

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 01-CE-317-EC(R) to 01-CE-324-EC(R)
	)	01-CE-327-EC(R) to 01-CE-498-EC(R)
RIVERA VINEYARDS, OASIS	)	01-CE-517-EC(R) to 01-CE-551-EC(R)
DISTRIBUTING, BLAS RIVERA,	)	01-CE-675-EC(R)
INC., LINDA VINEYARDS, INC.)	)	01-CE-721-EC(R)
and RIVERA VINEYARDS, INC.,	)	01-CE-767-EC(R)
	)	01-CE-813-EC(R)
Respondents,	)	01-CE-859-EC(R)
)	
and	)	29 ALRB No. 5
	)	(September 19, 2003)
VIRGINIA MEJIA, ET AL.,)	
)	
<u>Charging Parties.</u>)	

DECISION AND ORDER

On June 6, 2003, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-entitled case, in which he concluded that the complaint should be dismissed in its entirety. The complaint consisted of allegations that a foreperson, Virginia Mejia, and her crew were unlawfully discharged for engaging in union and other protected concerted activity. The ALJ dismissed the complaint as to Mejia, finding that she was a supervisor and, further, finding that no credible evidence established that she and her crew were discharged because she refused to discharge those who had engaged in protected activity (the ALJ found no credible evidence of union activity, but did find that the crew had concertedly objected to ill treatment by Mejia's supervisor, Lazaro Rodriguez). He also

dismissed the complaint as to the crew members, concluding that even though the General Counsel established a prima facie case, Rivera Vineyards, et al. (Employer) successfully demonstrated that the crew would have been discharged for poor work performance even in the absence of their protected activity.

In a key finding underlying his analysis, the ALJ found that the Employer, fairly or not, blamed any failings of the crew on poor direction and leadership by Mejia, and that she, not the crew, was the intended target of the discharge. Given the Employer's established practice of hiring primarily through forepersons who assemble their own crews, the discharge of Mejia had the unfortunate effect of resulting in the loss of work for those in her crew who did not proactively seek employment on other crews because the Employer did not inform the crew that they could apply for work individually to fill out other crews.¹

The ALJ also relied on several other factors in concluding that the protected activity was not a "but for" cause of the discharge of the crew. First and foremost is that the record indicates that Mejia's supervisor, Lazaro Rodriguez, who was given full discretion in hiring, firing, and supervision of the crews, had serious problems with Mejia and her crew's work performance prior to the crew's protected activity, including a suspension and warnings to Mejia's relatives that she was in danger of being discharged. The ALJ also relied on the admission by one of the charging parties, Rosario Taylor, that prior to the protected activity she heard Rodriguez' assistant, Jorge Padilla, say that Mejia would be discharged. In addition, the ALJ cited the lack of any contemporaneous reaction to the protected activity by the

¹ The ALJ did find that as a legal matter the crew was discharged regardless of the Employer's intent because the conduct of its agent, Lazaro Rodriguez, could have led the crew to reasonably believe that they had been discharged. (Citing *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4.)

Employer's managers. Lastly, the ALJ concluded that Rodriguez' evasive conduct toward Mejia, giving false and inconsistent reasons for failing to recall her before finally telling her she was discharged, was more likely a reflection of the Employer's reluctance to confront a long time employee with her discharge for poor work performance, rather than an effort to conceal an unlawful motive.

The United Farm Workers of America, AFL-CIO (UFW) timely filed exceptions to the ALJ's decision. The Employer also timely filed exceptions, despite the recommended dismissal of the complaint.²

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact³ and conclusions of law, and adopts his recommended decision.⁴

² The Employer's exceptions are best described as conditional, in that they suggest additional grounds for dismissing the complaint should the Board find merit in the UFW's exceptions. In light of the decision herein, the Employer's exceptions are moot.

³ Due to a tremendous amount of conflicting and inconsistent testimony on key issues in this case, coupled with the relative lack of other evidence to corroborate the testimony, the ALJ was forced to make numerous credibility determinations, many based on demeanor. 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 or 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. (*P.H.Ranch*, supra.) A review of the record in this case has revealed no basis for disturbing the ALJ's credibility determinations.

⁴ In one of its exceptions, the UFW argues that the ALJ failed to consider finding a violation on the theory that Mejia was unlawfully discharged in retaliation for taking up the cause of Rosario Taylor, who had complained of a sexual assault by supervisor Jorge Padilla. Though this theory of the case was not alleged specifically in the complaint, the UFW suggests that the Board may address it because it was fully litigated. Assuming that to be true, we note that this theory is precluded by the evidence in the record. While Mejia claimed to have confronted Padilla with Taylor's allegations, she admitted not relating the claim to owner Blas Rivera or Padilla's supervisor Lazaro Rodriguez until March 2001, long after the evidence shows that Rodriguez made the

ORDER

The complaint in Case No. 01-CE-317-EC(R), et al. is hereby DISMISSED in its entirety.

DATED: September 19, 2003

GENEVIEVE A. SHIROMA, Chairwoman

GLORIA A. BARRIOS, Member

CATHRYN I. RIVERA, Member

decision to discharge Mejia. Moreover, the ALJ credited Padilla's denial that Mejia ever raised the issue with him.

CASE SUMMARY

RIVERA VINEYARDS, ET AL.
(Virginia Mejia, et al.)

29 ALRB No. 5
Case No. 01-CE-317-EC(R), et al.

Background

On June 6, 2003, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in the above-entitled case in which he concluded that the complaint should be dismissed in its entirety. The complaint consisted of allegations that a foreperson, Virginia Mejia, and her crew were unlawfully discharged for engaging in union and other protected concerted activity. The ALJ dismissed the complaint as to Mejia, finding that she was a supervisor and, further, finding that no credible evidence established that she and her crew were discharged because she refused to discharge those who had engaged in protected activity. He also dismissed the complaint as to the crew members, concluding that even if the General Counsel successfully established a prima facie case, Rivera Vineyards (Employer) successfully demonstrated that the crew would have been discharged for poor work performance even in the absence of their protected activity.

Board Decision

The Board affirmed the decision of the ALJ, noting that the decision was based heavily on credibility determinations, and that the Board's review of the record provided no basis for disturbing those determinations. The Board also noted that an alternative theory proffered in exceptions, that Mejia was discharged in retaliation for reporting an allegation of sexual assault on one of her crew members by another supervisor, was precluded by admissions by Mejia that she did not report the incident to higher level management until long after the decision to discharge her was made and by the credited denial by the alleged perpetrator that Mejia discussed the matter with him shortly after the incident was brought to her attention.

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

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DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Indio, California on March 25-28 and 31, 2003.

The charges were filed with the Agricultural Labor Relations Board (hereinafter ALRB or Board) by 36 individuals on May 1 and 22, and October 2, 2001. These individuals are former employees of Rivera Vineyards, and their foreperson, Virginia Mejia. The charges allege that Blas Rivera, Inc., Linda Vineyards, Inc., Oasis Distributing, Rivera Vineyards, and Rivera Vineyards, Inc., violated section 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter Act), by denying employment to Mejia and her crew because of their known or suspected protected concerted and/or union activities. The Board's General Counsel issued two complaints alleging said violations, which were consolidated for hearing. The charged entities filed answers denying the commission of unfair labor practices, and setting forth affirmative defenses. In the answers, they admitted that Blas Rivera, Lazaro Rodriguez Navato (Rodriguez), and Daniel Perez were supervisors and/or agents of Linda Vineyards.

