Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WOOLF FARMING CO. OF CALIFORNIA, INC., a California Corporation; CALIFORNIA VALLEY LAND COMPANY, INC., a California Corporation doing business as WOOLF ENTERPRISES, Respondents, and AGUSTINE LARA, Charging Party.	)	Case No. 06-CE-28-VI 35 ALRB No. 2 (March 10, 2009)

DECISION AND ORDER

This case involves the allegation that Woolf Farming Company of California, Inc. and California Valley Land Company, Inc. dba Woolf Enterprises (Respondents or Employers) violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by discharging the Charging Party, Agustine Lara Vasquez (Lara), in retaliation for engaging in protected concerted activities. On December 9, 2008, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision, finding that no violation had been proven and dismissing the complaint. Specifically, while the ALJ found that Lara engaged in protected activity and that the Employers at least suspected his involvement in that activity, the ALJ concluded that the evidence was insufficient to raise an inference that the discharge was motivated by Lara's protected activity. In addition, the ALJ concluded that, even if such an inference had been raised, the evidence established that Lara would have been

discharged even in the absence of the protected activity. The General Counsel timely filed exceptions to the ALJ's decision, arguing that the ALJ erred in failing to find that Lara was discharged for engaging in protected concerted activity.

The ALJ's findings of fact necessarily were based in large part on credibility determinations. As a result, the General Counsel's exceptions are primarily focused on claims that the ALJ's credibility determinations should be overturned. 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.)

The General Counsel claims that the ALJ "unfairly prejudged" Lara, based on numerous instances where the ALJ either discredited Lara or credited the Employers' witnesses. It is true that the ALJ discredited Lara several times and generally found him to be less than a believable witness. But this was based not only on demeanor but on the implausibility of some of his testimony as to key events. Also a stated factor was that even under Lara's version of events, he lied to his supervisor by telling him that he was taking herbicide for his personal use. Our review does not indicate that the ALJ engaged in a wholesale discounting of Lara's testimony, nor is there anything inherent in

disbelieving Lara on key points that casts doubt upon the integrity of the ALJ's overall assessment of the evidence.

The General Counsel also suggests that the testimony of the Employer's witnesses should not have been credited. The General Counsel asserts that these witnesses were not disinterested and could be expected to testify only in a manner supportive of their employer's case. Even assuming that were true, they cannot be discredited on that basis. Rather, only if their demeanor had reflected a lack of veracity and/or their testimony was inconsistent or implausible, or it did not fit with other evidence in the record, would it have been proper to discredit their testimony. On the contrary, the ALJ found no such demeanor-based deficiencies and their testimony was consistent and supported by other evidence in the record.

In sum, our review of the record revealed no basis to disturb the ALJ's credibility determinations. In addition to being based in part on demeanor, they also were based on a careful evaluation of the consistency of the testimony and whether it was supported by other evidence in the record. In addition, much of the testimony of the Employers' witnesses stood unrebutted.

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ORDER

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 fact and conclusions of law, and hereby adopts his recommended decision. [1]

DATED: March 10, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

[1] Member Runner did not participate in this decision.

CASE SUMMARY

WOOLF FARMING CO. OF CA, INC. **Case No. 06-CE-28-VI**
(Agustine Lara) **35 ALRB No. 2**

Background

Woolf Farming Company of California, Inc. and California Valley Land Company, Inc. dba Woolf Enterprises (Employers) was alleged to have violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by discharging, Agustine Lara Vasquez (Lara), in retaliation for engaging in protected concerted activities. On December 9, 2009, Administrative Law Judge (ALJ) Douglas Gallop issued his decision, finding that no violation had been proven and dismissing the complaint. Specifically, while the ALJ found that Lara engaged in protected activity and that the Employers at least suspected his involvement in that activity, the ALJ concluded that the evidence was insufficient to raise an inference that the discharge was motivated by Lara's protected activity. In addition, the ALJ concluded that, even if such an inference had been raised, the evidence established that Lara would have been discharged even in the absence of the protected activity. The General Counsel timely filed exceptions to the ALJ's decision, arguing that the ALJ erred in failing to find a violation.

