

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVOSERV OF NEW JERSEY, INC.

and

Case 22-CA-131230

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST, NEW JERSEY REGION

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DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by 1199 SEIU United Healthcare Workers (the Union) on June 20, 2014, the Director for Region 22 issued a complaint and Notice of Hearing, alleging that Advoserv of New Jersey, Inc. (Respondent) violated Section 8(a) (1) and (3) of the Act by terminating the employment of Todd Kowinsky on December 30, 2013, because Kowinsky assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The trial with respect to the allegations raised in the complaint was held before me in Newark, New Jersey on January 13, 14 and 20, 2015. Briefs have been filed by General Counsel and Respondent, and have been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction and Labor Organization

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Respondent is a Delaware corporation with offices and places of business in Hewitt and Ringwood, New Jersey, where it provides residential and day services to adults with intellectual/developmental disabilities.

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During the 12-month period ending December 31, 2013, Respondent derived gross revenues in excess of \$500,000, and during the same period purchased and received goods in excess of \$50,000 directly from suppliers outside the State of New Jersey.

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Respondent admits, and I so find, that it is and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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It is also admitted and I so find that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. RESPONDENT'S OPERATIONS

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Respondent is a behavioral health care provider specializing in services for children and adults with intellectual and developmental disabilities. Respondent operates health care facilities throughout the country, including in the state of New Jersey. It operates 48 group homes in New Jersey for adults with intellectual

30 disabilities, which includes a facility located in Hewitt, New Jersey, which is known as the Respondent's Upper Greenwood Lakes (UGL) campus, as well as another facility, located in Ringwood, New Jersey, located 15 miles from the UGL campus.

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The UGL campus houses roughly thirty four individuals or clients. The campus contains those residential group homes (designated UGL-1, UGL-2 and UGL-3) that lie about 100 feet apart. In close proximity to the homes is an administration building, which contains administrative offices, a conference room and staff lounge.

40

Kim Mickus is the Program Director for the UGL campus and Rashad Byrd is its Assistant Program Director. They were both stationed at the UGL campus.

45

Darren Blough is Respondent's New Jersey State Director with final authority for all personnel and operating decisions in this territory. Jessica Bayer is Respondent's Assistant State Director, who oversees 25 group homes in the northern and central regions of New Jersey, including the UGL campus.

Respondent's main office is in Bear, Delaware. At that location, its CEO Kelly McCrann and COO Bob Bacon were stationed, as well as Katherine O'Brien, who is Respondent's Corporate Human Resources Director.

5 Respondent has stipulated that Blough, Bayer, Mickus and Byrd are supervisors of Respondent within the meaning of the Act.

Respondent also stipulated that Arthur Mongelli was employed by it until October 3, 2012, and that during his employment; Mongelli was a supervisor within the meaning
10 of the Act.

Similarly, Respondent stipulated and I find that Terri Outer was employed by Respondent until December 30, 2013, and that during her employment she was a supervisor within the meaning of the Act.
15

At the UGL campus, Respondent also employs a team of clinicians and behavior analysts. Respondent's senior behavior analyst is Alana Bellizzi. The clinicians develop and implement programs to address each client's own behavioral challenges. Every client or resident has a behavior plan developed by the clinicians that identifies
20 specific behavior that interferes with residents' ability to live independently, identifies the causes of said behaviors and maps out appropriate responses to those behaviors. The clinicians are not supervisors, but they work with Respondent's supervisors to develop these plans.

25 Respondent employs community living specialists (CLSs) who are assigned to each residential building to assist residents with daily life functions and to carry out the terms of the behavior plans, developed by the clinicians.

The (CLS'S) are divided into three shifts, (morning, day and night) with about
30 eight CLS's working per shift.

In UGL-3 Respondent housed 10 residents. On the night shift, Respondent employed three CLS's, Todd Kowinsky, Rob Wolyuk and Nancy Flipowitz to care for the residents in that home. Terri Outer was the night shift supervisor (or program
35 coordinator), for all three UGL homes. The night shift ran from 10:15 pm to 6:15 am.

B. The Union's 2012 Organizing Activity

40 In the fall of 2012 the Union began an organizing drive at Respondent's' UGL and Ringwood facilities. Kowinsky and another employee had discussed getting a union at Respondent, and they approached the Union about representing Respondent's employees. Cards were given out to Kowinsky and the other employee to distribute to other employees at Respondent's facilities.

5 Kowinsky signed a union authorization dated September 9, 2012. Kowinsky thereafter distributed blank authorization cards to 35-40 employees working on all three shifts at the UGL campus. Kowinsky spoke with these employees on the phone about the Union, met them in the parking lot to discuss the benefits of unionization, and discussed the Union and the signing of cards in the kitchen and the living room areas of residential buildings.

10 Kowinsky also wore a union hat at work nearly every day for about a two month period during the campaign. On one occasions, in October of 2012, Kowinsky was in the office at the Administration building at the UGL building, to pick up his paycheck. At that time Bayer was there, and she called Kowinsky into the office that Bayer uses when she is at the campus. Bayer commented to Kowinsky about his union hat. She said "nice hat." Bayer then showed Kowinsky on the monitor of her computer displaying an image of union employees on strike. Bayer said to Kowinsky that 1199
15 was involved in a strike and there were other problems with the union. Bayer added "why would you want them representing you, there is nothing good there."

20 The Union filed a petition for an election, which led to the Stipulated Election Agreement, signed by the parties, and approved by the Director of Region 22 on December 4, 2012. The Agreement provided for an election at both the UGL and Ringwood facilities, in a unit of full and regular part time and per diem community living specialists, housekeeping and maintenance employees at these locations.

25 Shortly after the information about the notice of the election was posted at Respondent's facility, Mickus spoke to Kowinsky in the staff lounge in the administration building. Mickus asked Kowinsky to give her a chance to see if she could straighten things out, and don't bring in the Union and let her have a chance at straightening things out, and running the place. According to Kowinsky, Mickus had been employed by Respondent for about two to three months at the time of this
30 conversation.

The election was scheduled to be held on January 4, 2013. However shortly before the election, the Union withdrew the petition, and the election was canceled.

35 During the course of the union campaign, Respondent conducted meetings with its supervisors and with counsel present. Respondent stipulated that it was not in favor of unionization of its employees in 2012 and that it campaigned vigorously against the Union in 2012. The campaign included meetings with supervisors and employees, and posters and flyers.
40

Blough testified that in 2012, he was aware through reports from other staff members, that Kowinsky was an advocate for the union's organizing and was taking an active role in the campaign on behalf of the Union.

In contrast, both Bayer and O'Brien denied that they were aware of any union sentiments or union activities by Kowinsky in 2012, or indeed at any time.

C. Kowinsky's Work Record

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Respondent stipulated at the trial that Kowinsky was recognized by Respondent as a good employee. He was employed by Respondent since January of 2008, and worked on the night shift.

10

Respondent issues "Way to go Certificates," to employees which compliments them on their performance in various respects. These "Way to Goes" are used by Respondent in connection with employee evaluations and bonuses that Respondent gave from time to time. In that connection Kowinsky has received a number of "Way to Goes" from various supervisors, and received bonuses as a result of his evaluations.

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The record reflects that Kowinsky received a "Way to Go," from Mickus on August 8, 2013, reading, "doing a great job making sure night shift runs smoothly."

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On September 26, 2013, Terri Outer issued two "Way to Goes" to Kowinsky stating that he "did great job putting fire out in UGL-3," and "great job getting the residents out of the house in 1 minute. You're awesome."

On November 11, 2013, Kowinsky was working on the day shift¹ and received a "Way to go" from day shift supervisor Debbie Schackmann.

25

Schackmann's "Way to GO" reads, "thanks so much for always going above and beyond with day program and mentoring new staff."

30

Kowinsky's evaluations dated 7/1/13 and 12/1/13 reveal above average grades in some categories, meets job requirements in most and needs improvement in one category (Follows job program policies described in the Employee Handbook, Behavior Management Guidelines, and in arranging directives) in a timely and correct manner."

35

The evaluation of 7/1/13, reflected that Kowinsky received 6 Way to Goes that quarter, and that he received some disciplinary actions for "placing oneself in a position conducive to sleeping."

40

In that regard the record reflects that Kowinsky received a three day suspension for conduct on June 24, 2013. According to the report of Mickus, she dialed into the home, and observed Kowinsky, where he was laying down, with a blanket covering his body, and in a "position conducive to sleep." The report reflects that Mickus called the

¹ Employees frequently are assigned to work additional shifts, as "mandatory overtime," when employees called out sick. This is known to employees as being "popped".

home spoke to Kowinsky and advised him to sit up, and that he would be receiving feedback. The notice further reflects that Kowinsky is suspended for 3 days from 9/8 – 9/10, and that “this constitutes sleeping on the job or placing oneself in a position conducive to sleep.” It further states that future occurrences may result in further disciplinary action up to and including termination from Adoserve as outlined in the handbook.

According to Kowinsky, he wasn’t sleeping on that day, but he had a headache and he was just putting his head back and resting. Mickus then called him, and told Kowinsky to “get the fuck up” and he told her that he wasn’t sleeping, but that he had a headache and was putting his head back and resting his eyes. Mickus told him during that conversation that she was going to let it go this time. However, according to Kowinsky, “the next day everybody knew about it, so they had to give me a suspension at that time.”

Mickus did not testify in this proceeding. Blough testified that he reviewed and approved the discipline recommended by Mickus, of a 3-day suspension for Kowinsky, based on that conduct. According to Blough, corroborated by O’Brien, this conduct by Kowinsky could have resulted in a termination for Kowinsky, at that time. In that connection, Respondent’s Employee Handbook lists a number of offenses under Group two. These offenses which include theft, possession or use of alcohol, absence without notification, willful destruction of property, also includes “sleeping on the job or placing oneself in a position conducive to sleeping while on duty.” The Handbook provides the following for this conduct. For a first offense, it states, “written warning to termination.” For a second offense, it provides the same comments, “written warnings to termination.” Finally for 3rd offense, it states “termination.”

According to Blough, although Respondent could have terminated Kowinsky, under its handbook for his conduct in June 2013, it decided after a review of Kowinsky’s employment history and his evaluations and performance feedbacks, that in fairness to Kowinsky, it would issue him a suspension as opposed to a termination at that point.

Respondent has an appeal procedure which is detailed in its handbook, wherein employees can appeal disciplinary actions. It involves various steps, and permits employees to have the discipline reviewed by higher officials of Respondent. Kowinsky chose not to exercise his right to appeal this discipline. In fact Kowinsky testified that he did not believe at that time, that his suspension was motivated by any antiunion view or position on the part of management.

On July 2, 2013, Kowinsky sent a text message to Blough, which makes reference to the suspension. In that text, Kowinsky explained his conduct as follows:

“Hay Darren I just want you to know that I took that 3 days without any problem. I was relaxing for a short time that night due to a horrible headache. I’m a man and I will take the punishment, but I can ensure(sic) you that it won’t happen again. I

herd(sic) you were skittle(sic) surprised when you heard my name again. I'm saying we're all human after all."

5 Blough responded as follows:

"I appreciate you reaching out. Believe me I understand and respect that. In the future just please tell the sup and we will work out getting you a break if you need it. Human we are."

10

In that same exchange, Kowinsky texted the following response to Blough.

15 "Thanks for understanding after all I love what I do. Thank you Darren. I'm sorry about the alternate thing. I'm kind of thinking about a bigger picture may be one of the new houses might be in line."

Blough responded "thank you for understanding our need to be fair across the board. And yes I understand your decision as well. Have a happy fourth."

20 The "alternate" thing referred to in the text exchange, was a position as alternate supervisor, which Respondent's officials had been vigorously attempting to persuade Kowinsky to accept for several months.

25 Alternate supervisor is a position that is filled when the regular supervisor is off or out. There is an increase in pay, when the employee serves as an alternate supervisor. In that regard, Mickus spoke to Kowinsky about five or six times over a period of five or six months in 2013, and informed Kowinsky that Respondent needed someone to run the night shift, when Outer was not there. She told Kowinsky, that "we need somebody with a little brains to run the shift. You've been here a while. You know." Kowinsky
30 declined Mickus' request, telling her that he had been in that position previously, and it was taken away from him for unexplainable reasons. He further explained that he didn't want it again because Respondent had a lot of immature kinds working on that shift, and that he didn't want the responsibility," if something happened, that would be on me."

35 Similarly, Bayer asked Kowinsky about four times over the same period about the position. Bayer said to Kowinsky, "take the alternate job, come on, we need you." However, Kowinsky continued to decline the request.

40 Finally, Kowinsky met with Blough and Bacon shortly before the text exchange, wherein Blough and Bacon urged him to accept the alternative supervisor position. Kowinsky told Blough at that time that he would think about it.

45 In the text exchange when Kowinsky mentioned the "alternate thing," he was referring to the alternate supervisor's position, and saying he was sorry and would not accept it, but he was thinking "about a bigger position maybe some of the new houses

might be in line,” meaning he was interested in a regular supervisor’s position, if one opened up at one of the houses.

5 On August 22, 2013, Kowinsky received a 2-day suspension, to be served on 4/3 and 4/4/13, issued by Mickus. The Disciplinary Action states the discipline was a Group 2 Offense, for “Endangering the welfare of residents.”

10 The narrative comments on the form reflected that on August 22, 2013 at 11:35 pm Kowinsky was informed that he would be required to provide clinical coverage on the morning of 8/22/13 due to staffing needs. Kowinsky stated that he wasn’t staying for the coverage because the first staff member refused to stay. The document further reflects that Kowinsky walked off the floor at 6:15 am leaving the premises without proper coverage. The form further stated that “this constitutes endangering the welfare of the residents as per the Advoserv employee handbook.”

15 Kowinsky stated that he would appeal this action, and write a response on the disciplinary notice. It reads, “They had proper staff coverage. It’s not endangering the welfare of the residents. And if this had been addressed before like it should have this would not have happened. (Was to prove a point). (I would like to appeal).”

20 On August 27, 2013, Kowinsky texted Blough that he wanted to speak to him. On August 28, they spoke on the phone. Kowinsky described what had happened and admitted that he had refused to stay for a mandatory overtime shift. Kowinsky explained that he had received a disciplinary action for endangering the welfare of the residents, and disputed that language, since there was a staff member who would be staying for that shift, so the individuals were not placed in danger.

25 After that conversation, Blough contacted Mickus, and she confirmed the information that Kowinsky had given to Blough, that another employee covered the shift. Blough and Mickus decided that the language in the notice should be altered to remove the language about endangering the welfare of the residents and substitute not following an established safety rule for the discipline. However, the suspension was not eliminated or revoked.

30 Blough talked to Kowinsky on August 28 at 5:33 pm, informing him that “Kim will be giving you a call. We discussed in great detail and tried to be fair across the board. She will give more detail, but call tomorrow if you have other questions.”

35 The record does not reflect whether or not Mickus spoke to Kowinsky, about Respondent’s decision, as testified to by Blough, and corroborated by O’Brien, to change the language of the Disciplinary Notice. Additionally, the record does not reflect the preparation of any revised document, changing the language of the discipline from endangering the welfare of the residents to not following safety rules.

D. The Union's Organizing Campaign in 2013

5 Kowinsky reached out to the Union in the summer of 2013 and spoke to organizer Brian Walsh. Kowinsky told Walsh that the employees were interested in trying to get the union again, that the first time wasn't so good, and he felt that the employees didn't have the full attention of the Union last year. Walsh informed Kowinsky that he would mail him authorization cards to get signed by employees.

10 Walsh did so, and Kowinsky signed a union card on 9/25/13 and proceeded to start distributing cards to employees and talking to them about signing cards for the Union and having the Union represent the employees. Kowinsky spoke to employees on the campus, in the houses, in the driveway, in the parking lot, and in some of their cars. He handed out cards to about 45 employees. In late December of 2013, Kowinsky met Walsh at a bowling alley in Warwick, New Jersey, and gave him the signed cards that he had obtained.

15 During the course of this trial I made an in-camera inspection of 52 authorization cards, which were submitted by the Union. This inspection revealed 52 cards dated on various dates between September and December of 2013, containing signatures of 52 of Respondent's employees employed at various facilities.

20 In October of 2013, Stacey Paterno was employed by Respondent as a CLS at the UGL facility, located in Hewitt, New Jersey. She worked on the night shift. Kowinsky approached Paterno in August of 2013 and told her that he is thinking about starting to bring the union back in, Terri Outer was also present, since Kowinsky at the time was driving Outer to work. After Kowinsky made his comment to Paterno about bringing back the Union, Outer interrupted and said "please don't do that in front of me," and she walked away.

25 Sometime in October of 2013, Paterno was standing outside of House 3. Mickus and Bayer came out of the house and closed the door. Mickus asked Paterno if she knew about the Union starting up. Paterno responded yes. Bayer asked if Paterno was going to be involved. Paterno replied no. Mickus then said, "good then you can downplay the necessity for a Union to the other employees." Paterno replied sure. Bayer then said, "you know Todd (Kowinsky) is behind it". Paterno replied yes.

30 Paterno also had a conversation about the Union with her supervisor Heather Barsch in August 2013, outside the home. Paterno brought up the subject, and said that she heard that the union might be starting up again. Barsch responded "yeah, I heard but I'm not going to get involved in it." Paterno had a similar conversation with Barsch during the 2012 campaign, where Barsch expressed to her that she didn't agree with unions.

35 As noted above, Kowinsky, drove supervisor Terri Outer to work, for a period of time. The record reflects that for the year 2013, Outer and Kowinsky drove together to

5 work. For six months they drove in Outer's car, and for six months they drove in Kowinsky's truck. During their daily commute together in 2013, Kowinsky informed Outer that he was getting cards signed up for the Union. Outer replied to Kowinsky, "Do what you have to do." She also told Kowinsky that she hoped that the employees get the Union in here, and that the employees deserve it.

10 Outer spoke to Byrd in the summer of 2013, and informed him that "people are talking about the Union." Outer did not recall if she told Byrd that Kowinsky was involved in the Union talk or organizing in 2013. Outer noted that there were other people, in addition to Kowinsky who were talking about the Union in 2013.

15 In October of 2013, Outer was in the staff lounge at about 5:30 a.m., right before the shift change. At that time Debra Schackmann who is the supervisor (program coordinator) for the day shift, which starts at 6:00 a.m. was present, along with four or five staff members from the day shift. Schackmann told the employees that she thinks that the employees should go for a Union, that things are not going right, and she believes that it would do the Company good to have a union, because people aren't treated right. Outer interrupted and told Schackmann that she shouldn't be saying things like that to employees.

20 Subsequently, Outer informed Byrd that there was a conversation in the staff lounge, and that Schackmann was talking to employees about how it's good for them to get a Union.

25 In October of 2013, Respondent had its weekly administration meeting in the basement of UGL-3. Present at this meeting were Bayer, Byrd, Mickus and a number of other supervisors (program coordinators) from both the UGL facility and Respondent's Ringwood facility, including Schackmann, Barsch, Lori Sokoly and Felicia Okay. Additionally, Respondent's administrators present included Brenda Mongelli the IHP
30 Coordinator, who makes up plans as what to residents do each day, and several behavioral analysts from both facilities, including Alana Bellizzi, Sally Raider and Christine Wedlock.

35 During the course of this meeting, Bayer was standing in front of a table, and stated that she knew that there was union activity going on and that there were meetings going on the night shift with cars coming in and out of the driveway. Bayer then stated that if she finds out who was involved in the Union, she's "going to fire our asses." Outer took that comment to mean everybody, including supervisors, administration, and CLS's.

40 A day or two later, Outer spoke to the employees on the night shift on Sunday night. The employees present included Kowinsky, Nancy Flipowicz, Rob Wosalyk and Chris Brown. Outer told the employees that the administration knew that there was union stuff going on, and were accusing the night shift employees of having union
45 meetings, and that the employees needed to "watch their asses," because whoever was

involved in the Union, “they would fire our asses.” Kowinsky commented to Outer, “I don’t know what you are talking about,” referring to the alleged union meetings on the night shift.