Virginia Mejia intervened at the hearing. The parties stipulated that for the purposes of this proceeding, Rivera Vineyards, Linda Vineyards, Inc., and Rivera Vineyards, Inc. (hereinafter referred to as Respondents) were the joint employers of the employees in Mejia's crew. General Counsel agreed that the charges against Blas Rivera, Inc. should be dismissed, but declined to do so with respect to Oasis Distributing. Inasmuch as no evidence was presented showing that entity to be an employer of the alleged discriminatees, those allegations will also be dismissed. At the outset of the hearing, General Counsel stated that should Mejia be found to be a supervisor within the

meaning of section 1140.4(j) of the Act, as contended by Respondents, she was still unlawfully discharged, for refusing to commit unfair labor practices. Subsequent to the hearing, General Counsel and Respondents submitted post-hearing 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 other arguments made by counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

Respondents cultivate and harvest several varieties of table grapes. Their crews are directly supervised by a foreperson, who often has an assistant. Lazaro Rodriguez is Respondents' field supervisor, and oversees the work of all the forepersons. In 2000, Jorge Padilla Bracamontes (Padilla), who had been a foreman, became Rodriguez's assistant. Blas Rivera is the owner of Rivera Vineyards. The evidence showed that he has little to do with the day-to-day supervision of the crews.

Respondents employ seasonal agricultural employees to engage in preharvest work, such as deshooting, thinning and tipping the grapes. The preharvest work for the 2000 season was performed by about 10 crews of 40-50 employees, from early March to the beginning of May. Substantially more employees are utilized for the harvest, which typically runs from May into July. Thus, Respondents usually have 16-19 crews of 60-80 workers for the harvest.

Prior to the preharvest and harvest operations, Rodriguez conducts meetings with the forepersons and their assistants. He sets staffing guidelines, and assigns the crews to work locations and job functions. Most of Respondents' field workers are not new employees. Returning employees are recalled to work by their foreperson. When new employees are needed, they are usually chosen by the forepersons, and sent to the office for document verification and other routine pre-employment matters. Rodriguez signs the dispatch slips new employees take to the office, but rarely, if ever, rejects employees chosen for work by the forepersons. If the forepersons cannot fill their crews, Rodriguez may hire additional employees. If applicants come to Respondents' office seeking work, they are typically sent to forepersons in need of crew members, or given a list of the forepersons with their telephone numbers. Respondents contend that their employees know they may obtain employment at the office; however, all of the many employees who testified on this point denied such awareness, or that they were ever so informed.

The Alleged Unfair Labor Practices

Testimony of the Witnesses

General Counsel called 18 non-adverse witnesses to testify, most of them charging parties and former members of Virginia Mejia's crew. Mejia's crew of about 49 workers began preharvest work for the 2000 season in early March. Respondents' records show that the entire crew was laid off on May 1, 2000.

Witnesses from both sides agree that over Mejia's 13 or 14 years with Respondents as a crew leader, Rodriguez had frequently criticized the crew's work performance. All but Rodriguez agreed that he frequently did this in a very loud manner.

It is also undisputed that Mejia's crew had been suspended, in 1998 or 1999, for leaving grapes on the ground. Daniel Perez, Respondents' Personnel Manager, testified that in 1999, he saw that Mejia's crew was not cleaning up fruit properly, and told her she needed to do a better job. Mejia denied this incident took place. Perez testified that he asked some of Mejia's family members (a brother, Jesus Godinez, was Mejia's assistant) to work with her on improving the supervision of her crew, or she would lose her job. Although not directly involved in field employee supervision, Blas Rivera testified he had heard complaints about Mejia's work performance and efforts to have her relatives work with her, before she was discharged. At the same time, Rivera had no personal knowledge of any deficiencies in her work, and gave her a letter of recommendation, dated February 18, 2000, commending her as a reliable, honest and hard working employee.

Rosario Taylor, a crew member, testified that five or six days prior to the end of the preharvest work, she was sexually assaulted in the fields by Jorge Padilla, at which point she pushed him away and reported the incident to Mejia. Mejia testified that after Taylor reported the incident to her, she spoke with Padilla, who denied engaging in the conduct attributed to him. Mejia testified that she did not report the incident to Lazaro Rodriguez or Blas Rivera until March 2001.

On September 27, 2001, Mejia signed a charge alleging gender discrimination with the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission (EEOC) stating, under penalty of perjury, that she did report the incident to Rodriguez, after which the crew was harassed,

discharged and not rehired.¹ Mejia did not contend that she spoke with Padilla in that statement, or in her ALRB declaration of July 16, 2001, which deals with the alleged incident. Padilla, in his testimony, denied sexually assaulting Taylor or speaking with Mejia about this, and stated he first found out about the allegation from Rodriguez in 2001.

General Counsel's witnesses who testified on the issue agree that at some point during the preharvest work in 2000, Rodriguez loudly berated the crew, using vulgar language, and that at least one employee, Melesio Sanchez, told Rodriguez not to speak to the crew members in that manner. Beyond this, there is little agreement amongst these witnesses concerning the incident(s). The first uncertainty created by the testimony is whether Rodriguez did this on one or more occasions during the 2000 season. Most of the witnesses referred to only one incident, while acknowledging Rodriguez had reprimanded the crew many times in prior seasons. Melesio Sanchez, however, testified that Rodriguez castigated the crew twice in one day, and he spoke out on the first occasion. Mejia, who had initially referred to only one incident in her testimony, was present during the testimony of all witnesses, as an intervenor. Mejia was then recalled as a rebuttal witness, and testified, in agreement with Sanchez, that there were two incidents, although she was far from clear as to whether they took place on the same day.

¹ Mejia at first denied filing this charge. Eventually, she admitted filing it, but claimed it was based on age discrimination, because she "looks old." (Mejia, in fact, does not look old in the ordinary sense of the word.) When confronted with the inconsistency regarding whom she spoke with concerning the Padilla incident, Mejia claimed she did not understand what she had signed, since the EEOC statement is in English, and Mejia speaks and reads only Spanish. Mejia, however, later admitted the agency representative conducted the interview in Spanish, and translated the statement to her before she signed it.

Most of General Counsel's witnesses testified that the incident(s) took place on or near their last day of work for Respondents. Sanchez testified he could not recall if, or for how long the crew worked thereafter. He did recall that the first reprimand took place in the morning, and the second in the afternoon. When recalled as a witness, Mejia initially testified that the two Rodriguez reprimands took place about three days apart, but then testified the reprimands took place on the same day.² Mejia claimed that the incident where Sanchez spoke up took place before she spoke with Padilla concerning the alleged assault on Rosario Taylor. Taylor testified that the reprimand to the crew took place after she was assaulted.

On the occasion that Sanchez spoke up, Rodriguez rapidly drove to where the crew was working, and ordered Mejia to bring the workers out of the field. At that point, Rodriguez began yelling at them. All of General Counsel's percipient witnesses, except Taylor, recalled he complained they were working too slowly and some, including Mejia, recalled one or more other complaints about their work, including crew members working too closely together. Taylor refused to acknowledge any work-related complaints by Rodriguez at that time,³ and contended Rodriguez simply began shouting insults and obscenities at the crew because, she believes, of her complaint concerning Padilla's alleged sexual assault.

Virtually all of General Counsel's witnesses to the incident(s) testified that Sanchez asked Rodriguez why he was shouting at the crew in that manner, and asked him

² See transcript, volume V, page 801.

