

**Avante at Boca Raton, and Avante Terrace at Boca Raton, Inc., Joint Employers and Local 1115-Florida East, SEIU, AFL-CIO, CLC, a division of District 1115, SEIU, AFL-CIO, CLC.** Cases 12-CA-18720 and 12-CA-18996

January 10, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND HURTGEN

On March 31, 1999, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Avante at Boca Raton, Inc., and Avante Terrace at Boca Raton, Inc., Joint Employers, Boca Raton, Florida, their officers, agents, successors, and assigns shall take the action set forth in the Order.

*George S. Aude, Esq.*, for the General Counsel.

*Clifford H. Nelson, Jr., Esq.*, for the Respondent.

*Libby Herrera-Navarette, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on February 8 and 9, 1999. The charge in Case 12-CA-18720 was filed on April 9, 1997, and was amended on June 9, 1997, and August 24, 1998.<sup>1</sup> The charge in Case 12-CA-18996 was filed on August 25. The complaint issued on August 28, 1998. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act by engaging in surveillance of employee union activities and violated Section 8(a)(3) and (4) of the Act by warning, suspending, and discharging Evanette Cyriaque because she engaged in union activities and appeared at a representation hearing before the Board. Respondent's answer denies any violation of the Act.

<sup>1</sup> 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.

<sup>1</sup> All dates are in 1997 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Avante at Boca Raton, Incorporated, and Avante Terrace at Boca Raton, Incorporated, joint employers, are corporations engaged in the operation of a nursing home and assisted living facility in Boca Raton, Florida, where they annually derive gross revenues in excess of \$100,000 and purchase and receive goods and services valued in excess of \$10,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Local 1115-Florida East, SEIU, AFL-CIO, CLC, a division of District 1115, SEIU, AFL-CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act 2

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

The Union began an organizational campaign among the Respondent's nonprofessional employees in the summer of 1996. A petition for a representation election was filed on November 13, 1996. On November 26, 1996, a hearing was held to determine the appropriate unit. An election was conducted on January 17. Respondent filed objections to the election, and a hearing on these objections was held on February 7. The union was certified on April 25. *Avante at Boca Raton, Inc.*, 323 NLRB 555 (1997).

Louis Manzo was the administrator of the Boca Raton facilities at all times relevant herein. Mike Miltello was hired as director of nursing in November 1996. There are three nursing shifts. The day shift begins at 7 a.m. and ends at 3 p.m.; the evening shift begins at 3 p.m. and ends at 11 p.m.; and the night shift begins at 11 p.m. and ends at 7 a.m. The residents of the nursing facility receive care and medication from registered nurses and licensed practical nurses. Certified Nursing Assistants (CNAs), who cannot administer medication, assist the residents with regard to activities of daily living, including dressing and personal hygiene, and, depending upon the condition of the resident, the use of wheelchairs, bathing, walking, and eating.<sup>3</sup>

The alleged discriminatee, Evanette Cyriaque, began working for Respondent as a CNA on September 25, 1992. On July 26, 1996, she signed a union authorization card and thereafter became active in the Union's organizational campaign. She solicited authorization cards from her fellow employees. Cyriaque was the only employee to appear at the representation hearing held on November 26, 1996. On February 7, following the union's election victory, Cyriaque appeared and testified at the hearing on objections to the election.

*B. The Warnings, Suspension, and Discharge of Evanette Cyriaque*

I. Facts

On the evening of November 25, 1996, Cyriaque received a subpoena to appear at the representation hearing scheduled for the next day. She called the facility and spoke with the supervisor on duty, Gladys Gardere, stating she had a problem and needed to be off the following day. Gardere questioned whether Cyriaque was sick, and she replied that she was not, that she had a problem. Gardere excused her from work. On November 26, Cyriaque was present with Union Representative Marie Jean Phillippe in the lobby at the Board's Miami Resident Office. Respondent's management team, including Administrator Manzo, arrived after Cyriaque. Manzo reacted with surprise at seeing Cyriaque.

<sup>2</sup> Although admitting that the Union is a labor organization, Respondent denies that this Union is the same entity as that certified by the Board. That issue is not material to this proceeding.

<sup>3</sup> The Decision and Direction of Election in Case 12-RC-8034 reflects that licensed practical nurses perform many of these tasks with the CNAs.

On December 4, during her morning break, Cyriaque went to her automobile to obtain a pen. Employees do not need permission to go outside the building when they are on break.<sup>4</sup> Upon returning to the facility she passed administrator Manzo, who followed her back into the building. Manzo asked Cyriaque if she had permission to be outside the facility, and Cyriaque responded that she did not because she was on her break. Later that day, Manzo summoned Cyriaque to his office and informed her that she had called in sick, but that, when he went to Miami, he saw her at the hearing. Cyriaque explained that she did not call in sick, that she had explained that she “had a problem and could not come to work.” Manzo then took Cyriaque to the second floor where he asked Cyriaque’s supervisor, Emily Schapley, if she knew that Cyriaque had been outside. Schapley responded, “No.” Manzo, with no further inquiry or comment, directed Schapley to write up Cyriaque because he saw her outside. Schapley asked, “[W]hy?” Manzo responded, “[A]ny way write her up.”

