

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

THE BOEING COMPANY

and

JOANNA GAMBLE, an Individual

Case 19-CA-089374

THE BOEING COMPANY’S RESPONSE TO NOTICE TO SHOW CAUSE

Respondent The Boeing Company submits this response to the National Labor Relations Board’s (“Board”) Notice to Show Cause why this proceeding should not be remanded to the Administrative Law Judge for further proceedings in light of the Board’s decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). Boeing respectfully requests that the Board not remand this case to the Administrative Law Judge because remand is unnecessary and would further delay final resolution of this dispute, as set forth more fully below.

Joanna Gamble filed the unfair labor practice charge in this case more than six years ago. The parties agreed to waive a hearing and requested a decision on a stipulated record. *See Exhibit A* (“Joint Stipulated Record”). The stipulated record identified three issues for the Administrative Law Judge to consider: (1) whether Boeing’s Notice of Confidentiality to witnesses in HR investigations, which was in effect from March to October 2012 and directed employees to keep investigations confidential (the “Notice”), interfered with employees’ Section 7 rights; (2) whether Boeing’s Revised Notice of Confidentiality, which was in effect beginning in November 2012 and only *recommended* confidentiality in HR

investigations (the “Revised Notice”), interfered with employees’ Section 7 rights; and (3) whether a written warning issued to Ms. Gamble in August 2012 for violating terms of the original Notice, which warning was rescinded in September 2012, interfered with her Section 7 rights. *Id.* at 8-9. On July 26, 2013, Administrative Law Judge Jeffrey D. Wedekind concluded that both the original Notice and the Revised Notice infringed on employees’ Section 7 rights in violation of Section 8(a)(1) of the National Labor Relations Act and that Ms. Gamble’s written warning was an unfair labor practice.

In a 2-1 decision, the Board agreed with the Administrative Law Judge, finding both the original Notice and the Revised Notice to be improper. The Board ordered Boeing to post a nationwide notice rescinding the Revised Notice and to post a notice at its Renton site rescinding Ms. Gamble’s written warning (which had already been rescinded almost three years earlier). *The Boeing Co.*, 362 NLRB No. 195 (2015), slip op. at 13-14. Boeing appealed the Board’s decision to the Ninth Circuit Court of Appeals.

On December 14, 2017, while the case was pending before the Ninth Circuit, the Board overruled part of its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and announced a new standard to apply retroactively to all pending cases concerning whether a facially neutral work policy may be reasonably construed to affect employees’ Section 7 rights. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-15, 17 (2017).

On January 8, 2018, Boeing filed an unopposed motion to remand this case to the Board for reconsideration in light of the new standard, which the Ninth Circuit granted on January 18. **Exhibit B** (Order on Motion to Remand). On December 17, 2018, the Board issued the present Notice to Show Cause why the case should not be further remanded to the Administrative Law Judge for additional proceedings.

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As an initial matter, remand to the Administrative Law Judge is not necessary because this case was decided on a stipulated record and the only questions left to resolve are issues of law. There is therefore no need for the Administrative Law Judge to hear new testimony, assess the credibility of witnesses, or examine the admissibility of other evidence.¹ The legal issue to be resolved on remand--the effect of the Board's decision in *The Boeing Co.* on its interpretation of the Revised Notice--can and should be decided by the Board in the first instance.

Moreover, remanding to the Administrative Law Judge would further and needlessly delay final resolution of this case, which has already been pending for more than six years. Declining to remand the case would further the Board's Strategic Goal of increasing the timeliness of case processing for unfair labor practice charges. *See* NLRB Strategic Plan (FY 2019-FY 2022), at 5.

For these reasons, Boeing respectfully requests that the Board decline to remand the matter to the Administrative Law Judge for further proceedings. Rather, Boeing requests that the Board request supplemental briefing on the impact of its decision in *The Boeing Company* on this case and decide the question itself.

DATED at Seattle, Washington, this 31st day of December 2018.

