SBM Site Services, LLC *and* Jose La Serna and Ester Quintanilla and Adilio Prieto and Luz Dary Duque Lopez. Cases 20–CA–157693, 20–CA–157705, 20–CA–157761, and 20–CA–157884

June 13, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On October 5, 2017, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employees Jose La Serna and Adilio Prieto and by discharging employee Ester Quintanilla. Contrary to the judge, we find that even assuming the General Counsel met his initial burden to show that union activity was a motivating factor in the discharge of Quintanilla and the suspension and discharge of Prieto,[2] the Respondent met its defense burden of showing that it would have taken the same action even absent their union activities. Accordingly, we reverse the judge and dismiss those allegations.

I. BACKGROUND FACTS

The Respondent provides facilities management services to large corporations and businesses, including custodial services and good manufacturing practices (GMP) work.[3] Since June 2011, the Respondent has provided a custodial services work force for Genentech, a biotechnology company that manufactures pharmaceuticals at its South San Francisco facility (the facility). That work force includes lead employees,[4] GMP technicians who work in controlled areas, and custodians who work in uncontrolled areas. The Respondent considers workplace safety an important matter and, to that end, provides employees with a handbook and safety manual, available in both English and Spanish.

SEIU-United Service Workers West Local 1877 (the Union) represents the Respondent's work force at the facility. La Serna, Prieto, and Quintanilla served as unit shop stewards.[5]

II. ALLEGED 8(A)(3) DISCRIMINATORY DISCIPLINE

A. Ester Quintanilla

1. Facts

On March 5, 2015,[6] at 11:30 a.m., Quintanilla was injured while working when another employee pushed a door into her arm. Contrary to the Respondent's rule that employees immediately report even the slightest on-the-job injuries, Quintanilla reported the injury at the end of her shift, 3-1/2 hours after it happened. Shortly after Quintanilla reported her injury, Senior Environmental Health and Safety Manager Bryan Hawes emailed other management personnel. The email stated that Quintanilla alleged she had called her direct supervisor, Marcia Silva, about the injury but that Silva denied receiving any calls from Quintanilla. The email further noted that the proper disciplinary action for Quintanilla's late reporting would be investigated.

On March 10, Facility Manager Eli Kahn initiated a "Request for Disciplinary Action" against Quintanilla. The next day, Safety Manager Ulices Cazarez met with Quintanilla to investigate the incident. Quintanilla claimed that her injury occurred on March 6 and that she had attempted to contact Silva that day. Cazarez advised Quintanilla that the documentation showed that the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent did not except to the judge's findings that its suspension and discharge of La Serna were unlawful. However, it did except to the reinstatement and backpay remedies recommended by the judge for La Serna. We address that issue in Sec. III below.

There are no exceptions to the judge's dismissal of the allegations that the Respondent unlawfully suspended and discharged employee Luz Dary Duque Lopez.

[3] GMP are rules and regulations defined by the Food and Drug Administration (FDA) requiring companies producing food, drugs, or cosmetics to meet certain standards in order to sell their products and to maintain logs and documentation for FDA review, if warranted. The FDA periodically performs inspections to ensure compliance with all rules and regulations.

[4] Leads are janitors with the additional responsibility of directing or assigning employees under a supervisor's guidance.

[5] La Serna served as steward since 2006, Prieto served as steward since 2011, and Quintanilla became a steward on March 26, 2015.

[6] All dates are in 2015 unless otherwise noted.

incident occurred on March 5 and reminded her of the Respondent's rule to report accidents immediately. On March 13, the Respondent issued Quintanilla a written warning for "failing to report a [work-related] injury immediately to management."

On March 26, Quintanilla asked La Serna to represent her in a meeting she requested with management about the warning. Quintanilla, La Serna, Kahn, and Employee Relations Manager Sonia Trinidad attended the meeting, during which Quintanilla argued that the discipline was unfair as she had called to report her injury on March 6, which she insisted was the date of the incident. Quintanilla showed Kahn her March 6 phone log, which reflected a call *from* Silva. Kahn pressed Quintanilla on the date because the Respondent's documentation showed that the injury occurred on March 5, but Quintanilla repeated that her injury occurred on March 6. Kahn asked Quintanilla for a copy of her phone log and a written statement of events. Kahn promised to review the matter and give Quintanilla a response by the end of the day. Based upon Kahn's review of the evidence, he concluded that Quintanilla had intentionally tried to falsify the timing of her injury to avoid discipline for failure to promptly report it.

Also, on March 26, Trinidad consulted with Human Resources Director Janice Periolat, who recommended that Trinidad interview and obtain a statement from Quintanilla and suspend her pending investigation. Trinidad held another meeting several hours after the first meeting and La Serna again represented Quintanilla. During the meeting, Trinidad presented Quintanilla with a disciplinary notice that stated she was being suspended for "[f]alsifying information about the security incident pertaining to work that occurred on March 5" and that "[f]inal 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."[7]

While these disciplinary meetings were occurring on March 26, unit employees elected Quintanilla as their shop steward.

Following Quintanilla's meeting with management, Periolat investigated the alleged falsification. On March 27, Cazarez submitted a statement to Periolat regarding his March 11 interview with Quintanilla; on April 7, Silva and another manager submitted statements regarding Quintanilla's injury;[8] and the other employee involved in the incident submitted a statement dated April 8 to Kahn.[9] In addition to these statements, Periolat reviewed relevant policy, handbooks, employees' acknowledgment of receipt of handbooks, emails, the accident package, and Quintanilla's work history. Periolat prepared an investigative summary that stated, "All evidence is that [Quintanilla] provided false and misleading statements related to a workplace injury ... [recommend] termination," and that progressive discipline would not apply because of the "seriousness and egregiousness of the actions," as Quintanilla "lied" despite having been given chances to be honest. Kahn agreed and Periolat discharged Quintanilla on April 9. The termination notice stated that Quintanilla provided "false and misleading information related to a workplace injury."

The parties stipulated that, among other things, Quintanilla (1) willfully provided false information to the Respondent regarding the date of her injury; (2) willfully provided false information to avoid lawful discipline issued on March 13; and (3) refused to retract her submission of false information in her suspension meeting although she was given several opportunities to do so.

2. Analysis

Where, as here, an employee's discharge is alleged as a violation of Section 8(a)(3) of the Act and the motive for that discharge is in dispute, the Board requires the General Counsel to make an initial showing sufficient to support an inference that union activity was a motivating factor in the employer's discharge decision. The burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). If the evidence establishes that the reasons given for the employer's actions are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Additionally, the employer's defense burden is not met by merely showing that the employer had a legitimate reason for its action. Rather, the employer must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. See *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

Applying *Wright* Line, the judge found that the General Counsel met his initial burden by demonstrating that Quintanilla's union activity was a motivating factor in her

[7] Quintanilla's suspension is not alleged as a violation of the Act.

[8] Also, on April 7, the Respondent and Union met and, among other things, briefly discussed Quintanilla's suspension. Quintanilla repeated her claim to Human Resources Vice President Paul Emperador, Periolat, and Kahn that the incident occurred on March 6 and alleged that the Respondent's evidence was fabricated.

[9] The record reveals that, although the Respondent did not receive the employee's written statement until April 8, a manager had spoken with him about the incident prior to March 26.

discharge. The judge further found that the Respondent's reasons for the discharge were pretextual. In light of the finding of pretext, the judge did not engage in the second step of the *Wright Line* analysis—requiring the employer to show that it would have taken the same adverse action even in the absence of protected activity. See *Golden State Foods,* supra. Rather, the judge merely noted, without explanation, that the Respondent "failed when the burden shifted to it to justify its decision to terminate Quintanilla."[10]

We find merit in the Respondent's exceptions to the judge's analysis. Assuming arguendo that the General Counsel met his initial burden to show that union activity was a motivating factor in the discharge,[11] we conclude that the Respondent met its defense burden by demonstrating that it would have discharged Quintanilla because of her dishonesty even in the absence of her protected activity.

To meet its defense burden, the Respondent must show that "it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged [the employee]." *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002); see also *Cellco Partnership v. NLRB*, 892 F.3d 1256, 1262 (D.C. Cir. 2018) ("The only question is whether the company excused someone it reasonably believed was lying[, and the employer] has made a legitimate business judgment—a not unusual one—that an employee lying during an investigation is a serious threat to management."). Where the employer demonstrates that it had such a reasonable belief, it must still show it would have, not merely that it could have, taken the same action absent the employee's protected conduct. See *St. Paul Park Refining Co., LLC*, 366 NLRB No. 83, slip op. at 16 (2018) (citing *6 West Limited Corp.*, 330 NLRB 527, 528 (2000)); see also *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (finding that the employer met its *Wright Line* burden by establishing that it would have suspended two employees even in the absence of their protected activity because, based on its investigation, it reasonably believed that the employees had engaged in serious misconduct).

The record shows that the Respondent reasonably believed Quintanilla lied regarding the date of her workplace injury, and in fact the parties stipulated that she willfully provided false information to avoid lawful discipline. Moreover, she was repeatedly dishonest, doubling down on her false assertion even when presented with contrary evidence and given opportunities to self-correct. The Respondent's handbook provides that immediate termination may be issued if an employee willfully falsifies or misrepresents information. Because Quintanilla's willfully false information to evade the consequences of her actions falls directly within this handbook provision, the Respondent's decision to terminate her was consistent with its stated policies. The termination notice is consistent, showing termination for this lawful reason.

We also disagree with the judge's finding that the Respondent treated Quintanilla disparately, concluding instead that it would have discharged Quintanilla regardless of any protected activity. The judge relied on the comparators presented by the General Counsel—dishonest employees who were disciplined by the Respondent but not terminated. We find that these comparators are inapposite. Specifically, the judge pointed to employee Rene Aguilar, who received a warning and suspension for signing cleaning logs without completing the work.[12] However, Aguilar's and Quintanilla's misconduct are distinguishable because Quintanilla, after receiving an appropriate discipline for failing to immediately report an injury, was repeatedly dishonest, even in the face of conflicting evidence, and presented false evidence to support her lie. There is no evidence that Aguilar engaged in similar compounding misconduct by attempting to cover up the underlying wrongdoing. Additionally, we find that the other comparators cited by the General Counsel and referenced vaguely by the judge are also distinguishable because they engaged in less severe misconduct: employee Roberto Perez received a warning for providing misleading information in the restroom cleaning log; employee Maria Elena Rodriguez received a warning for backdating a log; and employees Beatriz Alcantara and Orlin Mendez received warnings for leaving work before the end of their shift.[13] Accordingly, we find insufficient evidence that the Respondent treated Quintanilla disparately, and we dismiss the allegation that her discharge violated Section 8(a)(3) and (1). See *Walker Stainless, Inc.*, 334 NLRB

[10] We assume that, in making this finding, the judge relied on the comparators mentioned in the judge's pretext analysis.

[11] Because we assume arguendo that the General Counsel has made a prima facie case, we do not endorse or reject the judge's analysis of the General Counsel's burden, nor the judge's finding that the General Counsel established pretext. In fact, as discussed below, in analyzing the Respondent's defense, we specifically find that the basis for the judge's finding of pretext—disparate treatment—is not present here.

[12] The judge noted that Aguilar submitted the following "false statement" on a disciplinary form: "I am not in agreement with the sanction that was imposed on me…what this note says is false." However, the record does not indicate that Aguilar was disciplined for this statement.

[13] Although not discussed in the judge's analysis of Quintanilla's discharge, the Respondent has previously discharged an employee for lying. As noted in the discussion of Prieto's discharge, in September 2013, the Respondent discharged employee Veronica Barajas for failing to clean a room and then lying when questioned. This evidence of the Respondent's similar treatment of another employee for a similar offense supports our finding that the Respondent met its *Wright Line* defense burden. See, e.g., *Merillat Industries*, 307 NLRB 1301, 1302–1303 (1992).

1260, 1262 (2001) (citing *Avondale Industries*, 329 NLRB 1064, 1066 (1999), and finding that "an employer may still meet its *Wright Line* burden by showing that 'the disparity in discipline between alleged discriminatees and the General Counsel's comparators is attributable to differences in work history, *the severity of the misconduct*, or some other factor unrelated to union activity'") (emphasis in original).

B. Adilio Prieto

1. Facts

Prieto worked as a GMP technician from 2013 to May 20, 2015, and served as steward from 2011 until his discharge.[14] Prieto received specialized multistage training, including classroom training and training in on-the-job techniques, and he studied standard operating procedures and underwent knowledge assessments. He was also trained on "good documentation practices" and the "stop the job" policy, which requires employees to inform their supervisors when they do not feel comfortable or safe performing a task and to stop the task immediately. Prieto reported to and was assigned tasks by lead Jose Lazo, who, in turn, reported to Program Manager John Brodie and Supervisor James Sanchez.

In certain GMP areas, employees must sign logs indicating the areas they have cleaned and a pass-through log indicating that they have sanitized cleaning equipment brought into certain areas. Room 3218, the Cell Culture Lab in Building 3, is the facility's most controlled area, and employees must document all steps taken during its cleaning, including sanitization of equipment used. Any log documentation for Room 3218 must have an accompanying log entry for Room 3219, where employees perform sterilization and gowning before entering Room 3218.

On May 12, Lazo asked Prieto to buff the floor along a specific route that included Room 3218, work that was regularly done by an employee who was absent. Prieto accepted the assignment and acknowledged that he was familiar with buffing. Shortly thereafter, a GMP technician notified Brodie that the May 12 logs showed that Prieto verified cleaning Room 3218, but there was no accompanying verification for Room 3219.[15]

On May 19, Brodie and Sanchez met with Prieto and steward La Serna. Brodie showed Prieto the log and asked him to explain the omitted verification for Room 3219.[16] Prieto stated that he did not clean Room 3218 or 3219 and that Lazo told him to sign the log for Room 3218 but did not tell him to sign the log for Room 3219. Brodie gave Prieto a "Request for Disciplinary Action" for failure to document sanitization of cleaning equipment and then stated that the matter would be referred to Human Resources for investigation.[17] During the investigation, Prieto and Lazo gave written statements.

On May 20, Brodie and Manager Trinidad met with Prieto and his representative Eduardo Fernandez and gave Prieto a notice of suspension for "falsification of documentation [on 5/12/15]." The notice stated that final disciplinary action would be determined after an investigation and/or review of Prieto's disciplinary file. Prieto denied that he had been properly trained to perform buffing and claimed that there had been some miscommunication between himself and Lazo. In a May 29 letter to Human Resources, Prieto provided a more thorough statement, again blaming Lazo for the state of the logs.

Human Resources Director Periolat and Trinidad investigated the matter. Brodie clarified to Periolat that, although Prieto may not have buffed Rooms 3218 and 3219 before, he had performed various tasks in the area, was familiar with the building and log verification requirement, and had training in the area. Taking Prieto's conduct, training, and disciplinary history into consideration, Periolat decided to terminate him. On June 10, the Respondent discharged Prieto for "falsifying documents; providing false or misleading information, violation of GMP Tech Job Responsibilities, [and] Violation of business practice or policy."

2. Analysis

The judge, applying *Wright Line*, found that the General Counsel met his initial burden by demonstrating that Prieto's protected conduct was a motivating factor in his suspension and discharge and that the Respondent failed to meet its defense burden by demonstrating that it would have taken the same action even in the absence of protected activity.[18] Accordingly, the judge found the suspension and discharge unlawful.

[14] Prieto began working at the facility as a custodian in 2008. He also participated in labor-management meetings and an April 16 march.

[15] The log Prieto signed was a GMP document owned and managed by Genentech and used as an official record for regulatory review.

[16] Brodie assumed Prieto had performed the buffing but failed to sign both logs.

[17] The Respondent issues verbal warnings to employees who fail to complete the log. It has never terminated an employee for failing to complete the log.

[18] We disavow the judge's statement that "[the] Respondent cannot overcome its burden as the evidence shows that its decision to suspend and terminate Prieto was motivated by his union and protected concerted activity." The judge's finding that the Respondent's decision "to suspend and terminate Prieto was motivated by his union and protected concerted activity"—as to which we do not pass—was a finding that the General Counsel met his initial burden of proof under *Wright Line*, supra. The second part of the *Wright Line* standard specifically allows the Respondent to overcome this finding by demonstrating that "the same

We reverse. Assuming arguendo that the General Counsel met his initial burden,[19] we find that the Respondent met its defense burden by demonstrating that it would have discharged Prieto in the absence of his protected activity.

First, we disagree with the judge's finding that Prieto was treated disparately. The judge relied on comparisons to employees who received verbal warnings for failing to perform cleaning duties, an employee who was suspended after failing to sign the pass-through log and backdating a cleaning log, and other employees who were removed from GMP instead of being terminated. However, these comparators are not similarly situated as they engaged in less severe misconduct—no comparator failed to clean a highly controlled lab, falsified records (signed logs for rooms not cleaned), *and* was dishonest when confronted about the wrongdoing. Perhaps most critically, unlike Prieto, they did not attempt to pass blame onto another employee, compounding the initial misconduct.

Second, taking into consideration Prieto's training, familiarity with the area and the verification requirements, and shifting excuses for not cleaning Room 3218 in the face of Lazo's consistent and credited statements, we find that the Respondent reasonably believed Prieto was "providing false or misleading information." See *McKesson Drug Co.*, supra. Moreover, as the judge recognized, the Respondent had discharged an employee in a situation "most directly on point." Specifically, the Respondent discharged employee Veronica Barajas in September 2013 when she failed to clean an area, signed log books claiming the area was cleaned, and then lied when questioned about it. The Respondent has shown that it had a reasonable belief that Prieto was lying and that it would have discharged him for that, absent his union activity. Accordingly, we find that the Respondent has met its *Wright Line* defense burden, and we dismiss this allegation.

III. REMEDIAL ISSUE REGARDING EMPLOYEE JOSE LA SERNA

The judge found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging La Serna, and there are no exceptions to those violation findings. The Respondent argues, however, that La Serna is not entitled to reinstatement and that backpay should be tolled because he engaged in conduct for which the Respondent would have discharged any employee—specifically, operating a competing cleaning business while employed by the Respondent. The judge considered and rejected the Respondent's argument, crediting La Serna's testimony during the hearing that he did not start his cleaning business until after he was terminated by the Respondent. We affirm the judge's recommended reinstatement and backpay remedies.

The Respondent's handbook contains a rule prohibiting employees from "[w]orking for a competing business while [employed by the Respondent]" and noting that violations of the policy can result in "immediate termination." The handbook also precludes employees from taking an "outside job, either for pay or as a donation of his/her personal time, with a customer or competitor of [the Respondent]; nor may they do work on their own if it competes in any way with the sales or products or services [the Respondent] provides to its customers."

La Serna was discharged on April 23, 2015. On July 5, 2016, during a deposition in an unrelated matter, La Serna testified that, at the time of the deposition, he was running his own cleaning business. When asked how long he had been in business for himself, La Serna testified that it was "intermittent," but about 2 years. After being questioned about the Respondent's "competing work" policy, La Serna testified that he neither worked for another cleaning business nor had his own cleaning business while employed by the Respondent.

During the hearing before the judge, Respondent's counsel twice asked La Serna if he stood by his deposition testimony, and La Serna stated that he did. La Serna then clarified that, prior to starting his cleaning business in August 2015,[20] he ran a flea market and sales business while employed by the Respondent.

The burden lies with the Respondent to demonstrate that La Serna engaged in the alleged misconduct. See *Tel Data Corp.*, 315 NLRB 364, 367 (1994), enfd. in part 90 F.3d 1195 (6th Cir. 1996). In support of its argument that La Serna should be denied reinstatement and that backpay should be tolled as of July 5, 2016, the Respondent relies heavily on La Serna's deposition testimony that he had been in business for himself for 2 years—i.e., since approximately July 2014, about 9 months before he was discharged by the Respondent. We find this reliance misplaced.

Although La Serna testified that he had his own business for the 2 years preceding the deposition, he also

action would have taken place in the absence of the [union and protected activity]." *Wright Line*, supra at 1089.

[19] As with our analysis regarding Quintanilla, because we assume arguendo that the General Counsel has met his initial *Wright Line* burden, we do not expressly endorse or reject the judge's analysis of the General Counsel's burden or the suggestion that the General Counsel demonstrated pretext. Rather, we rely on the Respondent's showing on rebuttal that it would have discharged Prieto even in the absence of his protected activity.

[20] As the judge stated, La Serna must have "misspoken" when he testified that he started the cleaning business in August 2016.

explicitly testified during the deposition that he neither worked for a competitor nor ran a competing business while employed by the Respondent. During the hearing before the judge, La Serna repeated these claims and testified that, although he was in business for himself while employed by the Respondent, it was a business that did not violate the Respondent's policy—a sales and flea market business, which was not a *competing* business. While La Serna also testified to having a cleaning business that arguably might be a "competing" business with the Respondent, the credited testimony shows that he began the cleaning business only after the Respondent discharged him. It was therefore not a competing business *during his employment*. The Respondent failed to provide any evidence establishing that La Serna violated the Respondent's policy and, therefore, failed to meet its burden of demonstrating misconduct.