5 The Union never filed a petition for representation with the Region, in 2013, and the Union never made a demand for recognition to Respondent. Blough, O’Brien and Bayer all testified that they had no idea about a Union organizing campaign at Respondent’s facilities in 2013, and denied that they were aware of any union activities by Kowinsky during that time.

10 E. THE DECEMBER MEETING WITH EMPLOYEES WHEN RESPONDENT
ANNOUNCED PLANS TO ROTATE EMPLOYEES

15 In early December of 2013, Respondent conducted a monthly night shift meeting. Present were the 10 CLS’s from the night shift, who worked at the three Houses (UGL-1, -2 and -3), Bellizzi, Mickus, Byrd and Outer. Bellizzi, Mickus and Byrd announced to the employees that Respondent intended to begin rotating night shift staff members amongst the three Houses. Bellizzi explained that the primary reason for this change, was that a resident had made a complaint about some CLS’s on the night shift. As a result of these complaints Bellizzi, Byrd and Mickus announced that it intended to commence a process of rotation of CLS’s on the night shift amongst the three Houses, in order to protect both the residents and the employees.

25 According to Bellizzi, the specific complaint that was made by the resident was that the three employees at UGL-3, Kowinsky, Wosalyk and Flipowitz would insist that the resident stay in his room at night. The resident further asserted that the employees told him that they didn’t want to have to watch him, since the resident had a history of eloping from the house, so they didn’t want him having access to other parts of the House. According to Bellizzi this is not appropriate for the CLS’s to do, since it is not part of the resident’s behavior plan. Bellizzi then reported the accusations that the resident made about the employees’ conduct to Byrd and Mickus.

35 According to Bellizzi, she believes that Byrd and Mickus confronted the employees about the accusations, but Bellizzi was not sure what the employees responded to them about the accusations.² Nevertheless, the resident continued to complain about the same alleged conduct by the three employees. Therefore, Bellizzi recommended and Byrd and Mickus agreed that Respondent would resolve the issue by rotating the staff among the three houses. Bellizzi further testified that the practice of rotating employees (on the same shift), amongst houses is not uncommon at Respondent, that it is done regularly at its other facilities, and even on occasion on other shifts at UGL, when necessary.

² As noted neither Byrd nor Mickus testified.

However, the practice on the night shift at UGL had been that night shift employees would not rotate into the other houses, and would only work in other houses on other shifts, when employees were out, and they needed to fill in.³

5 The practice resulted essentially in night shift employees spending nearly all of their working time in the same houses. Kowinsky, Wolyzuk and Flipowicz were the most senior employees on the shift.

10 Bellizzi explained Respondent's rationale for the changes to the employees, with Mickus and Byrd commenting as well. Bellizzi informed the employees that the rotation of employees among the houses, would take place on all three shifts; and not only among the employees on the night shift.

15 They explained that due to the client complaints in the house, and also for the safety of the staff, Respondent decided to make the change. They also added that Respondent believed that it is not a good idea for the staff to be static in one house, and it is better to familiarize all staff with all clients, so that the staff could work in any given house, on any given day.

20 Several employees complained about Respondent's decision, primarily Kowinsky, Wolyzuk and Flipowicz. They stated that they felt that due to their seniority, that they should be able to choose which house that they are most comfortable in. The employees also stated referring to the client who made the complaint about them that the client can be aggressive so they needed to be there because of that. Bellizzi and
25 Byrd responded that all staff are trained to work the same, across all clients. Bellizzi responded that Respondent's decision was for the protection of the employees, as well as the client, and reiterated that it is something that Respondent has always done at other facilities and on other shifts.

30 Kowinsky, Flipowicz and Wolyzuk also asserted that Respondent was making an emotional decision, and listening too much to the clients, and always taking the clients side over the employees. These three employees, as well as a few other employees on the shift objected to the rotation, on the grounds that they should be allowed to remain in "their" house. Bellizzi and Byrd responded that it was the client's house, and not the
35 employees' house.

40 Kowinsky, Wolyzuk and Flipowicz stated that Respondent was targeting the night shift, that there was nothing going on in the night shift, and they questioned whether the day shift employees would be rotating houses as well. They also commented that they have been in UGL-3 for a long time, knew the residents well, and the residents knew the employees. Thus everyone is safer if Respondent maintained the status quo.

³ As noted, above, Respondent had a mandatory overtime policy, wherein if an employee is needed to fill in, when an employee is out, he or she is "popped" and required to work an additional shift.

Bellizzi and Byrd responded again that the rotation would be taking place on all three shifts, and not just for the night shift, and that the decision was made for the protection of both employees and the clients.

5 Of the 10 night shift employees at the meeting, about half expressed support for the decision, stating that they were happy to get experience working in other houses. Thus in addition to Kowinsky, Wolyzuk and Flipowicz, who worked in UGL-3, one or two other employees who worked in the other houses, also objected.

10 One of these employees Joe Olcay who worked in one of the other houses, complained that the day shift wasn't going to do it, and added that "this is bullshit," it was ridiculous that the employees were still in the same house. After Olcay complained again, Byrd said to Olcay, "shut the fuck up."

15 Subsequent to this meeting, Respondent instituted the change in scheduling announced by Respondent's officials. According to Bellizzi, Kowinsky, Wolyzuk and Flipowicz had previously been the only three UGL's at UGL-3, and they worked only in UGL-3, except for occasional pop's, when they were assigned to other shifts or houses. Once the new system started, Mickus and Byrd created a new schedule wherein
20 Kowinsky, Flipowicz and Wolyzuk would be assigned to all three of the houses, on different days, and CLS's from the other two Houses would rotate in to work in UGL-3, to replace them on the shift. Thus Kowinsky, Flipowicz and Wolyzuk were still assigned to UGL-3 for some shift's, but for others they were assigned to UGL-1 or 2, and
25 employees from 1 or 2, would be assigned to UGL-3 to fill slots previously assigned only to Kowinsky, Flipowicz and Wolyzuk.

F. THE DECEMBER 16, 2013 MEETING WITH BAYER

30 Immediately after the night shift meeting, described above, wherein Respondent notified the employees of the decision to rotate staff, there was considerable discussion and objection to this decision by several employees. Kowinsky, in the present of Flipowicz and Wolyzuk told Outer that employees felt that Respondent was targeting the night shift with its proposed rotation and the employees had concerns about Respondent's decision. Kowinsky asked if the employees could speak with higher level
35 administrators, such as Blough, Bacon or Bayer about the proposed changes. Outer told Kowinsky that she would speak to Mickus and Byrd to try to set up a meeting to further address these issues.

40 The next morning Outer spoke to both Byrd and Mikus together, and informed them that the night shift employees had an issue with switching houses, and requested to meet with Blough to discuss their concerns. Byrd replied that he would see what he could do about arranging a meeting. The next morning, Byrd informed Outer that on Monday morning December 16, 2013, Bayer would be coming to the facility, to discuss
45 the issue of moving the staff around the houses, and that she should make sure that all of the staff knew about it. Outer then sent a group text to all the night shift employees

informing them that Bayer would be there on Monday morning to meet with employees to discuss their concerns about the switching of the houses. Outer also called some of the employees who did not respond to her text message, to make sure that they knew what was coming on Monday.

5

Bellizzi, thereafter received a call from either Mickus or Byrd, informing her that the night shift employees had asked for a meeting, and the Byrd, Mickus, Bellizzi and Bayer should all be present on Monday morning December 16.

10

When the night shift ended on the morning of December 16, Kowinsky reported to the staff lounge. Present were Mickus, Byrd, Bayer and Bellizzi. Kowinsky asked to speak with Bayer privately. Bayer walked out to the hallway with Kowinsky. Kowinsky told Bayer that “we wanted to speak to Bayer by herself without anyone else there, because we didn’t like the way things were running there.” Kowinsky added that we wanted to speak without Rashad or Kim or Alana there.” Bayer replied fine no problem.

15

Bayer then informed Byrd, Mickus and Bellizzi that the staff would prefer to meet with Bayer, one on one, with no one else present. Bayer told Mickus, Byrd and Bellizzi to wait in case there were questions.

20

Bayer then met with night shift employees individually in a conference room. The first employee spoken to was Kowinsky. Bayer asked Kowinsky, as well as the other employees whom she interviewed, how things were going on the shift, what was going on in the shift, and did they have any concerns about how they were treated on their shift by their supervisor?

25

Kowinsky responded that there was nothing wrong with his supervisor, but that it seemed like Respondent was pinpointing the night shift by making adjustments on the night shift by switching houses amongst the employees. Bayer explained to Kowinsky that there had been accusations made by a resident against several of the night shift employees and that Respondent was doing what was best for the residents as well as the workers. Kowinsky responded that he Flipowicz and Wolyzuk were the most concerned employees, and that they should not be moved “out of our houses.”⁴ Bayer replied that seniority did not factor into the decision, and that Respondent was doing what was best for both the employees and the residents.

35

Kowinsky then commented about Respondent putting young immature employees into houses with some residents with violent histories, which could cause someone to get hurt. Bayer replied to Kowinsky, “Todd, why don’t you take the fucking alternate position for me, please, we need somebody mature like you, and you can help these kids along, straighten them out.”

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⁴ Kowinsky, Flipowicz and Wolyzuk were the only night shift employees regularly assigned to the UGL-3 house.

5 Kowinsky then remarked that these changes were coming out of nowhere and that the night shift employees didn't understand why Respondent was picking on their shift. Kowinsky added "if it wasn't broke, don't fix it." Kowinsky then informed Bayer that a lot of people are starting to get unhappy with the way things are going around here and there has been talk about the union, and that if it keeps up it's going to go through this time. At that point, Bayer, who had not been taking notes, picked up a pen, began to write down notes, and asked "what they're talking about a union again really?" Kowinsky replied yes and added that he was all for the Union.

10 Bayer asked Kowinsky what the problem was with the shifts and what was going on with the work on the shift. Kowinsky answered that Kim "doesn't know what the fuck she is doing, and neither does Rashad." Kowinsky added that the clinicians were "Jackasses" and "that Kim can't make any decisions and neither can Rashad." Kowinsky pointed out that the clinicians do not work with the residents every day like the CLS's do, and added they also know more about the residents than do the clinicians.

15 After meeting with Kowinsky, Bayer interviewed Outer, and then night shift employees Montrise Jordon, David Irizarry, Jose Joey Olcay, Randy Saracco, Chris Brown, Erin Fracht and Mike McCarthy. Neither Wolyzuk nor Flipowicz were interviewed by Bayer. The record is unclear as to why, since all night shift employees had been informed by Outer that a meeting with Bayer was scheduled for the morning, to discuss the employees concerns. According to Bayer, Wolyzuk and Flipowicz were not interviewed, because they were not there on that day or at the time of the interviews. Neither Wolyzuk nor Flipowicz testified.

20 After Kowinsky left the meeting with Bayer, he spoke to Outer before she went into the conference room to meet with Bayer. Kowinsky told Outer that he had mentioned in his interview with Bayer, that Byrd and Mickus were always picking on or "coming at" Outer. Bayer began her interview with Outer, by apologizing to Outer for the way that Byrd and Mickus had been "coming up" and treating her.

25 After Kowinsky left the meeting with Bayer, he spoke to Outer before she went into the conference room to meet with Bayer. Kowinsky told Outer that he had mentioned in his interview with Bayer, that Byrd and Mickus were always picking on or "coming at" Outer. Bayer began her interview with Outer, by apologizing to Outer for the way that Byrd and Mickus had been "coming up" and treating her.

30 Outer informed Bayer that her shift is running fine and that she did not understand why people were making complaints against her. Outer added that she treats everyone fairly, but if people do not want to do their job, they're going to get feedback from Outer for it.

35 Bayer asked Outer, how does she offer information to her staff that might not be palatable to them. Outer replied that she would present it to the employees as if it was her idea.

40 Outer also informed Bayer during the interview, that she (Outer) was supportive of the move. The next employee to be interviewed was Montrise Jordan. She works in UGL-1 and 2, during the week, and in UGL-3 on some weekends. Jordan told Bayer that she loves her job and her co-workers, and that Mickus and Byrd are fair. However, Jordan stated that Outer was unprofessional and unfair. Jordan said that Outer showed

5 favoritism towards the staff she likes, by keeping them in UGL-3, while everyone else gets to work in UGL-1 and 2. Jordan also informed Bayer that Outer talks about the staff's personal business in front of other staff and that Outer screams at staff while other staff is around. Jordan also complained to Bayer that she had not had any full weekends off, although she had been working for Respondent since April.

10 David Irizarry worked in UGL-1. He told Bayer that he liked his job and had no complaints about anyone. Irizarry did inform Bayer that his only concern was having gift cards taxed on his paycheck. Irizarry also told Bayer that although he had not had any personal problems with anyone, that he had heard Outer yell at other staff members in his presence.

15 Joey Olcay was employed by Respondent for 3 years in UGL-1. Olcay said that Outer created a very hostile work environment. Olcay added that Outer talks down to the staff in front of others, reports to staff when someone is being written up, and changes rules when she see fit. Olcay also stated that Outer was unprofessional, blames others when things are wrong, and punishes the staff if they speak up about anything. Olcay complained that Outer keeps Kowinsky, Wolyzuk and Flipowicz in the same house (UGL-3) every night, and she sticks him (Olcay) in UGL-1 as punishment, which Olcay regards as "favoritism."

20 Erin Fracht was employed by Respondent, at the time of her interview for nine months, and worked in UGL-2. Fracht told Bayer that she has no concerns. Fracht said that she had heard about same issues from the staff about inequality, but in her opinion, some of the staff members are lazy and have no work ethic, and that is why they get yelled at. According to Fracht, Outer was fair, reasonable respectful and professional. Fracht also informed Bayer during her interview, that she was interested in a position as a behavioral analyst.

30 Mike McCarthy was employed by Respondent on the night shift, and was a military veteran, with reserve obligations, and the possibility of being deployed. McCarthy told Bayer that Outer was too aggressive, and screamed at staff members in front of everyone. He specifically referred to Outer screaming at employee Chris Brown and giving 3 write ups to employee Randy Saracco. He also sad that Outer had yelled at him once or twice. McCarthy accused Outer of having her favorites, and said that she treated everyone else like garbage. McCarthy informed Bayer that he was very upset that Outer had told him that he could not be an alternate supervisor, because he is in the reserves and he might get deployed, so he would not be a reliable supervisor. McCarthy told Bayer that this was illegal and that Respondent could be fined for this.

40 McCarthy also told Bayer in the course of their conversation, that Kowinsky, and Flipowicz and Outer were "all in on Union." McCarthy additionally informed Bayer that Kowinsky "gave out Union cards."

5 Randy Saracco informed Bayer during his interview, that Outer created a very hostile work environment. He accused Outer of calling people out in front of others, and discarding employee's time sheets that she is angry with. Saracco also stated that in the past he was required to cover for Outer, when she left early. Saracco also complained about not getting one weekend off per month.

10 Saracco also informed Bayer that Kowinsky was "starting union nonsense again." Saracco additionally referenced another employee of Respondent, Alexis Dunez stating that "Alexis Munez said Union cards."

15 Chris Brown complained that Outer was unprofessional and targets staff who she feels are reporting on her. Brown told Bayer that he was afraid of retribution for talking to Bayer, and added that Outer had told him that morning not to say anything bad about her in his discussion with Bayer. Brown also told Bayer that Outer had agreed to give him Christmas Eve off, but then revoked it after, Brown had told Byrd that he (Brown) hadn't been in UGL-3.

20 After Bayer completed her discussions with the employees, as detailed above, Bayer called Blough, and informed him about the substance of her conversations with the employees. Bayer told Blough that these was a consistent concern across the majority of staff members on the shift in regard to Outer; such as being treated unfairly by Outer, complaints about her interaction style and overall professionalism.

25 Bayer also informed Blough that Kowinsky had expressed concerns about recent moves that had been made and lack of confidence about the management team in a profane and unprofessional way, specifically repeating Kowinsky's comments that Byrd and Mickus "didn't know what the fuck they were doing," and referring to the clinicians as "jackasses."

30 Bayer expressed concerns that these comments made by Kowinsky, could potentially evidence in a way that he would address patients. Bayer expressed concern about Kowinsky's employment with Respondent, given his interactions and the potential, for that to be exposed to the individuals that Respondent serves. Bayer did not make a specific recommendation to terminate Kowinsky at that time.

35 Blough replied that he shared Bayer's concerns about Kowinsky's conduct, and directed her to contact O'Brien, to arrange for further discussions, concerning Kowinsky's continuing employment status with Respondent. Blough also asked Bayer to summarize her notes in writing and send them to him, so it could be reviewed and discussed with O'Brien on further deliberation of Respondent's decision.

40 Bayer as instructed telephoned O'Brien. Bayer informed O'Brien that she had finished interviewing employees on the night shift, who had expressed concerns about Outer, and that she (Bayer) had concerns about Kowinsky and the language that he used in their conversation. Bayer told O'Brien that Kowinsky had called all clinicians

“jackasses,” and stated that Mickus did not know “what the fuck she is doing”, and neither does Byrd. Bayer also discussed Outer’s performance and the concerns raised by her staff members about Outer. O’Brien asked if Bayer had reported these same issues to Blough. Bayer replied that she had and it was decided that the matters would be discussed later in a conversation with the three of us. (O’Brien, Blough and Bayer). Bayer also informed O’Brien that she was recommending that Kowinsky and Outer be terminated. Bayer explained to O’Brien that she was recommending that Kowinsky be terminated based on Kowinsky’s performance at the meeting with her. Bayer stated that based on the words that Kowinsky used, she was concerned how Kowinsky would potentially interact with individuals in Respondent’s program, and that it was appropriate to separate him at this time.

O’Brien testified that her reaction when Bayer reported Kowinsky’s comments to her was that she had concerns whether Kowinsky would be capable of managing his interactions appropriately with individuals that Respondent serves. O’Brien said if people didn’t have a level of appropriate communication with senior administrators, she wasn’t sure that they would have the same level of interaction with the endangered individuals that Respondent serves. O’Brien further testified that the Kowinsky’s statements troubled her, because the concerns that Kowinsky stated about not having any trust in the clinical program, and the clinical program is what guides the organization and their management of the program. O’Brien was asked about Kowinsky’s use of profanity, and O’Brien replied “that was concerning but in and of itself, wasn’t the biggest concern. The biggest concern was how he expresses his opinions about the program.”

Bayer testified that she then typed up from her handwritten notes a “verbatim” description of all her conversations with the night shift and sent it to Blough in an email. The email sent on 12/16/13 at 12:55 pm. is as follows:

I arrived at UGL at approximately 5:30 am on Monday, December 16, 2013. I began meeting with each staff individually in the listed order with their noted concerns as follows:

Todd Kowinsky: Todd indicated that he was very upset about a recent change in staffing in UGL on overnight. He explained that he was told by both Kim and Alana that it was for clinical reasons but he claimed “this is bullshit. All clinicians are jack asses and Kim doesn’t know what the fuck she is doing. She can’t make any decisions and neither can Rashad”. He also said the shift is just fine and the problems are with the admin not the staff.

Terri Outer: Terri stated that her shift is running fine and she doesn’t understand what the problem is with staff complaining. I asked her how does she present information to staff that may be received as unfavorable and she claimed she presents it as if it were her own idea. She denies skewing information and claims

that as far as she is concerned everything is good with her staff. She treats everyone the same and staff just don't like getting feedback.

5 Montrise Jordan: She stated that she loves her job and her co-workers as well as the individuals but finds her supervisor highly unprofessional and unfair. She claims she was told she would get one weekend off per month and hasn't since she started last April. (we are looking into this immediately) She says Terri shows favoritism toward the staff she likes by keeping them in 3 while everyone else gets to work in 1 and 2. She has heard her scream at staff while other staff is around. She also talks about the staff's personal business in front of other staff. She is used to working in a more professional environment and hopes things improve soon.

15 David Irizarry: Mr. Irizarry had no complaints at all. His only concern was having gift cards taxed on his paycheck. He said he has not had any personal problems with anyone although he had heard Terri yell at other staff members in his presence.

