

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

JANUS OF SANTA CRUZ

and

Case 32-CA-226320

NATIONAL UNION OF HEALTHCARE WORKERS

**COUNSEL FOR THE GENERAL COUNSEL'S
POSTHEARING BRIEF TO
ADMINISTRATIVE LAW JUDGE GERALD M. ETCHINGHAM**

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I. INTRODUCTION

This case involves the unlawful discipline and threatening of Edgar Fuerte, one of the initial employee organizers during the National Union of Healthcare Workers' (Union) 2017 organizing drive. Fuerte, who remains one of the Union's most vocal supporters and a member of the Union's bargaining team, has also raised a variety of workplace complaints (particularly about the bathroom at Respondent's Sobering Center) and has spoken publicly about his working conditions. The facts of this case are largely undisputed. Janus of Santa Cruz (Respondent) issued a documented letter of counseling to Fuerte, on August 10, 2018, purportedly because Fuerte used "vulgar" language on August 6, 2018. However, other employees and supervisors/managers have regularly used the same or similar language without any form of reprimand. Indeed, an IT Manager used the same word as Fuerte on the very same day. Though both individuals used the same word, Fuerte, the open and active union supporter was disciplined, while the IT Manager was not. Further, when Respondent's Director of Operations issued the discipline to him, the Director chastised Fuerte for his concerted complaints about working conditions and admittedly solicited him to quit, thereby violating Section 8(a)(1) of the Act. The Director largely admits that he made the statement at issue and the Director further admits to having discussed with Fuerte's supervisor, the day before he issued the discipline, the fact that Fuerte had raised repeated complaints about Respondent and Respondent's Sobering Center bathroom. Accordingly, for the reasons sets forth more fully below, Counsel for General Counsel asks the Administrative Law Judge to find that Respondent engaged in the unlawful conduct as alleged in in the Complaint.

II. FACTS

A. Fuerte's Union and Protected, Concerted Activities

Respondent operates several facilities throughout the County of Santa Cruz in California related to alcohol and drug rehabilitation, including a prenatal program for pregnant women, a methadone clinic, and a Sobering Center. (Tr. 21:1-22:3). The Sobering Center, with about 12 employees, is located at 265 Water Street in Santa Cruz, California, next to the Santa Cruz County Jail. (Tr. 21:5-7; 22:6-8). Edgar Fuerte has worked for Respondent at its Sobering Center facility as an Intake Referral Specialist since May 2015. (Tr. 31:17-22; 32:21-24). In this capacity, Fuerte conducts the initial intake when a client is brought in by local law enforcement agencies in Santa Cruz County. (Tr. 31:25-32:12). In addition to conducting the intake process, Fuerte, in conjunction with a medical specialist, also monitors the sobering up of a client before the person is released. *Id.* Fuerte works approximately 32 hours per week, four days a week (Tr. 32:25-33:4) and is supervised by Sobering Center Manager Erin Tully. (Tr. 32:13-16). Tully reports to Jaime Campos, Director of Operations. (Tr. 32:17-20).

Between January and March of 2017, Fuerte and two other workers initiated the Union's successful organizing drive by speaking amongst themselves about forming a union and eventually reaching out to a representative of the Union. (Tr. Tr. 33:20-34:3-10). After meeting with a Union representative and in around March or April of 2017, the trio met their coworkers and Fuerte in particular circulated an organizing petition in the Sobering Center parking lot on his own time. (Tr. 34:14-35:11; 35:12-18). The trio continued their efforts in May and June 2017. (Tr. 36:1-10). Thereafter, Fuerte circulated a second organizing petition in the Sobering Center parking lot on his own time amongst his coworkers. (Tr. 36:6-21). Ultimately, these organizing efforts culminated in the successful election of the Union as the employees' collective-bargaining representative. (Tr. 36:24).

