Coachella, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CARDINAL DISTRIBUTING CO., INC., PETER RABBITT, INC., Joint Agricultural Employers,	)	
Respondent,	)	Case No. 82-CE-49-EC
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	9 ALRB No. 43
Charging Party.	)	

DECISION AND ORDER

On January 20, 1983, Administrative Law Judge (ALJ)[1/] Thomas M. Sobel issued the attached Decision in this proceeding. Thereafter, General Counsel timely filed exceptions to the ALJ's Decision and a supporting brief. Respondent timely filed a reply brief to General Counsel's exceptions.

Pursuant to the provisions of California Labor Code section 1146 the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan 30, 1983.)

conclusions as modified herein,[2/] and to adopt his recommended Order.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: August 5, 1983

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

[2/] While we do not agree with the ALJ's statement that Adelia Medina did not engage in protected concerted activity, we agree with his finding that General Counsel failed to prove a causal connection between her protected concerted activity and her discharge by Respondent.

CASE SUMMARY

Cardinal Distributing Co., Inc., Peter Rabbitt, Inc., Joint Agricultural Employers,

9 ALRB No. 43
Case No. 82-CE-49-EC

ALJ DECISION

The Administrative Law Judge found that General Counsel failed to establish a prima facie case that Respondent discharged Adelia Medina because she engaged in protected activity. Medina had complained about the dirty, unsanitary condition of the portable toilets. The ALJ further found that Respondent did not discharge Medina under the mistaken belief that she had filed a complaint with the Labor Commissioner about the condition of the toilets.

BOARD DECISION

The Board affirmed the ALJ and dismissed the complaint in its entirety.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: CARDINAL DISTRIBUTING CO., INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-CE-49-EC

Appearances:

Edwin H. Franzen
James A. Bowles
Hill, Farrer & Burrill
Los Angeles, California
for the Respondent

Deborah Escobedo
Richard Rivera
El Centro, California
for the General Counsel

Saul Martinez
Keene, California
for the Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

Thomas Sobel, Administrative Law Officer: This matter was heard by me on September 21, 28, 29 and 30, 1982 in Coachella, California. Pursuant to charges being filed by the United Farm Workers of America, AFL-CIO, the General Counsel issued a complaint alleging that Respondents Cardinal Distributing Company, Inc. and Peter Rabbit, Inc. discharged Adelina Medina in violation of sections 1153(a) and (c) because of her protected concerted activities, including certain union activites. At the hearing, I dismissed the allegations of the complaint relating to the 1153(c) violation for failure to establish a prima facie case. It remains to be decided whether Respondent would not have discharged Adelina Medina but for her concerted activities.

All parties were given full opportunity to participate in the hearing; the General Counsel and Respondent filed post-hearing briefs. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

Respondents Cardinal Distributing Company, Inc. and Peter Rabbit, Inc. admitted in their joint answer sufficient facts upon which I can conclude that they are agricultural employers; they also stipulated at the hearing that they are joint employers. I:5. Respondents admitted that the UFW is a labor organization and that Adelina Medina is an agricultural employee. The issue in this case is entirely a factual one -- whether Respondents' agents fired Adelina Medina because of their mistaken belief that she filed a complaint with the state labor commissioner about the toilet

facilities provided by Respondent.

MEDINA'S GENERAL WORK HISTORY

Adelina Medina worked only briefly for Respondent, beginning work in either September or November of 1980 (I:135,158), and working through "the last of December" or January 1981 (I:158). She returned to work for a few hours on September 17, 1981, and did not work again until October 5, 1981 (RX6, p. 2).[1]

According to Respondent's witnesses, Medina was not a good worker from the beginning of her tenure with the company. Supervisor Tony Garcia testified he observed problems with her work "from the first day" when, "[i]nstead of working in the middle of the furrows, she was setting on top of some of them." As a result, he warned her and the rest of the crew about the problem (III:76).[2]

Even after the warning, Garcia continued to be dissatisfied with Medina's work; according to him she knocked down plants, spaced the plants improperly, and left doubles and weeds. (III:77) If he warned her about the quality of her work, she would perform adequately for a day or two and then the quality of her work would deteriorate again. Ibid. Maria Servin, Medina's forelady, also testified that Medina's performance was less than adequate, that she

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1. Respondent required its workers to have a valid social security card to qualify for continued employment. (I:24) This policy was explained to the crew and it was apparently Medina's failure to have a card which was at least partly responsible for her not working between September 17 and October 5.