20 Jose Olcay: Joey was very vocal. He said that Terri has created a very hostile work environment. She talks down to staff in front of others, reports to staff when someone is being written up and changes the rules when she sees fit. He states she is utterly unprofessional, blames others when things go wrong and punishes staff if they speak up about anything. He said staff is all afraid to come forward because when they do she gives them crap detail or finds reasons to write them up.

25 Randy Saracco: Randy reports the same thing, very hostile work environment. Randy went as far as to say that several times in the past she completed her paperwork a day early and given it to him for the next day. Then she calls the evening shift sup to say she will be late and the day shift sup to say she had to leave early and then would not show up for shift. He says she is targeting him now because she thinks he is a "rat" because he comes to talk to the folks in admin. He also claimed that she discards people's time sheets that she is angry with.

30 Randy Saracco: Randy reports the same thing, very hostile work environment. Randy went as far as to say that several times in the past she completed her paperwork a day early and given it to him for the next day. Then she calls the evening shift sup to say she will be late and the day shift sup to say she had to leave early and then would not show up for shift. He says she is targeting him now because she thinks he is a "rat" because he comes to talk to the folks in admin. He also claimed that she discards people's time sheets that she is angry with.

35 Chris Brown: He was also very vocal. He claimed that Terri is totally unprofessional and targets staff who she feels are reporting on her. He said he was afraid of retribution for even being here today. He stated that just downstairs a few minutes prior Terri confronted him in the break-room and told him not to say anything bad about her. He said that when she has you in her sights she will do things like mysteriously lose your time sheet on Monday. He stated that she yells at staff in front of others and threatens staff that they are going to be fired for minor infractions such as being 3 minutes late for shift.

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Erin Fracht: Erin said she had no concerns. She feels staff is often lazy and have no work ethic and that's why they get yelled at. She felt Terri was fair and reasonable.

5 Mike McCarthy: Terri is too aggressive, screaming at staff members in front of everyone. She has her favorites and everyone else is treated like garbage. He was very upset that she told him he could not be an alternate supervisor because he is in the reserves and he might get deployed so he would not be a reliable supervisor. He was visibly angry stating that this was illegal and he could have us
10 fined for this. He basically said she is nasty, angry and unprofessional and the morale of staff even on others shifts is down because of her. No one wants to work night shift and have to deal with her screaming and yelling at them all night.

15 In passing I also heard from Chris Outer who said he will not work overnight because of Terri even though she is his aunt. I simply asked him how evening shift was doing and he proceeded to tell me that its fine until Terri gets on shift. He said the other night Bartsch left her a note asking her to run a fire drill and not realizing Bartsch was in the next room yelled loudly "fuck that, I'm not doing that
20 shit". Bartsch then walked back in the room and said, "fine don't do it" and walked away.

While he was telling me all of this, Danielle Verblaau came in and laughed saying she wished her phone hadn't broken yesterday so she could show me all the
25 nasty things Terri has sent to her via text.

I think we can come to the conclusion that Ms. Outer should not be supervising
30 staff based on these accounts.

My factual findings detailed above derived from a compilation of the credible
35 portions of the testimony of Kowinsky, Outer, Paterno, O'Brien and Bayer, Bellizzi and Schackmann, as well as from the handwritten notes that Bayer took of her conversations with the night shift employees and Bayer's email to Blough. In that regard, I note that while Bayer testified that her email sent to Blough, allegedly recanted a "verbatim" recanting of her discussion with the employees, in fact this testimony was
40 not truthful. Although Bayer further testified that she destroyed copies of written notes, after she sent the email versions to Blough, it turns out that a copy was made of Bayer's notes. Bayer was shown the notes at trial and identified the notes at trial as her signature and conceded that the notes represented the most accurate statement of what was stated during her conversations with employees on December 16, 2013.

45 Further, Bayer's notes contained reference to comments made by employees Saracco and McCarthy about the Union such as Kowinsky "is starting Union nonsense again and that Kowinsky, Lipowitz and Outer were "all in on union", and Kominsky "gave out union cards". Additionally, Saracco stated that employee "Alexis Munez said union cards."

5 I have included these comments in my findings of fact, as statements made by these employees to Bayer on that date, which Bayer implicitly conceded were made although amazingly, at trials he asserts that she did not recall these statements about the Union by the employees. When asked why she didn't include them in the email to Blough allegedly describing the conversations, Bayer testified that since her task during the meetings was only to discuss complaints about Outer that she decided to only include such subjects in her report to Blough.

10 I find Bayer's testimony on this subject to be not credible and that her testimony in general to be unworthy of belief. I find that her email to Blough which eliminated any reference to union activity to Kowinsky or other employees, although these comments were made to her by employees was done intentionally, to preclude any references to union activities in Respondent's records. This conduct reflects poorly on Bayer's
15 credibility as a witness and I rely on it, as well to discredit her testimony where it conflicts with the testimony of Outer, Paterno and Kowinsky in various respects. I have credited Paterno concerning her testimony as to the Bayer and Mickus questioning Paterno in October of 2013 if she knew about the union starting up again and asking her whether Kowinsky was behind the union's removal.

20 I also rely on the fact that Mickus did not testify and did not deny Paterno's testimony which I have credited that Mickus and Bayer made these statements to her. While Bayer did deny that she made the comments attributed to her and Mickus by Paterno, I credit Paterno and discredit Bayer's denials that such conversations
25 occurred. I note further in this regard, that Paterno is still an employee of Respondent, and that she testified contrary to the testimony of her supervisor. Such testimony is likely to be particularly reliable. *Farris Fashions*, 312 NLRB 547, 554 fn. 3 (1993) enf. 32 F.3d 373 (8th Cir. 1994), *Gold Standard Enterprises*, 234 NLRB 618, 619 (1988), *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006). *Bloomington Normal Seating Co.*, 334 NLRB 141, 143 (2003).

30 I have essentially credited Kowinsky's version of their conversation on December 16, 2013 over that of Bayer's. In that regard, I find Kowinsky's testimony with respect to the meeting to be far more detailed, trustworthy and reliable. Kowinsky credibly testified
35 that he had requested meeting with Respondent's higher officials to discuss concerns of he and his coworkers about the staffing changes announced at the monthly staff meeting. Outer corroborated Kowinsky's testimony in this area and credibly testified that she informed Byrd of Kowinsky's request and Byrd subsequently informed her, that Bayer would be coming to meet with employees, pursuant to that request. Further Outer
40 informed her shift that the requested meeting was going to take place on December 16, 2013, and that the purpose of the meeting was to address concerns with the rotation of employees. Significantly, Byrd did not testify, nor did Mickus. Thus Outer's testimony as to the purpose of the meeting as reflected above is credited and is consistent with Kowinsky's testimony.

Further Bellizzi, Respondent's own witness, corroborated Kowinsky's testimony in contradiction to Bayer's. Thus Bellizzi testified that she, as well as Mictus and Byrd, were present in the office, when Bayer told them that they (Mickus, Byrd and Bellizzi) would not be participating in the meetings due to the staff's desire to meet with her (Bayer) privately.

I also rely on Kowinsky's candid and forthright admission that he referred to clinicians as "jackasses" and told Bayer that Mickus and Byrd did not know what the "fuck they were doing."

Bayer's testimony about the meeting was evasive, illogical and generally unworthy of belief. As noted above, Bayer testified that Kowinsky was the only employee who mentioned anything other than about Outer that day, and that she had no knowledge of the 2013 organizing campaign or suspicion of any union activity at Respondent's facility. She further testified that she translated her handwritten notes of the meeting verbatim into the email that she sent to Blough later that day. However, her handwritten notes, shown to and identified by her, establish that her testimony was untruthful and unreliable. They establish that several employees specifically mentioned subjects other than Outer, and that these employees specifically mentioned Kowinsky's union activities, as well as union activities of other employees. It is inexplicable for Bayer to testify that she had no knowledge or suspicions of union organizing when she herself wrote that employees told her that Kowinsky was "starting up the union nonsense again" and that he was "all in regarding the Union." Instead of acknowledging these blatant discrepancies, Bayer, at trial feigned ignorance and stubbornly professed an inability to recall these events. I agree with General Counsel that the above reveal Bayer to be an untruthful witness who was unable or unwilling to admit having fabricated a significant position of her direct testimony.

I also note that Bayer in her testimony denied that she ever was aware of Kowinsky's union activities and support during the 2012 union campaign. This testimony is even contradicted by Respondent's stipulation that it was aware of Kowinsky's union activities in 2012, as well as Blough's testimony that he was well aware of Kowinsky's union activities and support during the 2012 union campaign. Indeed, Respondent as will be detailed below, relies on those facts in arguing that since it did not discharge Kowinsky after his union activities, when it could have done so, in the summer of 2013, when he was suspended twice for misconduct, that establishes the December 2013 discharge of Kowinsky was not motivated by his union activities.

Thus Bayer was so intent on disclaiming knowledge of any union activities or support by Kowinsky that she even contradicted the stipulation and testimony of Respondent's own witness, that Respondent was aware of Kowinsky's 2012 union activities and support.⁵

⁵ I note that Bayer was not present at trial, when Blough testified, or when the stipulations was entered into

5 Finally, I have credited Outer's testimony as detailed above, that at the administration meeting held in the fall of 2014, Bayer announced that she believed that there were union meetings taking place on the night shift, because there were strange cars coming in and out of the driveway at night. Bayer added that if she finds out who is responsible (for the union), she will "fire our asses."

10 While Bayer denied making these comments, or indeed any statements about union activities at administration any meetings that she attended, I have not credited Bayer's testimony in general for the reasons, I have detailed above, and I did not credit her denials of Outer's testimony in this instance as well.

15 I rely on the corroboration of Kowinsky of Outer's testimony, in that Outer told him in the presence of Lipowitz and Wolyzuk, that the employee should "watch your asses," because the administration believes that there were union meetings taking place on the night shift.

20 I also note the failure of Respondent to call either Mickus or Byrd to testify and corroborate Bayer's denials and refute Outer's testimony about Bayer's reference to union activity at the meeting and her threat to "fire our asses." The failure of Respondent to call either Mickus or Byrd to corroborate Respondent's series of events, leads to an adverse inference that I find appropriate to draw that their testimony would have been adverse to Respondent if they had been called to testify. *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), enfd, 851 F.2d 25 720 (6th Cir. 1988).

30 While Respondent did call three witnesses who were present at administration meetings, Sokoly, Bellizzi and Schackmann, and they each testified that they did not recall Bayer making any comments about the Union or firing employees during the administration meetings that they attended, I do not credit their testimony in this regard. Sokoly did not even work at UGL in 2013, and admitted that she did not attend every administration meeting during this time period. Schackmann refused to even admit that Kowinsky was a good employee, despite her glowing praise of his work performance in 35 "way to go" a month prior to his termination, and Respondent's own stipulation that "there is no dispute that Kowinsky was recognized as a good employee." I thus find that her repeated attempts to deny the obvious, leads me to conclude that her brief, evasive testimony should not be credited. Moreover, I also note that Schackmann testified that nobody from Respondent ever stated whether they were for or against the Union. This 40 testimony is refuted by the undisputed evidence that Respondent, ran a vigorous anti-union campaign in 2012, and it strains any credulity that Schackmann did not receive this message. Thus Schackmann's allegedly supportive testimony of Bayer's version of the conversations is unworthy of credit.

As for Bellizzi I found her to be a credible witness, who appeared to be recounting the facts to the best of her recollection, without trying to slant her testimony, to form what witnesses believed might be favorable to Respondent, as did Bayer and Schackmann, as I have observed above.

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 However, Bellizzi was somewhat equivocal in her alleged denials that of having heard Bayer bringing up the Union in any administration meeting, or bringing up strange cars coming and goings or making a statement that she would fire anyone who supports unionization. Thus she testified that she did not remember any of these statements at any meetings, but did not unequivocally deny that Bayer made such comments at any meetings that Bellizzi attended. To the extent that Bellizzi's testimony can be understood as a denial that Bayer made these statements, Bellizzi's supportive testimony is outweighed by the lack of credibility of Bayer's testimony, the person who made the statements that I have credited above as well as the adverse inference that I draw from Respondent's failure to call either Mickus or Byrd to corroborate Bayer's version of events. I note in this regard that Byrd and Mickus were the direct supervisors of Kowinsky and were Respondent's supervisors that Kowinsky criticized (using foul language) for their actions and performance which led to Kowinsky's discharge according to Respondent. Further Mickus and Byrd were both aware of the fact that Kowinsky as well as other employees had criticized the rotation plan for night shift employees announced by Respondent at the night shift meeting, which led to the meeting between Bayer and Kowinsky and the other night employees on December 16, 2013. Therefore it is appropriate to draw an adverse inference against Respondent for its failure to call Mickus and Byrd as witnesses and conclude that their testimony would have been adverse to Respondent with regard to these issues. *Hialeah Hospital supra, International Automated Machines, supra.*

G. The Termination of Kowinsky

30 On 12/30/13 Blough sent Kowinsky a text message notifying him of his termination. The text message reads as follows:

Hello Todd this is Darren.

35 After attempting to arrange an in-person conference and then making multiple attempts to call you that have been avoided, I feel it is incumbent to conclude what needs to occur. Effective immediately, your employment has been terminated. A letter will be forthcoming further explaining this matter and as always you have a right of appeal.

40 I wish you the best on your future endeavors.

45 Three or four days later, Kowinsky received a document in the mail, from detailing the reasons for his discharge, entitled Advoserv Disciplinary Action Form. The document is signed by Blough and dated 12/30/13. It reads:

Concern: Behavior inconsistent with the Professional nature of the organization.

During the course of Investigation, concerns have been raised regarding your ability to conduct yourself in a manner that is sufficient to support the individuals served in the program.

When Interviewed, on December 16, 2013 in response to concerns from coworkers about negative interactions and problems on the shift, you stated that “this is bullshit. All clinicians are jackasses and Kim doesn’t know what the fuck she is doing. She can’t make any decisions, and neither can Rashad.”

While Advoserv respects your right to your opinion regarding personnel and operations, as a result of the inappropriate language and tone used in a professional setting, AdvoServ has significant concerns regarding your interactions with coworkers and individuals served. As such, Advoserv can no longer maintain the employment relationship. Your employment with the organization is hereby terminated, effective December 30, 2013.

After Kowinsky received the text message and the letter explaining Respondent’s decision, Kowinsky telephoned Blough. Kowinsky expressed his concerns about Respondent’s actions to terminate him. Blough replied that Kowinsky was discharged for his unprofessional conduct and his unprofessional interactions with the assistant state director, (Bayer), and Respondent’s concerns that these interactions may occur with individuals that Respondent serves outside the presence of supervisors. Kowinsky responded, “so I’m being fired because the administration is a bunch of clowns and I said so.” Blough answered that this is an example of the lack of confidence Kowinsky had in Respondent’s administration, and his conduct in expressing that in an unprofessional manner. Kowinsky asked about the appeal process, and Blough provided Kowinsky with information about the appeal.

Respondent referred in its letter to Kowinsky to “Behavior Inconsistent with the Professional Nature of the Organization,” as the basis for its decision to terminate Kowinsky. In that connection Respondent provides a manual to employees which details personnel guidelines and practices, including disciplinary procedures and employee conduct.

After the table of contents, the handbook’s section entitled “INTRODUCTION,” reads as follows:

This handbook is intended to provide employees with a general understanding of AdvoServ’s personnel guidelines and practices in conjunction with AdvoServ’s Policy Manual. It is essential that employees familiarize themselves with its contents, as it will answer many common questions employees may have. However, it cannot anticipate or address

every situation or question. For this reason, consider your immediate Supervisor a valuable source of information, and feel free to approach him/her with any questions you may have.

5 Employee handbook provisions are not contractual, and AdvoServ reserves the right to modify, delete, add, amend, change or revoke any or all guidelines or practices at any time for any reason, with or without advance notice. AdvoServ reserves the right at its discretion to apply or not apply all or some of the guidelines or practices contained in his
10 handbook.

AdvoServ and its employees have the right to terminate his/her employee relationship at will. AdvoServ reserves the right to terminate any
15 employee at any time for any lawful reason.

Employment at Advoserv is not to be construed as a guarantee of employment for any specific period of time or specific type of work. All assignments and continued employment will depend upon satisfactory performance and AdvoServ's determination of need for the services.
20

This handbook and the guidelines and practices contained herein supersede and revoke any and all prior or past guidelines or practices, oral or written representations or statements that are in conduct herewith.

25 The handbook then lists a number of examples of prohibited conduct, including using profanity, stealing, and behaving in an insubordinate manner. The list goes on to say that the examples of impermissible behavior listed above are not intended to be an all-inclusive list.

30 Later on in the Manual, is a Section entitled "Disciplinary Procedures." It reads:

DISCIPLINARY PROCEDURES

DISCIPLINARY GUIDELINES

35 AdvoServ is committed to providing the best possible working conditions for its employees. Each employee is entitled to be treated with respect, dignity and courtesy. Each employee is obligated to give the organization his/her cooperation, loyalty, personal interest and to comply with AdvoServ rules, guidelines and practices.
40

In the interests of creating an effective work environment, AdvoServ has established a disciplinary process for situations that merit correction. Supervisors and administrators shall initiate prompt action to discipline an employee when these rules, guidelines and practices are not followed or
45 when it is evident that such action is necessary to maintain an orderly and

productive work environment. The severity of the disciplinary action shall be in keeping with the nature or gravity of the offense.

5 It is expected that this procedure will eliminate the need for further action. However, should the process not produce the desired result, AdvoServ may terminate the employee.

10 An employee who violates any of AdvoServ's rules and regulations or standards of employee conduct shall be subject to disciplinary action as set forth in the following Disciplinary Action Grids of Progressive Discipline. However, all applications of the grid shall be at the sole discretion of AdvoServ. In some instances AdvoServ may choose to ignore the progressive nature of the grid as a result of a breach of conduct as it relates to the safety or abuse of persons and/or property, or the
15 aggravating circumstances of several or more violations of various conduct standards. In every instance AdvoServ will strive to be fair and consistent.

20 In the application of the progressive portion of the Disciplinary Action Grid, any action (s) within a particular category that is twelve months or more before the last offense within that category will not be counted within the progression, however, multiple offenses, or evidence of patterned behavior may be used to determine aspects of evaluations, promotions, demotions and continued career tracking.

25 The next several pages are entitled Disciplinary Grids and divides offenses into Group One and Group Two offenses, with different progressions listed for each offense. Group One offense lists 17 offenses, which are of the less serious nature than Group Two offenses and provide for more extended progressional disciplinary steps. For
30 example, one of the Group One offenses is entitled "obscene, profane or abusive language." For this offense, the grid lists the following disciplinary progression. 1st offense – written reminder, 2nd offense – written warning, 3rd offense- suspension to termination and 4th offense – termination. Another example is entitled, "Behavior inconsistent with the nature of the organization, e.g. Discourtesy to Another." I note that
35 this statement was referenced in Kowinsky's termination notice. The progressive discipline listed for this offense is, 1st offense – written reminder, 2nd offense – written warning to suspension, 3rd offense – suspension to termination, and 4th offense – termination.

40 Group Two offenses include willful destruction of or abuse of individual staff, or organization property and theft of the organization and violence or fighting with other employees or individuals served or visitors to the workplace. For these offenses, the grid lists first offense, suspension or termination, and second offense, termination. Another step two listing is "sleeping on the job or placing oneself in a position conducive
45 to sleeping on the job." For this offense, the grid lists 1st offense written warning to

5 termination, 2nd offense written warning to termination, and 3rd offense, termination. Another offense listed is entitled "Endangering the health and welfare of individuals we serve, and employee or organization guests. For this offense the progression is 1st offense written warning to termination, 2nd offense suspension to termination, and 3rd offense, termination.

10 Subsequent to the receipt of the letter of discharge from Respondent, Kowinsky retained an attorney to represent him in his appeal of Respondent's discharge decision. His attorney, Edward Azar sent the following letter to Respondent:

January 20, 2014

15 AdvoServ
Katherine O'Brien, Human Resources
2520 Wrangle Hill Road, Suite 200
Bear, DE 19701

Dear Ms. O'Brien:

20 Please be advised that our office represents Todd Kowinsky, a former employee of AdvoServ.

25 Mr. Kowinsky was wrongfully terminated by AdvoServ on or about December 30, 2013. In reviewing this matter with Mr. Kowinsky, it is clear and unequivocal that AdvoServ has failed to comply with the provisions and guidelines set forth in their employee manual and the disciplinary procedure provided therein.

