

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 20**

**SBM SITE SERVICES, LLC**

**and**

**JOSE LA SERNA, an Individual**

**Cases 20-CA-157693**

**and**

**ESTER QUINTANILLA, an Individual**

**20-CA-157705**

**and**

**ADILIO PRIETO, an Individual**

**20-CA-157761**

**and**

**LUZ DARY DUQUE LOPEZ, an Individual**

**20-CA-157884**

**COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS**

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## I. INTRODUCTION

This case is about SBM Site Services, LLC (Respondent) retaliating against four employee janitors because of their Union and protected-concerted activity. These activists had as strong an employee following as they did opposition from Respondent's management and even from Service Employees International Union Local 1877 (the Union), the Union that represented them, because they often engaged in protected concerted activity without first seeking the Union's permission or blessing. Respondent now tries to buckle, what it could not in the hearing before the administrative law judge, the resounding evidence of its anti-union animus against these activist Union members, whose particular activity was frequently unsanctioned by the Union and invariably disliked by Respondent.

On October 5, 2017, Administrative Law Judge<sup>1</sup> Amita Baman Tracy issued her decision in *SBM Site Services, LLC*, finding that Respondent violated the Act by unlawfully suspending and terminating employees and shop stewards Jose La Serna, Adilio Prieto and Ester<sup>2</sup> Quintanilla.<sup>3</sup> Respondent could not overcome its *Wright Line*<sup>4</sup> burden then, and certainly fails to do so in its exceptions. Further, Respondent has once again failed to make any plausible argument that Charging Party La Serna's remedy should be diminished or that it is entitled to attorney's fees.

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<sup>1</sup> All references to the Administrative Law Judge are noted by "ALJ." All references to the Administrative Law Judge's Decision are noted by "ALJD;" All references to the hearing transcript are noted by "Tr." followed by the page number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to Respondents' exhibits are noted as "R Exh." followed by the exhibit number(s). All references to Joint exhibits are noted as "Jt. Exh." followed by the exhibit number(s). All references to Stipulations are noted as "Stip." followed by the paragraph number(s). All references to Respondent's Exceptions are noted by "R Exc." followed by the exception number(s). All references to Respondent's brief in support of exceptions are noted by "R Br." followed by the page number(s).

<sup>2</sup> Erroneously spelled in the ALJD as "Esther."

<sup>3</sup> Counsel for the General Counsel does not take exceptions to the ALJ's finding that Respondent properly suspended and terminated Luz Dary Duque Lopez.

<sup>4</sup> *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

## II. BACKGROUND

Respondent is a facilities management services company that provides custodial services, good manufacturing practices (GMP) work and move crews, along with managerial services (ALJD 3). Among its clients is biotechnology company Genentech, whose South San Francisco campus is the worksite of the employees at issue (ALJD 3). Respondent's janitors at the Genentech worksite are represented by the Union (ALJD 6: 27-29). The Union and Respondent are parties to the Northern California Maintenance Contractors Agreement which was in effect May 1, 2012 through April 30, 2016, and thus at all times relevant to this proceeding (the collective-bargaining agreement). (ALJD 6: 27-29; Jt. Exh. 2(a)).<sup>5</sup>

The bargaining unit was regularly represented at various times by Union organizers Cesar Diaz and Yvonne Pasaran, as well as about six employee shop stewards who were elected to their positions about every three years (ALJD 6: 34-37). Charging Parties Jose La Serna and Adilio Prieto were regularly elected as shop stewards (ALJD: 39-41). In the most recent shop steward election on March 26, 2015,<sup>6</sup> Charging Party Ester Quintanilla was elected shop steward as well. (ALJD: 6:42)

The beginning of 2015 saw an increase in Respondent's disciplinary action against its janitors at the Genentech worksite that corresponded with Employee Relationship Manager Sonia Trinidad's increased presence on-site (ALJD 7:10-12). In response to the rise in disciplinary actions, the employee shop stewards, whose appeal to the Union for assistance went unanswered, took matters into their own hands and began a campaign to address what they

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<sup>5</sup> Respondent disingenuously claims that there is no evidence that SBM was involved in a side letter in this case and that the side letter was negotiated between the Union and Genentech (R Exc. 43). The collective-bargaining agreement was entered into the record as Joint Exhibit 2(a). That collective-bargaining agreement is between the Union and the Respondent. Part Six, Bay Area Side Letters of Understanding, includes a side letter that sets forth some working conditions specific to those employees at the Genentech worksite, irrespective of who the employer is (Jt. Exh. 2(a) p. 83). In this case, it is the employees of SBM at the Genentech worksite (R Exc. 43).

<sup>6</sup> All dates 2015 unless otherwise noted.

considered unfair working conditions. (ALJD 7:10-14) Between January and March, activist Union shop stewards and employees, led by Charging Party La Serna, prepared flyers and posted them around the worksite and held Union membership meetings criticizing management (ALJD 7:14-38; 9:1-15, 20-21). On March 26, in the midst of a Union shop steward election, Charging Party Quintanilla, then a candidate for shop steward, was suspended for falsification of documents related to an on-the-job accident (ALJD 11:24-26). On March 30, La Serna was suspended for his zealous advocacy of Quintanilla during her March 26 suspension meeting. (ALJD 14: 5-8) On April 9, just days after a labor-management meeting with all of the shop stewards, including newly-elected shop steward Quintanilla and fellow Charging Parties La Serna and Prieto, Quintanilla was terminated for her Union activity with Respondent citing the same reason it had used for her suspension as the reason for her termination. (ALJD 21:30-32) On April 16, the dissident employees' protected concerted activity culminated with a march on the Genentech worksite to protest their working conditions and unfair disciplinary actions and to present client Genentech with an employee-signed petition seeking its intervention in the dispute with Respondent (ALJD 17:14-41, 18:13-14, 29-34). By April 23, Respondent had terminated La Serna for his Union and protected-concerted activity, specifically, for his vigorous representation of Quintanilla on March 26 and his involvement in the April 16 march (ALJD 20:9-16). Finally, on May 20, Respondent was able to get rid of Prieto, first, by suspending him, and, then, by terminating him on June 10 for his own Union activity, with Respondent citing an exaggerated "falsification" as the pretext for his suspension and termination (ALJD 29:17-19, 31:20-22).

### **III. THE ALJ RIGHTLY FOUND THE FOLLOWING FACTS<sup>7</sup>**

#### **A. The Meeting Between Manager Kahn and Charging Parties La Serna and Quintanilla Occurred on March 26. (Respondent's Exception 2)**

Respondent claims the ALJ omitted to find that Manager Kahn met with and Charging Parties La Serna and Quintanilla on or around March 19 to discuss Quintanilla's accident. However, the record evidence most certainly does not support that such a meeting occurred on March 19. Charging Party La Serna, whose testimony was credited by the ALJ, testified that that a meeting took place between himself, Quintanilla, and Kahn on March 26. His recollection of the date was bolstered by a point of reference, as La Serna recalled that the meeting with Kahn happened the same day as the Union shop steward election, March 26 (ALJD 33; Tr. 123). Kahn testified that the meeting took place after Quintanilla's injury, which occurred March 6 (Tr. 934). After Respondent's Counsel pressed him, Kahn testified that it was less than a month after the injury (Tr. 934). When pressed specifically as to whether the meeting took place a week or two later, Kahn stated, ambiguously, "Something like that," which by extrapolation dates the meeting at around March 19 (Tr. 934). There is no testimony or other evidence of more than one meeting between Kahn, La Serna, and Quintanilla. Thus, the ALJ only found that the one meeting took place on March 26, based on the specific, credited testimony of La Serna versus Kahn's inability to name any date at all.