¹ Boeing submits that the record *should* be supplemented to reflect the undisputed fact that Ms. Gamble retired from Boeing employment in August 2013, but this can be accomplished by stipulation and does not require or warrant remand to the Administrative Law Judge.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Notice to Show Cause in the above-captioned matter has been served upon the persons shown below by e-filing with the Board and by depositing a courtesy copy thereof in the United States Mail on December 31, 2018, with proper postage affixed for first-class mail to:

Joanna Gamble
23610 130th Ave SE
Kent, WA 98031-3653

Carolyn McConnell
Counsel for the General Counsel
National Labor Relations Board, Region 19
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915 Second Avenue
Seattle, WA 98174-1006
Email: Carolyn.mcconnell@nrlrb.gov

DATED: December 31, 2018



Mary L. Lyles
Legal Practice Assistant

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

THE BOEING COMPANY
and
JOANNA GAMBLE, an individual

CASE NO. 19-CA-89374
JOINT MOTION AND
STIPULATION OF FACTS

I. INTRODUCTION

The parties to Case 19-CA-089374, the Boeing Company (“Respondent”) and the Acting General Counsel (“GC”), jointly move to waive a hearing in this matter and to authorize the Administrative Law Judge to issue a decision pursuant to Section 102.35(a)(9) of the Rules and Regulations of the National Labor Relations Board (“Board”) based on a stipulated record. The waiver of the hearing will effectuate the purposes of the Act and avoid unnecessary costs and delay. This Joint Motion is not intended in any way to waive the parties’ right to file with the Administrative Law Judge briefs in support of their positions or with the Board any exceptions to the Administrative Law Judge’s decision, or to obtain judicial review of the Administrative Law Judge’s Decision and Order the Board issues in this case based on the stipulated record.

If this Motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, Amended Charge, the Complaint, the Answer, the Stipulation of Facts set forth in this document together with any exhibits attached thereto, the Statement of Issues Presented, and each party's Statement of Position.

2. This case is submitted directly to the Administrative Law Judge for the issuance of her/ his recommended findings of fact, conclusions of law, and an Order.
3. The parties waive their right to a hearing before the Administrative Law Judge.
4. All subpoenas issued or retained in this matter in connection with the previously-scheduled hearing before the Administrative Law Judge will be deemed null and void.
5. The Administrative Law Judge should set the time for the filing of briefs, which shall be no less than 35 days from the date she/he grants this Motion.
6. This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.

II. STIPULATION OF FACTS

1. The Original Charge in Case 19-CA-089374, attached as Exhibit A, was filed by Charging Party Joanna Gamble (“Charging Party” or “Gamble”) on September 17, 2013, and a copy was served on Respondent by regular mail on about the date.
2. The Amended Charge in Case 19-CA-089374, attached as Exhibit B, was filed by Charging Party on November 16, 2012, and a copy was served on Respondent by regular mail on about November 19, 2012.
3. On January 29, 2013, the Regional Director of Region 19 of the National Labor Relations Board (“Regional Director”) issued the Complaint and Notice of Hearing

("Complaint") in Case 19-CA-089374, attached as Exhibit C, alleging that Respondent violated § 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*

4. On February 12, 2013, Respondent filed a timely Answer to the Complaint, attached as Exhibit D, in which it denies having violated the Act.

5. Respondent, a State of Delaware corporation headquartered in Chicago, Illinois, with various facilities throughout the United States, including in Renton, Washington (the "Facility"), Seattle, Washington, and Portland, Oregon, is engaged in the business of manufacturing and producing military and commercial aircraft.

6. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 5, derived gross revenues in excess of \$500,000.

7. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 5, both sold and shipped from, and purchased and received at, the Facility goods valued in excess of \$50,000 directly to and from points outside the State of Washington.

8. Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

9. Human Resources ("HR") investigations at Respondent's facilities, including the Facility, are conducted by HR Generalists employed by Respondent.

10. Respondent represents that its "HR Investigations" process is used when a reporting party alleges behavioral or work performance issues that are unrelated to allegations of discrimination or retaliation based on protected status. Respondent also represents that, in contrast, its internal investigations regarding discrimination or retaliation

based on legally protected class or category (e.g., race, age, sex, disability, FMLA use) are conducted by its Equal Employment Opportunity ("EEO") office. Respondent's EEO Investigation office is separate from the HR Investigations function.