Schapley, who is no longer employed by Respondent, did not testify. Director of Nursing Militello testified that employees were entitled to their breaks and that, although he encouraged CNAs to tell the nurse when they would leave their floor, “It was not a requirement.” I do not credit his further testimony that employees were required to notify supervision if they left the building during break. That testimony is contradicted by the credible testimony of Cyriaque as well as the testimony of Administrator Manzo.

Pursuant to Manzo’s instructions, Schapley prepared a warning. The warning mentions nothing about being outside the building. It states that Cyriaque “left her duty station without asking permission or telling anyone she was leaving.” Cyriaque, on the warning, noted that, after she had gone to her car for a pen and seen Manzo, he called her to the office. She then states, “[H]e blame me . . . I went in the meeting, I see you.” The only evidence of any meeting at which Manzo had seen Cyriaque was the representation hearing held in Miami. I do not credit Manzo’s denial that he confronted Cyriaque regarding her presence in Miami. The confrontation is established by Cyriaque’s credible testimony and the foregoing remarks that she wrote contemporaneously with her receipt of the warning.

Manzo admitted that Cyriaque should not have been warned if she had been on break. He testified that he asked Cyriaque why she was in the parking lot and she told him that she went outside to get a pencil. He then asked if any nurse or supervisor knew she was outside, and testified that Cyriaque responded, “No.” I find, consistent with Cyriaque’s testimony, that when Manzo asked if she had permission to be outside the facility she responded that she did not, that she was on break. Manzo did not state that he ever asked Cyriaque if she were on break. In testimony, Manzo contended that she “wasn’t on a break, obviously. I was told that they wrote her up for it the next day, so apparently she wasn’t on a break.” Manzo’s circular reasoning ignores the fact that he directed that Cyriaque be written up. When Schapley questioned why she should do so, Manzo simply repeated his direction to write her up.

I credit Cyriaque’s recollection of these and other conversations she had with Manzo. I was impressed with her demeanor and her attempt to accurately relate what she recalled happening. Respondent seeks to cast doubt upon Cyriaque’s credibility, noting that she received a suspension in 1994, whereas her pretrial affidavit states that she had not received discipline before December 4, 1996. Counsel for Respondent appeared to question Cyriaque’s need for a Creole interpreter at this proceeding by establishing her successful completion of CNA training courses in English. I do not find that Cyriaque’s failure to recall discipline issued to her more than 2 years prior to the date she gave her affidavit detracts from her credibility. Her handwritten remarks on the 1994 warning that Respondent introduced and the December 4, 1996 warning at issue in this proceeding confirm that she has significant limitations in English. I credit Cyriaque. I was completely unimpressed by the demeanor of Manzo.

On December 9, 1996, the Union filed a charge on behalf of Cyriaque. On February 25, counsel for Respondent wrote the Union the following letter:

I am sending this letter to confirm that Ms. Cyriaque does not have a written warning in her file for the events which allegedly occurred on December 4, 1996 (leaving her work station without authorization and/or for calling in

<sup>4</sup> This finding is based upon the testimony of Cyriaque and Administrator Manzo.

sick). Furthermore, no alleged warning for any activities that may have occurred on that day will be relied on in conjunction with the assessment of any progressive discipline in the future.

On the same date, counsel for Respondent wrote Manzo a letter, stating the following:

Enclosed is a copy of a letter which I have sent to the attention of 1115’s business agent, Debbie Okker-Washington. I was advised by Kevin Morris, the Board agent investigating this unfair labor practice charge that upon receipt of a copy of this letter he would either dismiss the unfair labor practice charge or permit the Union to withdraw the charge. Since a withdrawal cannot be appealed, the Regional Office normally attempts to solicit a withdrawal prior to proceeding with the dismissal of a charge. As a result, I anticipate that we will receive notice of a withdrawal of the charge in the near future. Upon receipt of that notice, we will be able to consider the case as being closed.

Please make sure that there are no warnings in Cyriaque’s personnel file for any incidents described in the attached letter.

The Union withdrew the charge. Respondent did not withdraw the warning. When Manzo was questioned regarding whether he took any action to assure that the warning was removed from Cyriaque’s file, he responded, “It wasn’t that significant for me to spend my day thinking about.”