³ Taylor later admitted that Rodriguez had previously complained about the crew's work on many occasions.

to show more respect. Many, but not all of General Counsel's witnesses, including Mejia, Sanchez and Taylor, testified that Jose Manuel Diaz also spoke up in similar fashion. Diaz testified, stating he spoke up after Sanchez responded to Rodriguez's verbal attack. Mejia, Sanchez, and Taylor, but only one or two other witnesses testified that Taylor also spoke up. Mejia and Sanchez, in their prehearing Board declarations, specifically stated no one other than Sanchez spoke out to Rodriguez.⁴

Most of General Counsel's witnesses, including Sanchez, testified that Rodriguez said nothing in response to the complaint(s), and simply left in an angry manner, spinning the wheels of his vehicle on the dirt road, as he left in a cloud of dust. Mejia alleged that Rodriguez told her that she had a leader or leaders⁵ in her crew, in front of the entire crew. Rosario Taylor testified she heard this, but claimed Rodriguez made the statement **before** Sanchez spoke up, and considered it a reference to her complaint about Padilla. Rosalia Perez Rios (Perez) testified that the "whole crew" and Mejia were saying, (at an unspecified time), that Rodriguez was talking about a leader. Perez did not, however, claim to have heard this herself. Rosa Margarita Rodriguez testified that she thought the crew had been discharged because Lazaro Rodriguez took them out of the field, and because they had a leader, "or something like that." Rosa Rodriguez did not claim she actually heard Lazaro Rodriguez say anything about a leader, and when asked what he actually said to make her think the crew was discharged, she testified that after he ordered the crew from the field, Lazaro Rodriguez said Respondents would contact the crew later.

⁴ No Board declaration by Taylor was mentioned at the hearing.

⁵ Mejia alternated between the singular and plural.

No other witness testified that Lazaro Rodriguez told the crew, at that point, that Respondents would contact the workers later.

Mejia claimed Rodriguez later repeated the comment about leaders to her when they were alone, the time period varying from a week, to about three days, to at some point between the two reprimands. Rodriguez allegedly approached her in the fields and again complained about the crew's slow work. He told her she had leader(s) and wanted them fired. Mejia testified she responded that the employees were only asking him why he was mistreating them, and she did not see any leaders in her crew. Since there had been no strikes or riots, why should she fire them?

Mejia initially claimed Rodriguez, at that time, accused Melesio Sanchez of having a "Boycott Grapes" bumper sticker on his vehicle. Mejia said she did not know anything about it. When Rodriguez identified the vehicle with the sticker, Mejia told him she did not believe it belonged to Sanchez. On cross-examination, Mejia testified that the discussion regarding a bumper sticker took place during the reprimand to the crew, rather than the subsequent discussion. Upon further questioning, she testified Rodriguez asked about the bumper sticker on both occasions.

The first mention of Rodriguez using the word, "leaders," in Mejia's prehearing Board affidavit of July 16, 2001 refers to March 23, 2001.⁶ Indeed, her account of the 2000 preharvest reprimand incident therein bears only a vague resemblance to her testimony:

⁶ Instead, Mejia, in the declaration, claims that after accusing Sanchez of having a sticker on his vehicle, Rodriguez told her to discharge the man with the sticker "on many occasions."

Approximately in April 2000, one of the employees in my crew, Rosario Taylor, complained to me that Jorge Padilla, a supervisor of Blas Rivera Vineyards, grabbed her breasts during work hours. I trie[d] to talk with Lazaro to complain about what Jorge had done to Rosario. When I tried to talk to Lazaro, Lazaro yelled at me in front of the crew that we were all stupid and for us to go fuck ourselves (vallanse a la verga- go to the dick). Then an employee, Melesio Sanchez, who heard what Lazaro said, intervened, telling Lazaro, "Why are you offending us like that?" and that we deserved his respect.

Rodriguez denied he ever told Mejia she had leaders in her crew, or that he wanted the leaders discharged. Rodriguez testified he could not recall this or these incident(s).

General Counsel's witnesses concerning the event agree that after Rodriguez's harsh reprimand(s), a group of 14-16 from the crew went to speak with Blas Rivera or Daniel Perez, although there is disagreement as to whether this took place the day of the reprimand(s) or the next. All testified that a reason they did this was to protest Rodriguez's treatment. Some testified they also went to seek reinstatement, because they believed Rodriguez had discharged them. All of these witnesses testified that after being informed Rivera was not available, they met with Perez. Sanchez, speaking for the employees, told Perez that Rodriguez was mistreating them. Perez allegedly told them not to pay attention to the "old man," because he was "nervous." Some of the witnesses also alleged Perez told them they could return to work on Monday.

Perez denied speaking with the workers, or being at the office when the incident occurred. Eloy Rivera, a brother of Blas Rivera and Respondents' Maintenance Supervisor, testified that during the 2000 preharvest season, he drove up to the office, and saw a group of workers, who told him they wanted to speak with Blas Rivera. Eloy Rivera went into the office looking for his brother and Perez. When informed neither

was present, he spoke to the employees.⁷ He agreed that the employees complained about Rodriguez's conduct, but denied telling them they could return to work on Monday, since this was not raised as an issue. In response to the complaint, Rivera told them that Rodriguez is an "old-timer," and to bear with him, because Rodriguez was "under a lot of stress." No witness to this incident alleged that Rodriguez's purported use of the term, "leader" was mentioned at that time. There is no physical resemblance between Eloy Rivera and Daniel Perez.

One might assume that Rodriguez would have been informed of this incident. On questioning initiated by General Counsel, however, Eloy Rivera and Perez denied telling Rodriguez about it, and Rodriguez denied knowing that it had occurred.

There is a brief layoff between the end of the preharvest work and the start of the harvest season. Mejia testified that she met Rodriguez at a store shortly prior to the commencement of the 2000 harvest. She asked him when the harvest work would begin, and he told her it would not, for them, because Blas Rivera was bankrupt, and would only be using male forepersons. Mejia asked why such a decision had been made, asking about a forelady highly regarded by Respondents. Rodriguez repeated that only foremen would be working the harvest. He told Mejia to find other work for the season, but to keep her crew together, because when Rivera's financial situation improved, the crew would be recalled. Mejia testified she informed her crew of this decision, and many witnesses testified they were told there would be no harvest work, because Respondents were not going to employ foreladies.

⁷ Eloy Rodriguez testified in English. He spoke to the employees in Spanish.

There are several contra-indications to Mejia's testimony. In her sworn statement to the EEOC, alleging gender discrimination, there is no mention of Rodriguez stating there would be no foreladies working in the harvest. Perez testified that, in fact, six foreladies, worked during the 2000 harvest. Evangelina Lopez Castaneda (Lopez), one of Mejia's sisters, testified that after Mejia was informed she would not work the harvest, she visited Mejia and asked what had transpired. Mejia told her that she did not know why this had happened, and she was unaware of what the problem was. Furthermore, Lopez testified that Rodriguez, who would presumably have known of the relationship between Mejia and Lopez, offered her a position as foreperson, shortly after allegedly telling Mejia no female forepersons would be hired.⁸

Rodriguez denied telling Mejia that no foreladies would work in the harvest, or that he informed her of this at the store. Rodriguez testified he informed Mejia, and two or three⁹ other foreladies, that they and their crews would not be working in the harvest, because the crop was very poor, and to find other work. Rodriguez contends he did this at the preharvest meeting of forepersons and their assistants, in front of all those present.