2. If the quality of Medina's work were so conspicuously bad, one wonders why Garcia felt it necessary to address the entire crew about a problem she had?

was very slow and always behind the other employees. Servin testified she repeatedly warned Medina about the quality of her work. (II:114) Servin gave an even bleaker account of Medina's amenability to criticism, testifying that Medina rejected all criticism, simply responding that she was as good as any other workers. (II:115)[3/] (See also Medina's testimony where she admits rejecting Servin's criticism. II:20, 23.) Employee Maria Gamez testified that she overheard Medina reply to Servin's criticism on the day she was fired with just such insouciance. (III:75) On October 20, 1981, Medina received a warning notice, RX4, about the quality of her work.[4/]

On October 23, Medina asked for and received a leave of absence to attend to family problems. (See RX2). The leave of absence stated that she was to be back at work by November 2, 1981

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3. Garcia also testified that about "50-60%" of the time he observed her work, it was below standard and that he admonished her about her performance 15-20 times. (III:77-78) If true, Garcia's toleration of Medina makes him an extremely indulgent supervisor; in fact, there are indications that he is, in some ways, a tolerant one. As will be discussed, he rehired Medina after she overstayed her leave of absence, apparently out of sympathy for her.

4. A great deal of testimony was devoted to the question of who gave this warning to Medina and when. Garcia claimed he gave the notice tc Medina, III:84; Maria Servin didn't recall whether it was she or Garcia who gave it to Medina (II:126); and Medina and Lupe Hinojosa testified Servin gave it to Medina. (II:21, Medina; III:159-61, Hinojosa.) Like so many other issues of this strongly contested case, the veracity of the several versions concerning who gave RX4 is of no independent moment, except to the extent it may bear upon the credibility of the witnesses. To this end, General Counsel strenuously argues that Garcia's and Servin's testimony concerning who gave RX4 to Medina (and under what circumstances) reveals them to be incredible witnesses. I shall discuss my difficulties with the credibility of all the witnesses in the case later; for the moment, it is sufficient to note that I did not find either Garcia or Servin to be totally unworthy of belief. Accordingly, I decline to make my finding on this substantively irrelevant issue.

or she would be discharged. Medina testified she was granted another leave of absence from the company after the expiration of her original leave (I:141), but there is no other evidence to support her contention. Garcia testified that Medina did not come back to work after her leave expired and she was summarily discharged (III:73). The time card for the week ending November 4 (See RX6) corroborates this. Thus, I do not credit Medina's testimony that she received another leave of absence.

Both Medina and Garcia agree that after she was discharged she appealed to Garcia to get her job back (Medina, I:142; Garcia, III:74), and that he rehired her. She returned to work on November 9, 1981. Garcia testified that before rehiring her he advised her she would be treated as a new hire "more or less on a trial basis" because she had not been a good worker before her leave. Ibid. Medina, too, understood that Garcia told her this was her "last chance" (I:143, II:19), but she maintained that "the last chance" Garcia was referring to was not giving her another leave.[5/] Servin and Garcia both testified Servin asked Garcia not to rehire Medina because of the poor quality of her work. (II:129; III:79.)

In order to corroborate Garcia's testimony that he treated Medina as a "probationary" employee when she returned on November 9,

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5. When General Counsel first elicited testimony from Medina "about what kind of chance Garcia was referring to," Medina testified she "understood" him to be referring to any other leaves of absence. Respondent's counsel moved to strike the answer on the grounds that her understanding wasn't relevant, but only Garcia's actual words. I asked General Counsel to clarify what Medina actually heard, but he simply re-asked the question without eliminating the ambiguity in her answer between what was said by Garcia and what was understood by her. (I:142 et seq.) See also cross-examination. (II:19).

