

Nos. 19-2062, 19-2159

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**MARBURN ACADEMY, INC.**

**Respondent/Cross-Petitioner**

**and**

**MICHQUA LEVI**

**Intervenor**

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**ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR  
REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT REGARDING ORAL ARGUMENT**

Although this case involves the application of settled legal principles to well-supported factual findings, the Court may find oral argument helpful in clarifying the issues in dispute. The National Labor Relations Board (“the Board”)

believes that 10 minutes per side would suffice for the parties to present their views.

**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the Board for enforcement, and the cross-petition of Marburn Academy, Inc. (“Marburn”) to review a Board Decision and Order issued against it on August 1, 2019, and reported at 368 NLRB No. 38. (A. 1-16).<sup>1</sup> Michqua Levi, the charging party below, has intervened in support of the Board. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order is final with respect to all parties. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in New Albany, Ohio, where Marburn transacts business. The Board applied for enforcement of its Order on September 17, 2019, and Marburn cross-petitioned for review on October 8,

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<sup>1</sup> “A.” references are to the joint appendix. “Br.” references are to Marburn’s opening brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

2019. Both filings were timely because the Act imposes no time limit on the initiation of enforcement or review proceedings.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board's findings that Marburn violated Section 8(a)(1) of the Act by:

- Disciplining Levi because of her protected concerted activity;
- Requiring her to resolve disagreements through school officials, thereby conditioning her continued employment on refraining from protected concerted activity; and
- Withdrawing and terminating her employment contract because she refused to adhere to the unlawful restrictions on her protected concerted activity.

2. Whether the Court lacks jurisdiction to consider Marburn's belated challenge to the Board Order's requirement directing that Levi be reinstated.

### **STATEMENT OF THE CASE**

Michqua Levi, who was employed by Marburn as a second and third grade teacher, filed an unfair-labor-practice charge alleging that Marburn disciplined and discharged her in retaliation for her protected concerted activity, and required her to refrain from engaging in that activity as a condition of employment, all in violation of Section 8(a)(1) of the Act. The Board's General Counsel issued an

unfair-labor-practice complaint alleging those violations. Thereafter, an administrative judge conducted a hearing and issued a recommended decision, finding that Marburn violated the Act by that conduct, and relatedly by conditioning Levi's continued employment on following an internal conflict resolution procedure that restrained her from engaging in protected concerted activity. (A. 12-14.) After considering the judge's decision and the record in light of Marburn's exceptions, the Board adopted his findings and recommended order as modified. (A. 1-2.)

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Marburn's Operations; Levi's Employment History**

Marburn is a private, independent day school that educates students in grades 2-12 with learning differences such as dyslexia, attention deficit hyperactivity disorder, and autism. (A. 3; 27, 32, 102.) The school is divided into three divisions, which are led by division heads who report to Scott Burton, the associate head of the school. Burton in turn reports to the head of school, Jamie Williamson, who reports to the board of directors, which is led by Chairman Brian Hicks. (A. 4; 146-47.)

Levi, a teacher with more than 30 years of experience, began working at Marburn in 2012. (A. 4; 34-35.) Like other full-time teachers, she worked under a series of one-year employment contracts and would receive an annual performance

evaluation along with a contract setting forth her salary for the upcoming school year. (A. 4; 64, 152-62.)

**B. Levi Discusses Concerns About Marburn's Salary Scale and Fundraising Gala with Fellow Teachers**

Levi received her annual evaluation and proposed contract for the 2018-2019 school year in March of 2018. Before signing and returning her contract, she learned from other teachers that Marburn had a pay scale, which she obtained from Associate Head of School Burton. (A. 5; 37, 165.) Upon reviewing the pay scale, Levi concluded that her salary was below what a teacher with her experience and positive performance evaluations was expected to earn. She spoke with Burton about the discrepancy, and he explained that the pay scale did not accurately portray how teacher salaries were computed. (A. 5; 38.)

After learning that the pay scale was inaccurate, Levi spoke with her coworkers, raising the concern that teachers had no way of determining whether they were being paid fairly. (A. 5; 37-38, 40-42.) For example, Levi discussed that concern on dozens of occasions with the school music teacher, Dr. Chris Geisler, and her co-teacher Angie Bell. (A. 5; 41-44, 89-90.)

Around this time, employees learned of changes in Marburn's plans for handling staff invitations to its annual fundraising gala. Historically, all staff were welcome to attend the gala free of charge and were seated with other attendees. In 2018, however, Marburn informed staff they could attend only if they paid for the

tickets or volunteered to work at the event, which would allow them to eat dinner but not at tables with other attendees. Marburn also announced that some staff would be selected to attend the event for free as special guests of the school. (A. 5; 39-40, 88, 166.) Levi and other teachers believed this new practice would lead to favoritism because only a select few teachers would be invited as special guests. (A. 5; 39-40, 88.)

Throughout March and April, Levi had more than a dozen conversations with Bell, and “well over 20” conversations with Geisler, about pay calculations and changes to the gala that affected the staff. (A. 5; 43, 90.) Levi also discussed these issues with teachers Nicole Fischer, Sammy Smith, Kevin Fish, Sally Sayer, Maggie Alexis, Jim Fitzer, as well as Athletic Director Steve Bean, and Language Department Head Lisa Neuhoff. (A. 5; 41-42.)

**C. Levi and Her Coworkers Inform Board Chairman Brian Hicks About Their Workplace Concerns**

Around the same time Levi was discussing her concerns with other staff about the lack of an accurate pay scale and the potential for favoritism toward certain employees, she reviewed the employee handbook to learn how to report her concerns.<sup>2</sup> Marburn had no human resources representative, so Levi asked a board

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<sup>2</sup> The employee handbook contains a “Problem Solving System” that directs employees “not to become involved” in conflicts they are not directly a party to, and instructs them to discuss conflicts one-on-one rather than in groups. It also discourages employees from “sharing” issues with others “for the purpose of

member, explaining that teachers were hesitant to raise their concerns directly with their superiors because their concerns were about their superiors. The board member suggested that teachers get in touch with Board Chairman Hicks and gave Levi his contact information. (A 6; 45.) Levi then informed the other teachers that she planned on writing Hicks to raise their workplace concerns. (A. 6; 43-46, 90-91.) She asked six or seven other teachers to join her in writing to Hicks about their common concerns, explaining that if they also wrote to him, it might speak louder than if it was just her “taking one for the team.” (A. 6; 46.) Geisler and Bell agreed that they too would write to Hicks. (A. 6; 46, 91.)