While the judge's decision contains errors about whether certain statements by La Serna were made during the hearing or in the deposition, the judge's finding reflects that she considered all the evidence before her (both the deposition and hearing testimony) and ultimately credited La Serna's testimony *at the hearing* that he did not operate a competing business while working for the Respondent. The Respondent failed to produce sufficient evidence to overcome the deference that the Board gives a judge's credibility findings. See *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2005) (noting that the evidence must clearly preponderate against the judge's credibility finding to overturn it). Accordingly, we adopt the judge's recommended order that La Serna be reinstated and awarded full backpay.

ORDER

The National Labor Relations Board orders that the Respondent, SBM Site Services, LLC, McClellan, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose La Serna full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jose La Serna whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Jose La Serna for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Jose La Serna, and within 3 days thereafter, notify Jose La Serna in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in South San Francisco, California, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 30, 2015.

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

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 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, Washington, D.C. June 13, 2019

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated 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 representatives 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 suspend, discharge, or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jose La Serna full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose La Serna whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Jose La Serna for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Jose La Serna, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

SBM SITE SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/20-CA-157693 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Carmen Leon, Esq. and *Min-Kuk Song, Esq.,* for the General Counsel.

Nick C. Geannacopulos, Esq., Alison Loomis, Esq., and *Candice T. Zee, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This controversy involves an extremely contentious relationship between union shop stewards and their employer. In response to vigorous advocacy by the shop stewards in complaining about increased disciplinary actions against certain employees, the employer unlawfully suspended and terminated well known and active Shop Stewards Jose La Serna (La Serna) and Adilio Prieto (Prieto), and unlawfully terminated newly elected Shop Steward Esther Quintanilla (Quintanilla). I also find, however, that the employer properly suspended and terminated Luz Dary Duque Lopez

(Lopez) for her credible threats to employees and the workplace.

This case was tried before me in San Francisco, California for 11 days between January 17 and February 3, 2017, based upon charges filed by La Serna, Quintanilla, Prieto, and Lopez (collectively, Charging Parties or discriminatees)). On December 30, 2016, the Acting Regional Director for Region 20, on behalf of the General Counsel, issued an amended consolidated complaint and notice of hearing alleging that SBM Site Services, LLC (Respondent, Employer, or SBM)[1] violated the National Labor Relations Act (the Act) by: suspending La Serna on or about March 30, 2015,[2] suspending Lopez on or about April 1, and discharging Quintanilla on or about April 9 because they engaged in protected concerted activity and union activity on about March 24 and 26 in violation of Section 8(a)(1) and Section 8(a)(1) and (3) of the Act; discharging Lopez on about April 20, discharging La Serna on about April 23, suspending Prieto on about May 20, and discharging Prieto on about June 10 because they engaged in protected concerted activity and union activity on about April 16 in violation of Section 8(a)(1) and Section 8(a)(1) and (3) of the Act.[3] Respondent filed a timely answer to the amended complaint, denying all allegations.

Counsel for the General Counsel and Respondent filed post trial briefs in support of their positions on April 14, 2017, and supplemental briefing on May 31, 2017. On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by the General Counsel and Respondent,[6] I make the following findings, conclusions of law, and recommendations:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

At all material times, Respondent, an Oregon corporation with an office and place of business in McClellan, California, has been an employer engaged in the business of providing janitorial services at commercial office buildings including Genentech at its South San Francisco, California location which is the physical site of all alleged unfair labor practices at issue.[7] During the 12-month period ending December 31, Respondent performed services valued in excess of $50,000 in States other than the State of California. Thus, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. SEIU-USWW Local 1877 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. RESPONDENT'S ORGANIZATION

SBM is a worldwide company with approximately 8000 employees in the United States that provides facilities management services to large corporations and business offices including custodial services, good manufacturing practices (GMP) work and move crews, along with managerial services (Tr. 712, 910, 1232).[8] Since June 2011, SBM has provided custodial services for biotechnology company Genentech's South San Francisco facility (Tr. 39; Jt. Exh. 1).[9] At the South San Francisco facility, SBM employs approximately 220 to 225 employees, including approximately 15 to 20 lead employees (leads) and

[1] During the hearing, at times, SBM was referred to as "Somers" which is shorthand for Somers Building Maintenance or SBM (Tr. 494–495; Jt. Exh. 24).

[2] All dates are in 2015 unless otherwise specified.

[3] The General Counsel withdrew complaint par. 7(d) alleging disciplinary action on May 19 (GC Br. at 72, fn. 70).

[4] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr. 5), Line (L. 21): "are" should be "is"; Tr. 28, L. 7: "headquarters" is "headquartered"; Tr. 59, L. 3: "Huerta" should be "Huertas"; Tr. 75, L. 15: "agree" should be "agreed"; Tr. 89, L. 13: "saying" should be "say"; Tr. 120, L. 23: the correct speaker is "Ms. Leon"; Tr. 122, L. 24, Tr. 132, L. 23, Tr. 321, L. 23, Tr. 322, L. 3, Tr. 329, L. 3 and L. 12: "SBN" should be "SBM"; Tr. 133, L. 17, Tr. 1180, L. 18: the correct speaker is "Mr. Geannacopulos"; Tr. 134, L. 24: the correct speaker is "Ms. Leon"; Tr. 142, L. 2: "us ay" should be "you say"; Tr. 198, L. 6: "raised" should be "raise": Tr. 199, L. 7, Tr. 204, L. 15 and L. 22 : "UOP" should be "ULP"; Tr. 223, L. 9: the speaker is Mr. Geannacopulos, not Ms. Leon; Tr. 341, L. 14: "ADM" should be "ABM"; Tr. 352, L. 20: "flee" should be "flea"; Tr. 409, L. 15: "overruled" should be "overrule"; Tr. 414, L. 13: "biding" should be "binding"; Tr. 489, L. 1: "is" should be "it"; Tr. 556, L. 23: "suspicion" should be "suspension"; Tr. 764, L. 20: "062.915" should be "062915"; Tr. 812, L. 13, Tr. 814, L. 2, Tr. 896, L. 6: "right" should be "Wright"; Tr. 901, L. 18: "motive" should be "motion"; Tr. 906, L. 12 and 13: "GNP" should be "GMP"; Tr. 1098, L. 9: "Manger" should be "Manager"; Tr. 1110, L. 6: the speaker is "Ms. Zee", not "Ms. Leon"; Tr. 1143, L. 3: "here" should be "her"; Tr. 1168, L. 13: speaker is "Ms. Leon", not "Ms. Zee"; Tr. 1219, L. 20: "prove" should be "proof". In addition, in various locations of the transcript, Loomis' name is spelled incorrectly.

[5] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case, including witness testimony. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[6] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "GC Supp. Br." for the General Counsel's supplemental brief; "R. Br." for Respondent's brief; and "R. Supp. Br." for Respondent's supplemental brief.

[7] All references to Genentech in this decision refer to events at its South San Francisco, California facility.

[8] The term GMP is a life sciences-industry term which is written into a company's right to operate contracts based on Food and Drug Administration (FDA) requirements (Tr. 713–714). GMP are a set of rules and regulations defined by the FDA requiring companies producing food, drugs or cosmetics to have certain quality standards in place in order to sell their products to the countries it desires (Tr. 910). GMP work practices must meet FDA guidelines including logs and documentation for production to the FDA if warranted (Tr. 713–714). The FDA periodically inspects the facility to ensure compliance with all rules and regulations (Tr. 910–911).

[9] Genentech discovers, develops, manufactures and commercializes medicines to treat patients with serious or life-threatening medical conditions (Jt. Exh. 1; Tr. 908). Prior to SBM taking over the janitorial contract, PMC and AMC handled janitorial services for Genentech (Tr. 39). Most, if not all, employees were hired by each janitorial contracting company.

approximately 70 GMP technicians (Tr. 40, 715, 907, 912, 1080).[10]

Respondent's site manager is the highest-level management personnel at a specific facility. From May 2014 to 2016, Eli Kahn (Kahn) served as the site manager at the South San Francisco facility (Tr. 906, 1080). Kahn reported to Respondent's account manager, Debbie Castro (Castro) (Tr. 906). As site manager, Kahn acted as the primary point of contact between Respondent and Genentech (Tr. 906). Kahn oversaw the safety program and the GMP and non–GMP janitorial operations, and also reviewed and approved or disapproved requests for disciplinary actions including warning forms (Tr. 906–907, 1036). In the organizational hierarchy, the program managers for the GMP and non–GMP areas report to the site manager (Tr. 907). John Brodie (Brodie), as program manager, supervised all the GMP operations at Genentech's South San Francisco site (Tr. 1098–1099). Brodie also submitted requests for discipline to upper level management but did not make decisions in disciplinary actions (Tr. 1099). Reporting to the program managers are the assistant managers and other level managers or supervisors who are the first-line supervisors of the employees (Tr. 907). The GMP department at the South San Francisco facility has approximately 6 supervisors (Tr. 912).

Outside of Respondent's hierarchical structure at Genentech's South San Francisco facility, Janice Periolat (Periolat) serves as human resources director, and reports to the vice president of human resources, Paul Emperador (Emperador) (Tr. 1230). Periolat's responsibilities include compliance with collective bargaining agreements between Respondent and labor organizations as well as disciplinary investigations (Tr. 1230, 1233). Periolat does not make decisions on verbal or written warnings but may recommend and issue suspensions and terminations (Tr. 1239–1240, 1268). Sonia Trinidad (Trinidad), who is Respondent's employee relations manager, does not work at any particular facility, but leads the orientation of new hires and assists with their transition to Respondent (Tr. 1192, 1231). Trinidad also reports to Emperador (Tr. 1231). Trinidad has the right to recommend, request and issue disciplinary action (Tr. 1218).

At all material times, in addition to the above–named supervisors and/or agents for Respondent, the following persons are also considered supervisors and/or agents within the meaning of Sections 2(11) and 2(13): Marcia Silva (Silva), program manager; Ulices Cazarez (Cazarez), environmental health & safety manager; Mauricio Perez (Perez), program manager; Jorge Rodriguez (Rodriguez), program manager; Mike Jedan (Jedan), vice president of operations; Brian Hawes (Hawes), senior environmental health & safety manager; Lisette Mutt (Mutt), field HR coordinator; Juan Mendoza (Mendoza), program manager; and James Sanchez (Sanchez), GMP supervisor.

III. RESPONDENT'S EMPLOYEES AT GENENTECH'S SOUTH SAN FRANCISCO FACILITY

Since Genentech manufactures medicines, the cleaning employees perform is highly specialized and technical (Tr. 907–908). As part of Genentech's right to operate (its license to develop and market its medicine in various countries), the medications must be produced in a clean environment per standard operating procedures (SOPs) (Tr. 716, 908–910, 914). Cleaning tasks vary by day, week, and month as well as location within the facility (Tr. 360–361, 909). Daily cleaning includes removing trash, mopping and wiping and cleaning drains (Tr. 361). Weekly cleaning includes cleaning tanks and pipes (Tr. 362). Monthly tasks include more complete cleaning from the floor to ceiling (Tr. 362).

Employees are divided by their work areas: custodians who work in uncontrolled areas and GMP technicians (techs) who work in the controlled areas (Tr. 40, 402, 715–716, 827). There are three controlled areas at the South San Francisco facility (Tr. 716). GMP techs are required to follow SOPs, which are rules that instruct employees on how to clean and sanitize specific areas, and are given specialized multi–stage training including classroom training, studying SOPs and knowledge assessments, and a few months of on–the–job training (Tr. 402, 404–406, 407–409, 909, 911, 913, 915).[11] At the conclusion of their initial training period, GMP techs are given a skills assessment where Genentech certifies that each employee is qualified to work in the GMP department (Tr. 411, 432, 913, 1100). Furthermore, GMP techs access to buildings via their employee badge depends on their training level (Tr. 916, 1234). Finally, GMP techs earn more money than custodians due to the level of training required to clean controlled areas (Tr. 407, 912, 1101).

At the start of every shift, the leads send employees to clean specific areas (Tr. 363). The leads take supplies to employees, check on employees' cleaning areas, grade reports, check the loading docks and make sure that everything goes well during the shift (Tr. 951–952).

IV. RESPONDENT'S TRAINING AND HANDBOOK AND SAFETY RULES

As part of its training for all employees, Respondent provides its employees with an employee handbook and employee safety manual, in both English and Spanish, during new hire orientation (Jt. Exh. 1, 3(a) and (b), 4(a) and (b); R. Exh. 130; Tr. 917, 1242). During orientation, employees are trained on the employee handbook, given their expectations, and informed on how to contact human resources, make confidential complaints, and reach payroll (Tr. 1243).

The relevant handbook rules include:

- Unacceptable conduct which can lead to immediate termination defined as willful violation of any SBM or safety regulation, rule or policy; failure to wear required safety equipment; engaging in criminal conduct, acts of violence or threatening violence; threatening, intimidating or coercing fellow employees for any purpose; dishonesty, willful falsification or misrepresentation of information; and working for a competing business while an SBM employee.

[10] Leads are janitors within the bargaining unit represented by the Union who have the additional responsibility of directing or assigning employees under the supervisor's guidance and are not supervisors under the Act (Jt. Exh. 24).

[11] SOPs are also referred to as SOBs (Jt. Exh. 24).

- Employees agree not to engage in any business activity which may conflict with SBM, and failure to disclose facts shall constitute grounds for disciplinary action including termination.
- Progressive discipline in the employee handbook states that unacceptable behavior which does not result in immediate dismissal may be handled with a verbal warning, first written warning, second written warning, and dismissal. Suspensions may be included as well.
- Zero tolerance policy for violence in the workplace or any extreme or detrimental act including making threats of violence toward anyone on SBM premises, customer's worksite, or when representing SBM, and threatening, intimidating or coercing fellow employees for any purpose.
- All injuries, no matter how slight, must be reported immediately.

Respondent considers safety an important matter in the workplace (Tr. 916, 1100). As for safety training, employees receive an introductory training which covers Occupational Safety and Health Administration (OSHA) requirements for communication such as reporting hazardous materials, blood borne pathogens, and emergency procedures for fire or other accidents and incidents (Tr. 916–917, 1100). Respondent instructs that in the event of an accident or injury, employees who are physically capable, must report all accidents and injuries immediately after the event, no matter how minor (Tr. 917; R. Exh. 130). If an employee fails to immediately report an accident, the employee would be committing a policy violation and progressive discipline would ensue (Tr. 922).

At orientation, employees are given a checklist which indicates the documents they received (R. Exh. 3, 28, 49, and 49b, 93). Employees also sign an acknowledgement which states, "I realize that it is my responsibility to read and understand both handbooks and to abide by all of the policies in the handbooks" (Jt. Exh. 6). The rules contained in the handbook and safety manual were in effect from 2011 through the dates of discipline of La Serna, Quintanilla, Lopez, and Prieto (Tr. 254).[12]

In addition, Respondent provides classroom training and weekly training called safety chats where the employees and managers discuss current issues (Tr. 917–918, 1100). Employees have been instructed to "stop the job" if they feel unsafe or if they have not had adequate training to complete the task, and escalate the situation to their manager (R. Exh. 131). The training handouts also indicate that no employee would be disciplined for stopping any job for a safety concern (R. Exh. 131). This training was provided to employees, including Quintanilla, on February 11 (R. Exh. 132). Employees have also been given training on "Basic Do's and Don'ts" (R. Exh. 133). This training instructs employees that they must report all work–related incidents and injuries to a supervisor immediately; Quintanilla signed a written acknowledgement that she attended this training on March 19 (R. Exh. 133).

V. THE UNION

The Union represents custodians, GMP techs and leads employed by SBM (Tr. 41, 952). SBM and the Union were parties to a collective-bargaining agreement (CBA), effective May 1, 2012, through April 30, 2016 (Jt. Exh 1, 2(a) and (b)).[13] Union representatives, as used in this matter, refer to the president, organizers, or vice presidents who are employees of SEIU-USWW (Jt. Exh. 24). Shop stewards are employees of Respondent who hold elected positions (Jt. Exh. 24).

In 2015, for the Union, Denise Solis (Solis) served as vice president; David Huertas (Huertas) served as president; David Cota (Cota) and Pedro Malave (Malave) served as coordinators; Cesar Diaz (Diaz), Yvonne Pasaran (Pasaran), and Monica Rueda (Rueda) served as organizers; and Alejandra Arostegui (Arostegui) served as lead organizer (Jt. Exh. 24).

As for the shop stewards in 2015, La Serna served as shop steward since 2006 (Tr. 41, 230). Prieto served as shop steward since 2011 (Tr. 365). The other shop stewards in 2015 were Eduardo Fernandez (Fernandez), Luz Betty Ruiz Outten (Ruiz), and Luis Loli (Tr. 49). Quintanilla ran for shop steward in 2015, was on the March 26 ballot, and was elected. Lopez never served as a shop steward but was a union supporter. Shop stewards represent employees in their individual complaints against Respondent, represent employees during disciplinary actions, and attend labor-management meetings (Tr. 41–42, 46, 230, 366–367, 828–829).[14] In late 2014 to 2015, Kahn, Periolat, and Emperador attended labor-management meetings along with La Serna, Prieto, Quintanilla, and other union representatives including Diaz (Tr. 42–44, 368). At other times, Trinidad attended these labor-management meetings (Tr. 44, 1193–1194).

VI. THE SHOP STEWARDS' COMPLAINTS

Due to an increase in disciplinary actions issued to employees, shop stewards La Serna, Fernandez, Prieto, and Ruiz sent a letter via email and regular mail on January 5 to union President Huertas (GC Exh. 48(a) and (b); Tr. 48, 288). The letter detailed the problems the employees were having with Respondent and how the union representatives failed to defend their rights (Tr. 59; GC Exh. 48(a) and (b)). The shop stewards received no response from Huertas. La Serna and another shop steward, thereafter, created a flyer requesting that employees meet together on January 15 (GC Exh. 46(a) and (b)). The flyer announcing the meeting stated, in part:

> STOP THE UNJUSTIFIED DISCHARGE OF GENENTECH JANITORS: ROXANA CORDOVA, ESTHER RODRIGUEZ, EDA BLANCO, ELDA CORTEZ, MARLON ALEMAN AND DARLENE BRENES.

[12] La Serna, Quintanilla, Lopez, and Prieto acknowledged receipt of the handbook and safety manual in either May or June 2011 (Jt. Exh. 6, 9, 11, 14). In addition, Prieto acknowledged the safety program rules and standards which also outlined the disciplinary steps for any infractions (R. Exh. 78(a) and (b)).

[13] Art. XVII of the CBA covers grievances and arbitrations.

[14] Several of the witnesses testified to serving as delegates for the Union. The term delegate refers to shop steward per the parties' stipulation (Jt. Exh. 24).

> STOP THE UNDUE WITHDRAWAL OF PAID VACATION, THE CONTRACT OBLIGATES THE CONTRACTORS FROM CANCELLING PAID VACATION EACH YEAR;
>
> STOP THE LABOR HARASSMENT AGAINST JANITORS;
>
> NO TO THE OPPRESION [sic] AGAINST UNION SHOP STEWARDS;

(GC Exh. 46(a) and (b)). This flyer did not identify the author or sponsors of the meeting, but the record demonstrates that La Serna and Prieto were active shop stewards.

In response, Respondent posted a letter to employees to rebut the announcement of a January 2015 meeting (GC Exh. 47(a) and (b)).[15] Copies of Respondent's letter was posted in entryways, in announcement bulletin boards, and stacked next to the time clocks (Tr. 50–52).

On January 15, the announced meeting took place, attended by the shop stewards (Tr. 67). No paid union representatives attended the meeting (Tr. 67).

VII. RESPONDENT'S MARCH 30 SUSPENSION AND APRIL 23 TERMINATION OF LA SERNA

A. Background Prior to La Serna's Suspension

Since 2000, La Serna worked as a custodian and GMP tech for various contractors at Genentech's South San Francisco facility (Tr. 39, 229; R. Exh. 7(a) and (b)). He worked Monday through Friday from 6 p.m. to 2:30 a.m., and reported to Mendoza (Tr. 40). La Serna also served as an active and vocal shop steward for many years.

Thereafter, on February 20, Trinidad along with Brodie and Sanchez approached La Serna in his work area at 1:30 a.m. (Tr. 79). La Serna testified that Trinidad accused him of spreading a rumor that Respondent lost its contract with Genentech (Tr. 79). La Serna denied Trinidad's accusations. La Serna, in turn, accused Trinidad of talking to employees about not re-electing La Serna as shop steward (Tr. 79–80). Trinidad then shifted topics and told La Serna that he had been tardy many days, which La Serna admitted (Tr. 80). The meeting ended after 30 minutes.[16]

On February 23, La Serna sent an email to Arostegui (GC Exh. 40(a) and (b)). La Serna's purpose in sending this email to Arostegui was to make him aware that Trinidad was harassing him on January 30 and February 20, as well as the general discipline of employees. In this email, La Serna wrote, "she threatened me saying that she 'was going to finish this little game'" (GC Exh. 40(a) and (b)).[17] Thus, on February 24, Solis, Arostegui, Diaz, La Serna, and the other shop stewards met at a restaurant (Tr. 88). They discussed the workplace problems, and Arostegui informed the meeting attendees that the Union would file a grievance against Trinidad and collect employee signatures requesting her dismissal (Tr. 88–89).

