

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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|---------------------------|---|----------------------------|
| PICTSWEET MUSHROOM FARMS, | ) | Case No. 01-CE-620-EC (OX) |
|                           | ) |                            |
| Respondent,               | ) | 28 ALRB No. 4              |
|                           | ) |                            |
| and                       | ) | (June 4, 2002)             |
|                           | ) |                            |
| UNITED FARM WORKERS OF    | ) |                            |
| AMERICA, AFL-CIO,         | ) |                            |
|                           | ) |                            |
| Charging Party.           | ) |                            |
| _____                     | ) |                            |

DECISION AND ORDER

On January 10, 2002, Administrative Law Judge (ALJ) Douglas Gallop issued the attached Recommended Decision in this matter. In his decision, the ALJ found that Pictsweet Mushroom Farms (Respondent, Pictsweet or Employer) had violated section 1153 (a) and (c) of the Agricultural Labor Relations Act (ALRA or Act) by suspending and subsequently discharging employee Fidel Andrade Ferndandez (Andrade) because of his union and other protected concerted activities. Thereafter, Respondent timely filed exceptions to the Decision along with a supporting brief, and General Counsel filed an answering brief.

The Agricultural Labor Relations Board (ALRB or 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 conclusions, unless otherwise noted in this Decision, and to adopt his proposed Order as modified.

## **BACKGROUND**

The operative events resulting in Andrade's discharge occurred on May 27, 2001, when Andrade and his Foreman, Augustine Villanueva Navarro (Villanueva), became involved in a verbal confrontation with each other inside the growing facility. During the interchange, Andrade made physical contact with Villanueva's hand or forearm. Andrade was suspended for three days following the incident, and was subsequently discharged on May 31, 2001, for "physical aggression" against a supervisor.<sup>1</sup>

The United Farm Workers of America, AFL-CIO (UFW) became the certified bargaining representative of the employees of a previous owner of the business in 1975. The current owner, United Foods, Inc., took over Pictsweet in 1987. The parties stipulated at hearing that the UFW and Respondent have never reached agreement for a contract. There have been multiple attempts to negotiate a contract with Respondent, the most recent drive beginning at the end of 1999, as well as several decertification movements. Among current Pictsweet employees, there are those who clearly support the Union, as well as a group known as the "Contras," who disfavor the Union.

Andrade, who up until his discharge had worked for Pictsweet for nine years as a picker, testified that he began supporting the Union in January, 2000. Andrade

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<sup>1</sup> Prior to the May 27 incident, Andrade has no disciplinary warnings for improper behavior toward Villanueva or any other supervisor.

was named as a crew representative in July, 2000, in a letter from the Union to Pictsweet General Manager Ruben Franco (Franco). Andrade wore Union T-shirts and buttons to work, attended seven or eight negotiation meetings (but was not a negotiator), and spoke to his co-workers about supporting the Union. Respondent admitted knowing that Andrade supported the Union, and Union movement leader Jesus Torres Zambrano (Torres) testified that Andrade was his "right hand."

From mid-2000 on there was an increasing amount of friction among employees with respect to the Union. In August, 2000, the Union announced a boycott of Pictsweet's products. There is conflicting testimony as to whether the boycott was actually put into effect at this time or was merely sanctioned; however, Pictsweet did shortly lose two of its important clients, resulting in substantial financial loss. A drive to decertify the UFW was initiated around the same time.

The record contains testimony about several events during this tense period at Pictsweet that involved Andrade and Villanueva. In September, 2000, Andrade and some other workers were discussing the boycott, and there was some debate as to whether it was in effect yet. Foreman Villanueva intervened in the conversation and expressed some of his own anti-Union sentiments. Andrade (who is also Villanueva's cousin) took Villanueva aside later that day, and warned him that as a Foreman, he shouldn't get involved in such discussion because he risked having charges filed against him by the Union.

Tensions with regard to the Union continued to run high throughout the Fall of 2000. In mid- December 2000, General Manager Franco sent out a letter to employees

reminding them that the decision to participate in the decertification procedure was the employees' alone to make. The letter also stated among other things that: "the UFW is doing everything it can to destroy your jobs and your livelihood... We are fighting every day to save business and get new customers. At the same time, the UFW is doing everything it can to put this farm out of business."<sup>2</sup>

Shortly after the letter was circulated, the employees learned they wouldn't be getting their profit sharing bonuses for December.<sup>3</sup> On December 22, 2000, there was an incident involving two anti-Union employees, Gerardo Mendoza (Mendoza), and Enrique Ambriz (Ambriz) and Jesus Torres, in which the "Contras" blamed Torres and the UFW for the cancellation of the bonus. Andrade, who witnessed the exchange, testified that as Mendoza was going back to his work area, he heard Mendoza say that if Torres were to be killed, it would put an end to things. Ambriz said in response to Mendoza,<sup>4</sup> "There's a saying in Mexico. Get a gun and shoot a couple and they will respect you." Andrade told Torres what he'd overheard, and Torres contacted the Ventura County Sheriff's Department. The Sheriff took statements from those involved, with Human Resources Manager Gilbert Olmos present and acting as the interpreter.

General Manager Franco and Human Resources Manager Olmos later met with those involved in the December 22 incident. Mendoza and Ambriz indicated they had been joking, while Andrade testified that he understood them to be very serious.

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<sup>2</sup> The General Counsel introduced into evidence a series of letters from Franco to Pictsweet employees from the Fall of 2000 through July 2001 that discussed the UFW boycott and the decertification drive.

<sup>3</sup> The ALJ referred to this as the "Christmas bonus," and the record indicates that several employees also referred to a "Christmas bonus." Respondent's employee handbook indicates that it employs a profit sharing plan with bonuses distributed quarterly during the third weeks of March, June, September and December.

<sup>4</sup> Torres was out of earshot at this point.

Although there was no discipline or conclusion of wrongdoing following this incident, the employees in question were told not to joke about such matters, and in January, 2001, a written policy against violence in the workplace was drafted, posted on the company bulletin board, and stapled to the paychecks of those involved in the incident.<sup>5</sup>

Villanueva testified that he told the men not to talk about politics at work so much since their conversations kept ending in arguments.

In mid-March, 2001, there were two newspaper articles published in the Ventura Star about a compost fire on Pictsweet's premises that smoldered for over a week before it was extinguished. UFW organizer Jessica Archiniega (Archiniega), Torres and Andrade were each quoted in the articles. Andrade, who has asthma, complained of having difficulty breathing due to the smoke from the fire. Andrade testified that a few days after the article was published, Samuel Monroy (Monroy), the head supervisor of the picking department, called him into his office, looked "pretty upset," and told Andrade "there was no need to make us look bad." Monroy testified that he had read the articles, but denied speaking to Andrade about them.<sup>6</sup>

There were two other incidents involving Andrade before the event in May, 2001 that resulted in his discharge. The first was in March, 2001, when Foreman Villanueva accused Torres (who worked in the same crew as Andrade as a picker) and Andrade of intentionally mixing second-class mushrooms with premium mushrooms in

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<sup>5</sup> The Respondent's "Prevention of Workplace Violence Policy" was admitted into evidence as Respondent's Exhibit 8. The policy states that prohibited conduct includes "threats of any kind, physically aggressive or violent behavior, attempts to instill fear into others, belligerent speech, excessive arguing or swearing, stalking, harassing or threatening telephone calls or written communications." The policy calls for appropriate discipline for any violations including verbal or written warnings, reassignment, probation, suspension or discharge.

<sup>6</sup> The ALJ found that for purposes of the decision it was not necessary to resolve this conflict in testimony.

their baskets, which is against company rules unless a specific order is given to do so. Villanueva took Andrade and Torres to see Supervisor Monroy to complain, but Andrade and Torres denied mixing mushrooms, and as Villanueva hadn't brought any proof, Monroy ended the meeting.

Villanueva testified that after the meeting with Monroy, Andrade admitted to him he was "faking it," and that he and Torres were producing "evidence" for the Union. Andrade denied saying this, however, Villanueva apparently reported Andrade's comments to Monroy. Andrade testified that at a subsequent meeting with Monroy, he angrily accused Andrade and Torres of doing "bad things" to Villanueva and intentionally making him look bad. When Andrade and Torres denied this, Monroy also said sarcastically, "you [union supporters] are never wrong. I would like to know when you are ever going to be wrong."<sup>7</sup>

The second incident was in early April, 2001. Foreman Balthazar Lopez (Lopez), who was acting as foreman of Andrade's crew in Villanueva's absence, gave Andrade a written warning for failure to hook up his safety belt while harvesting. Andrade had been verbally warned for the same thing six months earlier, and there was testimony that other pickers often forgot to fasten their belts to the safety line. Because the general procedure was for the foremen to verbally warn or remind pickers to hook onto the line, Andrade protested the written warning to Monroy as excessive. Monroy,

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<sup>7</sup> The ALJ found that for purposes of the decision it was not necessary to resolve the conflict in testimony between Andrade and Villanueva, however, he credited Andrade's testimony with respect to Monroy's subsequent comments, as Monroy did not deny making them.

however, upheld the discipline. Andrade testified that Monroy and Lopez laughed at him and mocked him when they gave him the warning.<sup>8</sup>

### **The May 27, 2001 Incidents Leading to Andrade's Discharge**

On the morning of May 27, Foreman Villanueva pointed Torres to a remaining section of mushrooms that needed to be picked, however, as Torres started moving in the direction of the bin, another employee indicated that he had already claimed that area. Villanueva again told Torres "Go, I want you to pick in that area," and Torres responded that someone else was going to pick it. Villanueva repeated "I'm telling you that you should do it." Torres testified that Villanueva spoke to him "strongly." At this point, Andrade intervened, and accused Villanueva of acting on a whim and being "totally capricious," as another worker was already picking the area. Villanueva responded that he was just doing his job, and told Andrade: "you don't get involved in this." Andrade testified that he also told Villanueva he was giving Torres a hard time because of his Union activities. Torres, however, did not corroborate Andrade's testimony on this point.

Villanueva testified that Andrade proceeded to tell him "Go away. You're bothering me." Villanueva pointed his finger at Andrade's face and told him "watch your words." Reynaldo Arevalo Garcia (Arevalo), another employee who witnessed the event, testified that Villanueva was about two to three feet away from Andrade when he saw him point at Andrade. Arevalo also testified Villanueva spoke in a loud, angry voice as he pointed at Andrade.

