

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
HADLEY’S DATE GARDENS, INC.,)	Case No. 03-CE-15-EC
)	
Respondent,)	31 ALRB No. 1
)	(February 18, 2005)
and)	
)	
JOSE ANGEL PEREZ,)	
)	
_____ Charging Party.)	

DECISION AND ORDER

On December 23, 2004, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case, in which he found that Hadley Date Gardens, Inc. (Respondent) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) by discharging Jose Angel Perez (Perez) for engaging in protected concerted activity. The ALJ found that Perez engaged in protected activity by concertedly complaining about work assignments and by arranging for his brother Miguel Perez, also an employee of Respondent, to obtain an attorney to assist Miguel in his workers’ compensation claim. The ALJ found that the General Counsel established a prima facie case of retaliation for engaging in protected activity, and further found that Respondent failed to meet its burden of proving that Perez would have been discharged even in the absence of the protected activity. The

Employer timely filed exceptions to the ALJ's decision, and the General Counsel filed a reply to the exceptions.

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 fact¹ and conclusions of law, and adopts his recommended decision.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Hadley's Date Gardens, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in 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.

¹ 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. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) A review of the record in this case has revealed no basis for finding any prejudicial error in the ALJ's credibility determinations.

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

(a) Rescind the discharge of Jose Angel Perez, 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 Jose Angel Perez for all wages or other economic losses he suffered as a result of his unlawful 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 January 29, 2003, 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. Upon request of the Regional Director, 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 all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days at conspicuous places on its premises, 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.

Pursuant to the authority granted under Labor Code section 1511(a), give agents of the Board access to its premises to confirm the posting of the Notice.

(f) Arrange for a representative of Respondent or Board agents to distribute and 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 the reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions 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 non-hourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(g) 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 agricultural employees employed by Respondent at any time during the period January 29, 2003 to January 28, 2004.

(h) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired to work for Respondent during the twelve-month period following the date this Order becomes final.

(i) Notify the Regional Director in writing, within thirty days after the date this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically thereafter in writing of further actions taken to comply with the terms of this Order.

Dated February 18, 2005

GENEVIEVE SHIROMA, Chair

CATHRYN RIVERA-HERNANDEZ, Member

DANIEL ZINGALE, Member

MICHAEL BUSTAMANTE, Member

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 discharging Jose Angel Perez because he concertedly protested his conditions of employment and aided a fellow employee in a work-related matter.

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

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 discharge or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment or aid fellow employees in work-related matters.

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

WE WILL offer Jose Angel Perez 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 discharge.

DATED: _____
INC.

HADLEY’S DATE GARDENS,

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. 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

CASE SUMMARY

HADLEY'S DATE GARDENS, INC.
(Jose Angel Perez)

31 ALRB No. 1
Case No. 03-CE-15-EC

Background

On December 23, 2004, Administrative Law Judge (ALJ) Douglas Gallop issued his decision in the above-referenced case, in which he found that Hadley Date Gardens, Inc. (Respondent) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) by discharging Jose Angel Perez (Perez) for engaging in protected concerted activity. The ALJ found that Perez engaged in protected activity by concertedly complaining about work assignments and by arranging for his brother Miguel Perez, also an employee of Respondent, to obtain an attorney to assist Miguel in his workers' compensation claim. The ALJ found that the General Counsel established a prima facie case of retaliation for engaging in protected activity, and further found that Respondent failed to meet its burden of proving that Perez would have been discharged even in the absence of the protected activity.

Board Decision

The Board summarily affirmed the ALJ's findings of fact and conclusions of law, and adopted his recommended decision.

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	Case No. 03-CE-15-EC
)	
HADLEY'S DATE GARDENS, INC.,)	
)	
Respondent,)	
)	
and)	
)	
JOSE ANGEL PEREZ,)	
)	
<u>Charging Party.</u>)	

Appearances:

Jason E. Resnick
Western Growers Law Group
Irvine, California
For Respondent

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

Jose Angel Perez
Coachella, California
For the Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Indio, California on October 19, 2004.