After Levi prepared a draft of her email to Hicks, she shared it with Geisler to get his feedback, and he said he thought it looked good. On April 10, Levi sent Hicks the email, which stated that she wanted to “make him aware of issues that [she] had discussed with staff members in meetings throughout the past couple months and bring some things to his attention on behalf of [her]self and other teachers.” (A. 6; 45, 167-68.) In her email, Levi explained that she was writing Hicks because “we have had no HR person.” (A. 6; 45, 167-68.) She also identified several concerns, including the teachers’ overall job dissatisfaction, their low morale, and their concern that Williamson, the head of school, showed

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‘enlisting allies’ to help modify or reverse [unfavorable] decisions[s]. A proviso states that it “shall in no way infringe on employees’ right to engage in protected concerted activity under the National Labor Relations Act.” (A 4; 222-23.)

favoritism to certain teachers and a general lack of respect to others. As an example, Levi cited the new rules regarding teacher attendance at the fundraising gala. She explained that although “several of us” had told administrators that the new rules were unpopular among the teachers, “nothing [had] changed,” which confirmed that the administration did not value teacher input. Levi added that because of the new rules, “many staff members who attended/donated to the gala in the past [would] not be there this year.” (A. 6; 167-68).

Levi also informed Hicks that the staff was concerned about the administration’s lack of communication with them. As an example, she noted that the pay-scale grid the staff had access to was “inaccurate” and that staff did not know what the correct guidelines were. (A. 6; 167-68). She also expressed concern about the administration’s lack of respect for teachers, citing the school’s failure to seek their input about changes to the math program. (A. 6; 167-68).

Levi concluded her email by explaining the concerns she was raising were not just personal and that other teachers and staff members were also worried about the same issues. Specifically, Levi informed Hicks that “[l]ots of upset teachers were sharing their grip[e]s/mistrust, etc. to each other because they don’t know what to do, who to go to and certainly do not feel supported or trust[ed by] the administration.” (A. 6; 167-68). Levi added that there were “many people” who were hesitant to share their group concerns out of “fear of losing their jobs.” (A. 6;

167-68). She noted that she had spoken with other teachers and had encouraged them to share their concerns as well. She also expressed her hope that working conditions would improve. (A. 6; 167-68.)

Bell and Geisler also sent emails to Hicks. (A. 6; 91, 328.) Bell explained she was writing because she had been told he was the person to contact with “work-related issues at Marburn.” (A. 6; 328.) She said that she was “nervous about sharing some concerns with some administrative decisions,” and asked whether Marburn would be hiring a human resources representative. (A. 6; 328.) Bell also informed Hicks that she knew “this sentiment is common throughout the school.” (A. 6; 328.) Lastly, she suggested an anonymous survey be sent to the staff for the Board to get a gauge on their concerns. (A. 6; 328.) Geisler’s email to Hicks asked general questions about the staffing of the gala and the teacher pay scale. (A. 6; 91-92).

**D. Hicks Forwards Levi’s Emails to Williamson, Who Calls Her Efforts To Enlist Coworkers in Raising Workplace Issues “Extremely Disruptive and Divisive,” and Instructs Her Not To Discuss Their Collective Concerns**

At the time, Levi, Geisler, and Bell believed their correspondence with Hicks would be confidential. (A. 7; 47, 91-92, 181-96, 301.) Hicks, however, forwarded Levi’s and Bell’s emails to Williamson by copying him on his replies to their emails. (A. 6-7; 223-24, 327-28.) In his replies, Hicks encouraged Levi and Bell to go through their division head, then Burton, and then Williamson to address

their issues. (A. 6-7; 223-24, 327-28.) After realizing Hicks had forwarded her complaints to Williamson, Levi sent Hicks a second email, explaining that she had contacted Hicks in order to avoid bringing her grievances to Williamson because many of her concerns were about him. She added that by disclosing her concerns to Williamson, Hicks had put her in an awkward situation. (A. 7; 47, 225.)

Upon receiving a copy of Levi's email to Hicks, Williamson asked her to meet with him and Burton. Levi again emailed Hicks, expressing her discomfort in meeting with Williamson and explaining that her goal was to prompt the Board to consider staff concerns. (A. 7; 48, 170.) In response, Hicks again told Levi that she should meet with Williamson and Burton. (A. 7; 170.)

As with Levi's first email, Hicks forwarded her subsequent emails to Williamson, who emailed Levi directly. In his email, Williamson said there were "a number of issues" he needed to discuss with her, including his discovery that she had "attempted to recruit others to write letters to the Board Chair" complaining about school leadership. He also characterized her "current conduct" as "extremely disruptive and divisive." (A. 7; 49, 126.)

Levi agreed to meet with Williamson and Burton. Prior to that meeting, and in response to Williamson's allegation that she had failed to use the school's Problem Solving System (*see* n.2 on p. 6, above), Levi explained that in the past she had had little success with it. (A. 7; 70-71, 171-75.) She added that she had

been approached by other staff members “to complain on their behalf as they were afraid of losing their jobs if they were a ‘whistle blower.’” (A. 7; 70-71, 171-75.)

When Levi, Williamson, and Burton met, the first thing Williamson asked her was if she had written her email to Hicks “to get him fired.” (A. 7; 50-52, 113.) Levi denied that was her intent and explained that she was trying to bring concerns held by the staff to the Board’s attention. (A. 7; 50.) Williamson stated several times that he did not care about her coworkers’ concerns and instructed Levi not to use the words “us” or “we.” Instead, Williamson insisted that she only address *her* concerns, even though she had explained that her email to Hicks addressed group concerns. (A. 7; 50.)

Williamson then accused Levi of trying to recruit 10-15 coworkers to write to Hicks, a claim she denied. (A. 7; 51, 56, 113.) Levi explained that instead, she had provided Hicks’ contact information to several employees who had approached her to share their concerns and to ask who could address them. (A. 7-8; 51.) Levi also told Williamson that many coworkers were worried they might lose their jobs if they raised their concerns, and she refused to identify them by name. (A. 7; 51.) Burton then accused Levi of soliciting other employees to write Hicks through the school email server, which she denied. (A. 7-8; 51-52.) He claimed to have spoken with the coworkers she allegedly had recruited, to which she responded, “Okay.” (A. 7-8; 51-52.)

**E. When Burton Questions Levi's Coworkers About Their Conversations with Her, They Confirm Discussing Workplace Concerns**

After Williamson and Burton questioned Levi, Williamson directed Burton to ask other teachers about her efforts to involve them in making the Board aware of workplace concerns. (A. 7-8; 113, 137.) Burton first approached Geisler, telling him there were “rumors circulating” that he and Levi had emailed board members. Geisler confirmed that was correct. Burton then asked Geisler to write an e-mail stating exactly what he and Levi had discussed. Complying with this directive, Geisler sent Burton an email stating that Levi had approached him with Hicks’ contact information to “address complaints regarding the head of school in the absence of an HR representative,” and that Levi had been “told by [a] member of the board to contact [Hicks] with concerns she or others were having with [the] administration.” (A. 8; 180.) Later that day, Burton asked Geisler to rewrite the email by adding that Levi had “coerced” him, but Geisler refused because there was no coercion. (A. 8; 92.)

