Dinuba, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GIANNINI PACKING CORPORATION, a California Corporation, Respondent, and MANUEL ANTONIO CARRANCO LEAL, an Individual, Charging Party.	Case No. 91-CE-62-VI 19 ALRB No. 16 (November 18, 1993)

DECISION AND ORDER

On September 15, 1993, Administrative Law Judge (ALJ) James Wolpman issued a decision in which he found that Giannini Packing Corporation (Giannini) unlawfully refused to rehire Manuel Leal because of his support for the United Farm Workers of America, AFL-CIO, his filing of an unfair labor practice charge, and other protected activity. The ALJ did not order reinstatement and terminated backpay as of January 6, 1993, the date on which he found that Giannini 's labor contractor, Nori Ogata and Son, Inc. (Ogata), had a good faith basis for doubting Leal's ability to perform the work available.

The General Counsel timely filed exceptions to the failure to order reinstatement and the termination of backpay on January 6, 1993. Giannini filed no exceptions but filed a brief in response to the General Counsel's exceptions. Leal filed a letter with the Executive Secretary, the thrust of which is unclear. The letter has been considered only as an indication

that Leal supports the General Counsel's view that the ALJ erred by modifying the standard remedy of reinstatement and backpay.[1]

The Agricultural Labor Relations Board (Board) has considered the record and the attached decision of the ALJ in light of the exceptions and the briefs submitted by the parties and affirms the ALJ's findings of fact and conclusions of law, and adopts his recommended remedy, as modified herein.[2]

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[1]To the extent that the letter can be read to request an election, such a request cannot of course be granted in this proceeding, which dealt only with the allegation of a discriminatory failure to rehire.

[2]The General Counsel argues that the ALJ erred by terminating backpay and reinstatement rights, in that the record reflects that Leal has been doing similar work for another employer and therefore he is not unable to perform the work at Giannini. However, the fact that Leal has done similar work elsewhere does not go to the issue of Ogata's state of mind, which was properly the focus of the ALJ's analysis. Moreover, Leal's choice to do similar work elsewhere does not mean that it is medically advisable or that he is not partially disabled.

We do, however, find that January 6, 1993 is not the appropriate date on which to terminate backpay. January 6 is the evaluation date reflected in the report of the Agreed Medical Examiner. However, we have found no evidence in the record to indicate when or if Ogata was made aware of this report or of the subsequent settlement offer sent by Ogata's carrier to Leal's Worker's Compensation attorney. Nor may January 6 represent the date on which Leal was determined to be disabled because the report was admitted only for the purpose of showing Ogata's state of mind and not for the truth of the matter asserted. In addition, on their face, the work restrictions reflected in that report would not limit Leal's ability to perform his former duties at Giannini. Therefore, we will terminate backpay as of the date on which it was shown that Ogata had sufficient information to form a good faith doubt as to Leal's ability to do the work at Giannini or it was in fact determined that Leal should not return to such work. We find that date to be June 30, 1993, the date of the testimony of expert witness John Powell, who concluded that Leal was a qualified injured worker who should be provided rehabilitation services rather than returning to his usual occupation, which would subject him to a strong likelihood

(continued...)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Giannini Packing Corporation, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Discouraging membership of any employee in the United Farm Workers of America, AFL-CIO, or any other labor organization, by unlawfully refusing to hire or rehire, or in any other manner discriminating against, any employee in regard to the hire or tenure of employment or any term or condition of employment, except as authorized by section 1153(c) of the Act.

(c) Refusing to hire or rehire, or otherwise discriminating against, any agricultural employee because he or she has filed charges with the Agricultural Labor Relations Board.

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[2](...continued)
of re-injury. This finding shall in no way prevent Giannini from attempting to demonstrate in compliance that Leal was in fact disabled or otherwise unavailable for work during any period prior to June 30, 1993.

(d) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Reimburse Manuel Leal for all losses of pay and other economic losses he has suffered as a result of being refused employment between September 9, 1991 and June 30, 1993, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the exact backpay periods and the amounts of backpay and interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purpose set forth in this order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from September 9, 1991 to September 8, 1992.

(e) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and place(s) of posting to be determined by the Regional Director and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end, in addition to informing the Regional Director of the anticipated dates of the next peak season.