Board Decision

The Board affirmed the ALJ's findings of fact and conclusions of law, and adopted his recommended decision. The Board noted that that ALJ's findings of fact necessarily were based in large part on credibility determinations and that a review of the record revealed no basis to disturb those determinations.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	Case No. 06-CE-28-VI
WOOLF FARMING CO. OF CALIFORNIA, INC., a California Corporation; CALIFORNIA VALLEY LAND COMPANY, INC., a California Corporation doing business as WOOLF ENTERPRISES,	)	
Respondents,	)	
and	)	
AGUSTINE LARA,	)	
Charging Party.	)	

Appearances:

Howard A. Sagasar
Sagasar, Franson & Jones
Fresno, California
For Respondent

Francisco T. Aceron, Jr.
Visalia Regional ALRB Office
For General Counsel

Agustine Lara Vasquez
Avenal, California
For the Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Visalia, California on July 30 and 31, 2008. The Charging Party, Agustine Lara Vasquez (Lara), filed a charge on May 23, 2006, alleging that Woolf Farming Company of California, Inc. and California Valley Land Company, Inc. d.b.a Woolf Enterprises (hereinafter Respondents) 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 and amended complaint alleging said violation.[1] Respondents filed answers denying the commission of unfair labor practices, and alleging affirmative defenses. The Charging Party intervened at the hearing. After the hearing, General Counsel and Respondents submitted post-hearing briefs, the last of which was received on November 25, 2008,[2] 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.

[1] General Counsel also issued a Backpay Specification, and consolidated the proceedings. At the hearing, Respondents' motion to bifurcate the backpay and unfair labor practice cases was granted.

[2] The receipt of the transcripts was delayed by the lack of a State budget.

FINDINGS OF FACT

Jurisdiction

The jurisdictional facts are not in dispute. Respondents, who constitute a single employer, grow various crops, and are agricultural employers within the meaning of section 1140.4(c) of the Act. At all times material to this case, Gustavo Duarte, Kevin Fredrick Lehar and Richard Harold Blankenship were supervisors of Respondents within the meaning of section 1140.4(j). While employed by Respondents, Agustine Lara was an agricultural employee under section 1140.4(b).

The Alleged Unfair Labor Practice

Agustine Lara was employed by Respondents as a tractor driver for about 30 years. For many years, Gustavo Duarte was one of his supervisors. Duarte reports to Lehar, who in turn, reports to Blankenship. Lara, and longtime co-worker, Pedro Hernandez Ubierta (Hernandez), testified that over the years, Duarte treated them badly, citing such conduct as abusive and foul language, throwing objects at their tractors while they were driving and unfair work assignments. Lara, Hernandez and another co-worker had complained about Duarte to Lehar, but Lara claimed that nothing was done to improve Duarte's treatment of them.

Although not expressly stated as such, it appears that the culminating incident prompting a protest in June 2005 was Duarte's assignment of Hernandez to work at night, shortly before that protest. Hernandez refused to work nights, because he cannot sleep during the day, and felt his safety would be jeopardized by driving while tired. Duarte

reported Hernandez's refusal to Lehar who, after consulting with Blankenship, issued a warning letter to Hernandez.

Hernandez spoke with Lara, and they decided to send a written protest to Stuart Woolf, one of Respondents' officers. Lara, who is Spanish speaking, dictated the letter to his daughter, who translated what he said into English. She put the letter into an envelope, with Woolf's name on it.[3] The letter protested Duarte's treatment of the workers, and asked Woolf to resolve the problem. The letter was signed, "The workers from Woolf Enterprises," but did not identify any specific employee.

Lara brought the letter to Respondents' safety barbeque, on June 16, 2005. Woolf was initially at the barbeque, but Lara and Hernandez claimed they could not locate him. At the conclusion of the barbeque, Lara gave the letter to Hernandez, who handed it to an office worker, Kennie C. Wafford. According to Lara and Hernandez, Lara was by Hernandez's side when he handed the letter to Wafford, and two other office employees were with her. Wafford said she would give the letter to Woolf.