As one of the three original Union supporters, Fuerte was heavily involved in the representation campaign, (Tr. 37:2), and his picture and supporting quotes appeared in promotional materials used by the Union during its campaign. (GC Exhs. 6 through 8). Fuerte also distributed these flyers bearing his image to his coworkers; one was even posted at Respondent's facility on one of its refrigerators. (Tr. 37:19-25; 38:18-24; 40:11-25). Fuerte continued to support the Union following the election. The activities also included Fuerte's ongoing participation on the Union's bargaining team, which meets on a monthly basis,¹ though the parties have yet to reach an initial collective-bargaining agreement. (Tr. 46:20-25). During these bargaining sessions, Fuerte has raised workplace concerns, including a long-time workplace concerns regarding the bathroom of the Sobering Center. (Tr. 47:10-16; 47:24-48:1). There is only one bathroom at the Sobering Center, which is used by both Respondent's employees and clients of the Sobering Center. (GC Exh. 11). The bathroom is located right next to the front desk, causing Respondent's employees to be able to hear and smell everything that occurs in the bathroom. (Tr. 47:19-23; GC Exh. 11). In addition to raising the bathroom issue at the bargaining table, Fuerte discussed these concerns with coworkers nearly 30 times over the course of four years. (Tr. 48:2-13). Fuerte addressed the shared bathroom concerns with three former Sobering Center managers, including Manager Gabriel Miller, Respondent's former Chief Executive Officer Rod Libbey, as well as with the current Director of Operations, Jaime Campos, and the current Chief Executive officer Rudy Escalante, and a member of Respondent's governing Board. (Tr. 48:21-49:5). Respondent was aware that Fuerte had raised concerns regarding the bathroom, before August 6, 2018. (Tr. 49:6-11). Indeed, in his September 9, 2017, email to CEO Escalante, Director of Operations Campos referred to Fuerte as "a big union supporter" noted that Fuerte "wants another bathroom installed

¹ Campos was aware of the bargaining activities prior to the August 6, 2018 incident as he e-mailed Campos regarding his attendance at a bargaining meeting. (GC Exh. 13).

at the Sobering Center but that's not financially practical..." (GC Exh. 14). Campos sent an email to Supervisor Tully on August 9, 2018, where he wrote: "I keep hearing that he is making remarks abit (sic) Janus and thr (sic) bathroom ." (Tr. 108:6-13)

Fuerte twice spoke publicly before the entire Santa Cruz County Board of Supervisors (first on June 19, 2018 and then a week later)² and also met with an individual Supervisor during this same time frame. (Tr. 136:25-138:25). Respondent relies on County funds to operate its business, particularly at the Sobering Center which operates as an alternative for the County's law enforcement to house individuals who have been arrested and are suspected of crimes related to intoxication. (Tr. 41:23-25). Indeed, the purpose of Fuerte's public testimony before the Board was "to advocate for fellow coworkers and [himself] at Janus in order to get assistance funding from the [County Board of Supervisors], some budget funding to our [employer], to disburse somehow down to give us better wages and salaries for [the] workers." (Tr. 41:15-19). When Fuerte gave his public comments before the Board of Supervisors, he wore a black sweater with the NUHW insignia on the front and back as well as a neck lanyard with the NUHW insignia. (Tr. 43:3-14; GC Exh. 10). This is the same sweater and lanyard that Fuerte has worn to work nearly every day since October 2017 to the present. (Tr. 44:25-45:21). The video which includes Fuerte's testimony is publicly available on a website maintained by Santa Cruz County. (Tr. 43:23-44)/

Fuerte also met with Supervisor John Leopold "to discuss if there was any ways to find any budgeting that could help and assist us in getting more funding to help out coworkers." (Tr. 46:8-12). In a flyer distributed at Respondent's Sobering Center facility, Fuerte appeared in a picture with his coworkers and Supervisor Leopold above the caption "Supervisor John Leopold

² On June 19, 2018, was accompanied by Union representative Justin Palmer and eight coworkers. (Tr. 42:11-16). On the second instance, about a week later, Fuerte was accompanied by Union representative Palmer and five other coworkers employed by Respondent. (Tr. 42:21-22).

meets with Janus workers to discuss a plan to boost funding in order to fund raises for Janus Workers.” (GC Exh. 9). In his testimony, Director of Operations Campos admits that “it was common knowledge that [Fuerte] was making remarks about Janus and he was unhappy with the facilities and all the stuff, especially because he was at the board of supervisors.” (Tr. 137:6-8).