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: November 18, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

GIANNINI PACKING CORPORATION
(Manuel Antonio Carranco Leal)

19 ALRB No. 16
Case No. 91-CE-62-VI

ALJ Decision

On September 15, 1993, Administrative Law Judge (ALJ) James Wolpman issued a decision in which he found that Giannini Packing Corp. (Giannini) unlawfully refused to rehire Manuel Leal because of his union and other protected activity. The ALJ found a causal connection between the refusal to rehire and Leal's protected activity based on several factors, including failure to adhere to established reemployment practices and giving false and shifting rationales for the refusal to rehire. The ALJ did not order reinstatement and terminated back pay as of January 6, 1993, the date on which he found that Giannini had a good faith basis for doubting Leal's ability to perform the work available. The General Counsel timely filed exceptions to the failure to order reinstatement and the termination of back pay on January 6.

Board Decision

The Board affirmed the decision of the ALJ, but modified the proposed remedy to reflect a backpay cut off date of June 30, 1993. The Board rejected the General Counsel's argument that back pay and reinstatement rights should not have been terminated because the record reflects that Leal has been doing similar work for another employer and is therefore able to perform the work at Giannini. The Board observed that the fact that Leal has done similar work elsewhere does not go to the issue of the labor contractor's state of mind, which was properly the focus of the ALJ's analysis, and does not mean that doing such work was medically advisable or that he was not partially disabled.

However, the Board found that January 6, 1993, the evaluation date reflected in the report of the Agreed Medical Examiner, which was prepared in conjunction with Leal's Worker's Compensation claims, was not the appropriate date on which to terminate back pay. The Board found no evidence in the record to indicate that, prior to the hearing, the labor contractor was made aware of this report or of the subsequent settlement offer sent by the insurance carrier to Leal's Worker's Compensation .attorney. Instead, the Board cut off backpay on June 30, 1993, the date of the testimony of expert witness John Powell, who concluded that Leal was a qualified injured worker who should be provided rehabilitation services rather than returning to his usual occupation, which would subject him to a strong likelihood of re-injury. The Board noted that this finding would in no way prevent Giannini from attempting to demonstrate in compliance that Leal was in fact disabled or otherwise unavailable for work during any period prior to June 30, 1993.

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board by Manual Leal, the General Counsel of the ALRB issued a complaint which alleged that we, Giannini Packing Corporation, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to rehire Manuel Leal between September 9, 1991 and June 30, 1993.

The Board has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is the law that gives you and all other farm workers in California these rights:

1. To organize themselves;

2. To form, join or help a labor organization or bargaining representative;

3. To vote in a secret ballot election to decide whether you want a union to represent you and to end such representation;

4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;

5. To act together with other workers to help and protect one another; and

6. To decide not to do any of these things.

WE WILL NOT do anything in the future that forces you to do or stops you from doing any of the things listed above.

.WE WILL NOT refuse to hire or otherwise discriminate against any agricultural employee because he or she has engaged in union activities or acted together with other employees to protest the terms and conditions of employment, or because he or she has filed a charge with the Agricultural Labor Relations Board.

WE WILL reimburse Manuel Leal with interest for any loss in pay or other economic losses he suffered because we refused to rehire him.

DATED: GIANNINI PACKING CORPORATION

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about the Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, California 93291. The telephone number is (209) 627-0985.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the state of California.

DO HOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: GI ANNINI PACKING CORPOR-, ATION, a California Corporation, *Respondent,* and MANTTBL ANTONIO CARRANCO LEAL, an Individual, *Charging Party.*	)	Case No. 91-CB-62-VI

Appearances:

Michael J. Hogan
Littler, Mendelson, Fastiff,
Tichy & Mathiason
Fresno, California
for the Respondent

Stephanie Bullock
Visalia Regional Office
Visalia, California
for the General Counsel

September 15, 1993

DECISION OF TEE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAH: This case was heard by me in Visalia, California, on June 29 and 30, 1993.

It is based on a complaint, issued February 10, 1993, which alleged that the Respondent violated the Act by refusing to rehire Manuel Leal on and after September 9, 1991 because he had engaged in activity protected by §1152 of the Agricultural Labor Relations Act and because he had assisted and supported the United Farm Workers of America, AFL-CIO. It further alleged that, in taking such action, the Respondent was discriminating against Leal because of a previously filed unfair labor practice charge.

The Respondent answered denying that it had discriminated against Leal because of his support for the UFW, his protected activities, or his utilization of Board processes, and contending that Leal was not hired because his medical condition made it impossible for him to perform the work which was available.

The Charging Party did not intervene. Because the case met the requirements of §20278(e) of the Regulations as appropriate for disposition by oral argument without briefing, the General Counsel and the Respondent both presented oral argument at the close of hearing.

Upon the entire record,[1] including my observation of the witnesses, and after consideration of the arguments presented, I make the following findings of fact and conclusions of law:

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[1]The record fails to indicate the admission of General Counsel Exhibits Nos. 1 through 22. This is an error; all of those exhibits were admitted on June 29, 1993. The record is hereby corrected to reflect their admission.

