

1 Rona P. Layton (SBN: 121238)
LAYTON LAW FIRM
2 111 N. Market St., #300
San Jose, CA 95113
3 (408) 892-9870
rlyton@laytonlawfirm.com
4

5 Attorney for Employer
Janus of Santa Cruz
6

7 UNITED STATES OF AMERICA
8 NATIONAL LABOR RELATIONS BOARD
9

10 JANUS OF SANTA CRUZ
11 and
12 NATIONAL UNION OF HEALTHCARE
13 WORKERS
14
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CASE NO. 32-CA-226320
CLOSING BRIEF OF JANUS OF SANTA
CRUZ

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18 **CLOSING BRIEF OF RESPONDENT JANUS OF SANTA CRUZ**
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21 Rona P. Layton
22 Layton Law Firm
23 111 N. First Street, Suite 300
San Jose, CA 95113
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INTRODUCTION

1
2 The Complaint in this matter makes two allegations: 1) that Respondent's Director of
3 Operations Jaime Campos "solicited employee Edgar Fuerte (Fuerte) to quit by telling him that he
4 could work somewhere else if he was not happy working for Respondent" (Par. 6 of the Complaint);
5 and 2) that Mr. Campos "issued Fuerte a Letter of Counseling" (Par. 7(a) of the Complaint). Neither
6 action is inappropriate or unlawful unless, as the Complaint goes on to allege, Mr. Campos took it
7 *because* of Mr. Fuerte's Union activities. The testimony at the hearing did not support that
8 conclusion.

FACTUAL BACKGROUND

9
10 On August 6, 2018, Janus IT Manager Jesse Gifford was at Janus' Sobering Center to
11 perform some work. According to Mr. Gifford, he was there with a couple of other Janus employees
12 when Mr. Fuerte walked in. Seeing a new, larger table in the office, Mr. Fuerte said something to
13 the effect of, "what is this shit?" (Tr. 96:10-11.)

14 During that same week, Mr. Gifford met with Mr. Campos to discuss the IT work he had
15 performed at the Sobering Center, and he also raised the subject of Mr. Fuerte's conduct. Mr.
16 Gifford testified, "I just reported to him about when he [Mr. Fuerte] first came in, that I felt the
17 atmosphere change to very negative immediately when he came in and said that about the table . . .
18 when I was first there working on things, I think the other staff members can realize that I was
19 frustrated, and they were kind of joking and trying to keep things lighthearted. But it felt different
20 when – when Mr. Fuente (sic) came in. Like everything got really quiet." Tr. 98:9-17.

21 Mr. Campos testified that when Mr. Gifford came to him and mentioned the negativity Mr.
22 Fuerte brought to the workplace, he spoke with Rudy Escalante, Janus' CEO. According to Mr.
23 Campos, he needed to determine how, or if, to address this issue with Mr. Fuerte. He stated that he
24 did not want to "overstep, as far as any write-ups or anything, without following all the right
25 protocols, and including the union representatives and all that stuff. And so after – after we talked
26 about that, we were able – we basically determined that it was okay to draft a memorandum of oral
27 counseling just to kind of raise his – his awareness around his – his issues with using vulgarity in the
28 workplace and just having a bad attitude." (Tr. 109:14-24.)

1 And so Mr. Campos prepared Exhibit GC 3-001, entitled Interoffice Memorandum with the
2 subject "Documented Letter of Counseling". Mr. Campos testified that this was the first occasion
3 for using this format. "So this was not going to be anything that we were trying to write Edgar up for.
4 And so we just wanted to document – to document the occurrence on an informal memo, and so
5 that's why we used it." (Tr. 111:9-12.)

6 The Documented Letter of Counseling referenced two write-ups Mr. Fuerte had received on
7 2/21/17 and 3/10/17. When asked how Exhibit GC 3-001 was different from those, Mr. Campos
8 stated, "For one, it – it wasn't actually a disciplinary written reprimand. And it if were, it would
9 have – it would have wound up on this type of format here. And so this was just meant to be kind of
10 like a document of our verbal conversation that we were addressing that day. So that's why it's a
11 different format." (Tr. 112:3-8.)

12 Mr. Campos noted how Mr. Fuerte responded to the August 10 discussion about the
13 Documented Letter of Counseling: "For one, he was, to give him credit, pretty self-reflective about
14 what – where he had misstepped; he was accountable. He took responsibility for that; he admitted
15 using that language in the workplace." (Tr. 113:13-16.) Mr. Fuerte also raised the issue of Mr.
16 Gifford having cursed when he was at the Sobering Center, and Mr. Campos reminded Mr. Fuerte
17 that they were there to talk about him, not Mr. Gifford who, in any event, did not report to Mr.
18 Campos. (Tr.113:23-25.)