In March, Respondent transferred all of its Medicare residents, including several from the second floor where Cyriaque worked, to the first floor of the facility. Residents who had been on the first floor were transferred to the beds formerly occupied by the Medicare residents; thus the number of residents on the second floor remained the same. Following these transfers, the number of CNAs on the second floor day shift was reduced from seven to six. About 2 weeks after this, on April 2, one of the six CNAs called in sick, leaving only five CNAs. All five of these employees, including Cyriaque, refused to begin work without a sixth CNA. Supervisor Schapley was not present. The CNAs gathered at the nursing station at 7 a.m., and began complaining to the charge nurses on duty, Susie Lowe and Suyi Irowa, who exercise supervisory authority and were the highest ranking supervisors present. The job description signed by Cyriaque states that she is responsible to the director of nurses, charge nurse, and administrator. During the course of the discussion, nurse Karen Burns, who is also the rehabilitation coordinator, came to the nursing station. Burns did not ask the CNAs what their problem was. Upon overhearing the CNAs’ protest, Burns ordered the CNAs to return to their job. Cyriaque responded, “[Y]ou don’t have the right to talk to us that way because you’re not our supervisor.” Burns replied that she was going to write up Cyriaque. Cyriaque stated, “[Y]ou have your pen and you have your paper, go ahead.”<sup>5</sup> Burns then obtained the cooperation of an employee named Jennifer, who was under her supervision. Jennifer volunteered to assist the CNAs, and they returned to work. Burns did not write up Cyriaque.

Neither Burns nor Lowe testified. Respondent presented Charge Nurse Irowa. Insofar as his references to Burns and Lowe were in the past tense, it appears that neither of them are cur-

<sup>5</sup> Respondent, in its brief, argues that Cyriaque’s credibility is diminished by her testimony that she did not know that Burns was a supervisor. I find this argument unpersuasive. Counsel for General Counsel notes that, at the representation hearing, Respondent contended that licensed practical nurses were not supervisors and should be included in the unit. The record does not establish whether rehabilitation coordinator Burns was a registered nurse or a licensed practical nurse. Uncertainty regarding the specific position of various individuals was not limited to Cyriaque. When Manzo was asked about the position of his immediate superior, Ron Ostroff, he responded, “Your guess is as good as mine.”

rently employed. Irowa did not recall Burns telling the CNAs to get to work. He also did not recall the exact words used by Cyriaque, but did remember that the substance of her remarks to Burns were "to mind her business." He did not testify that Cyriaque pointed down the hall when speaking to Burns. He admitted that all five of the CNAs were protesting in louder than normal voices. He did not testify that there was any yelling or screaming. He acknowledged that some level of "blowing off steam" is tolerated at the facility. He initially testified that the conduct of the CNAs was "rowdy," and, in response to one question, characterized Cyriaque's conduct as "extremely insubordinate." Despite this testimony at the hearing, it is undisputed that, at the time of the incident, he did not consider her conduct to warrant discipline since he did not seek to initiate any discipline. Likewise, there is no evidence that either Burns nor Lowe, both of whom were authorized to discipline employees, initiated any disciplinary action against Cyriaque or any of the other CNAs, all of whom had refused to begin work.

Director of Nursing Militello arrived at work after the incident. When he heard there had been a problem, he spoke with Burns to learn what had occurred. Burns did not request that Militello discipline any employee. Militello then went to the second floor and called the charge nurses and CNAs together. When they arrived, he pointed his finger at Cyriaque, stating, "[Y]ou, young lady, the door is open for you. If you want me to replace you, I will replace you." Cyriaque responded that she did not know why he was singling her out since all five of the CNAs had been protesting. The other CNAs then spoke up, and Militello "cooled down." Nothing was mentioned about discipline or any further action, and the CNAs assumed that the matter was closed.

Militello denies that the other CNAs spoke up at this meeting. He testified that Cyriaque got loud, stating, "[W]e can't say anything any more, we can't complain, we can't do anything." He states that he responded that this was not true, that "there are ways to complain. Refusing to do your work is not one of them." Militello acknowledged stating, "I have a twenty-four hour facility to run. I would like them all to be happy, but if they could not be happy, if there was a problem, that there was nothing stopping anybody from walking out the door. That I would not be upset if they left." Although testifying that Cyriaque was the only CNA who spoke up, he denied that this comment was directed to her. Militello effectively acknowledged that he considered Cyriaque to be the catalyst when he testified Cyriaque "was part of the problem that the entire staff refused to work." Militello mentioned no threat of discipline.

Although the demeanor of Militello was somewhat more impressive than that of Manzo, various portions of his testimony contained logical inconsistencies and assertions contradicted by documentary evidence. I find that Cyriaque was the more credible witness.