1981, Respondent introduced RX3, a new Withholding Allowance Certificate (Form W-4), which Medina was required to execute when she returned to work. The word "REHIRE" appears on the bottom of the certificate. However, in GC2, a letter prepared by Respondent in response to the charge filed by Medina, Respondent contended that Medina was reinstated on November 9 "without loss of seniority." Although at the hearing, company officials contended that this statement was in error, (See e.g. Watters: II:166), Respondent put on no evidence that filling out a new withholding form triggers a new probationary period. Whether Medina was technically a "probationary" employee or not, I credit Garcia's testimony that he warned her that her position at the company was precarious. Even Medina remembered Garcia's characterizing her re-employment as "a last chance" with the company, a figure of speech which seems more in keeping with a generalized warning about her status than a limited reference to obtaining another leave of absence.

According to Respondent's witnesses, even after her return from the leave of absence, Medina's work continued to be of poor quality. See e.g. Garcia: II:77, 86-87. Garcia claimed to have admonished Medina about her poor work 8 or 9 times, reminding her that she had been hired on the condition that the work improve. According to him, he told her that she was letting him down. III:87.

THE PROBLEM WITH THE TOILETS

It is undisputed that the condition of the portable toilets in the fields left a lot to be desired. John Powell, Respondent's General Manager, testified that even Garcia complained to him that

the company which was supposed to service the toilets was not doing an adequate job of it. (II:172) See also testimony of Walter Watters: II:168. Maria Servin testified complaints by employees about the condition of the bathrooms were quite common. II:130; see also testimony of Garcia, III:160. Maria Gamez testified she heard a number of employees complain to Maria Servin about the toilets. II:66 Shortly before Medina was discharged, Lupe Hinojosa testified she told Tony Garcia that the condition of the toilets had been discussed at a union meeting. II:52

It is also undisputed that sometime shortly before she was terminated on November 24, 1981, Medina and Garcia had a discussion about the condition of the toilets. Servin overheard the conversation (II:130). According to Medina, she wanted to use the bathrooms, but they were so dirty she went into the bushes to relieve herself. She was accompanied by another worker named "Sabina" who did not testify. (I:150) When the women left the bushes (apparently chased by dogs, II:36, III;105), they encountered Garcia, who asked them what they had been doing. I:151, III:105 Medina told him she had relieved herself. When Garcia advised her that the bathrooms were not in the bushes, Medina said she knew that, but the toilets were too dirty to use. Ibid. Garcia replied: How delicate, and Medina replied that she was not delicate, but clean. Ibid.

According to Garcia, when he observed the women running from the bushes, he asked them what they had been doing. When they replied they had gone to the bushes to relieve themselves but some dogs had chased them away, Garcia testified he told them it was

dangerous to use the bushes and that he wished they would use the bathrooms because of insurance problems. III:105, see also testimony of Servin, II:130 (the women were chased by bees). Although Garcia originally testified he couldn't recall Medina saying anything about the toilets being dirty, I:29, he later corroborated Medina's testimony that she objected to using the dirty bathroom. II:106

Exactly when this discussion took place is impossible to determine. In her testimony, Medina placed the conversation the day after a union meeting, I:150, which took place, according to Saul Martinez, a UFW worker, on November 19, 1981. Garcia testifed the conversation took place when the crew was working B-4 (III:105). According to Respondent's time cards, Medina worked on B-4 on November 18, 21, and 23. (RX 6.) The most that can be said is that the discussion took place between November 18th and 23rd.

THE EVENTS OF NOVEMBER 24, 1981

On November 24, 1981 Labor Commissioner Special Investigator Wayne Hoy made a routine surprise inspection of the toilet facilities at Respondent's fields and found none there. Upon being told the toilets were "on their way", Hoy said he would return in an hour for another inspection. I:96. Also on November 24, 1981 Adelia Medina was fired. General Counsel contends there was a causal connection between these two events in that Garcia thought Medina might have called the inspector and fired her for that reason.