The Charging Party, Jose Angel Perez, filed a charge on May 19, 2003, alleging that Hadley's Date Gardens, Inc. (hereinafter Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act) by discharging him in retaliation for his protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint alleging said violation. Respondent filed an answer denying the commission of unfair labor practices. The Charging Party intervened at the hearing. After the hearing, General Counsel and Respondent 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

Jurisdiction

The jurisdictional facts are not in dispute. Respondent produces dates, obtained from palm trees, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. At all times material to this case, Albert Paul Keck, II, Respondent's President, and Supervisor, Jose Tomas Perez Martinez (Tomas Perez), were supervisors of Respondent within the meaning of section 1140.4(j). While employed by Respondent, Jose Angel Perez (Angel Perez) was an agricultural employee under section 1140.4(b).

The Alleged Unfair Labor Practice

Angel Perez was employed by Respondent as a palmero for about five years. Several of his relatives have also worked for Respondent, including his brother, Rodolfo Perez Tamara (Rodolfo Perez) and his cousin, Supervisor, Tomas Perez. At the time of the events described herein, Respondent employed about a dozen palmeros. At least during the harvest, the palmeros are paid a piecerate, and Angel and Rodolfo Perez often worked as a team. By all accounts, the Perez brothers were skillful and rapid workers. Angel Perez was discharged on January 29, 2002 under the following circumstances:

Respondent conducts safety meetings for the palmeros. As early as March 1998, employees, Angel Perez being the most vocal, complained about what they called, “coyotying” by some workers. Roughly translated, this means shirking one’s responsibilities. Angel Perez testified he complained about employees working too slowly, and leaving the bulk of the work for others. Rodolfo Perez testified that he made similar complaints. Albert Keck and Tomas Perez acknowledged that they were aware of complaints that some employees were shirking their duties, and the minutes of two safety meetings mention the issue, directing employees not to miss work to avoid more difficult assignments.

Angel Perez also testified that employees complained about workers skipping the taller and more difficult palm trees, and receiving more favorable job assignments from Tomas Perez. According to Angel and Rodolfo Perez, Keck, who speaks fluent Spanish, told them this was just their “politics.” Neither Keck, nor Tomas Perez, who was also present at these meetings, denied that Keck made this statement.

On November 15, 2002 Angel and Rodolfo Perez left work early. There is some dispute as to the events leading to their departure. The Perez brothers testified that when they and two other palmeros were about to finish their rows, Tomas Perez asked them to help other palmeros complete their work. They all complained that some of the palmeros were only harvesting the shorter palms, leaving the taller, more difficult ones for them. Because of this, they did not want to help. Tomas Perez told them he was not going to change things, and if they did not like it they could go to their [expletive] homes. The Perez brothers also testified, and Tomas Perez did not deny that he said he would get even with them for their actions when they began at the Oasis Ranch, their next work location.² Angel and Rodolfo left immediately, but the other two finished what they were doing and, apparently, claimed that due to a flat tire, they had to leave, rather than confronting Tomas Perez.

Tomas Perez testified that row assignments are made by a raffle, and continue from year to year. At the same time, he acknowledged that sometimes some workers skip the taller trees in their rows, resulting in complaints by employees.³ Tomas Perez agreed that he asked Angel and Rodolfo Perez to assist the other workers when they finished their rows and that they refused, citing the “coyotying” issue, but denied that the other two workers were involved. Tomas Perez testified he told them they could do any of the remaining work they wanted, and disputed that the remaining work was any more

² The record does not disclose the manner of this threatened retaliation, or whether it was carried out.

³ Keck, on the other hand, denied any significant difference in the difficulty of harvesting the palm trees, which was contradicted by these witnesses, and Valentine Perez, a former worker called as a witness by Respondent. Valentine Perez further testified that workers would go to the shorter palms so they could “grab” all the dates, apparently earning more on the piecerate system.

difficult. He stated that when they still refused, he told them they could leave, but denied using profanity.

Although Respondent's witnesses acknowledged that due to the piecerate system, employees are permitted to leave once they finish their assigned work,⁴ Tomas Perez testified he reported to Keck that "they," (e.g. Angel and Rodolfo Perez) had refused his order, because they did not want to work on the tall trees. According to him, Keck responded, "Well, if they don't want to help on the tall trees, they're not going to help on the small trees." Tomas Perez interpreted this to mean that the Perez brothers would thereafter work only their own rows.

