STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AUKEMAN FARMS, a Sole Proprietorship, Respondent, and GUSTAVO PLASCENCIA, Charging Party.	)	Case No. 06-CE-35-VI 34 ALRB No. 2 (June 25, 2008)

DECISION AND ORDER

On March 13, 2008, Administrative Law Judge (ALJ) James Wolpman issued the attached decision in the above-referenced case, in which he found that Aukeman Farms, a sole proprietorship (Respondent) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) by discharging Gustavo Plascencia (Plascencia) for engaging in protected concerted activity.[1] The ALJ found that Plascencia engaged in protected activity by concertedly complaining about broken ventilation fans and uncomfortable conditions in the milk barn where Plascencia and his fellow milkers were working.

[1]The Agricultural Labor Relations Act (ALRA) is found at California Labor Code section 1140 et seq.

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 Plascencia would have been discharged even in the absence of the protected activity. The Employer timely filed exceptions to the ALJ's decision.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions filed by the Respondent and affirms the ALJ's findings of fact[2] and conclusions of law, and adopts his recommended decision as explained below, and adopts his recommended order as modified.

The Respondent filed two exceptions to the ALJ's decision. First, the Respondent argues that the heat and lack of air circulation in the barn was not a "protected working condition" because it was based on Plascencia's subjective perception. Second, the Employer argues that even assuming that Plascencia did engage in protected concerted activity, contrary to the ALJ's conclusion, it met its burden of showing that Plascencia would have been discharged even in the absence of his complaint about the broken fans. The Employer argues that Plascencia improperly extended his vacation by a single day and this was the reason he was terminated.

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[2]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 overruling the ALJ's credibility determinations.

A. The Protected Concerted Activity

The Respondent argues that the heat and lack of air circulation in the barn was not a "protected working condition" and so Plascencia did not engage in protected concerted activity when he complained about the fans. The Employer cites *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, at p. 1404, for the proposition that "protected activity (such as a work stoppage) cannot reasonably be predicated on workers' subjective perceptions of distinctions between comfortable and uncomfortable working conditions.…" Respondent appears to argue that under ALRB and NLRB case law, a working condition must be objectively adverse before it can become the basis for any kind of protected concerted activity.

This argument is without merit. It is well-settled that the reasonableness of employees' complaints is irrelevant to whether their conduct is protected concerted activity. (See *NLRB v. Washington Aluminum* (1962) 370 U.S. 9; *Pictsweet Mushroom Farms* (2002) 28 ALRB No. 4; *J & L Farms* (1982) 8 ALRB No. 46; *Tanimura & Antle* (1995) 21 ALRB No. 12; *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.) In addition, the Board has held that a concerted protest about working conditions is still protected even if based on error. (*Venus Ranches* (1982) 8 ALRB No. 60.)

The Court of Appeal decision cited by Respondent, *Bertuccio v. ALRB*, *supra*, 202 Cal.App.3d 1369, is distinguishable from the instant case. In *Bertuccio*, the Court's focus was whether the workers' chosen form of protest--a work stoppage--was a protected concerted activity, and if so, whether their suspension for this activity violated the Act. Although the Court included language reflecting disagreement with the employees' perception

of uncomfortable working conditions, ultimately the Court's holding was based on the conclusion that the work stoppage was not a protected concerted activity, presumably because it amounted to a partial or intermittent strike.

While the *Bertuccio* decision lacks clarity, the Court's focus was whether the form of the protest (the work stoppage), not the basis of the complaint (the desire not to cut lettuce in rainy weather), was protected. Therefore, the holding in *Bertuccio* does not undercut the general rule that the reasonableness of the employees' demands is irrelevant to whether the conduct is protected.

In the instant case, there is no question that the subject matter of the workers' complaint--the temperature and air circulation in the barn--was a work-related complaint. Contrary to Respondent's argument, there is no requirement in ALRB or NLRB case law that a complained about work condition rise to a certain level of severity or danger before it can be a legitimate subject of protected concerted activity.[3]

B. The Record Supports a Finding of Unlawful Motivation for Plascencia's Discharge

Respondent argues in its exceptions that even if Plascencia's complaint about the fans was protected concerted activity, it met its burden of showing that the reason Plascencia was fired was because he took too many days of vacation. During the hearing,

[3]Even though the reasonableness of the workers' demands is irrelevant to the determination of whether there was protected concerted activity, it seems quite reasonable that Plascencia and his co-workers would take early action to prevent the barn from becoming any hotter than it already was. The dangers of heat stress had been widely publicized after several unfortunate heat-related deaths in the Central Valley during the 2005 harvest season. Plascencia and his co-workers attended two trainings on safety conducted by Respondent's insurance carrier (one on October 6, 2005 and one on May 23, 2006), and heat stress prevention was among the topics discussed. (TR: 15-17.)