Wafford testified that Lara was not present when Hernandez handed her the envelope containing the letter, and she was not with the two office workers when this took place. Wafford further testified that one of the office workers allegedly present was not at the barbeque, because she had not yet been hired.

[3] According to Lara, he and Hernandez solicited other employees to participate in drafting the letter, without success.

Wafford was clearly a more credible witness than Lara or Hernandez. She appeared to be disinterested, and her demeanor inspired confidence. Lara, as will be discussed further below, testified that he lied to Duarte, hardly a calling card for veracity. Lara's testimony on several other points was shown to be false or inaccurate. Hernandez appeared to be biased in Lara's favor. In addition, Lara and Hernandez failed to explain why Lara gave the letter to Hernandez, raising the implication that Lara did not want to be identified as being an author. Finally, General Counsel failed to rebut Wafford's testimony that one of the office workers allegedly present had not yet been hired.

Wafford credibly testified she did not read the letter, but simply placed it on Woolf's desk. She was not involved with it again until after Lara was discharged, and then told Respondents' supervisors Hernandez had given the letter to her.

Upon seeing the letter, Rick Blankenship asked Martin Montalino, an independent contractor who is Respondents' labor relations consultant, to ask employees under Duarte's supervision if they were having problems with him. Montalino spoke with some, but not all of the approximately 15 employees under Duarte's supervision at the time. Lara and Hernandez testified they both complained about Duarte's conduct to him. Respondents did not contact employees in any other manner regarding the letter.

Montalino testified he reported Lara's complaint, and other employees' complaints pertaining to hours, to Blankenship, but also told him he felt the problems were insignificant. Montalino denied that Hernandez complained to him. Blankenship testified he recalled being informed of the complaints regarding hours of work, but not

being told Lara had complained about Duarte's conduct. Lehar testified he recalled Montalino identifying Hernandez as an employee who complained to him.

Blankenship and Lehar initially testified they had "no idea" who wrote the letter. It took some prodding, but both eventually gave testimony indicating they viewed him as a possible, if not likely, participant in the protest. At the same time, under the circumstances, particularly Hernandez's recent warning letter, they would have reasonably suspected he was also involved. [4] Lehar testified that by the time Lara was discharged, he had forgotten about the protest letter.

Duarte testified he was unaware of the letter protesting his conduct until after Lara's discharge, and was unaware of what Montalino was discussing with the workers on his crew. For the most part, Duarte gave the impression of being a truthful witness.[5] General Counsel presented no evidence rebutting Duarte's denials, and they are credited.

Lara testified that on December 7 or 12, 2005, he was washing out a pesticide container (Respondents' property), so that he could take it home to put gasoline for his

[4] The undersigned believes Blankenship and Lehar were fully aware that knowledge of Lara's role in the protest would be an important issue in this case. Aside from Montalino's testimony, that he did report Lara's complaint, Blankenship and Lehar were far less than candid in their reluctance to identify an employee they clearly viewed as a chronic malcontent, and who had previously complained about Duarte's conduct (the June protest letter itself refers to the prior complaint), as a likely participant in this protest. Their lack of candor in this regard jeopardized their credibility.

[5] The one aspect of Duarte's testimony that appeared untruthful was his blanket denial of using foul language. Respondents should have, but failed to ask Blankenship, Lehar and Montalino to corroborate Duarte on his denial of knowledge of the June 2005 protest. Nevertheless, their testimony in no way contradicted Duarte's, and no adverse inference will be taken from their failure to directly testify on the issue.

lawnmower in it. Duarte approached him and asked what he was doing. Lara, out of anger for Duarte's perceived mistreatment of him, falsely told him he had Roundup, an herbicide, in the container, in order to get Duarte into trouble, or at least to embarrass him. Duarte asked Lara if he had permission to take the Roundup, to which Lara replied, "Who the hell (or fuck)[6] was around to ask?" Lara denied taking any Roundup, and claimed he had no access to it, because all of Respondents' herbicides and pesticides are locked up, and he was not given a key. Lara also testified that co-worker, Jose Carrillo, was present, but later told him he could not help him, because Carrillo feared retaliation from Respondents.