On February 25, Trinidad and Mendoza gave La Serna a request for disciplinary action for alleged tardiness 30 times in 3 months (GC Exh. 30). La Serna admitted to arriving late on some occasions but did not agree with all the dates listed in the request for disciplinary action (Tr. 310–311). Ultimately, Respondent did not discipline La Serna for this alleged tardiness (Tr. 312).

On February 26, Brodie sent Kahn an email regarding information he had gathered about the Union (GC Exh. 205; Tr. 1149). Brodie informed Kahn that Prieto, La Serna, and Fernandez decided to grieve two matters, including asking Respondent to remove Mendoza and Trinidad from the South San Francisco facility (GC Exh. 205). In addition, Brodie informed Kahn that the election would be held soon and that by March 11, the identity of candidates would be known (which he would share with Kahn) (GC Exh. 205).

On February 27, Diaz sent an email to La Serna stating that Respondent wanted the Union to drop the grievance against Trinidad and that he needed witness statements within the next few days (GC Exh. 40(a) and (b)). According to La Serna, the signatures were never collected because Diaz failed to create a signature list with the Union's letterhead and logo (Tr. 89–90).

Thereafter, the shop stewards planned an employee meeting for March 24 at 3 and 5 p.m. in the parking lot of the South San Francisco facility.[18] To promote the meeting, La Serna created a flyer which stated:

> STOP THE NON–COMPLIANCE OF THE CONTRACT BETWEEN THE UNION AND CONTRACTORS!!!!
>
> STOP THE UNJUSTIFIED DISCHARGES OF GENENTECH JANITORS !!!!!
>
> LET'S BE INFORMED AND DISCUSS IMPORTANT ISSUES !!!!!
>
> YOUR PRESENCE IN THIS ASSEMBLY IS IMPORTANT !!!!

(GC Exh. 49(a) and (b)). Employees, including Lopez, and shop stewards distributed the flyer (Tr. 93–94, 510–511). One day prior to the meeting, La Serna, Fernandez, Prieto, and Ruiz sent an email to Solis informing her that they planned to have an employee meeting the next day; they also informed her of their reasons for having the meeting (GC Exh. 53(a) and (b)). Solis did not respond to the email (Tr. 94).

On March 24, La Serna, Prieto, other shop stewards and many employees, including Lopez, participated in these two scheduled

[15] The term assembly refers to meeting (Jt. Exh. 24).

[16] Trinidad and Brodie did not confirm or deny this encounter with La Serna as they were not questioned about this event. Thus, I rely upon La Serna's unrebutted account of the February 20 meeting.

[17] Trinidad was never questioned about this alleged statement. As it was unrebutted, I accept La Serna's testimony that Trinidad made this comment.

[18] By 3 p.m., the day shift employees would be off duty as many of their shifts ended at 2 p.m. (Tr. 308). The night shift employees could attend the 5 p.m. meeting prior to the start of their shift. (Tr. 94–95).

meetings (Tr. 95, 97, 511–512, 830).[19] Leads Beatriz (Betty) Alcantara (Alcantara), Elizabeth Barrientos (Barrientos), and Lucia Hernandez (Hernandez) also attended (Tr. 98, 340, 632). Both meetings followed the same agenda. The shop stewards discussed the "serious things that were happening" at Respondent's facility, including the discipline and termination of employees and the grievance against Trinidad (Tr. 95). The shop stewards then decided to file a "petition" with Genentech (Tr. 95–96, 530). No paid union representatives attended either meeting (Tr. 99).

In addition, during one of these meetings, employees complained about the "attitude" of the leads and that the leads were "misinforming" Respondent about the employees and telling "lies" (Tr. 342–343, 832–833). La Serna generally stated that the leads should not mislead management about the employees they led as they were "asking that the Company carry out more discipline" (Tr. 106–107, 515, 529–530, 830). Lopez also spoke during the second meeting, stating that she was tired of asking Respondent to provide education to its employees to ensure that they knew how to perform their jobs while avoiding making mistakes (Tr. 515–516, 526, 529, 832). Lopez also stated that the leads give the employees the tools and resources to carry out their tasks but did not have the authority to discipline anyone (Tr. 527). La Serna testified that Lopez referred to the leads, some of whom were allegedly supporting Respondent's discipline of employees, but did not name them (Tr. 109). After the meeting, Hernandez and Barrientos spoke privately with La Serna about the meeting and the accusations made against them (Tr. 109–110).[20]

B. La Serna's Representation of Quintanilla on March 26

On March 26, La Serna represented Quintanilla, who was a custodian, in a potential disciplinary action regarding an injury incident on March 5 (Tr. 123, 929). While on duty on March 5, Quintanilla was injured. Respondent's Manager Hawes, on March 5, at 4:12 p.m., sent an email to management regarding Quintanilla's reported injuries that day (R. Exh. 101). Hawes' email states, "When asked why she did not report this incident when it occurred [at approximately 11:30 a.m., that morning], she [Quintanilla] states that she called her [first line] supervisor [Silva] at the time of injury. Supervisor states she did not call nor does her phone have any missed calls. Site will investigate proper disciplinary actions for late reporting" (R. Exh. 101). Kahn thereafter wanted to verify whether Quintanilla attempted to contact Silva, and asked Silva to check her cell phone call record and to check her office phone (Tr. 931). Silva reported no calls missed (Tr. 931–932). According to Kahn, he learned from Silva that Quintanilla had been injured mid-day but had not reported her injury until the end of the day (Tr. 930).[21] On March 10, Kahn then proceeded with a request for a warning for violation of the employee handbook, safety rules, page 54, as Quintanilla did not report her workplace injury on time: the injury occurred at 11 a.m. and she reported it at 3 p.m. (Tr. 128, 932–933; R. Exh. 102). On March 11, Cazarez investigated Quintanilla's injury by questioning her.

Thereafter, on March 26, Quintanilla asked La Serna to represent her because she received a warning from Respondent, and she wanted to meet with management (Tr. 128; GC Exh. 4a and 4b). The meeting took place at 11 a.m., in Genentech's building 54 conference room (Tr. 128). Kahn represented Respondent (Tr. 128). During this meeting, Quintanilla spoke first, stating that the discipline given to her had been unfair (Tr. 128, 934). Quintanilla explained she had made a phone call to report her injury the day it took place, claiming that her injury occurred on March 6, and she showed her March 6 phone log to Kahn (Tr. 129, 271–272, 934). Kahn pressed Quintanilla to make sure that she was firm on her date because his documentation showed March 5 (Tr. 934, 1094, 1253). Again, Quintanilla disagreed, stating that her injury occurred on March 6 (Tr. 934–935, 1094–1095). Kahn asked for a copy of Quintanilla's phone log and a written record of her version of events (Tr. 935; R. Exh. 105, 106). Kahn then called Silva and asked her for Quintanilla's workplace injury documentation (Tr. 129–130). Silva then came to the meeting but told Kahn she did not have the documentation (Tr. 130). Kahn said he would review the matter and give Quintanilla a response that afternoon (Tr. 130). The meeting ended.

Based upon his preliminary review of evidence, Kahn believed that Quintanilla intentionally tried to falsify the timing of her injury to avoid receiving discipline, so he asked for a review by human resources (Tr. 942). Meanwhile, Trinidad spoke to Periolat to obtain advice regarding Quintanilla, and Periolat recommended that Trinidad interview and obtain a statement from Quintanilla (Tr. 1247–1248). Periolat told Trinidad to suspend Quintanilla and investigate the matter further after Quintanilla insisted that Respondent had the wrong date of her injury (Tr. 1249–1250). Periolat only learned of Quintanilla's identity after she was suspended (Tr. 1248, 1250).

The second meeting regarding Quintanilla occurred around 4 p.m. Around that time, La Serna returned to building 54 at the South San Francisco facility (Tr. 130–131). He came in earlier than his shift time because the Union was conducting elections from 1 to 6 p.m., for shop stewards (Tr. 130–131, 373).[22] While

[19] Prieto only attended the 3 p.m. meeting, while La Serna and Lopez attended both meetings (Tr. 97, 830). The record does not establish whether Quintanilla attended the March 24 meetings.

[20] For Respondent's investigation of La Serna and Lopez, Hernandez and Barrientos submitted individual statements (GC Exh. 208, 209). Hernandez submitted a statement where she essentially complained that La Serna spoke badly about Respondent and Trinidad during this meeting, and Lopez identified her as a lead that "traps" people (GC Exh. 208). Hernandez wrote that after the meeting she spoke to La Serna about these statements during the meeting (GC Exh. 208). In an undated statement, Barrientos wrote primarily about Lopez who she claimed would laugh and tease her because she received recognition from Respondent. She again wrote about Lopez' "defamation" of her to all the employees at these meetings. Neither Hernandez nor Barrientos testified at the hearing. Despite the General Counsel's urging (GC Br. at 92, fn. 93), I decline to take an adverse inference because Respondent did not call Barrientos and Hernandez to testify. The salient fact here is not whether their allegations were credible but that they complained about La Serna's conduct at these meetings which resulted, in part, in his suspension.

[21] On March 6 at 8 a.m., Silva entered the injury into Respondent's designated database (R. Exh. 107).

[22] The Union announced the election to employees in the days prior by handing out flyers, and placing announcements at the time clocks and on bulletin boards (Tr. 131–132). The names of the 10 employees running for shop steward were listed on the flyers including Fernandez, Prieto, Ruiz, Quintanilla, Giovana Loli, Louis Loli, and La Serna (Tr.

in the conference room where the elections were being held, Diaz asked La Serna and Prieto to represent Quintanilla in a meeting scheduled by Trinidad (Tr. 130–131, 374).

La Serna and Prieto then went to the same conference room where the morning meeting regarding Quintanilla was held (Tr. 136, 374, 1208). This conference room included an oval table with seating for 8 (Tr. 143–144). This table took up much of the space in the conference room (Tr. 143).[23] Prieto testified that Trinidad began the meeting by stating that Quintanilla would be suspended due to falsification of documents, and requested her badge (Tr. 136–137, 375; GC Exh. 5a and 5b).[24] The suspension notice stated, "Falsifying information about the security incident pertaining to work that occurred on March 5, 2015," and a final disciplinary action would be determined after an investigation and/or review of the employee's disciplinary file (GC Exh. 5a and 5b). Cazarez, who led Respondent's security, spoke next, reiterating Trinidad's comments regarding the decision to suspend Quintanilla (Tr. 375). In response, La Serna said that the suspension was unfair, and that "it was an abuse that was being done" (Tr. 375). La Serna's comment made Trinidad upset and she stated that La Serna was insulting her (Tr. 375). Trinidad reiterated the decision to suspend Quintanilla, and Prieto told La Serna to wait and he left the conference room to get Diaz (Tr. 375–376). Prieto told Diaz that he needed to go into the conference room because "the situation was getting really ugly" (Tr. 376). Prieto then stayed in the election conference room (Tr. 376). [25]

After Diaz entered the meeting, he asked why Quintanilla was being suspended, and Trinidad responded that Quintanilla was being suspended because she had falsified information (Tr. 139, 273). Diaz then asked for further details, and Trinidad left the conference room and returned with Quintanilla's work injury report (Tr. 139). Quintanilla reviewed the report and told Trinidad that the report was filled out by Silva (Tr. 139). Trinidad replied that she still intended to suspend Quintanilla (Tr. 140).

A dispute then ensued where La Serna, Trinidad, Cazarez, and Diaz stood up from the conference table and spoke loudly at the same time (Tr. 141–142).[26] Only La Serna and Trinidad testified at the hearing, and provided contrasting version of events.[27]

La Serna admitted that there were loud tones of voice (Tr. 274, 319). He testified that he told Trinidad that she was looking for any reason to punish employees, and told her that she was looking for employees to have her removed from the South San Francisco work site (Tr. 142, 147). Trinidad responded, "Well before I leave, you will leave" (Tr. 142).[28] According to La Serna, Diaz then asked La Serna and Quintanilla to leave the meeting, and remained in the room with Trinidad and Cazarez as they did (Tr. 146).

In contrast, Trinidad testified that, after she insisted that Quintanilla turn in her badge, La Serna "slammed his hand on the table and literally pushed his chair back hard enough where he—it hit the wall. He stood up. As soon as he stood up, I stood up immediately" (Tr. 1213). La Serna then started walking towards her, yelling at her that he was going to get rid of her (Tr. 1214). Trinidad responded with an expletive while she was in a corner of the room (Tr. 1214). Then, according to Trinidad, Diaz came between La Serna and her, and shoved La Serna out the door, after which Trinidad started walking to the door and slammed

132, 372–373). Quintanilla ran for and was elected Union shop steward. Kahn could not recall if Quintanilla was running for shop steward when she provided him with the call log and written statement (Tr. 948). However, on cross-examination, Kahn admitted that he knew who the stewards were before the election, who was running for steward and who was elected (Tr. 1086). I do not find Kahn to be credible on his knowledge of who engaged in union activity. He had been told by Brodie on February 26 that an election would be held soon, and that he would inform Kahn of the names of the candidates. It is more likely than not that Brodie told Kahn before Quintanilla's suspension that she was a candidate for shop steward.

[23] In its posthearing brief, Respondent included a diagram of the conference room including table and chairs (R. Br. at 27). The General Counsel filed a motion to strike the diagram because it was not admitted into evidence and not an accurate depiction of the conference room (see GC Motion to Strike). In response, Respondent argues that the motion to strike should be denied as the diagram is permissible demonstrative evidence (R. Reply to Motion to Strike). The General Counsel responded. I grant the General Counsel's motion to strike as the diagram was not marked at the trial with an opportunity for the parties to respond. See *Bearid–Poulan Division, Emerson Electric Co.*, 233 NLRB 736 fn. 1 (1977). Even if I were to deny the General Counsel's motion to strike, I give little weight to Respondent's diagram in its brief, and instead rely upon witness testimony as set forth in my findings of fact and credibility determination.

[24] Quintanilla's suspension is not alleged as a violation of the Act (Jt. Exh. 1, 10).

[25] La Serna and Prieto provided differing versions of the start of this critical meeting. For the time in which he was in attendance, I credit Prieto's testimony regarding this meeting. Prieto's testimony of events seemed more likely to have occurred than La Serna's version of events. La Serna testified that Trinidad refused to provide a reason for suspending Quintanilla, and that Cazarez did not initially attend the start of the meeting (Tr. 137–138). Unlike La Serna, Prieto testified that Trinidad immediately told Quintanilla why she was being suspended, and that Cazarez attended the meeting from its beginning. I find it unlikely that Trinidad would not immediately inform Quintanilla for the reason why she was terminated. Earlier in the day Kahn informed Quintanilla he would be making a decision and it makes little sense to hide the reason from her at the start of the meeting. Therefore, I rely on Prieto's version of the meeting while he was in attendance.

[26] Trinidad and Cazarez sat on one side of the conference room table and La Serna and Quintanilla sat on the opposite side of the table (Tr. 146). When Diaz entered the meeting, he sat at the head of the table with La Serna to his right and Trinidad to his left (Tr. 146).

[27] Perez, Cazarez, and Diaz provided statements to Respondent during its investigation of La Serna's conduct. I specifically give little weight to these statements. None of these individuals testified at the hearing. The General Counsel subpoenaed Diaz but he did not appear at the hearing (GC Exh. 407). The General Counsel chose not to enforce the subpoena (Tr. 1317–1318). Perez and Cazarez no longer work for Respondent, and are not within their control (Tr. 735). Thus, the three statements are not dispositive to my credibility determination and only provided to demonstrate Respondent's investigatory process. In addition, Respondent's request for an adverse inference regarding any factual question which arose during this March 26 meeting as Diaz did not testify is denied (R. Br. at 81, fn. 27). Again, I give little weight to Diaz' statement since he did not testify, and rely solely on my credibility resolution between La Serna and Trinidad.

[28] La Serna documented this meeting per Diaz' request on April 15 (R. Exh. 13(a) and (b)). La Serna's April 15 statement is essentially consistent with his testimony at the hearing.

the door to put some space between La Serna and her (Tr. 1214–1215).[29]

Later that evening at 10:30 p.m., Trinidad met with La Serna again in the conference room of building 54 (Tr. 150, 677). This time La Serna was called to represent Lucina Vargas (Vargas) (Tr. 150). Trinidad sought to discipline Vargas with a warning for allegedly parking in a handicapped spot (Tr. 150). La Serna agreed that Vargas should be disciplined but argued for a verbal warning instead (Tr. 151). Trinidad stated that she would consider the suggestion (Tr. 151). This meeting lasted 15 to 20 minutes (Tr. 151).[30]

I credit the testimony of La Serna over the testimony of Trinidad as to the Quintanilla discipline meeting. First, based on the layout of the conference room, I do not find it likely that La Serna had the physical space to push back from his chair, and walk towards Trinidad. However, I do believe that La Serna told Trinidad that he was going to get rid of her. The shop stewards for some time had been dissatisfied with Trinidad's conduct towards the employees and filed a grievance requesting her removal. Circumstantial evidence supports a conclusion that Trinidad learned about this grievance from Brodie or Kahn. This meeting became contentious almost immediately. Trinidad clearly became offended by La Serna's "aggressive" defense of Quintanilla, which Trinidad and Cazarez found to be "offensive." I find that Trinidad testified in a hyperbolic manner, embellishing the concern for her physical safety, as her actions after this meeting certainly does not demonstrate that she was concerned for her wellbeing. She did not call for security to remove La Serna from the South San Francisco facility, and in fact, met with him that very night to discuss another disciplinary. Thus, I credit La Serna's version of events rather than Trinidad's version.

C. La Serna's March 30 Suspension

Periolat testified that she began looking into investigating La Serna in March 2015 when she received a statement from female coworkers about La Serna's conduct (Tr. 1286–1287). During this time, Trinidad contacted Periolat upset about what she perceived as a "verbal altercation" with La Serna where she felt "threatened" on March 26 (Tr. 1286–1287). Trinidad provided her statement to Periolat (R. Exh. 11). Based upon the statement, Periolat recommended suspension due to La Serna's alleged harassment of his "co-workers" Hernandez and Barrientos as well as Trinidad (Tr. 1288; R. Exh. 2).

Therefore, on March 30, at 8 p.m., Brodie, Perez, Jedan, and Castro met with La Serna and Prieto, as his representative, in the building 54 conference room (Tr. 155–156, 1148). At the start of the meeting, Brodie called Periolat who attended the meeting telephonically (Tr. 156, 1148). Periolat told La Serna that Respondent would be suspending him because he was insubordinate and had intimidated Trinidad during the March 26 meeting regarding Quintanilla's suspension (Tr. 42, 156, 1288–1289). Periolat also stated that there were some complaints from other employees about La Serna (Tr. 158–159).

La Serna responded to the allegations stating that he had not been insubordinate or intimidating to Trinidad, and the "strongest words" he had used was that Trinidad was "being abusive" (Tr. 157). Prieto also stated that he had been present during this meeting but needed to leave the meeting so Diaz could be present, and denied that La Serna acted in an insubordinate manner or intimidated Trinidad (Tr. 157–158). Brodie provided La Serna with a notice of suspension which stated:

> Event of 3/26/15 in which Employee [La Serna] became verbally abusive, hostile, aggressive and acted in an intimidating and threatening manner, in violation of the following policies: *Business Ethics & Conduct (page 15 Employee Handbook): communicate respectfully with other employees, *Unacceptable Conduct (page 15–16 Employee Handbook) Insubordination, refusing to obey instructions, threatening, intimidating or coercing fellow employees for any purpose, General Misconduct Prohibited Harassment & Discrimination (page 17 Employee Handbook): verbal, physical or visual, includes any unwelcome or offensive conduct that may be based on an employee's protected charachteristic [sic], *Violence in the workplace; SBM requires an environment free from intimidation and threats.
>
> In addition to the events of 3/26/15, SBM is in receipt of several female employee statements complaining of harassing, intimidating behavior LaSerna [sic] directed at them. These allegations will be investigated concurrently with the events of the 26th in our due diligence to identify any connection.

(GC Exh. 2(a) and (b)). The notice also indicated that the final disciplinary action would be determined upon the conclusion of human resources' investigation and/or review of La Serna's disciplinary file (GC Exh. 2(a) and (b)). Respondent asked for La Serna's badge, which he provided to Brodie, and he left the building (Tr. 158, 275–276, 1148).