Respondent's position appeared to be that Plascencia improperly extended his time off by trading shifts before his scheduled vacation began, thereby exceeding his allotted 14 days off by almost a week. The Respondent now appears to accept the ALJ's finding that the practice of trading shifts to extend vacation was still an acceptable practice at the dairy when Plascencia took his days off. Respondent instead focuses its argument on the days Plascencia testified were his official vacation days: June 9th through June 23rd. Respondent points out that there were actually 15 days taken during this time--one day more than Plascencia was entitled to. Respondent argues that even if it condoned the trading of shifts at the beginning of Plascencia's time off, he still would have been fired because he extended his vacation by one day.

Unlawful motive for an adverse employment action may be established by either direct or circumstantial evidence. Direct evidence would include statements admitting or implying that the protected concerted activity was a reason for the action. Where discriminatory motive is not apparent from direct evidence, there are a variety of factors that the Board and courts have considered in order to infer the true motive for the adverse action. Such factors may include: 1) the timing, or proximity of the adverse action to the activity; 2) disparate treatment; 3) failure to follow established rules or procedures; 4) cursory investigation of the alleged misconduct; 5) false or inconsistent reasons given for the adverse action, or the belated addition of reasons for the adverse action; 6) the absence of prior warnings; and 7) the severity of punishment for the alleged misconduct. (*Miranda Mushroom Farm, Inc. et al*. (1980) 6 ALRB No. 22; *Namba Farms, Inc.* (1990) 16 ALRB No. 4.)

We find Respondent's argument unpersuasive and further find that the new explanation given for the discharge in its exceptions provides additional support for inferring unlawful motive. Although the ultimate reason--that Plascencia took too much vacation--has stayed the same, Respondent's explanation for how it was determined Plascencia overextended his vacation has shifted over the course of the proceeding. Dairy owner Robert Aukeman (Aukeman) initially stated that he made the decision to fire Plascencia on the 24th of June, when Dairy foreman Marcos Gutierrez (Gutierrez) called him and said Plascencia had returned from his vacation and was there at the dairy. (TR: 156.) Later, after being reminded that the milker hired to replace Plascencia started working on June 17th, Aukeman admitted that he probably had a "mindset" to get rid of Plascencia after he learned Plascencia had traded shifts in order to leave town early. (TR: 161.) Now, in its exceptions to the ALJ decision, Respondent points out that Plascencia took 15 days of vacation instead of 14, and asserts that the decision to fire him was made when he returned one day late.

Although Gutierrez testified that he verbally warned Plascencia before he left town that he only had 14 days of vacation, and this was not specifically discredited by the ALJ, the record supports the ALJ's conclusion that Plascencia understood that trading shifts before his official vacation started was an acceptable way to extend his vacation by several days. The record supports the ALJ's finding that the written disciplinary notice that was purportedly given to Plascencia in order to warn him that he had to be back in 14 days was a fabrication. When viewed along with this falsified notice, Respondent's alleged "warnings" to Plascencia carry very little weight, and it is reasonable to conclude Plascencia had no

reason to think his vacation plans had been disapproved of before he left town, and that Respondent took its adverse action without warning Plascencia first.

Although Respondent later changed its policy to prohibit the trading of shifts, the record supports the conclusion that at the time Plascencia made his arrangements to trade shifts with two co-workers, this was still a practice that the Employer condoned even if he didn't particularly approve of it. Therefore, Respondent's action in penalizing Plascencia for trading shifts was a sudden departure from past practice, tending to support an inference of unlawful motive.

The severity of the discipline chosen here is also a significant factor supporting an inference of unlawful motive. "Firing an employee has been characterized as the industrial equivalent of capital punishment." (*Namba Farms, supra*, at p. 30 citing *Griffin v. Automobile Workers* (4th Cir. 1972) 469 F.2d 181.) The most extreme form of discipline, especially without warning, may give rise to an inference that the reason given for the discharge was unlawful. *(Namba Farms, supra*.) Termination under the circumstances in the instant case seems especially severe in light of Respondent's current position that Plascencia was only one day late in returning to work.

For the reasons discussed above, we conclude that the record supports the ALJ's finding that the reason given for Plascencia's discharge was a pretext. We note that there was no evidence presented of some other possible source of animus against Plascencia other than his protected activity. Therefore, it is reasonable to infer that the Respondent fired him due to his protected concerted activity in violation of the Act.

C. The Remedy

The ALJ's recommended remedy includes back pay amounts specified in the General Counsel's original back pay specification which covered the period of June 24, 2006 to May 31, 2007. The ALJ also recommended that Plascencia be offered reinstatement, and rejected Employer's argument that reinstatement was inappropriate because of a threat made by Plascencia to Aukeman. Relying on Aukeman's testimony that he did not take the threat seriously, the ALJ declined to eliminate reinstatement as a remedy. We uphold the ALJ's recommendation as to the remedy of reinstatement.