Respondent, in its' brief, does not deny that Keck was aware that both Angel and Rodolfo Perez protested working the taller trees. In his direct testimony, Keck stated Tomas Perez told him "they" had complained about coyotying, and his directive to Tomas Perez pertained to "them." In response to the undersigned's questions, Keck stated he was aware that "they're accusing the co-workers of working all the easy trees first, deliberately leaving [the] harder trees . . . for Angel and Rodolfo [Perez]." Keck testified that while he had heard of other complaints about having to help slower workers perform less lucrative job tasks, this was the first time he had heard of a complaint about more harvest work, which results in more income on the piecerate. Keck stated that after this incident, he heard no more complaints about "coyotying" during Angel Perez's employment with Respondent.

⁴ Based on other testimony from the witnesses, it appears the Perez brothers frequently finished and left work early.

As noted above, Tomas Perez testified he told Keck that both Angel and Rodolfo Perez had refused to help the others because they thought they were being left the most difficult trees. Furthermore, former employee, Carlos Verdusco, called as a witness by Respondent, testified that Tomas Perez told the crew the Perez brothers had refused to help them. Accordingly, it is found that Keck was aware that both Angel and Rodolfo Perez had participated in the protest.

On December 5, 2002, employee Miguel Perez, another brother of Angel Perez's, fell from a tree and was seriously injured. Angel Perez referred Miguel Perez to an attorney to represent him in his workers' compensation claim. Miguel Perez and Keck were on good terms, and Miguel Perez had been visiting Keck, seeking various forms of assistance. Keck was then informed by his workers' compensation carrier that Miguel Perez had obtained an attorney, and not to deal directly with him. Keck testified he was upset about this, because he wanted to help. The next time Miguel Perez visited Keck, which Keck estimated took place in mid-January 2003, Keck told Perez he could not help him anymore, because he had obtained counsel. Miguel Perez told Keck it was Angel Perez's idea for him to use an attorney, and he regretted this consequence.

Angel and Rodolfo Perez testified that on the morning of January 28, 2003, Tomas Perez told them Keck wanted to speak with them in the office. Keck testified he recalled having Angel Perez summoned to the office, and did not really know why Rodolfo came

with him. Respondent did not ask Tomas Perez to corroborate Keck's contention, and it is found that Keck summoned both of them to the office.⁵

According to Angel and Rodolfo Perez, Keck first loudly told Angel Perez he knew he had taken his brother to an attorney. Angel Perez told Keck he had done this. Keck acknowledged making the statement to Angel Perez, but denied he raised his voice.⁶ Keck did not deny this was the first thing he said during the meeting. Keck then raised the problems Angel Perez was having with Tomas Perez, and complaints from employees about name-calling by him. Angel Perez replied the problems with Tomas Perez stemmed from his hostile attitude and lack of respect for them. Angel Perez asked who had complained about him, but Keck would not disclose their identities. According to the Perez brothers, Keck told them he had considered having them work alone in fields apart from the other employees, but Tomas Perez was opposed to the idea, because the others would complain of preferential treatment. Keck testified he offered alternatives to Angel Perez, but Perez rejected them. Although Keck's "Exit Interview" corroborates him on this point, those notations are not very reliable, because they do not mention his statement about Angel Perez obtaining counsel for his brother. Furthermore, Respondent failed to have Tomas Perez deny that it was he who rejected the proposal.

⁵ The failure to have Tomas Perez corroborate Keck on this important point, in itself, would lead to the finding. To the extent that credibility resolutions are necessary in this case, the most credible primary witness from the standpoint of his demeanor and objectivity was Rodolfo Perez. Angel Perez appeared to be an emotional and easily angered witness, but his testimony was largely corroborated by Rodolfo Perez. Keck demonstrated a lack of candor at times, and his testimony is considered less reliable than that of Rodolfo Perez. Tomas Perez's testimony was limited, and did not materially contradict that of General Counsel's witnesses.

⁶ Keck testified he and Angel Perez were talking sternly.