FINDINGS OF FACT

I .

Giannini Packing Company is a California Corporation and an agricultural employer within the meaning of §1140.4 (c) of the Act. Nori Ogata and Son, Inc. is a California Corporation and a farm labor contractor as defined in §§ 1140.4 (c) and 1682 of the California Labor Code. Manuel Leal is an agricultural employee within the meaning of §1140.4(b). The United Farm workers of America is a labor organization as defined in §1140.4(f).

II.

Respondent's Operation. Respondent has its principal place of business in Dinuba, where it is engaged in growing, harvesting and picking nectarines and plums. It utilizes the services of labor contractor Nori Ogata and Son, Inc. to prune and thin, and pick its trees. For the past 15 years, Ogata and Son has been operated by Lyle Ogata. Pruning at Giannini usually begins in December and continues into January or February, thinning normally begins in April and lasts four to six weeks, and the harvest immediately follows and continues until August or September. (I:4) Ogata utilizes two crews to accomplish this work; the foreman of the crew in which Leal worked was Candelario Flores, and the foreman of the other crew was Joel Peregrine.

The Charging Party's Work History. Manuel Leal, a farmworker since 1963, began working for Ogata at Giannini during the pruning season which began on December 30, 1988, and continued working until the end of the season on February 19, 1989. In

April 1989, he was hired for thinning, but on April 25th a ladder on which he was working gave way and he had to grab onto a tree limb; the resulting injury to his neck, shoulders, wrists and leg made it impossible for him to continue working and led to the filing of a worker's Compensation claim.

Leal remained unemployed until November 23, 1990 when, after receiving medical clearance, he the returned to work with Ogata for the pruning season at Giannini. A few weeks later, he suffered nose bleeding and other symptoms which he believed to have been caused by the presence of pesticides in the area where he was working. He continued working, but the incident led to a second Worker's Compensation claim. Two weeks after that, on December 19, 1990, while he was walking through a muddy field with a ladder on his shoulder, he slipped an fell. He was injured and unable to work until December 26th, when he returned for the remainder pruning season which lasted until January 9, 1991. A third Worker's Compensation claim was filed for the sprain and/or strain which he suffered in the thoracic-lumbar region as a result of the fall.

None of his three Compensation claims has as yet been fully resolved; he did, however, receive Temporary Disability payments between December 19, 1990 and March 7, 1991 for his slip and fall injury. In early April 1991, he was cleared to return to work by his chiropractor, Dr. Daniel Molina.

Although he applied for work with Ogata at Giannini in April, he was not rehired. He thereupon filed an unfair labor practice

charge (91-CE-24-VT) against the Respondent. After investigation, it was dismissed by the Visalia Regional Director, and the General Counsel affirmed the dismissal on appeal.

The Charging Party's Union and Protected Activity. Throughout the period he worked for Ogata, Leal was an outspoken advocate of workers rights and unionization. In November 1990, he complained to supervision that Giannini had improperly charged a fellow employee for pruning shears. Around the same time, he photographed the toilet facilities provided by the Respondent and filed a compliant with the Labor Commissioner regarding their condition. In early December 1990, he filed a complaint with the Tulare County Agricultural Commissioner alleging the improper use of pesticides by Giannini.[2] in January 1991, he prepared a four page petition listing a number of work related grievances against Giannini and its labor contractors, and asking the Agricultural Labor Relations Board to conduct an election to allow the United Farm workers to represent employees at Giannini and obtain a contract which would rectify the situation. (G.C. Ex. 2.) He circulated the petition among his co-workers and obtained the signatures from two of them, Joe and Paul Rivera. He presented it to the ALRB, but no Notice to Take Access or formal Election Petition was ever filed. Six months later, in June 1991, he sent a copy of his petition to Giannini. Finally, Ogata was aware that, throughout his employment, Leal wore a belt buckle bearing

[2]He had filed a similar complaint in May 1989.

the UFW's insignia and name.

The Respondent does not contest its awareness of Leal's activities and sympathies.

Leal's Attempts to be Retired. While there had been an earlier, unsuccessful attempt to obtain work,[3] the Complaint confines itself to the attempts which began on September 9, 1991 and continued through 1992 and into 1993.

Employees who have had prior work experience with Ogata are contacted by their foreman shortly before the beginning of the season and told when work will begin. (I:23-24.)[4] However, when the harvest began, Foreman Flores did not contact Leal.[5] Instead, on September 9, 1991, as the harvest was concluding, Leal went to

[3]Leal's April 1991 rejection was the subject of the earlier unfair labor practice charge which was dismissed by the General Counsel. (*Supra,* pp. 4-5.)