30 Furthermore, it appears that one of the motivating factors for terminating Mr. Kowinsky was his recent recovery of a significant worker's compensation claim against AdvoServ.

35 Pursuant to your disciplinary action form, Mr. Kowinsky does hereby request an appeal of his termination. Mr. Kowinsky has indicated his intent to institute legal proceedings against AdvoServ for any and all damages regarding this matter. I would like to discuss a resolution and reinstatement of Mr. Kowinsky immediately and without any further delay. If it cannot be resolved, it is his intention to proceed further. Please be guided accordingly.

40 Very truly yours,

Edward P. Azar

45 EPA/JC

Cc: Todd Kowinsky

On February 4, 2014, Azar received the following response from Respondent's
General Counsel, Harlow Middleton:

5

February 5, 2014

10

Edward P. Azar, Esquire
Law Offices of Edward P. Azar, LLC
Gallant Professional Building
2840 Route 23 South
Newfoundland, NJ 07435

15

Re: *Todd Kowinsky*

Dear Mr. Azar:

20

Thank you for your letters of January 20, 2014 and January 31, 2014. I apologize for being tardy in my reply, but had to gather facts and materials.

25

Mr. Kowinsky was terminated from employment on December 30, 2013. Per the Employee Handbook, he had ten (10) days within which to appeal the disciplinary action. Your letter of January 20, 2014 requests an appeal. Although it is outside the time allowed, AdvoServ of New Jersey, Inc. will waive the appeal time in order to allow Mr. Kowinsky due process.

30

Please send your Letter of Appeal to the attention of Robert Bacon, Chief Operations Office and Katherine O'Brien, Director of Human Resources for AdvoServ of New Jersey, Inc., 2520 Wrangle Hill Road, Suite 200, Bear, Delaware 19701.

35

I would suggest you give Mr. Kowinsky's version of the facts and his reasons for believing the termination was in error. I would suggest you have it to them by February 16, 2014.

Very truly yours,

40

Harlow C. Middleton
General Counsel

45

HCM: bah

Cc: Robert Bacon, Chief Operations Office; AdvoServ of New Jersey, Inc.

Katherine O'Brien, Director of Human Resources; Advoserv of New Jersey, Inc.

On April 1, 2014, Middleton sent the following letter to Azar:

Edward P. Azar, Esquire
Law Offices of Edward P. Azar, LLC
Gallant Professional Building
2840 Route 23 South
Newfoundland, New Jersey 07435

Re: Todd Kowinsky; Appeal of Termination

Dear Mr. Azar,

An appeal Review will be held on Tuesday, April 22, 2014 by Katherine O'Brien, Robert Bacon and Darren Blough at the Doubletree by Hilton Hotel Mahwah, 180 Route 17 South, Mahwah, New Jersey 07430.

The issue to be reviewed under the Appeal is "Was Todd Kowinsky wrongfully terminated for behavior inconsistent with the professional nature of the organization.

The following documents will be reviewed for the appeal:

1. The AdvoServ Disciplinary Action Form
2. Text from Darren Blough to Todd Kowinsky notifying of separation
3. Statement from Darren Blough regarding follow-up phone call
4. Pages 30 through 33; and 46 through 52 of the Employee Handbook
5. Your letter dated January 20, 2014 as basis for appeal.

If you have any other evidence you would like reviewed to the point of the appeal, please provide ten (10) days prior to the appeal date, so that it can be reviewed and the additional material provided to the Appeal Review for rebuttal purposes.

Also, in your letter dated March 24, 2014, you indicated that the Employee Handbook is a contract. That is not correct. The handbook is a guideline that can be altered by the Employer without notice. All, a part, or some can be applied in a situation at the discretion of the employer. The employment is explicitly "employment at will". Please see the handbook.

The Appeal Hearing, which is reflected in the above correspondence, was held on April 22, 2014 in Mahwah, New Jersey as scheduled. Present were Azar, Kowinsky, O'Brien, Blough and Bob Bacon.

5 Azar raised again the contention of Kowinsky, that Respondent retaliated against him because of his workmen's compensation claim, and also asserted that Kowinsky would love to have his job back. Azar further contended that the infraction that Respondent cited for Kowinsky's discharge was a tier 1 violation and that termination should not be issued until the fourth violation for the offense. Thus, Azar asserted that Kowinsky should not have been discharged until the fourth violation, and that Kowinsky would like to have his job back. Azar conceded that Kowinsky used the F word in his conversation with Bayer and used other "flavorful vocabulary."

10 Bacon responded that the level of gravity of the offense committed by Kowinsky was beyond the disciplinary grid.

15 Kowinsky stated that he did not know that the meeting with Bayer was an investigation, and noted that he had asked for a meeting because of concerns by the shift about how the night shift was being treated. Kowinsky said that the night shift employees were being treated unfairly, since other employees on other night shifts do not have to move.

20 Blough responded that Respondent's goal was to shift staff to prevent unfair allegations by the clients.

25 Kowinsky responded that he had spoken to the behavior analysts, and the residents shouldn't be telling the workers when to work and where to work. Kowinsky added that it is unfair to switch the employees, because of statements made by clients about behavior of employees. Kowinsky, suggested why move staff, and why not move the residents.

30 Blough interjected that if allegations are made by a resident, Respondent must take some action.

35 Kowinsky recounted that he had asked for a meeting, and that Bayer came in response. Kowinsky, also asserted that he believed that the "closed door" meeting was an open forum, and that Respondent was "after Terri Outer." Kowinsky stated the rotation system made no sense, and admitted that he said to Bayer that the analysts were "jackasses," and that they don't know what they are talking about. He also recounted that he told Bayer that "Kim don't know how to make a fucking decision, and neither did Rashad." After he made that comment, Kowinsky stated that Bayer replied, "Why the fuck won't you take the supervisor position?" Kowinsky also added that Bayer
40 laughed when he made his comments about Mickus and Bryd, and that Bayer never said to Kowinsky at the meeting that his remarks about them were inappropriate. Kowinsky further stated that he had told Bayer at the meeting that when things are straightened out, he would be glad to take the supervisory job. Kowinsky added that Respondent should have a closed door policy, with confidence to talk about issues.
45

5 Bacon asked Kowinsky if Bayer had used derogatory language about others. Kowinsky replied that Bayer had not used derogatory language about others, except that Bayer had referred to 1199 as “those fucking assholes.” Kowinsky also made reference to the fact that when he mentioned the union, in his conversation with Bayer, that she then pulled out her pen and started writing. Apart from the above comments made by Kowinsky, about statements made by him and Bayer about the Union at their meeting, Kowinsky did not assert at the appeal hearing, (nor did his attorney), that Kowinsky was terminated because of his activities and support of the Union.

10 Kowinsky also admitted that when he spoke to Blough about his discharge, he stated to Blough, “I can’t believe I’m being fired because a bunch of clowns are running this place.”

Bacon then asked if Kowinsky had so many concerns about the leadership of Respondent, “why did he want to work there”?

15 Kowinsky replied that he liked his job, liked what they were supposed to do, and did not think it’s a problem with the supervisors. Kowinsky added that “we’re workers, and they use to care about how we feel.” Kowinsky also commented about the lack of professionalism among Respondent’s administrators and provided an example of Byrd saying “shut the fuck up,” to one of Respondent’s employees.

20 Azar stated that Kowinsky should be more polished about the way he approaches the administrators, and proposed that Kowinsky be permitted to take a sensitivity training course as a condition of returning to work.

25 Kowinsky responded that he knew how to behave or speak when he needed to, and that he always felt comfortable talking to Bayer, Byrd and Mickus.

30 Bacon asked Kowinsky if he was permitted to return to work, would he “be more respectful and professional?”

Kowinsky replied “yes, I would 100% be more respectful and professional.

35 Azar then reiterated that the goal was for Kowinsky to get back to work. He asked a question if there were classes available concerning behavior and professional behavior. No one responded to that inquiry.

40 The parties however agreed that Respondent would provide a response to the appeal within 10 days.

On May 1, 2014, O’Brien sent Azar a letter denying Kowinsky’s appeal. The letter reads as follows:

May 1, 2014

45 Edward P. Azar, Esquire
Law Offices of Edward P. Azar, LLC

Gallant Professional Building
2840 Route 23 South
Newfoundland, New Jersey 07435

5 Re: Todd Kowinsky; Appeal of Termination Findings

Dear Mr. Azar,

10 An Appeal Review was held on Tuesday, April 22, 2014 by Appeal Committee Katherine O'Brien, Robert Bacon and Darren Blough at the Doubletree by Hilton Hotel Mahwah, 180 Route 17 South, Mahwah, New Jersey 07430.

15 The issue reviewed under the Appeal was "Was Todd Kowinsky wrongfully terminated for behavior inconsistent with the professional nature of the organization?"

The following documents were reviewed by the Committee prior to the appeal:

- 20
1. The AdvoServ Disciplinary Action Form
 2. Text from Darren Blough to Todd Kowinsky notifying of separation
 3. Statement from Darren Blough regarding follow-up phone call
 4. Pages 30 through 33; and 46 through 52 of the Employee Handbook
 5. Your letter dated January 20, 2014 as basis for appeal.
- 25

You initiated conversation during the review, indicating that Mr. Kowinsky wanted to resume his position, and that in your opinion, AdvoServ did not strictly adhere to the disciplinary grid provided in the employee handbook. When offered the opportunity to present his perspective, Mr. Kowinsky stated his desire to return to his position. When asked to describe events leading to termination, Mr. Kowinsky acknowledged the statements he made to the Assistant State Director, but did not express any remorse for those statements. Mr. Kowinsky referenced other's behavior and use of profanity, although he admitted that others did not direct such behaviors toward another AdvoServ employee in a derogatory or insulting manner.

30

35

In further conversation, Mr. Kowinsky made statements regarding his negative opinion of personnel actions taken by the organization, including worksite reassignments based on resident needs. Mr. Kowinsky demonstrated a lack of understanding of the clinical needs of individuals served, necessary client safeguards and overall respect for the living arrangements of our individuals. While staff preferences are important to the organization, the ultimate guide for every decision made must first and foremost be the welfare of client. Mr. Kowinsky's testimony clearly delineates his opinion that staff needs should take precedence over the needs of our individuals.

40

45

5 During the review, it is noted that you asked Mr. Kowinsky whether he would be willing to participate in sensitivity training as a condition of return, and redirected Mr. Kowinsky's negative response to your suggestion. At the close of the review, Mr. Kowinsky was asked again about sensitivity training, and stated that he knows how to act professionally when needed.

10 In the Committee's review on the handbook and application of the disciplinary grid per your appeal that the disciplinary grid was not followed, the Committee notes that the introductory paragraph to the Discipline Grid, page 46 of the Employee Handbook, it is explicitly stated that "all application of the {disciplinary} grid shall be at the sole discretion of AdvoServ." As such, the decision to terminate Mr. Kowinsky's employment for unprofessional conduct is consistent with the guidelines presented within the Employee Handbook. Further, although
15 Mr. Kowinsky expressed a desire to have his job back and indicated his love for his job per his testimony, the Committee does not believe that his feelings toward the program or its management have significantly changed, nor does the committee believe there will be a change in Mr. Kowinsky's opinion or behavior if returned to work. Finally, the Committee notes that throughout the hearing
20 phase, Mr. Kowinsky refused any positive recommendations from his attorney.

25 After careful assessment of the application of the Employee Handbook, the statements made by Mr. Kowinsky during the review on April 22, his lack of enthusiasm or agreement with suggestion by his own attorney, and all documents mentioned above, the consensus of the Appeal Committee is to uphold the original decision to terminate employment. The Committee did not feel that Mr. Kowinsky's reinstatement was in the best interest of the organization and the individuals it serves, or that the decision to terminate was made properly.

30 Very truly yours

Katherine O'brien, M.S., PHR
Corporate Human Resources Director

35 Cc Robert Bacon, CCO
Darren Blough, New Jersey State Director
Harlow Middleton, General Counsel

40 Azar responded with the following letter dated May 14, 2014.

45 Law Offices
Edward P. Azar, L.L.C
Gallant Professional Building
2840 Route 23 South

Newfoundland, NJ 07455

May 14, 2014

5

Katherine O'Brien, M.S., PHR
Corporate Human Resources Director
Advoserv
10 2520 Wrangle Hill Road – Suite 200
Bear, DE 19701

RE: Todd Kowinsky – Appeal

15 Dear Ms. O'Brien:

I acknowledge receipt of your correspondence of May 1, 2014. Your
Decision is unfortunate. I believe that clearly the decision by Advoserv is actionable
and it is Mr. Kowinsky's intent to file litigation against Advoserv for his wrongful
20 termination. You should also be aware that my client will make an allegation of a
violation of the law against discrimination. Further, the decision to terminate Mr.
Kowinsky shortly after Mr. Kowinsky was successful in his Worker's Compensation
lawsuit against Advoserv. There is no doubt that his award entered into the
determination to terminate Mr. Kowinsky.

25

You should also be aware that in the event Mr. Kowinsky is successful in his litigation it
is our intent to seek the imposition of damages and legal fees as provided by law.
Please be guided accordingly.

30

Very truly yours

Edward P. Azar

35

O'Brien replied to Azar's letter of May 14, 2014, with a letter dated May 20, 2014
as follows:

40

May 20, 2014

Edward P Azar, Esquire
45 Law Offices of Edward P. Azar, LLC

Gallant Professional Building
2840 Route 23 South
Newfoundland, New Jersey 07435

5 Re: Todd Kowinsky; Appeal of Termination Findings

Dear Mr. Azar,

10 AdvoServ received you letter of May 14, 2014.

We disagree with your assertion that Mr. Kowinsky's termination was wrongful, or that he was terminated in any manner or for any reason that would violate the law against discrimination.

15 Mr. Kowinsky's worker's compensation award was definitely not a factor in the decision to terminate; as previously stated, none of the parties involved in the decision to terminate had any knowledge of the worker's compensation award. Mr. Kowinsky was successful in his worker's compensation claim based on the injury/illness
20 sustained, and the award was made under the fully-guaranteed insurance policy, with no impact to the organization.

Mr. Kowinsky was terminated for his behavior on December 16, 2013, and the unprofessional language and direction thereof, along with Advoserv's resultant concerns regarding Mr Kowinsky's ability to interact professionally with individuals
25 served.

Very truly yours,

30 Katherine O'Brien, M.S PHR
Corporate Human Resources Director

cc. Robert Bacon, COO
35 Darren Blough, New Jersey State Director
Harlow Middleton, General Counsel

As noted above, on June 14, 2014, the Union filed its charge, alleging that Respondent discharged Kowinsky in retaliation for his participation in protected
40 activities on behalf of and in support of the Union.

My findings above concerning the events at the April 22, 2014 Appeal Hearing is derived from a compilation of the credited portions of the testimony of O'Brien, Blough and Kowinsky, plus O'Brien's notes of the Appeal Hearing.
45

Most of the facts and comments made are not in dispute. However, Kowinsky testified that he specifically agreed to his attorney's suggestion at the meeting, that he would take sensitivity courses as a condition of his reinstatement. I do not credit Kowinsky's testimony in that regard. I note that both Bayer and Blough denied that he did so, and most significantly O'Brien's notes didn't reflect that Kowinsky agreed to his attorney's suggestion. Although the notes did not reflect that Kowinsky unequivocally rejected his attorney's idea, it does indicate that his response was that he always felt comfortable talking to Bayer, Byrd and Mickus which is consistent with O'Brien's testimony that I have credited that Kowinsky responded that he knew how to behave and speak when needed to. Further, I note that in Respondent's letter rejecting Kowinsky's appeal, O'Brien specifically stated that Azar had asked Kowinsky at the hearing whether he would be willing to participate in sensitivity training as a condition of returning and "redirected Mr. Kowinsky's negative response to your suggestions. Mr. Kowinsky was asked again about sensitivity training, and stated that he knew how to act professionally when needed." O'Brien further commented later in her letter after explaining the reasons why Respondent terminated Kowinsky and why it would not change its mind after the Appeal. O'Brien stated "finally, the committee noted that throughout the hearing phase, Mr. Kowinsky refused the positive recommendations from his attorney."

Notably, when Azar responded to O'Brien's letter on May 14, 2014 stating that Respondent's decision was unfortunate, and that Kowinsky intends to file litigation for wrongful termination and make an allegation of violation of the law against discrimination, Azar did not dispute O'Brien's assertion in her letter that Kowinsky had made a negative response to Azar's suggestion at the Appeal Hearing that Kowinsky participate in sensitivity training as a condition of his return to work with Respondent.

Based on the above factors, I do not credit Kowinsky's testimony that he agreed to take a sensitivity training course as suggested by his attorney at the Hearing; and instead that he responded as I have detailed above, that he knew how to behave when he needed to, and that he always felt comfortable talking to Bayer, Byrd and Mickus.

Blough, Bayer and O'Brien all testified concerning Respondent's decision to terminate Kowinsky and to some extent Outer. They testified consistently that the decision to discharge both Kowinsky and Outer was made during a conference call involving these three participants. With respect to Outer, she was terminated because of insufficient performance of job responsibilities and behavior inconsistent with the professional nature of the organization, including Outer's comments to service member McCarthy that he could not be promoted to supervisor because of his reserve commitments. The disciplinary form sent to Outer dated 12/30/13, explained her termination as follows:

EMPLOYEE: Terri Outer
DATE: December 30, 2013

CONCERN Behavior Inconsistent with the Professional Nature of the Organization, Insufficient Performance of Assigned Responsibilities

During the course of investigation into your willingness and ability to

5 conduct yourself within the professional boundaries required of a Program Supervisor, it has been determined that your communication with coworkers and subordinates, your pattern of reactive behavior toward subordinates, and specifically, your discriminatory statements regarding military service members, do not comport with the expectations of the organization.

10 You have been provided feedback regarding inappropriate interactions with subordinates as recently as October 2013, as well as written feedback regarding insufficient performance in March 2013.

15 As a result of the cumulative nature of the concerns identified, and the lack of improvement occasioned by the feedback previously provided, AdvoServ can no longer maintain the employment relationship. Your employment with the organization is hereby terminated, effective December 30, 2013

TYPE OF ACTION TAKEN;

- 20 Documented Counseling
- Written Reminder
- Written Warning
- Suspension – Number of Days
- X Termination

25 With respect to Kowinsky's termination the participants discussed Kowinsky's conduct at the December 16 meeting with Bayer, his use of profanity in expressing his concerns to Bayer, and his opinions about the program and the administrators and supervisors utilized by Respondent to run the program. Bayer recommended that

30 Kowinsky be terminated based on this conduct of Kowinsky and that she believed that Kowinsky's behavior in communicating his concerns to administrators, might also carry over to his interacting with the clients that Respondents serve. Both Blough and Bayer agreed with these sentiments of Bayer and her recommendation to terminate Kowinsky.

35 Although, Blough is the ultimate decision maker in discharge cases, this decision to terminate Kowinsky was made by consensus of Bayer, Blough and O'Brien during their conference call. All three participants testified that Kowinsky's union activity had no bearing on their own and Respondent's decisions to discharge Kowinsky. As noted

40 above Bayer testified that she was unaware of any union activities or union support by Kowinsky at any time. O'Brien testified similarly, except that she did recall hearing some discussion from staff members through Administration that Kowinsky might be interested in supporting a union, but she could not recall when it was, or who specifically she ascertained this information from.

While O'Brien and Blough both testified that Kowinsky's past record, and more particularly his two prior suspensions were discussed, during this conference call, Bayer did not recall any mention or discussion of Kowinsky's prior record or his prior suspensions during this conference call.