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<sup>8</sup> The ALJ credited Andrade's testimony about this event as Monroy didn't deny it.

Later that same day, Villanueva was walking along the corridor between the mushroom beds, and put two mushrooms that had been left behind by other pickers into Andrade's basket.<sup>9</sup> Villanueva's version of the events is that he bent down and placed the mushrooms in the basket, while Andrade, who had his head down inside a bed harvesting mushrooms, and didn't see what Villanueva had done, nevertheless immediately accused him of throwing mushrooms at him. Villanueva testified that he told Andrade "It's O.K., *camarada* (buddy)," whereupon Andrade angrily accused Villanueva of calling him "*cabron* (bastard)." Villanueva estimated that he was standing about three feet away from Andrade, and raised his arm to gesture to Andrade to go back to work, when Andrade smacked him on the hand or forearm and told Villanueva not to point at him. Villanueva testified that the blow caused him pain for 10-15 minutes. Villanueva further testified that Andrade blocked his way out of the area for 4 or 5 minutes by standing in the middle of the aisle and not letting him pass.

The ALJ, for the most part, credited Andrade's version of the incident. Andrade testified that although he didn't actually see Villanueva throw the mushrooms, his face was about six inches away from the basket because he was bent down picking, and he concluded that the mushrooms were thrown with force because he saw several bounce out of his basket. He told Villanueva not to throw mushrooms at him, at which point Villanueva who had been walking away from him, turned around and approached close to where Andrade was standing. Andrade testified that Villanueva pointed his

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<sup>9</sup> The mushrooms Villanueva put in Andrade's basket were brown while Andrade was picking white ones. There was testimony that brown and white mushrooms are generally not supposed to be mixed.



finger inches away from his face and yelled at him "what's the matter with you today?" Andrade testified at the hearing that he asked Villanueva not to point at him, and then grabbed Villanueva's hand and moved it down from his face. Andrade denied accusing Villanueva of calling him a "cabron."<sup>10</sup> He also denied blocking Villanueva's path, but said he may have gotten in Villanueva's way when he stopped momentarily to re-adjust his grip on the cart of mushroom baskets.

There was one witness to part of the conflict, Doroteo Rodriguez Ivarra (Rodriguez), another picker in the crew. Rodriguez testified that he was working several feet behind Andrade, and that he saw Villanueva throw the mushrooms at Andrade "in a bad manner." Rodriguez heard Andrade say "I don't like you to throw mushrooms," and heard Villanueva say loudly "what's the matter with you today?" Rodriguez testified that he left the area at that point and didn't hear the remainder of the conversation.

### **The Investigation of the May 27 Incident and Andrade's Subsequent Discharge**

Villanueva left the growing facility and reported the incident to two other foremen, Lopez, and Gerardo Pulido (Pulido). Lopez advised Villanueva to suspend Andrade, while Torres, who by this time had accompanied Andrade to the area where the foremen were talking, told Villanueva he should make the decision himself because he was their foreman. Ultimately the men sought out the advice of Supervisor Blanca Gomez (Gomez), who was acting on behalf of Monroy since he was out for the day.

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<sup>10</sup> The ALJ found it somewhat troubling that during the investigation of the incident prior to his discharge, Andrade described his action to supervisors and management as a somewhat milder "lowering" of Villanueva's hand from his face, but also found that Villanueva's claims that the physical contact caused him pain for 10-15 minutes and that Andrade blocked his way for 4-5 minutes were exaggerations. The ALJ found that it was unlikely that Villanueva had made up his testimony about Andrade accusing him of calling him a *cabron*, so he credited Villanueva on that point.

Gomez testified that Villanueva and Andrade each told her his version of the event. She told Andrade to come back to work the next day, that she would speak to Monroy, and that the matter would be looked into.<sup>11</sup>

Gomez called Monroy the night of the 27<sup>th</sup> at home, and after speaking with him decided to suspend Andrade for three days pending further investigation. She told Villanueva to write a suspension ticket for Andrade, which he did. The suspension notice indicated that "physical aggression" was the reason for the suspension.

Human Resources Manager Olmos learned of the incident on May 29. He met with Monroy and Villanueva, and took their statements. He met with Andrade and Rodriguez the following day. Olmos listened to Andrade's version of the incident, and although Olmos recalled that Rodriguez told him he saw Villanueva throw the mushrooms at Andrade in an aggressive manner, he chose to believe Villanueva over Andrade and Rodriguez.

Olmos testified that he made the decision to terminate Andrade because he felt his actions fell under Pictsweet's "no fighting in the workplace" rule on page 14 of the employee handbook. Monroy prepared the termination notice, and it was given to Andrade on May 31. Olmos admitted that if he had believed Andrade's version of the events, he would not have considered his conduct to be "physical aggression," and there would not have been grounds to terminate him.

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<sup>11</sup> The ALJ credited Gomez's version of this discussion over that of Villanueva and Pulido. Gomez testified that the only disciplinary action being contemplated at this time was a suspension of Andrade.

General Manager Franco heard about the incident on June 4 from Olmos. He was asked to reconsider the discharge by Andrade, Rodriguez and UFW organizer Archiniega who came to his office on the same day. Franco listened to statements from Villanueva, Andrade and Rodriguez, but ultimately chose to believe Villanueva. He told Andrade that he wouldn't change his decision and Andrade's discharge became final.

### **THE ALJ DECISION**

The ALJ found that Respondent's suspension and subsequent termination of Fidel Andrade violated section 1153(a) and (c) of the Act.

The ALJ found that Andrade engaged in protected concerted activity when he protested Villanueva's treatment of co-worker Torres on the morning of May 27. The ALJ found that because the General Counsel established that supervisor Villanueva knew of Andrade's concerted activity, it was the Respondent's burden to rebut the presumption that Human Resources Manager Olmos also knew of the activity when he made the decision to fire Andrade. Therefore, the ALJ concluded that the General Counsel established a prima facie case that the suspension and discharge of Andrade violated section 1153(a) of the Act.

The ALJ also concluded that the General Counsel established a prima facie case that the Respondent unlawfully retaliated against Andrade for his union activities in violation of section 1153(c) of the Act. The ALJ found that it was undisputed that the Respondent was aware that Andrade was a UFW supporter. However, because the record indicated that the Respondent knew of his UFW related activities long before the discharge, this knowledge alone was not compelling as evidence of anti-union animus.

Additional evidence that the ALJ found persuasive included Respondent's employee handbook which the ALJ found discouraged employees from seeking redress through the Union and actively encouraged them to deal directly with Pictsweet. The ALJ noted that this language in the handbook was effectively the solicitation of grievances by the employer, and as such, was arguably an unfair labor practice. The ALJ also found that when Respondent refused to recognize Union-designated employee representatives, it again arguably violated the Act. The ALJ noted that several other incidents that occurred during the period preceding Andrade's discharge tended to show the Respondent's predisposition to blame Union supporters in disputed cases of misconduct. The ALJ reasoned that based on the entire record, the General Counsel established a prima facie case of unlawful discrimination because of Andrade's Union support.

The ALJ then turned to the question of whether the Respondent had met its burden of showing that it would have discharged Andrade even in the absence of his protected concerted and union activities. The ALJ reasoned that under the provocation doctrine, the Respondent in establishing its defense, could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions. In reaching this conclusion, the ALJ relied on *Opelika Welding, Inc.* (1996) 305 NLRB 561, a case with facts that the ALJ found similar to those in the instant case. The ALJ found that Villanueva, in throwing the mushrooms, yelling at Andrade and pointing in his face, acted to provoke Andrade, and caused the conflict to escalate. The ALJ held that Andrade's single, brief physical contact was in line with the degree of Villanueva's provocation, and therefore

concluded that Respondent could not rely on Andrade's behavior in establishing its defense. Given this conclusion, the ALJ found it was not necessary to decide whether, in fact, the Respondent would have taken the same action even in the absence of Andrade's protected concerted and Union activities.

## **ANALYSIS AND DISCUSSION**

### **The ALJ's Credibility Determinations**

Respondent argues that the ALJ should have credited Villanueva over Andrade with regard to the events of the morning and afternoon of May 27, 2001. It is well-established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence of absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole.

As the ALJ in the instant case based many of his credibility determinations on factors other than witness demeanor, we have conducted a de novo review of the record as a whole, and find no reason to disturb the ALJ's credibility determinations. Nor has our review of the record led us to reject the ALJ's factual findings.

### **The Application of the Provocation Doctrine**

Respondent also contends that the ALJ erroneously applied the provocation doctrine in the instant case. Respondent argues that this doctrine applies only when the

provoking conduct involves concerted activity (or exceptional circumstances such as a systematic campaign of harassment against an employee for his union activities), and Andrade was not engaged in concerted activity on the afternoon of May 27, 2001 when the exchange between Villanueva and Andrade occurred.

Under the NLRB's provocation doctrine an employer is prohibited from provoking an employee to the point where he commits an indiscretion or insubordinate act and then relying on that indiscretion to discipline him. (*NLRB v. M & B Headwear Co.* (4<sup>th</sup> Cir. 1965) 349 F2d. 170.) Numerous cases have followed this doctrine, and although some of the cases do arise out of scenarios involving employee protected concerted activity occurring simultaneously with the provocation, the narrow reading of the doctrine suggested by Respondent is not supported by case law. On the other hand, there are some limits on the doctrine not expressly noted by the ALJ. A reading of cases applying the doctrine indicates that the employer's provocation must consist of unlawful conduct or be motivated by the employee's protected activity.

Respondent contends that the *Opelika Welding* case relied on by the ALJ represents an "erroneous and aberrational" application of the provocation doctrine as it did not deal with provocation arising out of protected activity. However, a close reading of the *Opelika Welding* case reveals that the confrontation between supervisor and employee arose out of a disciplinary slip given to the employee for being absent from work to attend union negotiations (clearly protected concerted activity). In addition, the disciplinary slip itself was found to be unlawful by the ALJ and the NLRB. The employee refused to sign the slip, and the general manager, unhappy about the

employee's refusal to sign, went to speak to the employee at his work station later in the day. The general manager walked up very close to the employee, shouted at him, and waved his finger in his face. At that point the employee grabbed the manager's hand and pushed it away. The NLRB, in finding that the employee's subsequent suspension was unlawful, held that the manager's conduct was not justified by anything the employee had done, and the employee's response in pushing away the manager's hand, was instinctive and spontaneous and was not inappropriate under the circumstances.