There are also several contra-indications to this testimony. Respondents did not call any of these supervisors, presumably under their control, to corroborate Rodriguez's claim that he told Mejia and the other foreladies they would not be working the harvest, at the preharvest meeting, or to explain why no such corroboration had been attempted. Respondents also failed to produce any evidence showing other foreladies and/or their

⁸ Lopez testified that she declined the offer, because she was upset about the treatment her sister had received, and after working the harvest as an assistant foreperson, resigned from her employment.

⁹ It is difficult to tell, from the transcript, whether Rodriguez named a third foreperson, or was repeating the name of the second.

crews had been laid off for the harvest. Lopez's testimony concerning Rodriguez's offer to make her a forelady indicates it took place at the preharvest meeting, and that Mejia was not present. Blas Rivera agreed that the 2000 harvest was "disastrous," but also testified that Rodriguez complained about Mejia's poor work performance, and told him he was discharging her, prior to the commencement of the 2000 harvest season. Rivera further testified that while he personally did not observe any problems with Mejia's work, and had given her a favorable letter of recommendation dated February 18, 2000, he had heard complaints about her work from others. Rivera was somewhat surprised and upset by Mejia's discharge, but deferred to Rodriguez's authority over the crews. Rodriguez, contradicting Rivera, denied informing Rivera he was discharging Mejia in May 2000. Rather, as discussed below, he allegedly told Mejia this in February or March 2001. Mejia is the first foreperson ever discharged by Respondents, and had worked all of the harvests in her 13 or 14 years of employment.

Lopez's testimony regarding an offer of crew leadership does not comport with the layoff of an experienced crew for strictly economic reasons. Perez testified that while the harvest was below average, Respondents had 16 crews, a normal number, and far more employees than performed the preharvest work. Finally, Lopez testified that when Rodriguez offered her the foreperson position, she asked him why he had "stopped" her sister. According to Lopez, Rodriguez said there were many problems in the crew, and Lopez did not have to know anything about them. Respondents did not call upon Rodriguez to respond to this testimony, other than to say that Lopez left work because she was "sick," and then told him she did not wish to return. Rodriguez did not specify

when Lopez last worked for Respondents, and Respondents did not offer any personnel records at the hearing showing she did not work the 2000 harvest season.

Although Rodriguez testified he told Mejia she and her crew were laid off for the harvest, Daniel Perez testified that, in fact, about 10 obtained jobs for the harvest on other crews. With some prodding, a few crew members admitted becoming aware of this, on unspecified dates, contending those employees obtained harvest work through friends on other crews. Mejia obtained work for the 2000 harvest season and the following winter tying work with a contractor, and brought the majority of her crew with her.

It is undisputed that Rosario Taylor met with Blas Rivera during the 2000 harvest season to inquire about future employment for the crew with Respondents. Taylor and Rivera sharply disagree as to what was said at the time. Taylor testified that she first informed Rivera about the Padilla assault, which Rivera denied. According to Taylor, Rivera told her he would take care of the problem. Taylor asked if the crew could return to work for Respondents the following season, and Rivera told her he would bring her and the rest of the crew back the following year. Rivera testified he told Taylor it was up to Rodriguez to recall the crew. Rivera also testified that as Taylor left, she asked him not to forget them, and he replied he would not. Rivera testified that he has nothing to do with day-to-day personnel issues, such as hiring and firing crew members, and such authority, for field workers, lies entirely with Rodriguez.

Taylor, who was working for the contractor with Mejia and other crew members, testified she returned to work, telling Mejia and the others that Rivera had told her he would hire Mejia and the crew back the following year. Mejia testified that Taylor told

them Rivera would call them back personally, and they would be working directly under Rivera's supervision, and not under Rodriguez. Mejia sent Rivera a box of grapes to show him how well the crew was working.

Mejia and crew checker Maria Elena Godinez Hernandez (Godinez) testified that in February or early March 2001, they went to Rodriguez's home and asked him if he was going to recall the crew for the 2001 preharvest work. Rodriguez agreed to do this, and told Mejia he would call her, but the work might start later than usual. Mejia further testified she told Rodriguez she knew Respondents had used foreladies in the 2000 harvest, and he replied that although the vineyards had not been doing well, "the boss" had suddenly started hiring foreladies. Rodriguez denied he told Mejia there was work available for her. Rather, he told Mejia there was work for the crew, but not for her. Rodriguez further testified that many crew members had already worked the 2000 harvest, and named two, including Mejia's brother, who had been her assistant, that he spoke with and put to work.

Mejia and Lopez testified they went to Respondents' fields looking for Rodriguez, later in March 2001, because he had not contacted Mejia. They found him at a field known as the "Pescaderia," with Padilla and a forelady. Mejia and Lopez repeatedly asked Rodriguez if he was going to recall Mejia and her crew, and he promised he would, telling Mejia he would call her on Friday, the next day. Mejia told Rodriguez he needed to contact her soon, because she and the crew were in danger of losing future employment with the contractor by the delay. Rodriguez and Padilla testified they could not recall such a conversation having taken place.

Mejia testified Rodriguez did not call that Friday, but did, on the following Monday. Rodriguez told her he had received reports she had been sleeping in the fields, and the crew was not paying attention to her orders. Rodriguez allegedly went on to say that she had leaders, and had obtained the people on her crew from the trash. Rodriguez said he had told her to fire the leaders, but she had not, and Mejia never listened to his orders. Mejia asked how he could discharge her, after Rivera had written a favorable letter about her. Rodriguez was angered that Mejia was going to use the letter against Rivera. Mejia said she was not going to use anything against Rivera, but just wanted her job back.

Mejia's July 16, 2001 declaration bears some resemblance to her testimony:

Approximately on Friday, March 23, 2001, Lazaro called me on the telephone and told me, "You know, you will not be able to work. I asked why, and Lazaro told me, "Because you are incompetent, because you have incompetent people in your crew, and because they found you asleep under the vines. I told Lazaro those were lies, and I told him to give me a better reason. I told him I am a respectable person, and I do not accept those excuses. Then Lazaro told me, "People talk about you and furthermore, you had leaders in your crew." I told Lazaro, "That man told you things because you said some very ugly things. Then Lazaro told me, "You did not obey my orders when I told you to fire the man with the sticker."

Other than denying any comments about leaders, Rodriguez was not asked to respond to this testimony. Rodriguez testified he had caught Mejia sleeping in the grapevines, the crew did not listen to her orders and that she and the crew were not performing their work as directed. Perez testified that an additional four employees from Mejia's crew resumed working for Respondents on other crews in the 2001 preharvest season.