The badge permits an employee to enter the buildings at the South San Francisco facility. According to La Serna, the streets surrounding the buildings are public (Tr. 276–278). La Serna's testimony was unrebutted. Brodie testified that at the suspension meeting, La Serna was told that he should not be on the Genentech property or campus (Tr. 1148, 1289). La Serna asked if he could return onsite to represent an employee, but this request was denied (Tr. 1148). He also asked if he could return onsite for a meeting between Respondent and the Union about another matter but was similarly denied (Tr. 1148, 1289).

At the hearing, La Serna disavowed Respondent's claim that Brodie told him that he could not come back on the property (Tr. 279). The issue of permission to return to the South San Francisco campus is critical. Brodie and Castro testified consistently that they informed La Serna he could not come back onto Genentech's property for any reason. Furthermore, Brodie and Castro's contemporaneous notes reflect such instructions (R. Exh. 12; Tr. 1148). Moreover, the evidence shows that on at least two occasions, after his suspension, La Serna requested permission

[29] Trinidad documented this interaction a day later, admitting that La Serna acted in his capacity as a shop steward, and provided her statement to Periolat (R. Exh. 11). I reject Trinidad's version of events as she dramatized and exaggerated La Serna's conduct towards her.

[30] Trinidad again met with La Serna on March 30 concerning the suspension of Oscar Otoye (Otoye) (Tr. 151). This meeting lasted more than 30 minutes with La Serna providing alternate discipline suggestions and thereafter went back to his work location (Tr. 153–154).

to return to the South San Francisco facility to attend meetings, and his requests were granted. However, Respondent's instructions were ambiguous at best. According to La Serna's unrebutted testimony, the streets surrounding the Genentech campus are public. Thus, La Serna's testimony is truthful in that Respondent never informed La Serna that he could not return to the public spaces surrounding the campus. But La Serna had an understanding that he needed to obtain permission from Respondent before entering any of its buildings. Therefore, although I credit Brodie and Castro's testimony that they told La Serna he could not come back on the campus or property, La Serna's testimony has also some truth in that he was not told he could not come onto the public areas without permission. Based on these varying accounts, it is clear that Respondent failed to clarify its instructions to La Serna.

D. The Union files a grievance regarding La Serna's suspension

On April 1, La Serna sent an email to Diaz and Solis, along with other unidentified recipients, regarding his suspension (GC Exh. 32(a) and (b)). In this email, La Serna noted that Diaz was present for the discussion in which he was accused of insubordination and intimidation. La Serna states, "The strongest word that I remember staying to Mrs. Sonia Trinidad was that it was what she was doing with the suspension of our delegate Esther Quintanilla was an "abuse." I believe you have a strong enough argument to ask that the suspension be lifted immediately" (GC Exh. 32(a) and (b)). La Serna wrote that his discipline is due to his union activities, not for work-related issues. Finally, La Serna requested Diaz to file a grievance on his behalf. Diaz filed a grievance with Kahn regarding La Serna's suspension on March 30 (GC Exh. 50).

E. The April 16 March

On April 15, the shop stewards sent an email to Huerta complaining about their problems with Respondent (GC Exh. 54(a) and (b)). Specifically, the shop stewards complained that Respondent had been disciplining and terminating employee-shop stewards who supported the Union. The shop stewards also expressed frustration with the Union's lack of support in filing grievances and representing their interests before Respondent. Thus, they decided to present a petition to Genentech the following day to inform them of Respondent's actions. Furthermore, the shop stewards reported that Diaz "threatened" employees who participated in the march. The email was signed by La Serna, Fernandez, Prieto, Ruiz, Quintanilla, Ruby Olmos (Olmos), and Martin Garcia (Garcia).[31] Huerta never responded to their email (Tr. 171).

The shop stewards decided to march at the South San Francisco facility on April 16, and present Genentech with a signed petition expressing the employees' concerns with Respondent. In preparation for the march, the shop stewards created a flyer to distribute to the employees (GC Exh. 33(a) and (b); Tr. 312–314). The flyer was titled, "NO TO THE PERSECUTION OF JANITORS FOR BEING UNION MEMBERS THURSDAY APRIL 16, 2 PM MARCH FOR DIGNITY" [all caps in original]. The body of the flyer states,

> SBM has begin [sic] implementing a policy of persecution against SBM-Genentech Janitors for their affiliation with the union. SBM discharged in an unjust manner our co-workers of the School B71–23: Marlon Aleman, Elda Cortes, Roxana Cordova, Esther Cerrato, Eda Blanco. SBM discharged our c. [co–workers] Darling Brenes of B3 and Emilia Juarez of B32 by creating false testimonies. SBM discharged our delegate Esther Quintanilla for a ridiculous discrepancy about the date of her injury, even though SBM never made an injury report as the law requires. They suspended our delegate Jose La Serna for a supposed shortcoming in his work of union representation, ignoring the labor laws that protect union leaders. And they suspended our c. [co–workers] Luz Dary Duque, taking as proof distorted representation of our Union Meeting, in which SBM has no right to intervene. Likewise they threaten workers who participate in Assemblies, Petitions, and any other action of our Union. For SBM's arrogance, the workers have a DAY TO FIGHT AGAINST THE UNJUSTIFIED DISCHARGES AND FOR THE DIGNITY OF THE JANITORS AND FOR UNION FREEDOM AS PROTECTED BY LAW. ALL WORKERS TO MARCH ON THURSDAY APRIL 16 AT 2 PM.
>
> NO TO SBM'S ABUSE AGAINST THE JANITORS; RESPECT FOR OUR UNION FREEDOM !!!!

(GC Exh. 33(a) and (b) (emphasis in original)).

Respondent became aware of the planned march on April 14 (GC Exh. 201). Emperador sent an email to Solis and other union representatives along with Periolat questioning the contents of the flyer, stating "Lots of disinformation that is not productive or helpful to the process and discussions we have had. This is also calling for people to walk off their jobs on Thursday. Please confirm whether or not this is a union sanctioned or endorsed message and event" (GC Exh. 201). A union representative responded, "The Union is not supporting any demonstrations at Genentech. Cesar [Diaz] and other Executive Board members are calling and meeting with the stewards at Genentech to discourage any potential demonstration. Our message to the stewards is that any open cases/grievances we have with SBM should be allowed to move through the grievance procedures established in NCMCA" (GC Exh. 201). That same day, Jedan communicated that Respondent did not believe that there would be a work stoppage, but instead akin to a gathering similar to the one held a few weeks prior and coordinated by "one or two janitorial staff" (GC Exh. 202).[32] This email was shared between Emperador, Periolat, and Trinidad (GC Exh. 202).

[31] Ruiz did not attend the march, but on April 15, she sent text messages to Diaz to communicate the employees' desire to march. Diaz discouraged the march, stating that Respondent would take action against the employees (GC Exh. 301a and b). The Union thus appears complicit in tamping down protected concerted activity by the employees and shop stewards.

[32] A prior demonstration/gathering, which was not sanctioned by the Union, was held on April 7 by a "newly elected shop steward" (GC Exh. 203). No witnesses testified about this event.

Later that evening, in response to the flyer, Trinidad placed a letter from Respondent to the employees (GC Exh. 203). This letter rebutted many of the statements in the union flyer. With regard to the Quintanilla reference, the letter states, "Providing false information and statements to SBM is a terminable offense. SBM takes the well-being of our employees very seriously. At the same time, we expect honesty from all our employees when providing information in regards to an incident that might have caused an injury. SBM follows all state and federal requirements" (GC Exh. 203). In response to the suspensions of La Serna and Lopez, the letter states, "No manager, lead, shop steward or regular employee is above SBM policies or the CBA. We all must act respectfully, not create a hostile work environment or intimidate. Also, we should not start rumors or create false stories against our co-workers" (GC Exh. 203).

The petition, created by the shop stewards, to be presented to Genentech stated,

> We, janitors of contractor SBM-Genentech signing this letter are turning to you. To express our concern and discomfort because our employer SBM is doing illegal and abusive acts against the janitors who work in your prestigious company. Acts that are manifested in the following: SBM has applied disciplines to workers who become ill, breaking labor laws; SBM is laying off workers creating lies and justifying them with requests for claims managers Department Genentech, as in the case of our fellow Darling Brenes (B3) and Emilia Juarez (B31); SBM has applied disciplines and penalties for falsifying workers motives and accumulating these disciplines and then lay off workers; SBM is refusing to comply with the resolutions of the Master Agreement between the contractors and the Union, in the process of offenses against discipline, not attending and widening process indefinitely, thus denying the possibility of protecting workers against the disciplines, SBM is complying with vacation pay to workers who have earned the right under the Contract between the Contractor and the Union.
>
> For these reasons Sr. Manager of Facility Genentech, we turn your attention to become aware of our protests SBM and asked for their mediation with SBM to change this negative situation janitors.

(GC Exh. 34: Tr. 320, 369). La Serna, Prieto, and Lopez signed this petition along with many other employees (Tr. 370–371, 399).[33]

On April 16, employees gathered for the march at 2 p.m.[34] No employees were asked to stop their work or strike. Approximately 80 to 90 employees and shop stewards met in the public parking lot in front of building 5 (Tr. 173, 351, 378–379, 574, 692–693; GC Exh. 55 (parking lot marked with an "X")). The shop stewards present were Prieto, Fernandez, Quintanilla, and La Serna (Tr. 173, 379, 574, 693, 847). Diaz and Imar Liborio (Liborio), who is a member of the Union executive board, attended the march as well (Tr. 174, 574–575). Prior to the start of the march, Diaz spoke to the employees and told them they should not have a march, that they should continue their discussion with Respondent, and that they could lose their letter of understanding with Genentech (Tr. 174–176, 314–315, 575, 692, 700).[35] Liborio also echoed Diaz' comments, and stated that they should have their discussion instead within the Union as some of the issues raised in the petition were being grieved (Tr. 175, 316, 379–380). La Serna spoke on behalf of the shop stewards telling the employees that they should march quietly (Tr. 381, 693). The employees were asked to vote by a showing of hands whether the march should take place (Tr. 175–176, 351, 381–382). About 30 to 45 employees voted to continue with the march (Tr. 177, 236, 351–352, 693). Diaz and Liborio did not march (Tr. 179).

At approximately 3 pm., the employees then walked silently on the sidewalk towards building 31 (Tr. 177–179, 186, 694; GC Exh. 55 (drawn black line along walking route from parking lot at building 5 to building 31)). The employees did not hold up signs or yell during the march, which took 10 to 15 minutes (Tr. 694). Once they reached building 31, Prieto and Fernandez approached Genentech's security guards, asking to speak to a Genentech representative (Tr. 180, 382). Prieto testified that 15 to 20 employees and shop stewards entered Genentech's building (Tr. 381). They were then asked to wait outside due to the small size of the space (Tr. 382). Thus, Prieto, Fernandez, and Lopez' daughter (who functioned as a translator) waited in the lobby while the remaining marchers, including La Serna, waited outside the building (Tr. 181, 383).

The marchers learned that the Genentech representatives were in building 32, so they walked to building 32 (which is next to building 31) (Tr. 181). Fernandez, Prieto, and Lopez' daughter went into building 32 to speak with the Genentech representatives while everyone else including La Serna remained outside the building (Tr. 172, 181, 321, 694). Prieto testified that they handed the Genentech representative the signed petition, and they were all asked to step outside the building with the representative (Tr. 183, 378, 383). Outside the building, Prieto told the Genentech representative that they were happy working at the South San Francisco facility, but that they were having trouble with SBM and wished for Genentech to contact Respondent to try to resolve some of the problems (Tr. 384). Lopez' daughter also spoke, and translated the employees' comments (Tr. 384). The Genentech employee stated that he would speak to

[33] Quintanilla does not appear to have signed the petition, but by this time, Quintanilla had been terminated by Respondent (GC Exh. 34).

[34] Prior to the march, Emperador sent an email to Cota and Solis, along with Periolat and Jedan stating that he learned that the march would still occur that day, and wanted to know what the Union would do to prevent the march as it could violate labor peace agreements (GC Exh. 404).

[35] Art. VI, no strike/lockout from the CBA states, "For the duration of this Agreement, the Union, its agents, and its members agree, both individually and collectively, that they shall not authorize, cause, sanction, aid, engage in or assist in any strike, boycott, slowdown of operations, or stoppage of work for any reason, including honoring an unsanctioned picket line of another union, that has not been properly sanctioned by the appropriate Central Labor Council nor shall they attempt to prevent access to any person to any job site." The side letter of understanding includes premium terms and conditions of employment.

Respondent as soon as possible (Tr. 384). The meeting lasted less than 15 to 20 minutes (Tr. 384). Thereafter, the employees left the South San Francisco facility (Tr. 183, 385). Kahn admitted that he saw La Serna, Prieto, and Quintanilla at this march but Kahn did not inform La Serna that he could not be located on the sidewalks and public parking lot adjacent to the South San Francisco campus (R. Exh. 2; Tr. 1094).[36]

F. La Serna's April 23 Termination

After La Serna's suspension, Periolat conducted an investigation of the allegations made against La Serna. She determined that La Serna had returned to the South San Francisco facility after his suspension, despite being informed by Respondent that he could not return to the property; Respondent obtained several statements from Kahn and employees, who stated generally that they observed La Serna on the property since his suspension (R. Exh. 2). She also determined that La Serna's conduct toward Trinidad during Quintanilla's suspension meeting was "clearly egregious and in violation of SBM's conduct policy" where she found that La Serna had threatened Trinidad with job loss and intimidated her physically (R. Exh. 2). Periolat also determined that La Serna had "abuse[d] his position" as shop steward and engaged in malicious gossip because four witnesses felt that La Serna attempted to intimidate and coerce them (R. Exh. 2). Periolat noted that La Serna's violation of the directive not to enter Genentech property during his suspension would be sufficient for termination (R. Exh. 2).[37] She noted that his conduct towards Trinidad was sufficient for termination as well (R. Exh. 2).

Regarding the allegation that La Serna "abuse[d]" his shop steward position, two leads provided written statements claiming that they feel intimidated by La Serna because he disparages Respondent and Trinidad, threatens Trinidad's job, and threatens employees' position in the union (R. Exh. 2). Regarding the allegation that La Serna acted "egregious[ly]" towards Trinidad on March 26, Trinidad claimed that La Serna has made her the victim of unprofessional and disparaging remarks, trying to remove her from her job, and a victim during Quintanilla's suspension meeting (R. Exh. 2).

Thereafter, on April 21, La Serna and Pasaran met with Periolat at a hotel in South San Francisco to discuss La Serna's suspension (Tr. 187). During this investigatory meeting, Periolat, who documented this meeting, interviewed La Serna as part of Respondent's investigation about his suspension (Tr. 187–189, 791; GC Exh. 206). La Serna denied pointing his finger at Trinidad during the March 26 meeting but admitted he raised his voice (GC Exh. 206). Periolat also asked La Serna about his presence at the South San Francisco facility after his suspension (Tr. 190–191). La Serna noted that on two occasions he received permission to return to the South San Francisco facility, into the buildings, to collect his pay check from Brodie and to attend an April 7 labor-management meeting (Tr. 190–191). La Serna explained that he went to the facility on April 16 for the march (Tr. 191). Periolat told La Serna that he was not permitted to go to the South San Francisco facility (Tr. 191). La Serna responded that this was the first time he was told he could not return to the South San Francisco facility (Tr. 192).[38]

On April 22, Periolat requested approval from Emperador to terminate La Serna for creating a hostile work environment for Trinidad, and for insubordination by returning to the South San Francisco facility despite being directed not to do so (R. Exh. 2). Emperador wrote, "approved" (R. Exh. 2).[39] However, at the hearing, Periolat testified that she was the decision maker and determined that La Serna should be terminated for "providing false information during an investigation and unauthorized access to a client site" (Tr. 815, 1292).

On April 23, La Serna attended a telephone conference call with Periolat, Kahn, Castro, Mutt (who acted as translator), and Pasaran, who acted as his representative (Tr. 193).[40] Periolat informed La Serna that she made the decision to terminate him for insubordination and intimidation towards Trinidad and for going on Genentech's property without authorization (Tr. 193–194, 815). Respondent sent La Serna a termination letter via mail (Tr. 194). The termination letter states that La Serna was involuntarily terminated on April 23 for "Ch.2 EHB pg.14–15/Insubordination–returning to the client site after suspension after directed not to re–enter site. (2) CH.2 EHB pg. 16 Misconduct–Insubordination involving Sonia Trinidad" (GC Exh. 35).[41]

G. The Union files a grievance regarding La Serna's termination

On April 27, Pasaran filed a grievance regarding La Serna's termination, stating that he was terminated without cause (GC Exh. 51). On May 12, Pasaran and La Serna attended a meeting to discuss the grievance with Kahn and Periolat (Tr. 196–197). Pasaran requested that Respondent reduce La Serna's discharge to a less severe form of discipline, and Periolat stated that she would let the Union know her response at a later time (Tr. 205).

Thereafter, on June 17, three officials from the Union (including Pasaran) met with Periolat and Kahn in the presence of a mediator (Tr. 206). Per the parties' collective-bargaining agreement, Pasaran brought these two other union officials as her panelist, and Periolat stated she would only have Kahn (Tr. 208).

[36] Curiously, the presence of Quintanilla (who had also been terminated), does not appear to have created a problem for Respondent.

[37] Although her investigation includes comments about a video surveillance of the April 16 march, at the hearing, she testified she never received the video from Genentech but that the march was "visually confirmed" (Tr. 1297–1298).

[38] Again, these instructions to La Serna were quite vague. Obviously, without his badge, La Serna could not enter the buildings but the instructions not to come onto the property are vague in that they do not define which areas he could and could not access. In addition, since his suspension, La Serna was permitted to enter Respondent's buildings with permission. Furthermore, in contrast, Alcantara reported that she saw Lopez "driving around building 43 and 48" the day she was suspended, and immediately reported her observation to her supervisor (GC Exh. 206). Lopez was not disciplined for driving around the campus after her suspension.

[39] Emperador did not testify at the hearing.

[40] Castro also took notes during this meeting, and emailed them to Periolat after the meeting (R. Exh. 23). These notes are consistent with the other witnesses' accounts of the meeting.

[41] Respondent's position statement to the General Counsel uses slightly different terminology and chapter references than found in La Serna's termination notice (GC Exh. 405). I do not rely on Respondent's position statement as it is not probative in this instance. Rather, I rely on the termination documentation and Periolat's testimony.

The mediator indicated that the mediation could not continue in such a manner, and that the matter would need to go to arbitration (Tr. 208).[42]

On November 11 and 14, after not hearing from Union representatives, La Serna sent an email and letter to Solis asking her the status of his grievance and to include "union reasons" in the grievance (GC Exh. 56(a) and (b)). La Serna received no response from Solis (Tr. 212). La Serna spoke to Pasaran several times, and she stated that his arbitration was not scheduled yet (Tr. 212). On January 15, 2016, based on its failure to prosecute his grievance, La Serna filed an unfair labor practice charge against the Union (Tr. 213). On August 15, 2016, he sent another letter to Solis (Tr. 213). On August 20, 2016, La Serna met with Union representative Pedro Malabet (Malabet). Based on La Serna's unfair labor practice charge, the Union agreed to arbitrate La Serna's termination but the date for the arbitration could not be confirmed at that time (Tr. 215–216).

VIII. RESPONDENT'S APRIL 9 TERMINATION OF QUINTANILLA

After suspending Quintanilla on March 26, Periolat investigated her alleged falsification (Tr. 792, 1250). Periolat obtained statements from various individuals including Cazarez, dated March 27 (Jt. Exh. 23). Cazarez interviewed Quintanilla on March 11 when Quintanilla again denied that the injury occurred on March 5 (Jt. Exh. 23). On April 7, the same day as the labor-management meeting, Silva and another manager also submit statements to Respondent regarding Quintanilla's workplace injury. Finally, Kahn also received a statement, dated April 8, from employee, Jacob Kuruvilla (Kuruvilla), who witnessed Quintanilla's injury (Tr. 942, 1011; R. Exh. 113). Periolat reviewed relevant policy, handbooks, confirmation of acknowledgment, and receipt of handbooks, emails with time stamps, the accident package, previous disciplinary actions, Quintanilla's prior incident reports, and statements from Quintanilla, Cazarez, and other employees (Tr. 1251–1252; GC Exh. 403). Periolat compiled her findings in an investigatory summary, in which she concluded, "All evidence is that the EE [Quintanilla] provided false and misleading statements related to a workplace injury. Recommendation of termination" (R. Exh. 91; Tr. 1253–1254). Progressive discipline, she stated, would not apply due to the "seriousness and egregiousness of the actions" as Quintanilla "lied" despite given chances to correct her lie (Tr. 1255). Periolat testified that there were no comparable disciplinary actions (Tr. 1258).

On April 8, Periolat sent her investigatory summary to Trinidad, Kahn, and Emperador (R. Exh. 91).[43] Kahn agreed with Periolat to terminate Quintanilla as she had falsified documentation, lied to management, and violated the zero tolerance policy (Tr. 946, 1085, 1254). Kahn testified that Quintanilla's falsification removed her discipline from progressive discipline (Tr. 947).