The Perez brothers testified that Keck told Angel Perez he was discharged at that point, but he did not have time to write a final check. Therefore, Angel Perez returned the following day, and was told to see Keck in the office. At that point he was asked to sign the Exit Interview, which he refused to do, and was given his final paycheck. Keck testified that although discharge was a likely outcome of the January 28 meeting, he did not inform Angel Perez of this until the following day. Keck stated that in addition to the above-cited problems with Perez's conduct, he demonstrated an intractable attitude during the meeting, which convinced Keck that the problems would continue.

Respondent's Defense

Respondent contends that Angel Perez was discharged for being insubordinate to Tomas Perez and for abusing co-workers. Tomas Perez testified that he often heard, or was told that Angel Perez insulted other employees with such words as "coyote," "you fucking," "you're too old to work here," "matado," and "barbaro."⁷ Former employees Valentine Perez and Carlos Verdusco testified that Angel Perez called them, or they heard him call other employees these things, other than "you fucking." These witnesses did not specify when, or how often such statements were made, but it is clear this

⁷ These last two terms, in Spanish, roughly mean someone who seeks management approval. It appears that Angel Perez would frequently shout this at groups of employees who continued to work as he was leaving.

had been going on for a long time. In this regard, Tomas Perez, at one point in his testimony, stated that he observed Angel Perez engaged in name-calling about once a week. Valentine Perez further testified that on one occasion, for reasons unknown to him, Angel Perez tore a back pocket off his pants. Valentine Perez and Carlos Verduco testified that they never complained to Tomas Perez or Keck about the conduct of Angel Perez. Verduco also testified that he heard Angel Perez call Tomas Perez “lazy” and “stupid,” an allegation not corroborated by Tomas Perez. Valentine Perez acknowledged that workers frequently called Angel Perez, “Pony Boy,” e.g. “shorty.”

Rodolfo Perez acknowledged that his brother called some of the other workers, “barbaro,” but stated he did not consider this to be an obscene term. He testified that Angel Perez used obscenity on the job, but only jokingly with those he got along with. Tomas Perez, on cross-examination, acknowledged that rough talk was not uncommon between the workers.

Angel Perez did not, in his testimony, deny having called co-workers unflattering names. He did, however, deny that Tomas Perez or Keck ever complained to, or warned him concerning this conduct. Tomas Perez testified he received “a few” complaints from unnamed employees about Angel Perez, on unspecified dates. On one occasion, in July 2002, he claimed to have told Angel Perez to treat a co-worker with more respect, after observing him verbally abusing the employee.

Tomas Perez testified he did not think his cousin treated him with respect either. Other than the coyotying complaints, he was far from specific as to what he meant by this. Tomas Perez denied ever asking Keck to discharge or discipline Angel Perez. He

related two complaints to Keck, the first pertaining to the November 15, 2002 dispute. Tomas Perez testified he made a second complaint to Keck, initially stating it was in early January 2003, and then changing this to about two days prior to his cousin's discharge. Tomas Perez testified he did not want Angel Perez to be discharged, but that Keck should talk to him about the name-calling, because it was inflaming the workers. Tomas Perez did not testify that he complained to Keck about any abusive treatment of himself by Angel Perez, other than the November 15, 2002 incident.

On direct examination, Keck testified that (other than the November 15, 2002 incident) he received no formal complaints from Angel or Tomas Perez, but observed "comments in passing" between them demonstrating there was a serious problem. On cross-examination, he claimed that Angel and Tomas Perez each complained about the other about a dozen times. Keck believes he spoke to Angel Perez about the complaints once, in April 2002, but was unable to give any specifics. Keck also testified that Tomas Perez complained that his cousin did not respect him. As noted above, Tomas Perez testified he complained to Keck, in January 2003, about Angel Perez's name-calling of co-workers.

Keck testified that he spoke with four employees to find out why the conflict existed, and thereby learned about the name-calling.⁸ Keck determined that the problem was not caused by Tomas Perez, but was due to Angel Perez harassing his co-workers. Without consulting Tomas Perez, Keck decided to speak with Angel Perez, a likely outcome being discharge.

⁸ Keck admitted he was unaware of the pocket-tearing incident prior to discharging Angel Perez.