Respondent points to the email dated March 19 from a Union representative as evidence that a meeting took place on March 19. However, this email states nothing about the date the meeting took place nor do the text or context of the email require the conclusion that it was sent after the meeting. When the email was introduced into evidence, Kahn gave no testimony as to

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<sup>7</sup> There is no merit to Respondent's Exception 1, the assertion that the ALJ based the decision's finding of facts and conclusions of law on the ALJ's review and considerations of the entire record for this case, including witness testimony. Apart from being nonsensical, Respondent has raised no argument or evidence in support of this exception and accordingly, it should be summarily denied.

whether he received it before or after the meeting with La Serna and Quintanilla. Thus, the record evidence supports that ALJ's finding that the meeting occurred on March 26, not March 19. Respondent's exception that the ALJ omitted to find a March 19 meeting had no merit and should be overruled.

**B. Periolat and Trinidad had a Single Conversation About Quintanilla's Conduct. ALJD 11:9-12 (Respondent's Exception 3)**

Again, the ALJ's finding is supported by the record evidence, while Respondent's proposed alternative finding is not. Respondent's assertion that there were two discussions between Human Resources Director Periolat and Employee Relationship Manager Trinidad concerning Quintanilla's discipline is not supported by the record testimony. Periolat testified that she had two conversations with Trinidad. However, she gave no foundation as to date, time, place, or context of either conversation that would lend credibility to her claim that there were two. Further, neither Trinidad nor Kahn corroborated that two conversations took place (Tr. 934, 1211). Trinidad only broadly stated that she became aware of Quintanilla's injury because she receives an email to the safety team when an incident is reported and because she spoke with Periolat and Executive Vice President Paul Emperador (Tr. 1208). Respondent asserts that Trinidad's second purported conversation with Periolat occurred about March 26, as "evidenced by the fact that Trinidad met with Quintanilla" on March 26. Again, Respondent's exception relies on unwarranted inference instead of sound testimony. The best evidence of two conversations would have been the corroborating testimony of the other participant, Trinidad, yet no such corroborating testimony was elicited. Thus, the record testimony supports that ALJ's finding of the one meeting between Periolat and Trinidad.

**C. John Brodie Told Eli Kahn Before Quintanilla's Suspension that She Was a Candidate for Shop Steward. (ALJD 11 fn.22) (Respondent's Exception 4)**

The ALJ's finding that it is more likely than not that Brodie told Kahn before Quintanilla's suspension that she was a candidate for shop steward is based on witness testimony and documentary evidence. Not only does an email between Brodie and Kahn state that Brodie will inform Kahn of who the shop steward candidates are, (GC Exh. 205) but Kahn also confirmed that he knew who was running before the shop steward election and then who won the election afterward (Tr. 1086). In any case, the identity of the person who told Kahn is not as important as the fact that he admittedly knew who was a candidate for shop steward (Tr. 1086). Regardless of who informed him, Kahn was aware prior to Quintanilla's suspension that she was a shop steward candidate. Considering that Brodie was the conduit who brought Kahn information about Union activity as evidenced by the February 26 email, the ALJ's finding that Brodie told Kahn before Quintanilla's suspension that she was a candidate for shop steward is a well-supported conclusion.

**D. The Account of the 4 p.m. March 26 Meeting with Quintanilla. (ALJD 11: 24-26) (Respondent's Exception 5)**

The ALJ completely discredited Trinidad as a witness particularly her testimony with regard to this meeting (ALJD 35: 29-38; 13: 17-18). Instead, the ALJ credited Charging Party Prieto's testimony when questioned by Counsel for the General Counsel:

Q Okay. And so who spoke first when you got to the conference room?

A It was Ms. Sonia Trinidad.

Q And what did she say?

A said that Ms. Ester Quintanilla was being accused for having falsified documents.

Q Who spoke next?

A Mr. Ulices, yes, he took out a paper that had stated that yes, what was being said was true.

Q Who spoke next, if anyone?

A Jose told him that it was unfair, that it was an abuse that was being done.

Q And who spoke next?

A Ms. Sonia replied in a very upset way and said that Jose was insulting her.

Q And who spoke after that?

A Ms. Sonia said that for that reason they had decided to suspend Ms. Ester Quintanilla and then I said to Jose, wait a second, wait and I left the conference room . . .

(Tr. 375:9-25, 376:1-2)

The ALJ also credited Prieto's account of the beginning of the meeting over La Serna's account and properly found that Trinidad told Quintanilla she was being accused of falsifying documents. The ALJ pointed out that the only significant difference between Prieto's and La Serna's testimonies about the meeting was that by Prieto's account, Trinidad stated the reason for Quintanilla's suspension (ALJD 12:fn.25). Moreover, the joint stipulation reached by the parties that "Quintanilla was given several opportunities to retract her submission of false information in her suspension meeting, and she refused" (Tr. 669) supports Prieto's testimony that Trinidad accused Quintanilla of falsifying documents. Respondent's argument that Trinidad should be credited merely because she testified that Quintanilla was given the opportunity to retract her statement fails to undercut the ALJ's credibility resolution in Prieto's favor. At most, Trinidad's testimony confirms the already-stipulated fact that Quintanilla was given an opportunity to retract the "false information" she was accused of; however, it is irrelevant to the fact that Quintanilla had already been issued a suspension for falsifying documents (GC Exh. 5(a) and (b)).

**E. The ALJ Accurately Described the Language Contained in Quintanilla's Suspension Notice. (ALJD 11:26-26) (Respondent's Exception 6)**

Respondent's exception that the ALJ incompletely cited the language in the Quintanilla suspension notice is not only without merit, it is also irrelevant. The ALJ quoted the language as it appeared in the Employee Warning specific to Quintanilla, "Violation of rules, policies, standards or unsatisfactory performance): Falsifying information about the security incident pertaining to work that occurred on March 5, 2015," and accurately summarized the remainder

which was pre-existing form language not uniquely relevant to Quintanilla selected by checking the box adjacent to the statement “Final disciplinary action will be determined by the Human Resources department after the conclusion of an investigation and/or the review of the disciplinary file of the employee” (GC Exh. 5(b)). Moreover, despite its exception, Respondent fails to show how the ALJ’s failure to quote the entire form even remotely affects her findings of violations. The exception should be overruled.

**F. Circumstantial Evidence Supports that Trinidad Learned About a Grievance Filed Against Her by the Union from Brodie or Kahn. (ALJD 13:22-23) (Respondent’s Exception 7)**

Although Respondent attacks the ALJ’s finding that circumstantial evidence supports a conclusion that Trinidad learned about a grievance filed against her by the Union from Brodie or Kahn, the evidence indeed supports such a conclusion. The record evidence includes an undisputed February 26 email from Brodie to Kahn in which Brodie notifies Kahn that the Union stewards are planning to request Trinidad’s removal (GC Exh. 205; ALJD 205). It is also undisputed that Trinidad was the Employee Relationship Manager and attended labor-management meetings (ALJD 7:5-6). An ALJ may draw inferences based on the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003) . Given Trinidad’s heavy involvement in labor relations as the *Employee Relationship Manager* and Brodie’s and Kahn’s awareness of the stewards’ complaints about Trinidad, it stands to reason that Trinidad would have learned about the stewards’ grievance to remove her from either Brodie or Kahn, who she worked with onsite at Genentech from January 2015 through June 2015. Therefore, the ALJ’s conclusion is supported by the record, and Respondent’s exception is without merit.