Mejia attempted to meet with Blas Rivera, and three days later, accompanied by Taylor, succeeded in doing so. Initially, they spoke alone with Rivera, but Rodriguez rapidly drove up and joined them. Mejia testified she asked Rivera if he would rehire Mejia and her crew. Rivera replied that Rodriguez had told him she was sleeping in the fields and was not a competent person to lead the crew. Taylor told Rivera he had promised them work, at which point, Rodriguez arrived, “burning rubber.” Mejia demanded an explanation for dismantling her crew. Rodriguez purportedly replied, “I already told Blas that you are not competent, and you have leaders.” Rodriguez allegedly continued by stating he had told Rivera that Mejia was sleeping in the fields, was incompetent, and hired ugly people she obtained from the trash. At that point, Taylor brought up the Padilla incident, telling Rivera that she had spoken to him about it earlier, and reminding him he had promised to take action. Rodriguez allegedly cut in, stating, “You’re going to start with your shit?” Rivera asked Rodriguez if Mejia could be rehired, to which Rodriguez responded, “Definitely not.” Mejia said, “Thank you,” and told Rivera she and the crew now had no work with Respondents or the contractor. Mejia turned in her cutters and other work materials, and left. Mejia’s prehearing declaration is significantly different than her testimony, concerning the alleged reference to “leaders” during this discussion:

After March 23, 2001, I went to Blas Rivera’s office to ask Blas Rivera if he was going to give me work for the 2001 season. Lazaro arrived later and in front of Lazaro, **I told Blas Rivera that I did not have leaders in my crew.** Then, I told Lazaro, “Prove to me that I was found sleeping under the vines and that I did not do good work, and prove to me that I had leaders in my crew. Neither Blas or Lazaro said anything to me, [and] I was not given work during the 2001 season. [Emphasis added]

Compounding the above discrepancy, Taylor testified that it was **Blas Rivera** who initiated the discussion about leaders. According to Taylor, **before** Rodriguez arrived, Rivera told them Rodriguez had discharged Mejia because she was incompetent and had leaders. Taylor also claimed that she raised the Padilla incident both before and after Rodriguez arrived. According to her, Rodriguez said, “You’re starting with that shit,” **twice**, first in response to Taylor asking him to admit using foul language to the crew, and again when she, for the second time, spoke about the alleged Padilla assault. Taylor again contradicted Mejia when she testified that Rivera asked Rodriguez if there were any positions available for Mejia **and her crew**, and claimed Rodriguez responded, “You have no work, **nor your people**, because you have leaders.”

Rodriguez testified that this meeting was the first time he had heard about the alleged Padilla assault. He claimed he was not present when Mejia asked Rivera for work. Otherwise, beyond denying any mention of leaders, Rodriguez was not asked to confirm or deny the allegations raised by Mejia and Taylor concerning this meeting. Rivera was only questioned concerning this incident by General Counsel as an adverse witness, and was never asked to give his complete recollection of what took place. Rivera testified that Mejia asked him for work, and he told her this was Rodriguez’s decision to make. Rivera further contended it was Mejia who first brought up the Padilla allegations, and this was the first time he had heard of them. Rivera was not asked to confirm or deny the remainder of the testimony by Mejia and Taylor concerning this discussion.

Mejia, who had earlier told the crew members she believed they would be returning to work for Respondents, contacted them to state that in fact, they would not be recalled. Many witnesses corroborated Mejia on this, and they uniformly testified that they relied on Mejia to inform them of recalls, and did not seek work from Rodriguez or any other source. Countering this, Rodriguez generally claimed that employees were aware they could seek work from him, naming two employees from Mejia's crew who did this and were hired for the 2000 harvest. As noted above, a few workers acknowledged being aware that some of their fellow crew members had returned to work on different crews.

Mejia's checker, Godinez, testified that when Mejia informed her of the decision not to recall the crew for the 2001 harvest, Mejia told her Rodriguez had said there were leaders in the crew, and he did not want Sanchez working for Respondents. Mejia did not claim to have said this to Godinez. All of the other witnesses concerning Mejia's calls testified that she simply told them they would not be returning to work.

Shortly after the first group of the charges in this case were served on Respondents, letters were sent out offering reinstatement to the crew members, but not Mejia, for the 2001 harvest. Several called Rodriguez, and he told them to report to a designated location. A group of former Mejia crew members, including Sanchez, Taylor and Godinez, appeared at about 5:30 a.m. Rodriguez had previously contacted a forelady, Ricarda Toledo, and told her to meet the employees, and put them to work on her crew. Toledo met the employees, and told them to follow her to a field, where her crew was assigned to work.

Sanchez initially testified that the employees did not go to work because they were not given any equipment. Sanchez then admitted Toledo offered them clippers, but the employees did not go to work, because they feared pressure from Rodriguez. The employees asked Toledo to have Rodriguez meet with them, and she contacted him. According to Sanchez, he asked Rodriguez if they would retain their seniority from Mejia's crew. Rodriguez allegedly responded, "Now you are starting with your politics again," and walked away. According to Sanchez, he felt the offer of reinstatement had been rescinded.

Taylor testified that Toledo did not arrive until 8:00 a.m., and by then, many of the employees had left. Those still there followed Toledo to the field. According to Taylor, they asked Toledo to have Rodriguez come to the field, because he was the one who had told them to return to work. Taylor further alleged that when Rodriguez arrived, Sanchez asked where they were going to work, to which Rodriguez responded "You're going to start with your shit already. If you want work, then take the work. Otherwise, leave." At that point, Rodriguez walked away.

According to Godinez, the employees decided not to work that day, because Rodriguez was not offering the job in good faith. Godinez did not corroborate either version of the exchange between Sanchez and Rodriguez, as portrayed by Sanchez and Taylor.

Claudia Celene Perez Rios testified that the employees did not return to work, because Toledo did not offer them the tools. According to Rios, when Rodriguez arrived, Sanchez tried to speak with him, but was cut off when Rodriguez said, "If you want

work, there it is,” and walked away. All of these witnesses denied anyone in the group said they would not work unless Mejia was the forelady.

Toledo testified that about eight to ten people were present at the meeting location when she arrived. According to Toledo, she and the group arrived at the field before 6:00 a.m. At the field, she told the employees this was where Rodriguez had instructed them to work, and offered them the cutters. The employees refused to accept them, stating they wanted to speak with Rodriguez. Two of the employees said they would only work if Mejia would be leading the crew. Toledo generally described the more outspoken of the two, whose names she does not know, in a manner comporting with Sanchez’s appearance. Toledo called Rodriguez on her cell phone, and left when he arrived at about 6:00 a.m.

Rodriguez testified that when he arrived at the field, he told the employees where they should start working. The former crew members told him they did not want to work without Mejia. Rodriguez told them Mejia would not be working, at which point, they got into their cars and left.

Credibility Determinations and Findings of Fact

As is apparent from the recitation above of the testimony at this hearing, there are virtually innumerable conflicts amongst General Counsel’s witnesses. Furthermore, two of General Counsel’s most important witnesses, Mejia and Taylor, proved to be utterly unreliable and prone to fabrications. Some of their numerous in-testimony, declaratory and inter-witness conflicts have been noted. Mejia was highly non-responsive to questions, frequently testifying to what she felt like saying, rather than answering the

questions put to her. Mejia's demeanor also did little to inspire confidence, inasmuch as she frequently answered (or failed to answer) questions while staring down at the table in front of her, rather than looking at the interpreter or questioner. Taylor, in addition to appearing almost possessed by a belief that the entire crew had been discharged because she reported the alleged Padilla assault, refused to even acknowledge Rodriguez's complaints about the crew's work performance during the 2000 preharvest incidents, and was contradicted on key points in her testimony by more credible witnesses, sometimes former crew members with allied interests. In view of the above, and their careless dissemination of such code words as "no foreladies," "no old ladies," "leaders," union "bumper stickers," etc., to establish cases under various legal theories, and in different forums, it is clear that nothing in their testimony should be accepted at face value.

Respondents face the same problem with their most important witness, Rodriguez, who proved to be deceptive, both in his testimony, and the course of conduct he engaged in to get rid of Mejia. In addition to the conflicts in his limited testimony, including significant conflicts with Respondents' other witnesses, Rodriguez was also repeatedly non-responsive to questioning, and appeared uncomfortable while testifying. His initial denial of ever having raised his voice to the crew, and his continued denial of using foul language were particularly egregious, given the overwhelming testimony to the contrary. Accordingly, very little weight will be attached to what this witness said while testifying.