Burton also approached teacher Robyn Delfino, asking her to document whether Levi had shared Hicks’ contact information. In response, Delfino sent Burton an email explaining that Levi had “stated that she would like to have me . . . as well as anyone else that we know (who has/had an issue with the Administration) to email the Board and air our grievances.” (A. 8; 138.) Delfino

added that Levi had said “10-15 teachers were going to email as well in order to make sure that the Board was aware of the issues that the Administration did not resolve or handle properly.” (A. 8; 138, 144, 325.)

**F. After Learning Levi Had Encouraged Coworkers To Voice Their Workplace Concerns, Marburn Disciplines Her for Communicating About Those Concerns, Orders Her To Stop Discussing Them, Then Discharges Her for Refusing To Comply with the Restriction**

On May 7, Williamson and Burton met with Levi again to give her a disciplinary notice titled a Summary of Concerns and Corrective Action Plan, which repeatedly mentioned Levi’s email to Hicks. (A. 8-9; 176-79.) Williamson divided the Summary of Concerns into three sections: communication, problem-solving, and divisiveness. In the communication section, he warned Levi that she needed to stop using what he termed “inflammatory, aggressive, and/or provocative language when upset or frustrated with a situation.” (A. 8-9; 176-79.) As examples, he cited Levi’s email to Hicks expressing employees’ shared concerns about low staff morale, an inadequate pay scale, lack of communication from the school administration, and lack of respect for teachers. Williamson also cited Levi’s conversation with him about her email to Hicks, telling her that by refusing to admit wrongdoing, she “struggled to acknowledge [her email’s] impact.” (A. 8-9; 176-79.) Lastly, in the Summary of Concerns he admonished Levi for asking coworkers to write to Hicks about their workplace concerns.

According to Williamson, by doing so she had engaged in behavior that ran “counter to our values, our problem-solving process, actively undermines our community, and contributes to a toxic culture.” (A. 8-9; 176-79.) Williamson told Levi that if she disagreed with school administrators’ decisions, she needed to share her “concerns with the appropriate people, accept the organizational decision, and move on.” (A. 8-9; 176-79.)

Williamson then informed Levi that if she wanted him to renew her teaching contract, she would have to admit fault and sign a Corrective Action Plan, which required her “commit[ment] to seeking out the [Lower Division] Head, Associate Head, and/or the Head of School to assist in the process” of addressing problems or disagreements. (A. 9; 179.) The Plan also required Levi to stop “all active solicitation and recruitment of others to support” her workplace concerns. (A. 9; 179.) The Plan thus prohibited her from directly communicating with coworkers about their terms and conditions of employment. (A. 9; 179.)

On May 11, Williamson told Levi he had learned that she had shared the Summary of Concerns and Corrective Action Plan with other employees and Board members, and that she had called it an “Extortion Contract.” (A. 9; 73, 115.) Williamson stated that he was therefore revoking the document and withdrawing her employment contract for the upcoming school year. (A. 9;73, 115.) Although

Williamson let Levi finish the current school year, Marburn forbade her return.

(A. 9; 73.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Chairman Ring and Members Kaplan and Emanuel) found, in agreement with the administrative law judge, that Marburn violated Section 8(a)(1) of the Act by disciplining Levi for engaging in protected concerted activity; by requiring her to follow a conflict resolution procedure that conditioned her continued employment on refraining from such activity; and by withdrawing and terminating her employment contract for refusing to comply with the unlawful restrictions imposed by that procedure. (A. 1.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order requires Marburn to reinstate Levi to her former job or if it no longer exists to a substantially equivalent one, make her whole for any lost earnings and benefits, and post a remedial notice. (A. 1.)

## STANDARD OF REVIEW

This Court defers to the Board’s factual determinations when they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *Peters v. NLRB*, 153 F.3d 289, 294 (6th Cir. 1998). As this Court has explained: “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.” *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). Where substantial evidence supports the Board’s findings, this Court upholds the findings even if it might “justifiably have made a different choice had the matter been before the court de novo.” *Universal Camera*, 340 U.S. at 488; *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987).

“The Board’s application of the law to the facts is also reviewed under the substantial evidence standard, and the Board’s reasonable inferences may not be displaced on review.” *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). Such findings of fact include determining an employer’s motive for taking adverse employment actions against employees. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019). Further, as the Supreme Court has explained: “For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board’s judgment so long as its

reading is a reasonable one.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996); *see also Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003).

### **SUMMARY OF ARGUMENT**

Levi, a seasoned teacher with an unblemished record, grew frustrated with several workplace issues, including the teachers’ pay scale, low staff morale, the lack of a human resources representative to address staff concerns, and employees’ fear of retaliation for raising those concerns. Upon discussing those issues with her coworkers, she learned that they shared her concerns. Accordingly, she raised their common concerns with the chairman of Marburn’s board of directors and encouraged her coworkers to do the same. For engaging in this concerted activity, which is protected by Section 7 of the Act because it involves wages as well as terms and conditions of employment, Marburn disciplined Levi, instructed her to stop it, and told that her she could only keep her job if she agreed to refrain from discussing those workplace concerns with coworkers. When she refused to abide by those unlawful restrictions, Marburn terminated her employment contract.

Substantial evidence supports the Board’s finding that Marburn violated Section 8(a)(1) of the Act by taking this series of adverse actions. To begin, Marburn does not dispute the Board’s finding that it disciplined Levi for discussing workplace concerns with coworkers, sharing them with the chairman of the board, and urging others to do likewise. Instead, Marburn doubles down on its action by

mischaracterizing her conduct—which is plainly protected by Section 7 of the Act—as “inflammatory” and contrary to the school’s “core values.” This approach is misguided and without support in law. In effect, Marburn is claiming that classic Section 7 activity should be unprotected in a school setting if it is bothersome or inconvenient to the administration. Moreover, Marburn failed to meet its burden of showing that it would have disciplined Levi even absent her protected concerted activity.

Substantial evidence also supports the Board’s finding that Marburn again violated Section 8(a)(1) of the Act by requiring Levi to abstain from engaging in protected concerted activity. In her disciplinary notice, which Marburn labelled a Summary of Concerns and Corrective Action Plan, the school effectively directed her to refrain from engaging in statutorily protected activity as a condition of continued employment. The document also mandated her assent to a “Problem Solving Process” that would have required her to resolve workplace complaints exclusively through the school administration instead of exercising her statutory right to discuss those matters with coworkers. Those requirements unlawfully restricted Levi’s right to engage in Section 7 activity. Finally, by terminating Levi’s employment contract because she refused to accept these unlawful restrictions on her protected concerted activity, Marburn again violated Section 8(a)(1) of the Act.