Duarte testified that on December 22, 2005, the last day of work for nonsupervisory workers before Respondents' seasonal layoff,[7] he observed Lara rinsing out a container. He asked Lara what he was doing, and Lara responded he was going to take some Roundup. Duarte asked Lara if he had permission to do this, to which Lara asked, "Who in the fuck am I going to ask if there's no one around?" Duarte responded, "Okay." Lara took the container over to a tractor, filled the container out of the spray tank, and left. Duarte testified he said, "Okay," not to give Lara permission to take the pesticides, but because Lara seemed to think it was okay to do so. Duarte further testified

[6] Although Lara used the Spanish verb, "chingar," which in Mexican slang means, "to fuck," the interpreter used the word, "hell," later acknowledging a stronger profanity might be indicated.

[7] Duarte's testimony regarding the date is corroborated by his notes of the incident, written on a calendar notebook page dated December 22, 2005. The disparity in dates is important, because it largely rebuts General Counsel's contention that Duarte unduly delayed reporting the incident to his supervisor, thus showing unlawful motive.

he had no authority to give such permission. At the same time, Duarte was unable to recall specifically what he told Blankenship or Lehar when he later discussed the incident with them, placing doubt on his recall of what he actually said to Lara.

Jose Carrillo, called as a witness by Respondents, testified that he heard Lara tell Duarte he *was going to get* the Roundup. Carrillo left before anything else happened. He testified that tractors with chemicals in their spray tanks are sometimes left in the yard, a point also made by Lehar in his testimony. Carrillo denied telling Lara he could not help him, or that he feared retaliation from Respondents, or that Lara asked if he would be a witness.

Pedro Hernandez testified that after his discharge, Lara told him it was for taking the Roundup. Hernandez modified this to "allegedly" taking the Roundup, upon subsequent questioning. Hernandez testified that Lara did not admit or deny taking the Roundup, when they discussed his discharge. When first asked why he was discharged (by General Counsel), Lara replied it was for the Roundup incident, although it was not true (that he had taken the herbicide). With some prodding by General Counsel, Lara then added the June 2005 protest as a perceived reason for his discharge.

Duarte's testimony, that Lara took Roundup from the spray tank, is credited over Lara's contention that he merely pretended to have done so. As noted above, Lara was generally not a credible witness, and was proved wrong as to when the incident took place. The credible testimony of Carrillo, corroborated by Lehar, also shows that Lara

fabricated an alibi based on the purported inaccessibility of the chemicals.[8] Furthermore, Carrillo's limited, but credible, testimony tends to support Duarte's account, and not Lara's. It is also disturbing that Lara failed to deny taking the Roundup, when speaking with his ally, Hernandez.

In late December 2005, Lehar, Duarte's supervisor, was off work due to a surgery. A few days after the workforce returned from their seasonal layoff, Duarte reported the incident to Lehar, who had returned from his absence. As noted above, Duarte could not recall the details of what he told Lehar or Blankenship regarding the incident. Blankenship testified Duarte told him that, after Lara responded with foul language, when he asked if Lara had permission to take the Roundup, Duarte just walked away from him.

After consulting with Blankenship, Lehar issued a written three-day suspension to Lara, effective January 30 to February 1, 2006. The suspension notice cited taking company property without permission, and creating a safety hazard by removing an unknown chemical from Respondents' property. Lehar and Duarte gave the notice to Lara, and Duarte translated it. Lara did not respond to the allegations, and refused to sign the notice.[9]

Lara had previously received a written warning notice for similar conduct. In 2004, Duarte observed Lara away from his tractor during working time. He asked what

[8] For Lara to state that he had no access to the Roundup, while claiming he told Duarte he had some in the container, borders on the absurd.

[9] In his testimony, Lara misidentified another disciplinary notice as the one he refused to sign, even after being shown the notice, with his signature on it. When confronted with that notice, Lara denied the signature was his. Said denial is not credited.