On April 14, 2008, the General Counsel filed a motion with the Board to amend its back pay specification due to errors in calculation, and submitted modified figures for the original period of June 24, 2006 to May 31, 2007, as well as figures for June 1, 2007 to March 31, 2008. The Board granted the General Counsel's motion on May 6, 2008 (see Admin. Order No. 2008-04) and allowed the Employer to file an answer addressing the entire back pay period.

The Employer filed its answer to the amended back pay specification on May 22, 2008. The Employer admits that the correct methods were used to calculate the back pay amount, but denies that the amount stated in the specification is correct, and takes issue with the amount of interim earnings in the back pay specification. The Board's previous order states that if a hearing was necessary to resolve disputed issues in the specification, it would be scheduled following the Board's decision on liability. As the Board finds Plascencia's discharge violates the Act, the Board orders that a hearing on the amended back pay specification be scheduled as soon as possible.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Aukeman Farms, 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 that are deemed necessary to effectuate the policies of the Act:

(a) Rescind the discharge of Gustavo Plascencia, 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 Gustavo Plascencia 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 June 26, 2006, 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 agricultural 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 June 26, 2006 to June 26, 2007.

(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 June 25, 2008

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged Aukeman Farms violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that it did violate the law by discharging Gustavo Plascencia on June 24, 2006.

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 these rights:

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

Because you have these rights, we promise that:

WE WILL NOT discriminate against any agricultural employee because he or she has acted together with other employees to protest their terms and conditions of employment.

WE WILL reimburse Gustavo Plascencia with interest for any economic losses he has suffered because we improperly terminated him on June 24, 2006.

DATED:

AUKEMAN FARMS

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 Agricultural Labor Relations Board.

One office is located at 1643 W. Walnut Avenue, Visalia, CA 93277. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

AUKEMAN FARMS Case No. 06-CE-35-VI
(Gustavo Plascencia) 34 ALRB No. 2

ALJ Decision

The ALJ found that Aukeman Farms (Respondent or Employer) violated section 1153(a) of the Act by discharging dairy worker Gustavo Plascencia (Plascencia) for engaging in protected concerted activity. The ALJ found that Plascencia engaged in protected activity by concertedly complaining about broken ventilation fans and uncomfortable conditions in the milk barn where he and fellow milkers were working. The ALJ found that the General Counsel had established a prima facia case that the Employer had unlawful motivation for firing Plascencia, and found that the Employer's proffered reason for the discharge—that Plascencia had over extended his vacation—was a pretext.

The Board Decision

The Board affirmed the ALJ's decision and modified his recommended order to reflect an amended backpay specification filed by the General Counsel following the hearing. The Board rejected the Respondent's argument that the heat and lack of air circulation in the barn was not a "protected working condition" because it was based on the workers' subjective perception of uncomfortable conditions. The Board noted that it is well-settled that the reasonableness of employees' complaints is irrelevant to whether their conduct is protected concerted activity. The Board found that the Court of Appeal decision cited by Respondent, *Bertuccio v. ALRB*, *supra,* 202 Cal.App.3d 1369, was distinguishable because the Court's focus was whether the form of the protest (the work stoppage), not the basis of the complaint (the desire not to cut lettuce in rainy weather), was protected.

The Board found that the record supported a finding that Plascencia's discharge was unlawfully motivated. Respondent's inconsistent, shifting explanation for the discharge, the fabricated warning given to Plascencia, and the severity of discipline were among the factors that provided support for an inference of unlawful motive. The Board found the record supported the ALJ's conclusion that the reason given by Respondent for the discharge was a pretext, and found there was no evidence presented of some other possible source of animus against Plascencia other than his protected activity.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: AUKEMAN FARMS *Respondent,* *and* GUSTAVO PLASCENCIA, *Charging Party.*	**Case No. 06-CE-35-VI**

Appearances:

Francisco Aceron
Assistant General Counsel
Agricultural Labor Relations Board
Visalia Regional Office
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Visalia, CA 93277
for the General Counsel

Joseph S. Soares
Horswill, Mederos & Soares
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for the Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN: I heard this unfair labor practice case at Visalia, California on November 27, 2007.

I. PROCEDURAL HISTORY

On June 27, 2006, Gustavo Plascencia filed unfair labor practice charge No. 06-CE-35-VI with the Visalia Office of the Agricultural Labor Relations Board (ALRB or Board), against Aukeman Farms, alleging that he was discharged on June 26, 2006 for participating in concerted activity protected by Section 1152 of the Agricultural Labor Relations Act (ALRA). (Board Exhibit 1-A.)

On March 6, 2007, the Regional Director of the Visalia Office issued a Complaint alleging that Aukeman Farms violated Section 1153(a) of the Act by discharging Plascencia on June 24, 2006. (Exhibit 1-B.) On April 3, 2007, Aukeman Farms filed its Response denying that Plascencia's discharge was due to protected activity and alleging a number of affirmative defenses. (Exhibit 1-C.)