On review, Marburn belatedly contests the Board's standard reinstatement remedy, which the administrative law judge recommended, and the Board adopted in the absence of exceptions. Under settled law, because Marburn failed to file exceptions with the Board challenging this aspect of the judge's recommended order, the issue is jurisdictionally barred from review under Section 10(e) of the Act.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT MARBURN VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCIPLINING LEVI BECAUSE OF HER PROTECTED CONCERTED ACTIVITY, REQUIRING HER TO REFRAIN FROM SUCH ACTIVITY, AND TERMINATING HER EMPLOYMENT CONTRACT BECAUSE SHE REFUSED TO ACQUIESCE IN THOSE UNLAWFUL RESTRICTIONS**

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Those rights are enforced through Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1).

The Board found that Levi engaged in protected concerted activity by discussing workplace issues with her coworkers, urging them to email Board

Chairman Hicks about those concerns, and sending an email herself on the group's behalf. Marburn therefore violated Section 8(a)(1) by disciplining Levi when it issued the Summary of Concerns and Corrective Action Plan expressly because of that activity. The Board also found that Marburn again violated Section 8(a)(1) by conditioning Levi's future employment on refraining from protected concerted activity, specifically by requiring her, through the Corrective Action Plan, to follow an internal conflict resolution process that restricted her right to engage in such activity. Finally, the Board found that Marburn violated the same section of the Act by discharging Levi for refusing to comply with those unlawful restrictions. As shown below, substantial evidence supports the Board's findings.

**A. Marburn Violated Section 8(a)(1) of the Act by Disciplining Levi for Engaging in Protected Concerted Activity**

It is axiomatic that an employer violates Section 8(a)(1) of the Act by taking adverse action against an employee for engaging in protected concerted activity. *See, e.g., NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 539 (6th Cir. 2000) (enforcing Board's determination that employer violated Section 8(a)(1) by discharging employees for activity protected by Section 7); *Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 767 (6th Cir.1998) (same). In determining whether an employer has taken the adverse action based on the employee's protected concerted activity, the Board applies the test of motivation set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other*

*grounds*, 662 F.2d 89 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that test, if substantial evidence supports the Board’s finding that protected conduct was a “motivating factor” for the adverse action, the action is unlawful unless the record as a whole compelled the Board to accept the employer’s affirmative defense that it would have taken the same action even absent the protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03; accord *NLRB v. Galicks*, 671 F.3d 602, 608 (6th Cir. 2012).

Moreover, to establish its defense “the [employer’s] rationale cannot only be a potential or partial reason for the [adverse action], it must be *the* justification.” *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotation marks and citation omitted). And the question on review is not “whether record evidence could support the [employer’s] view of the issue, but whether it supports the [agency’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015).

Here, Marburn’s motive for disciplining Levi was plain—it was because she discussed a range of workplace problems with coworkers, then sent Board Chairman Hicks an email criticizing school administrators’ handling of those issues and encouraged others to do the same. Indeed, the school’s Summary of Concerns and Corrective Action Plan directly admonished her for that very conduct. Marburn’s knowledge of her activity, and its reasons for disciplining her,

are therefore not open to question. Instead, the only contested issue is whether Levi, in voicing concerns she shared with colleagues about matters such as wages and staff morale, was engaging in protected concerted activity. Because substantial evidence supports the Board's finding that she was, and Marburn failed to show it would have taken the same adverse action even absent that activity, the school violated the Act by disciplining her.

**1. The Act protects individual employees raising shared concerns with their employer**

Under Section 7 of the Act, an individual employee's conduct is statutorily protected if it is "concerted" in nature and has as its purpose the "mutual aid or protection of employees." *City Disposal Sys.*, 465 U.S. at 829-31 (quoting 29 U.S.C. § 157). As the Supreme Court has recognized, moreover, the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Thus, concerted activity by individual employees may be protected by the Act even if unconnected with union activity or collective bargaining. *See NLRB v. Talsol Corp.*, 155 F.3d 785, 796-97 (6th Cir. 1998) (discharge unlawful where employee engaged in protected activity unrelated to union activity); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969); *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2d Cir. 1987).

The Supreme Court has indicated that the “mutual aid or protection” clause set forth in Section 7 of the Act should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 & n.17 (1978) (noting that the clause broadly protects employees who “seek to improve terms and conditions of employment”). It is axiomatic that protected activity includes employee complaints to their employer regarding their work environment, wages, and other terms and conditions of employment. *See NLRB v. Washington Aluminum Co.*, 370 U.S. at 14-15; *NLRB v. Lloyd A. Fry Roofing Co., Inc.*, 651 F.2d 442, 445 (6th Cir. 1981).

An individual employee’s action is “concerted” if it bears some relationship to initiating or preparing for group action or bringing truly group complaints to management. *See Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *accord Main St. Terrace Care Ctr.*, 218 F.3d at 540; *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Thus, an individual employee engages in concerted activity when he “brings a group complaint to the attention of management . . . even though he was not designated or authorized to be a spokesman by the group.” *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005) (internal citations omitted). *Accord Lloyd A. Fry Roofing Co.*, 651 F.2d at 445 (“It is not necessary that the individual employee be appointed or nominated by other employees to

represent their interests.”). Accordingly, the relevant inquiry in determining whether an employee’s action was concerted “is whether the employee acted with the purpose of furthering group goals.” *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998).

**2. Levi engaged in protected concerted activity when she discussed shared workplace concerns with coworkers, brought those concerns to Board Chairman Hicks’ attention, and urged others to do likewise**

Abundant record evidence supports the Board’s finding that Levi engaged in protected activity by discussing workplace concerns with her coworkers, sending an email expressing those concerns to Board Chairman Hicks, and encouraging others to do the same. It is undisputed, as the Board found (A. 10), that before sending Hicks her April 10 email, Levi spoke with many coworkers about their dissatisfaction with Marburn’s inaccurate pay scale, low staff morale (which in their view stemmed partly from perceived favoritism by school administrators), the lack of a human resources representative to address staff concerns, and a general breakdown in communication and fear of retaliation against employees who raised complaints. Under settled law, the grievances that Levi discussed with coworkers addressed subjects that are protected by the Act. *See, e.g., Lloyd Fry Roofing*, 651 F.2d at 445 (complaints about wages and the presentation of job-related grievances protected); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993), *enforced mem.*, 22 F.3d 303 (3d Cir. 1994) (employees’ complaints about preferential treatment

protected); *James Walsh Construction Co.*, 284 NLRB 319, 321 (1987)

(employees' complaints about wages and favoritism protected).