[4]Ogata's testimony on the hiring process does not explain how crews are established at the beginning of a season, only how he deals with individual calls from applicants (11:59.) Using foremen to obtain crews, as described by Leal, is consistent with normal agricultural practice. I therefore accept his description of the process.

[5]Although Leal had prior work experience with Ogata at Giannini, the General Counsel's determination that no violation occurred when he was denied employment in April and the fact that lie had not previously worked during the harvest could have led to Flores to believe, quite innocently, that Leal was no longer a candidate for employment. Or it may be that, since the harvest immediately follows thinning, the thinning crews hired in April continue on without being reconstituted. For those reasons, I do not believe Ogata to be at fault for not contacting Leal to work in he 1991 harvest. However, once Leal made it clear, as he did in September, that he wished to return to work, the failure to contact him in subsequent seasons becomes much more difficult to explain.

Ogata's office and asked for work. Ogata told him that none was available at the time.[6] Leal left, saying, "I'll see you when you have work." (G.C. Ex 5.)

At the hearing, Ogata admitted that immediately thereafter a new employee was hired, but he claimed that the hiring was inadvertent:

> "...a fellow that was looking for work happened to go out to the field with one of his friends that was working in the crew that Candelario Flores had, and without my knowledge Candelario just went ahead and put him on since he had showed up." (II:37.)[7]

In October, shortly after the harvest ended, Leal contacted both Ogata and Giannini and provided each of them with a Jobs Tax Credit Certification. (G.C. Ex. 6.) Leal testified that he again asked for work. Because the form was obviously intended to serve as an inducement to hire him, I discredit Ogata' s testimony that Leal simply presented the form without requesting employment. Leal further testified that he believed that he again contacted Ogata or Flores in November 1991.

Because Ogata was now well aware of Leal's desire to return to work at Giannini, one would have expected him to follow normal practice and have Flores contact him about working in the pruning

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[6] It should be noted that neither Ogata nor Leal claimed that Leal's medical condition was at all involved in the September 1991 refusal to rehire. (I:30; II:36-37; G.C. Ex 5.)

[7] At hearing, the General Counsel argued that, by stipulating that work was available when Leal applied (I: 4), the Respondent was precluded from offering an innocent explanation for its failure to hire him. I ruled that the stipulation did not preclude such evidence. (II:41)

season which began in December 1991, but Floras did not.

In March, 1992, just: prior to thinning, Leal made several telephone calls to Foreman Joel Peregrine. After learning that Peregrine was probably not going to continue on as a foreman at Ogata, Leal believes he called Flores to ask for work.

At this point, the question of his medical condition appears to have surfaced (II:55); and, on April 6, 1992, Leal provided Flores with a medical report from Dr. Molina, along with a copy of a medical release from 1991 indicating he could return to work. (G.C. Ex. 10.)[8] Two days later, on April 8th, Ogata hired him to shovel grape vines for another employer, but he was let go after one day when the grower complained that his work was poor. (I:90; 11:54.) On April 12th, Leal again called Ogata asking for work in thinning but was told there was nothing available. (I:47.)

On August 16, 1992, Leal once again telephoned both Ogata and Flores asking for work in the harvest and was told that none was available.[9] in October, Leal wrote directly to Giannini asking for work. (G.C. Ex. 9.) The Company replied that it did not do the hiring and that Ogata had completed his work for the season. (Resp. Ex. 2.)

Leal was not contacted to work in the pruning season which

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[8]While there is some doubt as to whether G.C. Ex. 10 was ever received, I have no reason to doubt the truth of events described in it.

[9]While one of those calls was so short that it may have only been a message left on an answering machine, the other is longer and supports Leal's testimony that he asked and was rejected for employment. (G.C. Ex. 8.)

began in December 1992.[10]

Finally, beginning in March, 1993, when the 1992 thinning season began and extending into June when the harvest was underway, there were a series of telephone calls and letters, both to Ogata and to Giannini, asking for work during the thinning season. On March 25th, Ogata responded in writing, saying that he would not be rehired:

> "Until I receive written permission from your doctor permitting you to work and perform the normal duties of an agricultural worker." (G.C. Ex 14.)

On March 26th, Leal replied, enclosing the portions the report prepared by the Company's Doctor [Donald Hagar. M.D.] which indicate that he was able to do his regular work. (G.C. Ex. 13.) Two weeks later, he followed this up with a letter reiterating Dr. Hagar's findings and indicating that the medical release from Dr. Molina which he had provided to Ogata in April 1991 was still in effect. (G.C. Ex. 15.) Nothing came of this, and Leal was not hired for thinning or picking in 1993.