At 2:30 in the afternoon, Irowa, Lowe, Burns, Assistant Director of Nursing Annabelle Lee, and the five CNAs were summoned to administrator Manzo's office. Militello was not present. After some discussion of the incident, Manzo directed several comments directly to Cyriaque.<sup>6</sup> He then dismissed the other CNAs, directing Cyriaque to remain with him and the other supervisors. Manzo told Cyriaque to look at his diplomas, stated to her that she was nobody, was not educated, that the reason that she "sold the place to the Union" was because she was stupid, an idiot, that she did not know anything.<sup>7</sup> When Cyriaque sought to respond, Manzo began tapping on his desk with his hand. He informed Cyriaque that although she was a good worker, he was suspending her for 3 days, that if God told him to call her, in an apparent reference to the period of her suspension, he would do so.

I do not credit Manzo's testimony regarding this meeting, nor do I credit his contention that the decision to suspend Cyriaque was left to Militello. Manzo contends that he did not single out Cyriaque, but both Cyriaque and Irowa confirm that, in the course of the meeting, Manzo dismissed all of the CNAs except Cyriaque. Manzo testified that, during the meeting, Cyriaque purportedly began shaking. When someone stated that God was talking to her, Manzo says that he commented that God was talking to him too and "[H]e's telling me to suspend her." Although Charge Nurse Irowa did not recall various statements from this meeting, I am certain

<sup>6</sup> Cyriaque testified that Manzo began cursing her, but did not state the actual words used. It is clear that Manzo singled Cyriaque out. Whether he used profanity is immaterial.

<sup>7</sup> Manzo denied referring to Cyriaque's race. Irowa did not recall either this reference or various other comments. He explained, "It's been such a long time." I credit Cyriaque, but note that such reference is not material to the issues before me.

that if he had observed Cyriaque shaking, or otherwise in a trance-like state, he would have recalled it. His testimony mentions no such incident. Manzo did not deny stating to Cyriaque that she was the person who "sold the place to the Union." Although Manzo testified that he told the employees that he was not going to put up with "yelling and screaming," he never attributed any specific misconduct to Cyriaque. Rather, he asserted that he recommended to Militello that she be suspended because of "her attitude on the second floor and the number of people that were there, and what the issue was." Contrary to Manzo's testimony, Militello was not at this meeting.

Militello did not initiate any discipline against Cyriaque. He asserted that he considered Cyriaque's misconduct to be "critical," which under Respondent's progressive disciplinary system could have warranted discharge. Despite this critical misconduct, he said he left the decision regarding any discipline to Assistant Director of Nursing Annabelle Lee. I find this testimony incredible. I find that Militello, who admittedly did not initiate discipline against Cyriaque, was attempting to construct his testimony so as to avoid contradicting Manzo who denied responsibility for Cyriaque's suspension.

Manzo suspended Cyriaque in the meeting and in the presence of Assistant Director of Nursing Annabelle Lee. Lee is no longer employed by Respondent and did not testify. Following the meeting, Lee prepared a warning notice that Cyriaque refused to sign. The warning states:

Staff [Cyriaque] is belligerent, uncooperative and insubordinate in response to health care decisions from charge nurse as well as rehab. coordinator. In addition, told rehab coordinator, pointing her finger down the hall, to mind her own business & do her work. After being told by charge nurse to stop, & continued to say it again. Not listening to charge nurse. Continued to complain and argue in a very loud voice. Refused to follow instruction when charge nurse ask to start her assignment.

Although Respondent's brief refers to Cyriaque yelling down the hall and the warning refers to Cyriaque pointing down the hall, no probative evidence establishes either action. Irowa did not testify to any yelling or pointing. Nor is there any evidence that Cyriaque repeated her statement that Burns had "no right to talk to us that way" since she was not their supervisor. Irowa never testified that Cyriaque refused to listen to either him or Lowe, nor did he testify that either he or Lowe directed the CNAs to start their assignments during the course of their protest. It was Burns who directed the employees to return to work, and it was in response to that direction that Cyriaque, on behalf of the CNAs, responded that she did not have the right to talk to "us" in that manner because she was not "our" supervisor.

On April 24, union representatives had made arrangements to present witnesses in support of unfair labor practice charges that the Union had filed. A Board agent, with an interpreter, had agreed to meet with the witnesses at a Denny's restaurant in Boca Raton. The witnesses that the union representatives had anticipated presenting did not appear. Union Representative Deborah Okker-Washington, who was coordinating the presentation of witnesses at Denny's, called Union Representative Marie Jean Phillippe and reported the absence of witnesses. In order not to waste the time of the Board agent and interpreter, Phillippe called Cyriaque, who had been scheduled to speak to the Board agent after her shift ended. Phillippe reached Cyriaque at work and asked "if [there was] any way possible she can be at Denny's restaurant to see the Board Agent earlier," explaining that the Board agent could not come to Boca Raton and return to Miami without her affidavit. Following her receipt of the call, Cyriaque informed her supervisor, Schapley, that she had an "emergency," and needed to leave at 11 a.m. Schapley sent her to Lee who sent her to Militello. Cyriaque told Militello that she had an emergency and needed to leave at 11. Militello granted permission for her to leave if she completed all of her morning duties. Thereafter, at 10:30, Cyriaque received a telephone call from her brother informing her that her sister, in Haiti, had died. She did not know of this when requesting permission to leave. Having already obtained permission to leave, Cyriaque completed her morning duties and left.