As noted above, Keck admitted commenting to Angel Perez about obtaining a lawyer for his brother, and did not deny this was the first thing he mentioned. When he told Perez he was the cause of the problems with his cousin and the crew members, Perez denied this, blaming his cousin. As also noted above, Keck claimed it was Angel Perez who rejected the idea of working by himself. Keck further denied he discharged Angel Perez on January 28, 2003. Instead, after considering the situation, he decided to discharge Perez that evening, and informed him of his discharge the following day. Keck denied that the coyotying issue, or the referral of Miguel Perez to an attorney were motivating factors in the discharge decision.

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.” 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; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *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 generally means the employee must act in concert with, or on behalf of others. 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.

Meyers Industries, Inc. (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 1481, 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. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. This is often true even if the employees disobey a management order in pursuing the protest. *Giannini Packing* (1993) 19 ALRB No. 16; *M. Caratan, Inc.* (1978) 4 ALRB No. 83.⁹

The issue of whether an activity is concerted has spawned extensive litigation, with varying results. One test utilized is whether the complaint serves a group interest, or only pertains to a single employee. Thus, if the complaint can be resolved by changing the working conditions of one employee, some courts will find the activity not concerted, even if other employees support the complaint. *Nash-DeCamp Co. v. ALRB* (1983) 146 Cal.App.3d 92; *Koch Supplies, Inc.* (C.A. 8, 1981) 646 F.2d 1257 [107 LRRM 2108]. Nevertheless, the National Labor Relations Board (NLRB) continues to find that

⁹ The Fifth Circuit of the California Court of Appeal affirmed the unfair labor practices, but remanded the case to the Board on portions of the remedy ordered, in an unpublished decision issued on January 17, 1980. See (1980) 6 ALRB No. 14, for the decision on remand.

when an employee speaks out against an employment practice to management in the presence of other employees, who would be affected by a change therein, this constitutes a “call to action” and is concerted. *American Red Cross Blood Services Johnstown Region, A Division of the American Red Cross* (1996) 322 NLRB 590; *Avery Leasing* (1994) 315 NLRB 576, at page 580, footnote 5 [148 LRRM 1136], cf. *Gourmet Farms, Inc., supra*. In addition, where a single employee speaks out on the same, or logically related issue raised previously by other employees, the conduct is considered concerted. *Mike Yurosek & Son, Inc.* (1992) 306 NLRB 1037 [140 LRRM 1001], (1993) 310 NLRB 831, enf’d (C.A. 9, 1995) 53 F.3d 261 [149 LRRM] 2094.

To be a “group concern,” the complaint does not have to pertain to, or benefit all employees. Indeed, the concerted complaint may pit employees against each other. Thus, employee complaints about preferential treatment or working conditions of others have been held protected and concerted, when the preferential treatment affected their working conditions. *Needell and McGlone, P.C.* (1993) 311 NLRB 455 [145 LRRM 1062], enfd. (C.A. 3, 1994) 22 F.3d 303 [146 LRRM 2256]; *M & D Investments d/b/a David’s* (1984) 271 NLRB 536 [117 LRRM 1283].¹⁰

The single-employee interest test also fails in a variety of other settings, under the “mutual aid and defense” clause of the ALRA and NLRA. Thus, while the filing of a workers’ compensation claim by an individual employee has been held not concerted,¹¹ a father’s support of his son’s workers’ compensation claim was so held. *T.T. Miyasaka*,

¹⁰ By way of a parallel example, even if the vast majority of unit employees oppose unionization, the lawful activities of those who are in support are protected.

¹¹ *Herbert F. Darling, Inc.* (1983) 267 NLRB 476 [114 LRRM 1048].

Inc. (1990) 16 ALRB No. 16. Testimony by a co-worker at an unemployment insurance appeal hearing was also found concerted. *Loyalhanna Health Care Associates.* (2000) 332 NLRB 933 [170 LRRM 1050]; *Supreme Optical Company, Inc.* (1978) 235 NLRB 1432 [98 LRRM 1131]; *S & R Sundries, Inc.* (1984) 272 NLRB 1352 [118 LRRM 1085].¹² In the workplace, the NLRB has held that one employee's assistance to another in obtaining maternity leave is protected concerted activity. *Boese Hilburn Electric Service Company* (1993) 313 NLRB 372 [145 LRRM 1091].