Leal's Medical Condition during the Period He Was Seeking Rehire. Because the Respondent's defense is, in large part, based on its claim that Leal's medical condition justified its refusal to hire him, it is appropriate here to examine the medical reports which had been prepared on his condition and ask to what extent Ogata was aware of those reports and to what extent

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[10]Leal found other work during this period: from December 22, 1992 until January 21, 1993 he pruned fruit trees for a labor contractor named Ballentine; and, in beginning April 19, 1993, he was rehired by Ballentine for the thinning season.

he relied on them.

Four medical reports were prepared in connection with the injuries Leal suffered in 1989 and 1990, two for the Attorneys representing Leal [April 18, 1990 by Albert Gomez, M.D. (Resp. Ex. 12) and August 22, 1990 by Charles Heller, M.D. (Resp. Ex. 13)1; one by Ogata's Workers' Compensation Carrier [November 13, 1991 by Kevin Hanley, M.D. (Resp. Ex. 14)] ; and one by mutual agreement between his attorneys and the carrier [January 6, 1993 by Donald Hager, M.D. (Resp. Ex. 15)]. In addition, Leal's Chiropractor appears to have prepared a report [see G.C. Ex. 10] and to have issued him a medical clearance to return to work in April 1991 [see G.C. Exs. 4 & 10].

Both reports from his own doctors (Resp. Exs. 12 & 13) were prepared prior to September 9, 1991, the date on which the unlawful refusals to rehire are alleged to have begun. The first estimates his disability at 10% to 15% and states:

> The factors that limit the patient's ability to return to work are his subjective feelings of pain with moderate work. The patient is a candidate for training in some time of manuel [sic] labor job which would not require him to be climbing, reaching, pulling or pushing. (Resp. Ex. 12, p. 4.)

The second concludes that:

> Mr Leal, due to his permanent disability relative to right and left shoulder and upper back, is unable to perform his usual and customary duties as a trimmer. (Resp. Ex. 13, p. 5.)

However, in April 1991 — subsequent to those reports — Leal had provided Ogata with release from his own doctor, Daniel Molina, D.C., authorizing him to return to work. (G.C. Ex. 4.)

On August 25, 1991, shortly before the alleged refusal to rehire, Ogata met with representatives from his Workers Compensation carrier to review Leal's claims. At that point, the Carrier appears to have had available to it not only the reports from Leal's physicians but also the preliminary findings of its own doctor, Kevin Hanley, M.D. (See Resp. Ex. 8, "Claims Management Strategy and Issues"). Hanley's report, which was not formally issued until several months later, concludes that:

> This gentleman is perfectly capable of continuing to work at farm labor.. . .1 would preclude him from prolonged and excessive amounts of kneeling and squatting only. He can continue to do his occupation, as stated above. {Resp. Ex. 14, pp. 3-4.)

Ogata was not shown the reports; instead, he was provided with three summaries, based on them, and dealing with each of Leal's three claims. (Resp. Exs. 8, 9 & 10.)

Because Ogata did not raise the medical issue with Leal on September 9th when he declined to hire him but intimated that he would keep him in mind for future openings, I can only conclude that Ogata did not believe that the injuries Leal had suffered were serious enough to render him unfit for employment. (Supra, p. 7.) And the same situation would have obtained in the Fall and Winter of 1991 when Leal sought work for the pruning season. (Supra, p. 8.)

In April 1992, when Leal applied for work thinning, the medical issue did surface (Supra, p. 8.); however, Ogata appears to have been satisfied by Leal's response (see G.C. Ex. 10) because he hired him to shovel grape vines at another employer's

operation.[11]

No additional medical information became available during the remainder of 1992; however, in October of that year, shortly after Leal wrote directly to Giannini asking for work, Ogata discussed the matter with his claims representative and obtained a letter, dated October 29th. (Resp. Ex. 7.)

The letter is odd. It purports to "update" Ogata on the status of Leal's claims, but it contains little or no information subsequent to the date of the previous meeting in August. More important, when its author, Wayne Aoki, was asked: "Have you at any time advised Mr. Ogata that he cannot put Mr. Leal to work?", he answered:

> No, I have not. Basically when you start with State Fund that is one issue that we do not get into. We handle the workman's comp aspect. As far as hiring or firing practices, when that is brought about or that question arises to an adjuster, we basically state that is something we do not get into. You should consult a labor attorney with regard to that matter. (II:108-109.)

