeking to resolve assignments so that Franklin and Teixeira could increase their hours, by email of November 17, Jesse urged solidarity among teachers and noted their success in getting another computer and an administrative pay raise. All of these actions were in response to matters which arose in the workplace at staff meetings and in preparation for upcoming staff meetings. Thus, by addressing these issues and possible action on these issues, Jesse was seeking to initiate, induce, or prepare for group action. Her actions thus consistute protected, concerted activity for mutual aid or protection.

If the very conduct for which an employee is discharged is the employee's protected activity, the employer's motivation is not at issue. See, e.g., *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003). In *Burnup & Sims*, 379 U.S. 21, 23-24 (1964), the Court held that Section 8(a)(1) is violated if "the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct. *Akal Security, Inc.*, 354 NLRB 122, 124–125 (2009), reaffd. 355 NLRB 584 (2010); *Tracer Protection Service*, 328 NLRB 734, fn. 2 (1999).

Here, as set forth above, the credible evidence indicates that Jesse engaged in protected, concerted activity by speaking to management on behalf of her coworkers and that Respondent knew she was speaking about terms and conditions of employment on behalf of her coworkers. Indeed, Respondent specifically warned Jesse that she should be careful about speaking for her coworkers and should refrain from sending group emails. Four days after being warned by Reilly to refrain from sending group emails, Jesse was discharged for sending group emails and "not fitting in." The only misconduct cited was her protected, concerted activity. Thus, under the *Burnup & Sims* analysis, Respondent violated Section 8(a)(1) of the Act in discharging Jesse.

The parties have briefed this case utilizing the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). This analysis yields the same result. *Wright Line* applies to all 8(a)(1) and (3) allegations that turn on employer motivation. Pursuant to *Wright Line*, the General Counsel must persuade by a preponderance of the evidence that the employee's protected conduct was a motivating factor (in whole or in part) for the adverse employment action.

The General Counsel satisfies the *Wright Line* standard by showing that the employee was engaged in protected activity, the employer was aware of the activity, and the activity was a substantial or motivating reason for the employer's action. *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004). Here, the General Counsel has shown that Jesse engaged in protected activity with the employer's full knowledge. Respondent's animus toward her activities is demonstrated by its threats on November 20 cautioning her not to speak in support of her colleagues and on December 16 not to send group emails about terms and conditions of employment. Thus the General Counsel

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[15] See also, *Inova Health System*, 360 NLRB No. 135, slip op. at 3 (2014) (employee engaged in protected activity when she emailed fellow employees about terms and conditions of employment); *Cibao Meat Products*, 338 NLRB 934, 934–935 (2003), enfd. 84 Fed.Appx. 155 (2d Cir.), cert. denied 543 U.S. 986 (2004) (activity of one employee, who speaks in the presence of other employees, regarding a change in employment terms affecting all employees is protected, concerted activity).

[16] See, e.g., *U.S. Furniture Industries*, 293 NLRB 159, 161 (1989) (discussion about wage rates constituted concerted activity even though there was no express object to induce group action).

has shown not only the three requirements of *Wright Line* as set forth in *Donaldson Bros.*, supra, but has also shown particularized motivating animus towards Jesse's protected activity as a nexus between Jesse's protected activity and the adverse action taken against her.[17]

The General Counsel's showing proves a violation of the Act subject to Respondent's affirmative defense of demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Wright Line,* supra at 1088–1089. In this regard, however, it is not sufficient for an employer to produce a legitimate basis for the adverse employment action[18] or to show that legitimate factors for adverse action were a part of its decision-making process.[19] Rather, *Wright Line* requires an employer to persuade by a preponderance of the evidence that it would have taken the same action in any event.

Respondent asserts that it would have discharged Jesse in any event because of her disparagement of French-speaking students and her reluctance to teach an assigned course. Although Respondent agrees that low student survey evaluation scores alone are not a ground for discharge, Respondent notes that both of the incidents above occurred in the context of Jesse's falling student survey evaluation scores. I find these grounds pretextual. Further, were these grounds not pretextual, I would find them insufficient to prove that Jesse would have been discharged for these reasons.

Thus, I note that there was no attempt to counsel or confront Jesse about her remark about French-speaking students. Respondent's Teacher Handbook states that it utilizes a progressive discipline system with at least one oral warning before a written warning is issued. If a written warning is issued, corrective action is set forth in the warning. "Some types of infractions [not enumerated] may result in immediate termination at this time." The handbook further provides that prior to termination, an employee is entitled to be informed of incorrect behavior or substandard performance through oral and written warnings unless the infraction is of a severe nature. Although Conway found Jesse's remark "troubling," she did not explain why it constituted grounds for immediate termination without an oral or written warning. Similarly, Jesse was told repeatedly that Respondent would not change its class assignment. She continued to complain but was given no warning that her complaints could lead to termination. She was not informed that she needed to correct this behavior or disciplinary action might be taken. Thus, because these reasons for discharge were not articulated at the time of discharge and because Respondent did not counsel or warn Jesse about these behaviors, I find that they are pretextual.

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Thus, if the evidence establishes that the reasons given for the Respondent's action are pretextual, the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Moreover, even were these reasons not pretext, they would not satisfy Respondent's *Wright Line* burden. Substantively the three reasons now asserted are low evaluation scores, characterization of a student demographic as "complainy," and continued resentment about a teaching assignment. These three grounds are insufficient to show that Respondent would have discharged Jesse in any event.