The Respondent's contention that *Opelika Welding* represents an erroneous application of the provocation doctrine is without merit, as the employer's provocation in that case consisted of unlawful conduct and was motivated by the employee's protected activity. We find therefore, that the ALJ's reliance on *Opelika Welding* was appropriate.

A review of the record supports the conclusion that the operative events leading to Andrade's discharge arose out of the protected concerted activity that he engaged in on the morning of May 27, 2001, when he intervened on behalf of Union movement leader, Jesus Torres, questioned a work assignment given to Torres by Villanueva, and protested Villanueva's treatment of Torres.

The Board has held that employees engage in concerted activity when they intervene on behalf of others in workplace disputes. *T.T. Miyasaka, Inc.*, (1990) 16 ALRB No. 16; *Churchill's Catering Corporation dba Churchill's Restaurant*, (1985) 276 NLRB 775.) One employee who acts to support another co-worker in a matter that may only affect the latter may nonetheless be engaged in concerted activity, and there is no requirement that those who join in a common expression of concern act in numbers larger

than two employees. (*T.T. Miyasaka, supra*, ALJ dec. at p.16, citing *Wells Dairy Inc., dba Wells Blue Bunny* (1987) 287 NLRB 827.)

It is well-settled that a concerted employee protest of supervisory conduct that impacts the terms and conditions of employment is protected activity. (*Arrow Electric Company, Inc.*, (1997) 323 NLRB 968, *enfd.* (1998 6<sup>th</sup> Cir.) 155 F. 3d 762; *Millcraft Furniture Co.*, (1987) 282 NLRB 593.) A supervisor's rude, belligerent manner in making job assignments, or other issues relating to the quality of supervision that have a direct impact on employee's jobs and their ability to perform them, are legitimate employee concerns. (*Arrow Electric Company, Inc., supra*, 323 NLRB 968, 971; *Fair Mercantile Co.*, (1984) 271 NLRB 1159, 1162., *enfd.* (1985 8<sup>th</sup> Cir.) 767 F 2d 930.)

We therefore affirm the ALJ's finding that Torres and Andrade, by protesting the manner in which Villanueva directed Torres' work, concertedly voiced a legitimate employee concern, and engaged in protected activity on the morning of May 27.

It is clear from the record in the instant case that Villanueva immediately became angry when Andrade protested Villanueva's treatment of Torres. Torres testified that Villanueva said to Andrade in a "very strong" manner: "you don't get involved in this." Co-worker Arevelo, who witnessed the exchange, credibly testified that Villanueva pointed his finger at Andrade's face and spoke to him in a loud voice.

The tension dissipated somewhat when Villanueva left the area, but just a few hours later the conflict quickly escalated again, and it is reasonable to conclude that afternoon's dispute was related to the morning's exchange. Rodriguez, a fellow



mushroom picker who was working close to Andrade, credibly testified that he saw Villanueva throw mushrooms at Andrade's basket "in a bad manner." It is apparent from the confrontational attitude observed by Rodriguez that Villanueva was still angry with Andrade that afternoon, and that throwing mushrooms served to reopen any unfinished business leftover from the morning. Rodriguez also testified that when Andrade asked Villanueva not to throw mushrooms, Villanueva angrily asked "What's the matter with you *today*?" Villanueva's choice of words tends to show that he still had the morning's exchange on his mind, and his subsequent conduct in approaching Andrade, shouting and pointing his finger in his face was very similar to the manner in which he reacted to Andrade that morning. The short time lapse between the morning's confrontation and the afternoon's dispute also supports the conclusion that Villanueva's conduct towards Andrade was related to and motivated by Andrade's protected concerted activity in coming Torres' aid earlier in the day.

A review of the record also supports the conclusion that the operative events leading to Andrade's discharge arose out of and were motivated by Andrade's support of the Union. There is no question that Respondent knew of Andrade's open support of the Union and of his association with Union movement leader, Torres. The record further indicates that Andrade was increasingly involved in incidents in the Spring of 2001 that were met with the disapproval of Villanueva and management in general.

There were several incidents in which Andrade was singled out by management in the two months immediately preceding the May 27 incident. In the March 17, 2001 edition of the Ventura Star, Andrade (along with UFW organizer

Archiniega, Torres and another worker) complained of the compost fire's ill effects on his health and expressed his frustration with Pictsweet's refusal to give workers time off with pay while the fire was burning. Andrade testified that Monroy admonished him for making the company look bad after the article was published, and although Monroy denied speaking with Andrade about his comments to the newspaper, Monroy admitted having read the article.

Soon after the article appeared, Villanueva accused Torres and Andrade of intentionally mixing mushrooms, which they denied. The accusation went unsubstantiated, and no discipline was imposed on the two men. However, when the matter was brought to Monroy's attention, he angrily told Andrade and Torres that he thought they were doing things to Villanueva to make him look bad, and made sarcastic comments about Union supporters "never being wrong" in workplace disputes. Villanueva, who had expressed his negative feelings about Andrade's Union support on several previous occasions, complained to Andrade after the mushroom mixing incident that his involvement with the Union was causing conflict and discord in their family.

Finally, in early April, several weeks before the May 27 incident, Andrade was given the disciplinary ticket for failing to hook up his safety belt, a minor infraction that usually resulted in a verbal warning to the picker. The ALJ credited testimony that Foreman Lopez and Head Picking Supervisor Monroy mocked Andrade while he was given the ticket.

The Respondent argues that the instant case is distinguishable from cases such as *E.I. Dupont de Nemours* (1981) 263 NLRB 159, that involve "exceptional

circumstances." In *E.I. Dupont*, the NLRB found that the employer had subjected the employee in question to 3 1/2 months of intimidation and harassment because of his union activities. During the course of normal work activities, the employee, who was operating a very noisy machine, yelled out, apparently just for the sake of yelling. The supervisor came up very close to him, got in his face, and told him angrily to stop "hollering." The employee pushed the supervisor away from him with his open palm, causing the supervisor to move back a step or two. The NLRB held that the employee's physical response was a "moderate, almost reflexive action," and in light of the company's campaign against the employee, his angry outburst was reasonably provoked.

While the record in the instant case does not indicate that Respondent's treatment of Andrade during the Spring of 2001 rose to the level of lengthy and deliberate campaign of harassment and intimidation that the employee in *E.I. Dupont* was subjected to, it is not necessary that the employer's behavior be of a particularly egregious nature for the provocation doctrine to become applicable. Instead, the NLRB in applying the doctrine, examines whether the employee's response is in line with or proportional to the employer's behavior. "The more extreme an employer's wrongful provocation, the greater would be the employee's justified sense of indignation and the more likely its excessive expression." (*NLRB v. M& B Headwear, supra*, 349 F2d. 170, 174.)

In light of the atmosphere of anti union animus at Pictsweet that is supported by the record as a whole, and given management's increasing scrutiny of Andrade throughout the Spring of 2001, we agree with the ALJ that under these circumstances, Andrade's response in grabbing and removing Villanueva's hand from his

face was proportional to and in line with Villanueva's behavior. In addition, because we find that Andrade's Union activities and other protected concerted activity motivated Villanueva's conduct, we affirm the ALJ's finding that the Respondent, in establishing its defense, could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions.

Even assuming, *arguendo*, that the provocation doctrine does not preclude the Respondent from presenting its *Wright Line*<sup>12</sup> defense, we find that the Respondent has not met its burden of showing that it would have discharged Andrade even in the absence of his union and other protected concerted activities.

The Respondent contends that Andrade was terminated because he violated the company policy against workplace violence, and argues that Andrade's discharge was consistent with the discipline imposed in every other instance of physical aggression committed by a Pictsweet employee. A review of several termination notices submitted by the Respondent and Charging Party as evidence indicates that the conduct of employees who were discharged was far more aggressive than Andrade's limited reaction, and at times resulted in serious injuries to other employees. For example, Reynaldo Ruiz, an anti-Union employee who was discharged a week after Andrade, hit a pro-Union employee in the face with his fist, knocked him to the floor, and left him with a bloody nose. Other examples of violent conduct resulting in discharge at Pictsweet include an employee attacking another in the women's restroom and leaving the victim

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<sup>12</sup> Under *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, once the General Counsel establishes a prima facie case, the burden shifts to the employer to show that the adverse action would have been taken even in the absence of the employee's protected concerted activity. If the employer fails to carry its burden in this regard, the Board may find that the discharge was unlawful.

with a swollen jaw and ruptured eardrum, and an employee slapping her coworker in the face three times in front of the rest of the packing crew.

In contrast, Andrade's reactive grabbing and pulling down of Villanueva's hand does not rise to the level of serious misconduct that the Respondent typically punished by termination, and the discipline imposed on him under these circumstances appears to have been excessive. In fact, Human Resources Manager Olmos testified that if he had believed the version of events related to him by Andrade and witness Rodriguez, he would not have considered Andrade's conduct to be physical aggression, and there would not have been grounds to fire him. Indeed, Supervisor Gomez testified that immediately after the incident, the only discipline being contemplated was suspension. It is suspect that it was only after Gomez spoke about the incident to Supervisor Monroy, who had expressed his displeasure with Andrade and the Union on several recent occasions, that Andrade's conduct became characterized as "physical aggression."

It is also worth noting that the ALJ found that Villanueva had exaggerated when describing the physical contact, and found it inconceivable that Villanueva would have been in pain for 10-15 minutes as he claimed. It is well-settled that when it is found that the employer has put forth a false reason for discharging an employee, it can be inferred that the true motive is an unlawful one which the employee seeks to conceal. (*JRL Food Corp.* (2001) 336 NLRB No. 6; *Doctors' Hospital of Staten Island* (1998) 325 NLRB 730, citing *Shattuck Denn Mining Corp. v. NLRB* (9<sup>th</sup> Cir. 1966) 362 F 2d 466.) Although Andrade did have some physical contact with Villanueva, Villanueva

significantly exaggerated the extent of that physical contact. As discussed above, Villanueva had expressed his negative feelings about Andrade's Union support on several previous occasions, and it is reasonable to conclude that Villanueva's efforts to maximize the seriousness of Andrade's conduct shows a retaliatory motive.