Yet Aoki's letter devotes an entire paragraph [¶2] to that very issue, and does so without bothering to mention the conclusion of State Fund's own physician that Leal could "continue to do his occupation" (Resp. Ex. 14), whose report, according to Aoki,

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[11] Ogata testified that he hired Leal for this position because it did not involve the kind of work which the doctor had forbidden. I cannot accept his explanation because his carrier's own doctor had specifically warned against "prolonged and excessive amounts of kneeling and squatting" (Resp. Ex. 14.), and those kinds of movement are much more likely to occur in shoveling grape vines than in pruning, thinning and picking fruit trees.

"carr ties'] the most significance" (II:102)[12]; instead, Aoki emphasizes the finding reached by the applicant's physician that:

> Based on the work he performs, [Leal] would not be qualified to perform [shoulder or overhead] work.

Given all of this, it is difficult to avoid the conclusion that the letter was solicited by Ogata to shore up the defense in the pending unfair labor practice.

Not unexpectedly, the attorneys for the Respondent wrote to the ALRB Regional Office a short while later, reversing their previous position on the failure to rehire and claiming for the first time it was due to Leal's medical condition. (Compare G.C. Ex. 21 with G.C. Ex 20.)

Finally, on January 6, 1993, Donald Hagar, M.D., the physician mutually agreed upon by the carrier and the applicant's attorney, issued his Agreed Medical Examination. (Resp. Ex. 15.) He found that Leal's condition had become permanent and stationary (p. 11), that "[t]he disability relating to the lumbar spine precludes very heavy lifting" (p. 12), that "[t]he disability of knees and lower extremities precludes repetitive squatting, running, and jumping" (p. 13), and concluded that if he "is required to repetitively lift 80 1b, I would consider him a medically qualified injured worker. Otherwise, I consider him able to do his regular work" (p. 13). As a result, Ogata's carrier offered to settle the matter by agreeing that Leal is "qualified

[12]At least, up until the point when a report is prepared by the mutually agreed upon physician.

injured worker" eligible for vocational rehabilitation services with a permanent disability of' 16%, which would here equal to $7,210. (Resp. Ex. 16; II:84-85; 96-97.) The offer has yet to be accepted.

ANALYSIS. FURTHER FINDINGS. ASP CONCLUSIONS OF LAW

I.

Labor Code §1153(a) makes it an unfair labor practice for an agricultural employer to "interfere with, restrain, or coerce" agricultural employees in the exercise of their right "to engage in...concerted activities for the purpose of...mutual aid or protection", and Labor Code §1153 (c) makes it an unfair labor practice for an agricultural employer "to discriminate in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." In order to establish a prima facie case of unlawful interference or discrimination, the General Counsel must ordinarily prove: (l) that the worker engaged in the protected activity, (2) that the employer knew it, and (3) that a causal relationship or connection exists between the protected activity and the adverse treatment suffered by the worker. (Jackson & Perkins Rose Co. (1979) 5 ALRB No. 20.). The elements of a §1153 (d) violation are identical to those of §1153 (a) and (c), except that the causal connection must be shown to exist between the adverse action and the discriminatee's involvement in Board Processes. (The Garin Company (1986) 12 ALRB No. 14; *McCarthy*

Farming Company. Inc. (1982) 8 ALRB No. 78.)

where the adverse action takes the form of a failure or refusal to rehire, there is a fourth requirement: The General Counsel must prove that the worker made a proper application for work at a time when it was available (*Verde Produce Company* (1982) 8 ALRB NO. 27; *Nishi Greenhouse* (1981) 7 ALRB No. 18.) However, in situations where the employer has a practice or policy of contacting former employees to offer them re-employment, this requirement may be satisfied by proof of the employer's failure to do so at a time when work was available. (*Kyutoku Nursery. Inc.* (1982) 8 ALRB No. 98; *Mission Packing Company* (1982) 8 ALRB No. 47.

Here, there is no question that Leal engaged in activities protected by §§ 1153 (a), (c) and (d), or that the employer was aware of his involvement. (Supra, pp. 5-6.)[13] That the activities he undertook and the complaints he filed all came to nothing is irrelevant; the Act protects the right of employees to engage in protected and concerted activity, regardless of the merits of their complaints or the success of their activities.