5

In regard to the issue of Kowinsky's prior record, both Blough and O'Brien testified as noted, that Respondent considered Kowinsky's prior record, and his two suspensions in deciding whether to terminate him. O'Brien testified that Kowinsky was terminated based on the interaction that Kowinsky had with Bayer and also a review of recent disciplinary history. She discussed and referred to Kowinsky's two previous suspensions, and testified further that had Kowinsky not had those two prior disciplines, "it would definitely have impacted our decision making." O'Brien also testified that the offense for which Kowinsky was suspended in June of 2013, for sleeping on the job or placing oneself in a position conducive to sleeping on duty," could have resulted in Kowinsky being terminated, based on Respondent's disciplinary Grid.⁶

10

15

O'Brien testified that she was involved in the discipline of Kowinsky at that time, and that Respondent chose not to discharge him; although it could have, due to his previous performance and history with the organization.

20

Blough testified similarly, that Kowinsky's prior disciplines, and evaluations were considered in Respondent's decision to terminate him on Dec. 30, 2013. He further testified that he was aware of Kowinsky's union activities and support during the 2012 union campaign, in that he was informed by staff members in 2012, that Kowinsky was an advocate for the organizing attempts and was taking an active role. Notwithstanding that knowledge, Blough testified that he approved the suspension of Kowinsky on June of 2013, rather than a discharge, as Respondent could have done under its disciplinary system. According to Blough, Respondent did not terminate Kowinsky; in June of 2013, after "a review of Mr. Kowinsky's employment history in regards to his evaluations, and review of the rubric determined that the fairness to Mr. Kowinsky would be to provide him the suspension, as opposed to a termination at that point." O'Brien also testified about the handbook pages relied upon by Respondent in its decision referring to p.33 (m) "using profanity or abusive language," and p.8 "behavior inconsistent with the professional nature of the organization." O'Brien also testified that although it has a progressive disciplinary policy, as detailed in its Manual, that Respondent reserves the right to implement all or part of that progressive disciplinary action as the situation warrants. She testified further that Respondent determined "in light of Mr. Kowinsky's two suspensions earlier in 2013, the organization determined that it was necessary to move more immediately to termination rather than step by step through one specific category." She was asked by her counsel why the termination letter did not identify the other disciplines as being part of the reason for termination. She replied, "At the time, while that was all part of the consideration, we did not seem ---, we didn't think it was

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⁶As noted above under that Grid, this conduct is a Group two Offense, and for a first offense, the penalties are "written warning to termination."

necessary to document it in that way.” She was asked if the primary reason for the discharge was Kowinsky’s language, and O’Brien responded “correct.” O’Brien added that Respondent was concerned with Kowinsky’s ability to work with and take directions from people that he was saying were jack asses and couldn’t make decisions. O’Brien
5 answered that using profane language is not always grounds for termination, but asserts that the decision is based on the context and the individual’s prior disciplinary record.

O’Brien also provided testimony that an employee named Terri Gunn who was employed by Respondent at the UGL facility was discharged for using the “N” word
10 repeatedly in speaking about and to co-workers, even though Mr. Gunn had not received any prior warnings or other discipline for similar conduct. Respondent’s files included a letter to NJ Unemployment concerning Respondent’s decision to terminate Gunn. Blough identified the document prepared by Donna Elliott, State Office Manager,
15 and testified that although he did not recall the incident in question, he conceded that the letter reflects, Respondent’s account of what happened.

The letter reads:



April 13, 2010

Ms. McNair
NJ Unemployment

Dear Ms. McNair,

After speaking with you today, I contacted Kim Mickus, Program Director of our Upper Greenwood Lake program, where Terrence Gunn had previously worked. Kim reported that after Mr. Gunn received a 3 day suspension for Sleeping While on Duty, he became verbally abusive. His statements were, "If she wants a war, she's going to have one. I'm going to take her down." These phrases were interspersed with the word, "nigger," used repeatedly and were said within earshot of other female African American staff members.

The staff member that he slandered decided not to press charges. If you need further information, please contact Kim Mickus who can give you more details. Office: 973-853-0250, Cell: 570-426 5290.

Sincerely,

A handwritten signature in black ink that appears to read "Donna Elliott".

Donna Elliott

State Office Manager

399 Helms Avenue, Swedesboro, NJ 08085
856-241-3320 • (fax) 856-241-3321 • www.advoserv.com

Blough also furnished testimony that once he heard about Kowinsky's comments to Bayer, and Bayer's concerns about Kowinsky's continued employment with Respondent, he shared Bayer's concerns. According to Blough he was concerned that Kowinsky might use profanity in the presence of the residents of the homes. Additionally, Blough asserts that he was concerned that Kowinsky felt comfortable expressing himself in such a way to basically the second ranking administrator in the State of New Jersey. Thus, Blough testified that he believed for these reasons, after his conversation with Bayer, that Kowinsky had committed a terminable offense, and asked her to contact O'Brien to coordinate a meeting to discuss a determination by Respondent with respect to Kowinsky as well as to Outer.

Blough further testified that during the conference call, the participants went over the notes that Bayer had taken about the meeting, and the concerns that Blough and Bayer had with it continuing to employ Kowinsky, and O'Brien agreed. Thus, all three participants agreed that Kowinsky should be terminated. Blough testified he is the decision maker in discharge cases, but he does consult with O'Brien about such actions.⁷ Blough also testified that Respondent did not apply its progressive disciplinary position to Kowinsky in this situation. According to Blough, the first offense for the offense that Kowinsky, was cited for would not warrant a termination based on the grid solely. However, Blough asserts, "given the gravity of the offense and given the environment he expressed that, and his obvious lack of confidence in the administration and the programs, we felt it was necessary, because we didn't feel a productive relationship would continue with Mr. Kowinsky and the programs, and it would not benefit the individuals." Blough added that the progressive disciplinary policy is not mandatory, and it allows for discretion by Respondent, which it exercised in deciding to terminate Kowinsky for this conduct.

Blough also testified that Respondent determined that Kowinsky's conduct was so severe that it merited steeper punishment and that Respondent considered his other disciplines and previous offenses, as part of its review.

Blough also testified that he had no knowledge of Kowinsky's renewed union activities in 2013, or indeed that there was any union activities in 2013, amongst Respondent's employees.

Blough further testified that he would have been notified of any renewed union activity by Kowinsky or other employees that came to the attention of any of Respondent's supervisors.

Blough further testified about the two suspensions issued to Kowinsky. According to Blough he approved Kowinsky's 3 day suspension, recommended by Mickus on 6/24/13 for "sleeping on the job or placing oneself in a position conducive to sleeping on the Job." Blough testified that he was aware of Kowinsky's union activities in 2012, when he approved the suspension, although Kowinsky could have been terminated for this conduct. As noted above, Blough testified that after reviewing Kowinsky's employment history and his evaluations, it was determined by Respondent in favor to Kowinsky "that he would be suspended, as opposed to termination at that time."

I note that the Disciplinary Action Forms from Respondent's files, describing this incident, was prepared and signed by Mickus, as the person taking action, and by Mickus as Director's signature. There is a line on the form Offending State Programs

⁷According to O'Brien she must agree to before a termination is approved. In the case of Kowinsky's termination, O'Brien testified that there was a consensus between Bayer, Blough and herself, and that all three of them were the decision makers.

Director Date of Notification (for Suspension or Termination). This is Blough's title. There is no date on this line, nor any signature of Blough on this form.

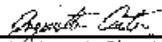
5 Blough also testified about the second suspension of Kowinsky on 8/22/13. Blough was not involved in the original decision by Mickus to suspend Kowinsky for 2 days for "endangering the welfare of the residents as per Advoserv Employee Handbook." As related above, this discipline resulted from Kowinsky's refusal to stay for mandatory overtime due to staffing needs. Kowinsky stated to Mickus that he wasn't staying for coverage, because the first staff member refused to stay, and that Kowinsky left the premises without proper staff coverage.

10 The Disciplinary notice from Respondent's files, was prepared by Mickus, and contained written comments by Kowinsky, that he wished to appeal the termination because Respondent did have proper staff coverage and the welfare of the residents was not endangered. Kowinsky after he received the discipline from Mickus, texted Blough and asked to speak with him. A few days later they spoke, and Kowinsky explained to Blough, as he had stated in written comments on the form, that a staff member did stay, to cover the next shift, so that the clients were not placed in danger and their welfare was not endangered. Kowinsky did not protest the suspension and acknowledged that discipline was warranted, but did protest the language used, about endangering the welfare of clients.

15 Blough further testified that he agreed with Kowinsky's argument and told Kowinsky that he would discuss the situation with Mickus. According to Blough, he spoke to Mickus, who confirmed Kowinsky's recitation of the facts that there was coverage for the shift. Based on that Blough states, they (Mickus and Blough) agreed that the language in the notice could be altered to "not following an established rule." Blough then informed Kowinsky that Mickus would reach out to him to discuss the revision of the action. According to Blough, Kowinsky was happy with how this matter was resolved.

20 General Counsel introduced into the record several documents from Respondent's files, documenting disciplinary actions against employees of Respondent, at other facilities in the state of New Jersey, not the UGL facility involved here. These facilities are under the overall supervision of Blough. However, the record reflects that Blough was not involved in the decision to discipline these employees and that he was not familiar with or aware of any of these disciplines. Thus the record reflects that unless the discipline involves a suspension or a termination, he is not consulted or involved, unless the employee brings the matter to his attention.

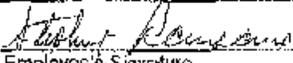
25 Employee Anginetta Carter worked for Respondent in a facility in Gloucester County supervised by Kimberly Francese. The discipline was issued by Francese to Carter on 9/18/13, referencing Carter's conduct on 8/26/13. It refers to a Group 1 offense, as "Behavior inconsistent with the professional material of the organization." The discipline issue was a "written reminder." The document reads as follows:

ADVOSERY PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: Anginella Carter	
DATE: 9/6/13	
CONCERN: Violation of Advosery of NJ Inc. rules and regulations and standards of employee conduct as outlined in the Advosery Employee handbook, February 2012 in the following ways: Group 1 Offense – Behavior inconsistent with the professional nature of the organization	
DATE OF CONCERN: 8/26/13	
TYPE OF ACTION TAKEN:	
<input type="checkbox"/> Documented Counseling <input checked="" type="checkbox"/> Written Reminder <input type="checkbox"/> Written Warning <input type="checkbox"/> Suspension (Number of days) <input type="checkbox"/> Termination	
Signature of Person Taking Action	
	8-26-13
Employee's Signature	Date
Witness (for termination)	
COMMENTS: On August 26, 2013, it was reported that Ms. Carter had a verbal altercation with another staff member during which she made inappropriate comments towards the other staff member. Ms. Carter, along with other staff members that were present, admitted the misuse of her language and approach with handling the situation. Ms. Carter's behavior was "inconsistent with the professional nature of the organization" as stated in the Advosery of New Jersey handbook (Rev. 2/12). Further occurrences will result in progressive disciplinary action up to and including termination.	
Director's Signature	State Program Director: Date of Notification (For Suspension or Termination)
	Legal Counsel: Date of Notification (For Suspension or Termination)

5 Francese also issued a written warning to employee Jennifer Gregory on 5/8/13, documenting Gregory's conduct on 4/28/13. The offense cited was Group 2 offenses "physical, verbal or psychological abuse or neglect of individuals or other staff." This warning reads as follows:

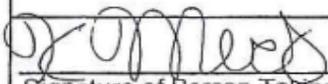
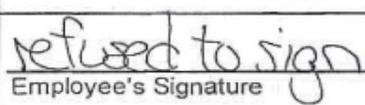
ADVOSEV PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: Jennifer Gregory	
DATE: 4/30/13	
CONCERN: Violation of AdvoServ of NJ Inc. rules and regulations and standards of employee conduct as outlined in the AdvoServ Employee handbook, February 2012 in the following ways: Group 2 Offense – Physical, verbal or psychological abuse or neglect of individuals or other staff.	
DATE OF CONCERN: 4/28/13	
TYPE OF ACTION TAKEN:	
<input type="checkbox"/> Documented Counseling <input type="checkbox"/> Written Reminder <input checked="" type="checkbox"/> Written Warning <input type="checkbox"/> Suspension (Number of days): <input type="checkbox"/> Termination	
<i>met w/ KF + MSJ 5/8/13 referred to SPS met later with PS + KF about the</i>	
Signature of Person Taking Action	
 Employee's Signature	Date: <u>5/8/13</u> <i>getting so upset on 5/8 when disciplinary was served</i>
Witness (for termination)	
COMMENTS: On April 28, 2013, Miss Gregory had a disagreement with another staff member during her regularly scheduled evening shift. Miss Gregory interjected into an interaction between the staff member and an individual, where direction was being given to the individual. Miss Gregory undermined the direction from the staff member and gave the individual other instructions, causing a conflict between Miss Gregory and the staff member. Miss Gregory became belligerent towards the other staff member, posturing in his direction, using profane language and appeared to be intimidating/coercing him. On April 8, Miss Gregory had a discussion with Kimberly Francese, Assistant Program Director regarding another altercation that she had with a different staff member. Miss Gregory and Miss Francese discussed the expectations of professionalism in the work environment and the proper way to communicate with her coworkers and administration for such particular issues. Miss Gregory's action on April 28, 2013 constitutes the Group 2 Offense of "Physical, verbal, or psychological abuse or neglect of individuals or other staff. This includes threatening, either verbally or physically, intimidating or coercing fellow employees while at work at any time for any reason." Further occurrences will result in progressive disciplinary action up to and including termination; in accordance with the AdvoServ Employee Handbook, R2/12.	

5 On May 14, 2013 supervisor ----- Ransom issued a written reminder to employee Maribell Hernandez who worked at a facility of Respondent in Gloucester County. This discipline referenced a Group 1 offense "Obscene profane or abusive language." It reads as follows:

ADVOSEV PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: XXXXXXXXXX	
DATE: 05/07/13	
CONCERN: Violation of Advoserv of N.J. Inc. rules and regulations and standards of employee conduct as outlined in the Advoserv of N.J. Inc. handbook, February 2012 in the following ways: Group one 1st Offense – Obscene, Profane or Abusive Language	
DATE OF CONCERN: 05/07/13	
TYPE OF ACTION TAKEN:	
<input type="checkbox"/> Documented Counseling <input checked="" type="checkbox"/> Written Reminder <input type="checkbox"/> Written Warning <input type="checkbox"/> Suspension <input type="checkbox"/> Termination	
Signature of Person Taking Action	
 Employee's Signature <i>Refuse to Sign</i>	Date 5-14-13
Witness (for termination)	
COMMENTS: On 05/07/13, Miss Hernandez used abusive language toward a supervisor when she was complaining about a coverage issue. It is acceptable to calmly question an Advoserv practice or a decision made by a manager in an appropriate setting. However it is not acceptable to use profane or abusive language in any setting. This act constitutes the Group one 1 st offense of Obscene, Profane or Abusive Language as stated in the Advoserv of New Jersey Employee Handbook, February 2012. Further occurrences will result in progressive disciplinary action, up to and including termination.	
Director's Signature	C.E.O.' Date of Notification (For Suspension or Termination)
	Legal Counsel: Date of Notification (For Suspension or Termination)

5 Terri Outer also furnished testimony concerning disciplinary actions taken by her as supervisor to employees, as well as one incident concerning discipline against her with respect to the latter incident, Outer received a written warning, signed by Mickus relating to conduct by Outer on 10/14/13. The discipline was for use of profane and abusive language towards another staff member and behavior inconsistent with the professional nature of the organization. It reads:

10

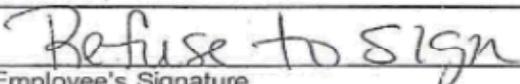
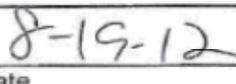
ADVOSEV PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: Terri Outer	
DATE: 10/21/13	
CONCERN: Violation of AdvoServ rules and regulations and standards of employee conduct as outlined in the AdvoServ Employee handbook, Feb. 2012 in the following ways: Group One Offenses: 1. Obscene, profane or abusive language 2. Behavior inconsistent with the professional nature of the organization	
DATE OF CONCERN: 10/14/13	
TYPE OF ACTION TAKEN: <input type="checkbox"/> Counseling/Retraining <input type="checkbox"/> Verbal Warning <input checked="" type="checkbox"/> Written Warning <input type="checkbox"/> Suspension (Number of days:) <input type="checkbox"/> Termination	
EXHIBIT NO. <u>GC-27</u> RECEIVED <input checked="" type="checkbox"/> REJECTED <input type="checkbox"/> 22-CR-131280 CASE NO. _____ CASE NAME <u>ADVOSEV</u> NO. OF PAGES _____ DATE <u>11/13/15</u> REPORTER <u>AGM</u>	
 Signature of Person Taking Action	
 Employee's Signature	Date
Witness (for termination)	
COMMENTS: On October 14th, 2013, Program Supervisor, Terri Outer, was overheard by additional staff members using derogatory language about a specific staff member. Ms. Outer was overheard calling an evening shift staff member a "fat, lazy, cunt". Program Director, Kim Mickus and Assistant Program Director, Rashad Byrd, conducted an internal investigation into the allegation. Ms. Mickus and Mr. Byrd interviewed staff members and Ms. Outer where it was substantiated that Ms. Outer did use profane and abusive language towards another staff member. This constitutes obscene, profane or abusive language and behavior inconsistent with the professional nature of the organization as outlined in the Advoserv Employee Handbook. Future offences will result in further progressive disciplinary action.	
Director's Signature	State Program Director: Date of Notification (For Suspension or Termination)
	Legal Counsel: Date of Notification (For Suspension or Termination)

5 Outer also testified concerning disciplinary notices that she issued to employee Eric Doucette on August 15 and August 19, 2012, relating to conduct of Doucette on August 10 and 15 respectively. On August 15, 2012, Outer issued a disciplinary notice to Doucette, of counseling/retraining, for leaving work without authorization. On the disciplinary form, Doucette refused to sign, and wrote the words "Bull Shit" in the space for his signature. This disciplinary notice reads:

ADVOSEV PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: Erik Doucette	
DATE: 08/13/12	
CONCERN: Violation of AdvoServ rules and regulations and standards of employee conduct as outlined in the AdvoServ Employee handbook, revised February 15, 2012 in the following ways: Group One Offenses: 1. Leaving work area or premises during work hours without the authorization of the supervisor.	
DATE OF CONCERN: 08/10/12	
TYPE OF ACTION TAKEN: <input checked="" type="checkbox"/> Counseling/Retraining <input type="checkbox"/> Verbal Warning (1 st) <input type="checkbox"/> Written Warning (1 st), (2 nd) <input type="checkbox"/> Suspension (Number of days:) <input type="checkbox"/> Termination	
Signature of Person Taking Action	
<i>BULL SHIT</i>	<i>8-15-12</i>
Employee's Signature	Date
Witness (for termination)	
COMMENTS: On August 10, 2012, Mr. Doucette was working in UGL 1. Mr. Doucette continuously left the house throughout the night without informing the supervisor. Mr. Doucette left at 1:05, 1:35, 1:50, 2:50, and 3:15. This falls under leaving work area or premises during work hours without the authorization of the supervisor in the AdvoServ employee handbook. Further occurrences will result in progressive disciplinary action, as outlined in the AdvoServ Employee Handbook. Further occurrences will result in further disciplinary action up to and including termination.	
Director's Signature	C.E.O.: Date of Notification (For Suspension or Termination)
	Legal Counsel: Date of Notification (For Suspension or Termination)

6c-29 ✓
EXHIBIT NO. RECEIVED REJECTED

5 Outer then notified her immediate supervisor Byrd about Doucette's conduct and provided him a copy of the notice, where Doucette wrote "Bull Shit" in the space designated for his signature. Byrd instructed Outer to issue a write up for Doucette for using language disrespecting the company. Outer then issued the following written warning to Doucette, dated 8/14/12, which Doucette refused to sign. It reads:

ADVOSERV PROGRAMS DISCIPLINARY ACTION FORM	
EMPLOYEE NAME: Erik Doucette	
DATE: 08/16/12	
CONCERN: Violation of AdvoServ rules and regulations and standards of employee conduct as outlined in the AdvoServ Employee handbook, revised February 15, 2012 in the following ways: Group Two Offenses:	
1. Flagrant disrespect for the ethical and moral dimension of the organization while on organization property or while representing the organization.	
DATE OF CONCERN: 08/15/12	
TYPE OF ACTION TAKEN:	
<input type="checkbox"/> Counseling/Retraining <input type="checkbox"/> Verbal Warning (1 st) <input checked="" type="checkbox"/> Written Warning (1st) <input type="checkbox"/> Suspension (Number of days): <input type="checkbox"/> Termination	
EXHIBIT NO. <u>6-28</u> RECEIVED <input checked="" type="checkbox"/> REJECTED <input type="checkbox"/> 22-CP-131238 CASE NO. _____ CASE NAME <u>ADVO SERV</u> NO. OF PAGES _____ DATE <u>8/21/12</u> REPORTER <u>ban</u>	
 Signature of Person Taking Action	
 Employee's Signature	 Date
Witness (for termination)	
COMMENTS: On August 15, 2012, Mr. Doucette was working night shift. Mr. Doucette was provided written feedback by his supervisor at 21:45 for leaving his work area without a supervisors approval. Mr. Doucette wrote profanity on the feedback document instead of signing his name. Mr. Doucette was informed that this was an unacceptable response but that he may refuse to sign. Mr. Doucette told his supervisor to hand it in that way cause that was how he felt about the disciplinary action. This constitutes flagrant disrespect for the ethical and moral dimension of the organization while on organization property or while representing the organization. in the AdvoServ employee handbook. Further occurrences will result in progressive disciplinary action as outlined in the AdvoServ Employee Handbook. Further occurrences will result in further disciplinary action up to and including termination.	
Director's Signature	C.E.O.: Date of Notification (For Suspension or Termination)
	Legal Counsel: Date of Notification <u>6 C 28</u> (For Suspension or Termination)

5 Sometime in late 2012 or early 2013, Outer gave employee Steven Matos a write up for kicking the door open in the administration building. Matos wrote on the disciplinary report given to him by Outer the words, "suck my balls". Outer placed this write up in the mailbox of Art Mongelli, the assistant director for Respondent at the time.