In addition, the unprecedented disciplinary ticket given to Andrade just weeks before for the minor infraction of failing to hook up his safety belt shows the seeds of disparate treatment of Andrade by management. The record supports the conclusion that absent his Union and other protected concerted activities, Andrade's altercation with Villanueva may have resulted in some lesser form of discipline, such as a formal warning or brief suspension, but not in a discharge. It is apparent that management seized on the May 27 incident as an opportunity to rid itself of an employee that Union leader Torres characterized as his "right hand."

The timing of Andrade's discharge is also suspect. Management clearly associated Andrade with Union leader Torres, and the decision to terminate Andrade directly followed his joining in Torres' protest of Villanueva's work assignment. Even discounting the protected concerted activity on the morning of May 27, Andrade was prominently involved in a string of Union activities in the Spring of 2001 that clearly annoyed Pictsweet management, including his being quoted in the newspaper along with Torres and UFW organizer Archiniega, and his implication along with Torres in the "mushroom mixing incident" in March. Andrade had worked for nine years at Pictsweet without discipline for improper behavior towards any supervisor, and the record supports

the conclusion that it was only after his increased visibility as a Union supporter throughout the Spring of 2001 that management began to single him out.

We conclude that the Respondent has not met its burden of proving that Andrade would have been discharged even in the absence of his union and other protected concerted activity. Therefore, even if we had found that the provocation doctrine was not applicable in this case, under the remainder of the *Wright Line* analysis, we nevertheless would find that his termination violated section 1153(a) and (c) of the Act.

### **ORDER**

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Pictsweet Mushroom Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise retaliating against, any agricultural employee because the employee has engaged in activities in support of the United Farm Workers of America, AFL-CIO, or any other labor organization, or other concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

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

(a) Offer to Fidel Andrade Fernandez immediate reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges of employment.

(b) Reimburse Fidel Andrade Fernandez for all wage losses and other economic losses he has suffered as a result of Respondent's discrimination against him, such losses to be computed in accordance with Board precedent. Such amounts shall include interest thereon, computed in accordance with our Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, 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 amounts of backpay and interest due under the terms of the Order. Upon request of the Regional Director, the payroll records shall be provided in electronic form if they are customarily maintained in that form.

(d) Sign the attached Notice to Agricultural Employees, and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.



(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all employees employed by Respondent during the period May 28, 2001 to May 27, 2002.

(f) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places 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. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(g) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this Order becomes final.

(h) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will 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.

(i) Arrange for a representative of Respondent or Board agents to read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at times and places to be determined by the Regional

Director. Following any reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question and answer period.

(j) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the order.

Dated: June 4, 2002

GENEVIEVE A. SHIROMA, Chairwoman

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

## NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (ALRA) by discharging Fidel Andrade Fernandez because he supported the United Farm Workers of America, AFL-CIO (UFW), and because he protested a supervisor's treatment of a fellow employee.

The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the ALRA is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
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;
4. To bargain with your employer about you wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
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 it is true that you have these rights, we promise that:

WE WILL NOT discharge or refuse to hire employees who participate in union activity or other concerted protected activity.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the ALRA.

WE WILL offer to Fidel Andrade Fernandez reinstatement to his former position of employment, and make him whole for all losses in pay or other economic losses he suffered as a result of our unlawful conduct.

DATED: \_\_\_\_\_

PICTSWEET MUSHROOM FARMS

By: \_\_\_\_\_  
(Representative) (Title)

If you have questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 711 North Court Street, Suite H, Visalia, California. The telephone number is (559) 627-0995.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

## CASE SUMMARY

Pictsweet Mushroom Farms,  
Division of United Foods, Inc.  
(United Farm Workers  
of America, AFL-CIO)

28 ALRB No. 4  
Case No. 01-CE-620-EC(OX)

### Background

This case involves the suspension and discharge of mushroom picker, Fidel Andrade Fernandez (Andrade). Andrade, who had worked for Respondent, Pictsweet Mushroom Farms (Pictsweet) for nine years before he was discharged, became a supporter of the United Farm Workers of America, AFL-CIO (UFW) in January 2000, and was named as a crew representative in July 2000. Throughout the year 2000 and during the Spring of 2001, there was an increasing amount of friction among employees with respect to the UFW, and between Pictsweet and the UFW.

On the morning of May 27, 2001, Andrade protested about the way Foreman Augustine Villanueva Navarro (Villanueva) had spoken to his co-worker, Jesus Torres (Torres), when assigning Torres work. Andrade and Villanueva engaged in a brief argument before Andrade went back to work. Later that afternoon, Andrade and Villanueva were involved in another exchange that ultimately lead to Andrade's discharge. Andrade was in the process of harvesting mushrooms, when Villanueva walked past and threw some mushrooms towards Andrade's basket. Villanueva then approached close to Andrade after Andrade asked him not to throw mushrooms, pointed at his face, and asked loudly "what's the matter with you today?" When Villanueva persisted in pointing and speaking in a loud voice even when Andrade told him not to, Andrade grabbed Villanueva's hand and lowered it from his face. Andrade was suspended and subsequently discharged for "physical aggression" after management investigated the incident.

### ALJ Decision

The ALJ found that Respondent's suspension and subsequent termination of Fidel Andrade violated section 1153(a) and (c) of the Act.

The ALJ found that Andrade engaged in protected concerted activity when he protested Villanueva's treatment of co-worker Torres on the morning of May 27, and that Pictsweet was aware of this conduct, as well as Andrade's various union activities. The ALJ further found that the circumstances indicated that the discharge was motivated by the protected concerted activity. Therefore, the ALJ concluded that the General Counsel established a prima facie case that the suspension and discharge of Andrade violated section 1153(a) and 1153(c) of the Act.

The ALJ then turned to the question of whether the Respondent had met its burden of showing that it would have discharged Andrade even in the absence of his protected concerted and union activities. The ALJ reasoned that under the provocation doctrine, in establishing its defense, the Respondent could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions. In reaching this conclusion, the ALJ relied on *Opelika Welding, Inc.* (1996) 305 NLRB 561, a case with facts the ALJ found similar to those in the instant case. The ALJ found that Villanueva, in throwing the mushrooms, yelling at Andrade and pointing in his face, acted to provoke Andrade, and caused the conflict to escalate. The ALJ held that Andrade's single, brief physical contact was in line with the degree of Villanueva's provocation, and therefore concluded that Respondent could not rely on Andrade's behavior in establishing a defense that it would have taken the same action despite Andrade's protected concerted and union activities.

#### Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ. The Board rejected the Respondent's argument that the provocation doctrine only applies when the provoking conduct involves concerted activity or exceptional circumstances. The Board indicated that under its interpretation of the doctrine, the employer's provocation must consist of unlawful conduct or be motivated by the employee's protected activity. The Board also found that the ALJ's reliance on *Opelika Welding* was appropriate, and rejected the Respondent's contention that the *Opelika Welding* case represented an erroneous application of the provocation doctrine.

The Board concluded that Villanueva's conduct towards Andrade on the afternoon of May 27 was related to and motivated by Andrade's protected concerted activity in coming to Torres' aid. The Board also found that the operative events leading to Andrade's discharge were motivated by Andrade's support of the UFW. The Board held that under these circumstances, Andrade's response in grabbing and removing Villanueva's hand from his face was proportional to and in line with Villanueva's behavior, and the Respondent, in establishing its defense could not rely on Andrade's conduct to the extent it was provoked by Villanueva's actions.

The Board further reasoned that even if the provocation doctrine had not precluded the Respondent from presenting its *Wright Line* defense, the Board would still have found that the Respondent had not met its burden of showing it would have discharged Andrade even in the absence of his Union and other protected concerted activities. In reaching this conclusion, the Board considered inter alia,

the timing of the discharge, comparisons with other discharges by Pictsweet for workplace violence, Villanueva's exaggeration of Andrade's conduct, Andrade's work history, and evidence that Pictsweet was annoyed by Andrade's earlier union activity.

\* \* \*

This Case Summary is furnished for information only, and is not the Official Statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: )  
)  
PICTSWEET MUSHROOM FARMS, ) Case No. 01-CE-620-EC(OX)  
DIVISION OF UNITED FOODS, INC. )  
)  
Respondent, )  
)  
and )  
)  
UNITED FARM WORKERS OF )  
AMERICA, AFL-CIO, )  
)  
Charging Party. )

**Appearances:**

Barbara A. Krieg  
Bryan Cave, LLP  
Santa Monica, California  
For Respondent

Barbara Macri-Ortiz  
Oxnard, California  
For the Charging Party

Eugene E. Cardenas  
El Centro ALRB Regional Office  
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: The hearing in this unfair labor practice proceeding was conducted before me in Oxnard, California on October 30, 31 and November 1, 2001. The case is based on an unfair labor practice charge filed by the United Farm Workers of America, AFL-CIO (hereinafter Union or UFW), alleging that Pictsweet Mushroom Farms, Division of United Foods (hereinafter Respondent) violated section 1153(a) and (c) of the Agricultural Labor Relations Act (Act) by suspending and then discharging Fidel Andrade Fernandez (Andrade) in retaliation for his Union and other protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint alleging said violations. Respondent filed an answer, in which it denied the commission of any unfair labor practice. The Charging Party has intervened in this proceeding. Subsequent to the hearing, the parties submitted briefs, which have been duly considered.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and oral arguments by counsel, I make the following findings of fact and conclusions of law.

## FINDINGS OF FACT

### **Jurisdiction**

Respondent operates a mushroom farm in Ventura, California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. While employed by Respondent, Fidel Andrade was an agricultural employee within the meaning of section 1140.4(b). The parties stipulated, at the prehearing conference, that at all material times, Foremen Augustine Villanueva Navarro (Villanueva), Gerardo Pulido and Baltazar Lopez; Assistant Supervisor, Blanca Estella Gomez; Supervisor, Samuel Monroy; Human Resources Manager, Gilbert Olmos; and General Manager, Ruben Franco were statutory supervisors under section 1140.4(j).



## Background

The Union represents Respondent's agricultural employees, based on the 1975 certification of a predecessor employer. There are about 172 bargaining unit employees. Respondent took over the business on October 1, 1987. Since that time, it has engaged in on-and-off negotiations with the Union, but the parties have never reached agreement for a collective bargaining contract. There have been at least two decertification movements since Respondent assumed control of the operations. The most recent drive for a contract began at the end of 1999.