Hoy recalled he came to Respondent's fields early in the morning, as the crew itself was arriving, I:95. Maria Lopez

testified he came at about eight in the morning, "before the break." I:122 Medina testified Hoy approached her and Gamez and another employee and asked where the foreman was (I:154). Servin was than about two feet away. Ibid. The employees identified Servin and Hoy went to speak to her. Ibid. According to Hoy, he spoke to a female "foreman," I:96, 102 identifed at the hearing as Maria Servin (see e.g. II:68) about the absence of the toilets. Since Hoy cannot speak Spanish, Maria Gamez interpreted for him. According to Gamez, Hoy asked Servin where the bathrooms were, told her that they were supposed to be there and warned her he would be back to make sure they were there. II:68[6/] According to Medina, the inspector then left the fields and Servin immediately left the fields "to look for Tony." Servin came back about 10 minutes later, Garcia arrived five minutes after that and approximately 10 minutes after Garcia arrived, Servin told Medina she was fired. "She [Servin] said that Tony said you are doing your work badly." I:155 According to Medina, then, she was fired within half an hour of Hoy's departure. Ibid, II:40,42. When she asked Garcia why she was being fired, Garcia told her it was Servin who was firing her. Ibid. According

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6. According to the uncontradicted testimony, the toilets were not in the fields because Garcia was cleaning them. I:33, see also testimony of Medina, I:154 (Servin told Hoy, Garcia was cleaning them). Respondent contends that Hoy testified he might have told Servin that the inspection was merely routine. Brief p. 13. I believe this assertion misinterprets Hoy's testimony. Respondent's counsel asked whether Hoy told "the company that this was a routine inspection." Although Hoy said he "could have" he went on to add: "On this particular [day] I probably did not make contact with the company office, personally." I:102. It seems clear from the complete answer that Hoy took the question about whether he told the company the inspection was merely routine to mean whether he told Respondent's officials the inspection was routine.

to Medina, earlier in the day she had asked Garcia how her work was and he told her it was fine. I:153

Lopez provided the same basic chronology as Medina. According to her, Servin went to look for Garcia after the discussion with Hoy, I:122, and immediately upon Servin's return to the fields, she told Medina that Garcia wanted to talk to her. I:122 Medina went out of the fields and never returned. I:122 Medina was fired within five minutes of Servin's leaving the fields to find Garcia. I:122[7/]

Garcia and Servin on the other hand tell a different story. According to Servin, Garcia returned to the fields, saw a row being done badly, asked Servin whose row it was and when he found out it was Medina's, he asked Servin to bring Medina to him, which she did. Servin did not hear what Garcia said to Medina. II:145, 154. Servin placed this incident at around 11:00 a.m. II:146. Servin testified she had warned Medina about the quality of her work earlier that morning. Ibid.[8/]

According to Garcia he arrived at B-4, where the crew was working, at about 8:30 or 9:00. As he arrived, someone told him an inspector had been there and would be back in an hour or so. He began to observe the quality of the work and noted a badly thinned row. He asked Servin to bring the employee whose row it was to him. It turned out to be Medina. When Medina arrived he pointed out the

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7. Lopez was quite insistent Hoy came in October rather than in November, see I:131, indeed she testified she was not even working for the company on November 24, 1981. I:131 However, Maria Gamez testified Lopez was present on the day Hoy arrived. II:61

8. As noted earlier, Gamez corroborated this.

quality of her work and she said "that's the best I can do. That's all I can do." According to Garcia, he prepared a warning notice, RX7, which states that Medina was doing "poor quality work and will not do as order (sic)." Medina's remark and her refusal to accept the warning convinced Garcia to discharge her. III:92 About an hour later, he returned to the office to have her termination notice and final paycheck prepared. III:93 The notice, RX8, reads "Poor quality work will not do as told by field boss." According to Garcia, he added the part about her refusal to follow orders because Servin had told him the day before that Medina's work was not improving. III:56 Garcia then returned to the fields at about 9:30 or 10:00 to terminate her. III:99 Medina's time card indicates she was paid for four hours that day. RX6.

It is of critical importance to this case to determine what happened on November 24. Unfortunately, that is not an easy task. Even though I didn't find any of the key witnesses to be wholly incredible, because I could not fully credit any of them, I cannot simply choose one party's version over another. As in her failure to remember being criticized by Servin on November 24, Medina obviously exhibited a selective memory; just as, in her testimony about receiving an extension of her leave of absence, and her "understanding" of what Garcia meant by a last "chance", she exhibited a self-serving one. As in her insistent testimony that Medina was fired in October because she (Lopez) was not working in November, Lopez showed herself not to be in complete command of the details of a year ago. On the other hand, I find little to prefer in Garcia who, despite contradicting himself on occasion and

otherwise appearing to be incapable of directly answering a question, also showed himself to be an extremely alert witness,[9] a curious mixture which left me with the impression that he was crafty and defensive. Servin, too, left me with little confidence in her ability to recall events of a year ago.