19 DISCUSSION

20 The facts are not, generally, disputed. Mr. Fuerte used a curse word and (according to Mr.
21 Gifford) brought a negative energy into the Sobering Center, enough that Mr. Gifford brought it up
22 to Mr. Campos when having a conversation about the IT work Mr. Gifford performed there. Mr.
23 Gifford did not raise the issue *because* Mr. Fuerte was involved in the Union: Mr. Gifford was
24 unaware of Mr. Fuerte's involvement. (Tr. 99:6-7.) Furthermore, Mr. Fuerte confirmed that neither
25 Mr. Gifford nor Mr. Campos attended bargaining sessions, and neither attended the Board of
26 Supervisors meetings when Mr. Fuerte spoke. (Tr. 73:21-24, 74:17-23.)

27 The question, then, is what should Mr. Campos have done with the information once it was
28 relayed to him by Mr. Gifford? His choices ranged from doing nothing to preparing a formal

1 disciplinary write-up like the ones Mr. Fuerte had received in the past for unprofessional conduct.
2 Unlike Mr. Gifford, Mr. Campos was aware of Mr. Fuerte's involvement in the Union. Mr. Campos
3 specifically did not want to make too much of this incident, but he also did not want to somehow
4 concede that Mr. Fuerte's conduct and comment were acceptable. So he took the middle ground,
5 which consisted of having a conversation with Mr. Fuerte about the issues. He made it clear to Mr.
6 Fuerte that the conversation was not disciplinary in nature, and he testified that at the end of the
7 meeting between Mr. Fuerte and him, the two shook hands and Mr. Fuerte acknowledged that
8 sometimes those conversations have to happen. That should have been the end of this - there was no
9 legitimate reason to bring a charge over this minor situation.

10 Another comment made during the August 10, 2018 meeting was Mr. Campos telling Mr.
11 Fuerte that if he is not happy working at Janus, he has other options and could work elsewhere. Mr.
12 Fuerte claimed he had been told such comments were threats, and Mr. Campos denied that it was
13 meant to be anything like that. (Tr. 64:18-65:4, and Exhibit GC 14-001). It was solely a response to
14 an employee complaining about his job: he was free to look elsewhere, as is anyone. According to
15 Mr. Fuerte, he then told Mr. Campos that he likes his job and is going to stay there, and Mr. Campos
16 "smiled, and he said, that's what I want to hear, Edgar." (Tr. 65:13-19,) No threat was made, and
17 there is no evidence any comment that was made had any connection with Mr. Fuerte's involvement
18 in the Union.

19 A final point: the attorney for the General Counsel went into great detail regarding the use of
20 curse words at the Sobering Center. A Sobering Center employee, Nicholas Brown, was brought in
21 to testify on this subject. When asked about a lengthy list of English and Spanish curse words, Mr.
22 Brown stated that he has heard certain vulgarities **10-15 times per shift (for each curse word)** (Tr.
23 24:5-19 and 26:5-16). Interestingly, Mr. Fuerte contradicted Mr. Brown when asked about the
24 frequency of curse words being used at the Sobering Center. He testified to only three words being
25 used, and as to them, testified that he heard one of them on average twice a week, (Tr. 71:1-2), one
26 twice a month (Tr. 71:12-15), and the third one "maybe three times a month" (Tr. 72:1-2). Clearly
27 the Sobering Center is not the hotbed of foul language that Mr. Brown claimed. But even if it were,
28 it does not follow that Mr. Campos (who does not work in the Sobering Center) could not take any

1 action when he was specifically made aware of an incident in which Mr. Fuerte created a negative
2 environment when he came into the Sobering Center and also used an inappropriate word. Of course
3 the Director of Operations had the right to address Mr. Fuerte's conduct, and he did so, although in
4 an extremely mild manner.

5 **CONCLUSION**

6 It is not sufficient for a violation of Section 8(a)(1) that a statement be made or an action
7 taken *and* that the employee be involved in the Union. What is required is that the statement be
8 made or the action taken *because* the employee is involved in the Union. And in this case, there is
9 no evidence whatsoever that the action taken by Mr. Campos was related to his Union activities, or
10 that Janus violated Section 8(a)(1).

11 Respectfully submitted,

12 Dated: 4/30/19

13 LAYTON LAW FIRM
14 By: Rona P. Layton
15 RONA P. LAYTON
16 Attorney for Employer
17 JANUS OF SANTA CRUZ
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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing Closing Brief of Respondent Janus of Santa Cruz has been served via electronic mail upon the following individuals:

Edris W. I. Rodriguez Ritchie
Counsel for the General Counsel
NLRB Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224
Edris.RodriguezRitchie@nlrb.gov

Florice Hoffman
Law Office of Florice Hoffman, LC
8502 E. Chapman Avenue, Suite 353
Orange, CA 92869
fhoffman@socal.rr.com

Date: 4/30/19



RONA P. LAYTON