Levi's conduct was also plainly concerted. As the Board found (A. 10-11), her efforts to convince coworkers to voice their workplace complaints clearly sought to "initiate or induce collective action for their mutual aid and protection because, as she stated, hearing from multiple employees about their shared concerns would be more effective than hearing just from her." (A. 11.) In addition to discussing those concerns with coworkers dozens of times, Levi also reviewed a draft of her email with Geisler in order to get his feedback on how to present their shared workplace concerns. Geisler told her the draft looked good and informed her that he too would send an email to Chairman Hicks. Moreover, other teachers who were unwilling to write to Hicks because they feared retaliation supported Levi and explicitly encouraged her to send her email. In short, the context surrounding Levi's April 10 email to Hicks demonstrates the concerted nature of her conduct. *See, e.g., NLRB v. Evans Packing Co.*, 463 F.2d 193, 194-95 (6th Cir. 1972) (employee's complaints to employer about overtime-pay policy were concerted because they reflected common grievances he had discussed with coworkers); *Salisbury Hotel*, 283 NLRB 685, 686-87 (1987) (employees' complaints showed they agreed "at least tacitly" on common grievance; individual employee's complaints to management were part of concerted effort).

Moreover, in the email itself Levi explicitly stated that she was seeking to further common goals. Not only did she repeatedly mention her coworkers, she also expressly advocated for the teachers as a group. Thus, her email refers to concerns that “we” share, as well as those expressed by “numerous other staff members,” “several of us,” “many teachers,” and “lower division teachers.” (A. 167.) In addition, her email directly notes that “[s]o many people are very afraid to share things with admin for fear of losing their jobs,” and that there were “[I]ots of upset teachers sharing their gripes/mistrust, etc. to each other because they don’t know what to do.” (A. 167.)

Levi’s complaints are similar to those at issue in *Oaks Machine, Inc.*, 288 NLRB 456 (1988), where the Board likewise found that an employee engaged in concerted activity by sending management a letter addressing his discussions with coworkers about the detrimental effect of company mismanagement on their working conditions. The Board found that the overall wording of the letter, as well as its use of the pronoun “we” and its references to complaints about management’s “attitude towards employees,” meant that the company “had reason to know that more than a single employee was involved in this protest. *Id.* at 456. Likewise, Levi’s April 10 email on its face plainly shows Marburn knew the complaints she voiced were shared by her coworkers and therefore concerted.

Indeed, the group concerns that Levi addressed in her email were echoed in follow-up emails that Bell and Geisler sent to Hicks. Thus, Bell explained that her concerns were “common throughout the school,” and even suggested an anonymous survey to get an accurate gauge on staff concerns. (A. 328.) Geisler also raised group concerns by specifically asking about the pay scale and the fundraising gala, as Levi had done. Geisler subsequently made the concerted nature of these complaints crystal clear by telling Burton, the associate head of school, that he and Levi had discussed writing board members about their concerns and explaining that the pair had obtained Hicks’ contact information “to address complaints regarding the head of school in the absence of an HR representative.” (A. 180.) Similarly, Delfino told Burton that Levi had encouraged staff members to “air our grievances” by writing to Hicks. (A. 8; 138.)

Moreover, in her meetings and subsequent communications with school leadership after Hicks forwarded her emails to Williamson, the head of school, Levi reiterated that the concerns she had raised in her emails were shared concerns, not just her own, despite Williamson’s persistent attempts to recast them as solely personal. For example, in response to Williamson’s demand to meet with her, Levi explained that staff members “requested I complain on their behalf as they were afraid to lose their jobs if they were a ‘whistle blower.’” (A. 172.) Levi also noted

that staff had been discussing some of the concerns she raised in her April 10 email “all year.” (A. 173.)

Given this compelling record evidence, which includes documents such as Levi’s April 10 email to Hicks and the Summary of Concerns issued by Marburn, as well as Levi and Geisler’s mutually corroborative testimony, Marburn errs in maintaining (Br. 25) that her complaints were “purely personal.” For example, Marburn mischaracterizes the credited evidence in asserting (Br. 11) that Levi’s concern about Marburn’s inaccurate salary scale was based solely on her personal dissatisfaction with her own salary. Notably, Levi’s April 10 email to Hicks makes no mention of her salary. Rather, in her email she told Hicks that Marburn lacked a functional pay scale grid to “breakdown . . . staff compensation.” In so stating, she was plainly voicing a group concern. The other issues she addressed in her email—about the lack of a human resources representative, the administration’s favoritism towards select staff, the accessibility of the head of school, and employees’ overall fear of retribution for raising those issues—also plainly affected the teachers as a group.

**3. Marburn disciplined Levi because of her protected concerted activity**

**a. Levi's protected concerted activity was a motivating factor in the school's decision to discipline her**

The Board had ample grounds for finding that Levi's protected concerted activity was a motivating factor in Marburn's decision to issue the Summary of Concerns and Corrective Action Plan. It is undisputed that after learning Levi had emailed Hicks and voiced complaints about the teachers' pay scale and working conditions, Williamson demanded to meet with her about the email and her attempts to "recruit others to write letters to the Board Chair to complain about the leadership," as Williamson put it. (A. 49.) At the meeting, which also included Associate Head of School Burton, Williamson began by asking Levi if she wrote her April 10 email "to get him fired." (A. 7; 50.) When Levi tried to explain that she wanted to make Hicks aware of workplace concerns she and others shared, Williamson repeatedly interrupted her and told her not to use the words "us" or "we." (A. 50.) Thus, it is plain that Williamson's focus was on her concerted activity.

Levi's meeting with Williamson and Burton served as a predicate for the school's disciplinary action—namely, the Summary of Concerns and Corrective Action Plan. And, as the Board found, the "clearest evidence of animus is the Summary of Concerns" itself, which directly admonishes Levi for expressing

group concerns—activity that the school found offensive. In the document, Marburn castigated her for what it viewed as “behavior [that] runs counter to our values, our problem-solving process, actively undermines our community, and contributes to a toxic culture.”<sup>3</sup> (A. 128, 177.) Never mind that her conduct was protected by Section 7 of the Act because it involved voicing employees’ concerns about wages and employment conditions. Further, in the “divisiveness” section of the Summary of Concerns, the conduct that Marburn cites as its reason for disciplining Levi *is* her protected concerted activity—her attempts to get her coworkers to join her in sharing their workplace concerns and “make the Board aware of issues with the administration.” (A. 177.) Moreover, by directing Levi to only share her concerns with the “appropriate people,” “accept the organizational decision,” and “move on,” the Summary of Concerns effectively tells her to pipe down and stop the protected concerted activity.<sup>4</sup>

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<sup>3</sup> Although the Correction Action Plan ambiguously characterizes Levi’s language as “inflammatory, aggressive, and/or provocative,” it fails to identify the language that the school found so problematic. But even if Levi used sharp words to describe teachers’ shared workplace concerns in her April 10 email, the Board has “reject[ed] the notion that professional colleagues, discussing collective action among themselves, can be disciplined or discharged merely for criticizing management in sharp and unequivocal terms.” *Dalton School*, 364 NLRB No. 18, 2016 WL 3124636, at \*1.