Thereafter, on April 9, Respondent discharged Quintanilla (GC Exh. 6; Tr. 377–378). Prieto, La Serna, and Olmos represented Quintanilla during the termination meeting, which was also attended by Trinidad and Periolat (Tr. 376–377). Trinidad informed Quintanilla and her representatives that, after the investigation completed, Respondent decided to terminate Quintanilla (Tr. 377–378). Periolat was the decision maker (Tr. 815). The termination notice stated, "Employee [Quintanilla] provided false and misleading information related to a workplace injury" (GC Exh. 6).

After her removal, on August 26, 2016, Quintanilla filed a complaint in state court against Respondent alleging discrimination, retaliation, wrongful termination, and unfair competition (Jt. Exh. 20). On October 13, 2016, Respondent deposed Quintanilla under oath in her lawsuit (R. Exh. 125). In her deposition testimony, Quintanilla stated, "I supposedly had an accident on March 5, and I got confused. I don't know what went through my head, and I got confused. I thought it was on the 6th that it happened" (R. Exh. 125). Quintanilla also admitted that she told La Serna about her confusion of the date a few days before the October 13, 2016 deposition (R. Exh. 125). She also admitted that when her injury occurred she told La Serna that she was confused about the date of her injury, and he told her "to remember, to remember" (R. Exh. 125). She stated that La Serna never told her to tell Respondent a specific date (R. Exh. 125). Thereafter, on October 24, 2016, Quintanilla moved to have her case dismissed (Jt. Exh. 22).

Quintanilla did not testify at the hearing, and the parties stipulated:

1. Quintanilla willfully provided false information to SBM regarding the date of her injury.
2. Quintanilla willfully provided false information to avoid lawful discipline issued on March 13.
3. Quintanilla informed SBM of this false information prior to March 19.
4. Quintanilla was given several opportunities to retract her submission of false information in her suspension meeting, and she refused.
5. Quintanilla's civil complaint is admitted into evidence. Quintanilla's deposition in her civil complaint lawsuit is admitted into evidence.
6. The March 27 letter of Cazarez is admitted into evidence.

(Tr. 669–671).

IX. RESPONDENT'S APRIL 1 SUSPENSION AND APRIL 23

[42] Pasaran requested that the mediator hear from both parties, and then give her opinion as to La Serna's termination, which he provided (Tr. 208–209).

[43] The day prior, on April 7, Respondent and the Union met at the South San Francisco facility's building 54 as the Union wanted to review the various disciplinary actions taken by Respondent as well as to discuss other matters affecting employees (Tr. 161, 168–169, 571, 841). Present on behalf of Respondent was Periolat, Emperador, and Kahn (Tr. 161, 841). Present on behalf of the Union were representatives Solis, Diaz, and Arostegui, and shop stewards Fernandez, Prieto, Ruiz, Quintanilla, Ruby Olmos, and La Serna; these shop stewards had been newly elected and this was the first labor-management meeting they attended (Tr. 161, 280, 841). Quintanilla's suspension was discussed during this meeting. Lopez, who was not a shop steward, was not permitted to attend the meeting, and upon learning that she was outside building 54, Periolat told the Union attendees that Lopez must leave the premises or she would call security (Tr. 164, 572, 840). Periolat did not give the same warning to La Serna or Quintanilla.

TERMINATION OF LOPEZ

A. Lopez' March 27 Conversation with Lead Alcantara

Lopez worked for Respondent from June 2011 to April 1 as a custodian, and worked at the South San Francisco facility for 10 years (Tr. 500–501, 505–506, 621). Prior to her termination, Lopez reported to Rodriguez, and her lead was Alcantara (Tr. 505, 507–508). Lopez was also a member of the Union; as such, she attended meetings, helped distribute union leaflets, and participated in elections (Tr. 509, 621).

Shortly after the March 24 meetings, on approximately March 27 (the day after the Quintanilla meeting) Lopez and Alcantara spoke in the lobby of building 43 (Tr. 532, 953). Lopez and Alcantara, however, disagree on how the conversation commenced and what was said.

Lopez claims that Alcantara spoke to her first about a rumor that La Serna would be suspended, while Alcantara claims that Lopez initiated the conversation about La Serna (Tr. 533–534, 953–954). During this meeting, Lopez testified that she stated, "If Jose La Serna got fired, then all the employees would make Genentech quake, that because we would make a lot of noise and if we had to bring pots so that they would hear use, we would do it" (Tr. 534–535, 636).[44] Lopez testified she also used the phrase, "The buildings were going to shake" (Tr. 636). Lopez denied Periolat's claim that she used the phrase "explode Genentech's buildings when speaking to employee-witnesses" (Tr. 535, 553).

In contrast, Alcantara testified that Lopez made much stronger statements such as "she wouldn't let anybody touch a hair on Jose La Serna's head" and that "she was going to do whatever was in her hands not to let that happen, that she was going to kick out SBM from Genentech and that she had a lot of contacts that she could reach out to bomb the buildings" (Tr. 954). Alcantara told Lopez not to get involved in other people's problems, that she did not like to hear that type of rhetoric, and was leaving to go to another building (Tr. 954). In response, Lopez showed her phone to Alcantara, telling her to remember the date and time since she had contacts in Columbia (Tr. 954–955). The conversation lasted 15 minutes (Tr. 955).

After her conversation with Lopez, Alcantara spoke to her supervisor Rodriguez (Tr. 958; R. Exh. 27). She told him that she was afraid of how Lopez had expressed herself and wanted to provide a statement to Respondent (Tr. 958). A day or two later Alcantara documented her conversation in a statement (Tr. 968; R. Exh. 27).[45]

Rodriguez then wrote his own statement, documenting conversations he had with Lopez regarding weapons (R. Exh. 27). Specifically, Rodriguez provided three statements, and also in an email on March 31, where he wrote, "I wanted to bring this conversation [regarding Lopez' alleged comments that she had been trained to use an AK47] up to you guys since the behavior of Luz is really aggressive, shows a lot of attitude" (R. Exh. 27). In one of these statements, Rodriguez noted that Lopez "confessed" two weeks prior about her personal history in Columbia which included alleged guerilla warfare (R. Exh. 27). Rodriguez provided Alcantara's and his statements to Periolat and other managers for Respondent.

With regard to Lopez' alleged statements to Alcantara on March 27, I credit Alcantara's testimony rather than Lopez's testimony. Alcantara testified that Lopez threatened to harm Genentech property and employees if Respondent terminated La Serna. Although Alcantara's contemporaneous notes differ slightly from her hearing testimony, her testimony regarding the tenor of Lopez' comments remained the same. Moreover, after Alcantara approached Rodriguez about Lopez' comments, he then recalled recent various conversations and behavior by Lopez that concerned him. Rodriguez provided detailed statements recounting several conversations with Lopez about weapons. Although it is undisputed that neither Respondent nor Alcantara reported Lopez' statements to law enforcement, this failure to do so does not undermine my finding that Lopez made comments to the effect that she would harm Genentech's property and employees if La Serna was terminated as he had not yet even been suspended—her threat was contingent on a certain outcome. After learning of Lopez' comments, Periolat suspended her and would not permit her to return to the South San Francisco facility without permission. In addition, as set forth below, during the suspension and termination meetings, Lopez never explained to Respondent what she is claimed at the hearing to have said–that she only intended to make noise with pots and pans if La Serna was terminated by Respondent. Furthermore, Lopez testified inconsistently regarding the subject of weapons. On direct examination, Lopez stated that she spoke to Rodriguez about weapons but only in the context of soap operas; on cross-examination, however, she denied speaking to him about weapons at all. Overall, Lopez' testimony cannot be credited, and thus, I rely upon Alcantara's testimony.

B. Respondent's Suspension of Lopez

Once Periolat learned about Lopez' alleged statements, she decided to suspend Lopez due to the seriousness of the allegations, which was consistent with Respondent's workplace violence policy (Tr. 1275–1276). Thus, on April 1, Periolat, along with Jedan and Castro, met with Lopez who was represented by Ruiz; Perez acted as an interpreter (Tr. 542–543, 546, 835–836; GC Exh. 11).[46]

[44] Lopez explained that in her native Columbia the term "quaking" or "shaking" means to make so much noise that the building would shake (Tr. 535).

[45] Alcantara's statement differs slightly from her hearing testimony. Alcantara states that Lopez mentioned that La Serna was having problems with Trinidad, and Lopez said, "Listen up Betty, I Luz Dary Duque swear by the only daughter I have that if someone touches Jose [La] Serna by a hair, I will make some calls to Columbia with great contacts of mine and if you don't finish I will kick it to SBM and command to bomb these buildings and you will fall, I swear" (R. Exh. 27).

[46] Castro took notes during the meeting, but she missed approximately 30 seconds of the meeting when she went to get security (R. Exh. 33; Tr. 1186). Castro's contemporary notes largely corroborate Lopez' version of events but her notes make no mention of Lopez and Ruiz's allegation that Respondent asked her to sign a blank sheet of paper (Tr. 546, 835–836, 840). Furthermore, Castro denied giving Lopez any form during this meeting other than the notice of suspension (GC Exh. 11; Tr. 1171–1172). I credit Castro's testimony as her testimony was corroborated by her contemporaneous notes. I do not credit Lopez and Ruiz's testimony. I find it unlikely that Respondent would ask Lopez to sign an

Periolat announced that the meeting would cover the recent complaints Respondent had received about Lopez (Tr. 543). Originally, Lopez and Ruiz understood that the scheduled meeting was to discuss La Serna's potential disciplinary action, as he had named Lopez as a witness. Periolat changed the subject matter of the discussion due to the complaints Respondent received; Periolat informed Lopez that she was suspended (Tr. 545–546). Unsurprisingly, Lopez and Ruiz became upset (Tr. 837).

After an argument about Lopez seeking to audio record the meeting and whether Respondent was following proper procedures, Periolat told Lopez the details of the complaints. Specifically, Periolat told her that she was accused of threatening to bring in weapons to the South San Francisco facility to kill people, and blow up the buildings if La Serna were terminated (Tr. 554, 837). Lopez yelled, "So you're accusing me of being a terrorist, of being a criminal? You could have accused me of being a thief, that I could have stole [sic] something or hit someone, but never that I'm a terrorist" (Tr. 553–554). Ruiz then stated, "Ma'am, just because we're Columbians doesn't mean that we're terrorists. Not all Columbians are terrorists" and "I don't think that someone who has been granted political asylum in this country is going to be a terrorist, because to get political asylum they investigate everything about that person, everything about their life" (Tr. 554–555). Lopez then asked for the name of the person who had accused her because she was going to the police (Tr. 555–556). Lopez continued to demand the name of her accuser and told Periolat that she would be reporting all their names to the police as this was an "atrocity" and a "crime" against her (Tr. 556). Periolat stated that she could not give her the names of her accusers at that time (Tr. 556). Periolat also asked for Lopez' badge but Lopez refused to provide her badge to Respondent; she would only provide her badge to security (Tr. 556–560, 655, 838, 840, 864). After security took her badge, Lopez left the South San Francisco facility (Tr. 560).[47] Respondent provided a suspension form to Lopez which stated, "Investigation regarding bad verbal behavior and apparently threats of violence and supposed damage to the client's property" (GC Exh. 11).

C. Respondent's Termination of Lopez

After Lopez' suspension, Periolat investigated Lopez for suspected violation of Respondent's violence in the workplace conduct policy related to the statements attributed to her (Tr. 1277). In this regard, Periolat interviewed employees, including Lopez, with the Union attending most of the interviews (Tr. 1277). Also, on April 20, Periolat interviewed Lopez with Pasaran acting as her representative at an offsite location; Mutt acted as a translator (Tr. 580–583). Periolat presented "many" written declarations to Lopez, and asked for her responses (Tr. 583–584, 646, 1277–1278). Lopez claimed that she did not interact with Hernandez or Barrientos often (Tr. 584–590). In response to Alcantara's allegations, Lopez testified she "completely lost it" during this interview and started crying; Lopez denied making the statements she was accused of making (Tr. 588–589, 647, 1279–1280).[48] In response to Rodriguez's multiple statements, Lopez admitted that she spoke to him about weapons, but only in the context of soap operas about terrorism and drug trafficking from Columbia (Tr. 594–596).[49] The meeting lasted approximately 3 hours (Tr. 598–599).

Periolat's findings were accumulated in an investigative file (R. Exh. 26 and 27). At the conclusion of the investigation, Periolat recommended to Kahn that Lopez be terminated (Tr. 1280; GC Exh. 26). Kahn concurred, and Periolat decided to terminate Lopez (Tr. 815, 1280–1281).

On April 23, Respondent, via conference call, informed Lopez, who was represented by Pasaran, that she was being terminated (Tr. 599– 600, 602, 656). The termination form states, "Ch.2 EHB Insubordination-Initially refusing to surrender badge/Ch.9 EHB Violence in the workplace states "Threats or physical acts against an individual or property"/Ch.2 EHB Business Ethics and Conduct-Dishonesty in an investigation" (GC Exh. 12, 210).

D. The Union files a grievance regarding Lopez' termination

The Union filed a grievance regarding Lopez' termination, and on July 8, Pasaran and Lopez met with Periolat, Kahn, and Castro at an adjustment board review per Art. XVII of the CBA (Tr. 604–606, 1177, 1282–1283). Kahn testified that during this meeting, Lopez attempted to clarify that bombing a building was

uncompleted form. The purpose of the meeting was to announce Respondent's decision to suspend Lopez, and Respondent has no reason to hide the reasons for the suspension. Furthermore, on April 7, Perez also documented this meeting which is consistent with Castro's summary (R. Exh. 27).

[47] After this meeting Lopez went to the police station to complain (Tr. 563). Respondent never reported Lopez' threats to law enforcement (Tr. 565–566, 840).

[48] On direct examination, Lopez testified in response to Alcantara's declaration, "And at no point, never, have I said anything about blowing anything up or killing anyone. I have not said anything like that. That I couldn't believe that she was making such a serious accusation and that these people, including the company, would have to give me evidence and respond to me in a court in front of a judge" (Tr. 589). Then, on cross-examination, Lopez testified that she disagreed with Alcantara's affidavit, and clarified that she said, "If Jose was fired, we would make a march, we would make so much noise that the buildings were going to shake from the noise, because we wanted Genentech to find out what was going on" (Tr. 647). But, Lopez never stated as such in her Board affidavit which was taken under oath and closer in time to her suspension and discharge (Tr. 647–649). Lopez stated that she was depressed after her termination, and did not want to talk or think which excused her omission (Tr. 649). Lopez also claimed that Alcantara's declaration along with other employees' declarations was manipulated by Pasaran (Tr. 648). I do not find Lopez credible. Lopez' testimony was filled with conjecture. Lopez never explained what she actually said to Alcantara. Instead Lopez reacted to the accusation with a denial and her own accusation of being called a "terrorist."

[49] Lopez testified that Rodriguez may have a reason to testify against her as he allegedly harassed her (Tr. 637–639). However, Lopez never filed a sexual harassment grievance/claim with a third-party agency or filed a civil lawsuit (Tr. 640). On cross-examination, in contrast to her direct examination testimony, Lopez denied speaking to Rodriguez about weapons, specifically about AK-47s (Tr. 594–596, 645). Rodriguez no longer works for Respondent. I rely upon his statements only to the extent it shows how Alcantara's complaint reached Respondent. I rely primarily on the testimonies of Lopez and Alcantara.

a Columbian euphemism and argued that she was going to drop a "truth" or "information" bomb on Genentech and Respondent (Tr. 1035–1036). The meeting ended with the adjuster informing Pasaran he would give his results in writing (Tr. 606). However, on July 8, the Union and Respondent signed a document which indicated that no agreement had been reached and that the matter was "deadlock[ed]" (GC Exh. 401). After not hearing from Pasaran, Lopez sent an email to Solis on September 1 asking for an update (GC Exh. 37(a) and (b); Tr. 608). Lopez never received a response to her email (Tr. 608–609). On November 10, Lopez asked Solis to file a new grievance with Respondent for her termination due to her union activities and slander (GC Exh. 38(a) and (b); Tr. 609–610). Again, Lopez did not receive a response (Tr. 610).

X. RESPONDENT'S MAY 20 SUSPENSION AND JUNE 20 TERMINATION OF PRIETO

A. Prieto's employment with Respondent and the May 12 incident

Prieto began working at Respondent's South San Francisco facility as a custodian in 2008, and as a GMP tech from 2013 to May 20, 2015 (Tr. 358–359, 396, 430; Jt. Exh. 15). In 2015, during the weekdays, Prieto reported to lead Jose Lazo (Lazo), who reported to Brodie and Sanchez (Tr. 364, 446). Lazo would assign daily tasks to the employees including Prieto (Tr. 447, 490–491). Prieto's daily cleaning tasks varied from day to day during the weekdays (Tr. 360, 363). As a GMP tech, Prieto received training on good documentation practices in 2013 and 2014 (R. Exh. 50, 55, 56; Tr. 412–414, 1019–1020, 1111). Prieto also received training on the "stop the job" policy which taught employees to inform their supervisors when they did not feel comfortable or safe performing a task and to stop the task immediately (Tr. 421–422).

In certain GMP areas, GMP techs must sign cleaning logs (FN2003)[50] indicating that certain areas have been cleaned, and a pass through log (FN1989) indicating that cleaning equipment brought into specific areas have been sanitized before entry into these rooms. Within building 3, the cell culture (CC) lab (or inoculation suite), room 3218, is the most controlled area (Tr. 1104). As such, before any employee enters room 3218 to clean, the employee must document steps taken to clean and sanitize any equipment taken into the CC lab; this room has daily tasks so there should be an entry for every day (Tr. 1105). But the employee should also include an entry for room 3219 as this is the room where the additional sanitization and gowning must be performed before entering room 3218 (Tr. 1108).

On May 12, according to Prieto, when he arrived at work, Lazo asked him to perform the task of buffing the "blue" room or media prep room in building 3, and Prieto replied that he did not have knowledge of that work route (Tr. 392–393, 977).[51] Prieto testified he had never received training on buffing in the GMP areas (Tr. 411). Prieto testified that Lazo insisted that he perform the work as he had no one else to perform the task, and assured Prieto he would show him the work route (Tr. 393). Prieto testified that Lazo showed him the room, but never mentioned to him that he should clean both of the laboratories (rooms 3218 and 3219) inside the "blue" room (Tr. 393, 406, 459). Prieto cleaned the rooms on the work route as Lazo had shown him, and went to sign the cleaning logs (Tr. 393–394). Prieto testified that Lazo showed him which logs to sign and where specifically on the logs to sign (Tr. 394, 462). Prieto signed those spaces on the log, not realizing that he was signing that he cleaned rooms which he had not done (Tr. 394–395; R. Exh. 54).[52]

Directly contrary to Prieto's testimony, Lazo testified that on May 12, he told Prieto that the employee who performs buffing, Donald Manzanares (Manzanares), was on vacation and asked Prieto if he could perform the work (Tr. 977). Prieto responded that he could, and Lazo asked Prieto if he could show Prieto the area to clean but Prieto told him he had done the work 3 times prior and could do it (Tr. 977–978). Lazo testified that he would never send an employee to an area to clean where he does not have knowledge (Tr. 978). Lazo denied telling Prieto to sign the logbooks for rooms he did not clean on May 12 (Tr. 983–984).

A short while after May 12, Brodie testified that GMP tech Giovana Loli approached him and showed him a discrepancy in the pass through log (FN1989) (Tr. 1103). Brodie then looked at the pass through log again to see the date that the entry was missing (Tr. 1105). Reviewing the pass through log, Brodie noticed the date 051215, or May 12, 2015, was missing (R. Exh. 83; Tr. 1106–1107). Because Brodie could not tell from the pass through log who failed to enter in the date, he looked at the cleaning log (FN2003) for the actual cleaning which occurred in the area (Tr. 1106; R. Exh. 54). The cleaning log shows that Prieto initialed that he cleaned the CC lab, but the pass through log did not have a correlating entry to show that the buffing equipment was sterilized before being brought into rooms 3218 and 3219 which are within the CC lab (Tr. 1108). Based on his review of the logbooks, Brodie assumed that Prieto completed the cleaning but had forgotten to sign the pass through log book, which is known as an omission (Tr. 1109). Typically, a failure to complete the pass through log results in a verbal warning, and has not resulted in an employee's termination (Tr. 1016, 1108–1109).[53]

On May 19, Brodie and Sanchez met with Prieto and La Serna, as his union representative, to present Prieto with a request for disciplinary action for alleged violation of an SOP (GC Exh. 8; Tr. 1111).[54] The request states:

[50] FN stands for "foreign number" (Tr. 1028).

[51] Buffing involves using a rotation machine to shine the floor (Tr. 411).

[52] The log Prieto signed was a GMP document owned and managed by Genentech and used as an official record for regulatory review (Tr. 1065). Restroom logs differ in that they are SBM owned documents which are provided as a convenience to show its customer that the restroom has been serviced (Tr. 1065).