Thereafter, on May 31, 2007, the Regional Director issued a Backpay Specification and ordered it consolidated with the Complaint for hearing. (Exhibit 1-D.) Receiving no timely Response to the Specification, the General Counsel moved for an order finding its allegations to be true. (Exhibit 1-E.) Aukeman then filed its Response to the Specification and asked that its failure to file in a timely manner be excused. (Exhibit 1-F.) The Administrative Law Judge assigned to the matter determined that the grounds alleged for the failure were insufficient and ordered that the Specification be deemed true. (Exhibit 1-G.) The Board affirmed. (Exhibit I-H.)

At the opening of the hearing on November 27, 2007, Plascencia's motion to intervene as a party was granted.

II. JURISDICTION

The Parties stipulated:

a. Respondent Aukeman Farms is, and at all times relevant was, a California corporation and an agricultural employer within the meaning of section 1140.4(a) and (c) of the Agricultural Labor Relations Act, with its principal place of business in Tulare, California.

b. At all times material herein, Gustavo Plascencia was an agricultural employee within the meaning of Section 1140.4(b) of the Act

c. The charge herein was filed on June 26, 2006 and served on June 27, 2006, as alleged in the Complaint.

d. At all times material, Robert Aukeman was the owner of Aukeman Farms and Marco Gutierrez was a supervisor**.**

e. Gustavo Plascencia was terminated by Aukeman Farms on June 24, 2006.

III. FINDINGS OF FACT

A. Background

Robert Aukeman owns and operates the Aukeman Farms Dairy in Tulare, California, where he has been in business since 2000. Prior to that he had operated a dairy in Southern California.

At the time in question, he employed about 19 employees: six worked inside the barn as milkers, three on the day shift and three on the night shift, and the rest worked outside. Plascencia was hired in February 2002 as a milker.

Robert Aukeman speaks little Spanish and therefore depends heavily on his foreman, Marcos Gutierrez, to direct and communicate with his dairy workers.

Gutierrez spends most of his time supervising the outside workers but also sees himself as a go-between between the milkers and Aukeman.

In the years leading up to Plascencia's termination, the work schedule for milkers was loose and informal. While there was a time clock and a presumptive schedule—two days on and one day off—milkers frequently punched in and out for each other, and management allowed them to trade work days and permitted one milker to pay another to cover his assigned shift. These practices were facilitated by the fact that milkers were paid a fixed salary, twice a month.

In November 2005, on the recommendation of his insurance company, Aukeman decided that something had to be done about the situation. He therefore installed a time clock that required a handprint, thus preventing employees from punching each other in or out. While he expressed his displeasure with the practice of trading shifts and buying days off, he did not outlaw it, and the practice continued. Only after Plascencia's discharge was it specifically forbidden. At the same time Aukeman also discontinued the fixed bi-monthly salary and began paying milkers by the hour.

Aukeman did have a consistent vacation policy. Workers were allowed a week with pay and, on request, they could obtain an additional week without pay.

B. The Incident Involving the Fans in the Barn

The milking barn is a large, long building with a 25 to 30 foot ceiling. Running down its length in the center is a sunken area, or pit, where the milkers work. On either side of the pit, the cows to be milked are aligned, side-by-side, hindquarters

toward the pit. Above the cows, on each side of the pit, are two rows, or banks, of fans, operated by thermostat, whose primary purpose is to prevent the temperature from rising to a point where it interferes with the cows' ability to produce milk. On hot or warm days, the fans also serve to cool the milkers, as do the open areas under the roof and at each end of the barn.

From time to time some or all of the fans breakdown, and Aukeman contacts Performance Dairy Service Inc. for an electrician to make the necessary repairs. He suggested that some of the breakdowns were due to employees turning on the fans manually and tampering with them. (Tr. 130-1, 136.)

In early May, 2006, as the weather was warming,[1] all the fans malfunctioned. Plascencia, who was working the day shift at the time, testified:

> "Well, since we [he and the other two milkers] were talking amongst each other that the fans weren't working, and that we felt kind of suffocated, I said, 'Let's go over and tell the boss.' But even myself, I was kind of fearful, a little afraid to go over there, because when you tell him something he gets upset." (Tr. 22.)

He and the two other milkers—Gustavo Pina and Trinidad Guizar—then went to the office in the barn where Aukeman was working, and he knocked while the others "stayed kind of toward the side." (Tr.20.) Aukeman's wife opened the door and told him to come in. He recalls Aukeman's son-in-law also being present. Aukeman asked what he wanted, and he replied, "That the fans weren't working, that it was

[1]Cows begin to lose milk production when the external temperature reaches 90°; inside the barn the thermostats were set to activate the fans when the temperature reached 80°; outside temperatures at the beginning of May 2006 at the closest weather station (Hanford), ranged from 84° to 90°; and the temperature inside the barn would have probably have been somewhat lower.

very hot, and that we all felt kind of suffocated, like there wasn't enough air to breath." (Tr. 24.) In response, Aukeman "kind of got upset" and told him to "Go away." (Tr.22.)