In order to determine what happened on November 24, without the benefit of simply disbelieving one witness or another, I must resort to an assessment of what appears most reasonable in light of the record as a whole. On the basis of the following factors, I do not credit Medina's testimony that Garcia complimented her work on the morning of her discharge. In the first place, Medina's testimony appears to require Garcia to have been at the fields before he brought the toilets when no other witness placed him there. Secondly, while I find it hard to believe that Medina was as terrible an employee as Garcia made her out to be, I believe she was not a very satisfactory one. Even though I believe Garcia himself exaggerated the poor quality of Medina's performance at the hearing, it does not follow as General Counsel would have it that her work was satisfactory. It seems clear that Garcia had enough sympathy for Medina to rehire her despite misgivings about the quality of her work. It also appears from Servin's and Garcia's uncontradicted testimony that Servin was much less indulgent towards Medina than Garcia was. See II:121. Thus, since Gamez and Servin both

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9. Thus, when General Counsel sought to question Garcia about events <u>after</u> Medina's discharge, Garcia essentially objected to the question as irrelevant. (See I:34) See also III:128, where Garcia smartly reminds General Counsel that the disciplinary notices are a legitimate record of past events which substitute for his memory.

testified that Servin warned Medina about the quality of her work on the morning of the 24th, it appears unlikely that Garcia would not have seen what Servin observed.

I also credit Respondent's version of the timing of events. According to the documentary evidence, Medina was fired after four hours of work. Since Medina herself testified work started at 6:30 that day (I:152), according to the documentary evidence she had to have been fired between 10:00 and 11:00. Gamez put Hoy's arrival at 8:00; Hoy himself testified he arrived early in the morning as the crew was arriving. (Gamez also said Hoy arrived around break time which Hoy might have confused with the start of work.) Whatever the exact time of Hoy's arrival, Hoy and Gamez were consistent in placing it early in the morning. Since Hoy's discussion with Servin could scarcely have consumed more than a few minutes at the most (and not more than 10 minutes according to the testimony) and Medina herself said she was discharged 25 minutes after Hoy left, crediting either Medina's or Gamez's testimony about the timing of her firing, would mean she was fired before 9:00 in the morning, a conclusion at odds with the documentary evidence.

Finally, I credit Garcia's testimony that he gave Medina a warning on November 24th.[10/]

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10. General Counsel himself doesn't specifically deny Medina received a warning; thus, on page 6 of his post-hearing brief: "General Counsel contends that the warning notice issued on November 24 (RX8) [sic] was executed at or after the discharge, and does not constitute a true warning notice." Whatever this statement might mean, it is not a denial that Medina received a warning on November 24.

A. Respondent's Disciplinary Policy

All witnesses agreed that at the beginning of the season, Tony Garcia advised the crew of the existence of a disciplinary system which required a certain number of warnings before discharge. When first called by General Counsel as an adverse witness, Garcia testified he told the crew members that unless the infraction warranted immediate discharge, employees would be fired after they received three warnings. I:22, see also III:6-7. Later Garcia testified an employee would be discharged after two warning notices. III:7 Employees recalled Garcia saying that the third notice would mean termination: Hinojosa testified that at the third ticket one would be fired (II:50); Gamez testified similarly: "on the third ticket" one would be fired. (I:140, See also testimony of Servin II:111).