Fidel Andrade was employed by Respondent for about nine years as a mushroom picker. His foreman was Augustine Villanueva, who is also a cousin. In a letter to John Franco dated July 3, 2000, the Union named Andrade as a crew representative, along with 27 other employees. Andrade openly supported the Union in various ways, including his participation in demonstrations protesting the lack of an agreement, wearing Union buttons and shirts, and taking pro-Union stances in conversations with employees at work. Respondent admits knowledge that Andrade was a supporter of the Union, but denies knowing he took a leadership role.

Respondent distributes its employee handbook to all workers. One section of the handbook essentially reads like the preamble of a nonunion employer who intends to retain that status. According to Franco, this is because it was issued at a time when the Union, in the face of a decertification drive, chose to take no role in representing the employees. Nevertheless, the handbook continues in force. The "Employee Relations Philosophy" states that Respondent prefers to deal directly with its employees, and that no third party is needed to intervene. It goes on to state that no "third party" can guarantee the employees' jobs, encourages employees to bring their problems directly to management, and not to rely on "outside intervention."

After the Union sent the letter identifying its crew representatives, Franco apparently met with picker Jose Torres Zambrano (Torres), who was acknowledged as the employee leader of the Union movement at Respondent's operations. In a letter to Torres dated July 13, 2000, in response to the naming of crew representatives, Franco stated, "Because of our obligations under the Agricultural Labor Relations Act (the "Act"), the request for direct dealings with individual employees cannot be accepted." Nevertheless, Respondent maintains a policy allowing employees to have a witness of their choosing for disciplinary meetings.

The Union, in protest of the lack of progress in negotiations, announced a boycott of Respondent's products, in about early August 2000. There is some dispute as to whether the boycott was only sanctioned, or was placed into effect. Irrespective of the boycott's status, Respondent soon lost two of its major clients, suffering substantial financial losses.

Andrade testified that in September 2000, he was discussing the boycott with other workers, and claimed that it was not yet in effect. Foreman Villanueva intervened in the dispute, stating the boycott was in force. When Andrade disputed this, Villanueva allegedly stated that the Union was always lying to them. Villanueva purportedly went on to say that the Union would be the major beneficiary, because it would get two percent of the employees' wages under their standard agreement, and he had heard it was now collecting even more. Andrade stated that two percent was not much, and would be subject to negotiations. He also told Villanueva he had never heard of additional dues being collected. Villanueva, in his testimony, acknowledged he intervened in the conversation, but denied saying anything about dues. There is no need to resolve this conflict in testimony. Andrade and Villanueva agree that later that day, Andrade spoke with Villanueva, in essence telling him not to get involved in such discussions, if he did not wish to have charges filed against him by the Union.

Respondent also informed the employees of its position on the boycott by a letter dated September 11, 2000. The letter stated that after the Union and "some UFW supporters" had

denied the boycott was in effect, the Union was now seeking a national boycott of Respondent's products. The letter went on to claim the Union was attempting to coerce Respondent, and accused it of being willing to "sell out" the employees to attain its goals. The letter noted that there had been several "near confrontations" between pro- and anti-Union employees, who were circulating a decertification petition, and stated that Respondent would not discriminate against employees based on their Union sympathies. The letter ended by stating that the current owners had saved the employees' jobs, and contending, "Before the [Union] boycott, we were able to avoid layoffs to make steady gains and to have an excellent profit-sharing program. Now we have to work hard to get back what we had."

In a letter to employees dated December 21, 2000, Franco, inter alia, stated:

At the same [t]ime that it is inviting you to a party, the UFW is doing everything it can to destroy your job and your livelihood. This week, the UFW agents greatly increased their pressure on our customers to cause them to stop buying mushrooms from [us]. Lost business means lost jobs. We are fighting every day to save business and get new customers. At the same time, the UFW is doing everything it can to put this farm out[t] of business.

The letter went on to state that the Union had done nothing to save jobs when a predecessor went out of business, and claimed that employees of a farm in Northern California faced layoffs because it operated under a Union contract.<sup>13</sup>

At about the same time, Respondent cancelled its Christmas bonus. On December 22, 2000, there was an incident involving anti-Union employees, Gerardo Mendoza and Enrique Ambriz. According to Jesus Torres, he had twice reported anti-Union harassment toward him by Mendoza to Franco, but nothing had been done. On the morning of December 22, he and Mendoza clashed because of the cancellation of the bonus. Mendoza later admitted to Franco that he had blamed Torres for the action, and made a derogatory remark concerning Torres' mother. After the confrontation, Mendoza returned to his work area. According to Andrade, he

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<sup>13</sup> Franco issued a similar letter on January 12, 2001, in which he also supported the decertification drive.

heard Mendoza repeatedly mumbling that by killing Torres, everything would end. Ambriz then said, “Why don’t you just get a gun and put a bullet in his head?” Andrade reported this to Torres, who contacted the Ventura County Sheriff’s department.

An officer took statements from those involved, utilizing Human Resources Manager Olmos as his interpreter. Andrade told the officer what he had heard, although the report states that Andrade said Mendoza wanted to “get rid” of Torres, rather than “kill” him. Mendoza, while admitting he was complaining about Torres, denied saying anything about killing him. Ambriz admitted to the officer (in the presence of Olmos) that in response to Mendoza, he said, “If you kill one, the others will be scared.” Mendoza and Ambriz did not testify at the hearing.

Torres, Andrade and a Union representative, Jessica Arciniega, later met with Franco. Andrade repeated his version of what took place. After this, Franco met with Mendoza and Ambriz, who essentially repeated what they had told the officer. Franco testified that they told him Ambriz stated, “There’s a saying in Mexico. Get a gun and shoot a couple, and they will respect you.” Mendoza and Ambriz told Franco the statement had not been made to Torres, and Ambriz was only joking. Franco told them not to joke around in that manner in the future, but took no further disciplinary action against them. Both Franco and Olmos admitted knowing that Mendoza and Ambriz oppose the Union.

Andrade testified that shortly thereafter, Franco summoned him to the office and asked him if he had been harassing Mendoza by asking him if he was Franco’s son, and if Franco had bought him a car. Andrade denied doing this, and nothing further developed. Franco, who testified at the hearing, did not deny this testimony which, therefore, is credited.

On March 17, 2001, two newspapers published articles concerning a smoldering compost fire on Respondent’s premises. Union representative Arciniega was quoted in both articles, as was Andrade, who complained about difficulty in breathing from the smoke. Torres and one

other employee were also quoted in one article, and the other employee was also quoted in the second article. The articles referred to a meeting between Union representatives and Franco concerning the problem, but there was no testimony on this point.

Andrade testified that two or three days after the articles were published, Monroy called him to his office and said, "There was no need for you to make us look bad. That wasn't necessary." Monroy, while admitting he had read the articles, denied ever speaking to Andrade about them. For the purposes of this Decision, it is unnecessary to resolve the testimonial conflict.

In late March 2001, Villanueva accused Andrade and Torres of mixing different types of mushrooms, which in some cases is against Respondent's rules. Andrade and Torres testified they told Villanueva they did not do this. Villanueva, however, testified that Andrade told him that Torres had placed second-class mushrooms in with the premium product, but Torres denied doing so. Villanueva took both of them to see Monroy, who was the next step in Respondent's supervisory hierarchy. Villanueva again accused Andrade and Torres of mixing mushrooms, which they denied. Monroy said that since Villanueva had failed to bring the mushroom basket with him, he had no proof of what he was saying, and ended the meeting.

Andrade testified that after the meeting, Villanueva approached him and said that since the pro-Union employees had started in with the Union, they were distancing themselves as family. Andrade denied this was the case. Villanueva accused Andrade and Torres of intentionally mixing the mushrooms to make the foremen look bad and to produce "evidence" for the Union. Andrade denied this, and told Villanueva to just do his job, and not set them up for Monroy. Villanueva left the area, Andrade believed, to falsely claim he had admitted mixing the mushrooms.

Villanueva gave a much different version of this conversation. According to him, Andrade admitted he was "faking it," after the meeting with Monroy. The following day, he

asked Andrade what he had meant by this. Villanueva acknowledged saying that the “situation” was dividing them, but contends that Andrade responded, “At war, everything is valid.” Andrade told him they needed “evidence” to continue their fight. Villanueva protested the mixing of mushrooms, and told Andrade he had always tried to be fair with him. Andrade purportedly responded that Villanueva should not check on their work so much, because Monroy would not notice. Villanueva said he had to do his job, and they should perform their work well. Villanueva then reported this conversation to Monroy. For the purposes of this Decision, it is again unnecessary to resolve the conflict in testimony.

Andrade testified that after this, he and Torres went to see Monroy about a “minor problem” with Foreman Pulido. During that meeting, Monroy told them, in an agitated tone, that what they did to Villanueva was bad, and accused them of intentionally mixing the mushrooms. When they denied this, Monroy said, “You guys are never wrong, I would like to know when you are ever going to be wrong?” This presents a difficult credibility resolution because Torres, in his testimony, did not corroborate Andrade. Nevertheless, Monroy did not deny saying this in his testimony and therefore, Andrade is credited.

On April 5, 2001, Andrade received a written warning from Foreman Lopez, who was directing his crew due to Villanueva’s absence. Andrade testified that he had left his Union button in his locker, and asked other employees if they had one, in the presence of Lopez, prior to the commencement of work. When Andrade began working, he forgot to fasten his safety belt, and Lopez immediately took him to the office to issue him a warning letter. Andrade and Torres testified that normally, all that is done in such cases is to tell the employee to fasten the belt. At the office, Andrade protested the discipline to Monroy, who reminded Andrade that he had previously verbally warned Andrade for the same safety violation. Andrade protested that the warning had taken place six months previously, but Monroy upheld the discipline. When Lopez handed the warning to Andrade, he and/or Monroy laughed at him, and Lopez said, “Read

it, because I don't know how to read." Inasmuch as Lopez was not called to testify, and Monroy did not deny this testimony, it is credited.

### The Incident On the Morning of May 27, 2001

On the morning of May 27, Torres asked Villanueva if there was a section of mushrooms that needed to be picked. Villanueva pointed out the one remaining section in the area, and Torres proceeded in that direction. Another employee called out that he had already claimed that area, so Torres turned around and returned to Villanueva. Villanueva told the employees that Torres was going to pick the area, and Torres said the other worker had already claimed it. Villanueva repeated his directive, but it appears that by then the other employee had begun picking the area, and finished the work.