**G. Brodie Was Aware that Prieto Participated in the March on Genentech on April 16 and Signed the Petition Dated March 24. (ALJD 28, fn. 54) (Respondent's Exception 8)**

Respondent's claim that there is no evidence to support the ALJ's finding that Brodie was aware of Prieto's participation in the march on Genentech on April 16 and the petition dated March 24 is without merit. Indeed, that finding was based on the ALJ's credibility resolutions, which are allotted great weight. The ALJ did not credit Brodie's testimony that he was unaware of whether Prieto participated in any marches or signed any petitions given the evidence that Kahn was Respondent's contact with client Genentech and it is likely that the petition with Prieto's signature was shared with Kahn who in turn shared it with Brodie (ALJD 28, fn. 54). Further, Kahn saw Prieto participate in the march and likely told Brodie (ALJD 28, fn. 54). The ALJD is supported by the fact that when Brodie was asked *on direct examination* whether he was aware that Prieto had engaged in any marches or walks on Genentech's campus in 2015, Brodie pivoted and rather than answer directly responded that he had not witnessed to any marches or walks without answering the question about Prieto (Tr. 1135). Had Brodie truly not been aware of Prieto's involvement in these marches or walks, surely he would have explicitly denied being aware of Prieto's involvement. Accordingly the ALJ rightfully discredited this testimony. Moreover, given that Brodie and Kahn consistently shared information regarding the Union and employees' Union activities, the record as a whole supports that Kahn would have told Brodie about Prieto's participation after Kahn saw Prieto at the march (GC Exh. 205). Again, the ALJ's determination was based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003). The ALJ's finding that Brodie was aware of Prieto's involvement in marches and petitions is well-supported, and Respondent's exception is without merit.

#### **IV. CREDIBILITY: The ALJ Rightly Credited La Serna and Discredited Periolat, Kahn, Brodie, and Trinidad. (Respondent's Exceptions 9-11)**

Under the standard set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. F.2d 362 (3d. Cir. 1951), the Board does not overrule an ALJ's credibility resolutions "except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." The Board defers to the ALJ's credibility findings because the ALJ has the advantage of observing the witnesses while they testify, and the Board allots great weight to the ALJ's credibility findings insofar as they are based on demeanor. *Id.* Moreover, "a credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). It is also well-established that, "[c]redibility findings need not be all-or-nothing propositions-indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony." *Daikichi Sushi*, supra at 662.

Here, the ALJ credited La Serna based on the extensive details with which he testified and his straightforward, forthright manner (ALJD 34:43-45, 35:9-11). Respondent points to the ALJ not crediting La Serna's testimony as to the beginning of the March 26 meeting regarding Quintanilla. However, the ALJ credited Prieto over La Serna only as to the beginning of the meeting and whether Trinidad stated the reason for Quintanilla's suspension. In all other respects, the ALJ noted La Serna's admission that the conversation became heated and that voice tones escalated. The finding that Prieto's testimony was more credible than La Serna's in regard

to one detail of the meeting is hardly a basis for finding that Trinidad's self-serving, hyperbolic testimony was more credible than La Serna's (ALJD 35:30).

Respondent attacks the ALJ's mixed credibility findings regarding Periolat, Brodie, and Kahn, arguing that the discrediting was based on the evidence and not witness demeanor (R Exc. 30). However, the ALJ clearly states that on the issue of knowledge of union and protected activity, a key element in finding a violation, Periolat, Kahn and Brodie *appeared untruthful* (ALJD 35:8-9, emphasis added). Kahn appeared to be nervous when asked whether Quintanilla was running for shop steward and was elected as shop steward. He then admitted he was aware of it only when confronted with emails between Brodie and himself on cross-examination (Tr. 1085). Similarly, Periolat denied knowing of Prieto's involvement in the April 16 march, but then her own investigative notes reflected that she singled him out as an orchestrator of the march (Tr. 824; GC Exh. 27-3). Lastly, when Brodie was asked directly whether he was aware that Prieto had engaged in any marches or walks on Genentech's campus in 2015, Brodie avoided answering and responded that he had not been a witness to any marches or walks (Tr. 1135). All of the ALJ's credibility determinations were based on observation of witnesses' demeanor when confronted with conflicting evidence.

Similarly, the ALJ wholly discredited Trinidad based on her demeanor which the ALJ explicitly described as oozing "the impression that she sought to remove La Serna from the workplace" (ALJD 35:29-31). Such a strong credibility determination based on demeanor must be left intact. Therefore, the ALJ's crediting of La Serna, finding of mixed credibility as to Periolat, Kahn, and Brodie, and wholesale discrediting of Trinidad, must stand.

## V. ARGUMENT

### A. Respondent Exhibited Anti-Union Animus Against the Union Stewards' Activism. (Respondent's Exceptions 14-17, 42, 43, 55, and 59)

As the ALJ correctly found, the record is ripe with evidence of union animus against those employees who advocated for or supported the Union.<sup>8</sup> Despite Respondent's assertions that it had a good relationship with the Union and its representatives, this was not the case with respect to the activist brand of Union stewardship engaged in by La Serna and those employees associated with him such as Prieto, Quintanilla, and Lopez. In January 2015, in response to the increased disciplinary actions against employees in the unit, the shop stewards, including La Serna and Prieto, prepared a flyer dated January 15 raising workplace issues and inviting employees to a membership meeting (GC Exh. 46 (a)-(b)). Rather than leave the protected-concerted activity alone, Respondent quickly attempted to rebut the issues raised in the shop steward's flyer (GC Exh. 47 (a)-(b)).<sup>9</sup> On February 20, Trinidad met with La Serna to chastise him and accuse him of spreading rumors within the bargaining by voicing his workplace concerns. Following her accusation that he was spreading unfounded "rumors" by airing his grievances, Trinidad threatened La Serna with discipline for his tardiness record (Tr. 79-80; GC Exh. 30).<sup>10</sup> Such interaction demonstrates that La Serna's Union activism was not received favorably by management, and the record amply supports the conclusion that this unfavorable sentiment extended to those associated with La Serna such as Quintanilla and Prieto.

As of February 26, Respondent managers, including Kahn and Brodie, were discussing employees' grievance seeking Trinidad's removal (GC Exh. 205). By February 27, Respondent was already pressuring the Union to drop the grievance requesting Trinidad's removal (GC Exh.

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<sup>8</sup> R Exc. 14

<sup>9</sup> R Exc. 15

<sup>10</sup> R Exc. 15

40 A and B).<sup>11</sup> By March 25, the discussion at the March 24 employee meeting during which La Serna and his supporters, criticized management and called for Trinidad's removal had been reported to management by employees Hernandez and Barrientos. (Tr. 95, 796; GC Exh. 208) La Serna's March 30 suspension notice, following close on the heels of the March 24 meeting, included a reference to the employees who reported his comments at the meeting and characterized his comments as "harassing, intimidating behavior against female employees." (GC Exh. 2(a) and (b)) Respondent's internal correspondence also demonstrates its disapproval of the employees' complaints and protected activity, including Respondent's April 14 memo refuting the employees' concerns (GC Exh. 203).<sup>12</sup> Respondent's disapproval of the April 16 march on Genentech is evidenced by Respondent's demand to know the Union's position on the march. (GC Exh. 201) This demand only ceased when the Union assured Respondent that the Union was not supporting any demonstrations at Genentech and that the Union representative Diaz and other Union executive Board members were calling and meeting with the stewards at Genentech to discourage any potential demonstration (GC Exh. 201).<sup>13</sup> Periolat, knew that the April 16 march included delivering a letter to client Genentech's executives. Respondent was actively trying to label the march as unsanctioned by the Union (Tr. 1285; GC Exh. 404). Client Genentech was demanding to know what Respondent would do about a march (GC Exh. 201). This chain of events was not favorable to the Employer.<sup>14</sup> Prieto, as a march co-organizer and co-activist with La Serna, and Quintanilla, as a candidate for shop steward and a recipient of La

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<sup>11</sup> R Exc. 16; R Exc. 43

<sup>12</sup> R Exc. 14

<sup>13</sup> R Exc. 43

<sup>14</sup> Respondent argues that there is no evidence that it raised any concerns about the January and March employee meetings, or the April 16 march (R Br. P. 8). However, the memos rebutting the flyers posted by the shop stewards and suspending La Serna for his statements at the March 24 meeting clearly show the opposite.

Serna's advocacy, were among the employees who supported and joined La Serna's protected activity and Respondent was aware of their involvement.