B. August 6, 2018 Incident

1. Fuerte’s Use of Language

On August 6, 2018, Fuerte was scheduled to work at 3:00 p.m. (Tr. 52:17-18). A few minutes before he was scheduled to work, Fuerte arrived through the front door, where he saw Jesse Gifford, IT Manager, and Kyle Last Name Unknown (LNU) in the front office. (Tr. 53:11-13). When Fuerte walked through the front door, Gifford was sitting working at Fuerte’s computer station, looking at the computer screen and Kyle was sitting at a new large desk. (Tr. 53:11-19). As Fuerte walked through the door and saw Kyle, he noticed a new “huge” desk that wasn’t previously there. (Tr. 53:22-54:3). Fuerte blurted out, “What’s this shit?” and kept walking through the front office towards the break room. (Tr. 54:1-3; GC Exh. 11). Fuerte’s comment was not directed at anyone and neither Gifford nor Kyle responded. (Tr. 54:9-15). There were no clients in the facility and the only other individuals in the front office area were Gifford and Kyle. (Tr. 58:15-21; 132:21-24). Sobering Center Manager Erin Tully was upstairs in a different part of the Sobering Center. (Tr. 55:18-21). IT Manager Gifford testified that Fuerte also talked about “getting another restroom or something in the facility, and something to the effect of how he’s fighting for [...] this restroom or something.” (Tr. 96:13-16). Fuerte raised the issue of having a second bathroom.” (Tr. 100:22-101:1, 14-15; 103:18-23). After Fuerte went to the breakroom, Fuerte came back to the front office and said out loud, “How are we supposed to work around this?” (Tr. 54:18-21). No one responded and the interaction was over.

2. IT Manager Gifford's Use of Language

After the interaction ended, another Sobering Center facility employee named "Lusy" entered the facility. (Tr. 55:3-6). After Lusy sat down, Sobering Center Manager Tully came downstairs and stood inside of the front office. (Tr. 55:18-21). In the presence of Tully, Kyle, Lusy, and Fuerte, IT Manager Gifford got up from the work station where he was working on a computer, turned around and stated in a loud voice, "I don't give a shit anymore, trying to get wireless internet for your personal devices." (Tr. 56:4-12). As he stated this, he looked at Kyle, Erin, and Fuerte as he walked to the breakroom as well as staring at Lusy, who was using a personal cell phone at that moment. (Tr. 56:4-12). Gifford then went into the breakroom. (Tr. 56:11-12).

Gifford came back into the front office area after a minute to minute and a half, taking his position back at the computer station facing the computer with his back to everyone else. (Tr. 56:21-23). After a few minutes of quiet, Fuerte stated, "Hey, it's okay. I don't really need wireless. You know, we're okay with just desktops. That's all we needed to work here." (Tr. 57:1-6). After a few more minutes of silence, Gifford got up, apologized, and stated that he was just stressed. (Tr. 57:9-13). In response, Fuerte told Gifford that he knew Gifford wasn't directing it towards the people in the room and told him that it was "okay." (Tr. 57:18-23). Fuerte also told Gifford not to worry and that it was "[n]o biggie."³ *Id.* At this point, Kyle left. (Tr. 58:1). After this, Lusy and Fuerte began their shift. (Tr. 58:3-4).

In Respondent's case in chief, Gifford admitted that he used "coarse language" and stated that he didn't remember whether he said "f-word to the system [he] was trying to fix, or the s-word" and admitted that he "was frustrated with – that [he] wasn't able to get [it] fixed, and [he] cussed at it." (Tr. 97:5-12).

³ Gifford corroborated Fuerte's testimony in this regard. (Tr. 97:16-23).

C. Director of Operation Campos Disciplines Fuerte and Solicits Him to Quit

IT Manager Gifford met with Campos on August 6, 2018 in order to update Campos regarding his work. (Tr. 97:24-98:5). During this meeting, Gifford told Campos that Fuerte had used the word “shit.” Gifford told Campos that he “felt the atmosphere change to very negative immediately when [Fuerte] came in and said that about the table.” (Tr. 98:9-17). Gifford said that he based this on the room being “quiet.” (Tr. 98:17). Campos testified that Gifford told him that Fuerte’s August 10, 2018 statement was “oh, what is this shit, typical Janus, putting something like this in here without asking us.” (Tr. 117:4-7). Gifford also told Campos that Fuerte had made a statement about regarding the bathroom. (Tr. 98:20-23; 103:18-23). Gifford did not ask Campos to take any particular action against Fuerte. (Tr. 98:24-99:1; 104:3-22). Gifford did not tell Campos that he himself had use any bad language because he “didn’t recall that [he] had cussed.” (Tr. 102:11; 103:18-23).

After Campos’ meeting with Gifford, Campos met with CEO Rudy Escalante to discuss whether to issue discipline to Fuerte.⁴ (Tr. 109: 10-24). Campos drafted a “Documented Letter of Counseling.” (Tr. 88:12-20; GC Exh. 20). While the initial draft did not refer to prior disciplinary history (GC Exh. 20), Escalante instructed Campos to include this information.⁵ (Tr. 109:20-24; GC Exhs. 3, 20).