<sup>4</sup> Williamson’s testimony further supports the Board’s finding that the object of his ire was Levi’s protected concerted activity. He admitted that his objection was to Levi “shar[ing] her gripes with everybody in the community but the people that could actually solve them.” (A. 114.)

Marburn does not help itself by doubling down and using coded language (Br. 34-35) to characterize the conduct addressed in the Summary of Concerns as “divisive.” Reframing employees’ protected concerted activity as troublesome and annoying is as predictable as it is misguided. For instance, in *Alternative Energy Applications*, 361 NLRB 1203, 1205 (2014), an employer, while claiming that it had discharged an employee for “significantly undercut[ting employee] morale,” actually cited his protected concerted activity. Although the employer listed other reasons for his discharge, as the Board noted, his protected activity was “featured as the first basis for the [employer’s] claim that [he] had undercut morale.” *Id.*

Similarly, although Marburn listed “divisiveness” in the Summary of Concerns, the complained-of conduct actually involved Levi’s protected concerted activity. In the document, Marburn also effectively acknowledged its unlawful motive by attacking Levi for “sharing some of [her] concerns” with coworkers and having “told others to do so as well.” (A. 177.) Likewise, Marburn took Levi to task for encouraging coworkers to raise their workplace concerns with Hicks, saying that her behavior “runs counter to our values [and] our problem-solving process, actively undermines our community, and contributes to a toxic culture.” (A. 128, 177.) Put simply, Marburn was objecting to her protected concerted activity. And if there were any doubt that the “divisiveness” Marburn was complaining about referred to her attempts to solicit coworkers to raise their

workplace concerns, the summary instructed her to direct her concerns to “the appropriate people” (i.e., the administration), then “move on.” (A. 128, 176-78.)

In other words, Marburn was telling Levi she was a thorn in the side of school officials and should stop discussing workplace concerns with her coworkers. This directive runs afoul of the Act.

**b. Marburn failed to meet its burden of showing that it would have taken the same adverse action even absent Levi’s protected concerted activity**

Faced with this compelling and incontrovertible evidence of the school’s unlawful motive for issuing the Summary of Concerns and Corrective Action Plan, it was incumbent on Marburn to establish, as an affirmative defense, that it would have taken the same action even absent Levi’s protected concerted activity. As the Board reasonably found, the school utterly failed to meet its burden. (A. 12.) To begin, although Marburn repeatedly suggests (Br. 30-35) that it disciplined Levi in part for prior alleged misconduct, the record evidence does not support its claim. The school’s insinuation of misconduct on Levi’s part turns a blind eye to the facts. Indeed, Williamson himself admitted in his testimony that although Levi had a misunderstanding with another staff member earlier in the year, her performance met expectations. (A. 125-26.)

Marburn fares no better in accusing Levi of “communication” shortcomings. (Br. 32.) The school presented no evidence that it based her discipline and

subsequent discharge on the examples cited in its appellate brief. The fact remains that the Summary of Concerns and Corrective Action Plan fails to mention any of those examples.<sup>5</sup> Moreover, because Marburn disciplined Levi *only after* she encouraged her coworkers to raise their group concerns to Board Chairman Hicks, the school's citations (Br. 33-34) to cases purportedly involving "similar breakdowns of communication" are inapposite. As shown, Marburn did not, in fact, rely on the cited communication breakdowns in disciplining her. Instead, it relied on Levi's protected concerted activity in bringing group concerns to Hicks' attention and encouraging coworkers to do the same—conduct that Marburn also erroneously impugns as a communication breakdown.

As the Board correctly stated, an employer "cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have been taken in the absence of the protected conduct." (A. 10.) *See* cases cited above p. 18. Marburn, however,

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<sup>5</sup> In any event, Marburn could not logically have relied on many of the examples belatedly cited in its appellate brief. For example, as a basis for issuing the Corrective Action Plan, Marburn cites (Br. 32) a private text message that Levi sent to Geisler in which she called Williamson an "idiot." (A. 278.) But there is no evidence that any administrator knew about the private message, which Marburn did not obtain until the day before the unfair-labor-practice hearing. It goes without saying that the school could not have relied, as its basis for disciplining Levi, on a private message it knew nothing about at the time.

“simply assert[ed] it would have taken the same action, which is insufficient to meet its burden.” (A. 12.) And where, as here, the employer has not met its burden, a violation of the Act may be found even if the employee’s protected concerted activity was not the only motivating factor for the adverse employment action. *Ajax Paving Indus. v. NLRB*, 713 F.2d 1214, 1219 (6th Cir. 1983); *Lloyd A. Fry Roofing Co. Inc.*, 651 F.2d at 445.

Marburn (Br. 35-39) overlooks these settled principles and oversimplifies its burden under *Wright Line*. It is not enough for an employer to show evidence supporting an “alternative story.” *Galicks*, 671 F.3d at 608. Instead, the employer must prove “by a preponderance of the evidence that it would have taken the same action even in the absence of protected conduct.” *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 778 (6th Cir. 2002) (quoting *NLRB v. Gen. Sec. Servs. Corp.*, 162 F.3d 437, 442 (6th Cir. 1998)); *see also Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 766 n.5 (6th Cir. 1998) (“an employer bears the burden of persuasion as to its affirmative defense”).<sup>6</sup>

Marburn also misses the mark in arguing (Br. 35-36) that its treatment of Angie Bell supports its affirmative defense. It was Marburn’s burden to show that it would have disciplined Levi even absent her protected concerted activity, not

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<sup>6</sup> Marburn also errs (Br. 40-41) in asking the Court for a remand and a second chance to present its affirmative defense. That ship has sailed.

that it failed to discipline every employee who engaged in such activity. In any event, the differences between the two employees are obvious, as there is no evidence that Bell actively encouraged coworkers to contact the Board—the conduct Marburn explicitly relied on in its Summary of Concerns as its reason for disciplining Levi.

