STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TULE RIVER DAIRY and P&M VANDERPOEL DAIRY, *Respondent,* *and* UNITED FOOD & COMMERCIAL WORKERS, LOCAL 5, *Charging Party.*	Case Nos. 05-CE-49-VI and 05-CE-51-VI 35 ALRB No. 4 (July 20, 2009)

DECISION AND ORDER

On November 27, 2007, the Regional Director of the Visalia Regional Office issued a complaint alleging that Tule River Dairy and P&M Vanderpoel Dairy (Employer), violated Sections 1153(a) and 1153(c) of the Agricultural Labor Relations Act (ALRA) by discharging milker Miguel Lopez on October 6, 2005 and by violating an implied agreement with the United Food and Commercial Workers (UFCW) to allow access beyond the 1-hour period provided for in Title 8, California Code of Regulations, §20900(e)(3)(B). An evidentiary hearing was held before Administrative Law Judge (ALJ) James Wolpman on December 2 and 3, 2008. On March 16, 2009, the ALJ issued a proposed decision in which he sustained the allegation of unlawful discharge but dismissed the allegation regarding access. The Employer timely filed exceptions to the finding that it unlawfully discharged Miguel Lopez.

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, for the reasons set forth below, will reverse the ALJ's decision and dismiss the complaint in its entirety.

DISCUSSION

Lopez was discharged from his job as a milker on October 6, 2005. At the end of his shift on that day at about 6:30 p.m. Foreman Ricardo Vasquez approached Lopez "and he said he was sorry, but that the boss [Dairy Manager Mike Vanderpoel] had ordered him to fire me." When he asked why, Vasquez said, "[He] was doing what the boss would tell him to do, that the boss told him to fire me, and that he was doing that, firing me." Fellow milker Osvaldo Mendoza, who was standing a few feet away, confirmed this exchange. Later, the Employer asserted that Lopez was fired for failing to follow sanitary procedures that are essential to the health of the cows. It was undisputed that in the days leading up to his discharge, Lopez had engaged in activity protected by the ALRA. Specifically, Lopez's protected activity at the dairy consisted of speaking about the UFCW with fellow employees 3 or 4 days prior to his discharge, spending an hour the night before the discharge, after attending a UFCW meeting earlier in the evening, handing out union authorization cards and speaking with milkers at the dairy, and speaking with several employees about the union on the day of his discharge.

In a case such as this alleging a retaliatory discharge for engaging in union activity, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected union activity

motivated the employer's adverse action. To do so, it must show: (1) that the employee engaged in union activity, (2) that the employer knew or suspected the employee engaged in such activity, and (3) that there was a causal relationship between the employee's protected activity and the employer's adverse action. Only then does the burden of persuasion shift to the employer to establish, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected conduct. (See, e.g., *Lawrence Scarrone* (1981) 7 ALRB No. 13.)

There is no dispute that Lopez engaged in protected activity. Further, if employer knowledge is assumed, there is substantial evidence from which to infer a causal relationship between the protected activity and the discharge.[1] However, after a careful review of the record, we find that employer knowledge (or suspicion) was not proven by a preponderance of the properly admitted evidence. Accordingly, the allegation must fail.

As the ALJ properly pointed out, the small size of the workplace may be used as circumstantial evidence of employer knowledge. However, this so-called "small plant doctrine" is not a presumption, but merely establishes the principle that the small size of an operation is one circumstance, but not the only

[1] The timing of the discharge, the failure to give advance warnings to Lopez, the failure to explain the reasons for the discharge at the time it occurred, the failure to intervene immediately when Lopez allegedly violated sanitary procedures, and the fact that Lopez's work was satisfactory up to the time of discharge all would have supported the inference of unlawful motive had employer knowledge been established.

one, to be considered. (See, e.g., *Mario Saikon, Inc*. (1978) 4 ALRB No. 107, p. 5.) As the ALJ observed, Lopez's protected activity took place for only a short amount of time prior to the discharge[2] and no witnesses testified that any manager or supervisor was present when Lopez engaged in union activity, or that they otherwise learned of it or suspected it. Nor was there any evidence of employer knowledge that an incipient union organizing campaign had begun or that such an effort was suspected or rumored. While Lopez testified that he made no effort to conceal his actions while talking with other employees at the dairy, this was contradicted by Mendoza, who otherwise testified in Lopez's favor.