Aukeman's version of the encounter differs in several respects. He testified that Plascencia "walked into the office . . ."

> ". . . and told me the fans weren't working. I was working on the computer, and I think I was putting my herd check in, actually. But I just told him, 'Hey, I can't fix them. I'm not an electrician.' Because when he comes in, he's usually very assertive. And so I just said, 'Hey, you know what? I can call him, but I can't fix them.'"
> . . . .
> "I don't think I was with my wife and my son-in-law. They don't even remember it. I thought, actually, that I was with my nutritionist, and I asked him about it, and he says he didn't remember it, either. So, I don't know. But somebody -- I think somebody was in there, but I can't remember who."
> . . . .
> "He said, 'It's hot.' And I go, 'It's not that hot.' I don't know -- even know if I said anything like that. I'm thinking to myself, 'I don't think it's that hot.'" (Tr. 137-138.)

He admitted that he probably told Plascencia to "'Go back to work' or something like that." (Tr. 146.) What angered him "a little bit" was not the complaint but "the way he burst into the office." (Tr. 146.) When asked if he knocked first, Aukeman hedged slightly, saying, "I don't believe so." (Tr. 146.)

Aukeman testified that he did not see the other two milkers in the vicinity. When asked if Plascencia "complained that the [other] workers were hot," he did not specifically deny Plascencia's testimony to that effect, but said, "I don't remember him talking about that." (Tr. 172.) He also conceded that Plascencia was concerned about working conditions, not the productivity of the cows (Tr. 172-3), and he

acknowledged that workers had, on previous occasions, sought to adjust the temperature in the barn by tampering with the fans. (Tr. 130-1, 136.)

Immediately after the encounter, Aukeman contacted Performance Dairy Service Inc., and within a day or so an electrician was dispatched to repair the fans. (Employer Exhibit #6.) Aukeman had no further discussions with any of his workers about the issue.

C. Plascencia's Vacation and Discharge.

Sometime in January 2006, Plascencia told his foreman, Marco Gutierrez, that he planned to take his vacation in June, so that Gutierrez could clear the dates with Aukeman. Thereafter, he reminded the foreman on several occasions and, a month before leaving, jotted the dates on a piece of paper for Gutierrez to show Aukeman. He planned to extend his time off by arranging with co-workers to cover his shifts for several days before his vacation began, and he testified that he noted on the paper both "the days I had exchanged and my vacation days." To that end, he agreed to pay Trini [Trinidad Guizar] to work one shift[2], and to exchange another with Rudi [Rudolfo de Anda]. That covered his assigned shifts for June 6th and 7th. Since June 8th was his scheduled day off, *in his view*, his two week vacation formally began on the 9th, meaning that it would end on June 23rd, and he would return to work on the 24th. He testified that he confirmed the arrangement with Gutierrez just before he left.

[2]Actually, Plascencia only had to hire Tini for the 1/2 shift to which he had been assigned for June 6th. (See Employer Exhibit #12.)

That was not, however, the view of Aukeman and Gutierrez. Gutierrez testified that, on Aukeman's instructions, he informed Plascencia that he had two weeks vacation, no more. (Tr. 228.) Under their interpretation, his vacation began when he did not work on June 6th, which meant he was due back at work on June 21st. According to Gutierrez, "I didn't realize that he exchanged days until it happened." (Tr. 228.)

Any decision over whose version to accept necessarily entails an assessment of the credibility of the three people involved—an assessment best made after consideration of subsequent events.

On June 6th—a month after the fan incident—Plascencia left for the State of Washington to visit his family and to attend the quinceañera[3] of one of his relatives on June 17th. On June 16th, he telephoned Rudy de Anda, who was to pick up his check. Rudy told him that it was less than he expected; later that day they spoke again, and Rudy said he had received another check for $200. The day after the quinceañera, Plascencia left for California and arrived home on June 19th.

At hearing, the Employer introduced several disciplinary notices. (Employer Exhibit #4.) One of them reads:

"Discipline Notice

> "Gustavo Placencia [sic] came for his check on June 16, 2006. He was asked when he was going to return from his vacation and he responded with (I will come back when I feel like it). He was

[3]The Latino celebration of a young woman's fifteenth birthday, often accompanied by a Catholic mass.

reminded verbally that he needed to be back to work after 14 days, which was June 21, or he would forfeit his job.

"He continued to argue with me.