Shortly after 11 a.m., Cyriaque entered Denny's and began giving an affidavit to the Board agent. Sometime after this, Director of Nursing Militello and a representative from a pharmaceutical company entered Denny's to eat lunch. Okker-Washington, who had seen Militello at

the facility, recognized him. She went to him and reintroduced herself. She then went to the Board agent and suggested that Cyriaque's affidavit be completed at another location. Militello observed Cyriaque as she left. He denied recognizing the Board agent.

On April 25, Cyriaque reported to work. At about 2:30, Militello called her to his office. Militello informed Cyriaque that "today [was] my last day because I lied, because I said that my sister died, so it wasn't true. Because when he went to Denny's, he saw me talking to the Board Union." Cyriaque responded that she did not lie. Militello then told Cyriaque that she had said she had an emergency, but it was not an emergency. She responded, telling Militello that "for him it wasn't an emergency, but to her it was an emergency." He then repeated that it was her last day and she attempted to hand her a document, but Cyriaque refused to take the document.

Militello testified that, when Cyriaque approached him on the morning of April 24, she stated, "I have an emergency, I need to go home." He acknowledged that he was surprised to see her at Denny's. Militello admitted that he made the discharge decision after seeing Cyriaque at Denny's but prior to speaking with her. He testified, "I had already decided that I was going to fire her. Okay?" He acknowledged that he "might" have sought the opinion of Manzo and legal counsel, but "I had already decided . . ." He asserted that he reviewed Cyriaque's personnel file before deciding to fire her, that he did not "remember seeing anything bad, so [he assumed] she was a satisfactory employee." Cyriaque's most recent employee evaluation rated her as "exceptional." Militello claims that he began the termination interview with Cyriaque not by telling her that she was discharged but by asking why she lied to him. He testified that she asked what he meant, and he repeated "you know, you lied . . . if you would have told me, I would have let you go." He contends that Cyriaque responded to this somewhat cryptic comment by stating, "I don't have to tell you anything." It was at this point that Militello says he wrote the document terminating her. Contrary to this testimony and consistent with the testimony of Cyriaque, I find the document was already written. If, as Militello testified, Cyriaque became belligerent and stated that she did not have to tell him anything, I am certain that this would have been reflected in the termination document that he purportedly wrote in her presence immediately after she made this comment. Militello asserted that he considered Cyriaque's purported dishonesty to be a critical offense and that the termination was not the product of progressive discipline.

Although Militello testified that Cyriaque asked to "go home" because of an emergency, the discharge notice contradicts this testimony. The discharge notice states:

You told the DON [director of nursing] and ADON [assistant director of nursing] that you had an emergency and had to leave—we let you go home and you were later seen outside the facility in a non-emergency situation—you lied to your supervisors and dishonesty is a critical offense.

The record does not establish when Militello learned of the death of Cyriaque's sister; however, he obviously learned of it prior to speaking with Cyriaque since he began that meeting by stating that she had lied by stating that her sister had died and that was not true since he saw her at Denny's. Militello did not question Cyriaque regarding the nature of her emergency. I find that Militello, upon learning of the death of Cyriaque's sister, simply assumed that the death was the emergency to which Cyriaque had referred. The wording of the discharge notice establishes that Militello thought that he was granting permission for Cyriaque to go home, but she never made that representation to him. Both Cyriaque and the discharge notice confirm that she simply stated she had an emergency. She did not volunteer the nature of the emergency, and Militello did not ask.

I do not credit Militello's testimony that Cyriaque's termination was unrelated to progressive discipline. The discharge notice lists the unremoved warning of December 4 and her suspension of April 2. It states: "Since this is your 3rd written warning in less than 6 months—the facility had decided upon termination in accordance with the progressive discipline policy." Militello denied any knowledge of counsel for Respondent's letter to Manzo dated February 25 in which counsel had stated, "Please make sure that there are no warnings in Cyriaque's personnel file for any incident described in the attached letter."

## 2. Analysis and concluding findings

In assessing the evidence relating to the warnings, suspension, and termination of Cyriaque under the analytical framework of *Wright Line*,<sup>8</sup> I find that Cyriaque did engage in union activity and that Respondent was fully aware of that activity.

I am mindful that there are no independent 8(a)(1) allegations predating Cyriaque's discharge. Nevertheless, an inference of animus and discriminatory motivation may be established by various factors, including "[e]vidence of suspicious timing, false reasons given in defense[,] and the failure to adequately investigate alleged misconduct . . ." *The 3E Co.*, 322 NLRB 1058, 1062 (1997).