At the time in question there was a single video camera, without sound and with a 6-hour viewing limit, in the milking barn where some of Lopez's conversations with other employees about the union occurred.[3] Vanderpoel, who spent only 20 percent of his time at the dairy (and 80 percent at an affiliated dairy) asserted he had viewed the tape only once in the four months preceding Lopez's discharge and had never seen any evidence of union activity. Vanderpoel stated that he did not know how often the supervisor, Vasquez, viewed the monitor. Nor

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[2] We note that in other circumstances such a short period of time between the protected activity and the adverse action could be strong evidence of a casual connection. Here, the ALJ was relying on the fact that word of Lopez's union activity would have had to spread within two hours from an employee with whom Lopez spoke to Vasquez and then to Vanderpoel, and that there was no evidence of any conversations among these people during that time.

[3] The record is not clear regarding how much of the milking pit could be viewed on the monitor.

was there other evidence indicating how often Vasquez would have had the opportunity to view the monitor.[4]

On October 6, 2005, Vasquez's brother-in-law, a student who worked part-time and who was living with Vasquez at the time at a home on dairy property, rebuffed Lopez's solicitation to sign a union authorization card. According to Lopez, this occurred two hours prior to his discharge. The ALJ was unwilling to infer from the relationship alone that Lopez's solicitation was immediately reported to Vasquez, who in turn passed it on to Vanderpoel.

The ALJ concluded that the circumstances summarized above suggested no more than the possibility of employer knowledge, even in light of the small size of the dairy, and are insufficient to conclude that the General Counsel met its burden to establish employer knowledge. We agree. The small plant doctrine may be applied where the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. (*Health Care Logistics* (6th Cir. 1986) 784 F.2d 232.) The mere fact that an employer's plant is of a small size does not permit a finding that the employer had knowledge of the union activities of specific employees, absent supporting

[4] The evidence indicates that the only time Lopez had authorization cards in his possession while on duty was on the day of his discharge. The cards were 2 inches by 3 inches. The record did not indicate that either Vanderpoel or Vasquez previously had experienced a union organizing campaign and Vanderpoel expressly denied having ever seen an authorization card prior to his decision to discharge Lopez.

evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, the employer must have known about them. (See e.g., *NLRB v. Mid States Sportswear* (5th Cir. 1969) 412 F. 2d 537, at 540, quoting *NLRB v. Joseph Antell, Inc.* (1st Cir. 1966) 358 F.2d 880.)

In the present case, the record does not reflect facts or circumstances that would allow an inference of employer knowledge based on the small size of the dairy. As noted, there was no evidence that the protected activity was carried out in the presence of any supervisors or that management had any reason to know or suspect that union activity was occurring. *Mid States Sportswear*, *supra*, is the case most favorable to the General Counsel, in that the NLRB's inference of employer knowledge was based in part upon factors also present here, namely, the timing of the discharge, the failure to give advance warnings to the employee, the failure to explain the reasons for the discharge at the time it occurred, and the fact that the employee's work was satisfactory up to the time of discharge. However, in the *Mid States Sportswear* case there was evidence of rumors of union activity and during the period of the union activity the plant supervisors had reported to the plant manager that there was unusual activity and talking between machine operators in the employee's section, with various operators congregating there and talking to her at some length.