On August 9, 2018, Campos e-mailed Manager Tully informing her that he needed to meet with Fuerte “about [Fuerte’s] attitude.” As noted earlier, during this email conversation, Campos

⁴ Campos testified that he sought Escalante’s involvement because Escalante was Respondent’s lead authority figure regarding matters pertaining to the Union. (Tr. 117:21-118:7). Escalante participates on the bargaining team for Respondent during the negotiations for a collective-bargaining agreement. (Tr. 118:8-12). Escalante also “approved” the issuing of the “Documented Letter of Counseling.” (Tr. 126:14-25).

⁵ Oddly, Campos’ attempt to justify the discipline runs afoul of Respondent’s handbook policy pertaining to disciplinary actions, which states that such actions will only be used against an employee for up to one year after the warning is issued. (GC Exh. 2-016). Respondent failed to offer any explanation as to why it deviated from its policy in this instance and used Fuerte’s prior discipline to justify the August 10, 2018 discipline.

wrote, “I keep hearing that he is making remarks aboit (sic) Janus and thr (sic) bathroom a (sic).” (Exh. 12). While Campos testified that he had no idea what he was referring to in this email, he admitted that he spoke with Tully about Fuerte’s bathroom complaints before August 10, 2018. (Tr. 134:20-23).

On August 10, 2018, Campos arrived at the Sobering Center to meet with Fuerte and Tully. (Tr. 58:22-25). As Campos began speaking, Fuerte noticed Campos holding what he later found out was a document titled “Documented Letter of Counseling” dated August 10, 2018.⁶ (Tr. 60:7-8; 61:13; GC Exh. 2). Fuerte stopped Campos and said, “before you continue, can I ...” (Tr. 60:14). Campos interrupted Fuerte and stated, “No, no, no, you don’t need union representation. You don’t need a union rep for this.” (Tr. 60:15-16). Fuerte reiterated his request, which Campos denied. (Tr. 60:19-22).

Campos then read the Documented Letter of Counseling⁷ which states that Fuerte “displayed a very negative attitude and adamantly disagreed with a newly installed desk, stating ‘what is this shit?’ thereby violating Respondent’s handbook policy regarding ‘the use of vulgar language.’” (GC Exh. 3). When Campos asked if Fuerte had engaged in the conduct, Fuerte

⁶ Respondent’s attempt to categorize the “Documented Letter of Warning” as a “verbal conversation” (Tr. 112:7) which is “not disciplinary in nature” is unpersuasive. (Tr. 113:9-10). Indeed, the record establishes the opposite to be true. First, Campos’ September 14, 2018 email explicitly describes the document as a “verbal warning.” (GC Exh. 4). Second, according to Respondent’s handbook, the first step of Respondent’s disciplinary system is a counseling or verbal warning. (GC Exh. 2-033). Respondent admits in its September 17, 2018 position statement that counselings and verbal warnings are forms of corrective actions. (GC Exh. 18). Third, Respondent asserts that Fuerte’s conduct violates the General Standards of Conduct’s prohibition on the use of “vulgar language,” and the Code subjects the accused employee to disciplinary action up to termination. (GC Exh. 2-020 through 021). Campos agreed that employees faced disciplinary action up to and including terminating for Code violations. (Tr. 129:25-130:7; 130:16-19). Finally, the document itself states that “if repeated violations of policy continue to occur, [the Documented Letter of Counseling] will be incorporated into a future investigation, which could result in possible disciplinary action, up to and including termination” (GC Exh. 3).

⁷ Although the incident occurred on August 6, the Documented Letter of Counseling mistakenly refers to the date as occurring on August 9, 2018.