Garcia's inconsistency about what his disciplinary policy consisted of is peculiar, to say the least.[11/] Part of that peculiarity may be attributable to the fact that he had no real policy at all. This seems clear from examination of his discharge actions for the preceding years, III:16-18, which shows that no consistent number of warnings preceded discharge. General Counsel contends that when finely analyzed, Garcia's disciplinary actions fall into a number of separate categories, all of which are

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11. Even those witnesses who testified that "three" notices were required, testified that "at" or "on" the third notice discharge would ensue. In such a system the third "warning" is not really a warning but, in effect, the discharge itself. This ambiguity is consistent with Garcia's equivocations concerning the number of "warnings" an employee was entitled to. From the record as a whole, however, it appears that the more likely explanation for his inconsistency is that Garcia had no policy.

different enough from the facts of this case, to lend support to the inference that Garcia discriminated against Medina. While I agree with General Counsel that the disciplinary actions need to be looked at carefully, I only see arbitrariness in them rather than proof of discrimination. While it is true that absence of a system provides the opportunity for unlawful discrimination to occur, being arbitrary is not necessarily unlawful unless the criteria for firing have been specifically prohibited by law.

Nava Cruz, Serjio Rojas, and Jaime Valenzuela each worked one day during the pay period ending 11/25/81. According to Garcia all three could not do the job properly and essentially quit. III:10-11 and especially lines 11-14. Garcia testified Maria Munoz,[12/] Francisco Manasquez and Guadalupe Corona also left Respondent's employ because they couldn't do the work. II:22-24. Among these six employees, General Counsel also places Maria Luisa Valenzuela, contending that all seven were actually probationary employees and therefore, according to Garcia's own system, could have been fired without the required number of warnings.[13/]

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12. He testified Munoz was among a group of "four" who couldn't do the job. Adding Munoz to the group of Cruz, Rojas and Valenzuela would be four, but the first three were fired in the week ending 11/25 while Munoz was fired on 11/7. The group Garcia might have been referring to (although not a group of four) probably consisted of Munoz, Corona and Marquez, all of whom were discharged on the 7th of November and all of whose notices bear the same notation: slow and poor quality.

13. Garcia testified that he utilized a three-day probationary period in 1981 to evaluate an employee's ability to do the job. See III:50. However, as with the "three warning notice" system, Garcia wasn't certain whether probation was actually three days long or two days long: "[My] own rule is that I give an equal chance of <u>two</u> days, or whatever it is. If after the <u>third</u> day, it just seemed possibly they were not going to do the job, it's I have a three-day deal like that . . . ." <u>Ibid</u>. Like his warning policy, Garcia's probationary policy appears fluid indeed.

Valenzuela was discharged September 22, 1981, a few days after the season had begun, III:134. Whether all seven employees were actually "probationary" is difficult to tell. It is clear that Valenzuela received a warning notice, see p. 10 of RX5,[14/] and none of the others did which may indicate she was discharged rather than, as in the case of the others, a voluntary quit.[15/]

A number of other employees who were discharged also fall into a natural category. These are Jesus Gallegos, Hedda Torres, Jose Salazar, Juan Sanchez and Virginio Torres, all of whom were discharged for failing to report for work. See RX5 p. 2, Gallegos; RX5, p. 3, Hedda Torres and Salazar, Sanchez, RX5, p. 8. All of these employees received a warning notice. Virginio Torres was also discharged for missing work, RX5, p. 7, although she did not receive a prior warning notice.[16/]

Other employees received a single warning notice which on its face advised them they would be discharged if they failed to heed the warning, ostensibly in contradiction of Garcia's "dual" or "treble" warning policy. See, Isaias Villasana, Maria Lopez RX5,

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14. During part of his examination, Garcia claimed she didn't receive a notice, see III:24, but the notice is in evidence on p. 10 of RX5.

15. Garcia also claimed she was fired for threatening a supervisor with a hoe, III:135, but he also testified she was fired for unsatisfactory work. III:24 See also, RX5, p. 10.

16. General Counsel argues from the fact that only Virginio Torres didn't receive a warning notice before discharge that I should conclude the warning system was not in effect until the beginning of the 1981-82 season on September 17. However, Gallegos received his warning notice in March of 1981.

p. 12, Juan Sanchez, RX 5, p. 13.[17] None of these employees was fired, however. Filemon Sotelo also received only one written notice for running over valves which advised him he would be discharged if he did it again. He had apparently been orally warned prior to receiving the written warning. In any event, he quit the same day.

Javier Garcia and Miguel Lerma were discharged for various infractions. Garcia for continually being late and (apparently being warned) and Lerma for drinking on the job. RX5-7. Neither had received prior notices. Maria Ruiz, Rudolph Batts, Francisco Diaz were fired respectively for bad work and bad language (Ruiz, RX5-2), insubordination and bad work, (Batts, RX5-8), and insubordination and bad language (Diaz, RX5-10). All three had received one warning before being fired.