Given the very limited reliability of these witnesses,¹⁰ the undersigned is willing to credit only the following. Although Mejia and many of her crew members had been employed by Respondents for a number of years, it is apparent that Rodriguez was not pleased with their work. It is undisputed that he had frequently reprimanded the crew for poor work performance, and had suspended them. Perez had also complained to Mejia about the work of her crew, and Mejia's brother, at least, was asked to help her improve her work performance, or she would be discharged.¹¹ It is also clear, from the testimony of General Counsel's witnesses, that Rodriguez was furious at the crew's work performance during the 2000 preharvest season, prior to any protected concerted activity by the crew members. Taylor's inadvertent admission, that Padilla told the crew, prior to Rodriguez's reprimands, that Rodriguez intended to discharge them is revealing because, under the credible facts, said intention would have been in response to the crew's work performance, and not Taylor's complaint to Mejia (if actually made) concerning the alleged assault by Padilla.¹²

It is found that on the last or very close to the last day of the 2000 preharvest season, Rodriguez twice reprimanded the crew in a loud and vulgar manner. During the morning incident, Sanchez and, at least, Diaz protested to Rodriguez concerning his loud,

¹⁰ This is not to say that General Counsel's other witnesses were all that trustworthy. To the contrary, only a few, who will be named, inspired significant reliance. It was distressing to see witness after witness claim to have met with Perez after Rodriguez's outbursts, when Eloy Rivera, a very credible witness both from the standpoint of his demeanor and the parallel, but slightly different words he used in English to relate what he said to the employees in Spanish, testified he was the one who spoke with them. This uniform misidentification cannot be written off as a coincidence. The credibility of Sanchez, Godinez, Rios and, of course, Taylor, is seriously undermined by their denial that anyone said the workers would not return to work without Mejia, in light of testimony to the contrary by Ricarda Toledo, who also impressed as a highly credible witness.

¹¹ Perez and Blas Rivera are credited over Mejia.

¹² In this regard, Mejia now admits she did not inform Rodriguez about the complaint at the time, and Padilla is credited in his denial that Mejia spoke with him about it, over Mejia's assertion that she did.

crude language.¹³ Rodriguez did not say anything in response to the complaints, but drove off in an angry manner.¹⁴ When Rodriguez returned that afternoon and repeated his conduct, a group of the crew members went to Respondents' office, looking for Blas Rivera. Since he was not available, they voiced their complaint to Eloy Rivera,¹⁵ who told them not to be too concerned about Rodriguez.

Mejia's testimony, that Rodriguez later approached her and said she had a leader or leaders, that he thought Sanchez had a union bumper sticker on his vehicle, and that he wanted her to discharge Sanchez and/or the leaders generally, is not credited. Mejia was simply too unreliable as a witness to be believed without significant, compelling corroboration.¹⁶ The timing of the alleged later statements, a week or even three days after the reprimands, given the layoff of the crew right after them, is improbable, at best. The many other weaknesses of this specific testimony have been detailed earlier in this Decision. It is also significant that Mejia's sister, Evangelina Lopez, who was a credible witness, testified that when she asked Mejia why she was not going to work the harvest,

¹³ General Counsel's witnesses are credited over Rodriguez's denials. Since it is now undisputed that the crew later protested Rodriguez's treatment at the office, it is likely that Rodriguez had been verbally abusive. It is also apparent that Sanchez, who spoke out on other occasions, would have spoken out to Rodriguez when he lambasted the crew. Although both Sanchez and Mejia stated, in their Board declarations, that no one else spoke out, Diaz was a rather engaging witness, and was corroborated in his testimony by others, who often identified Diaz by his nickname and/or where he lived. The undersigned found this convincing.

¹⁴ Mejia and Taylor are not credited in their testimony that Rodriguez, while reprimanding the crew, told Mejia she had leaders, or that he thought Sanchez had a pro-union bumper sticker, based on their general unreliability as witnesses, and the conflicting evidence noted above. To the extent that the testimony of Rosalia Perez or Rosa Margarita Rodriguez could be construed to corroborate Mejia and Taylor, it is also not credited.

¹⁵ As noted above, Eloy Rivera and Perez are credited over General's Counsel's witnesses as to whom they spoke with.

¹⁶ It is not sufficient for General Counsel to point to Rodriguez's unreliability as a witness, and failures in proof by Respondents. General Counsel has the obligation to provide compelling, reliable evidence that Respondents have violated the law.

Mejia told her she did not know the reason. Certainly, she would have said something to her sister about the alleged comments by Rodriguez, if they had been made.

Rodriguez testified that he laid off the entire crew, and not just Mejia, for the 2000 harvest. This is difficult to reconcile with the employment of some ten crew members on other crews during the 2000 harvest. Mejia and Rodriguez, in their testimony, agree that Mejia was not, at that time, told she or the rest of the crew had been discharged, although both agree Rodriguez told Mejia to find other employment. Rather than attempting to choose between two unreliable witnesses as to what else Rodriguez said to Mejia when denying work for the 2000 harvest, it will suffice to state the reason given was false under either version. Thus, if Rodriguez told Mejia that Respondents were not hiring foreladies, this was clearly false, since foreladies did work the 2000 harvest, and there is no evidence that Rivera made or later changed such a policy. If, as contended by Rodriguez, his action was taken due to a reduced need for workers, this is contradicted by evidence that a normal contingent of crews was used, and his offer to make Lopez a foreperson. Furthermore, Rivera is credited over Rodriguez, in his testimony that Rodriguez, at the time, told him he was discharging Mejia for poor work performance.¹⁷ Lopez's testimony, regarding her conversation with Rodriguez at the meeting prior to the 2000 harvest, also strongly indicates Rodriguez had decided to discharge Mejia, and possibly the rest of the crew, because of the unspecified "problems" he was having with them.

¹⁷ Although, at times, Rivera appeared to be tailoring his testimony to corroborate Rodriguez, he appeared, generally, to be a sincere witness.

Taylor's testimony, denied by Rivera, that Rivera told her Mejia and the crew would be rehired, when she visited him during the 2000 harvest season is doubtful, given Rivera's delegation of such authority to Rodriguez, and his greater credibility as a witness. More likely, if she was told this, it was by Rodriguez. In any event, it is undisputed that Rodriguez, at some point after the commencement of the 2000 harvest, stated that at least the crew members, other than Mejia, could return to work. If he also said that Mejia could return, this would indicate he was either reconsidering his earlier decision, or did not want to tell her she was discharged in person.

It is also found that Rodriguez first informed Mejia of her discharge by telephone, after she and Lopez visited him at the "Pesacaderia" field. Whether Rodriguez, at the time, specified that only Mejia was being discharged is problematic, given Mejia's unreliability as a witness and Rodriguez's incomplete testimony concerning the conversation. Mejia, however, is not credited in her assertion that Rodriguez told her, during that conversation, that she had leaders, or a man with a bumper sticker, or that he had asked her to fire anyone and she had refused. Similarly, Mejia's and Taylor's testimony, that Mejia, Rivera and/or Rodriguez said any of these things when they sought reinstatement from Rivera, is not credited.¹⁸

¹⁸ This is again based on their general lack of credibility, and the conflicting testimony they gave on these specific incidents, detailed above. That there is, finally, some corroboration of Mejia's testimony in her Board declaration, does not establish either the testimony, or the declaratory allegations as being true. Godinez's testimony, that Mejia told her the crew was not going to work in the 2001 preharvest because there were leaders, and because Rodriguez did not want Sanchez working for Respondents is not credited.