readily admitted that he stated, “What’s this shit?”⁸ (Tr. 62:15). Fuerte told Campos that it wasn’t intended or directed at anyone or stated in anger but that he was surprised to see the new desk. (Tr. 62: 15-18). Fuerte explained to Campos that he learned that the Santa Cruz Police Department had concerns when a desk obstructed the view of a client’s hands during the intake processing because of the potential for a patient to use their hands to cause physical harm to a person. (Tr. 62:15-23). Fuerte then asked how Campos had learned of the incident. When Campos advised that IT Manager Gifford had reported the incident, Fuerte immediately reported that Gifford had used the same language that same day. (Tr. 63:8-11). Fuerte told Campos that Gifford stated: “I don’t give a shit anymore about trying to get wireless internet for your personal devices.” (Tr. 63:19-22). However, Campos did not ask Fuerte any questions about Gifford’s conduct. (Tr. 63:25-64:1). Instead, Campos told Fuerte, “[you need] to stop poking holes around here.” (Tr. 64:4-5). Campos then clarified his comment by stating, “The bathroom thing, you need to let that go and just accept it. Your co-workers are comfortable with their jobs. In fact, your peers have complained to me about you.” (Tr. 64:7-10). Fuerte asked Campos to provide examples without providing names but Campos refused to provide any such examples. (Tr. 64:12-20). Campos admits that he told Fuerte that “it was apparent to [Campos] and to a number of employees that [Fuerte] is highly dissatisfied with the Sobering Center and how Janus elects to run its business.” (GC Exh. 4). Campos then stated: “If [you are] not happy working at the Sobering Center that quite frankly, [you are] welcome to work elsewhere.”⁹ (GC Exh. 4).

⁸ Campos admits that Fuerte “took responsibility for” and “admitted using that language in the workplace.” (Tr. 113:15-17).

⁹ Although Respondent’s Answer denies that Campos solicited Fuerte to quit, Campos admits that he “pointed out” to Fuerte that “he could in fact work elsewhere if he was not happy working at Respondent’s Sobering Center.” (See GC Exh. 1(g)).

Fuerte then asked whether Campos was trying to intimidate him. (Tr. 65:2). Campos denied that he was trying to intimidate Fuerte. (Tr. 65:4). Fuerte reiterated his belief that, based on his training from the Union, he believed Campos was trying to intimidate him. (Tr. 65:6-14). Fuerte asked, “Do you mean poking holes as in all this union stuff and bringing issues up and making points about them?” (Tr. 65:24-25). Campos responded, “No, Edgar, it’s not because you’re in the union. It’s just always seeing what’s wrong and constantly always you bringing it up. Can you just leave it and let it be how it is, accept it for what it [is], and your pessimism around here isn’t good either.” (Tr. 66:4-8). Fuerte responded, “I don’t see it as pessimism. If you see it as poking holes or whatnot, I’m not going to stop doing that. When I see something wrong, I’m going to continue to bring these things up. I just want better working conditions for my co-workers and myself.” (Tr. 66:13-17).

Although Tully was present in the meeting, her participation was minimal. During this encounter, Fuerte asked Tully whether she recalled Gifford’s language, but she claimed only to recall he was angry and upset. (Tr. 67:2-4). Fuerte asked Campos, “Do you believe that anyone, including managers, should be held accountable for their unprofessional behavior or cursing at the workplace?” (Tr. 67:9-11). Campos responded that “No one should be displaying that type of behavior.” (Tr. 67:15-16). Fuerte then proceeded to recount an instance in 2015 in which Campos stated, “How in the fuck is this shit supposed to help me, looking at your paperwork.” (Tr. 68:4-5). Respondent did not question him on this topic and consequently Campos never denied that this occurred. Although Fuerte asked Campos whether he disciplined himself, Campos deflected the question. (Tr. 68:9-15).

Tully, who did not testify at hearing, wrote a memorandum dated September 17, 2018, which states that the purpose of the meeting was to address Fuerte’s “negative attitude towards a

change in the Recovery Center office.” (GC Exh. 5). At the end of the meeting, Campos asked Fuerte to sign the discipline but Fuerte refused. (Tr. 69:10-21). The meeting ended with the three shaking hands. *Id.*

D. Respondent Tolerates the Use of “Vulgar” Language

The uncontradicted testimony of Nicolas Brown demonstrates that Respondent tolerates the use of a plethora of language by employees and supervisory or managerial staff. Nicholas Brown works as a Medical Assistant at Respondent’s Sobering Center facility. (Tr. 20:22-23). Brown, testifying pursuant to a subpoena, has worked as a Medical Assistant for Respondent since May 28, 2018. (Tr. 27:21-23; 22:20). Brown’s supervisor is Erin Tully, Sobering Center Manager. (Tr. 22:8-12). As a Medical Assistant, Brown screens clients in and out at the Sobering Center and conducts a medical assessment to ensure that the person is in sufficiently good health to be housed at the Sobering Center and that the person is sober enough to take care of themselves upon release. (Tr. 21:10-20). Brown also responds to emergencies and issues regarding medication. *Id.* Brown works five days a week and an average of 40 hours per week. (Tr. 22:24-23:1). Though Brown has had brief interactions with Fuerte in the workplace, he has no other connection with Fuerte and is not friends with Fuerte. (Tr. 27:4-20).