Respondent argues that the employees had engaged in marches on Genentech in the past. However, there is no evidence that the past marches were unsanctioned by the Union as Respondent asserts (R Br. P. 6). Respondent also cited other shop stewards' continued employment as evidence that Respondent was not retaliating against the Charging Parties (R Br. P. 9). However, such facts are not dispositive. Here, Respondent was facing a grievance against its Employee Relationship Manager Trinidad, and a march coupled with an increased in grievances (Tr. 48, 90). Respondent took advantage of the Charging Parties' circumstances to retaliate against them and make an example out of them to the bargaining unit: go off course and you will be terminated.<sup>15</sup>

**B. The ALJ Rightly Found that Prieto and Quintanilla Were Terminated for Their Union Activity**

**1. Quintanilla was terminated on April 9 Because of Her Union Activity. (Respondent's Exceptions 12, 13, 18-38, 62)**

In concluding that Quintanilla was terminated in violation of Section 8(a)(1) and (3) of the Act, the ALJ correctly found based on the record that Quintanilla was engaged in Union activity. Respondent knew of her activity, Respondent exhibited animus toward her activity, and Quintanilla's Union activity was a motivating factor in Respondent's decision to fire her (ALJD 45:15-16). The ALJ also correctly determined that Respondent failed to show that it would have terminated Quintanilla absent her Union activity (ALJD 45:16-17).

Quintanilla ran for shop steward, and her name was on the ballot for the March 26, 2015, election (Tr. 132, 372-373; GC Exh. 205). The steward election and candidate names were announced via flyers posted around the time clocks where employees clock in when starting their

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<sup>15</sup> R Exc. 17

shift, and in entryways and glass cases outside of the SBM offices prior to the election (Tr. 50-51, 131-132, 372). The flyers were also distributed to employees throughout the facility prior to the election (Tr. 50-51; 132). In March 2015, Site Manager Kahn was well-aware of the process for the shop steward election and the identities of the employees who were running. Later he learned which employees had been elected as shop stewards and that Quintanilla was one of them (Tr. 1086). The Union introduced all of the new shop stewards, including Quintanilla, at the April 7 meeting with the Union officials and Respondent representatives, including Periolat and Kahn, concerning the pending suspensions (Tr. 163). Further, Respondent's own correspondence to client Genentech demonstrates knowledge that Quintanilla was involved: "A newly elected shop steward is planning a demonstration" (GC Exh. 203, p. 7-8). In addition to becoming a shop steward, Quintanilla was associated with activist stewards La Serna and Prieto, particularly after La Serna argued strenuously against her discipline at her suspension meeting on March 26 (Tr. 136, 375). Thus, the record contains ample evidence supporting the ALJ's conclusion that Quintanilla engaged in protected-concerted and Union activity and that Respondent that Respondent was well-aware of it.<sup>16</sup>

By asserting that Periolat did not know of Quintanilla's Union activity (R Br. p. 30), Respondent chooses to ignore crucial facts, Kahn was one of the decision makers in Quintanilla's termination (Tr. 815, 946), and had clear knowledge of Quintanilla's Union activity (Tr. 1086). By April 7, Periolat also knew Quintanilla was a shop steward due to her participation in the labor management meeting (Tr. 163).<sup>17</sup> Respondent argues that Periolat was

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<sup>16</sup> R Exc. 12 and 13. Human Resources Director Periolat said that she only became aware that Quintanilla was running for shop steward during the grievance period, subsequent to her termination (Tr. 816). The ALJ explicitly rejected Periolat's denial of knowing that Quintanilla was engaged in Union activity (ALJD 29-31). The ALJ's finding that Periolat knew about Quintanilla's Union activity is supported by the record clearly establishing that Periolat consulted with Site Manager Kahn concerning Quintanilla's termination (Tr. 1254).

<sup>17</sup> In any case, as the Supreme Court held in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), that an employer is liable for employment discrimination if a supervisor performs an act motivated by discriminatory animus that is

not at the Genentech worksite working with Quintanilla to support its contention that Periolat could not have known about Quintanilla's Union activity. (R Br. p. 37) However, Respondent ignores that at the time, between March 25 and April 9, Periolat was involved in the investigation of Lopez and La Serna and thus had knowledge of what was transpiring at the worksite. Thus, Respondent's assertions that Periolat did not know of Quintanilla's Union activity prior to her termination must fail.

The timing of Quintanilla's termination also leads to the conclusion that she was fired due to her Union activity.<sup>18</sup> Because an employer will seldom admit that it was motivated by anti-union animus when it made its adverse employment decision, circumstantial evidence is sufficient to establish anti-union motive. *Healthcare Employees*, 463 F.3d 909, 919 (9th Cir. 2006) , citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir.1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving."); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.1997); *Folkins v. NLRB*, 500 F.2d 52, 53 (9th Cir.1974) (per curiam). Thus, factors such as the employer's knowledge of employee union activity, the employer's expressed hostility toward its employees' union activities, the commission of other unfair labor practices, and the timing of the adverse action in proximity to the employees' union activities create an inference of unlawful motive. *Transportation Management Corp.*, 462 U.S. 393 at 403-04 (1985); *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 916-917 (9th Cir. 1982); *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 837-838 (9th Cir. 1981).

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intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action. *Id.* at 422. In *Bozzuto's, Inc.*, 365 NLRB No. 146 (2017), Member Miscimarra's concurrence notes that under this analysis known as the "cat's paw" theory, even if the decision maker based its decision to discipline on legitimate workplace infraction, because the manager who caused the infraction was motivated by discriminatory animus, the discipline was discriminatory and violated the Act

<sup>18</sup> R Exc. 22 and 25

Here, Manager Kahn wanted to be rid of Quintanilla and sought documentation to justify firing her.<sup>19</sup> By the time Kahn met with Quintanilla on March 26, he had all the evidence in his possession to indicate that she had been untruthful regarding the date of her injury (Tr. 1083-1084).<sup>20</sup> That same day, March 26, Respondent suspended Quintanilla for “Falsifying information about the security incident pertaining to work that occurred on March 5, 2015” (GC Exh. 5(b)). Then, Respondent relied on all of the evidence already in its possession on March 26 to terminate Quintanilla on April 12 (Tr. 1084).<sup>21</sup> In the interim, on March 27, supervisor Cazarez submitted a statement documenting his March 11 conversation with Quintanilla (R Ex. 91-15).<sup>22</sup> On April 7, Managers Silva and Lomeli submitted their own statements about Quintanilla’s March 5 accident and their interactions with her on March 5 (R Exh. 91-17, 18). However, none of the information was new. It was all known to Respondent prior to March 26. In fact, the only thing that changed between Quintanilla’s suspension and termination was her new prominence as a Union officer: she was now a shop steward among a growing contingent of very vocal, activist stewards, such as La Serna and Prieto, and she had La Serna’s full support. Silva and Lomeli submitted their statements about Quintanilla’s March 5 accident the same day that Quintanilla was introduced as shop steward to management at a labor-management meeting

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<sup>19</sup> R Exc. 20, 21, 23, and 26

<sup>20</sup> This supports the ALJ’s assertion that SBM suspected Quintanilla may have been untruthful in her version of events on March 11 (R Exc. 23).

<sup>21</sup> Although the Genentech employee who observed Quintanilla’s injury submitted a written note concerning the accident which has a “4/8/15” on it, the record shows that the verbal statement was already in Respondent’s possession by March 26, and the written note was a mere formality (Tr. 935).

<sup>22</sup> Respondent argues that there was no evidence that Respondent suspected Quintanilla was being untruthful on March 11, but R Exh. 101 shows that Manager Brian Hawes already knew by March 5 that Quintanilla was denying not having called her supervisor immediately after the accident (R Exh. 101). Moreover, Supervisor Cazarez interviewed Quintanilla on March 11 and questioned her on the timing of the accident and asked that she show her cell phone to prove that she reported the accident immediately after (Jt. Exh. 23). At that point Cazarez clearly knew that Quintanilla was being untruthful about having called to report the accident.