Juan Frias was apparently given two oral warnings and one written warning which told him that refusal to heed the second oral warning would be grounds for discharge. RX5-14. Micaela de Rocha received one warning notice for the quality of his work and was not fired. RX5-5.

General Counsel contends that because these disciplinary actions show that only Medina was fired for poor work performance,

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17. Another employee who received a warning for lateness was Garcia's son, Tony. General Counsel argues that because Garcia did not warn his son he would be discharged, as he had warned Villasana and Lopez, I must conclude he discriminated against Medina on the theory that failing to warn his son shows warning notices were used discriminatorily. In the first place, the other notices indicate at least two days missed and Garcia Jr.'s doesn't; thus on the face of the notices there is no showing of disparate treatment. Second, as I noted earlier, the failure to treat people equally in a totally different context only shows Garcia to be arbitrary, rather than discriminatorily motivated toward Medina.

they prove that Garcia discriminated against Medina. He points out that the other employees discharged for poor work -- for example, Batts, Ruiz -- were also guilty of insubordination, and that the only other employee who received a warning for poor quality work, Micaela de Rocha, was not fired. However, General Counsel overlooks the second warning notice, the validity of which he does not really dispute. No witness testified about how bad, or how persistently bad, de Rocha's work was so that on this record one cannot say that he and Medina were similarly situated. On this record, I do not find evidence that Garcia discriminatorily ignored his disciplinary procedure.

ANALYSIS AND CONCLUSIONS[18/]

In order to make out a prima facie case in an ordinary discharge case, the General Counsel must put on proof that "the alleged discriminatee engaged in union activity, or protected concerted activity, and that the employer took adverse action against the employee because of his/her union or protected concerted

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18. At the hearing, General Counsel put on evidence of an incident in January, 1982 allegedly involving Tony Garcia'a reaction to other employee complaints lodged with the Labor Commissioner. These complaints resulted in another visit by Hoy to Respondent's fields whereupon he once again found the condition of Respondent's toilets to be substandard. See I:98, II:82. Because the incident took place after the Medina incident, Respondent vigorously objected to the introduction of any evidence relating to it and continues to contend that it is irrelevant. Despite permitting the evidence to come in, I do not rely on it in my decision. Even assuming the veracity of Guillen's testimony that Garcia impliedly threatened the crew after Hoy's second inspection of the toilets, see II:83, Testimony of Francisco Guillen, the incident throws no light on the threshold issue in the case, which is whether Garcia connected Medina's complaint with the arrival of Hoy on November 24.

activity." Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98. This case is not an ordinary discharge case in that, as Respondent points out, there is no evidence that Medina engaged in any concerted activity. Rather, the crux of General Counsel's case is that Garcia only thought she did.

Our Board has held in two cases that employee complaints to law enforcement officials will be deemed "concerted" activities. See Miranda Mushroom (1980) 6 ALRB No. 22, Foster Poultry Farms (1980) 6 ALRB No. 15. There is no reason to confine the protection against retaliatory employer actions to cases in which an employee actually engages in protected activity as opposed to cases in which an employer merely believes the employee has engaged in it. Thus, if it is true, as General Counsel contends, that Garcia thought Medina's complaints led to Hoy's inspection, and he fired her for that reason, Respondent would have violated the Act. See N.L.R.B. v. Link Belt (1940) 311 U.S. 584, 589 (Proof of mistaken belief in union activities will support a finding of illegal motive).

Even if we may dispense with some of the standard elements of proof in 1153(a) discharge cases, however, General Counsel must still meet his burden of showing that Respondent thought Medina called Hoy and fired her for that reason. Putting aside the evidence of Respondent's other disciplinary actions, which I find irrelevant to General Counsel's case, General Counsel principally relies upon the employee's testimony regarding the swift succession of events on November 24 plus what General Counsel characterizes as the inherent implausibility of Garcia's and Servin's description of Medina's performance, to support an inference that Garcia linked

Medina's complaints to him about the toilets with Hoy's inspection and fired her for that reason.