Having tentatively found no basis for inferring employer knowledge, the ALJ then turned to consideration of Mendoza's testimony that in May 2006 he encountered Vasquez at a Taco Bell in Tulare. By that time both Mendoza and

Vasquez had been discharged from the dairy. According to Mendoza, Vasquez stated that Vanderpoel told him he had fired Mendoza, Lopez, and another milker, Hipolito Vargas, because Vanderpoel thought they had brought in the union.

Mendoza's testimony is double hearsay, the first "out of court" statement being from Vanderpoel to Vasquez and the second "out of court" statement being from Vasquez to Mendoza. For the evidence to be admissible, each of the out of court declarations must fall within an exception to the hearsay rule. As the ALJ observed, the first statement, had Vasquez testified, might be admitted as the admission of a party, but the statement from Vasquez to Mendoza is more problematic. The ALJ discussed and rejected the application of various hearsay exceptions, but found Evidence Code section 1202 applicable. Section 1202 provides:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.

As the ALJ observed, under section 1202 the inconsistent statement is admissible not to establish the truth of the statement, but only to impeach the earlier statement received in evidence. [5] For that limited purpose, the ALJ admitted the May 2006 statement at Taco Bell. The ALJ viewed the hearsay statement of Vasquez at the time of the discharge that he did not know the reason

[5] The October 2005 hearsay statement was received in evidence without objection.

as inconsistent with the May 2006 statement that he did know the reason. He further concluded that Vasquez's failure to give a straight answer to either Lopez or Mendoza when he was asked why Lopez was being fired is in itself suspicious, and that Vasquez was deliberately concealing what he knew from the two workers. The ALJ reasoned that had Vanderpoel told Vasquez to fire Lopez for a sanitation violation, Vasquez would have had no reason whatsoever to conceal that fact; if, however, the reason was union activity, he had every reason to conceal what he knew.

The ALJ then noted that Lopez was terminated at the end of the shift on October 6th, immediately after he had spent the day talking up the union and distributing authorization cards. The ALJ concluded that this timing element, along with the conclusion above that Vasquez knew the reason for the discharge all along and was concealing the true reason, as well as the other evidence indicating the possibility of employer knowledge, taken together was sufficient to establish knowledge of Lopez's protected activity and a causal connection to the discharge. The ALJ thus concluded that the General Counsel had established a prima facie case, thus shifting the burden of proof to the Employer to establish that the discharge would have occurred even in the absence of the protected activity.

While the ALJ found credible Vanderpoel's testimony concerning the serious nature of failing to follow proper sanitation procedures, he did not find credible Vanderpoel's assertion that this was the reason for the discharge. In addition to the factors listed above that otherwise might indicate unlawful motive,

this conclusion was based largely upon the ALJ's view that it was unlikely that Vanderpoel would not have intervened immediately when he saw Lopez fail to follow important sanitary procedures in the morning, but instead merely instruct Vasquez to fire Lopez at the end of the day. The ALJ thus concluded that the Employer had failed to meet its burden that Lopez would have been discharged even in the absence of protected activity.

For the following reasons, we find that the May 2006 statement was inadmissible. As the ALJ noted, the second hearsay statement may be admitted only to impeach the prior hearsay statement and, thus, the two statements must be inconsistent. It is not clear that the May 2006 statement was inconsistent because there was no showing that Vasquez in fact knew the reason for the discharge at the time he was instructed to fire Lopez. While it is reasonable to expect that Vanderpoel would have given Vasquez a reason for the discharge, it is also quite possible that Vanderpoel simply instructed Vasquez to fire Lopez without telling him why and that, if Vasquez learned of the reason for the discharge, he learned of it at a later date.