Andrade testified that immediately after this, he told Villanueva he was acting totally capriciously. Villanueva responded he was not, that it was his job. Andrade told Villanueva he just wanted to harass Torres because he knew full well Torres supported the Union, and repeated that Villanueva was acting capriciously. Villanueva then approached Andrade and loudly told him that the issue did not concern him, and it was his job. Unprompted, Andrade testified that Villanueva was pointing his finger *at* his face when he said this. On a leading question by General Counsel, he testified Villanueva pointed his finger *in* his face. Andrade told Villanueva to just leave the area, and when Villanueva persisted in continuing the discussion, ignored him until he left.

Villanueva testified that Andrade told him he was acting on a "whim," but this did not upset him. What did upset him was that after he explained to Andrade that he had made the decision, Andrade said, "Get out of here. Go away. You are bothering me." Villanueva told Andrade, "Watch your words. Nobody is going to tell me to leave the work area."

Torres and employee, Reynaldo Arevalo Garcia (Arevalo) witnessed a portion of this exchange. Both corroborated Andrade's contention that Villanueva was first angered by Andrade disputing the work assignment, and not by telling Villanueva to leave the area. Torres, however, did not corroborate Andrade's claim that he cited Torres' Union sympathies as the reason for Villanueva's directive. Of all people, Torres certainly would have remembered this if it had happened. In addition, while Arevalo testified that Villanueva was pointing at Andrade's face, he estimated his finger was two or three feet away when he did this. Based on the foregoing, it is concluded that Villanueva was angered by Andrade's protest, did point his finger at him, but not directly in his face, and Andrade did not mention Torres' Union sympathies.

#### The Incident On the Afternoon of May 27

According to Villanueva, on the afternoon of May 27, he picked two mushrooms that had been missed by other pickers and placed them in Andrade's basket, because he was the closest picker. Andrade accused Villanueva of throwing the mushrooms and told him not to do it. Villanueva said, "It's ok, *camarada*" (comrade or buddy). Andrade angrily said, "What did you tell me?" He responded, "I told you it's ok, *camarada*." Andrade said, "No, you called me *cabron* (bastard)." Villanueva said, "No, Fidel, don't put words in my mouth. I never said that word. I called you comrade." Andrade said, "But you threw the mushrooms at me," which Villanueva denied. The two repeated their positions, and then Villanueva, in the process of raising his arm to the side, told Andrade to go back to work. Villanueva estimated Andrade was three feet away when he did this. As he raised his arm, Andrade slapped him on the hand or arm, causing his arm to go down,<sup>14</sup> and told Villanueva not to point at him. Villanueva claimed that while he was not injured, he was in pain for 10-15 minutes. Villanueva tried to leave the area, but was repeatedly blocked by Andrade, for a substantial period of time, before he could do so.

Andrade's version of the incident was somewhat different. According to him,

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<sup>14</sup> At the hearing, Villanueva claimed Andrade slapped his forearm, but he previously stated it was his hand.



Villanueva forcibly threw the mushrooms in his basket, causing mushrooms to bounce out.<sup>15</sup> At the time, Andrade was prone or stooped over, and his face was inches from the basket.

Villanueva continued walking in the barn, away from Andrade. Andrade told Villanueva not to throw mushrooms at him, at which point, Villanueva returned to where Andrade was working. Apparently, Andrade had gotten out of the mushroom bed, and was now standing. Villanueva denied throwing the mushrooms. Andrade repeated his claim, at which point Villanueva pointed his finger close to Andrade's face and angrily asked, "What's the matter with you?" Andrade replied he was only telling Villanueva not to throw mushrooms, and told Villanueva to stop pointing in his face. Villanueva continued pointing his finger, and again asked Andrade what was wrong with him.

Andrade testified that he "grabbed" Villanueva's hand and lowered it. According to Andrade, it was at that point Villanueva pointed off to the side, and told him to return to work. Andrade denied intentionally blocking Villanueva's exit from the area. Rather, the passageway is narrow, and he briefly got in Villanueva's way when he paused to adjust his basket-carrier. Andrade also denied accusing Villanueva of using bad language toward him. According to Andrade, he had completely forgotten the incident of that morning, and did not become upset until Villanueva threw the mushrooms.

Employee Doroteo Rodriguez Ivarra (Rodriguez), who is an active Union supporter, corroborated Andrade's claim that Villanueva threw the mushrooms, and did not corroborate Villanueva's claim that he heard Andrade accuse Villanueva of swearing at him. Rodriguez testified he heard Andrade protest the throwing of the mushrooms, at which point Villanueva approached Andrade and loudly asked, "What's the matter with you today?" At that point,

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<sup>15</sup> Andrade admitted he did not actually see Villanueva throw the mushrooms, but felt they had been thrown too hard because mushrooms bounced out of his basket.

Rodriguez left the area. Villanueva testified that Rodriguez was not in a position to see him placing the mushrooms in Andrade's basket.

The foregoing also presents a difficult credibility issue, because the undersigned does not consider either Andrade or Villanueva to be a totally credible witness. With respect to Andrade, his belated admission that he "grabbed" Villanueva's hand is disturbing, since during Respondent's investigation of the incident, he contended he had merely lowered the hand. In addition, while Rodriguez did not corroborate Villanueva's claim that Andrade accused him of calling him a "*cabron*," there is no reason why Villanueva would have made this up, and it would have been highly imaginative of him to do so.<sup>16</sup> On the other hand, Andrade may have desired to conceal this portion of the incident, now believing his accusation was in error. Furthermore, the undersigned does not believe that Andrade had totally forgotten the morning incident. In addition, Torres' failure to corroborate Andrade's claim that he cited Torres' Union sympathies during the morning incident, and Arevalo's testimony, that Villanueva's finger was not directly in Andrade's face that morning, as claimed by Andrade, cast doubt on his reliability.

Villanueva's testimony also presents problems. His denial of being upset with Andrade for questioning the picking assignment on the morning of May 27 is not credible, in light of the more persuasive testimony of Torres, Andrade and Arevalo on this issue. It is also more likely that Villanueva did throw the mushrooms in Andrade's basket, contrary to his denial that he did so, given Rodriguez's corroboration of Andrade on this point, Villanueva's upset state from the morning incident and Andrade's angry reaction. In this regard, although Andrade was also probably still upset about the incident of that morning, it is unlikely that he would have protested had Villanueva gently placed the mushrooms in his basket. In addition, the undersigned finds it almost inconceivable that even if Andrade slapped Villanueva's forearm/hand as claimed and

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<sup>16</sup> Although Villanueva contended Rodriguez was present when this happened, it is entirely possible that he was simply wrong on that point.

demonstrated<sup>17</sup> by Villanueva, this would have caused him to be in pain for 10 to 15 minutes as alleged. If, indeed, such pain resulted, the undersigned does not believe Villanueva would have had any difficulty deciding what to do, as the evidence discussed below shows was the case.

This also raises the contradiction in Villanueva's witness-stand testimony, that Andrade slapped his forearm, with his earlier statements, that contact was made with his hand.

It is concluded that Andrade's version should be credited, except it is found that during the incident, he also accused Villanueva of calling him a "bastard," which Villanueva denied. It is noted that Villanueva, contrary to his denial, had engaged in similar conduct that morning. His denial, that he shouted at Andrade during the afternoon incident, is contradicted by another employee, Rodriguez. In addition, Villanueva omitted from his testimony the fact that he had moved away from Andrade, and then returned, which escalated the confrontation. If Villanueva was then three feet away from Andrade, it appears that Andrade would have had to lunge at Villanueva, or taken steps to make contact with his hand, if it had been pointed to the side, which Villanueva did not contend took place. Inasmuch as Respondent did not rely on Andrade's purported blocking of Villanueva's exit in its decision to discharge him, it is not directly relevant whether he did so, but it is noted that Villanueva's statement concerning the incident did not mention this.

Based on the foregoing, it is concluded that Villanueva threw mushrooms into Andrade's basket, and continued walking down the aisle way in the mushroom barn. Andrade protested, and Villanueva denied throwing the mushrooms. Andrade repeated his protest. Villanueva said, "O.K. buddy, go back to work." Andrade accused Villanueva of calling him a "bastard," which Villanueva denied. Andrade again accused Villanueva of throwing the mushrooms, at which point Villanueva approached Andrade, who got out of the mushroom bed and faced him.

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<sup>17</sup> When Villanueva demonstrated what Andrade did, it appeared more like a forceful contact than a slap.

Villanueva loudly asked what was wrong with Andrade, and pointed his finger at Andrade's face. Andrade told Villanueva to stop pointing, but instead, Villanueva again loudly asked Andrade what was wrong with him, and told him to return to work. Andrade grabbed Villanueva's hand and pulled it down.

Respondent's employee handbook contains work rules that, inter alia, prohibit fighting, or provoking a fight. The handbook does not require discharge for doing this, but Respondent's witnesses testified, and Torres agreed, that in all prior cases of physical aggression, discharge has been imposed. This was the first case involving physical contact by an employee against a supervisor. Respondent produced evidence concerning several prior incidents involving assaults between employees, where the discipline imposed was discharge. As reported, all of these incidents involved far more serious altercations than what was alleged by Villanueva.

Although Respondent did little concerning the Mendoza/Ambriz incident, General Manager Franco credibly testified that in response to that incident, and others involving alleged harassment by pro-Union employees, Respondent implemented a "Prevention of Workplace Violence" policy for such conduct. The policy, which is in evidence, was distributed to all employees and posted at the farm. The policy, inter alia, prohibits "threats of any kind," "threatening, physically aggressive or violent behavior, such as intimidation of or attempts to instill fear in others," and "[o]ther behavior that suggests violence, which can include belligerent speech, excessive arguing or swearing, sabotage, stalking, surveillance or harassing/threatening telephone calls or written communications." The policy provides that those found to have engaged in such conduct will generally be disciplined, but does not require discharge.

### **Andrade's Discharge**

The remainder of the evidence dealt with the progress of the investigation of this incident through four levels of supervision. The parties contend that the opposition's

witnesses made various direct or implied admissions, were or were not consistent, and did or did not condone misconduct. In the final analysis reached herein, what took place after the incident on the afternoon of May 27, beyond Andrade's discharge, would not, in any event, change the outcome of this Decision. What follows are the salient facts that reasonably can be gleaned from the conflicting evidence presented.