I have already indicated that I do not believe Medina was as bad an employee as Garcia made her out to be, but it also seems clear she was not a very good one. I have also indicated that I believe Garcia was willing to tolerate her poor work performance more than Servin was. Thus, the skepticism I share with General Counsel about the details of Garcia's exaggerated testimony does not detract from my overall impression that there was a good deal of truth in Respondent's (and especially Servin's) complaints about Medina. Additionally, I have found the documentary evidence to more fully support Garcia's version of the timing of events, rather than the employees' version.

Most important, however, is the fact that within the same period of time between Medina's discussion with Garcia and her dismissal, Lupe Hinojosa also complained about the toilets to Garcia; told him, in fact, that the crew had discussed the problem at a union meeting. Why Garcia would have thought that Medina's very personal-in-tone complaints reached Hoy's ears, but that Hinojosa's plainly concerted ones did not, is nowhere addressed or explained by General Counsel. In Jim Causley Pontiac v. N.L.R.B. (6th Cir. 1980) 620 F.2d 122, 104 LRRM 2190, the court identified the following details as supportive of the Board's inference that a Respondent would have believed that a certain employee was responsible for complaints to a state agency.

> Petitioner's second argument is that the finding that Causley Pontiac had knowledge that Wittbrodt was engaged in the concerted activity is not supported by substantial evidence. This argument focuses first on Causley Pontiac's

alleged lack of knowledge that Wittbrodt filed the complaint. After a careful review of the record, however, we must conclude that the Board's determination in this matter was supported by substantial evidence. The record indicates that on the morning of the inspection Mr. Causley was given a document which, although it did not disclose the identity of the complainant, did identify the two nonmanagement positions that were affected by the complaints. It would be reasonable to infer that Mr. Causley would concluded that one or both of those employees must have filed the complaint. Further, the complaint form that was given to Causley referred not only to the employees' discomfort in breathing the paint fumes, but also to the proximity of gas heaters to the fumes and the loudness of a telephone buzzer in the area. The only references in the record to complaints to management on the second and third items are to complaints made by Wittbrodt.

Thus, two critical elements distinguish the Causley case from this one: first the Respondent knew someone had complained to OSHA and General Counsel offered very strong proof as to why Respondent would have singled out the employee he discharged as the one who had complained. See Jim Causley Pontiac (1977) 232 NLRB 125. Similarly, in N.L.R.B. v. Link Belt, supra, the evidence directly showed that, although mistaken, Respondent thought the discharged employee was a union man because its manager accused the employee of being one. In this case, both Medina and Hinojosa complained about the same subject and, if anything, Hinojosa's complaints, arising in the context of a union meeting, appear more pregnant with action than Medina's, and yet Hinojosa was not fired. Since there was nothing in Medina's conversation with Garcia that implied any intention to call the Labor Commissioner,[19/] there is no

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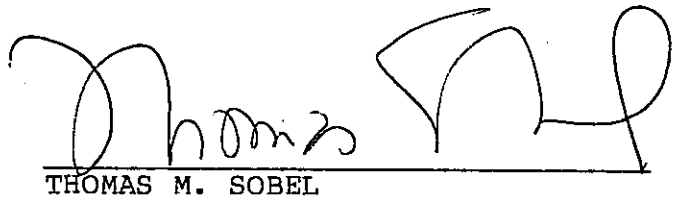
19. Although General Counsel does not urge this, it is possible that Servin, seeing Medina and Gamez and another employee speak to Hoy on the morning of the 24th, thought Medina might have called Hoy; that in other words, she was the one rather than Garcia

(Footnote continued----)

reason for me to conclude Garcia would have thought she did, other than the fact that he fired her. To draw an inference on this basis would be to permit proof of a discharge to substitute for every element of an "a" or "c" case.

I recommend dismissal of the complaint for failure to establish a prima facie case.

DATED: January 20, 1983



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Administrative Law Officer

(Footnote 19 continued)

who made the link between the conversation with Garcia about the toilets and Hoy's presence. However, there is no evidence that Servin told Garcia about the encounter between Hoy and Medina or that, standing two feet away, Servin took the encounter as anything other than Hoy's asking some employees the identity of the foreman.