That leaves the third requirement – the existence of a causal

[13]In making this determination, I do not, however, include his complaints about the failure to provide adequate toilet facilities or improper use of pesticides. It was not established that those activities were concerted in nature. As the law presently stands, complaints about individual safety or health conditions, standing alone, are not protected by § 1153 (a) of the Act. (Meyers Industries (1984) 268 NLRB 493, rev'd, 755 Fed.2d 941, decision on remand, 281 NLRB 882 (1986), aff'd, 835 Fed.2d 1481, cert. denied, 487 U.S. 1205 (1988).)

connection or nexus between the protected activity and the discharge. Several factors suggest such a connection. First of all, there is the failure of Ogata to offer any coherent explanation, save inadvertence, for not hiring Leal in September 1991. (Supra, p. 7.)[14] Then, there is his denial, in the face of clear evidence to the contrary, that Leal asked him for work in October and November 1991 (Supra, p. 7), coupled with the failure, once he knew that Leal wanted work, to follow normal practice and have Flores contact him for the 1991 pruning season,[15] (*Supra, pp. 7-8.*)

Again, in March and April 1992, he made no attempt to see to it that Leal was contacted for work during the thinning season or the ensuing harvest. Instead, Ogata now claims that Leal was medically unfit to perform such work. But this leaves unexplained why he accepted the medical information provided by Leal and hired him to work for another employer, performing work which, according to Doctor retained by his own carrier, posed a greater medical risk than thinning and picking. (Supra, pp. 11-12 & fn. 11.) The more credible explanation is that Giannini made it known to Ogata that it did not want Leal back because of the trouble he had caused, leaving Ogata – who had just received a medical report and

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[14]Had this case only involved the events of September 9th, I might have been inclined to accept Ogata's claim of inadvertence (II:37); however, when that testimony in considered in the context of his subsequent behavior, as described below, there is every reason to disbelieve his explanation.

[15]Or – to the extent the thinning crews were reconstituted and additional members hired – for the 1991 harvest as well.

release from Leal (Supra, p. 8) — with no alternative but to employ him elsewhere. Furthermore, Ogata's present claim that employment was denied for medical reasons is at odds with the explanation given to the ALRB at the time by Respondent' s attorneys. (G.C. Ex. 20.)

Ogata now seeks to justify his failure to contact or hire Leal for the 1992 pruning season by citing the letter he received in October of that year from Wayne Aoki, but its selective use of medical information and the manner in which it was solicited and prepared (Supra, pp. 12-13.) lead me to conclude that it was contrived to conceal Ogata's true motive for refusing Leal work. The same is true of the shifting reasons offered by Respondent's counsel. (Compare G.C. Ex. 21 with G.C. Ex 20.)

Failing to adhere to established reemployment practices, resorting to contrived and false reasons, and giving shifting and inconsistent explanations all constitute strong circumstantial evidence of the existence of an undisclosed and forbidden motive. (The Gar in Company (1986) 12 ALRB No. 14, pp. 4-5 (false reasons); Baker Brothers (1986) 12 ALRB No. 17, ALJD, pp. 24-25 (false reasons); Ranch No. 1. inc. (1986) 12 ALRB No. 21 (shifting-reasons) ; Paul W. Bertuccio (1984) 10 ALRB No. 10 (deviating-from established practice) ; s. Kuramira. inc. (1977) 3 ALRB No. 49 (shifting reasons) ; A & Z Portion Meats, inc. (1978) 238 NLRB 643; First National Bank of Pueblo (1979) 240 NLRB 184; Dyer v. MacDougall (2nd Cir. 1952) 201 F.2d 265, 269.) I therefore conclude that the reasons offered by Ogata for failing to reemploy

Leal from September 1991 through December 1992 were pretextural and that the real reasons why he was not employed were his union and protected activities and his invocation of Board processes.

The additional requirement in refusal to rehire cases that a position have been available is satisfied by the evidence that Ogata had a policy of contacting former employees to offer them reemployment (supra, p. 6) and by the stipulation entered into by Respondent "that during the periods of time when requests for employment were made by Mr. Leal to Giannini or Mr. Ogata, work was available then or shortly thereafter." (I:4.)

On January 6, 1993, the Agreed Medical Examination by Dr. Donald L. Hagar issued. In his report, Dr. Hagar concluded that "[t]he disability of knees and lower extremities precludes repetitive squatting...." (Resp Ex. 15, p. 13.) Both Hagar's Report and the earlier report prepared for Leal's attorneys by Dr. Heller indicate that his job required both kneeling and squatting. (Resp. Ex. 13, p. l; Resp. Ex. 15, p. 1.)[16] As a result of Dr. Hagar's findings, Ogata's carrier modified its position and conceded that Leal to be a qualified injured worker with a permanent, partial disability of 16%. (Resp. Ex. 16; II:84-85; 96-97.)