(Tr. 163; GC Exh. 6).<sup>23</sup> Thus as the ALJ accurately observed, the timing of Respondent's gathering of evidence is highly suspicious (R Exc. 25).

Further, the ALJ rightly found that Respondent's asserted reason for firing Quintanilla was pretextual.<sup>24</sup> The record provides ample evidence of disparate treatment based on Respondent's long history of issuing lesser discipline for comparable infractions. Respondent's disciplinary records include numerous examples of employees who have "falsified" documents. Employee Roberto Perez, on June 24, 2015, just weeks after Quintanilla was fired for falsifying documents, provided "misleading information in the restroom cleaning log" or backdated his signature on the cleaning log, which is the same infraction as falsification (GC Exh. 124, 126 A; Jt. Exh. 3A). Kahn testified that backdating is a form of falsification. (Tr. 1056) Similarly, employee Rene Aguilar also backdated his signature on bathroom cleaning logs on June 29, 2015 (GC Exh. 102). After he falsified records, this same employee, who was still employed nearly a year later, received a warning on March 4, 2016, for insubordination and being very rude to the manager. In a written statement, the employee states that "what this note [the disciplinary form] says is false" (GC Exh. 106 A and B). Then, on April 7, 2016, the same employee is only suspended, not fired like Quintanilla, for signing cleaning logs without completing the work (GC Exh. 107 A, at 5). Similarly, employee Maria Elena Rodriguez backdated a log on September 14, 2016 and was given only a written warning (GC Exh. 132). Lead Beatriz Alcantara was given a warning for leaving early before the end of her shift, an infraction that actually cheats Respondent out of money (GC Exh. 156). Similarly, Orlin Mendez left the site early and was only given a written warning (GC Exh. 121). None of these employees were terminated for their

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<sup>23</sup> Respondent asserts wrongly that the parties met specifically to discuss Quintanilla's grievance (R Br. p.38). However, this labor management meeting was held to discuss numerous grievances. There is no evidence that Quintanilla was given the opportunity to retract her statement at this meeting (R Exc. 27, 28).

<sup>24</sup> R Exc. 19

falsifications, while Quintanilla was suspended and then terminated for the same offense.<sup>25</sup>

Moreover, Quintanilla did not have the multiple disciplinary infractions that some of the other employees had, particularly with respect to documentation errors, yet her discipline was more severe (GC Exh. 102, 106, 107, 117, 118).<sup>26</sup> The evidence of Respondent's lesser discipline for comparable infractions shows that Respondent treated Quintanilla differently by firing her and supports that Respondent would not have fired her absent her Union activities.

Moreover, the severity of Quintanilla's discipline, termination, was disproportionate to the offense.<sup>27</sup> Considering the accident report that Quintanilla was presented with at her termination meeting, it is clear from her response and the Union representatives present that she had not filled out the injury report, someone else had, and there was at least some confusion as to what she was accused of having falsified. Although the multiple documents in play causing confusion during the discipline meeting do not reduce the severity of Quintanilla's conduct in misrepresenting the date of the accident, termination was nonetheless an excessive discipline. Particularly when the "falsification" relied upon was a handwritten document that Kahn asked Quintanilla to prepare (Tr. 935). Not at all recognizing his own role in creating the "falsification," Kahn states that Quintanilla was "intentionally falsifying information . . . to avoid getting discipline for something else, so making up a story" (Tr. 1043).

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<sup>25</sup> R Exc. 31-36. If Respondent had abided by the policies it contends it relied on in terminating Quintanilla, zero tolerance for falsification (Tr. 1070), Quintanilla and the other comparable employees would have been terminated immediately after confirming the falsification. However, this was not the practice. Respondent uses its own fabricated justification for Quintanilla's termination to accuse the ALJ of setting a dangerous precedent causing employers to "shoot first" (R Br. p. 43). Clearly this is not what the ALJD states, but simply points out that had falsification truly been a zero tolerance offense, Respondent would have relied on all of the evidence it had by the suspension meeting to terminate (ALJD 45:1-3).

<sup>26</sup> Respondent's cite to *Phc-Elko, Inc., d/b/a Elko Gen. Hosp.*, 347 NLRB 1425, 1427 (2006), is not dispositive as it has to do with an employee engaged in unprotected activity, i.e., the employee was terminated for unprotected activity and there was no proof of disparate treatment (R Exc. 30).

<sup>27</sup> R Exc. 18. See *Kellwood Co.*, 299 NLRB 1026, 1040 (1990) (affirming the ALJ's finding that "the imposition of discipline so harsh as to be unreasonable and disproportionate to the offense clearly suggests ulterior motivation" where respondent alleged it discharged discriminatees based on a policy violation that merited discharge but where past discharge based on the same policy was not similar to case at hand.)

Essentially, Quintanilla was punished twice, suspended and terminated, for the same infraction: providing false or misleading information (GC Exh. 5 & 6).<sup>28</sup> No new evidence was acquired between the date Quintanilla was suspended and her termination (Tr. 1082-1084; R Exh. 91). Nor was further investigation performed (Tr. 1082-1084).<sup>29</sup> Rather, Respondent terminated her for the same offense for which she had already been suspended (GC Exh. 5 & 6).<sup>30</sup> Based on all of the above, the ALJ rightfully found that Respondent failed to meet its *Wright Line* burden to show that it would have both suspended and fired Quintanilla for “falsification” absent her Union activity. The record evidence amply supports the ALJ’s conclusion that Quintanilla was terminated because of her Union activity in violation of Section 8(a)(3) of the Act.<sup>31</sup>

**2. Prieto Was Suspended on May 20 and Terminated on June 10 Because of His Union Activity. (Respondent’s Exceptions 39 – 61, 63)**

The ALJ correctly found that Prieto was suspended and terminated in violation of Section 8(a)(1) and (3) of the Act. As the ALJ found, Prieto was engaged in Union and protected-concerted activity, and Respondent knew of his activity.<sup>32</sup> Prieto was an active shop steward who participated in disciplinary meetings and labor-management meetings. Specifically, Prieto participated in the March 26 disciplinary meeting at which Quintanilla was suspended which later served as the basis for La Serna’s suspension and termination, the March 30 disciplinary meeting at which La Serna was suspended, and the April 9 disciplinary meeting at which

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<sup>28</sup> R Exc. 29

<sup>29</sup> Although Periolat claims that Quintanilla was given the opportunity to retract her statement at labor management meetings, her own testimony establishes that this was post termination (Tr. 1256). (R Exc. 27)

<sup>30</sup> The ALJ correctly observed that all of the evidence used by SBM to terminate Quintanilla were facts known to SBM prior to Quintanilla’s suspension and which it relied on in suspending her. (R Exc. 26)

<sup>31</sup> Respondent accuses the ALJ of misapplying *Wright Line* in order to justify oral argument (See Respondent’s Request for Oral Argument Regarding Its Exceptions). However, it is Respondent that misapplies *Wright Line* by ridiculously positing that “fraud and lying are not protected conduct.”(R Br. 44) Obviously the Counsel for the General Counsel stipulated that Quintanilla willfully provided false information (Tr. 669-671). Where Respondent’s defense falls short in the fact that employees who had equivalent misconduct were not terminated, and that discipline, as the ALJ pointed out, was excessive when compared to other employees (ALJD 44:10-12, 41-42).