Manzo admitted that Cyriaque would not have been warned on December 4 if she had been on break when she went to her car. When Manzo asked Cyriaque if she had permission to be outside the facility, she responded that she did not because she was on her break. Manzo thereafter called her to his office and accused her of lying by using sickness as the reason for her absence on November 26 when he had observed her in Miami at the representation hearing. Cyriaque denied lying, stating that she had said she had a "problem." Manzo did not warn her for lying. Despite Manzo's knowledge that Cyriaque had been on break, he directed her supervisor to issue a warning. The supervisor asked why, and Manzo responded "any way write her up." Following the filing of an unfair labor practice charge regarding this warning, Respondent's counsel assured the Union, with a copy of the letter being sent to the Board, that Cyriaque's file contained no warning relating to her conduct on December 4. Counsel wrote Manzo and requested that he assure that the discipline was removed. Respondent did not do so. An employee's compliance with a Board subpoena is conduct protected by Section 8(a)(4) of the Act. *Quality Millwork Corp.*, 276 NLRB 591, 595 (1985). I find that Manzo, in order to retaliate against Cyriaque for her presence on behalf of the Union at the representation hearing, directed that she be disciplined after he observed her in the parking lot, even though she was on break and informed him of this fact. The warning issued to Cyriaque was pretextual and was in retaliation for her appearance with the Union at the representation case hearing. By issuing this warning, Respondent violated Section 8(a)(3) and (4) of the Act.<sup>9</sup>

The five CNAs, including Cyriaque, who refused to begin work on April 2 were engaged in protected concerted activity. Respondent had set the manning level on the second floor at six CNAs. On the morning in question, the five CNAs went to the nurses' station to protest their working condition of having to perform the work of six CNAs. The only issue is whether Cyriaque, by responding to Burns' order to begin work by stating, "[Y]ou don't have the right to talk to us that way because you're not our supervisor," ceased to engage in protected activity. Respondent argues that this constituted insubordination. I disagree. Burns' order to return to work was tantamount to a direction to cease engaging in concerted activity protected by Section 7 of the Act. In *Lewittes Furniture Enterprises*, 244 NLRB 810, 815 (1978), the Board recognized that a short refusal to return to work during a conversation concerning the subject of the concerted action does not constitute insubordination. There is no evidence that Cyriaque's comment, made loudly at the nurses' station, affected the work of any other employee. There is no probative evidence that Cyriaque screamed or yelled. There is no contention that she used profanity. Her conduct was not unlawful, violent, or otherwise indefensible. *Fiesta Printing Co.*, 268 NLRB 660, 662 (1984). Although Respondent asserts that Burns did have the right to order the CNAs back to work since any nurse has authority over any CNA, the CNAs were making their protest to the two individuals, Lowe and Irowa, who were their direct supervisors. Burns injected herself into the situation, and Cyriaque responded to her intervention. The Board has long recognized that intemperate comments are sometimes made in the heat of protected confrontations. Such conduct may not be characterized as insubordination and seized upon to justify discipline unless the conduct is "so egregious as to render [the] concerted activity unprotected or to make [the employee] unfit for further employment." *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988). Cyriaque's response did not constitute egregious conduct.

The record establishes that discipline became an issue only when Manzo became aware that Cyriaque had been involved in the employees' concerted protest. Neither Charge Nurse Susie

<sup>8</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

<sup>9</sup> Respondent's brief does not address the warning of December 4, 1996, which remained in Cyriaque's file and is cited on the warning notice that effectuates her discharge.

Lowe nor Suyi Irowa, the direct supervisors of the CNAs, initiated discipline against any of them. There is no evidence that Burns requested that Cyriaque be disciplined. Militello did not initiate discipline at or after his meeting with the charge nurses and CNAs, and the document suspending Cyriaque makes no mention of her comments to Militello when he met with the charge nurses and CNAs following their 7 a.m. concerted refusal to begin work. Militello was not even at the 2:30 meeting at which Manzo suspended Cyriaque, purportedly because God told him to. Manzo's incredible testimony that it was Militello's decision is contradicted by Militello who was not at the meeting and who credibly asserted that he left the decision to Lee. Cyriaque credibly testified that Manzo suspended her after dismissing the other CNAs and berating her because she "sold the place to the Union." The record establishes, and I find, that Manzo, contrary to his denial, did single out Cyriaque and suspended her for 3 days because of her leadership in the employees' concerted work stoppage and her involvement in "selling" Avante to the Union. In so doing, Respondent violated Section 8(a)(1) and (3) of the Act. There is no evidence that Manzo relied upon the unlawful warning issued to Cyriaque on December 4, 1996, thus there is no basis for finding that this warning and suspension also constituted an 8(a)(4) violation.