Those findings and the concessions made because of them are

[16]While the exact amount of kneeling and squatting is uncertain — Hagar calls it "occasional", while Heller makes no such qualification — the fact that both Doctors mention it indicates that it occurs with sufficient regularity to be of legitimate concern.

sufficient to convince me that, beginning January 6, 1993, Ogata had a legitimate and good faith basis for doubting Leal's ability to perform the work available at Giannini.[17] I therefore conclude that the earlier illegal conduct ceased on that date.[18]

The actions which have been found to have violated the Act were taken by Ogata; however, Giannini was not a disinterested bystander. First of all, Leal's union and protected activity was directed at Giannini as well as at its labor contractor. Second, Giannini was well aware of Leal's situation but made no effort to restrain Ogata. Finally, the most credible explanation for Ogata's behavior in putting Leal to work shoveling vines for another employer is pressure coming from Giannini. (Supra, pp. 16-17.) For all of those reasons, I conclude that, under the expansive agency standard enunciated by the California Supreme Court in Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 322, the actions of Ogata are imputable to the Respondent, and it is therefore responsible for the violations of §§ 1153 (a), (c) and (d) of the Act which occurred during the period from September 9, 1991 to January 6, 1993.

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[17]Such a finding is consistent with the standard applied in cases arising under Labor Code §132a. (See Barns v. WCAB (1989) 216 Cal.App.3d 524, and especially the cases cited at 534-35.) While those decisions are not binding on the ALRB, they are entitled to serious consideration.

[18]Because the Doctors' Reports were admitted, not for the truth of the matter asserted, but only as circumstantial evidence of Ogata's state of mind, I am unable to invoke the normal backpay rule terminating the reinstatement and backpay rights of a discriminatee upon proof of disability. (See Abatti Farms, Inc. (1983) 9 ALRB No. 59, p. 6.)

REMEDY

Having found that Respondent violated §§ 1153 (a), (c) and (d) of the Act by unlawfully failing to reemploy Manuel Leal, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Because I have concluded that the unlawful activity ceased on January 6, 1993, when there was a legitimate and good faith basis for doubting Leal's ability to perform the work available at Giannini, I have not ordered that Leal be reinstated, and I have terminated his back pay as of that date.[19]

In fashioning the affirmative relief delineated in the following order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management. Inc. (1977) 3 ALRB No. 14.

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent Giannini

[19]Additionally, there is evidence that Leal began working for another labor contractor on December 22, 1992. His earnings from that employment must, of course, be taken into account in determining the net backpay to which he is entitled.

Packing Corporation, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by §1152 of the Act.

(b) Discouraging membership of any of employee in the United Farm Workers of America, AFL-CIO, or any other labor organization, by unlawfully refusing to hire or rehire, or in any other manner discriminating against, any employee in regard to the hire or tenure of employment or any term or condition of employment, except as authorized by §1153 (c) of the Act.

(c) Refusing to hire or rehire, or otherwise discriminating against, any agricultural employee because he or she has filed charges with the Agricultural Labor Relations Board.

(d) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Reimburse Manuel Leal for all losses of pay and other economic losses he has suffered as a result of being refused employment between September 9, 1991 and January 6, 1993, the amounts to be computed in accordance with established Board

precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms. (1988) 14 ALRB No. 5.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the exact backpay periods and the amounts of back pay and interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purpose set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from September l, 1991 to December 31, 1992.

(e) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and places (s) of posting to be determined by the Regional Director, f and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have

already begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end, in addition to informing the Regional Director of the anticipated dates of the next peak season.

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and places (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or his rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at the reading and quest ion-and-answer period.

(h) Notify the Regional Director in writing, with 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: September 15, 1993

JAMES WOLPMAN
Chief Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board by Manuel Leal, the General Counsel of the ALRB issued a complaint which alleged that we, Giannini Packing Corporation, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to rehire Manuel Leal between September 9, 1991 to January 6, 1993. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

We also want you to know that the Agricultural Labor Relations Act is a law that give you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, and help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do or stops you from doing any of the things listed above.

WE WILL NOT refuse to hire or otherwise discriminate against any agricultural employee because he or she has engaged in union activities or acted together with other employees to protest the terms and conditions of employment, or because he or she has filed a charge with the Agricultural Labor Relations Board..

WE WILL reimburse Manuel Leal with interest for any loss in pay or other economic losses he suffered because we refused to rehire him.

DATED:

GIANNINI PACKING CORPORATION,

By: _____
Representative Title

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural labor Relations Board.' One office is located at 711 N. Court Street, Suite H, Visalia, California 93291. The telephone number is (209) 627-0985.

DO NOT REMOVE OR MULTILATE