Brown testified that he has heard employees use a variety of curse words such “shit,”¹⁰ “fuck,” “piss,” “ass,” “asshole,” “bitch,” “son of a bitch,” “verga,”¹¹ and “motherfucker” between 10 and 15 times per shift. (Tr. 23:22-24:7; 26:9, 22; 24:8-10; 15-22). This has happened in the presence of Sobering Center Manager Erin Tully at least a dozen times (Tr. 26:22) Brown also explained that he had heard Tully use each of these words at least a dozen

¹⁰ Tr. 23:24-24:1.

¹¹ “Verga” is a word in Spanish that means “dick.” (Tr. 25:24-25:2).

times. (Tr. 24:5, 8-10, 23-25). Brown has never heard Respondent express any concerns or talk to employees about their use of such language in the workplace (Tr. 25:8) and Brown himself has never been disciplined for using the word “shit” in the workplace, even though he used the work 10 to 15 times per shift. (Tr. 25:10).

Fuerte testified that Janus employees say the word “shit” at least twice per week and that Tully’s uses the word “shit” approximately one time per week. (Tr. 70:18-71:9). Fuerte also testified that the word “bitch” is used about twice per month by Janus employees and that Supervisor Tully used it twice in the past six months. (Tr. 71:13-21). Fuerte testified that the word “fuck” is used about three times per month and that Tully herself has used the word twice during Fuerte’s employment with Janus. (Tr. 71:22-72:8). IT Manager Gifford admitted during his direct examination that he used the word “fuck” or “shit” on August 6, 2018. (Tr. 97:8-12). Gifford also testified that he has used the words “fuck” and “shit” while at work in the past as well and never been disciplined for his use of those words. (Tr. 86:10-87:10; 99:20-21; 102:15-25; 103:9-17; GC Exh. 15).

Although Respondent’s policies apply equally to managers and bargaining unit employees (Tr. 104:23-105:1), Fuerte is the only employee that has been disciplined in any way for the use “vulgar” language. Campos, who issued the discipline to Fuerte, admitted that it was possible that he himself has used curse words in the workplace. (Tr. 119:21-120:19). (Tr. 88:22-89:12; 89:21-90:12; 119:17-23; GC Exhs. 19, 22).

III. ARGUMENT

A. Campos’ Statement Violates Section 8(a)(1) of the Act

Section 8(a)(1) of the Act prohibits employers from coercing employees by telling them to quit their employment rather than engage in protected, concerted activities. Here, Campos told Fuerte that he “should stop poking holes” and that he need to “let go” of “the bathroom thing” and

“if he is not happy working at the Sobering Center that quite frankly, he is welcome to work elsewhere.” (GC Exh. 4) Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise if their Section 7 rights. 29 U.S.C. § 158(a)(1). The Board has interpreted Section 8(a)(1) to prohibit employers from making statements that imply a threat of job loss. As the Board stated in *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006):

The Board has long found that comparable statements made either to union advocates or in the context of discussions about the Union violate Section 8(a)(1) because they imply that support for the Union is incompatible with continued employment. *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

The statement the Board found unlawful in *Jupiter Medical Center Pavilion* was a statement by a supervisor, after employees expressed dissatisfaction with working conditions, stating “[m]aybe this isn’t the place for you ... there are a lot of jobs out there.” *Id.* (internal quotations omitted). The Board’s *Jupiter Medical Center Pavilion* rationale was recently adopted by the Board in *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131 (2017). In *Pacific Coast*, a supervisor violated Section 8(a)(1) by telling a group of employees that “employees who did not like the conditions or wages could quit and go work for other employers.” *Pacific Coast Sightseeing Tours & Charters, Inc.*, *supra* at slip op. 9. Similarly, Campos’ undisputed instructions that Fuerte quit rather than engage in further protected, concerted activities violates Section 8(a)(1) of the Act.