<sup>32</sup> R Exc. 39

Quintanilla was terminated. More particularly, Respondent knew of Prieto's involvement in the April 16 march on Genentech and identified him as an orchestrator, along with La Serna (GC Exh. 27, p. 3).<sup>33</sup> Respondent incredulously states that the decision maker for Prieto's termination, which it has already admitted was Periolat (R Exc. 39), did not know of his participation in the April 16 march despite her own notes labeling him an orchestrator of the march. (R Exc. 41) Moreover, Site Manager Kahn saw Prieto at the march (Tr. 1094).<sup>34</sup> Respondent also exhibited disapproval toward this activity when it sought the Union's disavowal of the march (GC Exh. 201) and tried to shut down the action with its own flyers rebutting the show stewards' complaints (GC Exh. 203).<sup>35</sup>

In addition to Respondent's animus toward this activity referenced above, the ALJ correctly found that the timing of Prieto's suspension and termination raised an inference of unlawful motive (ALJD 27-30).<sup>36</sup> The timing of Prieto's termination, a mere two months after his fellow shop steward activists and bargaining-unit employees La Serna and Quintanilla were unjustly terminated indicates that his termination was part and parcel of Respondent's plan to remove La Serna's and the other activists, who had no compunction about organizing the employees for protected activity, such as the march on Genentech, whether the Union sanctioned it or not.

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<sup>33</sup> Respondent disingenuously represents that Periolat's notes which state Prieto and La Serna were orchestrators of the April 16 march, is a summary of her investigation and does not show knowledge (R Br. 45-43). Instead, Respondent focuses on her blanket denial that Prieto's activity had anything to do with his termination and notes her testimony that Prieto's involvement in the march "doesn't ring a bell." However, this testimony was before she was confronted with her notes on cross examination, and Periolat did not explain the inconsistency between her testimony and her own notes.

<sup>34</sup> Of note, Periolat made the recommendation to terminate Prieto and Kahn agreed (Tr. 1023).

<sup>35</sup> Respondent erroneously applies *Ogihara American Corp.*, 347 NLRB 110, 111-112 (2006) to the instant facts. In that case, the discriminatee was indisputably terminated for his protected activity. *Id.* Here, the conduct for which Prieto was suspended or terminated was not the protected conduct. Prieto's protected conduct is his Union activity, i.e. his shop steward work, his involvement in the April 16 march. Respondent failed to show that it would have suspended and terminated Prieto absent this activity, in light of the disciplinary records for comparable infractions by other employees.

<sup>36</sup> R Exc. 41

Prieto was suspended for “Falsification of documentation on FN2008 on 051215” (ALJD 48:27; GC Exh. 9).<sup>37</sup> However, the record evidence shows that when Prieto was approached by GMP Operations & Quality Manager Brodie regarding an omission on the pass-through log for equipment, Prieto readily admitted that he had not cleaned the two lab rooms and explained that he cleaned the Blue Room and signed the log based on Lead Lazo’s instruction (Tr. 1112).<sup>38</sup> Brodie quickly accused Prieto of falsification notwithstanding Prieto’s forthright explanation (Tr. 387). Prieto’s discipline for “falsification” was escalated to a suspension, when a written warning would have sufficed. Respondent then terminated Prieto for the same infraction for which he was suspended.<sup>39</sup>

Absent his association with activist steward La Serna and his Union activity, Respondent would not have taken the step of firing Prieto for conduct that at most warranted a suspension, but more likely a written warning. Respondent’s own handbook describes the infraction as “Dishonesty; willful falsification or misrepresentation of information.” (Jt. Exh. 3A at 9-10) Even though Prieto’s “falsification” was hardly “willful,” as he quickly pointed out that he had not cleaned the two rooms he had signed for and explained that this was a misunderstanding with his lead, Respondent clung to Prieto’s error in order to justify a more severe discipline. All evidence points to Prieto having filled out the form erroneously but quickly owning up to his failure to clean the lab rooms inside the Blue Room. There is no dispute that he cleaned the remainder of the Blue Room. Nevertheless, Respondent escalated his conduct to “falsification” in order to justify his suspension. Respondent’s own disciplinary records establish Prieto’s conduct would not have warranted such severe penalties absent his Union activities.

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<sup>37</sup> R Exc. 40

<sup>38</sup> R Exc. 46

<sup>39</sup> The exact wording on the termination form is: “Conduct Violations: falsifying client documents; providing false or misleading information, Violation of GMP Tech Job Responsibilities Violation of business practice or policy” (GC Exh. 10).

The record provides ample evidence that Respondent did not treat “falsification” with such gravity (See Section V.B.1.).<sup>40</sup> Respondent makes much of the fact that Prieto worked within the GMP and that in this section of the campus the standards for compliance with cleaning routines are strictly enforced (Tr. 908). However, the record contains numerous examples that demonstrate that the rules surrounding the GMP area are not so strictly enforced in practice, despite what the rules may be. For example, on May 5, Respondent gave employee Jesus Canaveral a mere verbal warning for signing for both the cleaning and the verification of the cleaning, when it is against the “Standard Operating Procedures” to sign for both tasks, despite the promise of FDA audits at any time (Tr. 1266; GC Exh 109). Similarly, Respondent issued employee Jose Davila a verbal warning on June 12 for failing to perform the weekly cleaning of benchtops in certain labs (GC Exh. 110).<sup>41</sup> Both of the aforementioned employees were worked in GMP. On July 27, employee Henry Rodriguez was issued a verbal warning for failing to perform the monthly cleaning in a cold room, which is a GMP area (GC Exh. 128). On September 17, employee Cesar Menjivar was issued only a written warning for failing to perform sterile gowning as required in the strictest areas (GC 120). More recently, on July 20, 2016, employee Erik Hernandez was issued a verbal warning for having missed the cleaning of room 8280, another GMP area (GC Exh. 114).<sup>42</sup> Employee Cristo Cerrato was suspended on April 28, but only after he committed multiple back to back documentation infractions at GMP, and while he was removed from GMP, he was not terminated.<sup>43</sup> Prieto, on the other hand, had prior safety violations, such as receiving a cut on his finger on October 3, 2014 when he failed to wear appropriate gloves (R Exh. 46-44) and not immediately reporting a slip on some stairs (R

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<sup>40</sup> R Exc. 47

<sup>41</sup> R Exc. 49

<sup>42</sup> R Exc. 50

<sup>43</sup> Employee Cristo Cerrato had a history of errors at GMP, including a counseling notice on July 22, 2013 regarding his failure to wear appropriate protective clothing (GC Exh. 138 B).

Exh. 46-42), but he had no history of document discrepancies before May 12. Despite the great emphasis that Managers Kahn and Brodie placed on the GMP area and following the SOPs, Respondent's minor disciplinary actions for SOP infractions belie their testimony.

Further, the record evidence amply demonstrates that Respondent does not address "falsification" with such severity, even in GMP. On October 22, 2015, Respondent suspended employee Donald Manzanares because he failed to sign the pass-through log and backdated a corresponding cleaning log for the same rooms involved in Prieto's discipline (GC Exh. 118). On March 25, employee Oscar Otoyá backdated a log at GMP and was suspended, though he also misbehaved during the disciplinary meeting (GC Exh. 313; Tr. 124, 154). Then on June 17, after being suspended just weeks before, Otoyá only received a written warning when he made another documentation error by failing to perform or document his daily room cleaning (GC Exh. 122). Similarly, on September 24, 2016, employee Maria Elena Rodriguez received just a written warning for backdating, i.e., initialing and dating a form on a date that she did not perform the work. (GC Exh. 132).

Therefore, Respondent's assertion that the GMP areas are more sensitive has been exaggerated in order to justify Prieto's discipline. Despite Brodie's attempted rationalization that Prieto failed to clean rooms that are of the "highest controlled area" within GMP, many other employees have made errors there. (Tr. 1118) In June and then October, Respondent issued discipline for errors in the same lab rooms 3218/3219 (GC Exh. 115, 116). First, on June 5, 2015, employee Giovanna Loli was issued a verbal warning for failing to sign the appropriate equipment pass-through log on the same date as Prieto (though her discipline was inexplicably issued weeks after Prieto's) (GC Exh 116). Then on October 22, employee Donald Manzanares, the employee Prieto was covering for on May 12, was suspended for backdating work.