Respondent purportedly discharged Cyriaque on April 25 for dishonesty. At the hearing, Militello testified that Cyriaque stated to him, "I have an emergency, I need to go home." When he saw her at Denny's he was surprised and, in the discharge notice, characterized this as a "non-emergency situation." Respondent, in its brief, does not address the contradiction between Militello's hearing testimony that Cyriaque stated that she needed to go home and the discharge notice which states she said she "had an emergency and had to leave." Rather than rely upon Militello's testimony, Respondent's brief argues that Cyriaque could not have reasonably believed that meeting with the Board agent was an emergency and that, therefore, Cyriaque lied by characterizing it as an emergency. The dictionary defines emergency as: "A serious situation or occurrence that happens unexpectedly and demands immediate action."<sup>10</sup> Cyriaque received a call at work requesting that she come give an affidavit so the Board agent would not return to Miami empty-handed. Cyriaque took immediate action to obtain permission to leave work, characterizing the situation as an emergency. The following day, when Militello accused Cyriaque of lying by saying she had an emergency, she responded that for him it wasn't an emergency, but to her it was an emergency. This apt response confirms her perception of the situation.<sup>11</sup> Cyriaque perceived Phillippe's request that she leave work to give an affidavit to be an emergency.

Respondent's brief does not deal with Cyriaque's credible testimony that Militello initially accused her of lying about her sister's death. Cyriaque responded that she did not lie. Militello then stated that she said she had an emergency, that it was not an emergency. Cyriaque responded that for him it wasn't an emergency, but to her it was an emergency. Although Cyriaque never stated that she was going home, Militello, as established by his accusation that Cyriaque had lied about her sister's death and the reference "we let you go home" on the discharge notice, assumed that Cyriaque was going home in response to her sister's death. So far as he was concerned, that was the permission that he had given to her. Upon observing that Cyriaque had not gone home, consistent with the permission that he believed he had given her, but was engaging in union activity, Militello concluded that she had lied to him. With no investigation he seized upon Cyriaque's presence with Union Representative Okker-Washington as evidence that Cyriaque had lied and decided that "I was going to fire her." "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). Militello assumed Cyriaque was going home. Upon seeing her with a union representative, he relied upon his assumptions and decided to fire Cyriaque without seeking to determine any of the circumstances or sequence of events surrounding what he had observed. This is confirmed by his conduct on April 25 when he accused

Cyriaque of lying about her sister's death, a lie she never uttered. He then accused her of lying about having an emergency, and Cyriaque disputed this, stating that to her it was an emergency. Militello then attempted to hand Cyriaque the termination document that he had already prepared. Respondent pretextually terminated Cyriaque for a purported lie she never uttered after observing her with a representative of the Union. In so doing, Respondent violated Section 8(a)(3) of the Act. The termination document reflects that Respondent relied upon the unlawful warning of December 4, 1996, in terminating Cyriaque pursuant to its progressive discipline system. Thus, the termination of Cyriaque also violated Section 8(a)(4) of the Act.

A complete *Wright Line* analysis is applicable in dual motive cases. When the reason given for an action is either false, or does not exist, General Counsel's prima facie case is un rebutted, thus there is no need for further analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). In the instant case, I have found that the reason given for the discipline issued to Cyriaque on December 4, 1996, was false and that the purported lie for which she was discharged on April 25 was never uttered; thus, both of these actions were pretextual. The discipline issued to her on April 2 resulted from activity specifically protected by Section 7 of the Act. Even if I were to apply a traditional *Wright Line* analysis, I would find that Respondent has not established that it would have taken the same action against Cyriaque in the absence of her union activities. There is no evidence of any employee having been disciplined for being outside the building without permission during break. Manzo admitted that he was unaware of "any other employees" being disciplined for arguing. Although Manzo stated, in a pretrial affidavit, that he knew Militello had terminated other employees for being insubordinate, this statement was not corroborated by Militello. No documentary evidence was introduced in support of this uncorroborated statement in Manzo's affidavit. There is also no evidence of any employee being disciplined for alleged dishonesty. Militello testified that the issue had never come up. Insofar as Cyriaque was not dishonest, even if such evidence existed, it would be irrelevant.

### C. The Surveillance Allegation

The complaint alleges that Respondent engaged in surveillance of employee union activities on August 19, the date of an announced union meeting at Denny's restaurant in Boca Raton. This was the same restaurant at which Militello observed Cyriaque when she met with the Board agent on April 24. On August 19, prior to 3 p.m., Union Representative Marie Jean Phillippe had been meeting with employees, including Cyriaque who had been terminated in April. At 3 p.m., Cyriaque observed Gladys Gardere, nurse supervisor of the 3 to 11 p.m. shift, leave the restaurant and go to a car accompanied by one child. The car did not leave immediately. One of the employees at the meeting whose shift had started at 3 p.m. asked Cyriaque to take her to work, explaining that she did not want to be seen by Gardere. Cyriaque left with this employee after a short time because the employee was already late for work. The Avante facility is only a short drive from the Denny's restaurant. No employee who got off work at 3 had arrived at the point that Cyriaque left.