[53] SOP, GSP 005 refers to documentation practices to fill out the logs (Tr. 1110).

[54] Brodie was aware that Prieto was a shop steward, but unaware if Prieto participated in any marches or signed any petitions (Tr. 1134–1135). I do not credit Brodie's testimony. As Kahn was Respondent's contact for Genentech, it is more likely than not that Genentech shared the petition, which included Prieto's signature, with Kahn. Kahn, in turn, likely shared this information with Brodie. Khan also observed Prieto at the April 16 march, which is information he likely shared with Brodie

> On 051215 Adilio Prieto entered rooms 3218 & 3219 to perform Buffing activities. Per SOP 200.847 All equipment must be cleaned and sanitized prior to entry of these rooms and documented on FN 1989 [pass through log]. Adilio signed as performing cleaning activity in these rooms on FN 2003 [cleaning log] but failed to document entry of equipment on FN 1989 for cleaning that occurred on 051215. Discrepency [sic] 1028535 was initiated by GNE area owner for this ommission [sic]. This is also in violation of SBM supporting clients right to opperate [sic] policy.

(GC Exh. 8). Brodie showed Prieto the two logbooks to provide Prieto an opportunity to explain the error (Tr. 1112). Brodie asked Prieto if he had forgotten to sign the pass through log (Tr. 387). Prieto responded that he had not forgotten to sign the pass through log because he had never cleaned the room (Tr. 1112). Brodie brought Prieto's attention back to the cleaning log which Prieto initialed, which stated that he had buffed the rooms (Tr. 1113). Prieto told Brodie that Lazo had told him to sign the cleaning log (Tr. 388, 1113). Prieto stated that Lazo insisted that he help him perform the work and Lazo would tell him which rooms were to be cleaned and where to sign on the log (Tr. 388). Prieto further explained that Lazo told him to clean the "blue room" but never told him that he needed to clean the laboratory rooms (rooms 3218 and 3219) inside the blue room (Tr. 388, 417). Brodie then told Prieto that he needed to escalate the matter to human resources to investigate, so Prieto should document his own version of events (Tr. 1113). [55]

Prieto documented his version of events, and Brodie also documented the meeting via email (Tr. 1114). Prieto wrote, "I, Adilio Prieto, they asked me to work doing buffing when they encountered me about buffing the CC lab. There was a confusion that happened not appropriately informing me of the area and how to work it" (R. Exh. 59(a) and (b); Tr. 1116).[56]

Due to their conversation with Prieto, Brodie and Sanchez went to Lazo to obtain his version of events (Tr. 1119). Brodie informed Lazo that they would be escalating the matter to human resources and asked him to write a statement (Tr. 1120). That day, Lazo created a statement of his version of events (R. Exh. 60). In this statement, Lazo wrote:

> Yesterday, Adilio [Prieto] told me that they were questioning some rooms that were signed off but not done. He told me that he did not go in to do them because he did not have knowledge about the rooms that he didn't do. I told him–okay. "I said you didn't go in. He said no because of the work he was doing, it was being done, he was doing it quickly." "So the work he was doing, he was doing it quickly. I, Jose, remember that I told you." "Jose, remember that I told you that I didn't go in. I said– "I told him you haven't told me this at any point. I don't remember, Adilio, what you're saying, I said, Jose Lazo, at no point have I told him not to do a job."

(Tr. 986). On May 28, Lazo wrote another statement again denying Prieto's claims (R. Exh. 68a and b).

B. Respondent's Suspension of Prieto

The following day, on May 20, Prieto, with Fernandez as his representative, received a notice of suspension for "falsification of documentation on FN2008 on 051215" from Brodie and Trinidad (GC Exh. 9; Tr. 390–391, 1125).[57] The notice further stated that the final disciplinary action would be determined after an investigation and/or review of his disciplinary file. During this meeting, Prieto again explained that he had not been properly taught to perform the task to which he was assigned, and that there had been miscommunication between Lazo and himself (Tr. 392, 1125). Brodie and Trinidad informed Prieto that he had cleaned these rooms many times in the past years, should not have been confused and that, by signing that he cleaned rooms which he did not, had falsified documents, as his signature was a legally binding document which is reviewed by the FDA (R. Exh. 65; Tr. 1127). Trinidad and Brodie took Prieto's badge and told him not to return to Genentech until he was called by Respondent (Tr. 1127). The meeting lasted no more than 10 minutes (Tr. 392).[58]

C. Respondent's termination of Prieto

Thereafter, Periolat, with Trinidad's assistance in collecting statements and providing translations, investigated the matter and interviewed other GMP techs, and other employees who had signed logbooks (Tr. 791–792, 1016, 1022–1023, 1259–1260; R. Exh. 70). Trinidad questioned the GMP techs on whether they knew not to sign a logbook without completing the task either by their own decision or being told by a lead to do so (R. Exh. 70). Trinidad sent her notes with the questions and answers of these employees to Periolat (Tr. 1206).

Brodie also wrote an email to Kahn and Trinidad summarizing the incident (R. Exh. 63). On May 20, Brodie wrote,

> On 051915 it was discovered that Adilio Prieto was assigned to perform cleaning activities (floor buffing) in Inoc suite 3218 &3219 for the date of 051215. His task requires him to sign for cleaning activity on FN 2005 and as it is an Inoc suite it is required to sign a material transfer log 1989 for any materials brought into the room. Adilio signed for cleaning activities in both rooms on FN 2005 but failed to sign the 1989 for the

and other managers. It also appears that Prieto mistakenly named La Serna as his representative, which is unlikely since La Serna had been terminated.

[55] Sanchez, on May 20, documented this conversation (R. Exh. 46). Sanchez stated that Prieto told them that Lazo told him not to go into the CC labs (R. Exh. 46). Sanchez did not testify at the hearing, but continues to work for Respondent.

[56] I rely on Brodie's translation rather than the translation in the exhibit as that translation did not include the term CC lab which is written in Prieto's statement as "sisilaban." Respondent's counsel could not identify who translated Prieto's statement originally but admitted that Respondent provided the translated document to the General Counsel.

[57] Brodie documented this meeting by sending an email to Trinidad and himself on May 26 (R. Exh. 65).

[58] With La Serna's assistance, Prieto prepared a detailed statement regarding the events of May 12 for the Union (Tr. 474). Prieto could not recall if the statement at R. Exh. 69 was the same statement he prepared with La Serna's assistance. However, the statement, dated May 29, corroborates Prieto's hearing testimony (R. Exh. 69(a) and (b)).

> corresponding cleaning on 051215. As it was not documented or verifiable a DMS was initiated by GNE area owner for the omission of information.
>
> […]
>
> After explaining the situation to Adilio, he told us that the reason that he did not sign the 1989 is not because he forgot but because he did not clean the rooms. He was then asked why he signed for the rooms if he did not clean them. He responded that he was shown the area of the FN he was to sign by Lead Jose Lazo. It was explained to him that according to GMO GDP (Good Documentation Practices) training he is not to sign for any room that he did not clean.
>
> He then stated that he is familiar with the rooms and has done mopping activities in them various times and knows the room numbers and pass–through procedure for the rooms in question. He stated however that he was not familiar with the buffing route and that he thought he was not supposed to clean the inoc suit per instructions from Jose Lazo.

(R. Exh. 63).

On May 29, Prieto submitted another statement to human resources (R. Exh. 69). In this statement, Prieto noted that Lazo had told him that he needed to help perform buffing in the controlled area because Lazo was behind on that work and the other employee who was in charge of the task was not going to finish on time (R. Exh. 69). According to Prieto, he told Lazo that he was not familiar with the work area, and Lazo said he would show him the area (R. Exh. 69). Prieto agreed to help him but also told him there was too much work, and he would not have time for signatures (R. Exh. 69). Prieto wrote that Lazo told him not to worry, and that he would help him with the signatures (R. Exh. 69). Prieto provided further details, including stating that he did not realize he needed to buff the two laboratories within the larger media prep room (R. Exh. 69). Prieto further cast blame on Lazo, stating that Lazo had never checked on him or told him that by signing for the media prep room cleaned that he was committing to have buffed the two inner laboratories (R. Exh. 69).

On June 4, Periolat asked Brodie to review Prieto's May 29 statement (Tr. 1121–1122). Periolat wanted to know how many times Prieto cleaned the area at issue in the past, and also asked, "Was it really the first time?" (R. Exh. 71). In response, Brodie noted that Prieto had performed various tasks in the area before, was familiar with the building and the log sheets (R. Exh. 71; Tr. 1123). Brodie also explained that Prieto may have never buffed those particular rooms, but he has training in the area (R. Exh. 71; Tr. 1123). Brodie further explained that Lazo on May 11 noted that certain rooms in building 3 did not need to be buffed but rooms 3218 and 3219 were not marked out (R. Exh. 66 and 71). Brodie further stated that every employee is responsible for the logbook entries, and that leads only assist and will not be held responsible for an employees' mistakes (R. Exh. 71). In addition, Brodie testified that the room numbers were listed on the doors that Prieto worked (R. Exh. 71; Tr. 1123).

Periolat compiled an investigative file with the evidence gathered and prepared a summary (R. Exh. 46). She concluded that Prieto violated the following policies: (1) violation of any SBM policy, rule or safety regulation when falsifying Genentech's logs; (2) dishonesty of any kind, including, but not limited to, providing false, incomplete or misleading information related to the GMP logs; (3) violation of GMP tech 2 job responsibilities including understanding and following directions, consistently following all customer and SBM SOP's and procedures, and completing daily logs accurately and completely; and (4) violation of business practice or policy (R. Exh. 46).[59] Periolat, who also considered Prieto's prior disciplinary record, decided to terminate him for the violations (R. Exh. 46; Tr. 1264–1265).[60] Periolat consulted Kahn for his approval or disapproval while Brodie had no role in the decision to terminate (Tr. 815, 1023–1024, 1129). These violations, listed in Periolat's summary, were not all included in Prieto's termination notice.

On June 10, Respondent discharged Prieto for conduct violations described as "falsifying documents; providing false or misleading information, violation of GMP Tech Job Responsibilities, Violation of business practice or policy" (GC Exh. 10; Tr. 397–398). Per Genentech's rules, Respondent informed Genentech that those rooms had not been cleaned (R. Exh. 79). This record is unclear as to whether Respondent or Genentech drafted the summary which notes that the error by Prieto were due to human error and did not affect product-quality or processing (R. Exh. 79).

As for the events of May 12, I fully credit the testimony of Lazo rather than Prieto's testimony as Lazo remained consistent in his version of events. I do credit Prieto for being honest immediately when asked why he did not sign the logbooks. If Prieto clearly sought to deceive Respondent in claiming to clean the rooms when he purposefully did not, then he would not have admitted that he did not clean the rooms. But Prieto provided contrary reasons why he did not clean the rooms. Prieto honestly

[59] Respondent provided a comparator disciplinary action. In March 2013, Respondent terminated Veronica Barajas (Barajas) for failure to follow proper SOP requirements and falsifying logbooks (R. Exh. 90). Barajas claimed to clean a room and signed the logbook as such but then later admitted she had not cleaned the room (R. Exh. 90). Brodie and Mendoza were involved in this matter. The General Counsel argued instead that a June 2015 incident involving Giovana Loli was comparable to Prieto's violation. In June 2015 Mendoza issued Giovana Loli a verbal warning for cleaning certain rooms but failing to sign the appropriate equipment pass through log which violated good documentation practices and client's right to operate (GC Exh. 116, 116(b)). Brodie explained that Loli did not falsify documents, and actually performed the cleaning task unlike Prieto (Tr. 1140–1141). Respondent notified Genentech of Giovana Loli's error in failing to document the appropriate logs (R. Exh. 79). The General Counsel also argued that Christina Ramirez (Ramirez) was only suspended in September 2016 when she signed a log before completing her cleaning tasks (GC Exh. 127). Ramirez immediately acknowledged her error and apologized.

[60] Prieto received a warning on December 10, 2014 for failing to report an accident, and on October 3, 2014, he received a warning regarding safety equipment (R. Exh. 46). When reporting the October 3 incident, via email to other managers including Kahn, Jedan, and Sanchez, Manager Kristen Sanchez noted, "This is a well known shop steward" (R. Exh. 58).

and consistently testified that he was confused about which rooms to clean but I cannot credit his testimony in full because the reasons for why he was confused about the rooms did not remain consistent. Prieto testified that Lazo said he did not have an employee to buff the floors in the CC lab, but in his May 29 statement, he admitted that Lazo told him that the employee who was assigned to buff the room was behind on his work and Prieto needed to complete the work. Prieto also claimed that Lazo told him not to clean the rooms. Prieto admitted to receiving training in GMP, and had been a GMP tech for two years but then claims that he not know how to perform the buffing task or at the very least, realize he was signing that he cleaned an area when he did not. The rooms were clearly numbered and the logbook was not marked out as not needing to be cleaned. In total, Prieto's version of events cannot be completely credited while Lazo's version of events is totally credited.

Discussion and Analysis

A. Procedural Issue: Deferral Argument

Respondent argues that La Serna and Lopez' allegations should be deferred to arbitration as the Region initially decided to defer their cases (R. Br. at 54–59).[61] The General Counsel argues that deferral of La Serna and Lopez' allegation is not appropriate for policy reasons (GC Br. at 94–104). While I fully understand Respondent's obvious frustration with the Region's changing position, I agree with the General Counsel that deferral is not appropriate here based on the totality of the circumstances.

As background, initially, on October 30, the Regional Director for Region 20 deferred La Serna's suspension and termination for serving as shop steward and in retaliation for his union activities to the parties' CBA (Jt. Exh. 1, 16A). The Union never contacted La Serna to schedule his arbitration despite his many inquiries. Thus, on February 10, 2016, the Regional Director revoked his decision to defer to the parties' CBA as the "underlying grievance is not being processed through the grievance/arbitration procedure" (Jt. Exh. 1, 16B). But then in May 2016, related charges against the Union were dismissed, allowing the Union five months to proceed to arbitration (Jt. Exh. 1, 7, 8, 12, 13). In August 2016, the Union finally responded to La Serna's inquiry regarding arbitration, but the arbitration could not be scheduled for some time.

Similarly, in October, the Region deferred Lopez' allegations to the CBA (Jt. Exh. 19A). The Union never contacted Lopez to schedule the arbitration. Thus, on April 13, 2016, the Regional Director revoked his decision to defer to the parties' CBA (Jt. Exh. 19B). But in May 2016, related charges against the Union were dismissed, allowing the Union five months to proceed to arbitration (Jt. Exh. 1, 13). By the close of this hearing, Respondent received arbitration requests from the Union concerning Lopez and La Serna which were scheduled for April and May 2017, respectively (Tr. 1320–1321).

The Board has considerable discretion in determining whether to defer to the arbitration process. *King Soopers, Inc.*, 364 NLRB No. 93 (2016); *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 6 (2016); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). The Board has articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present. These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, supra at 558. Furthermore, the burden of proof lies with the party asserting deferral which in this instance is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB 1220, 1232 (2015).

Although the parties have a long and productive collective-bargaining history, Respondent has had animosity towards the employees' exercise of their protected rights. For example, Respondent strongly opposed any meetings or marches by the employees and made its position known via Trinidad's letter to all employees. Moreover, Respondent clearly did not appreciate La Serna's strong advocacy during grievance meetings. In addition, this case presents a factual scenario where the Union failed to represent its members adequately. Thus, the discriminatees in this matter were in a state of limbo. Although they are shop stewards, they could not take their cases to arbitration without the Union representatives' cooperation. And without the Union representatives' cooperation to take these matters to arbitration, Respondent could not proceed to arbitration either. The Union's failure to represent these employees also precedes La Serna and Lopez' discipline as they did not respond to numerous requests by the shop stewards for assistance in addressing Respondent's alleged unfair actions. Throughout 2015, the shop stewards sought the union representatives' assistance, to no avail. Thus, deferral is inappropriate.

B. Witness Credibility

The critical findings of fact in this matter may only be resolved with credibility determinations. 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). Credibility 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 622. In addition to my specific credibility findings set forth above, I will provide my overall impression of key witness'

[61] According to Respondent, deferral of Quintanilla and Prieto's allegations is not at issue in this proceeding (R. Br. at 54, fn. 15). In July and December 2015, the Union declined to continue Quintanilla and Prieto's cases to arbitration, and the Regional Director revoked deferral of their allegations (GC Exh. 408, 409). Thus, Respondent does not appear to argue that Quintanilla and Prieto's cases should be deferred to arbitration.

testimony.

As for the General Counsel's witnesses, I found La Serna to be a credible witness. La Serna provided extensive details regarding the experiences of the shop stewards and their interactions with Respondent and the Union. La Serna's testimony vividly explained the conflict the shop stewards had not only with Respondent but with its own Union representatives. La Serna convincingly testified about the increasingly tense relationship between Trinidad and himself. La Serna, in unrebutted testimony, testified about an incident where Trinidad ostensibly threatened with him with discipline for allegedly spreading false rumors. La Serna's credible background testimony set up the incident of March 26 which is the key event leading to his termination. Although I do not credit La Serna's testimony for the start of the meeting, as I find it more likely than not that Trinidad informed Quintanilla and her representatives the reason for her suspension, La Serna credibly testified that the meeting became heated and voice tones escalated. Certainly, as Quintanilla's shop steward, La Serna acted in an advocacy role, arguing on her behalf. Thereafter, La Serna left the conference room. La Serna testified without hesitation, remained calm, appeared forthright and credibly captured the events as they took place. In addition, on another key point, as explained above, La Serna testified reasonably regarding his allowance to return to the South San Francisco facility. Certainly, without his badge he could not enter the buildings, but Respondent did not clearly inform him which areas he could and could not return to on the property, including the public areas, during his suspension.

As for Prieto, while he testified credibly regarding the details of the start of Quintanilla's March 26 meeting, he failed to testify completely credibly with regard to his own incident. Prieto seemed quite sincere in his testimony but frankly could not recall many details which undermined his credibility. At one point he could not recall whether he had training on good documentation practices. Also, his reasons for why he did not clean the two rooms for which he signed in the logbooks waffled. He testified that he did not know that he needed to buff the floors of the two rooms, but also claimed to not know how to buff these floors. GMP techs are only given access to the buildings where they have been trained to clean so it seems more likely than not that he knew how to buff the floors of those rooms. In addition, Respondent provides extensive training which Prieto had taken. During the investigation, at the first meeting with Brodie, Prieto initially blamed Lazo and stated that Lazo told him where to sign on the logbooks and never told him to clean the rooms. But a day later, Prieto stated he did not know how to buff the rooms. Thus, as his version of events changed and because he could not recall key details, I could not rely on his testimony regarding the May 19 incident.

Lopez provided generally incredible testimony which was at times contradictory and confusing. Many times during her testimony, she became upset which is to be expected. However, during cross-examination, when confronted again with the alleged statements she made, Lopez became visibly angry, slamming the witness stand with the palm of her hand. In addition, during the suspension meeting, Lopez never clarified to Periolat what she claimed to have said or explained how her statements could have been misconstrued by Alcantara. If she had truly only used the phrase "shake the buildings," then one would expect Lopez to have explained this idiomatic expression, especially when hearing the accusations made against her, immediately when confronted. She also likely would have clarified her comments after Alcantara told her she did not like to hear such rhetoric. Overall, Lopez did not appear believable in her version of events. Similarly, I cannot credit Ruiz's testimony as to key moments during Lopez' suspension meeting because even though she is a current employee testifying against her own pecuniary interest, Ruiz also testified that Respondent asked Lopez to sign a blank form during her suspension meeting. As explained previously, such a scenario is highly unlikely as it makes little sense for Respondent to suspend Lopez without sharing with her the reasons. Thus, Ruiz's testimony was not corroborated by a credited witness, and is not reliable.

As for Respondent's witnesses, I found Periolat, Kahn, and Brodie to be witnesses with mixed credibility. They testified in a straight-forward manner with sufficient detail and little hesitation. However, Respondent's investigations of La Serna, Quintanilla and Prieto, although detailed and extensive, focused on irrelevant information or relied upon previously obtained evidence. Also, on the issue of knowledge of union and protected activity, Periolat, Kahn, and Brodie appeared untruthful. For example, Kahn, on direct examination, appearing nervous, claimed that he did not know if Quintanilla was a shop steward or even running for Union office, when he suspended her. On cross-examination, though, he admitted to knowing that Quintanilla was running for elected office. Thus, on this point, Kahn is not credible. Moreover, at one point Periolat denied knowing who was involved in the marches and who was a shop steward but I reject such testimony as it is clear from the record that Respondent knew who was an active union adherent and who supported the union and engaged in protected concerted activity. Several emails among Respondent's management officials show clearly that they knew of La Serna, Prieto, and Quintanilla's union activity.