Lastly, Marburn’s heavy reliance on inapposite caselaw does not advance its cause. For example, Marburn cites (Br. 34, 35) this Court’s decision in *APX International v. NLRB*, 144 F.3d 995 (6th Cir. 1998), to support its argument that employers are free to discipline employees for defiance towards supervisors. But in that case, the employee had a “poor employment record[,] . . . was warned of potential further discipline for persistent lateness and tardiness by [a supervisor] who was unaware” of the employee’s protected activity, and there was no evidence the employee was outspoken in regards to his protected activities. *Id.* at 1001. Here, of course, Levi had a strong work record and no prior discipline or warnings. And unlike the employer in *APX*, Marburn obviously knew that Levi had spoken with many coworkers and successfully encouraged them to raise workplace concerns.

Marburn fares no better by citing (Br. 39-40) *Carlton College v. NLRB*, 230 F.3d 1075 (8th Cir. 2000), a distinguishable, out-of-circuit case where the court found that the employer met its burden under *Wright Line* because the employee’s

conduct at a meeting was not protected by the Act. *Id.* at 1081-82. By contrast, Marburn explicitly relied on conduct that was plainly protected and concerted as its reason for disciplining Levi.

In sum, ample evidence supports the Board's finding that Levi's protected concerted activity was a motivating factor for issuing the Summary of Concerns and Corrective Action Plan. Moreover, the Board was not compelled to accept Marburn's claim that it would have disciplined her even absent her protected concerted activity.

**B. Marburn Violated Section 8(a)(1) of the Act by Conditioning Levi's Continued Employment on Unlawful Restrictions on Her Protected Concerted Activity**

An employer violates Section 8(a)(1) of the Act by making statements or engaging in conduct that would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Because the test is whether the employer's conduct has a reasonable tendency to coerce, proof of actual coercion is unnecessary. *See, e.g., Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005); *ITT Automotive v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999). In making this determination, the Board considers the totality of the context in which the statements were made and is justified in viewing the issue from the standpoint of its impact on employees. *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987).

Specifically, and unsurprisingly, an employer violates Section 8(a)(1) by conditioning employment on abstention from protected concerted activity. *See, e.g., Flex Plastics, Inc.*, 262 NLRB 651, 659 (1982) (unlawful to require employees to agree to refrain from engaging in protected activity as a condition of employment), *enforced, NLRB v. Flex Plastics, Inc.*, 726 F.2d 272, 275 (6th Cir. 1984). This is so because such restrictions on inter-employee communications regarding workplace concerns “undoubtedly tend[] to interfere with” their right to engage in protected concerted activity. *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) (internal citation and quotation marks omitted).

Relatedly, policies requiring employees to follow a certain process or procedure in raising and resolving workplace concerns unlawfully restrict their ability to exercise Section 7 rights. *See, e.g., DHSC, LLC v. NLRB*, 944 F.3d 934, 939 (D.C. Cir. 2019) (employer may not require employees to take all work-related complaints to their employer through the “chain of command”) (internal quotation marks and citation omitted); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting employees from talking negatively about management would reasonably be construed as barring them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities).

Applying these settled principles, the Board reasonably found that Marburn independently violated Section 8(a)(1) of the Act by telling Levi, verbally and in the Summary of Concerns and Corrective Action Plan, that as a condition of continued employment she would have to refrain from engaging in protected concerted activity. To start, in their May 7 meeting, Head of School Williamson directly conditioned Levi's employment on her agreeing to cease what he regarded as a pattern of "unacceptable" behavior. (A. 13; 177.) In other words, he was saying that if she wanted to keep her job, and renew her employment contract, then she would have to agree not to engage in protected concerted activity. This statement was plainly unlawful. *See, e.g., Lancaster Fairfield Community Hosp.*, 311 NLRB 401, 403 (1993) (by demanding that an employee "discontinue [her] disruptive behavior immediately," employer was in effect telling her to "refrain from complaining about working conditions and even making suggestions for improvement").

In addition to Williamson verbally instructing Levi to stop discussing workplace concerns with other teachers, the Summary of Concerns and Corrective Action Plan itself squarely conditioned her continued employment on her agreeing to follow Marburn's Problem Solving System, which precludes employees from "airing disagreements in group meetings," and conferring with "individuals who are not directly involved" in the dispute. (A. 318.) The Correction Action Plan

also required Levi to “[c]omit[] to seeking out the LD Division Head, Associate Head, and/or the Head of School to assist in the process.” (A. 341.) As the Board reasonably found (A. 13), by mandating that Levi follow this specific procedure in raising and resolving workplace concerns, without involving or notifying coworkers, Marburn unlawfully restricted her exercise of Section 7 rights.<sup>7</sup> *Accord Michigan State Employees*, 364 NLRB No. 65, slip op. at 5, 2016 WL 4157599, at \*5 (employer violated the Act by maintaining a work rule requiring employees to present any concerns directly to the president, and by suspending and discharging an employee for concerted complaining to an executive board member in violation of the rule); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1254 (2007) (employer may not require employees to take all work-related concerns through a specific internal process), *enforced sub nom. Nevada Service Employees Union, Local 1107*, 358 F. App’x 783 (9th Cir. 2009).

Marburn misses the mark in asserting (Br. 44-45) that the Board “neglected the big picture” and its stated justifications by failing to examine the unlawful restrictions from its perspective. There is zero basis in the law for Marburn’s argument, as it is settled that the question for the Board is whether the employer’s

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<sup>7</sup> By imposing these restrictions, Marburn also blithely ignored a vow it made in the Problem Solving System that it “shall in no way infringe on employees’ right to engage in protected concerted activity under the National Labor Relations Act.” (A. 4; 222.)

conduct, “considered from the employees’ point of view, had a reasonable tendency to coerce.” *Dayton Newspapers, Inc.*, 402 F.3d 651, 659 (6th Cir. 2005); accord *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 476 (6th Cir. 2002); *Peabody Coal v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984).

### **C. Marburn Unlawfully Discharged Levi**

When Levi received the Summary of Concerns and Corrective Action Plan, she was understandably upset. She therefore spoke with other teachers about the disciplinary action and reached out to two board members to reiterate her position that she had done nothing wrong. Upon learning that Levi had notified coworkers and board members about her discipline, Williamson and Burton informed her that they were revoking her contract, effectively terminating her employment. As explained below, substantial evidence supports the Board’s finding that by discharging Levi, Marburn again violated Section 8(a)(1) of the Act.

It is settled that an employer’s decision to discharge an employee is tainted if it relies on prior unlawful discipline. *Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1521 (6th Cir. 1996) (discharge for insubordination unlawful where employee would not have been discharged but for prior, unlawfully motivated suspension); *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Dynamics Corp.*, 296 NLRB 1252, 1253-54 (1989) (“a legitimate basis for discharge . . . cannot be established by unlawful disciplinary warnings” previously

issued), *enforced*, 928 F.2d 609 (2d Cir. 1991); *Celotex Corp.*, 259 NLRB 1186, 1186 & n.2 (1982) (suspension unlawful where employer relied on prior unlawful warning). Under this analysis, a reviewing court will uphold the Board's unfair-labor-practice finding if substantial evidence shows that the employer based its adverse employment decision at least in part on the unlawful prior discipline, unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the prior discipline.