According to Outer, Matos was not disciplined by Respondent for the “suck my balls” remark that he made on Respondent’s disciplinary form given to him by Outer.

5 Additionally, employee Stacy Paterno, who works in UGL House 3 testified that employees use profanity in the workplace towards other workers daily, including herself, and to her knowledge no one has ever been disciplined for such conduct, and that no supervisor ever said anything to her about using profanity in the workplace.

10 In March of 2014, Paterno was called into a meeting with Mickus, Byrd, and supervisor Heather Barsh and alternate supervisor Chris Outer. The purpose of this meeting was to discuss complaints that a couple of staff members had made that Paterno had made derogatory comments about Chris Outer. During this meeting and in the course of defending herself against the allegations made against her by other employees, Paterno told the four supervisors that they “are playing into the bullshit and that they’re a bunch of fucking idiots if they keep listening to it.” Paterno was not
15 disciplined for making these comments to the four supervisors.

20 Paterno also was told in a conversation with supervisor Heather Barsh, in discussing Paterno’s divorce, by Barsh that she (Barsh) thought that Paterno’s husband “was a fucking idiot.”

25 Additionally, according to Paterno, Byrd, in general conversations with the staff would use profanity on a daily basis, using such words as “bullshit” and “fuck that.”

III. Analysis and Conclusions

The Termination of Kowinsky Allegedly in Violation of Section 8(a)(3) of the Act.

30 The complaint alleges that Respondent violated Section 8(a)(3) of the Act, by discharging Kowinsky on December 30, 2013 because he assisted the Union and engaged in concerted activity, and to discourage employees from engaging in those activities.

35 This complaint allegation, insofar as it alleges discrimination based on union activity and to discourage union activity, must be analyzed under *Wright Line* 251 NLRB 1083 (1980). The Board in *Alternative Energy & Applications, Inc.* 361 NLRB 139 (2014), concisely summarized the mixed motive analysis as follows:

40 In determining whether an employee’s discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee’s protected conduct was a motivating factor in an
45 employer’s adverse action. The General Counsel satisfies his initial burden by showing

(1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i. e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

In applying those principles, I conclude that General Counsel has more than satisfied its burden of establishing that the union activities of Kowinsky was a motivating factor in Respondent's decision to discharge him.

The evidence is overwhelming and undisputed that Kowinsky was the primary organizer amongst Respondent's employees during the fall and winter of 2013, as well as in the Union's organizing campaign in 2012. The latter campaign resulted in an election being scheduled, and canceled.

Kowinsky distributed authorized cards to employees of Respondent in both campaigns, discussed the union and the union cards with employees in various places, including at Respondent's premises, and inside the groups homes.

In 2013, Kowinsky contacted the Union again, received from the Union authorization cards, distributed them to employees, discussed the signing of cards with employees including at Respondent's houses, and returned signed cards to the Union, a few days before he was notified of his termination.

While Respondent's witnesses, Blough, Bayer and O'Brien all deny any knowledge of any union activity by Kowinsky in 2013, I find this testimony unpersuasive and not credible, and conclude that the record amply supports the conclusion that I make, that Respondent was aware of Kowinsky's union activities in 2013.

While Respondent stipulated that it was aware of Kowinsky's role in supporting the union during the 2012 campaign, and Blough so testified, both Bayer and O'Brien testified that they were unaware of Kowinsky's union support or role at any time. Blough denied any knowledge of any union activity at all in 2013, as well as any role by Kowinsky in supporting the union in 2013. I also note that O'Brien admitted that she

had heard from someone in administration who she did not recall, that Kowinsky might be interested in supporting a union in 2013.

5 I find the testimony of Respondent's witnesses to be unpersuasive and not credible concerning knowledge of Kowinsky's union support, and the existence of any union activity in 2013. Rather, I conclude that the evidence overwhelmingly supports the conclusion that I make, that Respondent was aware of both the resurgence of union activities in 2013 at Respondent's UGL facility , as well as Kowinsky's role as principal union organizer in the union's 2013 organizational drive.

10 The evidence consists of a number of sources, starting with Paterno's conversation with Bayer and Mickus in October of 2013. Mickus questioned Paterno about whether union activity had resumed and Paterno replied yes. Bayer then inquired whether Kowinsky was behind the renewed campaign, and Paterno again said yes.

15 Further in an administration meeting in the late fall of 2013, Bayer informed the supervisor and administrators present, that she believed that there were union meetings taking place on the night shift, because there were cars coming into the driveway.

20 Furthermore the evidence established that Outer told assistant program director Byrd in August of 2013 that people were starting to talk about the union again, and that in October of 2013 supervisor Schackmann spoke to Outer about the union, and that she (Outer) reported the conversation to Byrd. Finally, shift supervisor Heather Barsh was told by Paterno in August of 2013 that union activity might be starting up again, and
25 Barsh responded that she had already heard this. Thus the above evidence compellingly establishes that starting in the summer of 2013 all three shift supervisors (Barsh, Outer and Schackmann) UGL program director Mickus, assistant program director Byrd, and assistant state director Bayer had either specific knowledge of Kowinsky's union activities or general knowledge of union activities in 2013.
30 Additionally, as noted above, O'Brien, Respondent's Human Resources director, admitted that she was informed by someone in administration that Kowinsky, sometime in 2013, "might be interested in supporting the union."

35 The most compelling evidence of Respondent's knowledge of union activities, comes from the comments made to Bayer by Kowinsky, and other night shift employees, during her meetings with these employees on December 16, 2013. During Bayer's meeting with Kowinsky, wherein Kowinsky was complaining to her about the night shift scheduling decision and that employees were unhappy about their treatment, Kowinsky added that there had been talk about the Union again, and if things keep up, it
40 was going to go through this time. Bayer then questioned Kowinsky about the union, and Kowinsky told her that he was all for the union.

45 Further, during Bayer's interview with employee Mike McCarthy, Bayer was informed by McCarthy that Kowinsky had been distributing union cards for two weeks, and that Kowinsky, Flipowicz and Outer were "all in on union." Employee Randy

Saracco informed Bayer during their discussion, that Kowinsky was “starting union nonsense again.”

5 The above evidence completely destroys Bayer’s credibility as to her knowledge of union activities in general, and of Kowinsky’s union activities in particular, in 2013. It further undermines the credibility of Blough’s denials that he was unaware of any union activity or Kominsky’s role in such activities in 2013.

10 Notably my findings above concerning the comments of employees to Bayer in December of 2013 was derived primarily from Bayer’s own notes of her meetings with employees on December 16, 2013. While Bayer testified that she had destroyed these notes, since she had incorporated them “verbatim” into here email summarizing her discussions with employees sent to Blough on December 16, 2013, in fact copies of her notes were made, and she identified them as an accurate statement of what was said to her on that date by employees. Significantly the references to Kowinsky’s union activities in 2013 made by employees Saracco and McCarthy to Bayer, somehow were not included in the email that she sent to Blough summarizing the discussions.

20 I can find no logical explanations for Bayer’s failure to include these comments to her in her email to Blough, other than she was instructed by Blough to eliminate any reference to Kowinsky’s union activities in the email summarizing the meeting. Respondent’s conduct in regard to these statements reflect poorly on Blough’s credibility on this issue, and I conclude that contrary to Blough’s testimony, that he was fully aware of Kowinsky’s role in the resurgence of the union in 2013.

25 In this regard, Respondent argues that since Blough was the decision maker in Respondent’s decision to discharge Kowinsky, and there’s no evidence that he was aware of Kowinsky’s union activity, or indeed any union activity in 2013, that the evidence of knowledge of Kowinsky’s 2013 union activities, by Bayer, Mickus, Byrd and other supervisors cannot be attributed to Respondent. I do not agree.

30 First of all the record establishes that as to Kowinsky’s discharge, Blough was not the sole decision maker. Rather the evidence disclosed, as even O’Brien testified that a joint decision was made by Bayer, O’Brien and Blough, to discharge Kowinsky during their conference call, shortly after the December 16, 2013 meeting between Bayer and Kowinsky. Moreover, Bayer who was one of the decision makers, clearly recommended that Respondent discharge Kowinsky. Thus her knowledge of Kowinsky’s union activities in 2013 is properly attributable to Respondent.

40 A supervisor’s knowledge of union or concerted activities is imputed to the employer, unless credited testimony establish the contrary. *Coastal Sunbelt Produce* 358 NLRB 135 fn.3 (2012); *Gestamp South Carolina* 357 NLRB 130, slip op. at 10 (2011); *State Plaza Hotel* 347 NLRB 755, 756 (2006), *Dobbs International Services* 335 NLRB 972, 973 (2001); *Harris Corporation* 269 NLRB 733, 734 (1984) (Supervisor who recommended termination aware of concerted activity.)

5 *GATX Logistics* 323 NLRB 328, 333 (1997) (Knowledge of supervisor imputed to Respondent, although he didn't make decision to discharge discriminatee); *United Cloth Co.* 278 NLRB 583, 591 (1986) (Supervisor's knowledge of union activity imputed to Employer, when supervisor reported alleged offense causing discharge to attention of decision makers.)

10 I also note that O'Brien who jointly made the decision to terminate Kowinsky, admitted that she had heard in 2013 that Kowinsky might be interested in supporting the union, and that Bayer, who clearly had knowledge of Kowinsky's 2013 union activities, recommended his discharge to Blough and O'Brien. *Springfield Air Center* 311 NLRB 1151 (1993) (Supervisor's knowledge of union activity of discriminate attributed to Employer, since supervisor had direct input into the decision to discharge him). *Accord Grand Rapids Die Casting v. NLRB* 831 F. 2d 112, 117-118 (6th Cir. 1987).

15 Thus, in sum I find ample evidence of Respondent's knowledge of Kowinsky's union activities in 2013, since Bayer, one of the decision makers in Kowinsky's discharge, and who recommended it to the other decision makers Blough and Bayer, knew of Kowinsky's role in bringing the union back in 2013, and that O'Brien, one of the other decision makers, at least suspected Kowinsky's 2013 union activities, since she was informed by administration officials that Kowinsky might be interested in forming a union in 2013. I further rely upon the record evidence that the email that Bayer sent to Blough, allegedly describing her conversations with employees, inexplicably failed to include her discussions with employees about the renewed union activity and Kowinsky's leading role in that activity, although these discussions were included in her contemporaneous notes that she admittedly took on 12/16/13. In such circumstances I do not credit Blough's denials that he was unaware of Kowinsky's 2013 union activities and conclude that Bayer informed him of her discussions with employees on 12/16, wherein Kowinsky's 2013 union activities were discussed.

20 The timing of Kowinsky's termination herein strongly supports the conclusion that it was motivated by his union activities and support. Kowinsky's role in the renewed union campaign in 2013 was confirmed during the December 16 meeting with Bayer. Kowinsky raised the resurgence of union activity, in connection with his concerted complaint about Respondent's rotation of employees amongst the homes, and announced to Bayer that he was a union supporter. Further during Bayer's meetings with two other night shift employees, these employees both mentioned Kowinsky's role in bringing back the union. Thus Saracco told Bayer that Kowinsky, "was starting this union nonsense again."

25 Kowinsky was discharged 2 weeks after this meeting. This timing, coming shortly after Kowinsky's union activities were highlighted to Respondent, represents significant evidence of unlawful motivation. Such coincidence in time between Respondent's knowledge of the employees union activity, and his discharge is strong evidence of an unlawful motive for his discharge. *Trader Horn of New Jersey* 316 NLRB 194, 198

(1995). Indeed, “timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision.” *Sawyer of NAPA* 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware* 732 F.2d 1349, 1354 (7th Cir. 1084), *NLRB v. Windsor Industries Inc.* 730 F.2d 860, 864 (2nd Cir. 1984); *Manor Cape of Eastern PA* 356 NLRB 39, slip op 3, 25 (2010) (Proximity in time between discriminatee’s union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil and Gas*, 337 NLRB 1120, 1123, 1132 (2002). (Discharge shortly after Employer learned of employee’s union activities, strongly supports a finding that discharge motivated by union animus.”)

Respondent has demonstrated animus towards union activities of its employee in general, and of Kowinsky in particular, by the conduct of Mickus and Bayer. Thus in October of 2013, Mickus asked employee Paterno if she knew about union activities starting up again and Paterno said yes. Bayer asked if she would get involved and Paterno said no. Bayer then asked Paterno whether Kowinsky was behind the union revival, and Paterno replied yes. These comments by Mickus and Bayer would constitute interrogations in violation of Section 8(a)(1) of the Act, had they been so alleged, and had they occurred within the 10(b) period, and a violation of the Act would have been found based on this questioning by Mickus and Bayer.

While I cannot and do not find that Respondent violated the Act by this conduct of Bayer and Mickus, I can and do consider the evidence of this conduct as useful background evidence of Respondent’s animus towards employees union support. *Jack in the Box Distribution Center* 334 NLRB 40, 52 (2003); *Storer Communications* 295 NLRB 72 fn. 3 (1989).

Similarly, Bayer unlawfully threatened to terminate employees who engaged in union activities, by announcing at a meeting that she believed union meetings were taking place on the night shift, and that if she found out who was responsible, she would “fire our asses.” I would find this comment to be an independent unlawful violation of Section 8(a)(1) of the Act, if it had occurred within the 10(b) period and if it had been so alleged in the complaint. However, although I cannot and do not make such finding, I can and shall consider the comment as evidence of Respondent’s animus towards the union activities of its employees. It is notable that this comment was made by Bayer, who was involved in the decision to terminate Kowinsky within two months of Bayer’s comments, and within two weeks after Kowinsky’s role in the resurgence of the union campaign was confirmed during her conversations with both Kowinsky and two other employees on December 16, 2013.

Thus, I conclude that General Counsel has established a strong and compelling prima facie case that Kowinsky’s union activities, was a motivating factor in Respondent’s decision to discharge him on December 30, 2013.

As noted above, the burden then shifts to Respondent, to establish that it would have discharged Kowinsky, absent his union activities. I conclude that Respondent has failed to meet its burden of proof in this regard.

Respondent asserts that it terminated Kowinsky, because of his unprofessional and profane statements made to his supervisor, which caused Respondent to doubt Kowinsky's ability to interact positively with staff and residents. At trial Respondent's witnesses Blough and O'Brien testified and Respondent asserts in its brief, that Kowinsky's prior disciplinary records also played a role in its decision to discharge him, specifically referring to his suspension in June and August of 2013, and asserting that his prior disciplinary record was discussed and reviewed during their conference call wherein the decision to discharge Kowinsky was made.⁸

Significantly, the discharge letter sent to Kowinsky, informing him of the reasons for his discharge, made no reference to his prior disciplinary record or actions. Additionally, in Blough's text message to Kowinsky announcing Respondent's decision he failed to mention Kowinsky's prior disciplinary record as factors in Respondent's decision to discharge him. Further, in Blough's telephone discussion with Kowinsky explaining Respondent's decision, Blough also failed to do so. In that discussion, Blough told Kowinsky that he was discharged for unprofessional interactions with the assistant state director (Bayer), and Respondent's concerns that these interactions may occur with individuals that Respondent serves

Further, at the appeal hearing conducted on April 22, 2014, by Respondent's officials, no reference was made by any of Respondent's representatives present that Kowinsky's past disciplinary actions were factors in Respondent's decision to terminate him, or that these disciplines were even considered in its deliberations.

When Respondent denied Kowinsky's appeal, in a letter of May 1, 2014 from O'Brien, again no reference was made to Kowinsky's prior discipline as factors in its discharge decision. The letter mentioned the documents that the appeal committee reviewed in making its decision, and these documents did not include his past disciplinary notices. Furthermore, in May 2014, O'Brien sent another letter to Kowinsky's attorney, responding to the attorney's claim in his disagreement with the appeals committee's decision. In that letter, O'Brien stated that Kowinsky was terminated for his behavior on December 16, 2013, and the unprofessional language and direction thereof, along with Advoserv's result and concern regarding Kowinsky's ability to interact professionally with individuals served." Once again no reference was made to Kowinsky's two prior disciplines as playing any role whatsoever in Respondent's decision to discharge him.

Thus the Respondent's failure to mention Kowinsky's past disciplinary record until the trial, represents shifting reasons for its discharge decision, and strengthen the inference that the true reason for the discharge was for union activity. Such an

⁸ Notably, Bayer, who had participated in the conference call and recommended the discharge of Kowinsky, did not testify that Kowinsky's prior discipline was discussed in the conference call, or that it played a role in her recommendation.

inference is warranted here, and undermines Respondent's attempt to meet its *Wright Line* burden of proof. *Marquez Brothers Enterprises, Inc.*, 358 NLRB 61 slip op. (2012) (Employer failed to mention alleged grounds for discharge in termination notice, and raised another additional alleged reason for discharge for this first time at the trial); *City Stationery Inc.*, 342 NLRB 523, 524 (2003). (Employer's reason for discharge offered at trial, different from set forth in discharge letters); *McClendon Electrical Services*, 340 NLRB 613, 614 (2003). (Employer added additional reason for discharging discriminate at hearing, which were not contained in disciplinary notice; *Sound One*, 317 NLRB 854, 858 (1995); *Abbey's Transportation Service v. NLRB* 837 F. 2d 580, 581 (2nd Cir 1988) (Changing nature of employer's justification for discharge, strengthening inference of discrimination motivation, and undermines Employer's meeting its burden of proving that it would have terminated discriminate absent his union activity.) *Mt Clemens General Hospital*, 344 NLRB 450 457-458 (2005) (Employers assertion that discriminatee's prior disciplinary actions were in part responsible for its refusal to rehire him, not raised until trial) *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1425 (2004) ("When an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.") *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985) (Alleged reason for layoff not raised until trial)

Respondent's witnesses testified and Respondent argues in its brief, that Kowinsky was terminated for his unprofessional profane and vitriolic statements concerning the competency of his coworkers and supervisors. Respondent's termination notice characterized Kowinsky's conduct as "behavior inconsistent with the Professional Nature of the Organization," and then recounted his use of profanity to Bayer, in referring to Mickus, Byrd and the clinicians, and concluded that as a "result of the inappropriate language and tone in a professional setting, Advoserv has significant concerns regarding your and interactions with coworkers and individuals served. As such, Advoserv can no longer maintain an employment relationship." However, the record contains numerous examples of other employees Respondent who uttered expletives at coworkers or supervisors, or wrote profane comments on Respondent's disciplinary forms, and were penalized far less severe than Kowinsky, or not disciplined at all. Notably, Paterno who was employed at the same UGL facility as Kowinsky, was called into a meeting with supervisor Mickus, Byrd, Barsh and alternate supervisor Chris Outer, to investigate Paterno's allegedly derogatory remarks about Christ Outer to other employees. In connection with defending herself against the allegations, Paterno told the four supervisors that they, "are playing into the bullshit and that they're a bunch of fucking idiots if they keep listening to it." These comments by Paterno, made directly to and about four supervisors, are remarkably similarly to the statements made by Kowinsky to Bayer, about the clinicians Mickus and Bryd, for which he was terminated. However, Paterno received no discipline whatsoever for this outburst and profanity made directly to four supervisors.