/S/ Robert Aukeman
/S/ Marcos Gutierrez
6-16-06"

On June 30, 2006, Aukeman wrote the Board Agent assigned to investigate the charge which Plascencia filed, asking that it be dismissed. In it, he again asserted:

> "On June 16 he [Plascencia] came to get his paycheck. He received a check for one week of vacation and another check for his [sic] three days that he worked. Supervisor Marco Guiterez [sic] asked him when he was planning to return to work. His response was that he was going to come back when he wanted to and he would pay 'the guys' (meaning fellow milkers in his shift). Apparently he thought he could trade days and still be paid by us his regular salary and in turn pay the other milkers himself. I reminded him that he only was allowed two weeks, as did supervisor Marco Guiterez [sic], and he needed to return to work or he would not have a job." (G.C.Ex A.)

At hearing, the General Counsel presented overwhelming evidence—photographs of Plascencia at the quinceañera on the 17th (G.C. Ex. C#1 thru C#6), a certification from the Washington Department of Licensing that he had taken a driver's test on the 14th (G.C. Ex. B), his own testimony, and stipulated testimony from his brother and his wife (Tr. 115, 116)—all establishing beyond any reasonable doubt that he was in Washington from June 7th to June 18th.

In response, Aukeman attempted to downplay his false written claims by testifying that he could not recall whether Plascencia came in to pick up his check. (Tr. 155.) But the damning fact remains that Aukeman and Gutierrez prepared and

signed a statement which, on the date they claimed to have signed it, they had to have known was false, and then, 14 days later, Aukeman had the temerity to reiterate that falsehood to a Board Agent.

On June 24th—the day he believed he was due to return to work—Plascencia arrived at the dairy and spoke with Gutierrez who, after telephoning Aukeman, informed him that he had been terminated. When Plascencia asked to speak with Aukeman, Gutierrez told him that he would have to wait until Monday, the 26th.

Gutierrez testified that Plascencia was upset and made several threats: "That he was going to sue him for certain things. Exactly, I don't know. He showed me a few recordings. I don't know exactly what, but I just heard of them." (Tr. 223.)

On the morning of the 26th Plascencia returned and spoke with Aukeman, who told him that he had taken "too much vacation." (Tr. 46.) When he was unable to convince Aukeman otherwise, he questioned the size of the checks he had received, and refused to return his uniform until he was paid "the money that you owe me" (Tr. 47.) Aukeman told him he was fired and to leave.

Aukeman testified that, at the end of their encounter, Plascencia threatened to kill him and "took his finger across his throat." (Tr. 164.)

Plascencia testified that, while he was upset at losing his job, he threatened no one either on the 24th when he spoke with Gutierrez or on the 26th when he met with Aukeman.

D. Factual Conclusions

Little credence can be given to witnesses who fabricate a false "discipline notice" and then use the false information contained in that notice in an attempt to deceive a Board investigator into dismissing an unfair labor practice charge.

As for hearing demeanor, I found Gutierrez to be an evasive witness who sought to downplay as much as possible his role and responsibility as foreman and repeatedly avoided giving straight answers to direct questions—the same sort of behavior which, I believe, characterized his dealings with Plascencia over the vacation issue.

Aukeman came across as brash, impulsive, and quick to say whatever he felt at the moment. This is consistent with the testimony of Plascencia who described him as abrupt, ill-tempered, and quick to anger in his dealings with his workers—just the kind of employer who would react badly when challenged by an employee he believed to be "assertive." (Tr. 22, 77, 79, 89, 137-8, 196.) And Plascencia struck me as just that sort of employee—one ready "to stick up for his rights."

With that in mind, I accept Plascencia's account of his encounter with Aukeman over the fans. When they broke down, he and the other milkers were bothered by the increase in temperature and the decrease in air-circulation. After discussing the problem among themselves, Plascencia went to the office, knocked, and explained to Aukeman that the barn had become uncomfortable because the fans were not working. I accept his testimony that, in doing so, he made Aukeman aware that he was speaking on behalf of himself and the other milkers. Aukeman resented

the intrusion, felt the complaint to be overblown, and ascribed it to Plascencia's "assertiveness." He curtly told Plascencia to "go away."

Turning to the facts surrounding Plascencia's vacation and discharge, I find that, while Aukeman Dairy had acted to prevent milkers from punching each other in and out, it continued to tolerate their practice of trading work days and allowing one milker to pay another to cover an assigned shift. Plascencia availed himself of that arrangement in planning for his trip to Washington State by scheduling his two-week vacation to begin on June 9th and then arranging to purchase a shift from one milker and exchange shifts with another so that he could leave on June 6th. I find that, despite Gutierrez's claims to the contrary, Plascencia informed him of his plans, and Gutierrez never told him that there was anything wrong with trading and buying the shifts just prior to the start of his vacation.[4] As for Aukeman, he did not realize what the arrangement was until after the fact, and then abruptly decided to create a new policy forbidding employees from combining trade-offs and buy-outs with vacation time.[5] Aware of the shakiness of his *ex post facto* rule, he later fabricated the above quoted "Discipline Notice" and had Gutierrez sign it.