B. Respondent’s Discipline of Fuerte Violates Section 8(a)(1) and (3) of the Act

Under the *Wright Line* analysis, in order to establish unlawful discrimination under Section 8(a)(3) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity,

and that the employer's hostility to that activity motivated its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).¹²

In the instant case, the General Counsel has proven that that Respondent was aware that Fuerte engaged in substantial Union and other protected concerted activities, including serving on the Union's bargaining team, testifying before the Santa Cruz County Board of Directors to advocate for higher wages for his coworkers, and raising concerted concern for better bathroom conditions on behalf of himself and his coworkers. In particular, Campos admits that he was aware that Fuerte was a "big union supporter" and a member of the bargaining team. (GC Exhs. 13-14). Campos also admitted that Fuerte had appeared before the Santa Cruz County Board of Supervisors and that his advocacy was related to the working conditions at Respondent's facilities. (Tr. 137:6-8). Regarding the Sobering Center bathroom, Campos was aware that this issue was historically an issue of general concern and even discussed Fuerte's raising this issue with

¹² The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

Sobering Center Manager Tully on August 9, 2018, the day before issuing the Documented Letter of Warning to Fuerte.¹³

Regarding the last element, the evidence shows that Respondent's animus towards Fuerte for these Union and protected concerted activities was a motivating factor for issuing the August 10, 2018 Documented Letter of Counseling. In this regard, the motive for the discipline is revealed in Campos' August 9, 2018 email to Tully; (GC Exh. 12), the Documented Letter of Counseling (GC Exh. 3), the statements in his August 10, 2018 conversation with Fuerte (including his written memorialization (GC Exh. 4), his admission that his main concern was Fuerte's attitude (See e.g. Tr. 118:18-119:12). Regarding the latter, the Board has repeatedly found, with court approval, that, in the labor-relations context, company complaints about "bad attitude" are often euphemisms for prounion sentiments. *Boyer Ford Trucks, Inc.*, 254 NLRB 1389, 1395 (1981) (statements by owner and manager that employee was discharged for a "bad attitude" and being a "disruptive influence" were euphemisms or code words for union activity); *Promenade Garage Corp.*, 314 NLR 172, 180 (1994) (holding a supervisor's reference to employee's "attitude" was a euphemism for prounion attitude); *Mardi Gras Casino*, 359 NLRB 895 (2013) (supervisor's statement that he had heard employee was "getting herself into trouble" was a veiled reference to her union activity), reaff'd. 361 NLRB 679 (2014); *Smithfield Foods, Inc.*, 347 NLRB 1266, 1274 (2006) (supervisor's statement that employee was a "problem person" was a euphemism for the employee's union activity); *Boddy Construction Co.*, 338 NLRB 1083 (2003) (president's reference to employee as an "instigator" was a euphemism for employee's prounion sentiments); *Diversified Bank Installations, Inc.*, 324 NLRB 457, 471-72 (1997) (president's statement that employee caused

¹³ Regarding the bathroom complaints, such complaints plainly fall within the meaning of Section 7. *Myers Industries*, 268 NLRB 493 (1984); remanded sub. Nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985); cert den. 106 S.Ct. 313, 352 (1985), reaffirmed 281 NLRB 8882 (1986) (*Myers II*) (holding that complaints regarding a workplace bathroom were protected, concerted activity).

“problems” or “trouble” was a euphemism for union activity); *McClain of Georgia, Inc.*, 322 NLRB 367, 382 (1996) (president’s statement that employee was responsible for the “shit” in the shop was a thinly veiled reference to the union campaign), *enfd.* 138 F.3d 1418 (11th Cir. 1998); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 458 (1995) (owner’s statement that employee did “not work well with his team and had a bad attitude” was a euphemism for union animus); *K&E Bus Lines*, 255 NLRB 1022, 1033 n. 27 (1981) (president used various euphemisms for union activity, including “upset,” “nervousness,” and “agitation”).

Respondent’s unlawful motivation is further shown by its disparate treatment of a direct comparator, IT Manager Gifford. Gifford used the same language on the same day as Fuerte but was not issued any discipline. This demonstrates that Respondent was not concerned about Fuerte’s use of “vulgar” language but was tired of Fuerte’s Union support and other protected activities. Further, other employees and managers have used similar “vulgar” language without any consequence. Lastly, Respondent’s shifting reasons for disciplining Fuerte demonstrate that its motive was pretextual. *See McClendon Electrical Services*, 340 NLRB 613, 614 (2003) (shifting defense in and of itself may be found to constitute evidence of unlawful motive); *see also Abbey's Transportation Services, v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (“shifting assertions strengthen the inference that the true reason was for [protected] activity.”). On August 10, 2018, Campos’ discipline stated that the reason for the discipline was that he “displayed a very negative attitude and adamantly disagreed with a newly installed desk, stating ‘what is this shit?’” (GC Exh. 3). In Respondent’s September 6, 2018 dated position statement, Respondent’s reason suddenly shifted when it argued that Fuerte had displayed unprofessional and unacceptable conduct in the workplace towards a manager, something that is plainly false. (GC Exh. 17-001). Several days later on September 14, 2018, Campos’ rationale for the Documented Letter of