However, I found Alcantara, Lazo, and Castro to be generally credible witnesses. I particularly found Alcantara to be a credible witness. Although her testimony differed slightly from her investigatory statement, the tenor of Lopez' comments was clear to her. It also seems realistic that Alcantara did not immediately fear for anyone's safety as Lopez continually commented what she would do "if" La Serna were terminated. Alcantara then appropriately reported Lopez' statements to her supervisor. Again, it is reasonable that Respondent did not call law enforcement as Lopez' threats were not imminent–La Serna had not yet been suspended or terminated. Lazo's testimony is credited as set forth above, and Castro seemed genuine in her testimony and her contemporaneous notes corroborated her testimony.

Among Respondent's witnesses, I did not find Trinidad to be a reliable, credible witness. She testified in a self-serving, hyperbolic manner, and her testimony oozed with the impression that she sought to remove La Serna from the workplace, especially since La Serna actively sought to remove her from the worksite with the grievance. Trinidad wrote the day after her meeting with La Serna that he acted in an "aggressive" manner and sought to "intimidate" her into not following policy. However, Trinidad's actions later that day belie her testimony.

Trinidad did not call security after La Serna's alleged intimidation but instead met with him approximately 6 hours later when he represented Vargas in another potential disciplinary action. She also met with him a few days later when he represented another employee. Thus, Trinidad's testimony that La Serna acted in a manner that was threatening is simply not believable

C. Respondent Violated Section 8(a)(1) and (3) of the Act when Suspending and Terminating La Serna

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended and terminated La Serna on March 30, and April 23, respectively (GC Br. at 41–65). In support of its position, the General Counsel offers numerous theories of discrimination. Respondent, on the other hand, argues that it lawfully suspended and terminated La Serna (R. Br. at 79–103). Specifically, Respondent argues that La Serna's March 26 conduct during Quintanilla's disciplinary meeting lost the protection of the Act, and that his termination was lawful under a mixed-motive theory.

The appropriate analysis for La Serna's suspension *and* termination is found in *Burnup & Sims*, 379 U.S. 21, 23–24 (1964). If the very conduct for which an employee is discharged is the employee's protected activity, the employer's motivation is not at issue. *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. mem 63 Fed.Appx. 524 (D.C. Cir. 2003). Furthermore, when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

The credible evidence indicates that La Serna engaged in protected, concerted activity when he represented Quintanilla during her suspension meeting. I find that La Serna also engaged in protected concerted activity when he participated in the April 16 march while suspended. The question then presented is whether La Serna's protected concerted activity lost the protection of the Act during the March 26 meeting as well as the April 16 march.

On March 30, Respondent suspended La Serna for violating the employee handbook rules regarding respectful communication with other employees, insubordination, harassment and intimidation, and violence in the workplace for his conduct during the March 26 Quintanilla disciplinary meeting. Respondent also noted that it planned to investigate La Serna for complaints from female employees about his harassing and intimidating behavior which center on his role as a shop steward (see R. Exh. 2; GC Exh. 208, 209).[62] The Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992).

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984). "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so "flagrant, violent, or extreme" as to render him unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB at 1170 (1991).

In addition, the Board has commented that "some latitude must be given to participants in these incidents. Indeed, although we might wish it otherwise, it is unrealistic to believe that the principals involved in a heated exchange can check their emotions at the drop of a hat." *United States Postal Service*, 251 NLRB 252, 252 (1980). Union representatives are considered to stand upon equal footing with management with regard to resolving labor disputes. Id. However, although union stewards enjoy protections under the Act when acting in a representational capacity and are permitted some leeway for impulsive behavior when engaged in protected activity, that leeway is managed against "an employer's right to maintain order and respect." *Tampa Tribune*, 351 NLRB 1324, 1325–1326 (2007). Thus, when an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employee loses the Act's protection. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). This standard for losing the Act's protection is set high such that the conduct must be egregious or offensive. *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001).

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[62] Respondent did not address this suspension reason in its brief. Presumably, Respondent omitted the argument as the crux of its suspension of La Serna was his conduct during the March 26 meeting with Trinidad. However, I also find that Respondent violated the Act by suspending La Serna for his alleged harassment of Barrientos and Hernandez. Both Barrientos and Hernandez complained about La Serna's alleged comments during the March 24 shop steward-led meeting. They complained that they felt harassed when La Serna mentioned the leads role in Respondent's discipline of employees. They also complained that they did not appreciate La Serna speaking negatively about Respondent and Trinidad. Applying *Burnup & Sims*, 256 NLRB 965 (1981), Respondent violated Sec. 8(a)(1) and (3) for suspending La Serna for disciplining him for his protected concerted activity. Moreover, Respondent presented no evidence or argument that La Serna's comments during the March 24 meeting lost the protection of the Act especially as the meeting was an employee–only meeting.

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979). Contrary to Respondent's contention that La Serna's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of La Serna not forfeiting protection of the Act.

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On March 26, the meeting to discuss Quintanilla's suspension occurred in a conference room. There is no evidence that anyone else heard their discussion, and their discussion remained confined to the conference room interior. Furthermore, Respondent admits that the meeting occurred in a private conference room (R. Br. at 81). However, Cazarez' statement indicated that La Serna left the conference room "yelling" and "screaming" (GC Exh. 406). But as stated previously, I give little weight to Cazarez' statement as he did not testify at the hearing. Even if La Serna's yelling and screaming was heard by other employees, I do not find that he would lose protection of the Act as the yelling and screaming was brief. See *Goya Foods of Florida*, 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006) (place of discussion, employee meeting away from employees' work area, weighs in favor of protection as no evidence of disruption to the work processes); *Stanford Hotel*, 344 NLRB 558 (2005) (workplace outburst occurred away from normal working area in a closed door meeting where no other employees present, and management's authority not weakened). In sum, I find this factor weighs in favor of protection for La Serna's conduct on March 26.

The second factor, the subject matter of the discussion, favors protection. The purpose of the March 26 meeting was for Respondent to present Quintanilla with its decision to suspend her. La Serna acted as Quintanilla's representative and advocated on her behalf, disagreeing with Respondent's decision. The subject of the meeting clearly concerned the parties' collective bargaining agreement which is protected under the Act. See *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). In addition, Respondent admits that the subject of the meeting concerned discipline (R. Br. at 81). Overall, the nature of the subject matter weighs in favor of protection of La Serna's March 26 conduct.

The third factor, the nature of the outburst, favors protection as well. The credited evidence shows that during the March 26 meeting, after Trinidad announced Quintanilla's suspension for falsification, La Serna told Trinidad that the suspension was unfair and the suspension was an abuse. The meeting then quickly devolved with Trinidad becoming insulted when La Serna accused Respondent of "abuse" and of looking for any reason to punish employees. Prieto even left the meeting to bring Diaz into the meeting as it was becoming "ugly." After Diaz entered the room and asked questions, a dispute ensued where all the participants stood up and raised their voices. La Serna told Trinidad that she was looking for any reason to punish employees and that she was looking for the employees to have her removed from the South San Francisco site. Trinidad remarked, "Well before I leave, you will leave." Diaz then asked La Serna and Quintanilla to leave the meeting.

La Serna never used intemperate language, profanity, or threats of violence but admitted to raising his voice. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101; see *Goya Foods*, 356 NLRB 476, 478; *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1323 (nature of the outburst weighed in favor of protection whether employee told another employee to "mind [her] f–king business" during grievance discussion); *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). In addition, the Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014). La Serna's conduct on March 26 did not forfeit the protection of the Act. His conduct came nowhere close to the conduct the Board has found to lose the Act's protection. See *Crowne Plaza LaGuardia*, supra (employees lose protection of the Act when attempting to restrain a manager). The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the strong willed, advocacy behavior displayed by La Serna. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act), adopted in 355 NLRB 636 (2010) enf. denied in part, and remanded on other grounds 679 F.3d 70 (2d Cir. 2012) decision on remand *Starbucks Coffee* Co., 360 NLRB 1168 (2014).

In sharp contrast to La Serna's credited testimony, Trinidad claimed that La Serna slammed his hand on the table, pushed back his chair which hit the wall, stood up and started walking towards Trinidad, yelling he would get rid of her. Trinidad then claimed that she was in a corner of the conference room and shouted an expletive. Diaz then came between them and pushed La Serna out the door and Trinidad slammed the door closed. As explained extensively in the findings of fact, I do not credit Trinidad's testimony, but even if accepting Trinidad's version of events, La Serna's conduct still would not lose protection of the Act. The context of events is extremely important to keep in mind. Prior to the meeting, the shop stewards including La Serna had been actively complaining about Respondent, and

particularly Trinidad's discipline of employees. The shop stewards even filed a grievance seeking her removal. La Serna's statement that he was going to get rid of her should be interpreted in such context, not that he intended to physically harm her. In fact, Trinidad knew that La Serna would not physically harm her since she attended a meeting later that evening, without the presence of anyone else, to discuss another employee's discipline. Trinidad's complaint, which came a day later, claiming to fear for her safety and worry about her job is simply unbelievable. La Serna certainly has no supervisory role over Trinidad to be able to direct her removal; he can only proceed through the parties' CBA to request such a change. In *Kiewitt Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves."

Respondent cites a few cases in support of its position that La Serna's conduct under this *Atlantic Steel* factor loses the protection of the Act. None of the cases cited supports Respondent's argument. In *Coca Cola Puerto Rico Bottlers*, 362 NLRB 1047 (2015), the Board determined that a steward did not lose the Act's protection when he spoke to a supervisor, referring to a past event, as he did not make the statement in the context of ongoing violence and did not threaten future violence. Respondent argues that La Serna's threat to "get rid of" Trinidad was aggressive in that he would end her employment or physically harm her. I do not agree with Respondent. Again, the standard is an objective standard. Under the totality of the circumstances, La Serna clearly was referring to the grievance the Union filed seeking to remove her from her job which is the only avenue La Serna could possibly have to "end her employment."

Respondent also cites to *Public Service Co. of New Mexico*, 364 NLRB No. 86 (2016), where the Board found that a union steward lost the protection of the Act during an employee-management training meeting when he intentionally shut down the meeting by inserting his own demands, not allowing others to ask questions, refused to leave the meeting and after leaving and returning, demanded the meeting end and the employees leave. Again, that decision is distinguishable. In contrast, here La Serna did not end the meeting but instead left after Diaz asked him to leave. Moreover, the meeting was only to present Quintanilla with her suspension notice and was not an investigatory meeting or any other fact–gathering/information sharing meeting. Thus, La Serna's conduct on March 26 weighs in favor of protection under the Act.

With regard to the fourth factor, provocation by employer's unfair labor practice, I do not find that this factor weighs in favor of or against finding La Serna's conduct unlawful. Initially, Trinidad did nothing to provoke La Serna. She set forth the reason for Quintanilla's suspension, which is not alleged as an unfair labor practice in this complaint, which caused La Serna to react negatively as his advocacy role expects. Trinidad then reacted to La Serna's comments of the suspension being unfair and his belief that she was trying to find anyway to punish employees which would cause them to try to remove her. Trinidad became defensive, and told La Serna that he would be gone from the workplace before her.

In sum, I find that La Serna's conduct on March 26 was not so opprobrious as to warrant the loss of the Act's protection. Thus, because his actions were protected on March 26, Respondent violated Section 8(a)(3) and (1) of the Act when it suspended La Serna.

Now turning to Respondent's termination of La Serna, Respondent terminated La Serna on April 23 for insubordination when he returned to Genentech's South San Francisco site after being directed not to do so when he was suspended and for insubordination for his conduct toward Trinidad. As set forth above, La Serna's protected conduct towards Trinidad did not lose the protection of the Act, and thus, his termination for such conduct also violates the Act. See *Spartan Plastics*, 269 NLRB 546, 552 (1984) (finding no defense for employer to recite a wrong by the discriminatee in responding to the action of the employer which itself constituted a violation of law").

Periolat, the decision maker, testified that even the insubordination violation for returning to the South San Francisco site after being directed not to do so, would have also resulted in termination. La Serna engaged in protected concerted activity when he participated in the April 16 march. There is no evidence that La Serna engaged in any conduct during this march that would have lost him the protection of the Act. Moreover, the very act of participating in the march is why Respondent disciplined him, not for any conduct during the march. I find that Respondent acted in a determined manner to terminate La Serna, and found any possible infraction to "pile on" its termination decision. Thus, even terminating La Serna for his participation in the April 16 march violates the Act. Under *Burnup & Sims*, Respondent's termination of La Serna violates Section 8(a)(1) and (3) of the Act.

Respondent argues that La Serna's participation in the April 16 march was unprotected as the march was not sanctioned by the Union and La Serna violated its instructions not to return to the South San Francisco campus without permission (R. BR. at 86–97). Respondent cites to *Quantum Elec., Inc.*, 341 NLRB 1270, 1279 (2004), where employees who left work early to facilitate attendance at a union meeting were not considered to have engaged in protected activity. However, here, La Serna, along with other stewards, scheduled this meeting to continue their protest against Respondent's discipline of their co-workers for 2 p.m., but specifically did not ask employees to walk off the job or end work early to attend the meeting. The record does not show that any employees were disciplined for doing as such, and Respondent merely speculates that by scheduling the meeting at 2 p.m., La Serna sought to have employees walk off the job. In fact, later Jedan clarified that Respondent understood there would be no work stoppage. Moreover, the march does not appear to violate any CBA provision. Thus, the act of marching was not unprotected.

Respondent also argues that La Serna was told he could not be on the property which made his participation in the march unprotected as he violated their instructions. However, as indicated above, I find that these instructions were ambiguous. It should be noted that La Serna did not enter Respondent's buildings without permission. He was granted permission on two occasions: once to pick up his check and another time to attend a labor-management meeting. On the third occasion, which is the infraction referenced in his termination notice, he remained in

the public areas of the South San Francisco site and did not enter any building. Thus, he did not violate their instructions which were ambiguous.

In sum, under the *Burnup & Sims* analysis, Respondent violated Section 8(a)(1) and (3) of the Act when terminating La Serna.

Respondent and the General Counsel, as an alternative theory, argue that La Serna's termination needs to be analyzed as a mixed-motive situation.[63] As established above, La Serna engaged in well known union and protected concerted activity. I further find that the General Counsel has established that La Serna's union and protected concerted activity was a "substantial or motivating factor" in its decision to terminate La Serna. Respondent knew about the shop stewards discontent with its recent disciplinary actions. Respondent perceived La Serna's fervent engagement in union and protected concerted activity as an affront to Trinidad's managerial authority which demonstrates animus. *Casino San Pablo*, 361 NLRB 1212, 1214 (2014); *Hawaii Tribune–Herald*, 356 NLRB 661, 680 (2011); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006). Circumstantial evidence supports an inference that Respondent knew that La Serna was the driving force behind the written communications and in-person meeting with employees, as well as the grievance requesting Trinidad's removal. Respondent argues that La Serna participated in marches in the past which did not result in discipline. Simply because La Serna engaged in known union activity without any violations of the Act in prior years does not mean that animus cannot ever be proven.

Trinidad also spoke of La Serna's efforts to remove her during the March 26 meeting regarding Quintanilla. Only 4 days later, Respondent suspended La Serna for not communicating respectfully with Trinidad, insubordination and violence in the workplace. Thereafter, only one week after the April 16 march, Respondent decided to terminate La Serna for his conduct toward Trinidad during the March 26 meeting as well as his participation during the April 16 march. Thus, the timing of events is suspicious.

In addition, the proffered reason for the termination is suspect. La Serna was treated differently from other employees. For example, Alcantara reported that she saw Lopez "driving around building 43 and 48" the day she was suspended, April 1, and immediately reported her observation to her supervisor (GC Exh. 206). However, Lopez was not terminated, in part, for such infraction as was cited in La Serna's suspension. Quintanilla attended the April 7 labor–management meeting, after her suspension, was seen by Periolat, and not disciplined for her attendance.

Also, Respondent's reasons for terminating La Serna shifted during the course of events. Shifting explanations for adverse employee actions is evidence of discriminatory intent as well as pretext. *Seminole Fire Protections*, 306 NLRB 590, 592 (1992). Periolat testified that La Serna was also terminated for providing false information during the investigation, but La Serna's termination document did not include that reason. The document states: "Ch.2 EHB pg.14–15/Insubordination–returning to the client site after suspension after directed not to re–enter site. (2) CH.2 EHB pg. 16 Misconduct–Insubordination involving Sonia Trinidad" (GC Exh. 35). It is clear from the record that La Serna's discharge was motivated by Respondent's animus towards his union and protected concerted activity, especially his push to remove Trinidad from the workplace. Shifting explanations by Respondent is another evidence of pretext.

Furthermore, Respondent cited to no other employees who had been terminated for similar misconduct. However, the General Counsel showed that other employees had been issued lesser discipline for insubordination (see GC Exh. 106, 137, 148). In addition, Lopez and Quintanilla were not disciplined for returning to the property after their suspensions.

As Respondent's reasons for terminating La Serna are pretextual, even under a *Wright Line* analysis, Respondent violated Section 8(a)(1) and (3) of the Act.[64]

Based on the foregoing, Respondent violated Section 8(a)(1) and (3) of the Act when it suspended and terminated La Serna.

D. Respondent Violated Section 8(a)(1) and (3) of the Act when Terminating Quintanilla

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Quintanilla on April 9. Respondent, on the other hand, argues that it lawfully

[63] In a mixed-motive situation, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employee's discharge is unlawful thereby violating Section 8(a)(1) or 8(a)(3). 251 NLRB 1083 (1980), enfd on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor in discharging the employee. The General Counsel's evidence must show that the employee engaged in union and/or protected activity, that the employer knew about the union and/or protected activity, and that the employer harbored animus toward the union and/or protected activity. *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001); *Club Monte Carlo Corp.*, 280 NLRB 257, 261–262 (1986), enfd. 821 F.2d 354 (6th Cir. 1987). If the General Counsel successfully demonstrates that the protected activity was a motivating factor for the discharge, the burden then shifts to the employer to show that it would have discharged the employee even absent the employee's protected activity. *Wright Line*, supra at 1089; *Briar Crest Nursing Home*, supra. An employer does not meet its burden merely by showing that it had a legitimate business reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing authorities. If the evidence establishes that the proffered reasons for the employer's action are pretextual–i.e., either false or not actually relied upon–the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[64] The General Counsel advances a third theory that Respondent's instructions to La Serna to not return to Genentech's property while he was suspended, if assumed to be credited, are unlawful under the legal principles set forth by the Board in *Tri–County Medical Center*, 222 NLRB 1089 (1976). The General Counsel further argues that since the instructions to La Serna were unlawful, his resultant termination is also unlawful under *Continental Group, Inc.*, 357 NLRB 409 (2011). Since Respondent unlawfully suspended and terminated La Serna under a *Burnup & Sims* analysis, as well as under the alternate theory of *Wright Line*, I find it unnecessary to discuss such a theory.

terminated Quintanilla (R. Br. at 79–103). Specifically, Respondent argues that Quintanilla did not engage in protected concerted or union activity known by Respondent, and even if so, she would have still been terminated. Quintanilla's termination will be analyzed under *Wright Line*.

1. Quintanilla engaged in union and protected, concerted activity which was known to Respondent.

Although Quintanilla's union and protected concerted activity was not as extensive as La Serna, she too engaged in union and protected concerted activity when she ran for shop steward in March 2015. The Union announced the election a few days prior and posted at the time clocks and bulletin boards the names of employees' names running for shop steward. Brodie shared the information regarding the upcoming shop steward election with Kahn on February 26. Brodie informed Kahn that he would let him know the names of those employees running for shop steward once he became aware. Kahn, on cross-examination, admitted that he knew the names of the employees running for shop steward including Quintanilla prior to her suspension and termination. In addition, two days prior to her termination, on April 7, Quintanilla participated in a labor-management meeting at the South San Francisco site which included Periolat, Emperador, and Kahn. Thus, Quintanilla engaged in union and protected concerted activity which was known to Respondent. Respondent's argument that Quintanilla did not engage in union and protected concerted activity is rejected along with its argument that her actions were not known to Respondent, particularly Periolat. It is well-established that a supervisor's knowledge of protected concerted activities and/or union activities is imputed to an employer in the absence of credible evidence to the contrary. See *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs Int'l Services*, 335 NLRB 972, 973 (2001). The credited evidence does not support Respondent's argument.

2. Respondent discriminatorily discharged Quintanilla.

The record is ripe with evidence of union animus against those employees who advocated or supported the Union. Respondent took every opportunity to shut down the shop stewards protestations against its conduct. Respondent even sought the aid of the Union to stop these employees. Motivation of antiunion animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such an inference. *Union Tribune v. NLRB*, 1 F.3d 486, 490–492 (7th Cir. 1993). Simply because Respondent did not discriminate against all the shop stewards does not prove that Respondent had no antiunion animus. Even without direct evidence, the Board may infer animus from all the circumstances. *Flour Daniel, Inc.*, 304 NLRB 970 (1991).