11. From September 2011 through October 2012, at most of Respondent's locations within the United States, including the Facility, management and employee witnesses in HR Investigations were given/issued the "Human Resources Generalist (HRG) Notice of Confidentiality and Prohibition against Retaliation" Form F70149 REV (16 SEP 2011) ("Notice"), attached as Exhibit E.

12. Since November 2012, at most of Respondent's locations within the United States, including the Facility, witnesses in HR Investigations are routinely asked to sign the revised "Human Resources Generalist (HRG) Notice of Confidentiality and Prohibition against Retaliation" Form F70149 REV (08 NOV 2012) ("Revised Notice"), attached as Exhibit F.

13. Respondent has not publicized its rescission of the Notice (Exhibit E) or its replacement of that form with the Revised Notice (Exhibit F) to its employees outside the HR Investigations department.

14. Since September 2011, Respondent's HR Generalists have conducted over 1,000 HR Investigations in Respondent's Commercial Airplane group ("BCA").

15. Gamble has been employed by Respondent in various capacities since 1980. For approximately the past 7 years, she has worked for BCA at the Facility as a Product Data Management Specialist, a non-represented position that is sometimes referred to as Process Technical Integrator.

16. In March 2012, Gamble was the subject of an internal EEO complaint by a co-worker, which prompted an internal EEO investigation. Respondent found that complaint to be substantiated and gave Gamble a written warning on August 9, 2012, a copy of which is attached as Exhibit G.

17. Respondent contends that, during the course of the EEO investigation, Gamble alleged that her supervisor Richard ("Dick") Carroll ("Carroll"), a BCA Engineering manager and supervisor within the meaning of § 2(11) of the Act, made inappropriate comments about race and age, which it made part of the EEO investigation.

18. On or about May 16, 2012, Gamble sent an email with the subject line, "Help Needed –Stop the Name Calling," a copy of which is attached as Exhibit H. The email was addressed to numerous BCA Engineering managers and executives (named in the "To" and "CC" lines of Exhibit H), all supervisors within the meaning of § 2(11) of the Act on the date of the email. In addition, the email was "copied" to three non-management coworkers (employees within the meaning of §2(3) of the Act): Camille Foote ("Foote"), Sandy Ingraham ("Ingraham"), and Amber Stroscheim ("Stroscheim"). Foot and Ingraham were Product Data Management Specialists, and Stroscheim was a Staff Analyst. The email complained about Carroll and Duane Muller ("Muller"), a non-management coworker and Product Data Management Specialist.

19. At the time the email was written, Gamble, Foote, and Muller reported to Carroll; Ingraham and Stroschiem reported to Jean Rainbow, a BCA Engineering manager and § 2(11) supervisor.

20. In June 2012, Kelsie Sanchez Islas ("Sanchez") conducted an HR Investigation of three specific allegations from Exhibit H. Sanchez was an HR Generalist,

and she was acting as an agent of Respondent within the meaning of § 2(13) of the Act, in connection with this HR Investigation. Respondent contends that Sanchez's investigation was restricted to non-EEO issues and allegations, as Gamble's EEO allegations were being addressed in the separate, EEO investigation.

21. On June 4, 2012, Sanchez interviewed Gamble in connection with the HR Investigation described in paragraph 20. During this interview, Gamble identified several individuals as potential witnesses, including Foote, Ingraham, Stroschein, and Rainbow.

22. On June 5, 2012, in connection with Sanchez's HR Investigation, Gamble signed a Notice (Exhibit E). The copy of the version signed by Gamble is attached as Exhibit I.

23. On July 2, 2012, Sanchez completed her HR Investigation report, attached as Exhibit J. It is undisputed that Sanchez did not contact Ingraham, Stroschein, or Rainbow as part of the investigation for the stated reason that none of them had observed the three discrete alleged events Sanchez investigated. See fn. 1 of Exhibit J.

24. On or about July 3, 2012, Sanchez informed Gamble of the investigation results. Upon inquiry, Sanchez told Gamble that she (Sanchez) had not contacted Ingraham, Stroschein, or Rainbow.

