



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

VIA CM/ECF

May 7, 2020

Deborah S. Hunt, Clerk
United States Court of Appeals
for the Sixth Circuit
540 Potter Stewart United States Courthouse
100 East Fifth Street
Cincinnati, OH 45202-3988

Re: *NLRB v. Marburn Academy, Inc.*, 6th Cir. Case Nos. 19-2062, 19-2159

Dear Ms. Hunt:

The Board responds to Marburn's Rule 28(j) letter citing *Lemon v. Norfolk S. Ry. Co.*, 2020 WL 2078985 (6th Cir. Apr. 30, 2020), a Federal Railroad Safety Act case that has no bearing here. It involves Lemon's discharge for falsely claiming, in a workplace report, that he injured himself on the job. Lemon then alleged the railroad violated the FRSA by firing him for reporting a workplace injury. In affirming the district court's grant of summary judgment for the railroad, the Court found it unnecessary to determine the applicable causation standard because it was plain the railroad discharged Lemon for lying, not for filing a report. *Id.* at *2.

In so ruling, the Court rejected Lemon's theory that the report contributed to his discharge because without the report he would not have lied to his employer. As the Court noted, under this theory any event could be a contributing cause. *Id.* at *3. Marburn seizes on the Court's further remark that this theory would authorize employees to engage in banned behavior so long as it occurs during protected conduct. *Id.* But this dicta does not help Marburn. It plainly disciplined Ms. Levi

for engaging in activity that is protected and concerted under the National Labor Relations Act—discussing workplace concerns with coworkers and bringing those concerns to Marburn’s attention. Further, Marburn again violated the Act by conditioning her continued employment on refraining from that protected, concerted activity, and by terminating her employment contract because she would not acquiesce in those unlawful restrictions. *See* Board Br. 19-43.

Very truly yours,

s/David Habenstreit

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Encl.

cc: all counsel (via CM/ECF)