Respondent claims that Quintanilla was terminated because of her false and misleading information related to a workplace injury. While it is true that Quintanilla lied about when her workplace injury occurred, Respondent's decision to terminate Quintanilla was excessive and pretextual.[65] Respondent conducted an "investigation" only after Quintanilla became a shop steward and participated in a labor-management relations meeting. This investigation only consisted of statements already known to Respondent when it decided to suspend Quintanilla. A timeline of events shows Respondent's pretext. On March 5, Hawes reported to management that Quintanilla was injured during his shift but did not stop her work and report her injury immediately. On March 6, Silva entered the injury into Respondent's database. Thereafter, on March 10, Respondent proposed a warning for failing to report the injury timely. On March 11, Cazarez investigated Quintanilla's injury by questioning her when it was suspected that she may have been untruthful in her version of events.

At some unknown point, both Kahn and Trinidad spoke to Periolat for her advice; Periolat recommended suspension. Only one day after the shop steward election and tense March 26 meeting with Trinidad, Cazarez, La Serna, and Quintanilla to announce her suspension, Cazarez submitted a statement documenting his March 11 conversation with Quintanilla. On April 7, the same day as the labor-management meeting, Silva and another manager also submitted statements to Respondent regarding Quintanilla's workplace injury. Finally, on April 8, Kuruvilla submitted a signed statement. With this documented evidence, Periolat then decided to terminate Quintanilla for false and misleading information. The timing of gathering evidence is highly suspicious as all the evidence used by Respondent to terminate Quintanilla were facts known to Respondent prior to her suspension and which it relied upon in suspending her. Periolat did not question Quintanilla after her suspension nor did she offer her the opportunity to retract her version of events, which Respondent relies upon to prove it harbored no animus, after the suspension. An employer's failure to give an employee the opportunity to explain the circumstances for which she is being disciplined or discharged support a finding of employer pretext. *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 861 (2006); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). I agree with the General Counsel in that it appears that Respondent suspended and terminated Quintanilla for the same incident (GC Br. at 69).

Further pretext is found in the fact that Respondent has not disciplined any other employee to the same level as Quintanilla for a similar infraction. Respondent's handbook does contain a provision which states that immediate termination may be issued if an employee willfully falsifies or misrepresents information. If Respondent had abided by its own policy, it would have immediately terminated Quintanilla rather than suspending her for the exact same facts in its decision to terminate. The suspension notification states: "Falsifying information about the security incident pertaining to work that occurred on March 5, 2015" (GC Exh. 5a and 5b). The termination notification states: "Employee provided false and misleading information related to workplace injury" (GC Exh. 6). Thus, Respondent appeared willing to consider lesser discipline but circumstantial evidence leads me to conclude that Respondent decided to follow its handbook only after learning and observing Quintanilla's union and protected concerted activity. In addition, the General Counsel set forth

[65] Respondent argues that Quintanilla's credibility is destroyed by her "false and fraudulent" claims against Respondent (R. Br. at 74). While it is true that Quintanilla was not a truthful about her workplace injury, the credited evidence shows that Respondent decided to terminate her for her union and protected concerted activity.

numerous examples of employees who were given written warnings and suspensions for similar falsification allegations. For example, employee Rene Aguilar (Aguilar) signed cleaning logs without completing the work, and submitted a false statement on a disciplinary form (GC Exh. 106A and B, 107A). Aguilar only received a warning and suspension for those violations.

As Respondent's reasons for terminating Quintanilla are pretextual, Respondent violated Section 8(a)(1) and (3) of the Act. Respondent cannot show that absent the union and protected concerted activity it would have still terminated Quintanilla.[66]

E. Respondent did not violate the Act when suspending and terminating Lopez

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it suspended and terminated Lopez on April 1, and April 23, respectively. Respondent suspended Lopez to investigate threat allegations, and ultimately terminated her for threatening employees and property, refusing to surrender her badge and dishonesty during an investigation. Respondent argues that it lawfully suspended and terminated Lopez, and the overwhelming evidence shows that even without protected concerted activity, it would have still suspended and terminated Lopez.

1. Lopez engaged in protected concerted activity which was known to Respondent.

Lopez, although not a shop steward, participated in the March 24 Union meeting. During this meeting, Lopez openly and vocally supported the shop stewards, especially La Serna, and berated the leads for allegedly helping Respondent to discipline their co-workers. As Lopez sought to preserve the rights of other employees by speaking during the union meeting, loudly defending La Serna's actions as a shop steward during this meeting, and signing the petition, I find that Lopez engaged in protected, concerted activity which was known to Respondent. Further evidence to support knowledge on the part of Respondent is the statements submitted by Hernandez and Barrientos. Thus, Respondent knew that Lopez participated in the Union meeting which would be considered union and protected concerted activity.

Furthermore, the shop stewards created a flyer for an April 16 march which named Lopez as one of the employees that Respondent sought to discipline unfairly; this flyer was seen by Respondent on April 14. Lopez also signed a petition that the employees presented to Genentech. The petition indicated that the employees were upset with Respondent's treatment of them. It is more likely than not that Respondent received a copy of the petition, and that Respondent was aware of Lopez' open support of the shop stewards.

2. Lopez' suspension and termination did not violate the Act.

In applying the *Wright Line* analysis, the General Counsel has proven a prima facie case of discrimination. Lopez engaged in protected concerted activity, which was known to Respondent. Moreover, as established with La Serna and Quintanilla, Respondent harbored animus towards the shop stewards and the supporting employees, including Lopez. Respondent pushed back anytime the employees sought to meet to fight against Respondent's discipline of their co-workers. Thus, circumstantial evidence infers animus in this instance. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

The General Counsel argues that Respondent's timing of the suspension is suspect as it occurred one week after the March 24 meetings. I disagree. As soon as Respondent learned of the statements made by Lopez, Respondent suspended her pending an investigation. During this suspension meeting, she refused to surrender her badge to Respondent, and would only give her badge to Genentech's security member. Thus, I do not finding the timing to be suspect.

The General Counsel also argues that a "misunderstanding" occurred among employees (GC Br. at 83). I disagree. Respondent investigated Alcantara's report, and then determined that Lopez violated their zero tolerance policy regarding violence in the workplace. Moreover, considering the totality of the circumstances with regarding to statements made to Rodriguez, Respondent legitimately reasoned that Lopez could act on her claims. The credited evidence shows that Lopez' comments were not taken out of context, and Lopez failed to clarify what she actually said or what she possibly could have said to have created the misunderstanding.

In addition, Respondent showed that it did not act inconsistently. Respondent informed Lopez that she would be suspended pending an investigation into the statements she made, and then later terminated. The General Counsel claims that Respondent acted inconsistently and proffers the matter concerning Miguel Valera (Valera) as a comparator. Valera reported claims of harassment, and during the harassment investigation, opened August 21, 2014, Respondent learned in mid–September 2014 of alleged threats by Valera to other employees. In that situation Respondent used Valera's suspension period as a disciplinary measure. Ultimately, Valera abandoned his job one month later (GC Exh. 155). Here, Alcantara reported Lopez' threats which caused Respondent to suspend and terminate her. The difference between the two matters is that Valera's threats were discovered well after they occurred whereas the threat Lopez posed was dependent on how Respondent's handled La Serna's disciplinary action. Thus, Respondent did not treat Lopez inconsistently.

Respondent also extensively investigated Lopez' misconduct and conducted the investigation and disciplinary procedures in accordance with Respondent's policy. Respondent interviewed Lopez along with many other employee witnesses. Objectively, the credited statements attributed to Lopez would not merely cause an employee to feel "uncomfortable" or "annoyed" but rather constituted legitimate threats to the workplace and employees. See *Stemilt Growers, Inc.*, 336 NLRB 987 (2001) (Board found that the employer demonstrated it would have suspended and discharged a pro-union supporter who deliberately pushed his 80-pound packing cart toward another employee). Although Barrientos and Hernandez submitted statements during the course of Respondent's investigation, the critical statements for which Lopez was suspended and terminated was for her

[66] Because the General Counsel has established its burden of proof, and Respondent failed when the burden shifted to it to justify its decision to terminate Quintanilla, Respondent's request for litigation expenses is moot (R. Br. at 76–78).

statements to Alcantara. I also do not fault Respondent for not reporting Lopez' threats to the police, considering that it immediately placed her on suspension pending its investigation. Lopez' threat was contingent on whether Respondent terminated La Serna. La Serna was not suspended until March 30, and terminated on April 23. That same day Respondent terminated Lopez. Periolat, though, on April 7 did warn the shop stewards that Lopez could not attend the April 7 meeting at the facility, and warned her to leave the premises or security would be called. In addition, Respondent included in its termination of Lopez that she continued to audio record the suspension meeting despite being told not do so and affirming that she had.

Respondent only discussed the threat charge in its brief, and failed to discuss the charges regarding refusing to surrender her badge and dishonesty during an investigation. These incidents occurred during the suspension meeting. As for the insubordination charge, Lopez did refuse to turn over her badge, and Respondent needed Genentech to take the badge. I disagree with the General Counsel's characterization of Respondent's action as "acquiesce[ing]" to her request (GC Br. at 87). Rather Respondent had no option other than to call security to take Lopez' badge. Despite finding that Lopez engaged in protected concerted activity which was a motivating factor in her termination, I find that her termination was lawful. Although there were no real comparator employees, Respondent's policy of a zero tolerance policy for threats in the workplace supports its decision to terminate Lopez.

Respondent has proven that it would have suspended and terminated Lopez even without her protected concerted activity. The General Counsel has not established sufficient grounds to reject Respondent's credited evidence. See, e.g., *Carrier Corp.*, 336 NLRB 1141, 1141 fn. 3 (relying on credited testimony, the employer established its affirmative *Wright Line* defense). As Respondent argues, the facts here are similar to the facts in *Wal–mart Stores, Inc.*, 341 NLRB 796 (2004) where a pro-union employee threatened to blow up the premises. Similarly, Lopez threatened to blow up the buildings if La Serna were terminated. The most striking evidence is Lopez' failure to explain what she actually said or what could have been misinterpreted when she was suspended; she waited until her suspension investigatory meeting to provide an explanation for why Rodriguez may have stated she had weapons which calls into question her credibility and motivation. Moreover, she testified inconsistently about whether she had ever discussed weapons in the workplace.

Therefore, I dismiss the General Counsel's complaint allegations that Respondent violated the Act when suspending and terminating Lopez.

F. Respondent violated the Act when suspending and termination Prieto

The General Counsel also argues that Prieto's suspension and termination on May 20 and June 20, respectively, violated Section 8(a)(1) and (3) of the Act. Meanwhile, Respondent argues that it did not violate the Act as the decision makers were not aware of Prieto's protected activity, Respondent harbored no antiunion animus, and would have suspended and terminated Prieto for falsification even without protected concerted activity.

1. Prieto engaged in protected concerted activity which was well known to Respondent.

Again, the record is filled with evidence that Prieto engaged in protected concerted activity for many years at Respondent as a shop steward. Moreover, Respondent's managers including Kahn, Brodie, Periolat, Trinidad, and Emperador were well aware of Prieto's union activity as he participated in labor-management meeting with those managers. Therefore, Respondent's argument that Periolat and Emperador would not be aware of who are the shop stewards because they work in a remote location is false. Furthermore, Prieto worked with La Serna in 2015 to complain to the Union about Respondent's increased discipline of their co-workers. When the Union failed to address their needs, they took matters into their own hands. Prieto also participated in the grievance filed with Respondent, requesting Trinidad's removal from the South San Francisco site. In February, Brodie informed Kahn about this information he gathered. Prieto also participated in the March 24 meetings with employees where they discussed the increased number of disciplinary actions issued by Respondent. Prieto also represented employees in disciplinary actions including Quintanilla and La Serna. Prieto ran again for shop steward, and Kahn knew about the election and the names of the candidates from Brodie. Prieto also participated in the April 16 march, speaking directly to Genentech representatives, and signed the petition. Thus, Prieto engaged in union and protected concerted activity which was well known to Respondent.

2. Respondent unlawfully suspended and terminated Prieto.

Respondent suspended Prieto for falsification of the logbooks. In terms of animus, the Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity may raise an inference of animus or unlawful motive. Disciplinary action only one month after engaging in known protected concerted activity is sufficient to prove animus. See *Sheraton Anchorage*, 363 NLRB No. 6 (2015) (finding that an employee's discharge which occurred 2 months after giving testimony "substantially adverse" to his employer, suggests that the motivation behind his termination was his protected activity, his testimony). In addition, as explained within, Respondent actively worked to dissuade the shop stewards from rallying the employees to protest disciplinary actions. Respondent even reached out the Union to pressure the shop stewards to withdraw their grievances and to threaten the employees with loss of their side agreement.

Respondent's investigation, while extensive, focused on irrelevant questioning where employees would certainly not admit to signing the logbooks if they had not cleaned a room. Also, I agree with the General Counsel's argument that Respondent did not seek to gather pertinent facts such as if there were any witnesses to Lazo and Prieto's conversation. A shoddy investigation supports a conclusion of pretext.

Respondent also characterized Prieto's actions as falsification but the credited evidence shows that Prieto explained that there was confusion on which areas he was to clean. Prieto clarified immediately that he had not cleaned the rooms when questioned. Prieto certainly is not completely without fault here. He did not clean the rooms as assigned and altered his reasoning for why he

did not clean the rooms but reviewing the comparable punishment Respondent issued for similar misconduct, the penalties were not so severe. In one instance of discipline most directly on point, an employee in 2013 failed to clean an area, and when questioned she lied about cleaning the area. Respondent confronted the employee with evidence to the contrary which she then admitted (R. Exh. 90). Respondent terminated this employee. Another employee was given a verbal warning for failing to perform weekly cleaning (GC Exh. 110). An employee was also issued a verbal warning for failing to clean a room in the GMP area (GC Exh. 114). Respondent only suspended Manzanares when he failed to sign the pass through log and backdated a cleaning log (GC Exh. 118). Employees have also been removed from GMP rather than terminated (GC Exh. 118). Respondent's claim that Prieto's actions were different from other disciplined employees is a distinction without a difference. Kahn and Brodie tried to parse differences among allegations of falsification (which they claim Prieto did), and backdating (where the employee performs the task but forgets to sign the logbook). Respondent also claims that since Periolat did not decide all these cited instances of other disciplinary actions they would not be proper comparators. I disagree. As the human resources director, Periolat should have the information to ensure that the discipline she recommends and decides remains consistent. Respondent cites *MEMC Electronic Material, Inc.*, 342 NLRB 1172, 1198 (2004) for its argument. However, Respondent cites to the administrative law judge portion of the decision to which no exception had been filed and thus, not of precedential value. When the Board has adopted all or even a portion of a judge's decision to which no exceptions have been filed, that decision or portion is not binding precedent in other cases. *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel*), 357 NLRB 1683 n. 1 (2011); and *Trump Marina Associates LLC*, 354 NLRB 1027 fn. 2 (2009), reaffd. 344 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

Having found that the General Counsel has proven Prieto's union and protected concerted activity was a motivating factor for Respondent's suspension and termination, the burden shifts to Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of union activity. *Austal USA, LLC*, 356 NLRB 363, 364 (2010). Respondent cannot overcome its burden as the evidence shows that its decision to suspend and terminate Prieto was motivated by his union and protected concerted activity. Moreover, Respondent often gave employees reduced disciplinary actions rather than suspensions and termination. The credible evidence shows that Prieto was immediately honest with Brodie when he informed him he had not cleaned the rooms. Without a doubt, Prieto could have explained himself better but Respondent did not make consistent decisions on its related disciplinary actions. Rather than accepting Prieto's confession when he admitted immediately that he did not cleaned the rooms, Respondent claimed that he falsified the logbooks. Respondent's motivation to terminate Prieto rather than issuing a lesser disciplinary action seems driven by antiunion sentiment.

I find that Respondent failed to prove that it would have taken the same adverse actions in the absence of union and protected concerted activity. Thus, Respondent violated Section 8(a)(1) and (3) of the Act when suspending and terminating Prieto.

CONCLUSIONS OF LAW

1. Respondent, SBM Site Services, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the SEIU-USWW Local 1877 has been a labor organization within the meaning of Section 2(5) of the Act.
2. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by suspending and discharging employee Jose La Serna on March 30, 2015, and April 23, 2015, respectively, because of his participation in union and protected concerted activities.
3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging employee Esther Quintanilla on April 9, 2015, because of her participation in union and protected concerted activities.
4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by suspending and discharging employee Adilio Prieto on May 20, 2015, and June 20, 2015, respectively, because of his participation in union and protected concerted activities.
5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. All other allegations in the complaint are dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily suspending and discharging Jose La Serna, discharging Esther Quintanilla, and suspending and discharging Adilio Prieto, shall be ordered to offer them reinstatement to their former positions, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. As this violation involves cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 298 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate Jose La Serna, Esther Quintanilla, and Adilio Prieto for the adverse tax consequences, if any, of receiving lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 20 a report allocating the backpay award to the appropriate calendar year for said employees. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers*, supra, Respondent shall compensate Jose La Serna, Esther Quintanilla, and Adilio Prieto

for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful suspension and discharge of Jose La Serna, discharge of Esther Quintanilla, and suspension and discharge of Adilio Prieto, and notify them in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against them in any way.

The General Request also requests that I order Respondent to reimburse Jose La Serna, Esther Quintanilla, and Adilio Prieto for "consequential economic harm" incurred by them as a result of Respondent's unlawful conduct. Respondent opposes such a request. After post-hearing briefs were filed, I granted the General Counsel's request for supplemental briefing on this issue, and thus find that the General Counsel did not waive its right to make such a request as argued by Respondent. I also permitted Respondent to file a responsive brief to the General Counsel's request for consequential damages. The Board does not traditionally provide remedies for consequential economic harm in make-whole orders. See *Operating Engineers Local 513 (Long Const. Co.*), 145 NLRB 554 (1963). While the General Counsel acknowledges the Board's typical remedies ordered, the General Counsel urges that the discriminatees should be reimbursed for consequential economic harm if so shown. Both the General Counsel and Respondent thoroughly briefed the issue, which the Board may consider. However, at this stage in the proceedings, I must follow Board precedent, cannot order such a remedy, and deny the General Counsel's request. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

Respondent argues that the doctrine of after-acquired evidence bars Jose La Serna from seeking a make-whole remedy (R. Br at 97–100). The Board has held that if an employer satisfies its burden of proving that a discriminate engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first learned of the misconduct. *Tel Data Corp.*, 315 NLRB 364, 367 (1994), reversed in part on other grounds, 90 F.3d 1195 (6th Cir. 1996); *Marshall Dublin Poultry Co.*, 310 NLRB 68, 69–70 (1993), reversed in part on other grounds, 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856, 856–857 (1990). The Board follows this rule concerning after–acquired evidence of employee misconduct to "balance [its] responsibility to remedy the Respondent's unfair labor practice against the public interest in not condoning" the discriminatee's misconduct. *John Cuneo, Inc.*, supra at 856. The burden of proof is on the employer. Id.

At the hearing, Jose La Serna denied being self-employed, cleaning buildings, while he was working for Respondent (Tr. 259–260). However, during a July 5, 2016 deposition in an unrelated matter, Jose La Serna initially testified he had been in business for the 2 prior years, intermittently, cleaning (Tr. 260–262). Jose La Serna then confusingly testified during this deposition that his cleaning business began in August 2016, but denied that he performed janitorial work; Jose La Serna must have misspoken as he was speaking about the future (Tr. 263–264). Jose La Serna also testified he had been in the sales and flea market business (Tr. 264, 352). Later, Jose La Serna clarified during this deposition that he began his cleaning business to clean kitchens after he was terminated in August 2015 (Tr. 353, 355–356). I find that Jose La Serna's testimony regarding his work, cleaning buildings, while working at Respondent was not clear. As I found Jose La Serna to be a generally credible witness as set forth above, I credit his testimony at the hearing that he did not work for a competing business while employed by Respondent which would have been a violation of its rules. Respondent failed to adduce sufficient evidence to convince me that it has meet its burden of proof. Therefore, I deny Respondent's request to not reinstate Jose La Serna and not award him full backpay.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[67]

ORDER

Respondent, SBM Site Services, LLC, McClellan, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging or otherwise discriminating against employees because they engage in union or protected concerted activities;

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose La Serna, Esther Quintanilla, and Adilio Prieto full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Jose La Serna, Esther Quintanilla, and Adilio Prieto, for any loss of earnings and other benefits suffered as a result of their unlawful suspensions and/or discharges against them, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(c) Compensate Jose La Serna, Esther Quintanilla, and Adilio Prieto for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for Jose La Serna, Esther Quintanilla and Adilio Prieto.

(d) Within 14 days from the date of this Order, remove from

[67] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes due under the terms of this Order.

its files any reference to the unlawful suspension and discharge of Jose La Serna, discharge of Esther Quintanilla and suspension and discharge of Adilio Prieto and within 3 days thereafter, notify said employees in writing that this has been done and that the discharge will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in South San Francisco, California, copies of the attached notice marked "Appendix."[68] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 30, 2015.

(g) Within 21 days after service by the region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. October 5, 2017

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