Once Villanueva left the mushroom barn, he sought out Foremen Lopez and Pulido, and reported that Andrade had struck him. They advised him to get Andrade and to have him bring a witness. Villanueva found Andrade, told him to find a witness and then meet with the foremen. Andrade initially asked Rodriguez to come, but since he was busy, Torres accompanied him. Villanueva accused Andrade of striking him, at which point, Lopez told Villanueva to suspend Andrade for three days.<sup>18</sup> Torres told Villanueva he was their foreman, and should make the decision for himself. Villanueva told Andrade to punch out, and both headed toward the office.

At the office, Villanueva told Andrade to come with him, because he was going to issue a suspension notice. Andrade refused, stating he had punched out and was now off work. Villanueva said fine, and to leave, but he could return on Wednesday. Andrade left and met with other employees, who had finished their work. They decided to go to the office in an attempt to have Blanca Gomez, who was acting in Monroy's place during his absence, reverse Villanueva's decision.

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<sup>18</sup> Andrade testified that Villanueva first said he had lowered Villanueva's hand, and then changed this to claim he had hit his hand. Villanueva and Pulido testified that Andrade implicitly admitted striking Villanueva by essentially responding that he did it because Villanueva pointed his finger. Torres and Andrade testified that, in fact, Andrade specifically responded that all he did was lower Villanueva's hand. I did not find any of these witnesses to be compelling enough to sustain the proponent's position.

Villanueva had begun telling Gomez what had happened when the group of about 10 employees entered. Pulido and Lopez were also there. Torres protested Andrade's suspension, because the next day was a holiday, and he would lose pay at double time. She listened to Andrade's and Villanueva's accounts of what had happened, and told Andrade to return the next day, pending Monroy's return, or her consultation with him.<sup>19</sup> At the time, and thereafter, until this hearing, Andrade claimed that he had merely lowered Villanueva's hand. After Andrade left, Gomez discussed the incident with Villanueva, and testified that she then decided to suspend Andrade. Gomez credibly testified that at the time, the only discipline being contemplated was a suspension.<sup>20</sup>

That evening, Gomez called Monroy, and informed him of the incident. Monroy told her that Andrade should be suspended for three days, pending an investigation for further discipline. Therefore, when Villanueva reported for work the next day, Gomez told him to issue a three-day suspension, pending investigation, which he did. Somewhat contradicting her earlier testimony, Gomez now testified she told Villanueva that Monroy had told her to suspend Andrade. Andrade, who had clocked in for work, was summoned to the office.

Villanueva handed Andrade the suspension notice, which cited his "physical aggression." Torres, who was with Andrade, read the notice. According to Villanueva and Gomez, Torres said, "Physical aggression? Do you know what your are doing, you are firing your cousin?" Villanueva said the decision had been made, and he and/or

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<sup>19</sup> At the hearing, General Counsel contended that Gomez reversed Villanueva's decision. Even viewing the conflicting evidence in its most favorable light to General Counsel's case, while the employees may have felt they had obtained a victory, it is clear that Gomez never told them this was the end of the matter.

<sup>20</sup> Villanueva and Pulido either denied this or vacillated on the issue. Gomez, although failing in recall on some points, was a more credible witness, and the circumstances show that no further discipline was contemplated by them.

Gomez told Andrade they were not firing him at that point. Torres purportedly told Villanueva to change the notice to read what had happened, that Andrade lowered his hand, and he would tell the pro-Union employees to be less aggressive. Villanueva refused. Torres told Andrade that he had “blown it.”

Torres agreed that he protested the use of the term, “physical aggression” and, believing Andrade, told Villanueva to write down that he lowered his hand. Torres denied saying, at the time, that physical aggression meant termination, but admitted that in practice, this was the case. Torres admitted he told Andrade he had “blown it.”

Monroy informed Olmos of the incident on May 29. Olmos called a meeting with Monroy and Respondent’s farm manager. They called Villanueva in, and he told them his version of the events. At that point, Olmos testified he decided this constituted grounds to discharge Andrade. Nevertheless, Olmos telephoned Andrade and invited him and any witnesses to come in and give statements on May 31.

Instead, Andrade and several employees went to see Olmos on May 30. Olmos agreed to meet with Andrade, but permitted only one witness. Andrade chose Rodriguez, because he had witnessed part of the incident. Olmos took statements from both, who essentially reiterated what they testified to herein, other than Andrade’s admission that he grabbed Villanueva’s hand.

Olmos admitted that if Andrade had merely lowered Villanueva’s hand, he would not have considered this physical aggression. Nevertheless, Olmos chose to believe Villanueva, because of the way he gave his account, and because he believes Villanueva is an honest individual. On the other hand, Olmos claimed he believed Rodriguez and Andrade had gotten together to discuss what they were going to say, and could not

understand why Andrade would object to receiving more mushrooms, since he was being paid piece rate. Also, according to Olmos, he felt that Andrade was not really denying his conduct, but only claimed it was provoked by Villanueva.

Olmos contacted Andrade, and told him to report to him the following day. Andrade brought Arciniega and some other employees, including Torres, with him. Olmos informed them that Andrade was being discharged. Arciniega asked him to reconsider his decision. Olmos told her his decision was final, but she could speak with Franco, when he returned from vacation, to seek a reversal.

Torres testified that shortly after meeting with Olmos, he, Andrade and Arciniega met with Monroy. Gomez was also present. According to Torres, after pleading their case, Monroy told them that every time an employee had previously engaged in physical aggression, the employee had been terminated. Monroy purportedly went on to say, "Look, since you guys are involved in this movement, you have caused a lot of problems to my foremen. You have been treating them like garbage. They don't let your foremen work within the crew." This presents another difficult credibility resolution, because Andrade did not corroborate Torres' testimony, and Arciniega was not called as a witness. Nevertheless, since neither Monroy nor Gomez denied that Monroy made the statements, Torres' testimony will be credited.

In early June 2001, the Union asked Franco to review Andrade's discharge. Franco reviewed the statements given by the various witnesses, spoke with Andrade and Villanueva, and upheld the discharge. According to Franco, one reason he did this was because Andrade implicitly admitted blocking Villanueva's exit on May 27, stating he did not know what action Villanueva would take against him. Andrade did not deny



doing this in his testimony, although it is noted that Franco did not specify how long, if any, he accused Andrade of preventing Villanueva from leaving.

### **ANALYSIS AND CONCLUSIONS OF LAW**

Section 1152 of the Act grants agricultural employees the right, inter alia, “to engage in . . . concerted activities for the purpose of mutual aid and protection.” Under §1153(a), it is an unfair labor practice for an agricultural employer to “interfere with, restrain or coerce” agricultural employees in the exercise of that right. In order to be protected, employee action must be concerted, in the absence of union activity. This means the employee must act in concert with, or on behalf of others. *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev’d (1985) 755 F.2d 941 [118 LLRM 2649], decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff’d (1987) 835 F.2d 1481 [127 LRRM 2415], cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41.

Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work arising from employment-related disputes are concerted activities. The protected nature of the activities does not depend on the reasonableness of the demands. *J. & L. Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22; *Giumarra Vineyards, Inc.* (1981) 7 ALRB No. 7; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9 [50 LRRM 2235]; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

The evidence establishes that in joining Torres’ protest of Villanueva’s work assignment on the morning of May 27, 2001, and in doing so, coming to the aid and

defense of Torres, Andrade engaged in protected concerted activity. Clearly Villanueva was aware of Andrade's activity. Olmos denied being told of the incident when he investigated the incident of that afternoon, but did not specifically deny any knowledge thereof at the time he decided to discharge Andrade. Inasmuch as it is Respondent's burden to show lack of knowledge by the decision-making manager, once it is established that another supervisor had such knowledge, it is questionable whether Respondent has rebutted the presumption that Olmos learned of Andrade's activity prior to making the discharge decision. *George A. Lucas & Sons* (1985) 11 ALRB No. 11, (1987) 13 ALRB No. 4; *Arco Seed Co.* (1985) 11 ALRB No. 1; *William Warmerdam, Individually, and doing business as Warmerdam Packing Co.* (1998) 24 ALRB No. 2, at footnote 3; *E. W. Merritt Farms* (1988) 14 ALRB No. 5, at ALJD, pages 59-70; *Woodline Motor Freight, Inc. et al.*, (1986) 278 NLRB 1141 [122 LRRM 1355]; *Emery Worldwide, A Division of Consolidated Freight Corp.* (1992) 306 NLRB 318 [140 LRRM 1152]; *Cardinal Hayes Home for Children* (1994) 315 NLRB 583 [147 LRRM 1241]. Assuming Olmos did not gain such knowledge, it was Villanueva's conduct that set the discharge in motion, and if such conduct violated the Act, Respondent's subsequent reliance thereon would still constitute a violation. *Hambre Hombre Enterprises, Inc., d/b/a Panchito's* (CA 9, 1978) 581 F.2d 204 [99 LRRM 2541]; *Big Three Industrial Gas & Equipment Co.* (1977) 230 NLRB 392 [95 LRRM 1379], *enfd.* (CA 5, 1978) 579 F.2d 304 [99 LRRM 2223].

Unlawful motivation may be established by direct or circumstantial evidence. Direct evidence includes statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the protected activity is an important circumstantial consideration. Timing alone, however,

will not establish a violation. Other circumstantial evidence includes disparate treatment; interrogations, threats and promises of benefits directed toward the protected activity, and expressions of hostility thereto; the failure to follow established rules or procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; and false or inconsistent reasons given for the adverse action. *Miranda Mushroom Farm, Inc., et al.*, supra.

The credited evidence shows that Villanueva was angered by Andrade's protest. See *W. F. Bolin Co.* (1993) 311 NLRB 1118 [143 LRRM 1289], *enfd.* (CA 6, 1996) 99 F.3d 1139 [154 LRRM 2352]. In addition, the timing of the discharge, shortly after Andrade protested the work assignment, points to unlawful motivation. Accordingly, it is concluded that General Counsel has established a prima facie case that Respondent's suspension and discharge of Andrade violated section 1153(a) of the Act.