In order to establish a prima facie case of retaliation for engaging in 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 a suspicion) of the concerted nature of the activity; and (3) that a motive for the adverse action taken by the employer was the protected concerted activity. *Meyers Industries, Inc., supra; Gourmet Farms, Inc., supra; Reef Industries, Inc.* (1990) 300 NLRB 956 [136 LRRM 1352]. 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

¹² This Agency has held that where a group of employees obtained legal assistance in improving their working conditions, such activity was concerted. *Harry Carian Sales* (1983) 9 ALRB No. 13.

procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; false or inconsistent reasons given for the adverse action; the absence of prior warnings and the severity of the punishment for alleged misconduct.

Miranda Mushroom Farm, Inc., et al., supra; Namba Farms, Inc. (1990) 16 ALRB No. 4.

Once the General Counsel has established the 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].

General Counsel contends that Angel Perez engaged in protected concerted activity on two issues: “coyotying” and obtaining an attorney for his brother, Miguel Perez. Respondent denies that either activity was protected or concerted, and contends Perez would have been discharged for misconduct in any event.

It is undisputed that the issue of employees shirking their duties had been a concern voiced by several employees at the safety meetings. It has also been established that at least four employees were upset about their co-workers avoiding the taller trees in November 2002. While changing this situation for Angel Perez might well have resolved the problem for Respondent, since he was the loudest and most militant of the objectors, it hardly would have resolved the issue for the others. Therefore, it is concluded that all manifestations of the coyotying issue represented a group concern pertaining to their

working conditions.¹³ It is also concluded that since a group of employees protested the issue at the safety meetings, and at least Rodolfo Perez joined his brother in protesting the November 2002 job assignment, leaving work with him, both manifestations of the protest were joined by more than one employee, and constituted protected concerted activity.¹⁴

It is further concluded that by referring Miguel Perez to an attorney to represent him in his work-related injury, Angel Perez also engaged in protected concerted activity. Thus, he was coming to his brother's aid in a work-related matter, and the case law finds such assistance to be concerted in nature, even if it only relates to the benefits to be obtained by one employee. *T. T. Miyasaka, Inc., supra; Loyalhanna Health Care Associates, supra; Boese Hilburn Electric Service Company, supra.*

The evidence further shows that Respondent, and specifically Keck, was aware of the concerted nature of these activities. Thus, Keck was aware that employees, generally, had protested the shirking of duties of others, and was aware that at least Angel and Rodolfo Perez had protested having to work the taller trees on November 15, 2002. Keck admitted knowing that Angel Perez had obtained counsel for his brother, in January 2003. The credited evidence also establishes that Tomas Perez informed Keck that both Angel

¹³ Clearly, many employees believed that working the taller trees was more onerous, and could impact their wages. Respondent produced wage records showing that Angel Perez generally earned the same or higher wages as other palmeros. This should not come as a surprise, due to his skill and speed level, and it is still entirely possible that he would have earned more with more favorable job assignments.

¹⁴ The Perez brothers credibly testified that two other employees agreed with their refusal to assist the others in November 2002, although it is possible that, as he testified, Tomas Perez was only aware that Angel and Rodolfo Perez engaged in the protest. Even if the subject of the November 2002 protest were to be considered a separate issue from the earlier "coyotying" complaints, and only voiced by Angel Perez, it would be found to be a continuation of, or a logical outgrowth of the earlier complaints, and still concerted in nature. *Mike Yurosek & Son, Inc., supra.*

and Rodolfo Perez had refused to assist the other employees, based on their objection to being left to work on the taller palms.

General Counsel has presented enough credible evidence to show that a motivating factor in Angel's Perez's discharge was his protected concerted activity. The timing of the discharge, shortly after Keck learned that Angel Perez had obtained counsel for his brother, is a strong circumstantial factor. Keck was admittedly displeased with this, and whether he shouted at Perez, or merely spoke in a stern manner, the registering of his disapproval as the first item in a meeting, likely to culminate in discharge, strongly points to this assistance as a motivating factor.