Low evaluation scores are by Respondent's admission not a ground for discharge but rather an alert showing that performance improvement is required. The record contains several different student survey evaluation scores. The 2013 annual score was 4.02 according to an email from Freeny. This score is confirmed by an annual score survey prepared for hearing. A third document indicates a score of 3.89 for the period October 24 through December 19. Before that time, Jesse was a top performer with a 4.35 score. But numbers aside, Respondent's policy was to counsel a teacher with a low evaluation score in order to raise the score. Respondent specifically awarded full-time status to high scoring teachers but did not use the scores as a reason for discharge. Thus, Respondent has not proven that it would in any event have discharged Jesse for low student survey evaluation scores. In fact, her annual score met their criteria if not their expectation.

The second reason given by corporate personnel for Jesse's discharge was that in an email sent to Freeny (but not to other teachers or to students) she referred to the French-speaking demographic of students in one of her classes as "complainy." This characterization was not shared with the students or teachers. As Conway stated, the characterization was troubling and, indeed, it is possible to categorize it as an ethnic slur.[20] However, absent broadcast of such a stereotypical characterization, it is difficult to find that the single, isolated statement warranted discharge. Moreover, Respondent called no attention to the remark at the time it was made and did not counsel or attempt remediation. Further, Respondent does not assert Title VII concerns to maintain a workplace free of national origin harass-

[17] See, e.g., *Nichols Aluminum, LLC,* 361 NLRB No. 22, slip op. at 6–8 (2014) (concurrence of Member Johnson stating particularized motivating animus toward employee's own protected activity is implicit in *Wright Line)*.

[18] *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so regardless of his union activities.")

[19] *Weldun International,* 321 NLRB 733, 747 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998) (employer cannot carry this burden merely by showing it also had a legitimate reason for the action).

[20] Wikipedia defines an ethnic slur as a term designed to insult others on the basis of race, ethnicity, or nationality. In other words, it is an aspersion or disparaging remark about race or language.

ment as a reason for Jesse's discharge.[21] Given Respondent's progressive disciplinary system and Jesse's tenure at the school, I am unconvinced that this remark proves that Jesse would have been discharged in any event.

Finally, Respondent found fault with Jesse because she continued to complain about assignment of an A2-1 class because she thought it would lower her evaluations and because she believed she was much better at teaching A2-2. Jesse did indeed complain and complain about this assignment, but in the end, she taught the class. Jesse was never warned to cease complaining but she was told on numerous occasions that she must keep the A2-1 class and she did. There was no failure to perform her assigned duties and this ground put forth by Respondent does not support a finding that Jesse would have been discharged in any event.

Thus, because the student survey evaluation scores were admittedly not grounds for discharge, because the "complainy" disparagement was a single, isolated occurrence, and because Jesse taught her assigned classes, and because none of these perceived grounds for discharge were treated under the progressive discipline system, absent a finding of pretext, I would find that Respondent has not satisfied its burden of showing that Jesse would have been discharged absent her protected activity by advancing these three reasons for discharge. Based on the record as a whole, I find that Jesse was discharged because of her protected, concerted activity in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act by threatening unspecified reprisals to an employee because she was involved in helping coworkers.

2. Respondent violated Section 8(a)(1) of the Act by threatening unspecified reprisals to an employee because she sent group emails discussing employees' terms and conditions of employment.

3. Respondent violated Section 8(a)(1) of the Act by discharging Andrea Jesse because she assisted coworkers and concertedly discussed employees' terms and conditions of employment in group meetings and group emails.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent discriminatorily discharged Andrea Jesse, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, Respondent shall compensate Jesse for any adverse tax consequences 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. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip opinion at 4–5 (2014). Additionally, the customary notice shall be posted and published in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[22]

Order

The Respondent, EF International Language Schools, Inc., its officers, agents, successors, and assigns, shall cease and desist from threatening or discharging employees for their protected, concerted activities or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Andrea Jesse 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.

(b) Make Andrea Jesse 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 this decision.

(c) Reimburse Andrea Jesse an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Andrea Jesse it will be allocated to the appropriate calendar quarters.

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

(f) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board

[21] Title VII requires an employer to maintain a workplace atmosphere free of national origin harassment. The EEOC defines such harassment as ethnic slurs or other verbal and physical abuse relating to an employee's national origin when such conduct has the purpose or the effect of (1) creating an intimidating, hostile, or offensive work environment, (2) unreasonably interfering with the employee's work performance, or (3) otherwise adversely affecting an employee's employment opportunities. See 29 C.F.R. § 1606 8(b).

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or its agents, all payroll 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 facility in San Francisco, California, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director of Region 20, 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. In the event that, during the pendency of these proceedings, 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 employment by the Respondent at its San Francisco facility at any time since November 20, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C. September 15, 2014

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 threaten employees because they get involved in helping their coworkers or because they send out group emails discussing employees' terms and conditions of employment such as healthcare eligibility, wage increases, 401(k) programs, availability of computers, or hiring and scheduling of employees.

WE WILL NOT discharge an employee for complaining at employee meetings and through group emails about employees' terms and conditions of employment.

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, within 14 days from the date of the Board's Order, offer Andrea Jesse 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.

WE WILL make Andrea Jesse whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, less any net interim earnings, plus interest.

WE WILL reimburse Andrea Jesse an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Andrea Jesse, it will be allocated 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 Andrea Jesse and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discrimination will not be used against her in any way.

EF INTERNATIONAL LANGUAGE SCHOOLS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-120999 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[23] 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."