Significantly, these employees were removed from GMP rather than terminated (GC Exh. 118; Tr. 1054). Thus, regardless of whether GMP areas are treated more sensitively, the evidence still shows Respondent treated Prieto more harshly than other employees.<sup>44</sup>

Further undercutting Respondent's defense is its illogical and inconsistent distinctions between Prieto's conduct and similar conduct of other employees who were issued lesser discipline.<sup>45</sup> Kahn distinguished Prieto's conduct from an omission by stating that an "omission is of human error whereas what Adilio did was intentional." (Tr. 1018) However, the documentary evidence shows that Respondent clearly categorized Prieto's conduct as human error and not a willful falsification (Tr. 1025; R Exh. 79). The discrepancy management system<sup>46</sup> report concerning Prieto's purported "falsification" and employee Giovana Loli's failure to sign the pass-through log, both of which occurred on May 12, states: "*Human error* caused this event. Appropriate corrective actions are performed . . . This is not a recurring issue; therefore no further corrective action is necessary." (R Exh. 79, p. 3, emphasis added) If no further corrective action was necessary and the record evidence shows that human error warrants a verbal warning, Respondent has failed to show it would have taken the further corrective action of firing Prieto even absent his Union activity. Concerning employee Loli's failure to sign the pass-through log on May 12, Kahn represented that Loli "forgot to document her pass-through, but she claimed she did the work," and so received a verbal warning for her human error. (Tr. 1053, GC Exh. 116) The difference between Prieto and Loli is that she claimed to do the work, while Prieto quickly acknowledged that he had not performed the work. There is no evidence that Loli

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<sup>44</sup> *Abbey's Transportation Services, Inc. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983) .

<sup>45</sup> R Exc. 52 and 53. Respondent argues that the comparators are not proper because none had the same decision maker. But as the ALJ pointed out, "[A]s the human resources director, Periolat should have the information to ensure that the discipline she recommends and decides remains consistent." (ALJD 49:17-19)

<sup>46</sup> A discrepancy management system (DMS) is where a record is placed as a deviation from the procedure (Tr. 1016).

actually performed the work. Certainly, employee Otoya did not perform the work on June 17 and was only issued a written warning. (GC Exh. 122) Thus, Respondent failed to show that human error such as Prieto's warrants a suspension, let alone termination.

Despite its efforts, Respondent also failed to make a credible distinction between Prieto's "intentional" behavior and that of other employees. Kahn half-heartedly distinguished Prieto's conduct from that of other employees by categorizing other employees' conduct as human error, and not an "intentional mistake." (Tr. 1048-1049) According to Kahn, Prieto's conduct was a terminable offense because "[N]ot only was it falsification of documentation but that it was intentionally falsified in order to get out of another documentation issue." (Tr. 1024) However, rather than showing that he was trying "to get out of" something, the documentary evidence and other witness testimony shows that Prieto quickly owned up to his failure to enter and clean the lab rooms despite having signed for them. (Tr. 1112; R Exh. 46-13, 46-16) There are numerous examples of employees, even in GMP, backdating the logs to reflect the work they may or may not have done. The act of backdating necessarily requires intent to falsify the document. (GC Exh. 118, 132, 313) With respect to his October 22 backdating, Manzanares wrote a statement explaining that when employees arrive to clean a room and another type of cleaning is taking place in that room, the norm is to note the current date but clean the next day, that is, to intentionally backdate. (GC Exh. 116 B)<sup>47</sup> Tellingly, Kahn distinguished Manzanares' conduct by stating that Manzanares was "trying to do the right thing." (Tr. 1057) However, Prieto's conduct was in the same spirit in that he did what his lead told him to do and, when questioned

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<sup>47</sup> R Exh. 51

about the documentation, without hesitation told Respondent the truth. Kahn's clearly subjective distinction was arbitrary and unabashedly designed to justify Prieto's unlawful termination.<sup>48</sup>

The ALJ cited one example of a disciplinary action that was comparable to Prieto's conduct. (ALJD 49:4-6) In 2013, employee Veronica Barajas was terminated for falsifying the log books. (R Exh. 90) Barajas' case is clearly distinguishable from Prieto's because she continued to lie, while Prieto quickly stated he had not cleaned the rooms within the Blue Room. According to the documentation, employee Barajas had signed the log book and at first represented that she had cleaned the rooms within the Blue Room on the two days in question. When pressed by manager Brodie about a ball of tape on the floor, Barajas said she did not know why the tape was on the floor, then stated she had only cleaned the drains because she did not know a key in her possession could open the room in question. After further inquiry from Brodie and another round of interviews with her, she was confronted with contrary evidence, (ALJD 49:6-7) Barajas finally admitted she had not cleaned the room on either day. Barajas had been assigned to clean that route for three months. Unlike Barajas, as the credited evidence shows, Prieto explained that there was confusion as to which areas he was to clean. (Tr. 392-393) Prieto quickly admitted he did not clean the area, but initialed the documents as directed by his lead Lazo. Had his intent been to falsify as Respondent contends, he would not have so readily pointed out his failure to perform the work.<sup>49</sup>

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<sup>48</sup> Respondent's witnesses' testimony was inconsistent regarding the reason why Prieto's infraction was more serious than others. According to Brodie, backdating is different from falsification even though Kahn stated they are the same (Tr. 1055, 1146). Kahn stated that while backdating is a form of falsification it is still distinguishable from Prieto's case. Citing employee Manzanares' backdating of a GMP log, Kahn called it an omission that "the employee attempted to correct without asking for assistance from management" making it a suspension-worthy offense rather than a termination (Tr. 1056; GC Exh. 118). Brodie attempts to say the same example is distinguishable because it was for work performed versus work not performed (Tr. 1157). However, this distinction is contrary to Kahn's testimony that what made Prieto's conduct terminable was the intent.

<sup>49</sup> R Exc. 48

Further, Brodie’s handling of Prieto’s admission that he had not cleaned the rooms and merely followed Lazo’s instructions shows a clear departure from Respondent’s past practice of addressing similar conduct. For instance, another employee’s failure to perform the weekly cleaning that was spelled out in the Standard Operating Procedures (SOPs) was called “a mistake” by Site Manager Kahn because it “wasn’t a hundred percent clear on the logs” (Tr. 1050). Yet, this “mistake” was somehow different from Prieto’s misunderstanding of Lazo’s instructions given to him on a post-it note and his resulting failure to clean the two lab rooms he had signed for. Respondent was quick to jump to the conclusion that Prieto engaged in “falsification,” while many similar such instances were only considered “mistakes” or a lapses in judgment not requiring termination (Tr. 490-491). Respondent’s severe treatment of Prieto demonstrates animus because its discipline of Prieto was much more grave than its discipline of others without any evidence to justify the disparate treatment.<sup>50</sup>

Moreover, the ALJ properly determined that Respondent’s “investigation” into Prieto’s suspension and termination is further evidence of pretext (ALJD 39-43).<sup>51</sup> Respondent provided testimony and documentary evidence regarding its investigation of Prieto’s conduct, i.e., his failure to clean the two lab rooms while signing that he performed the work.<sup>52</sup> Employee Relationship Manager Trinidad, a high-ranking manager with the authority to discipline employees, interviewed employees one-on-one and asked them hypothetical questions, such as “can GMP employees sign off on GMP rooms if they were not cleaned; what would be the consequence?” (Tr. 1204; Exh 206). Respondent’s self-serving investigation did not inquire into any of the actual facts relevant to Prieto’s situation, such as whether anyone witnessed the

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<sup>50</sup> R Exc. 46

<sup>51</sup> R Exc. 44 and 45

<sup>52</sup> Respondent argues that Prieto was actually suspended for falsifying the log and then terminated for lying about it. However, the evidence shows that signing for work not done would have resulted only in a write-up and that Respondent did not even truly investigate the “lying about it” accusation. (R Exc. 40)

conversation between Lazo and Prieto, or whether Prieto's version of events was more or less consistent with past practice.<sup>53</sup> The extra lengths Respondent took to "justify" Prieto's termination shows that termination was not the automatic penalty for such conduct, despite Managers Kahn and Brodie's testimony that termination was a foregone conclusion (Tr. 1025, 1136). Respondent conducted interviews by asking rhetorical questions that could only result in the answers it desired, answers that it estimated would support Prieto's termination. Despite Respondent's façade of a legitimate investigation, the ALJ correctly observed that, "[a] shoddy investigation supports a conclusion of pretext."