Additionally, Byrd, Respondent's supervisor, told employee Joey Olcay to "shut the fuck up" several times, in front of the entire shift, and no discipline was received by

Byrd for this conduct, although Mickus, Byrd's supervisor was present when Byrd made these remarks.

5 Further, Terri Outer received a written warning on 10/14/13, for calling a staff member a "fat lazy, cunt." This written warning was issued by Mickus and Byrd, and was listed on the Disciplinary Action form as Group one offenses, "obscene, profane or abusive language" and (2) Behavior inconsistent with the professional nature of the organization."

10 Again, this represents strikingly similar conduct to that engaged in by Kowinsky, and yet it resulted in only a written warning to Outer, and not even a suspension, much less a discharge.

15 Similarly, Terri Outer issued a disciplinary warning to employee Eric Doucette for leaving work without authorization. When he received this disciplinary notice, Doucette, rather than signing his name in the space on the form for his signature, wrote the word "BULLSHIT" instead. After Outer reported Doucette's conduct to Byrd, Outer pursuant to Byrd's instructions issued a written warning to Doucette, for a Group Two offense, of "flagrant disrespect for the ethical and moral dimensions of the organization while on company property or while representing the organization."

20 Terri Outer also disciplined employee Steven Matos for kicking the door open. Matos wrote on the disciplinary report given to him to sign by Outer, "suck my balls." Although Outer notified her supervisor Art Mongelli; of Matos's conduct, Matos received no disciplinary action for writing such remarks on the form.

25 The review also reflects that employees Anginetta Carter, Jennifer Gregory and Maribell Hernandez, received only written warnings from their supervisors, for using profanity and or derogatory language towards other staff members and/or towards supervisors. These written warnings were issued at other facilities of Respondent in New Jersey, and not by any of the supervisors from the UGL facility involved here.

30 I conclude that the above evidence demonstrates that Respondents was most likely to issue a written warning to employees, or even not to discipline them at all, for the same type of conduct for which it discharged Kowinsky. This evidence of disparate treatment by Respondent of other employees supports an inference that Kowinsky's union activity was a motivating factor in his discharge and undermines Respondent's defense that it would have discharged Kowinsky even in the absence of his union concerted activities. Camaco Lorain Manufacturing Plant, 356 NLRB 143, slip op at 4 (2011). (Other employee who are engaged in similar conduct to discriminate was not discharged, but merely issued an incident report); Turtle Bay Resorts, 353 NLRB 1242, 1243 (2009). (Discipline of discriminate more severe than that imposed by Employer on at least five other occasions who used bad language and/or engaged in harassment); La Gloria Oil And Gas Company, 337 NLRB 1120, 1124 (2002). (Employer had

practice of either not disciplining owners for driving infractions, or issuing lesser discipline than discharge.)

5 Respondent argues that none of the evidence of disparate treatment that I have detailed above can be relied upon, inasmuch as Blough, O'Brien or Bayer the decision makers in the discharge decision, were not involved in any of these prior disciplinary actions, or lack of disciplinary actions, or indeed there is no evidence that any of them were aware of these incidents.

10 I do not agree. I conclude that the above evidence does reflect how Respondent's supervisors at its facilities, including significantly some at the UGL facility here, where Kowinsky was employed, treated conduct similar to that engaged in by Kowinsky, that allegedly according to Respondent motivated his discharged. Yet, Respondent did not terminate any of these employees for engaging in such conduct, 15 and issued them only written warnings, and in some instances no discipline at all, such as Paterno's profanity-laced comments to and about her supervisors.

I note that Mickus and Byrd, who were the supervisors, who Kowinsky attacked in his profane comments to Bayer, that Respondent asserts, caused his termination, 20 were present when Paterno made these profane comments to them, criticizing their performance as supervisors, and yet they took no action to recommend an exact any discipline against Paterno, for engaging in similar conduct.

25 Respondent argues that the only relevant comparator that should be examined is the termination of Terrence Gunn, who was discharged by Respondent for "unprofessional and vitriolic comments regarding the competency of his co-workers." Respondent contends that Gunn engaged in a profanity laced act ad hominem assault on the competency of his supervisor, "and the appropriateness of the discipline that he was issued" and was discharged for such conduct. While the record does reflect that 30 Gunn was discharged by Respondent, for using the word "nigger" in speaking about it to his co-workers, it also reflects that he also became verbally abusive to his supervisor stating, "If she wants a war, she's going to have one. I'm going to take her down." I find that this behavior of Gunn, including racially inflammatory comments and threats to the supervisor, represents far more serious and egressions conduct, than that engaged in 35 by Kowinsky. Thus, Kowinsky made no threats to anyone, did not make racially inflammatory statements, and merely expressed some profanity in the course of describing his criticism of Respondent's supervisory and managerial staff.

40 Accordingly, Respondent has not established that it has taken the same employment action against similarly situated employees, who were not engaging in union activities.

45 Furthermore, I also note that Respondent failed to follow its disciplinary grid as expressed in its Employee Handbook, in discharging Kowinsky. In that regard, the disciplinary grid lists group one offenses that include "abusive profane and abusive

language,” and “behavior inconsistent with the nature of the organization, e.g. misconduct to another.”⁹ Notably the disciplinary grid for each of these offense, calls for a written reminder for a 1st offense, written warning to suspension for a second offense, and for a third offense suspension to termination. Thus, Respondent clearly did not
 5 comply with the terms of its Manual, by discharging Kowinsky for a first offense involving the conduct for which he was discharged. Respondent contends, as it did in its response to Kowinsky’s internal appeal, that the Employee Handbook is not a contract, and that it is only a “guideline, that can be altered by the Employer without notice, all, or part, or some can be applied in a situation at the discretion of the
 10 employer.” In that regard, Respondent noted that its Handbook on p.46 explicitly states that “all applications of the grid shall be at the sole discretion of AdvoServ.” The manual goes on to explain that “In some instances AdvoServ may chose to ignore the progressive nature of the grid as a result of a breach of conduct as it relates to the safety or abuse of persons and/or property, or the aggravating circumstances of several
 15 or more violations of various conduct standards. In every instance, AdvoServ will strive to be fair and consistent.”

While this language does permit Respondent to ignore the grid if it so chooses, and ignore the progressive nature of the grid, in certain aggravating circumstances, it
 20 also states that Respondent will be “fair and consistent.” Thus, while I agree with Respondent that this “savings clause,” does establish that the disciplinary grid reflected in the Manual is not a contract and may be altered, at Respondent’s discretion it does not mean that Respondent’s failure to apply it cannot be considered or relied upon. Indeed, the detailed progression set forth in the Manual must have some meaning, and
 25 cannot be eliminated from consideration, merely because Respondent reserved the right not to apply it in “aggravating circumstances.” The fact is Respondent’s manual states it will be “fair and consistent.” Clearly, as I have detailed above they have not been fair or consistent to Kowinsky, since he was treated much more harshly then Respondent treated other employees who engaged in similar conduct to him. Thus I
 30 conclude that Respondent could not and did not consider Kowinsky’s conduct to be “aggravating circumstances of several or more violations of various conduct standards,” and that it has violated its own progressive disciplinary procedures by discharging Kowinsky. This further undermines Respondent’s attempt to meet its burden of establishing that it would have discharged Kowinsky absent his union activity. Metro
 35 Transportation Services, 351 NLRB 557, 659 (2007); Publix Super Markets, 347 NLRB 1434, 1437-1440 (2006).

Accordingly, I conclude that Respondent has failed to establish that it would have
 40 terminated Kowinsky, absent his union activities, and that it has violated Section 8(a)(1) and (3) of the Act.

⁹ This latter statement was included in Kowinsky’s discharges notice, along with references to his profanity during his comments to Bayer.

B. THE TERMINATION OF KOWINSKY ALLEGEDLY FOR HIS EXERCISE OF
PROTECTED CONCERTED ACTIVITY IN VIOLATION OF SECTION 8(a) (1) OF THE
ACT

5 The Complaint alleges and the General Counsel contends that respondent
violated section 8(a) (1) of the Act, by discharging Kowinsky, because of his exercise of
protected concerted activity. More specifically, it is asserted that Kowinsky was
engaging in protected concerted activity, by complaining about Respondent's decision
to rotate staff during his meeting with Bayer, on December 16, 2013, and that
10 Respondent terminated him because he engaged in such activities.

 The analysis of this allegation does not involve an analysis under Wright Line,
supra, as did the above discussion, wherein I concluded that Kowinsky was discharged
because of his union activity in violation of section 8(a)(3) of the Act.

15 This alternative theory that Respondent violated the Act, by discharging
Kowinsky, because of his concerted activity at the December 16, meeting with Bayer is
independent and separate from my finding of an 8(a)(3) violation for his union activity.
Indeed, even if I had found as Respondent contends, that the discharge did not violate
20 Section 8(a)(3) of the Act, because it was not established by General Counsel that it
was motivated by his union activity, or that even if it was found to have been in part
motivated by union activities of Kowinsky, that Respondent would have terminated him
absent such union activities, thereby meeting its *Wright Line* burden of proof, a violation
of the Act based on Kowinsky's protected concerted activity would still be a viable
25 alternative possibility.

 In that regard, the first issue to be determined is whether Kowinsky was engaging
in concerted activity during his meeting with Bayer. I agree with General Counsel and
contrary to the position of Respondent, that Kowinsky was clearly engaging in concerted
30 activity, when he registered his complaints to Bayer about Respondent's decisions to
rotate staff among the houses at the UGL facility.

 Kowinsky's concerted activity began during the meeting earlier in December of
2013, when Respondent announced the decision to rotate employees to different
35 houses at its facility. This decision was announced by Bellizzi, the clinician who
recommended the action, and by Mickus and Byrd, those two supervisors of
Respondent at the UGL facility, who approved the recommendation of Bellizzi to
implement the rotation plan. Kowinsky as well as several other night shift employees,
including Wolyzuk and Flipowicz who worked with Kowinsky in UGL3, complained about
40 this proposal at this meeting. Indeed the record discloses that about half of the night
shift employees present spoke out in opposition to the move, while the other half spoke
in favor of it. There can be no doubt that Kowinsky, as well as the other employees
complaining about the staff changes, were engaging in concerted activity at that
meeting. *Worldmark by Wyndham*, 356 NLRB No. 104 slip op. 2-3 (2011) (Complaint
45 made by employee at the meeting announcing new rules affecting other employee

constitute concerted activity.); *Chromally Gas Turbine Corp.*, 331 NLRB 858, 862 (2000) (comments by employee protesting changes in working conditions announced at meetings by Employer falls within the definition of concerted activity); *Neff Perkins Co.*, 315 NLRB 1229 fn. 1 (1994) (comments by employees concerning working conditions raised at group meeting called by Employer clearly comes within definition of concerted activity); *Wal-Mart Stores, Inc.*, 341 NLRB 296, 804 (2004) (comments by employee including a common concern of employment of employees to supervisor, represents concerted activity); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) single employee's comments at employer meeting announcing suspension of wage increases for employees protesting that action, amounted to exercise of concerted activity).

Kowinsky's concerted activities continued when he told Outer in the presence of Wolyzuk and Flipowicz that the night shift employees were requesting a meeting with higher management representatives to address concerns that employees had about the proposed staffing changes. Outer relayed that request to Byrd, and shortly thereafter, Byrd told Outer that Bayer was coming to the UGL campus on December 16 to discuss the night shift's concerns about moving staff around the houses.

On December 16, Kowinsky reported to the staff lounge, and seeing Byrd, Mickus and Bellizzi present along with Bayer, asked to speak with Bayer privately. Bayer agreed and Kowinsky informed Bayer that "We wanted to speak to Bayer herself without anyone else there, because we didn't like the way things were running there." Kowinsky added that "we wanted to speak without Rashad or Kim or Alana there." Bayer replied fine, no problem, and then informed Mickus, Byrd and Bellizzi that the staff would prefer to meet with Bayer, one on one, with no one else present, and told them to wait there in the lounge in case there are any questions.

Kowinsky was the first employee with whom Bayer met on December 16. After telling Bayer that there was nothing wrong with his supervisor (Outer), Kowinsky complained to Bayer that Respondent was pinpointing the night shift by making adjustments on the night shift by switching houses amongst the employees. Bayer explained to Kowinsky that there had been accusations made by a resident against several of the night shift employees, and that Respondent was doing the best for the residents as well as the workers. Kowinsky responded that Flipowicz and Wolyzuk were the most senior employees, and that they should not be "moved out of our house." Bayer replied that Respondent was doing what was best for both the employees and residents.

Kowinsky then asserted that Respondent was putting young immature employees into homes with residents with violent histories, which could cause someone to get hurt. Bayer then urged Kowinsky to take the alternative supervisor position, (using an obscenity in her remarks).

Kowinsky, then commented that these changes were coming out of nowhere, and the night shift employees didn't understand why Respondent was picking on their shift. Kowinsky added, "if it wasn't broke don't fix it."

There can be no doubt that Kowinsky was continuing his exercise of concerted activity at this meeting with Bayer, and that Kowinsky's conduct on December 16, 2013, was a logical outgrowth of a continuation of his concerted activity, from the earlier meeting in December when he and his fellow employees concertedly complained to management officials about Respondent's decision *to rotate staff on the night shift, contrary to past practice*. *Wal-Mart Stores supra*; *Salisbury Hotel*, 283 NLRB 685, 687 (Individual employees call to Department of Labor grew out of employees concerted protest of Employer's change in lunch hour policy, and is therefore a continuation of that concerted activity) *Every Woman's Place*, 282 NLRB 413 (1986) (Employees telephone call to Department of Labor, related to and was a "logical outgrowth" of a prior complaint made by three employees to Employer about overtime compensation for holidays.)

Kowinsky clearly demonstrated the concerted nature of his complaints about the staffing change, by his telling Bayer that "we" wanted to speak to Bayer herself, without Byrd, Mickus or Bellizzi present, by complaining to Bayer that Respondent was pinpointing the night shift by its adjustments on switching houses, and commenting that he, Flipowicz and Wolyzuk were the most senior employees on the shift, and that they should not be moved out of "our" homes, and stating to Bayer that the night shift employees didn't understand why Respondent was picking on their shift. It is clear based on the evidence that Kowinsky was speaking on behalf of himself as well as other night shift employees in making his complaints to Bayer, and that Bayer, and Respondent was aware that he was engaging in concerted activity by such conduct. *Chromalloy Gas Turbine, supra*, 331 NLRB at 863 (employees complaint at meeting about employer's changes in breaks and scheduling); *Dickens, Inc.*, 352 NLRB 667 fn. 3 (2008); *CKS Tool & Engineering*, 332 NLRB 1583-1585 (2009) (Employee complaining about employer demand for increased productivity used the term, "we".) *Grimmway Farms*, 315 NLRB 1225, 1274-1280 (1995) (employee complained about how employer treated fellow employees and used the term "we wanted to know"); *Colders Furniture*, 292 NLRB 103, 941, 942-945 (1989) (Salesman in complaining about change in start time used "we" several times); *Whittaker Corp., supra*, 289 NLRB at 434 (Employee phrased his remarks at meeting complaining about Employer's wage increase suspension, in terms of "us" and "we").

Respondent's contention that Kowinsky's comments were not concerted, but merely personal griping and speaking only for himself, in his complaints about the Employer's actions, *Tampa Tribune*, 346 NLRB 369, 370-372 (2006) has no merit. The employee in *Tampa Tribune, supra* made a purely personal complaint about his treatment by his employer, no other employee shared his concerns nor made any similar complaints to the Employer about the issues raised by the employee, and the employee therein didn't use the term we or us, in making his complaints.

Here, as detailed above, Kowinsky's complaints about Respondent's staffing changes on December 16, had been expressed previously at prior meetings when the changes were announced and other similarly opposed employees expressed their

disagreement at the same time. Kowinsky then requested and was granted a meeting with Respondent's higher officials to protest these changes, which resulted in the meeting of December 16 with Bayer wherein he continued to protest. Respondent's rotation of staff on the night shift, using the term "we" and referring to other members of the night shift, particularly the employees at his building, as being adversely affected by Respondent's decision.

Accordingly, I conclude that Kowinsky was engaged in Section 7 activity during the December 16 meeting, wherein he complained about Respondent's staffing changes. Based on Respondent's own assertion as to its motivation for Kowinsky's discharge, he was terminated for engaging in inappropriate and profane conduct during his discussions with Bayer, it is clear that he was discharged for conduct that is part of res gestae of protected concerted activities. In such cases *Wright Line* is not applicable to the analysis. The appropriate inquiry is whether Kowinsky's use of profanity and disrespectful language in the exchange with Bayer during their discussion was sufficiently egregious to remove him from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322-1323 (2005) *Stanford Hotel*, 344 NLRB 558 (2005); *Circle K Corp.*, 305 NLRB 932, 933 (1971).

Thus, the Board has held that there are limits as to how far an employee can go in the course of exercising their concerted activity in order to retain the Act's protection. An employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced. Against the employer's right to maintain order and respect. *NLRB v Thor Power Tool*, 351 F. 2d 584, 587 (7th Cir 1965); *Cibao Meat Products*, 338 NLRB 934. 935 (2003). Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant inquiry is whether the conduct is so egregious as to take it outside the protection of the Act or of such character as to render the employee unfit for further service. *Consumer Power Co.*, 282 NLRB 130, 132 (1986); *Dickens Ins.*, *supra* 352 NLRB at 672; *Chromalloy Gas Turbine*, *supra.*, 331 NLRB at 863.

In assessing whether or not an employee who is otherwise engaged in protected activity loses the protection of the Act by his conduct during a conversation with a management representative, the appropriate analysis is set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), *Pier Sixty LLC*, 362 NLRB 59 slip op. at 2 (2013), *Triple Play Sports Bar*, 361 NLRB. No. 31 slip op. at 3 (2014); *Beverly Health & Rehabilitation*, *supra*, 346 NLRB at 132; *Alcoa Inc.*, *supra*, 352 NLRB at 1226 (2008). In making this determination the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004).

In assessing factor (1) place of discussion, it is significant that the discussion with Bayer occurred in a closed meeting with her, with no other employees or even any other supervisors present. In such circumstances, Kowinsky's remarks to Bayer although

they included profanity, and denigration of supervisors and clinicians, were not heard by any other employees, are not disruptive of workplace discipline, and do not undermine management's authority, and did not disrupt the work process. *Health Bridge Management*, 362 NLRB No. 33 slip op. at 1 (2015); *Plaza Auto Center v. NLRB*, 664 F.3d 289, 292 (9th Cir 2011); *Stanford Hotel supra* 349 NLRB 58 (2005) (outburst occurred away from normal working area in a closed door meeting with no employees present, did not impair Employer's ability to maintain discipline in the workplace, and location weighs in favor of protection.) *Alcoa Inc.*, supra, 352 NLRB 1222, 1226 (conduct of employee didn't take place in a work area and was not disruptive of work process), *Datwyler Rubber & Plastic*, 350 NLRB 664, 670 (2007) (outburst occurred during an employee meeting, where employees were free to raise workplace issues and in a location that might not disrupt employee's work process.) *Noble Metal Processing*, 346 NLRB 795 796 (2000) (outburst at meeting not disruptive of the work process, and meeting where employees could be expected to express views concerning changes announced by management.)