ANALYSIS AND CONCLUSIONS OF LAW

Section 1152 of the Act grants agricultural employees the rights to join, form and assist labor organizations, and “to engage in . . . concerted activities for the purpose of mutual aid and protection.” Under section 1153(a) and (c) it is an unfair labor practice for an agricultural employer to discriminate against employees for engaging in union activities. Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 1153(a). *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].

In order to be protected, employee action must be concerted, in cases not involving 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, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff’d (1987) 835 F.2d 1481, 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 protected activities.

In order to establish a prima facie case of retaliation for engaging in union or other protected concerted activity, the General Counsel must preponderantly establish: (1) that the employee engaged in such activity, or that the employer suspected this; (2) that the employer had knowledge (or suspicion) of the activity; and (3) that a motive for the adverse action taken by the employer was the union or protected concerted activity.

Lawrence Scarrone, supra; *United Credit Bureau of America, Inc.* (1979) 242 NLRB 921 [101 LRRM 1277], enf'd (CA 4, 1981) 643 F.2d 1017 [106 LRRM 2751]; *Mid-America Machinery Co.* (1978) 238 NLRB 537 [99 LRRM 1290]. In cases where the adverse action is a failure to recall or rehire employees, General Counsel must also show that the employees applied for work at a time it was available, unless the evidence shows that the employer had a policy of recalling or rehiring the employees without an application. *Rogers Foods, Inc.* (1982) 8 ALRB No. 19, at ALJD pages 30-34; *Grand View Heights Citrus Association* (1986) 12 ALRB No. 28; *McCaffrey Goldner Roses*, et al. (2002) 28 ALRB No. 8.

Unlawful motive may be established by direct or circumstantial evidence. Direct evidence would include 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 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; 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.

Once the General Counsel has established union or other protected concerted activity as a motivating factor for the adverse action, the burden shifts to the employer to rebut the prima facie case. To succeed, the employer must show that the action would have been taken, even in the absence of the protected concerted activity. *J. & L. Farms*, supra; *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169].

There is no evidence that Mejia, or any of her crew members engaged in union activities, at a time material to this case. The only evidence that Respondents suspected such activity was Mejia's testimony, claiming Rodriguez asked her if Sanchez had a bumper sticker on his vehicle, arguably referring to support for the United Farm Workers of America, and her declaratory statement that this was mentioned when Rodriguez informed Mejia of her discharge. These contentions have been discredited. Therefore, General Counsel has failed to establish a prima facie case of anti-union discrimination, and these allegations will be dismissed.

It has been established that Mejia was a supervisor of Respondents, within the meaning of section 1140.4(j) of the Act, in that at minimum, she effectively recommended the hire and recall of her crew members. The Act, by its terms, limits the protections therein to non-supervisory agricultural employees. Certain narrow exceptions have been created, where discrimination against supervisors directly affects the employment of statutory employees. One is where the supervisor refuses an order to

discriminate against employees, based on their protected activities, and is then disciplined for that reason. The second is where discipline against the supervisor is the employer's means to unlawfully discriminate against employees. *Sequoia Orange Co., et al.* (1985) 11 ALRB No. 21; *McCaffrey Goldner Roses, et al.*, supra.

General Counsel's theory is that Respondents discharged Mejia, because she refused to commit the unfair labor practice of discharging employees for engaging in union or other protected concerted activities. Mejia's and Taylor's testimony, and the declaratory allegation by Mejia, that Rodriguez told Mejia to discharge such employees, and later cited her alleged refusal to do so when discharging Mejia, has not been credited. Since the credible evidence fails to show that Mejia was asked to discharge any employee, she could not herself have been discharged for refusing to do so. Accordingly, the allegations concerning Mejia will be dismissed.

There has been credible evidence presented that Sanchez and at least one other employee, Diaz, protested to Rodriguez concerning the abusive manner in which he reprimanded the crew. Protests concerning mistreatment by a supervisor are protected under the Act. *Tenneco West, Inc.* (1981) 7 ALRB No. 12; *Arrow Electric Company, Inc.* (1997) 323 NLRB 968 [156 LRRM 1284]. Since the protests were directed at Rodriguez, Respondents were aware, through him, of the protected concerted activity.¹⁹

¹⁹ As noted earlier, a group of the workers later protested Rodriguez's conduct to Eloy Rivera, also protected concerted activity, assuming the evidence establishes Eloy Rivera as a statutory supervisor. This raises a presumption that Rodriguez, who made the decision to lay off/discharge these employees, would have learned of this. The evidence, however, shows that Rodriguez was not told of this incident, and was not aware of it when he took the adverse actions herein. Accordingly, Respondents have rebutted the presumption of knowledge concerning this activity, and it cannot be cited as part of the prima facie case. See *Vincent B. Zaninovich & Sons, Inc.* (1999) 25 ALRB No. 4, at ALJD pages 23-25.

Respondents deny that the crew was discharged, and that by failing to seek recall, the employees forfeited their rights. Rodriguez's extreme dissatisfaction with the crew's work, his comment to Lopez after informing Mejia the crew would not work during the 2000 harvest and Taylor's testimony concerning Padilla telling her the crew would be discharged cast doubt on this assertion. Nevertheless, even if Rodriguez did not intend to discharge the crew, other than Mejia, he may not have made this clear when informing Mejia of her discharge on or about March 23, 2001. Furthermore, even if Rodriguez truly believes that Respondents' employees know they can obtain work on their own, the testimony of the many witnesses presented by General Counsel shows this was far from a universally known fact. Thus, they would reasonably rely on what Mejia told them concerning their employment status with Respondents.²⁰ It is clear that Mejia, whether acting on a reasonable interpretation of what Rodriguez told her or not, told the crew members there was no work for them. Even if Mejia was mistaken, employees could reasonably rely on her representation. See *Superior Farming Co. v. ALRB* (1984) 151 Cal.App.3d 100 [198 Cal.Rptr. 608]. That some of the employees may have known they could obtain employment on their own, or took the initiative to do so does not mean that the others were required to do so in order to retain their rights, under the facts presented in this case.

To the contrary, the course of conduct Rodriguez engaged in could be interpreted as showing a disregard for whether the crew members returned, if not an outright intent to

²⁰ Although, in fact, Rodriguez had discharged Mejia prior to when she informed the crew members they would not be returning for the 2001 preharvest work, they would not have been aware of this. Instead, they would have reasonably relied on her representations as an apparent spokesperson for Respondents.

discharge them. His testimony that employees “knew” they could obtain employment other than through their foreperson is suspicious. It is undisputed that, at no time, did any authority from Respondents ask the employees to return, until after unfair labor practice charges were filed. Thus, in the most favorable light to Respondents, employees would have justifiably been confused as to their employment status, and it became Respondents’ burden to clarify this. See *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4.

Therefore, it is concluded that the alleged discriminatees, if not actually discharged, reasonably believed this to be the case, when Mejia told them they would not be returning to work after her conversation with Rodriguez in March 2001.²¹ At least arguably, this would, in itself, nullify any requirement that they seek further employment with Respondents. In any event, since the evidence shows that Respondents maintained a policy where employees were informed of their recall by their forepersons, and did not have to apply for work, this element of the prima facie case is not required herein.