As the ALJ correctly found, Respondent failed to overcome its burden to prove that it would have suspended and terminated Prieto even absent his Union and protected concerted activity.<sup>54</sup> Rather, the record evidence shows that Respondent pounced on Prieto's conduct and quickly labeled it a falsification despite the obvious mitigating facts, exaggerated the seriousness of mistakes in the GMP, and created nuanced and inconsistent distinctions between Prieto's conduct and the similar conduct of others who were disciplined less severely in order to justify his suspension and termination.<sup>55</sup> Rather, Respondent terminated Prieto because he was a Union shop steward. He engaged in protected activity with long-time activist shop steward La Serna and newly-minted shop steward Quintanilla, and he participated in the unsanctioned April 16 march on Genentech. Thus, he was among the contingent of hard-core union activists that both the Respondent and Union were happy to see go.<sup>56</sup>

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<sup>53</sup> R Exc. 44-45

<sup>54</sup> Respondent questionably excepts to the ALJ's inability to rely on nonbinding precedent, but makes no argument as to why. (R Exc. 54)

<sup>55</sup> Respondent argues that SBM terminated Prieto for both falsifying client documents and providing false or misleading information (lying about his shift leader instructing him to sign the log book without first cleaning the room). (R Exc. 40) However, Kahn testified that Prieto was terminated for falsification of documents. (Tr. 1013)

<sup>56</sup> R Exc. 55-58, 60, 61, and 63

**C. The ALJ Appropriately Recommended that La Serna Is Entitled to Reinstatement and Backpay. (Respondent Exceptions 64-65)**

The ALJ correctly found that Respondent failed to adduce sufficient evidence to meet the substantial burden to prove that after-acquired evidence bars La Serna from a remedy.<sup>57</sup> In *John Cuneo, Inc.*, 298 NLRB 856 (1990), the Board held that, if an employer shows that an employee engaged in misconduct for which it would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first learned of the misconduct. As the ALJ correctly pointed out, the burden of proof is on the employer. (ALJD 52: 1-2) Here, Respondent asserts that it would have terminated any employee for violating its policy against working for a competitor.

The ALJ explicitly credited La Serna's testimony that he did not work for a competing business while employed by Respondent. (ALJD 52:14-16) The ALJ's conclusion is supported by the documentary evidence on which Respondent relies. (R Exh. 24) Respondent cites to a deposition taken of La Serna for a sexual harassment case filed against Respondent involving former employee Darlene Brenes. (R Exh. 24) Respondent contends that La Serna admitted to having a janitorial business, which is forbidden by Respondent's non-compete clause. (R Exh. 24; Jt. Exh. 3A, p. 10) Respondent contends that La Serna engaged in this business even during his employment with Respondent. However, the deposition makes clear that La Serna did not have a cleaning business while working for Respondent. (R Exh. 24, p. 75) Moreover, La Serna testified at the hearing that he did not have a janitorial business while working for Respondent. His testimony was unrefuted by contrary evidence and was credited by the ALJ. As La Serna explained, although he had a business license since 2014, he sold items at flea markets and did

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<sup>57</sup> Equally unavailing is Respondent's attempt to preclude La Serna's remedy by inappropriately citing immigration status issues. Nothing in the record justifies such an argument. However, the Board need not concern itself, given Respondent is not requesting that the Board make a finding on this particularly frivolous argument.

not perform work as a janitorial business, manned only by himself, until August 2015 or 2016, subsequent to his termination (R Exh. 24; Tr. 259-260, 264, 352). Thus, La Serna was not in a competing business while employed by Respondent.<sup>58</sup>

**D. The ALJ Correctly Concluded that Respondent Is Not Entitled to an Award of Its Litigation Expenses.<sup>59</sup>**

Respondent is not entitled to attorney's fees under any controlling case law. The government brought a claim against Respondent to trial before an administrative law judge. In such circumstances, the Equal Access to Justice Act (EAJA) is the only means by which respondents may obtain attorney's fees. However, to be eligible to seek attorney's fees under EAJA, a respondent must have a net worth below \$7 million and less than 500 employees at the time of the complaint. 5 U.S.C. § 504(a)(1), and (b)(1)(C), 554(a)-(c), 28 U.S.C. § 2412(d)(3). Clearly, as a worldwide corporation with over 9,000 employees and contracts with multimillion dollar corporations such as Genentech, Respondent is not eligible for attorney's fees under EAJA (Tr. 711-712). Nor can Respondent establish the other elements of an EAJA claim, as the NLRB thoroughly investigated the charges filed against Respondent and, finding reasonable cause based on the evidence, issued the complaint.

Respondent cites to various cases to support its argument that it is entitled to attorney's fees because, it argues, the prosecution of Quintanilla's charge was made in bad faith. The case law is clearly not on point, first, because the cases relied upon by Respondent concern *frivolous defenses*. Here, the General Counsel litigated Quintanilla's termination after a lengthy investigation and a failed attempt to defer the claim to the parties' grievance and arbitration

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<sup>58</sup> Even if deemed a competitor, La Serna's remedy should be left for a compliance proceeding. See *Vincent C. Vandemotter d/b/a Rex Printing Company*, 227 NLRB 1144 (1977), where the Board fashioned a remedy of conditional reinstatement based on a discriminatee's divestment in competing business and backpay from the date of the unlawful discharge to the date on which employer could have discharged discriminatee lawfully upon learning fully of discriminatee's involvement in competing business.

<sup>59</sup> Respondent failed to make an exception to the ALJ's conclusion and thus the argument should not be considered. Nevertheless, the argument raised in Respondent's brief is addressed here.

procedure because the Union would not pursue the grievance. (Jt. Exh. 17(a) and (b); GC Exh. 409) Moreover, a winning ALJD demonstrates that the Quintanilla charge was far from frivolous as the evidence was sufficient to establish not only a prima facie case but also to defeat Respondent's asserted *Wright Line* defense. Second, there is simply no evidence that the General Counsel prosecuted this case in bad faith. The parties *jointly stipulated* not to call Quintanilla as a witness. Respondent cannot now claim that the joint stipulation is evidence of bad faith when it explicitly agreed to it. Although Respondent cites to Quintanilla's deposition in a civil lawsuit, her testimony in that case does not contradict the allegations brought before the ALJ or undermine the General Counsel's case.

As for Respondent's disingenuous citing of *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016), the case is clearly distinguishable from Quintanilla's charge. In *Heartland Plymouth Court MI, LLC*, the DC Circuit found that the Board's non-acquiescence to the Circuit law definition of "clear and unmistakable" amounted to bad faith. Here, the General Counsel is not challenging Circuit Court law but the termination of an employee for exercising her Section 7 right to engaged in union and protected concerted activity. Respondent's attempt to frame the issue as an act of bad faith is an offensive and startling attack against the fundamental purpose of the Agency which is to protect employees' Section 7 rights. That the outcome may not be favorable to Respondent is most certainly not indicative of the General Counsel acting in bad faith.

## **VI. CONCLUSION**

The ALJ appropriately found three unlawful terminations violative of Section 8(a)(3) of the Act, all stemming from Respondent's attempt to rid itself of a group of activist employees led by Charging Party La Serna. Respondent's unfounded attacks on the ALJ's sound credibility resolutions and factual and legal conclusions have no credence. Based on the record evidence

and the facts and arguments set forth above, the General Counsel respectfully requests that the Board overrule Respondent's exceptions in their entirety.

Dated: January 5<sup>th</sup>, 2018

/s/ Carmen León

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Carmen León  
Min-Kuk Song  
Counsel for the General Counsel