Lara was doing, to which Lara responded that he was relieving himself, and was then going to take some of Respondents' tomatoes. Duarte told Lara not to do this without permission and during working time, but Lara went ahead and took the tomatoes. Duarte reported the incident to Lehar, who was concerned about the taking of company property without permission, but more concerned with the possibility that Lara may have taken produce recently sprayed with pesticides, to be consumed by persons unaware of this.

Lehar testified that when he discussed that incident with Lara, Lara responded with foul and abusive language. Lara did not deny this conduct. Lehar, after consulting with Blankenship, issued the warning letter.

Lehar and Blankenship discussed the Roundup incident, and Lara's prior warning notice for taking the tomatoes without permission. Lehar testified that employees, including Lara, are constantly being reminded of the possibility that crops have recently been sprayed, at Respondents' safety meetings. Lehar felt there was a lack of respect between them, based on Lara's refusal to accept counseling. In light of these factors, Lehar recommended that Lara be terminated.

Montalino conducts training sessions for Respondents' supervisors. He distributed a handout entitled, "Twenty Practical Tips For Supervisors," during this training. Blankenship acknowledged that these are part of Respondents' policies for supervisors. One of the "tips" reads, "Be open minded. Always listen to the employee's side of the story."

Lehar testified that he had interviewed Lara before issuing the warning letter in the tomato incident, but did not do so for the Roundup incident suspension notice, because he

was very busy at the time. In addition, Lara had responded abusively to him when discussing disciplinary issues, and Lehar felt it was Blankenship's decision as to whether Lara should be interviewed, since further discipline was likely.

Blankenship testified that Lara was the first nonsupervisory employee he has discharged. He made this decision after speaking with Lehar, Duarte and Everisto Garcia, another supervisor. Garcia, inter alia, characterized Lara as argumentative, insubordinate, a chronic complainer and lacking in maturity. Blankenship prepared a discharge notice, which cited failure or refusal to follow instructions, failure to observe safety rules, unsatisfactory work performance and insubordination.

Blankenship met with Lara to give him the notice on February 1, 2006. Montalino acted as an interpreter. Blankenship had not interviewed Lara prior to the meeting, but testified that Lara could have changed his mind. Lara brought his wife and daughter to the meeting. Blankenship told Lara he had decided to discharge him, and gave him the option of resigning, in which case Respondents would not oppose his unemployment insurance claim, or being discharged, in which case they would contest the claim. Lara refused to resign.[10]

Blankenship asked Lara why he had stolen the Roundup. Lara replied he was not a thief, but had merely told Duarte he had Roundup in the container, when there actually

[10] Respondents, in fact, did contest Lara's unemployment insurance claim. The undersigned in no way condones Blankenship's coercive ultimatum, which pertained to statutory and regulatory conditions for the receipt of benefits. At the same time, since Blankenship admitted this conduct, it does not adversely affect his credibility, and is otherwise irrelevant to the issues presented in this case.

was none. At the same time, Lara admitted having taken small amounts of chemicals in the past. Blankenship asked why he would have said that to Duarte, to which Lara responded he was trying to "trap" Duarte, because he treated the workers badly.[11]

This surprised Blankenship, who asked Lara and his family to leave the room. He then consulted with Montalino. Blankenship decided that Lara's contention was not credible, and to proceed with the discharge.

Both Blankenship and Lehar testified that the June 2005 protest had nothing to do with their disciplinary decisions. As noted above, the lack of candor regarding their suspicions as to who was involved in that protest creates some concern as to their credibility. Nevertheless, considering all of the circumstances of this case, as will be discussed further below, their testimony will be credited. Inasmuch as the evidence fails to show that Duarte was aware of the June 2005 protest prior to Lara's discharge, there is no showing that his decision to report the Roundup incident to Lehar resulted therefrom.

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

[11] Lara testified that Blankenship told him he was being discharged for lying to his supervisor, a contention denied by Blankenship. Lara claimed he attempted to show Blankenship a copy of the June 2005 protest letter at his discharge meeting, which Blankenship denied. At the same time, the letter was folded up, so that its' contents were not visible.

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.