In order to establish a prima facie case of unlawful retaliation for union activity, General Counsel must show that the alleged discriminatee, to the employer's knowledge, engaged in union activity, and that the discipline or other adverse action imposed was motivated, at least in part, by that activity. The same factors are considered in determining unlawful motivation as in protected concerted activity cases, although the alleged discriminatee need not act in concert with other employees. Once a prima facie case of union-related retaliation is established, the burden again shifts to the employer to show that it would have imposed the same sanctions, absent the employee's union activities.

It is undisputed that Respondent was aware that Andrade supported the Union as of the time of his suspension and discharge. It is also undisputed, however, that

Respondent had obtained this knowledge long before the discipline was imposed, so this important test for animus is not compelling herein.

General Counsel insists that Franco's strongly expressed displeasure at the Union's boycott, and employees who rationalized it, establishes animus in this case.

Section 1155 of the Act provides:

The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute evidence of an unfair labor practice under the provision of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

General Counsel does not contend that any of the statements contained in the notices can be interpreted as containing threats or promises to employees.

The Board, in *Gourmet Harvesting & Packing, Inc., and Gourmet Farms* (1988) 14 ALRB No. 9, at pages 39-44, strictly construed this section, finding that such statements have no probative value in establishing discrimination. Other cases under the Act have found that such statements may be used as evidence of animus, even if the statements themselves do not constitute violations of the Act. *Babbitt Engineering & Machinery, Inc. v. ALRB* (1984) 152 Cal.App.3d 310, at page 331; *Kawano, Inc. v. ALRB* (1980) 106 Cal.App.3d 937. As a general rule, however, if such statements are considered, additional evidence of animus must be presented.<sup>21</sup> It may be presumed that expressions of anti-union sentiment by a high-ranking company official represent the

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<sup>21</sup> The NLRB takes the position that anti-union statements which do not amount to unfair labor practices, in themselves, may be used to establish animus. *Sun Hardware Co., Inc.* (1968) 173 NLRB 973 [69 LRRM 1564], *enfd.* (CA 9, 1970) 422 F.2d 1296 [73 LRRM 2861]; *Gencorp, General Tire Division* (1989) 294 NLRB 717, at footnote 1 [131 LRRM 1783]; *General Battery Corporation* (1979) 241 NLRB 1166 [101 LRRM 1065]. The Courts of Appeals tend to disagree, sometimes citing section 8(c) of the National Labor Relations Act, the parallel of our section 1155. *B E & K Construction Company v. NLRB* (CA 11, 1998) 133 F.3d 1372 [157 LRRM 2335]; *Holo-Crome Co. v. NLRB* (CA 2, 1990) 907 F.2d 1343 [134 LRRM 2686]; *NLRB v. Best Products, Inc.* (CA 9, 1980) 618 F.2d 70, at page 74 [104 LRRM 2539]. In practice, the NLRB rarely relies solely on mere expressions of opposition to unions in finding the establishment of prima facie cases.

views of management generally. *Parsippany Hotel Management Co. v. NLRB* (CA DC, 1996) 99 F.3d 413, at pages 423-424 [153 LRRM 2781].

In addition to generally expressing its displeasure with the Union's boycott, Respondent maintained an employee handbook discouraging employees from seeking redress through the Union, and encouraging direct dealing, the latter arguably constituting an unfair labor practice. *Mars Sales and Equipment Co.* (1979) 242 NLRB 1097, at page 1102 [101 LRRM 1405], *enfd. in part* (CA 7, 1980) 626 F.2d 567 [105 LRRM 2138]; *Thrill, Inc.* (1990) 298 NLRB 669, at page 671 [134 LRRM 1239].<sup>22</sup> By refusing to recognize Union-designated employee representatives, Respondent again arguably violated the Act. *Oates Bros., Inc.* (1962) 135 NLRB 1295 [49 LRRM 1676]; *Lusterlon, Inc.* (1979) 242 NLRB 561, at pages 569-570 [101 LRRM 1231]. The cursory treatment given by Respondent to Ambriz's *admitted* reference to killing Union supporters, Monroy's sarcastic reference to Torres and Andrade as "know it alls," his general tarring of Union supporters as treating the foremen like "garbage," and the mocking conduct of Lopez when issuing Andrade the warning letter, even if in itself justified, all tend to show animus toward Union sympathizers, and a predisposition to blame them in disputed cases of misconduct. Therefore, based on the entire record, it is concluded that General Counsel has established a *prima facie* case that the discipline imposed on Andrade violated section 1153(a) and (c).

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<sup>22</sup> Although employees are free to seek redress of grievances directly even if there is a certified bargaining representative, the solicitation of such grievances by the employer is often considered unlawful.

It now becomes Respondent's burden to preponderantly show that it would have disciplined and discharged Andrade, absent his Union and other protected concerted activities. General Counsel contends that inasmuch as Andrade's response was provoked, Respondent may not rely on that conduct in disciplining him. The NLRB's provocation doctrine prohibits an employer from relying on conduct, which is in line with the degree of provocation, to establish a defense. *Caterpillar, Inc.* (1996) 322 NLRB 674 [154 LRRM 1001], vacated as moot, with direction that the case still stands as precedent, *Caterpillar, Inc.* (2000) 332 NLRB No. 101 [168 LRRM 1181].

The undersigned believes that the facts in this case are, in essence, indistinguishable from those found in *Opelika Welding, Inc.* (1991) 305 NLRB 561 [139 LRRM 1046], cited by General Counsel. In that case, the alleged discriminatee became embroiled in a conflict concerning a warning letter, which he refused to sign. When a management official attempted to explain the significance of the letter, the employee again refused to sign, and then made a sarcastic remark about the manager to his supervisor, telling the supervisor to inform the manager of what he had said. When the supervisor did this, the manager returned, and the employee acknowledged his sarcastic comment. The manager became angry with the employee, shouted at him, and pointed his finger at the employee's face. In response, the employee "partially grasped" the manager's hand and pushed it away. The NLRB affirmed the judge's conclusion that the employee's response was provoked, and could not be relied on to establish a defense.

The facts herein are very similar, the main difference being that Andrade grabbed Villanueva's hand, although Villanueva's testimony concerning the level of pain this caused has not been credited. While the level of contact herein does not appear to be

significantly greater than in the NLRB case, it is noted that there was more provocation in this case. Thus, Villanueva had earlier shouted at Andrade, and pointed his finger at his face. That afternoon, Villanueva, apparently still angry about the morning incident, threw mushrooms into Andrade's basket, at a time Andrade's face was inches away. When Andrade protested this, Villanueva chose to escalate the confrontation by returning to Andrade's work area, and by again shouting at him and pointing his finger. In response, Andrade made one, brief physical contact, causing no injury. Under these circumstances, and in light of the decision in *Opelika Welding, Inc.*, supra, it is concluded that Andrade's response was in line with Villanueva's provocation and, therefore, Respondent may not rely on it in establishing a defense.<sup>23</sup> Given this conclusion, it is not necessary to decide whether, in fact, Respondent would have discharged Andrade for his conduct on the afternoon of May 27, absent his Union and other protected concerted activities. Based on the foregoing, it is concluded that Respondent violated sections 1153(a) and (c) of the Act by suspending, and then discharging Andrade.

### **THE REMEDY**

Having found that Respondent violated section 1153(a) and (c) of the Act, I shall recommend that it cease and desist there from and take affirmative action designed to

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<sup>23</sup> General Counsel also cites *E. I. DuPont de Nemours* (1982) 263 NLRB 159 [111 LRRM 1620]. In that case, where a supervisor stood face to face with an employee and demanded he lower his voice, the employee pushed the supervisor away, directed foul language at him, asked if the supervisor wanted to fight and said he would "kick his ass" if the supervisor were younger. The NLRB held that in light of the company's prior campaign of harassment against the employee, his response was reasonably provoked. The NLRB distinguished its decision in *Great Western Coca-Cola Bottling Company d/b/a Houston Coca-Cola Bottling Company* (1981) 256 NLRB 520 [107 LRRM 1286], where it upheld the discharge of an employee who (after being highly insubordinate), slapped her supervisor *on the side of his forehead*. In *Caterpillar Inc.*, supra, a supervisor, during the course of a protected protest by an employee, harassed the employee by directing foul language toward him. In response, the employee swore at the supervisor, said he would "deal with" him "on the outside" and poked the supervisor on the forehead. In addition to finding that the employee's conduct did not lose protected status, the NLRB held that the employer could not rely on the provoked conduct to establish a defense. These cases also support a finding of provocation herein.

effectuate the purposes of the Act. 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.

On the basis of the entire record, the findings of fact and 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, Pictsweet Mushroom Farms, Division of United Foods, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
  - (a) Suspending, discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in activities in support of the United Farm Workers of America, AFL-CIO, or any other labor organization, or other concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).
  - (b) 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) Rescind the suspension and discharge of Fidel Andrade Fernandez, and offer him immediate reinstatement to his former position of employment or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.
- (b) Make whole Fidel Andrade Fernandez for all wages or other economic losses he suffered as a result of his unlawful suspension and discharge, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in *E. W. Merritt Farms* (1988) 14 ALRB No. 5.
- (c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning May 28, 2001, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.
- (d) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

- (e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.
- (f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, 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 a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.
- (g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period May 28, 2001 to May 27, 2002, at their last known addresses.

- (h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.
- (i) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: January 10, 2002

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Douglas Gallop  
Administrative Law Judge

**NOTICE TO AGRICULTURAL EMPLOYEES**

After investigating a charge that was filed in the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by suspending and discharging Fidel Andrade Fernandez because he supported the United Farm Workers of America, AFL-CIO (UFW), and concertedly protested terms and conditions of employment.

The ALRB has told us to post and publish this Notice.

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

1. To organize yourselves;
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;
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 ALRB;
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** suspend, discharge or otherwise retaliate against agricultural employees because they join, support or assist the UFW, or any other union, or protest about their wages, hours or other terms or conditions of employment.

**WE WILL NOT** in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

**WE WILL** offer Fidel Andrade Fernandez immediate reinstatement to his former position of employment or, if his position no longer exists, to substantially equivalent employment, and make him whole for any loss in wages and other economic benefits suffered by him as the result of his unlawful suspension and discharge.

DATED: \_\_\_\_\_

PICTSWEET MUSHROOM FARMS,  
DIVISION OF UNITED FOODS, INC.

By: \_\_\_\_\_  
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 319 South Waterman Avenue, El Centro, California 92243. The telephone number is (760) 353-2130.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

**DO NOT REMOVE OR MUTILATE**