Although I credit Cyriaque's testimony that she observed Gardere and a child leaving Denny's and that the vehicle into which they entered did not leave immediately, this testimony does not establish surveillance. Cyriaque's testimony does not establish that Gardere was looking in the direction of the union meeting or that she observed any employee. The employee who requested that Cyriaque take her to work did not believe that she had been identified. Denny's is a public restaurant. There are a myriad of reasons that a person leaving Denny's would not have immediately started his or her car. The mere presence of a supervisor or management official at a location where union activity is taking place does not establish unlawful surveillance. "[W]here purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act." *Gossen Co.*, 254 NLRB 339, 353 (1981). Cyriaque's testimony establishes only the presence of Gardere in the parking lot of a public restaurant with a child for a short period of time. There is no probative evidence establishing surveillance on the basis of Cyriaque's testimony.

Union Representative Phillippe testified that Cyriaque called her attention to Gardere. At the hearing she testified that the individual Cyriaque pointed out had one child with her; however, in a pretrial affidavit given on September 17, less than a month after the incident, Phillippe stated that the individual she identified as Gardere had two boys with her. Phillippe did not know Gardere personally; she had been pointed out to her by employees at the facility. I find, consistent with the affidavit, that Phillippe thought Cyriaque was referring to a person

<sup>10</sup> *The American Heritage Dictionary of the English Language*, 602 (3d ed., 1992).

<sup>11</sup> The assertion in Respondent's brief that Cyriaque had been granted time off "without incident" to attend representation hearings fails to note that, after attending the initial hearing, Cyriaque was, on December 4, 1996, accused of lying by Manzo and unlawfully disciplined.

accompanied by two children. No probative evidence establishes that this individual was Gardere. Two Avante employees who got off work at 3 arrived at Denny's. They did not observe Gardere, but Phillippe pointed out the vehicle in which the person who she thought was Gardere was purportedly sitting. Phillippe testified that, after some 10 to 15 minutes, she went to the parking lot, got in her car, drove to the vehicle in question, rolled down her window and demanded the parking space. Phillippe testified that the person she had identified as Gardere rolled down her window, but did not say anything and departed. Any view of the restaurant from the vehicle in question was through the rear view mirror; the car was not adjacent to the restaurant, but in a row of spaces across the driveway. None of the employees who arrived at Denny's and to whom Phillippe pointed out the vehicle in which Gardere purportedly was sitting were called to corroborate her testimony. If it were Gardere that Phillippe had been observing, those employees would certainly have been able to confirm Gardere's identity. Gardere, although acknowledging occasionally stopping by Denny's with her daughter, denied engaging in surveillance of the union meeting. In the absence of corroboration, I find that the record does not establish that Phillippe was observing the same person or vehicle as Cyriaque. In view of the foregoing, I find that General Counsel has not established by the greater weight of the evidence that Respondent engaged in surveillance, and I shall recommend that this allegation of the complaint be dismissed.

#### CONCLUSIONS OF LAW

1. By warning, suspending, and discharging Evanette Cyriaque, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By warning and discharging Evanette Cyriaque, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (4) and Section 2(6) and (7) of the Act.

#### REMEDY

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

The Respondent having discriminatorily warned, suspended, and discharged Evanette Cyriaque, it must rescind the warnings, suspension, and discharge, expunge all references to them, offer her reinstatement and make her whole for any loss of earnings and other benefits as a result of her suspension, and make her whole for any loss of earnings and other benefits computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, Avante at Boca Raton, Incorporated, and Avante Terrace at Boca Raton, Incorporated, joint employers, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning, suspending, discharging, or otherwise discriminating against any employee for supporting Local 1115-Florida East, SEIU, AFL-CIO, CLC, a division of District 1115, SEIU, AFL-CIO, CLC, or any other union.

(b) Warning, discharging, or otherwise discriminating against any employee for appearing at an office of the National Labor Relations Board to testify.

(c) 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.

<sup>12</sup> 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.

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

(b) Make Evanette Cyriaque whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspension, and discharge of Evanette Cyriaque and, within 3 days thereafter, notify her in writing that this has been done and that the warnings, suspension, and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Miami, Florida, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed 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 December 4, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

#### AN AGENCY OF THE UNITED STATES GOVERNMENT

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you for supporting Local 1115-Florida East, SEIU, AFL-CIO, CLC, a division of District 1115, SEIU, AFL-CIO, CLC, or any other union.

<sup>13</sup> 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."

WE WILL NOT warn, discharge, or otherwise discriminate against any of you for appearing at an office of the National Labor Relations Board to testify.

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

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

WE WILL make Evanette Cyriaque whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

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

AVANTE AT BOCA RATON, INCORPORATED, AND AVANTE TERRACE  
AT BOCA RATON, INCORPORATED, JOINT EMPLOYERS