Complaints regarding alleged mistreatment of workers by a supervisor are considered protected activity. *Trompler, Inc.* (2001) 335 NLRB 478 [172 LRRM 1144]. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. 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.

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 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].

The June 2005 letter protesting supervisor Duarte's conduct, involving the joint participation of Lara and Hernandez, constituted protected concerted activity. Lara's complaint to Montalino, an agent of Respondents, directly related to the protest letter. Accordingly, this complaint, as well, was protected and concerted. General Counsel has also established that Lara had previously participated in a group complaint concerning Duarte. There is, however, no evidence that Respondents retaliated against Lara, or anyone else, for making that complaint.

The evidence fails to establish that any supervisor or agent of Respondents knew, for sure, who authored the protest letter, or that Duarte knew or suspected of Lara's involvement in the June protest, prior to Lara's discharge. The evidence does show that Montalino, at least, knew of Lara's subsequent complaint about Duarte's conduct, and that Lehar and Blankenship reasonably suspected Lara was involved in the protest, irrespective of whether Montalino specifically informed them of his complaint.

Considering the entire record in this matter, however, it is concluded that General Counsel has failed to establish that Lara's protected concerted activity was a motivating factor in his discharge. The discharge took place long after the June 2005 protest. See *Yamamoto Farms* (1981) 7 ALRB No. 5, at ALJD pages 14-15. Upon receipt of the protest letter, Respondents had their consultant investigate the complaint, and he did so in a non-coercive manner. Montalino's conclusion was that a serious problem did not exist, and he reported this to Respondents' managers. Respondents' failure to remedy the alleged misconduct by Duarte, as perceived by Lara and Hernandez, was not unlawful. In addition, while not in itself determinative, it is significant that Respondents, who

would have at least equally suspected that Hernandez was involved in the protest, took no disciplinary action against him.

General Counsel contends that by failing to interview Lara prior to disciplining him, Respondents violated their own policy, and this establishes unlawful motive. While such a policy may have existed in principle, and one might assume a pre-disciplinary interview with Lara would have been the preferred employment practice, the record shows that this was the first time Blankenship or Lehar had been involved in the discharge of an hourly employee. Therefore, whether they, in fact, violated an established policy is questionable. Furthermore, Lara did have the opportunity to respond when given the suspension letter, and then at his discharge interview. He chose to say nothing about the incident to Lehar, and then concocted a false story for Blankenship, that was justifiably rejected. In any event, it would be quite a leap of faith to translate this one failure into establishing an unfair labor practice, in the context of the entire record.

Furthermore, if General Counsel had established a prima facie case of unlawful discrimination, Respondents have shown they would have still discharged Lara, absent the protected concerted activity. Lara had previously been disciplined for taking potentially hazardous produce from Respondents. It is clear that this was perceived as a serious matter, and grounds for discharge, even if the earlier warning was not proximate to the Roundup incident.

Taking Duarte's testimony at face value, if he merely said, "Okay," to Lara after confronting him, one interpretation could be that he was granting Lara permission to take

the Roundup. General Counsel, in his brief, does not contend this, and could not do so based on Lara's testimony. Clearly, Lara did not interpret what Duarte said to him in that manner, because he at no time claimed permission had been given. Rather, Lara knew he had not been given permission, because Duarte did not have that authority, or because Duarte, in his testimony, did not accurately relate what he said to Lara. In any event, even if Duarte did say it was "Okay," the evidence fails to establish that Blankenship, the ultimate decision maker, was aware of this.

The evidence shows that Lara engaged in repeated misconduct, considered cause for discharge. By the time the Roundup incident occurred, the June 2005 protest, which evoked no tangible animus from Respondents, would have been a faint, or non-existent memory for Lehar and Blankenship. Blankenship was entitled to believe Duarte's account of the incident over Lara's belated, fabricated version of the event. For these reasons, they have been credited in their assertions that Lara was discharged for misconduct. Accordingly, the complaint will be dismissed.

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

The First Amended Complaint is dismissed in its' entirety.

Dated: December 9, 2008

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Douglas Gallop
Administrative Law Judge