Accordingly, based on the above analysis and precedent, I conclude that the place of discussion here weighs heavily in favor of protection of the Act. *Plaza Auto Center supra*, 360 NLRB slip op at 7; *Success Village Apartments, Inc.* 347 NLRB 1065, 1069 (2006) (Discussion and use of crude language took place in office with supervisors *NLRB v Starbucks Corp.*, 679 F.3d 70, 74 (2d Cir. 2004 ("In balancing the Atlantic Steel factors, the Board has also "regularly observed a distinction between outbreak under circumstances where little if any risk that other employees heard the obscenities and those were the risk was high.") Kowinsky spoke privately with Bayer in a conference room away from other employees, and far removed from UGL residents. No one else was present for this conversation and no one else overheard Kowinsky's remarks. Therefore, this private closed door conversation strongly favors Kowinsky retaining the Act's protection.

The second factor in the Atlantic Steel analysis, subject matter of the discussion also strongly militates in favor of Kowinsky retaining the Act's protection. As detailed above, Kowinsky and other night shift employees engaged in protected concerted activities, when they complained about the proposed shift changes, at the prior night shift meeting. These complaints were then elevated to Bayer's level at the request of Kowinsky and his coworkers. Therefore Kowinsky's continued discussion with Bayer during his Dec. 16 meeting with her about those complaints directly related to the prior concerted activities of Kowinsky and was a legal outgrowth of such conduct. Thus, Kowinsky's comments in discussing reasons for objecting to rotation of personnel through different houses that the clinicians (who recommended the plan) were "jackasses", and that Mickus and Byer (the supervisors who agreed to follow the recommendation and implemented it), didn't know "what the fuck" they were doing, were related to that concerted complaint, and in furtherance of such activity. Accordingly, I conclude that since the substance of Kowinsky's December 16, 2013 conversation directly related to Kowinsky's protected, concerted conduct, the facts also strongly mitigates in favor of Kowinsky retaining the Act's protection. *Stanford Hotel*, supra 344

NLRB at 557 (conduct of employee while engaged in assertion of a fundamental right under the Act, weighs strongly in favor of finding that employee's rights are protected, *Alcoa Inc.*, supra 352 NLRB at 1226 (outburst of employee clearly involved terms and conditions of employment of employees, and weighs in favor of protection). *Datwyler Rubber & Plastics*, supra, 350 NLRB at 630 (outburst of employee occurred during discussion of employee complaints about terms and conditions of employment, and weighs in favor of protection).

Turning to factor 3, in *Atlantic Steel*, the nature of the outburst, I do not find that it favors the loss of protection or that this factor warrants the conclusion that Kowinsky forfeited his Section 7 protections. Kowinsky's conduct consisted of a brief verbal outburst of profane language, unaccompanied by insubordination, physical contact or threat of physical harm. *Beverly Health & Rehabilitation Services*, supra, 346 NLRB 1322-1323, (Employee told employee in connection with grievance possessing to "mind her fucking business," and comment reported to supervisor); *Fresnius USA Mfg.*, 358 NLRB No. 138 NLRB No. 138 slip op. at 5-6 (2012) (Comment by employee "dear pussies" in newsletter to employees, although vulgar and can be construed as demeaning to women, does not cause protection to be lost); *Alcoa Inc.*, supra, 352 NLRB at 1222, 1226, 1231-1233 (calling supervisor an "egotistical fucker"); *Success Village Apartments*, 347 NLRB 1065, 1067 (2006) (Telling supervisor "what the hell is this crap"); *Corrections Corp of America*, 340 NLRB 632, 635-636 (2006) (statement by employee, "this is bullshit"); *Union Carbide Co.*, 331 NLRB 356, fn. 1, 334, 360 (2000) (calling supervisor "fucking liar"); *Kiewit Power Corp.*, 355 NLRB No. 150 slip at 3 (2012) (Employees telling supervisors that the situation could "get ugly," and that supervisor "better bring his boxing gloves."); *CKS Tool & Engineering*, 332 NLRB 1578, 1582, 1585-6 (2000). (employee used f --- word several times in his discussion with management); *Burle Industries*, 300 NLRB 498, 502, 504 (calling supervisor f---ing asshole); *United States Postal Service*, 250 NLRB 4 fn. 1, 6 (1980) (calling supervisor a "stupid ass"); *Thor Power Tool*, 148 NLRB 1304, 1308 (1964), enfd 351 F.2d 584 (7th Cir. 1965) (Referring to plant superintendent as "the horse's ass"); *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982) (Employee referring to a co-worker as a "brown nosing suck ass."); *Leased Inc.*, 289 NLRB 547 (1988) (statement to supervisors "if you're taking my truck, I am kicking your ass right now."); *NLRB v. Cement Transportation Co.*, 490 F.2d 1023 (6th Cir. 1974) (referring to company president as a "son of a bitch." *Accord Severance Tool Foodstores*, 301 NLRB 1661, 1178 (calling company president a "son of a bitch"); *US Postal Service*, 241 NLRB 389, 390 (1979) (calling acting supervisor an "asshole").

I also note the Board's decision in *Pier Sixty LLC*, supra 362 NLRB 59 (2015). Here the board considered Facebook comments made by an employee about a supervisor. The comments were, "Bob is such nasty mother fucker don't know how to talk to people. !!!! fuck his mother and his entire family. What a LOSER!!! Vote for the Union."

5 There the Board didn't apply *Atlantic Steel*, to determine whether the conduct of the employer was so egregious to exceed the Act's protections, but rather applied a totality of the circumstances test. Slip op. at 2-4. However, in considering the relevant circumstances, section six and seven were the nature of the outburst and seven is whether the Employer considered the language used by the employee to be offensive. The Board concluded that the "overwhelming evidence establishes that the Respondent tolerated the wide spread use of profanity in the workplace, including the word "fuck" and "motherfucker." Considered in this setting, Perez' use of the words in his Facebook post would not cause him to lose the protection of the Act." The Board cited *Traverse City Osteopathic Hospital*, supra, 260 NLRB at 1061 (Employees use of profanity calling fellow employees a "brown nosing suck ass," while engaging in protected activity, did not cause her to lose the Act's protection where the use of profanity at the Respondent's facility was not uncommon and had been tolerated in the past), and *Coors Container Co.*, 238 NLRB 1312, 1320, 1438 enf. 628 F.2d 1283, 1288 (1st Cir. 15 1980), (Employee's engaged in protected activity did not lose the Act's protection, by calling the Respondent's guards "mother fuckers," where the phrase was commonly used at its facility, one of the guards was not disturbed by the employees using the most to degrade him and there was no evidence that any employee had been discharged solely for using obscenities.

20 See also *United Enviro Systems*, 301 NLRB 942, 443-444 (1991) (Profanity used by salesmen while engaging in concerted complaints about working conditions such as "the god dam paper work is a pain in the ass. I don't have fucking time for it," insufficient to cause them to lose the Act's protection, since profanity was used at other times at sales meetings and routinely tolerated by employees.)

30 Similarly here, as I have detailed above in connection with my *Wright Line* analysis concerning the 8(a)(3) allegation the evidence reflects that Respondent tolerated similar profanities by employees, or supervisors to employees, without any discipline at all, much less discharge, or at best only a written warning. For example, Palermo referred to supervisors Byrd, Mictius and Barash as "a bunch of fucking idiots", and told them that they were playing into the bullshit." Yet Palermo served no discipline whatsoever for her outburst made directly to three supervisors. Additionally, supervisor Byrd told employee Olcay to "shut the fuck up," in the presence of the entire shift, including Byrd's supervisor Mickus. Byrd served no discipline for this incident.

40 Further, Outer referred to a staff member as a "fat lazy cunt," and received only a written warning for that conduct. Similarly, night shift employees Doucette and Matos only received written warnings for writing "bullshit" and "suck my balls" respectively, on Respondent's disciplinary forms with which they did not agree.

45 Finally, I note that Bayer herself used profanity towards Kowinsky, in the course of their discussions, when he complained about the shift rotation system, and stated that Respondent was putting young immature employees into business with some residents with histories of violence which would cause someone to get hurt. Bayer

replied, "Todd, why don't you take the fucking alternate position for me." Please we need somebody mature like you and you can help these kids along and straighten them out."

5 Thus the above evidence demonstrates that Respondent did not consider
Kowinsky's conduct to be so egregious that it renders him unfit for service, and further
supports my conclusion that factor three under *Atlantic Steel* does not weigh in favor of
Kowinsky losing the Act's protection. *Fresnius USA*, supra, 358 NLRB at 6; *Corrections*
10 *Corp. of America*, 347 NLRB 632, 636 (2006) (finding no loss of protection based on
employee's profanity where similar language was common among supervisors and
employees like).

 Turning to the fourth factor in *Atlantic Steel*, I do not find that Kowinsky's outburst
was provoked by any unlawful or inappropriate conduct by Respondent.

15 In this regard General Counsel contends that this factor should be regarded as
neutral here. It is argued that the record establishes that Kowinsky commented to
Bayer at the meeting that the night shift believed that it was being unfairly targeted.
General Counsel further asserts that "these comments originated from Bayer's remarks
20 at the administration meeting that she believed that there was union organizing taking
place on the night shift and that if she found out who was involved, she would fire them.
Outer passed their remarks on to Kowinsky and his night shift colleagues and even
though not specifically pled in the complaint, Bayer's remarks clearly were unlawful
threats that provide necessary content to Kowinsky's protected asserted complaints." I
25 cannot agree with General Counsel.

 While I have found above, that Bayer's comments at the administrator meeting
did constitute evidence of animus towards union activity, although not alleged as an
unlawful threat, under section 10(b) of the Act, I do not and cannot find any connection
30 between that comment, and Kowinsky's outburst. I cannot conclude that Kowinsky's
comments to Bayer on December 16 were provoked in any way by Bayer's threats
made at the prior meeting, about firing for union activity. Rather, the evidence
establishes that Kowinsky's comments about the supervisors and the clinicians were
provoked, if anything by Bayer's failure to agree with him as to his assessment of the
35 capabilities of Respondent's managers and clinicians and his criticism of Respondent's
staffing decision. Therefore, I conclude that the factor of provocation does not favor
protection.

 In sum I conclude that the factors of place of discussion and subject matter of the
40 discussion strongly favor continued protection of the Act. The third factor nature of the
outburst, also favors protection of Kowinsky's conduct. In such circumstances, only the
factor of provocation does not favor protection, and in balancing the *Atlantic Steel*
factor, Kowinsky has not lost the protection of the Act by his comments at the December
16 meeting to Bayer. *Kewitt Power Constructors*, supra, 355 NLRB 150, slip op. at 3-4;

Alcoa Inc., supra, 352 NLRB at 1225; *Success Village Apartments*, supra 347 NLRB at 1069, *Healthbridge Management*, supra at 2.

5 Although I have found above that Kowinsky's comments did not weigh against his retaining the Act's protection, even if I concluded that this factor did not favor Kowinsky retaining the Act's protection, under *Atlantic Steel* principles, it does not follow that this finding would be sufficient to conclude that he lost the Act's protection. In *Media General Operations Inc. d/b/a Tampa Tribune*, 351 NLRB 1324 (2007), enfd. denied 560 F.3d 181 (4th Cir. 2009), the Board considered a comment by an employee
10 to two supervisors, made in connection with concerted activity, that the employer's vice president was a "stupid fucking moron." The judge had found that this statement was sufficient to cause the employee to forfeit the protection of the Act, since it was profane, offensive and personally degrading to the Vice-President, and was not provoked by any unfair labor practices of the Employer. The Board disagreed, and concluded that
15 though it agreed with the Judge that the employees' reference to the vice-president as a "stupid fucking moron" was clearly intemperate, that the nature of the remark weights only moderately against his retaining the Act or protection.

20 Thus the Board found it significant that although his remark was about the vice president, it was not directed at the vice president to his face, and there were no other confrontational aspects to it, such as physical contacts or threats. Further, at no point prior to his discharge was the employee informed that his remarks deserved any sort of official response or discipline, let alone discharge. Finally, the Board observed that although the employee's remark was disrespectful, it was not insubordinate in regard to
25 production or work assignments, nor did it serve to directly challenge the vice president's managerial authority. Thus the Board found that the employee's conduct did not warrant the loss of the Act's protection, even though the outburst moderately favored the loss of protection and was not provoked by any unfair labor practices. *Tampa Tribune*, supra at 1326-1327 citing *Success Village*, supra 347 NLRB 1969
30 (finding employee's outburst protected where location and subject matter weighed in favor of protection, while nature of outburst and lack of provocation weighed against protection).

35 The facts here are quite similar to *Tampa Tribune*. Thus even if Kowinsky's references to supervisors Mickus and Byrd as not knowing "what the fuck" were they doing, and to the clinicians as "jackasses," is considered intemperate and degrading, it was not made directly to these supervisors or the clinicians. Kowinsky's statements were spontaneous, not repeated and were not confrontational and were without any physical contact or threats. At no point, before his discharge was Kowinsky informed
40 that he deserved any sort of official response, let alone termination. Indeed to the contrary, Bayer during the meeting told Kowinsky that he should "take the fucking" alternate supervisor's positions, which demonstrated that Respondent did not view his comments as so egregious to warrant him unfit for service. Further, although
45 Kowinsky's remarks were disrespectful, it was not insubordinate, in regards to production or work assignments, nor did it serve to directly challenge the Respondent's

managerial authority. Therefore, it is appropriate to conclude and I do, that Kowinsky's conduct did not lose the protection of the Act and is distinguishable from cases where the Board has found that protection of the Act was lost. Compare e.g. *Waste Management of Arizona*, 345 NLRB 1337 (2005), (employee cursed repeatedly and loudly before witnesses, refused supervisor's repeated requests to move discussion into office, made threats to supervisor and was terminated in part for refusal to follow orders); *Damler Chrysler*, 349 NLRB 1329 (2005), (Employee cursed repeatedly in front of many other employees, called supervisor an "asshole" to his face and physically approached supervisors in an intimidating manner); *Trus Joist MacMillion*, 341 NLRB 369 (2009) (Employee called supervisor names, including lying "bastard," and "prostitute" in front of the other employees, repeated his comments made directly to supervisors to face, after being warned to stop, made sexually insulting gestures (grabbing his crotch), and was terminated for insubordination.); *Aluminum Co. of America*, 338 NLRB 20, (2007) (Employee's cursing directly at supervisor was heard by other employees and occurred in the course of employee's refusal to perform his assignment; also, employee refused to leave supervisor's office when he was told to).

In *Plaza Auto Center*, supra, 362 NLRB 117, the Board considered conduct by an employee wherein he was engaging in concerted activity by protesting an employer's decision concerning wage draw and commissions, at a meeting in a manager's office. During the course of that discussion, the employer addressed the employer's owner Tony Plaza and called him a "fucking mother fucker, fucking" "fucking crook," and an "asshole," and said that he was stupid, nobody liked him, and everyone talked about him behind his back. The Board had initially concluded in *Plaza Auto Center*, 355 NLRB No. 85 (2010), that these comments did not favor the employee's loss of protection of the Act. Slip op. 8-9. However, the Ninth Circuit Court of Appeals, reversed this finding in *Plaza Auto Center*, 360 NLRB 117 (2014), 664 F.3d 286 (9th Cir. 2011), and remanded the case to the Board instructing it to rebalance the decision under *Atlantic Steel's* principles consistent with the Court's analysis.

The Board did so, and concluded that the Court's finding that the employee's conduct consisted of obscene and degrading language, and was also insubordinate, was the law of the case, and would be followed by the Board. The Board further observed that upon further consideration "we concur with the Court's findings, that the nature of the outburst factor weights against protection." Slip op. at 6. The Board emphasized in making that conclusion that the employee's obscene and degrading remarks "must be give given considerable weight, because Aguirre targeted Plaza personally and uttered obscene and insulting remarks during a face to face meeting with Plaza, and used profanity repeatedly." *Id.* at 6. Moreover, the Board also noted that there is evidence that the employer did not tolerate employees cursing at management.

Here in contrast to *Plaza Auto*, supra Kowinsky's comments to Bayer about the clinicians and the supervisors were not made face to face, to either the clinicians or to the supervisors criticized by Kowinsky, and the evidence does reveal instances where Respondent tolerated employees cursing at management. For example, Paterno's

5 profanity directed towards Mickus and Byrd, resulting in no discipline at all, and the conduct of Matos and Doucette who received only written warnings for writing “suck by balls,” and “bullshit,” on Respondent’s disciplinary forms with which they did not agree. Further Bayer herself used profanity in her discussion with Kowinsky, and supervisor Byrd used profanity in his discussions with other employees.

10 The Board’s decision *Plaza Auto Center*, supra, 350 NLRB 25, does not support a finding that Kowinsky’s conduct favored loss of protection of the Act, in view of the above distinguishable factors.

15 Nonetheless, the Board in *Plaza Auto Center*, ultimately concluded although the employee’s conduct weighs against loss of protection, that finding does not establish by itself a loss of protection since the other *Atlantic Steel* factors, favor protection. *Id.* at 9.

20 While I have not found that Kowinsky’s comments were provoked by any unlawful or improper conduct of Respondent, his comments do not establish by itself a loss of the Act’s protection, even where there is no evidence of provocation. *Tampa Tribune*, supra; *Success Village*, supra.

25 Accordingly, based on the foregoing analysis and precedent, I conclude that Kowinsky’s conduct on December 16, 2013, did not cause him to lose the protection of the Act, and that his discharge of December 30, 2013 was violative of Section 8(a)(1) of the Act.

Conclusions of Law

- 30
1. By discharging Todd Kowinsky because of his activities on behalf of and support for 1199 SEIU United Healthcare Workers East, New Jersey Region, (The Union), Respondent has violated Section 8(a)(3) of the Act.
 - 35 2. By discharging Todd Kowinsky because he engaged in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.
 3. The aforesaid violations of the Act affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

40 The Respondent, Advoserv of New Jersey, Inc. of Hewitt, New Jersey, its officers, agents, and representatives shall

1. Cease and Desist from
 - (a) Discharging or otherwise discriminating against its employees because of their activities on behalf of or support for 1199 SEIU United Healthcare

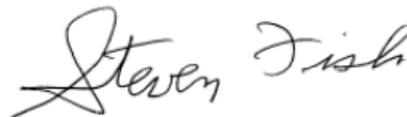
Workers East, New Jersey Region, (The Union).

- 5 (b) Discharging or otherwise discriminating against its employees because they engaged in protected concerted activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.
- 10 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - 15 (a) Within 14 days from the date of this Order, offer Todd Kowinsky, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - 20 (b) Make Todd Kowinsky whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this Decision.
 - 25 (c) Remove from its files any reference to the unlawful actions against Todd Kowinsky within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.
 - (d) Reimburse Kowinsky an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against him.
 - 30 (e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Kowinsky it will be allocated to the appropriate periods.
 - 35 (f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action against Kowinsky and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.
 - 40 (g) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of

backpay due under the terms of this Order.

- 5 (h) Within 14 days after service by the Region, post at its facility, copies of the
attached notices marked "Appendix."¹⁰ Copies of the notices, on forms
provided by the Regional Director for Region 22, after being signed by the
Employer's authorized representative, shall be posted by the Employer's
authorized representative, shall be posted by the Employer and
maintained for 60 consecutive days in conspicuous places including all
10 places where notices to employees are customarily posted. In addition to
physical posting of paper notices, notices shall be distributed
electronically, such as by email, posting on an intranet or an internet site,
and/or other electronic means, if the Employer customarily communicates
with its employees by such means. Reasonable steps shall be taken by
15 the Employer to ensure that the notices are not altered, defaced, or
covered by any other material. In the event that, during the pendency of
these proceedings, the Employer has gone out of business or closed the
facilities involved in these proceedings, the Employer shall duplicate and
mail, at their own expense, a copy of the notice to all current employees
and former employees employed by the Employer at any time since
20 December 30, 2013.

Dated at Washington, D.C. September 18, 2015

25 

30

Steven Fish
Administrative Law Judge

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their activities on behalf of or support for 1199 SEIU Healthcare Workers East, New Jersey Region (The Union).

WE WILL NOT discharge or discriminate against employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer Todd Kowinsky full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful actions against Todd Kowinsky and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

ADVOSERV OF NEW JERSEY INC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110
(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-131230 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.