Counseling changed back to Fuerte expressing his dissatisfaction with the Sobering Center facilities. (GC Exh. 4). The September 14 statement was written three days before Respondent submitted a new position statement in the instant matter on September 17, 2018. (GC Exh. 18).

C. Respondent has Failed to Establish its *Wright Line* Defense

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. 393, 401 (1994) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

Simply put, Respondent has failed to meet its burden to demonstrate that it would have issued the Documented Letter of Discipline even in the absence of Fuerte's protected activity. As the General Counsel demonstrated during the hearing, there is substantial evidence that Respondent's Sobering Center employees routinely use the same or similar language. Indeed, the testimony of Brown is particularly credible in light of the fact that Brown's testimony was uncontradicted and Brown has no stake in the outcome of the case and was testifying against his own pecuniary interest. *Flexsteel Industries*, 316 NLRB 745, 745 (1995). Moreover, the General Counsel demonstrated that Respondent's supervisors and managers (Gifford, Tully, and Campos) have used the same and similar language themselves without having ever been disciplined. Thus, Respondent has failed to establish that it would have taken the same action absent Fuerte's Union and/or protected, concerted activities.

IV. REMEDIES

Under Section 10(c) of the Act¹⁴, the Board is authorized to require any affirmative action “as will effectuate the policies [of the Act].” In cases involving an unlawful disciplinary action taken against an employee in violation of Section 8(a)(1) and (3) of the Act, a traditional remedy in the form of rescission of the disciplinary action and expungement of all references to the discipline from an employee’s personnel file is the traditional remedy. See e.g. *Ory Bros. Marine Service of America, Inc.*, 236 NLRB 74, fn. 2 (1978); see also e.g. *Brooks Bros.*, 261 NLRB 876, fn. 2 (1982). As part of the affirmative action included in a rescission and expungement remedy, Respondent should also be further required to notify Fuerte in writing that it has done so. See *Brooks Bros.*, supra.

Additionally, the General Counsel seeks the traditional remedy of a notice posting at all facilities in which employees represented by the Union are employed by Respondent.

V. CONCLUSION

Therefore, for the reasons set forth above, Counsel for the General Counsel respectfully requests that Administrative Law Judge issue an Order requiring Respondent Janus of Santa Cruz to:

A. Cease and Desist from:

1. Preventing employees from exercising their Section 7 rights to form, join, or assist a Union, choose a representative to bargain with Respondent on behalf of the employees, act together with other employees for their benefit and protection, or choose not to engage in any of these protected activities;
2. Threatening employees if they engage in protected concerted or Union activities;
3. Disciplining or otherwise discriminating against employees for engaging in Union and other protected concerted activities;

¹⁴ 29 U.S.C. Section 160(c).

4. In any like or related manner.¹⁵

B. To Affirmatively:

1. Within 14 days from the date of this Order, rescind the August 10, 2018 dated Documented Letter of Discipline issued to Edgar Fuerte and expunge any and all references thereto from the personnel file of Edgar Fuerte.
2. Within 14 days after service by the Region, post at all locations operated by Respondent in which bargaining unit employees are employed in Santa Cruz County, California, the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's Chief Executive Officer, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or by other electronic means. Reasonable steps shall be taken by the Respondent 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 Respondent has gone out of business or closed any of its facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at the closed facility(ies) at any time since August 10, 2017.
3. Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DATED: April 30, 2019

/s/ Edris W.I. Rodriguez Ritchie

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¹⁵ *Springfield Dodge, Inc.*, 218 NLRB 1429 (1975).

[PROPOSED]
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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with restrain or coerce you in the exercise of the above rights.

WE WILL NOT impliedly threaten you or solicit you to quit by telling you to work somewhere else if you do not like your working conditions.

WE WILL NOT discipline you because of your union membership or support or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL remove from our files all references to the documented letter of counseling of Edgar Fuerte and **WE WILL** notify him, in writing, that this has been done and that the warning will not be used against him in any way.