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[4]Indeed, as a practical matter, it is hard to see how an employer who permits trade-offs and buy-outs is in any way harmed or disadvantaged when an employee combines them with his vacation. No additional employees need be hired for the days traded or bought, and those needed to fill in during the actual vacation period would have had to be hired in any case. Thus, while there may well be sound practical and legal reasons for eliminating the practice of buy-outs and exchanges, if they are allowed—as they were here until July 1st—there is no valid justification for forbidding their use in conjunction with a scheduled vacation.

[5]At hearing there was testimony that an employee named Alfonzo had been fired earlier for overextending his vacation. (Tr. 235, 239-40, 250.) There is no indication,

When Plascencia returned to California on June 19th, he justifiably believed that he was not due back to work until the 24th. At that point, the only thing he thought amiss was the size of his paycheck for the beginning of June, which Rudy de Anda had picked up on the 16th. Contrary to the normal practice of paying employees for the time they would have worked had they not traded or paid another to take their shift, the check reflected only the time he actually worked at the beginning of June.

Not until he arrived for work the 24th did he learn from Gutierrez that he was being discharged for staying away too long. On the 26th, when he was able to meet with Aukeman, he was upset. They argued over Aukeman's claim that he had taken too much vacation and over his reduced paycheck. (Tr. 89.) Plascencia may have used threatening language, but I accept Aukeman's view that it was not to be taken seriously. (Tr. 164, 200-1.)

IV. LEGAL CONCLUSIONS

Section 1152 of the Act grants agricultural employees the right "to engage in…concerted activities for the purpose of mutual aid and protection." Section 1153(a) makes it an unfair labor practice for an agricultural employer to "interfere with, restrain or coerce" agricultural employees in the exercise of that right. Where union activity is not involved, employee action—if it is to be protected—must be concerted. That means the employee must act in concert with, or on behalf of others. *Cieniga Farms, Inc.* (2001) 27 ALRB No. 5; *T.T. Miyasaka, Inc.* (1990) 16 ALRB

(cont.) however, that he had used buy-outs or trade-offs to gain the additional time he took off.

No. 16; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41; *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], revd. (1985) 755 F.2d 941 [118 LLRM 2649] (D.C. Cir.), decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], affd. (1987) 835 F.2d 1481 [127 LRRM 2415], cert. denied, (1988) 487 U.S. 1205. So long as the concerted action relates to wages, hours, or some other term or condition of employment it is protected (*Cieniga Farms, Inc*., *supra*; *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4).

In weighing the evidence to determine whether an employer has violated Section 1153(a), our Board follows the NLRB's so-called *Wright Line* analysis. *Wright Line* (1980) 251 NLRB 1083 [105 LRRM 1169], enfd. 662 F.2d 899 (1st Cir. 1981)[108 LRRM 2513], cert. denied 455 US. 989 (1982); *Pictsweet Mushroom Farms* (2002) 28 ALRB No. 4; *J. & L. Farms* (1982) 8 ALRB No. 46. Under *Wright Line*, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected conduct motivated the employer's adverse action. To do so, it must show that the employee engaged in protected conduct, that the employer knew or suspected the employee engaged in such conduct, and that the employer harbored unlawful animus and acted on that animus. If the General Counsel succeeds in establishing such a *prima facie* case, the burden of persuasion then shifts to the employer. To meet that burden an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *Lawrence Scarrone* (1981) 7 ALRB No. 13; *NLRB v. Transpor-*

tation Managment Corp. (1983) 462 U.S. 393, 399-403; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 [116 LRRM 1394] (1984).

Applying the *Wright Line* analysis to the factual findings above, there is, first of all, no question that there was protected concerted activity. The milkers were uncomfortable with the heat and lack of air circulation in the barn—clearly a protected working condition. See: *Tanimura & Antle, Inc.* (1995) 21 ALRB No. 12; *NLRB v. Jasper Seating Co., Inc.*, 857 F. 2d 419 [129 LRRM 2337] (7th Cir. 1988) enforcing 285 NLRB 550 [127 LRRM 1119] (1987). They discussed the matter among themselves and Plascencia undertook to present their complaint to management—clearly concerted activity.

At hearing the Respondent argued that the temperature in the barn was not at all unusual or uncomfortable, and therefore the complaint was without merit. The evidence does not support that contention, but even if it were true, it is not a valid defense. In *Venus Ranches, Inc.* (1982) 8 ALRB No. 60, pp. 4-5, the Board stated:

> It is a firmly established principle of labor law that the protected nature of a concerted activity is in no way based upon the merit of the employees' complaint. [Citing cases.] Even if the employee's concerted protest about working conditions was based on an erroneously held belief, the protected nature of their conduct would not be affected. [Citing cases.]