Most of the direct evidence of animus toward the crew for its’ protected concerted activity has been discredited. The issue becomes whether there remains enough in the record to establish a prima facie case. The evidence shows that the crew members’ first loss of employment took place shortly after crew members protested to Rodriguez

²¹ Respondents’ contention that these charges are barred by the Act’s six-month statute of limitations, section 1160.2, is rejected. Although it is concluded that Rodriguez made the decision to discharge Mejia as of May 2000, the evidence fails to establish that she was informed of this at the time. Even crediting Rodriguez’s version of what he told Mejia and the other foreladies when informing them that they and their crews would not be working the 2000 harvest, they reasonably would have believed they were being laid off due to lack of work, and would have been eligible for recall in the future. Thus, his reference to obtaining other work would reasonably have been interpreted as suggesting they find interim employment until they could be recalled. Similarly, when Mejia told the crew members they would not be working the harvest, they too, under the circumstances, would have believed they had been temporarily laid off, and not discharged. Furthermore, if Respondents are to rely on Rodriguez’s testimony, they have to accept his representation that he told Mejia and Taylor, when they visited his home, that there would be work in the future for the rest of the crew. Therefore, the statute of limitations did not begin to run for Mejia until on or about March 23, 2001, and on or after that date for the other alleged discriminatees.

concerning his abusive conduct.²² Whether, as Mejia claims, Rodriguez told her there would be no foreladies for the 2000 harvest or, as Rodriguez testified, he told Mejia the harvest was poor, Rodriguez lied to Mejia when informing her the crew would not be working in the harvest. Clearly, foreladies did work the 2000 harvest, and Rodriguez knew this would be the case. While Respondents may have experienced a substandard crop, the evidence totally fails to show that an experienced crew would not have been employed in an expanding workforce. Lopez's testimony, that Rodriguez told her of unspecified "problems" with the crew, and his refusal to discuss them with her could be interpreted to include the protected concerted activity some of its' members engaged in.

Rodriguez's deceptive conduct toward Mejia at that time, and thereafter could be construed as an attempt to cover up unlawful conduct. His denial that anyone complained to him about his treatment of the crew, credibly contradicted by General Counsel's witnesses, also raises suspicions of improper motive. Given the close timing of the first adverse employment action to the protected concerted activity, the false explanation given to Mejia for the crew's exclusion from the 2000 harvest, and Rodriguez's other deceptive conduct, it is concluded that General Counsel has, at least arguably, established a prima facie case that the refusal to rehire the crew in 2001 was motivated by unlawful considerations. See *Stamoules Produce Co.* (1990) 16 ALRB No. 13.

²² The loss of employment for the 2000 harvest season is not alleged as an unfair labor practice, apparently because General Counsel believes the statute of limitations had passed by the time the charges were filed. Nevertheless, unalleged unfair labor practices may be used to establish animus for timely-filed charges.

Respondents' rebuttal to the prima facie case is hampered by Rodriguez's lack of credibility, and Respondents' reliance on their position that the crew members were not discharged.²³ In essence, the undersigned has considered whether Respondents have satisfied their burden of proof, disregarding Rodriguez's testimony, and has concluded they have done so.

Assuming, in fact, Rodriguez intended to discharge the entire crew, the credible evidence shows this would have happened, absent any protected concerted activity, due to their poor work performance. As noted above, although Mejia and most of her crew members had worked many seasons for Respondents, and Rivera wrote Mejia a letter of recommendation in early 2000, Rodriguez was dissatisfied with their work performance. On many occasions, he had reprimanded the crew, had issued a suspension, and Mejia's relatives had been warned she would be discharged.²⁴ It is also clear that Rodriguez was furious with the crew's work by the end of the 2000 preharvest season. Thus, his expressions of rage preceded the protests by Sanchez and Diaz. Also telling is Taylor's admission that Padilla told her Rodriguez intended to discharge the crew, before the reprimand incidents.

General Counsel's rebuttal to the cited work deficiencies consists of simple denials that the crew was working too slowly, or that Mejia slept while on duty. Mejia, when relating the complaint cited by Rodriguez concerning crew members working too

²³ As noted above, the return to work of some of the crew members, in itself, does not sustain Respondents' position under the circumstances of this case.

²⁴ Although Rodriguez was probably brusque to other crews, General Counsel has failed to establish that his level of discontent with other employees approached his dissatisfaction with Mejia's crew. It is also noted that Respondents do not have a policy of issuing written warnings.

closely together, did not deny this had taken place. Furthermore, it is unlikely that the crew members would have been aware of how their progress compared with the other crews. Therefore, it is concluded that Rodriguez was highly dissatisfied with the pace of the crew's work, and the manner of its' completion, prior to the commencement of any protected activity.²⁵

The credible evidence shows there was little, if any response by Respondents' managers to the protected concerted activity. Thus, the credible evidence shows that Rodriguez did not respond at all to the protests, and the angry manner in which he drove away was more likely a continued manifestation of his rage arising from the crew's poor work. It is also noted that Rodriguez returned later, still highly upset with the crew's work performance, and no one alleges protected activity occurred at that time. Eloy Rivera's response to the crew members' protest was conciliatory, and no one contended he reacted to it in an adverse manner.

As discussed above, the reference to problems with the crew by Rodriguez in his conversation with Lopez raises suspicions of unlawful motive. It is, however, equally possible that he was referring to problems with their work performance, or if referring to both, he would have discharged Mejia and the crew absent the protest concerning his abusive treatment. This is reinforced by Blas Rivera's credited testimony that Rodriguez, prior to the 2000 harvest, told him he was terminating Mejia for poor work performance. Thus, Rodriguez, in particular, wanted to discharge Mejia and perhaps, did not care if this

²⁵ In light of this, it is unnecessary to choose between two unreliable witnesses, Mejia and Rodriguez, to determine whether Mejia slept on the job, or if Rodriguez at least believed it to be the case.

resulted in the crew members also believing they had been discharged. The undersigned also believes that Rodriguez's subsequent deceptive conduct toward Mejia, regarding her prospects of regaining employment with Respondents, was a function of his reluctance to confront her with her discharge for poor work performance, and not an effort to conceal unfair labor practices. Again, whether Rodriguez actually intended to discharge the crew members, or simply did not care if this was the result of his conduct, at least the great majority of displeasure he had with the crew members related to their work performance, and not the brief encounter he had with Sanchez and Diaz.

If, as Respondents contend, the crew was not intentionally discharged, the events leading to their loss of employment commencing with the 2001 preharvest season still amount to a discharge at law, as discussed above. Given this scenario, the issue becomes whether the employees' protected concerted activity precipitated the discharge. The most logical explanation for the confusion as to the employees' status would be that either Mejia misunderstood who was being discharged, or that Rodriguez, in his desire to discharge Mejia, did not take adequate steps to protect the employment of the crew members.

Under either scenario, the credible evidence shows this had nothing to do with the protests concerning Rodriguez's reprimands. Thus, if Mejia erroneously told the crew they too were discharged, her mistake certainly was not in retaliation to the protected conduct, or caused by it.²⁶ If Rodriguez did not take adequate measures to protect the rest

²⁶ Cf. *Boyd Branson Flowers, Inc.*, supra, where the statements leading to a reasonable belief of, or confusion as to whether the employees had been discharged were in direct response to the protected concerted activity.

of the crew, in order to discharge Mejia, this would not make his conduct unlawful, since the evidence fails to establish Mejia's discharge as unlawful. Finally, if the employees were mistakenly discharged, and unlawful motive was a factor in the mistake, Respondents have satisfied their burden in showing that the events leading to the discharge at law would have still taken place, based on Rodriguez's dissatisfaction with the crew's poor work performance. Therefore, the complaint will be dismissed.

ORDER

The Consolidated Complaint herein is dismissed in its entirety.

Dated: June 6, 2003

Douglas Gallop
Administrative Law Judge, ALRB