Here, Marburn explicitly withdrew its offer of an employment contract for the upcoming school year and discharged Levi because she continued to exercise her rights under the Act and refused to refrain from doing so in the future, contrary to the Corrective Action Plan's unlawful restrictions on her protected concerted activity. The Act, however, made it unlawful for Marburn to take those further adverse actions based on Levi's refusal to accept restrictions imposed by the earlier, unlawful disciplinary measure (the Corrective Action Plan).

Before the Board, Marburn contended that it was entitled to terminate Levi's contract because, by discussing the Corrective Action Plan with coworkers and refusing to abide by its restrictions on her Section 7 activity, she "demonstrated that she did not want to strive to communicate in a more productive manner or work with administration." (A. 13, quoting R. Br. 22.) In Marburn's view, her

refusal to comply with the plan's restrictions constituted misconduct. (A. 14.) The Board, however, properly rejected this argument, explaining that Marburn was simply using her refusal to accept its unlawful restrictions on her protected concerted activity to justify her discharge. (DO 13-14.) As shown above, Marburn's position merely confirms that its discharge decision was unlawful.

To the extent Marburn implies (Br. 27; 30-35) that it was privileged to discharge Levi because of the way she communicated her concerns, this argument borders on the absurd. To be sure, employees can lose the Act's protection if they engage in sufficiently "opprobrious conduct" during the course of otherwise protected activity. *See Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In determining whether an employee's conduct is so egregious that it forfeits the Act's protection, the Board balances two competing policy concerns: allowing employees some latitude for impulsive conduct in the course of protected activity and respecting employers' need to maintain order in the workplace. *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 546-47 (6th Cir. 2016). Accordingly, in striking an appropriate balance, the Board weighs the following factors: the place of discussion; its subject matter; the nature of the employee's conduct; and whether it was provoked by an employer's unfair labor practice. *Caterpillar*, 835 F.3d at 547; *Atlantic Steel*, 245 NLRB at 816.

Applying the *Atlantic Steel* factors, the Board reasonably found that Levi did not lose the Act's protection, concluding that the factors all favored protection. Marburn does not directly contest this finding in its opening brief (A. 14), and any challenge "has thus been waived." *Conley v. NLRB*, 520 F.3d 629 (6th Cir. 2008). In any event, as the Board noted, Levi spoke with her coworkers and a few board members primarily through text messages and emails, and there was no evidence that those exchanges interfered with the operation of the school or the recipients' ability to do work. The subject matter (her unlawful discipline) also favored protection, as she was upset and had been threatened with discharge if she failed to comply with Marburn's unlawfully restrictive disciplinary plan. As to the nature of Levi's conduct, although Marburn has suggested that it was inflammatory for Levi to call the Corrective Action Plan an "extortion contract," as the Board noted the term is an apt one because Marburn was conditioning her employment on an agreement to "forego a critical statutory right." (A. 14.) Finally, it was Marburn's unlawful conduct that led to Levi using that terminology.

## II. THE COURT LACKS JURISDICTION TO CONSIDER MARBURN'S BELATED CHALLENGE TO THE BOARD ORDER'S REINSTATEMENT REQUIREMENT

Marburn spills much ink arguing (Br. 47-54) that the Board erred in ordering it to reinstate Levi as a remedy for her unlawful discharge. But because Marburn failed to raise this objection to the remedial order before the Board, Section 10(e) of the Act, 29 U.S.C. § 160(c), precludes the Court from hearing it. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

The Board's remedial power is "a broad discretionary one, subject to limited judicial review," and the authority to fashion remedies under the Act "is for the Board to wield, not for the courts." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)). In particular, the Board's authority to award reinstatement derives from Section 10(c) of the Act, 29 U.S.C. § 160(c), which provides that upon finding that an unfair labor practice has been committed, "the Board shall order the violator 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies' of the Act." *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 262 (quoting Section 10(c)).

In keeping with these settled principles, the administrative law judge issued a recommended order directing Marburn to reinstate Levi to her former position,

or, if it was no longer available, to a substantially equivalent position. (A. 15.) Marburn, however, failed to file an exception to this aspect of the recommended order. Accordingly, in the absence of exceptions, the Board adopted the judge's proposed remedy. (A. 1.)

Under Section 10(e) of the Act and settled precedent, this Court lacks jurisdiction to consider Marburn's untimely challenge to the Board's standard reinstatement remedy. This is because Marburn waited to raise its argument for the first time in its appellate brief, after forgoing the opportunity to present it in exceptions to the judge's decision. *See* 29 U.S.C. § 160(e) ("no objection that has not been urged before the Board . . . shall be considered by the Court" absent "extraordinary circumstances").<sup>8</sup> *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) bars reviewing court from considering arguments raised for the first time on appeal); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 843 (6th Cir. 2003) (same).

This Court enforces the Section 10(e) bar strictly, holding consistently that the failure to present a question to the Board in the first instance precludes the Court from considering it on appeal. *See, e.g., Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 & n. 1 (6th Cir. 2006); *Southern Moldings, Inc. v. NLRB*, 728 F.2d

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<sup>8</sup> Marburn does not present any extraordinary circumstances that would excuse its failure to raise its challenge to the reinstatement remedy in exceptions before the Board.

805, 806 (6th Cir. 1984). As this Court has noted, Section 10(e)'s jurisdictional bar "affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the Court] may have the benefit of its opinion when [the Court] reviews its determinations." *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977). In other words, adherence to the jurisdictional command of Section 10(e) results in a "win-win situation" because it "simultaneously enhances the efficiency of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship." *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005). *See also IUE Local 900 v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) ("[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice") (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Nowhere in the 73 exceptions that Marburn filed with the Board regarding the judge's recommended decision and order did the school specifically challenge the reinstatement remedy. Rather, Marburn merely asserted in broad terms that the remedial order as whole was "erroneous as a matter of law" (A. 364), which was insufficient to provide the Board with notice of the argument Marburn now pursues on appeal. *See Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943)

(objection must be specific and not general). Because Marburn failed to make the argument before the Board that it now attempts to raise on appeal, the Court lacks jurisdiction to entertain it.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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February 2020

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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	)	
Petitioner/Cross-Respondent	)	Nos. 19-2062, 19-2159
	)	
v.	)	
	)	Board Case No.
MARBURN ACADEMY, INC.	)	09-CA-224092
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
MICHQUA LEVI	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 10,800 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC  
this 13th day of February 2020

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	)	
MICHQUA LEVI	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on February 13, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
this 13th day of February 2020