The case of *O'Gan v. King City Joint Union High School Dist.* (1970) 3 Cal. App. 3d 641 is instructive, as it too involved one affirmative hearsay statement and one equivocal one in which the declarant denied knowledge. In that case, the court held that the hearsay statement was inadmissible, inter alia, because it was not inconsistent with the hearsay statement sought to be impeached. The case involved a personal injury suit filed by a student who was injured when a

bathroom sink broke loose from its fastenings. A factual issue in the case was whether the student was sitting on the sink (or leaning against it) and thus may have been contributorily negligent. A fellow student, who was unavailable to testify at trial but who was present at the time of the accident testified in her deposition that she did not know whether the plaintiff was sitting on the sink or otherwise putting pressure on it. The plaintiff sought to introduce an earlier hearsay statement, in the form of a letter the declarant had written to the plaintiff four days after the incident in which she stated that she had told the principal that plaintiff was not sitting on the sink. The court found that the statement in the deposition that the declarant did not know whether the plaintiff was sitting on the sink was not inconsistent with and, thus, could not be impeached by, the statement in the letter.

In addition to the fact that the two hearsay statements are not necessarily inconsistent, there also are other considerations that weigh against admission of the Taco Bell statement. The Law Revision Comments to section 1202 contain the following statements.

> If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

In this case, the General Counsel, as the party seeking to admit the hearsay for impeachment purposes, had the burden of showing Vasquez's unavailability and

failed to do so. In addition, it is not clear that the statement sought to be impeached, i.e., Vasquez's statement at the time of the discharge that he did not know the reason for it, was in fact adverse to the General Counsel. Lastly, Mendoza did not mention the Taco Bell statement in his August 22, 2006 declaration given to the General Counsel at the time the unfair labor practice was investigated. He testified that he did not mention it to the General Counsel until about a week before the hearing. This casts some further doubt on the reliability of the statement.

As noted above, the ALJ concluded that in the absence of the May 2006 hearsay statement the evidentiary record is insufficient to establish the necessary element of employer knowledge of Lopez's protected activity. For the reasons set forth above, we agree with that conclusion. We do not reach this result lightly, particularly in light of the evidence that otherwise would have established unlawful motive for the discharge. The complaint in Case Nos. 05-CE-49-VI and 05-CE-51-VI is hereby Dismissed in its entirety.

DATED: July 20, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

TULE RIVER DAIRY and P&M VANDERPOEL DAIRY (United Food & Commercial) Workers, Local 5)

Case Nos. 05-CE-49-VI 05-CE-51-VI 35 ALRB No. 4

Background

On March 16, 2009, Administrative Law Judge (ALJ) James Wolpman issued a proposed decision in which he found that Tule River Dairy and P&M Vanderpoel Dairy (Employer) violated Sections 1153(a) and 1153(c) of the Agricultural Labor Relations Act (ALRA) by discharging milker Miguel Lopez on October 6, 2005. The ALJ dismissed an allegation that the Employer violated an implied agreement with the United Food and Commercial Workers (UFCW) to allow access beyond the 1-hour period provided for in Title 8, California Code of Regulations, §20900(e)(3)(B). The Employer timely filed exceptions to the finding that it unlawfully discharged Miguel Lopez.

Board Decision

The ALJ admitted into evidence a hearsay statement attributing to a former supervisor the assertion that the discharge was due to union activity. Though this statement was admitted only to impeach an earlier hearsay statement of the supervisor that he did not know the reason for the discharge, it was critical to the ALJ's conclusion that the necessary element of employer knowledge of Lopez's union activity had been met. The ALJ noted that the record otherwise failed to establish employer knowledge. The Board concluded that the hearsay statement was not admissible because it was not necessarily inconsistent with the earlier hearsay statement sought to be impeached, the witness was not shown to be unavailable, and the first hearsay statement was not necessarily adverse to the General Counsel, all of which are prerequisites for the admission of such a statement. In addition, the Board noted that the reliability of the testimony was reduced by the fact that the witness did not mention this statement by the former supervisor in a declaration taken two months after the alleged exchange. Agreeing that in the absence of the admission of the hearsay statement the record evidence was insufficient to establish employer knowledge, the Board reversed the finding of a violation and dismissed the complaint in its entirety.

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