Clearly, Tomas Perez was angered by Angel Perez's leadership role in the November 2002 protest, at the minimum because he complained to Keck about it. Keck had earlier registered his disapproval of the "coyotying" protests by referring to them as the employees' "politics." It is also clear that, with respect to Tomas Perez's complaints, Keck was aware that the friction between the two, at least in part, stemmed from Angel Perez's vocal leadership role in the coyotying complaints. By calling both Angel and Rodolfo Perez in to speak with him on January 28, 2003, Keck implicitly demonstrated his continued displeasure with their conduct, and in particular, Angel Perez's leadership role. Even if Keck became aware of other insubordinate aspects of Angel Perez's conduct on the job, it is concluded that a contributing factor in the discharge decision was the discord he caused by leading the protests against perceived unequal treatment.

Finally, there is the precipitous nature of the discharge. Even if Tomas Perez and Keck had spoken to Angel Perez concerning disrespect for co-workers, this took place at

times remote from the discharge, and consisted of isolated comments, rather than formal warnings. The exchange between Keck and Angel Perez on January 28, 2003 could hardly be considered an investigation. Keck blamed Perez for friction in the workplace, Perez denied this, and Keck proceeded with the discharge.¹⁵ Accordingly, the evidence establishes a prima facie case of unlawful retaliation.

It thus becomes Respondent's burden to establish that it would have discharged Angel Perez, absent the assertion of his statutory rights. At the outset, it is noted that Keck and Tomas Perez were not very persuasive as witnesses, particularly when comparing their testimony. Thus, Tomas Perez and Keck conflicted as to whether the January complaint pertained to Angel Perez's treatment of Tomas Perez, or his co-workers, and Tomas Perez changed his testimony concerning when he made that complaint. Respondent failed to have Tomas Perez corroborate Keck on several points. For his part, Keck radically changed his testimony concerning the number of times

¹⁵ Angel Perez's conduct during the January 28, 2003 meeting does not constitute insubordination warranting discharge.

Tomas and Angel Perez complained to him about each other.

Aside from this, and understanding that it is sometimes difficult to separate protected activity from general hostility, it is clear that any unrelated name-calling and other disrespectful conduct by Angel Perez had been going on for a long time. Tomas Perez admitted knowing this, and it is difficult to believe that Keck, as an on-site supervisor, would have been unaware of the conduct. Thus, it is at best suspicious that Keck would have embarked on an investigation of Angel Perez's purported harassment of co-workers at that late date, particularly since Keck testified that Tomas Perez's complaint concerned insubordination toward himself, and not other employees. Although Tomas Perez testified that the hostility by Angel Perez increased prior to his complaint to Keck in January 2003, he gave no specifics on this. It is also noted that Keck did not contend anyone other than Tomas Perez complained to him about Angel Perez (prior to launching the investigation), and Tomas Perez admitted employees had complained about this to him only a few times, on unspecified dates, during the course of Angel Perez's approximately five years of employment. Thus, Respondent's asserted reason for the discharge appears to be a pretext, based on long-tolerated conduct. *CKS Tool & Engineering, Inc. of Bad Axe* (2000) 332 NLRB 1578 [168 LRRM] 1047; *American Cyanamid Company* (1991) 301 NLRB 253 [136 LRRM 1263]; *Safety Railway Service Corp.* (1972) 198 NLRB 385 [81 LRRM 1125].

Taking all of the foregoing into account, it is concluded that Respondent has failed

to establish, on the preponderance of the evidence, that it would have discharged Angel Perez, when it did, for reasons other than his protected concerted activity. Accordingly, Respondent, by its' conduct, violated section 1153(a) of the Act.

THE REMEDY

Having found that Respondent violated section 1153(a) of the Act, I shall recommend that it cease and desist there from and take affirmative action designed to 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, Hadley's Date Gardens, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
 - (a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in 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 discharge of Jose Angel Perez, 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 Jose Angel Perez for all wages or other economic losses he suffered as a result of his unlawful 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 January 29, 2003, 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 non-hourly 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 Respondents at any time during the period January 29, 2003 to January 28, 2004, 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: December 23, 2004

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 discharging Jose Angel Perez because he concertedly protested his 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:

7. To organize yourselves;
8. To form, join or help a labor organization or bargaining representative;
9. To vote in a secret ballot election to decide whether you want a union to represent you;
10. 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;
11. To act together with other workers to help and protect one another; and
12. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT discharge or otherwise retaliate against agricultural employees because they 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 Jose Angel Perez 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 discharge.

DATED: _____

HADLEY'S DATE GARDENS, 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. 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