25. Later on July 3, 2013, Gamble sent two emails, attached as Exhibits K and L, to Foote, Stroschein, and Ingraham, and Rainbow.

26. On July 9, 2012, after receiving the July 3 emails from Gamble, Stroschein sent an email to Sanchez, attached as Exhibit M.

27. On July 11, 2012, Sanchez sent Gamble an email, and Gamble replied by email. These emails are attached as Exhibit N.1. Attached as Exhibit N.2 is different

version of this email string, which displays certain metadata, namely, hidden "blind copy" or "bcc" addressees of Gamble's reply. It is undisputed that the Exhibit N.2 version was not provided or disclosed, and the fact these additional "bcc" addressees may have been sent copies of it was not known, to any supervisor of Respondent (other than Rainbow) or any agent of Respondent involved in any of the investigations described herein, or the decision to issue or the issuance of Exhibit Q.

28. In July 2012, Andy Granbois ("Granbois") commenced an HR Investigation of Gamble based on a report from Sanchez. Granbois was an HR Generalist, and he was acting as an agent of Respondent, within the meaning of § 2(13) of the Act, in connection with this HR Investigation.

29. On July 25, 2012, in connection with the HR Investigation described in paragraph 28, Granbois interviewed Gamble for the purpose of taking a written statement from her. A copy of that statement is attached as Exhibit O.

30. On August 3, 2012, Granbois completed his HR Investigation report, attached as Exhibit P.

31. On August 9, 2012, Respondent issued Gamble a written warning, attached as Exhibit Q, based on Gamble's statement (Exhibit O) and the findings in Granbois' HR Investigation report (Exhibit P). This written warning was signed by Linda Carlson, an Engineering Manager and a supervisor within the meaning of § 2(11) of the Act, and Linda Hopper ("Hopper"), an HR Generalist. Hopper was acting as an agent of Respondent, within the meaning of § 2(13) of the Act, in connection with the issuance of this written warning.

32. Respondent contends that on September 24, 2012, the written warning referred to in paragraph 31 (Exhibit Q) first came to the attention to Respondent's Law Department.

33. On September 28, 2012, Respondent rescinded the written warning referred to in paragraph 31 (Exhibit Q).

34. On October 1, 2012, Hopper mailed Gamble a letter, attached as Exhibit R, informing her that the written warning referred to in paragraph 31 (Exhibit Q) had been rescinded and removed from her record.

III. ISSUES PRESENTED

1. Between March 17, 2012 and October 2012, did Respondent interfere with, restrain, and/or coerce employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act by issuing Exhibit E (Notice) to witnesses in HR Investigations?
2. Since November 2012, has Respondent interfered with, restrained, and/or coerced employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act by issuing Exhibit F (Revised Notice) to witnesses in HR Investigations?
3. The parties propose alternative statements of Issue #3.

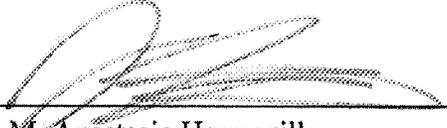
A The Acting General Counsel proposes the following:

Since on or about August 9, 2012, did Respondent interfere with, restrain, and/or coerce employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act by issuing Exhibit Q (written warning) to Joanna Gamble?

B. Respondent proposes the following:

Between August 9, 2012, and September 28, 2012, did Respondent interfere with, restrain, and/or coerce Gamble in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act by issuing Exhibit Q (written warning)?

DATED: June 5, 2013

By 
M. Anastasia Hermosillo
Counsel for the Acting General Counsel

DATED: June 5, 2013

PERKINS COIE LLP

By 
Charles N. Eberhardt
Attorneys for Respondent The Boeing
Company

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THE BOEING COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent/Cross-Petitioner.

Nos. 15-72894, 15-73101

NLRB No.
19-CA-089374

ORDER

Petitioner/Cross-Respondent's unopposed Motion for Remand is GRANTED. *See* Dkt. No. 70. We remand this matter to the National Labor Relations Board for further consideration in light of the Board's recent decision in *Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). The copy of this order shall constitute the mandate.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Omar Cubillos
Deputy Clerk
Ninth Circuit Rule 27-7