See also: *Boyd Branson Flowers, Inc., supra; J. & L. Farms, supra*; *Lawrence Scarrone. supra*; *NLRB v. Jasper Seating Co., Inc., supra*; NLRB v. *Washington Aluminum Co.* (1962) 370 U.S. 9, 16-17.

The second element of *Wright Line*—that the employer knew or suspected the employee was engaged in protected concerted activity—was likewise established. While Aukeman may not have been aware that the other milkers had accompanied Plascencia to the office and remained in the vicinity, he would naturally have been aware that the condition complained of affected them (*supra*, pp. 5, 6-7), and Plascencia specifically told him that he was speaking on their behalf (*supra*, pp. 5-6, 11).

In meeting its burden of establishing the third element of *Wright Line*—unlawful motivation—the General Counsel may utilize direct or circumstantial evidence. *Cieniga Farms, Inc.*, *supra.* Direct evidence includes statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the activity, may be circumstantially significant. But timing alone is not enough. Other circumstantial evidence may include disproportionate treatment, deviation from established practices or procedures, cursory investigation of alleged misconduct, and false or inconsistent justifications for the adverse action. See *Miranda Mushroom Farm, Inc.*, (1984) 6 ALRB No. 22.

Here, the circumstantial evidence is persuasive. Aukeman admitted he was angry at Plascencia for disturbing him to complain about the temperature and air circulation in the barn, characterizing him as being "very assertive." (Tr. 137.) As for timing, Aukeman had little or no contact with Plascencia until six weeks later when he learned of his vacation arrangements. (Tr. 77-8.) It was then that he decided to

take action against him for combining his two-week vacation with the still-accepted practice of trading and buying shifts—a sudden change in policy for which there was no prior notice and no clear precedent. (*Supra*, pp. 12-13 & fn. 5.) And, in doing so, he chose the most serious punishment an employer can inflict on an employee—discharge—despite the fact that Plascencia's conduct in no way harmed or disadvantaged the Dairy. (*Supra*, fn. 4, p. 12.) Finally, and most seriously, he fabricated a false "Discipline Notice" in an attempt to justify his action, and then used that false information in an attempt to deceive the Board Agent investigating the Charge.

That is more than enough to establish a *prima facie* case under *Wright Line* and thereby shift to the Respondent the burden of persuading, by a preponderance of the evidence, that it would have discharged Plascencia even in the absence of his protected activity.

The only evidence offered by Respondent in this regard—that Plascencia improperly extended his vacation—has already been considered and found wanting. (*Supra*, pp. 12-13.)

I therefore conclude that Respondent's explanation for the discharge was a pretext and that the General Counsel has established by a preponderance of the evidence that Respondent violated section 1153(a) of the Act by terminating Gustavo Plascencia for engaging in protected concerted activity.

V. REMEDY

Here the Regional Director, acting pursuant to section 20290(b) of the Regulations, consolidated the unfair labor practice complaint with a backpay specification covering the period from his discharge until May 31, 2007 (Exhibit 1-D), and the Board subsequently found that Specification true. (Exhibit I-H.) This may result in a further period of backpay accrual not included in the Board's previous order (*Anthony Harvesting* (1992) 18 ALRB No. 7) and may necessitate a further specification covering any accrual of backpay since May 21, 2007. *Valley Farming Company* (1994) 20 ALRB No. 4, pp. 7, 8.

Respondent argues that there should be no reinstatement order because of the threat made by Plascencia to Aukeman. Because I accept Aukeman's view that the threat was not one to be taken seriously (*supra*, p. 13), I decline to eliminate the important and long established remedy of reinstatement for an employee who has been discharged in violation of the Act.

Accordingly, upon 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

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

1. Cease and desist from:

(a) Unlawfully discharging any agricultural employee because he/she has engaged in activity protected by section 1152 of the Act;

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights under section 1152 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Gustavo Plascencia immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges of employment.

(b) Make Gustavo Plascencia whole for all wages or other economic losses he suffered as a result of Respondent's unlawful discharge from the date of said discharge until May 31, 2007, in the amount of $17,900.00, and for any future periods of economic loss resulting from Respondent's unlawful discharge of Gustavo Plascencia, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon to be determined in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

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

(d) 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) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from June 24, 2006.

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to all of its agricultural employees on company time 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 and 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 work time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms,

and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 13, 2008

_____

JAMES WOLPMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged Aukeman Farms violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that it did violate the law by discharging Gustavo Plascencia on June 24, 2006.

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 these rights:

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

Because you have these rights, we promise that:

WE WILL NOT discriminate against any agricultural employee because he or she has acted together with other employees to protest their terms and conditions of employment.

WE WILL reimburse Gustavo Plascencia with interest for any economic losses he has suffered because we improperly terminated him on June 24, 2006.

DATED:

AUKEMAN FARMS

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 Agricultural Labor Relations Board.

One office is located at 1643 W. Walnut Avenue, Visalia, CA 93277. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE