STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PREMIERE RASPBERRIES, LLC, dba DUTRA FARMS,	)	Case Nos. 2012-CE-003-SAL
	)	2012-CE-029-SAL
Respondent,	)	2012-CE-030-SAL
	)	2012-CE-038-SAL
and	)	2012-CE-046-SAL
	)	2012-CE-047-SAL
UNITED FARM WORKERS OF AMERICA,	)	39 ALRB No. 6
	)	(May 24, 2013)
Charging Party.	)	

DECISION AND ORDER

On January 7, 2013, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case. The General Counsel alleged in the amended consolidated complaint that Premiere Raspberries, LLC, dba Dutra Farms (Employer) violated section 1153, subdivisions (a) and (c) of the Agricultural Labor Relations Act (Act),[1] by, inter alia, disciplining and discharging Dalia Santiago (Santiago), a puncher in training with Employer. ALJ Gallop also held that, based on conduct that was alleged in the consolidated complaint but not included in any charge, Employer violated section 1153(a) by initially refusing to reinstate Santiago under a court order entered pursuant to section 1160.4(b)(2) of the Act. The Employer refused pending its appeal of section 1160.4(c), which precludes a stay of injunctive relief granted under the section 1160.4(b)(2) of the Act.

[1] California Labor Code section 1140 et seq. All statutory references are to the California Labor Code unless otherwise indicated.

The General Counsel, Employer and Charging Party United Farm Workers of America (UFW) timely filed exceptions.

The Agricultural Labor Relations Board (Board) has considered the entire record and the ALJ's findings of fact and conclusions of law in light of the exceptions and briefs filed by the parties and adopts the ALJ's findings of fact[2] and conclusions of law to the extent consistent with this decision. We reverse the ALJ's findings of fact and conclusions of law as to the termination of Santiago and the unfair labor practice charge against Employer for failure to reinstate Santiago.[3] We conclude that the reason given by Employer for Santiago's termination was pretext, and that well-supported inferences from the record as a whole as well as a clear preponderance of the evidence support this

[2] The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB No. 544, enfd. (3d. Cir. 1951) 188 F.2d 362.) In instances where credibility determinations are based on factors 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. (*United Farm Workers of America (Ocegueda), supra,* 37 ALRB No. 3*; S & S Ranch* (1996) 22 ALRB No. 7.)

[3] In General Counsel's Exception number seven, it is argued that the ALJ erroneously stated that the complaint failed to "meet the minimum standards for the Board to assert jurisdiction over this dispute" on the grounds that it did not state the dates that the charges were filed and served. However, because, as the ALJ stated, Employer conceded the timeliness of the charges, the issue is moot. Nevertheless, we note that, regardless of whether any regulation requires such pleading, section 1160.2 mandates that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made . . . ." and the Board does, as the General Counsel notes in footnote 14 of its brief, "deem it appropriate" that the dates of service and filing of charges be included in future complaints.

conclusion. We conclude further that the ALJ erred in holding that Employer's refusal to reinstate Santiago was an unfair labor practice. Both the ALJ and the General Counsel agreed that the conduct was not included in any charge, although it was alleged in the complaint, and the ALJ expressly stated that, absent a finding of violence or other demeaning conduct in the refusal to reinstate Santiago, he would not find an unfair labor practice based on Employer's refusal to reinstate pending appeal of section 1160.4(c). The ALJ stopped taking testimony on the effect of Employer's refusal to reinstate Santiago during the General Counsel's case in chief, precluding litigation of the issue.

Termination of Dalia Santiago

General Counsel's Exception number 3 takes issue with the ALJ's conclusion that "Respondent has preponderantly demonstrated that it would have discharged Santiago, even absent any protected activity she might have engaged in." (ALJD at p. 39; General Counsel's Brief at 25.) We find merit in the exception.

The ALJ stated that General Counsel had arguably established a prima facie case that Santiago's termination was unlawfully motivated. We have concluded that the prima facie case was established. We agree with the ALJ that Santiago's complaints regarding the pruning shears constituted protected concerted activity. Employer was clearly aware of that activity. Furthermore, we believe that the General Counsel established that Santiago's protected concerted activity motivated the termination, at least in part. The termination occurred close in time to the protected activity. Hogan was sufficiently upset with Santiago over her complaints that, as the ALJ found, he unlawfully disciplined her for making them. As discussed below, we reject Employer's

claim that the termination was based solely on statements Santiago made to three punchers in training on February 1, 2012. Rather, the General Counsel preponderantly established that Santiago's protected activity at least partially motivated the decision to terminate her. Accordingly, the prima facie case was established. (*Temple Creek Dairy* (2010) 36 ALRB No. 4, ALJD at p. 35; *Meyers Industries, Inc*. (1984) 268 NLRB 493, revd. (1985) 755 F.3d 1481, decision on remand, (1986) 281 NLRB 882, affd. (1987) 835 F.2d 1481, cert. den. (1988) 487 U.S. 1205.)

The ALJ found, and we agree, that Santiago was disciplined on February 1, 2012 for voicing her complaints about working conditions and was subsequently discharged on February 4, 2012. At issue is whether her intervening act between February 1 and February 4 – telling her fellow punchers in training that they were going to lose their jobs because Chris Hogan (Hogan), Employer's general manager, didn't like working with women – was, as stated by Hogan, the sole reason for her being terminated. (RT Vol. IV at p. 842.) We find that, based on the record as a whole, it was not. In the absence of any other reason provided by Employer for Santiago's termination, and in light of the General Counsel's prima facie case, the ALJ's conclusion that Santiago's termination was lawful must be reversed.

This case is factually similar to *Aukeman Farms* (2008) 34 ALRB No. 2. In *Aukeman Farms*, we found that the Employer's asserted reason for firing the employee at issue, that the employee took too many days of vacation, was pretext. Citing prior Board precedent, we considered a variety of factors to consider in determining the true motive for an adverse action, such as: 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. (*Aukeman Farms* (2008) 34 ALRB No. 2 at p. 5, *citing Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22 *and Namba Farms, Inc.* (1990) 16 ALRB No. 4.) As many of these factors led to the conclusion in *Aukeman* that the Employer's proffered reason for termination was pretext, many of them also lead to the conclusion in this case that the weight of the evidence, however circumstantial, shows Employer's proffered reason for firing Santiago to be pretext.

Hogan testified that his decision to fire Santiago was not based on her protected concerted activity of complaining about the pruning shears the employees were required to use, but because of what three punchers in training told him when they met with him to discuss what Santiago had said to them. (RT Vol. IV, p. 842.) Specifically, Hogan testified:

> My decision was based upon the fear and intimidation that the three women showed me. I had no reason to believe that they were not expressing the truth. With the way that they were expressing themselves, with tears, in the meeting, I felt that it was a very serious situation. (RT Vol. V, 941:13-18.)

Hogan repeatedly testified that this meeting with the punchers in training took place on February 3, 2012 (RT Vol. V, pp. 827-830, 915, 933, 935, 968), and he also testified that Melchor Garcia was in the meeting. (RT Vol. IV, p. 828.) Hogan testified that he had decided by 5:00 p.m. on the evening of February 3, 2012, to fire Santiago

based on his meeting with the punchers in training (RT Vol. V, p. 923), and repeated that the punchers in training had been crying in the meeting that caused him to reach his decision. (RT Vol. IV, p. 830; RT Vol. V, p. 941.) Yet, the weight of the evidence shows that the meeting Hogan had with the punchers in training did not occur on February 3, 2012. Adela Badillo (Badillo), one of the punchers in training, testified that she did not meet with Hogan and the other punchers in training before Santiago was fired, and stated that they all met the day Santiago was fired (RT Vol. VI, pp. 1226, 1233), after 8:00 a.m. (RT Vol. VI, p. 1233.) Melchor Garcia testified that the first meeting with the three punchers in training, Hogan and himself took place around 10:00 a.m. on February 4, 2012. (RT Vol. V, p. 982.) Hogan testified that he fired Santiago on February 4, 2012, around 6:00 a.m., shortly after she arrived for work. (RT Vol. IV, pp. 834-835.) When confronted with his declaration stating that he first met with the punchers in training on February 4, 2012, not February 3, Hogan testified that there had been two meetings with the punchers in training, one on February 3, the other on February 4 after Santiago had been fired. (RT Vol. V, pp. 933-934.) In order for Hogan to have made the decision to fire Santiago the evening of February 3, 2012, based on the lie she told <u>and</u> the tumult the lie caused as expressed by the tears of the punchers in training in a meeting, the meeting in which the punchers in training were alleged to have been crying would have had to have taken place on February 3 or prior to Santiago's termination on the morning of February 4, contrary to Hogan's declaration, his conflicting testimony, and the testimony of others present.

Equally problematic was Hogan's reiteration that, in the meeting with the punchers in training that led to Santiago's termination, the punchers in training had been crying. (RT Vol. V, p. 941.) This was disputed by Melchor Garcia, who said none of the three punchers in training had been crying (RT Vol. V, p. 985), and that they were not calm, but silent and worried. (RT Vol. V, pp. 985-986.) Badillo also stated that in the first meeting with Hogan and the punchers in training, none of the punchers in training were crying. (RT Vol. VI, pp. 1233-1234.)

As noted in *Aukeman Farms*, the level of discipline chosen, especially in light of Hogan's testimony, albeit discredited, that the February 1, 2012 meeting with Santiago was not disciplinary in nature (RT Vol. IV, p. 825), seems severe, given that Santiago had worked for Employer since 2004 and, according to her testimony, had not received any disciplinary notices from 2004 to 2011 and was promoted to puncher in training in 2011. (RT Vol. 1, p. 82-93.)

Finally, the evidence shows that Employer engaged in a very cursory investigation before deciding to exact the most severe punishment available. In particular, the record reflects that Hogan terminated Santiago without investigating her side of the story. Hogan claims that the termination decision was based on his alleged February 3, 2012 meeting with the three punchers in training (RT Vol. V, pp. 915-924.) However, even if the Board were to credit this claim (which it does not), Hogan testified that he did not even speak to Santiago or consult her personnel file before deciding to terminate her (RT Vol V, pp 923-924.) This is, given the record as a whole, the death

knell for any remaining credibility Hogan had as to his proffered reason for terminating Santiago.

In short, Hogan's proffered decision was based on a meeting that did not occur when he said it did and in part on behavior by the punchers in training that did not occur. Given that, as the record reflects, the meeting he had with the punchers in training on February 4, 2012 occurred after Santiago was dismissed, it was not possible for Santiago's lie, <u>and</u> the tumult it allegedly caused the punchers in training as evidenced in a meeting, to have been the reasons for discharging Santiago around 6:00 a.m. on the morning of the February 4, 2012. Furthermore, Hogan chose to impose the harshest form of discipline without even speaking to Santiago to ascertain her version of events.

The Employer offered no other reason for Santiago's termination. We find Hogan's reason unpersuasive, and, in the absence of any other reason or a rebuttal of the *prima facie* case, we conclude that Santiago's termination was unlawful. Where it is shown that the employer's proffered reasons are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis – whether the employer would have taken the same action even in the absence of the employee's protected activity. (*Limestone Apparel Corp.* (1981) 255 NLRB 722, enfd. (6th Cir. 1981) 705 F.2d 799.)

<u>Unfair Labor Practice Based on Employer's Refusal to Reinstate Santiago</u>

ALJ Gallop held that Employer violated section 1153(a) because of its refusal to reinstate Santiago in the face of a preliminary injunction. The refusal to

reinstate, although alleged in the complaint, was not the basis of an unfair labor practice charge, and the General Counsel stated as much. (RT Vol. I, p. 12.) Employer did not acquiesce to litigating this issue and, more to the point, Employer was assured twice by the ALJ that, absent some showing of violence or demeaning behavior by Employer when Santiago arrived seeking reinstatement, the ALJ would not find an unfair labor practice and, upon proper objections, would sustain objections to testimony on the issue. (RT Vol. 1, pp. 12, 15-16.) Specifically, ALJ Gallop stated that he thought Employer had the right to pursue its appeal before granting Santiago reinstatement. (RT Vol. I, p. 15.) ALJ Gallop stopped taking evidence on the purported chilling effect of Employer's refusal to reinstate Santiago during the General Counsel's case in chief, stating that whether Employer committed an unfair labor practice by delaying Santiago's reinstatement until its appeals had been exhausted was a legal issue which the testimony offered would not help him decide. (RT Vol. III, pp. 532-533.) There was no showing of violence or demeaning behavior by Employer regarding the attempt to have Santiago reinstated pursuant to the court order.

Whether we agree with ALJ Gallop that Employer had the right to pursue its appeal of section 1160.4(c), the new anti-stay provision that applies to injunctive relief sought under the Act, is not of the moment. When an ALJ states on the record that, absent a particular showing, no unfair labor practice charge will be found, the parties should be able to trust in the assurances from the bench, especially when the ALJ ceases to take evidence on the issue, foreclosing litigation on the issue. For that reason and that reason alone, we reverse the ALJ's conclusion of law as "contrary to the elementary

constitutional principles of procedural due process." (*Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board* (1979) 93 Cal.App.3d, 922, 933-934.)

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Premiere Raspberries, LLC, dba Dutra Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

a) Warning employees not to raise work-related complaints in the presence of other employees, and threatening them with discipline, up to and including discharge, if they do not comply;

b) Interrogating employees concerning their Union activities, sympathies and desires, or those of other workers;

c) Engaging in the surveillance of employee Union activity, or creating the impression thereof; and

d) 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) Offer Dahlia Santiago immediate and full reinstatement to her former position of employment, or if her former position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights or privileges of employment;

b) Make Dahlia Santiago whole for all wages or other economic losses she suffered as a result of Respondent's unlawful discharge from the date of said discharge until the date she was reinstated by agreement of the parties and for any future periods of economic loss, if any, resulting from Respondent's unlawful discharge of Dahlia Santiago, the makewhole amount to be computed in accordance with established Board precedent, 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 necessary to a determination, by the Regional Director, of the backpay period and any amounts of backpay due under the terms of this Order.

d) Upon the request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all agricultural employees

then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period February 1, 2012 to January 31, 2013 at their last known addresses.

h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

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

/////

/////

/////

3. All other allegations contained in the Amended Consolidated Complaint are hereby dismissed consistent with the Board's decision.

DATED: May 24, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by United Farm Workers of America (Union) in the Salina Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging Dahlia Santiago and coercing employees in the exercise of their rights under the Act.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

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

Because you have these rights, we promise that:

WE WILL NOT warn employees not to raise work-related complaints with other employees, or threaten them with discipline, up to and including discharge, if they fail to comply.

WE WILL NOT interrogate employees concerning their Union activities, sympathies and desires, or those of other workers.

WE WILL NOT engage in the surveillance of employee Union activity, or give the impression thereof.

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

/
/
/
/

WE WILL reimburse Dahlia Santiago with interest for any economic losses she has suffered because we improperly terminated her on February 4, 2012.

DATED: ___________________

PREMIERE RASPBERRIES, LLC,
dba DUTRA 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 ALRB. One office is located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

CASE SUMMARY

PREMIERE RASPBERRIES, LLC, Case No. 2012-CE-003-SAL
dba DUTRA FARMS 39 ALRB No. 6
(United Farm Workers of America)

Background
On January 7, 2012, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he held, *inter alia*, that Premiere Raspberries, LLC, dba Dutra Farms (Employer) did not unlawfully terminate Dahlia Santiago (Santiago) but did wrongfully refuse to reinstate her pursuant to a court order. Employer refused to reinstate Santiago pending an appeal of the court's order and Labor Code section 1160.4, subdivision (c), which precludes a stay of injunctive relief granted pursuant to subdivision (b) (2) of the same section. The General Counsel, Employer and Charging Party United Farm Workers of America (UFW) timely filed exceptions.

Board Decision
The Board denied all the exceptions except for two. The Board overturned the ALJ's decision that Santiago was not wrongfully terminated because the weight of the evidence showed that the reason offered by Employer for her termination was pretext. The Board clarified that the General Counsel had established a *prima facie* case. Applying the factors enumerated in *Aukeman Farms* (2008) 34 ALRB No. 2, the Board then concluded that the inconsistent testimony from Employer's general manager showed that the meeting, and events during that meeting, he claimed to have relied upon in deciding to terminate Santiago could not have happened. Given that Employer never questioned Santiago about the acts leading to her termination prior to her termination and the severity of the discipline chosen given Santiago's long tenure with Employer without discipline, the Board concluded that Employer's proffered reason was pretext. In the absence of any other reason offered and in light of the *prima facie* case, the Board found no reason to continue a *Wright Line* analysis and held that Santiago was unlawfully terminated.

The Board also reversed the ALJ's conclusion that Employer committed an unfair labor practice by refusing to reinstate Santiago pending appeal of the court order requiring her reinstatement and of Labor Code section 1160.4, subdivision (c). The allegation regarding Employer's refusal to reinstate Santiago was not the subject of a charge, although it was alleged in the complaint. The ALJ had assured Employer that, absent a finding of violence or demeaning behavior in its refusal to reinstate Santiago, the ALJ would not find that the refusal to reinstate Santiago pending appeal was an unfair labor practice, and the ALJ ceased taking evidence on the issue during the General Counsel's case in chief, precluding litigation of the issue. The Board reversed, holding the ALJ's conclusion of law as "contrary to the elementary constitutional principles of procedural due process." (*Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922, 933-934).

***

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 2012-CE-003-SAL
	)	2012-CE-029-SAL
PREMIERE RASPBERRIES, LLC, dba	)	2012-CE-030-SAL
DUTRA FARMS,	)	2012-CE-038-SAL
	)	2012-CE-046-SAL
Respondent,	)	2012-CE-047-SAL
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	
AMERICA,	)	
	)	
Charging Party.	)	

Appearances:

Patrick S. Moody
Barsamian & Moody, P.C.
Fresno, California

Ana C. Toledo
Ottone, Leach, Olsen & Ray
Salinas, California
For Respondent

Sarah Martinez and Stanley Marubayashi
Salinas ALRB Regional Office
For General Counsel

Aida L. Sotelo and Brenda Rizo
United Farm Workers Legal Department
Bakersfield, California
For the Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case on September 11-14 and 17-19, 2012, at Salinas, California. It is based on charges filed by United Farm Workers of America (hereinafter Union), alleging that Premiere Raspberries, LLC, dba Dutra Farms (hereinafter Respondent) violated section 1153(a) and (c) of the Agricultural Labor Relations Act (Act), by discriminating against and discharging employees in retaliation for their Union and protected concerted activities, and by additional unlawful, coercive conduct. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Complaint and Amended Consolidated Complaint (hereinafter complaint), alleging these violations. The Union has intervened in these proceedings. Respondent filed answers denying the commission of unfair labor practices, and asserting affirmative defenses. After the hearing, the parties filed briefs, on December 21, 2012, which have been carefully considered.

Upon the entire record in this case, including the testimony, documentary evidence, briefs and oral arguments made by counsel, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The charges were filed and served in a timely manner.[1] Respondent produces raspberries, and is an agricultural employer within the meaning of section 1140.4(c) of

[1] The complaint alleges that the charges were "properly" filed and served, but does not set forth the dates of filings and service. As such, the complaint fails to meet the minimum standards for the Board to assert jurisdiction over this dispute. Respondent, however, admits that the charges were filed and served in a timely manner.

the Act. While employed by Respondent, the alleged discriminatees were agricultural employees within the meaning of section 1140.4(b). It is undisputed that at all times material to this case, Respondent's general manager, Christopher (Chris) William Hogan; controller, Melchor (Mel) Garcia; and its supervisors and forepersons, were and are supervisors of Respondent within the meaning of section 1140.4(j). It is undisputed that the Union is a statutory labor organization as defined by section 1140.4(f).

The Discipline and Discharge of Dalia Santiago

Dalia Santiago Agustin (Santiago) began working for Respondent in about 2004. She worked seasonally as a raspberry harvester until September 2011, when she applied for the position of puncher-trainee, which was approved by Chris Hogan. Punchers inspect the buckets of strawberries picked by the harvesters, making sure they are full of good quality berries. Once the baskets are approved, the punchers register credit for the worker, using an electronic probe applied to the picker's tag. They also register the harvesters' starting and ending times. The punchers pack the buckets into baskets, and then cardboard boxes. Punchers work year-round, performing other duties when the harvest season ends. Santiago, who had never received a disciplinary notice, was given a bonus in December 2011, along with the other punchers and puncher-trainees.

Santiago testified as to various work-related complaints she made to Respondent's supervisory personnel. In June, 2011 (prior to being promoted to the puncher trainee position), Santiago complained to foreman, Paco Rodriguez, that he was favoring workers in his crew by taking empty baskets away from her crew, and giving them to his workers, thus slowing down their work. Santiago made this complaint in the presence of

other employees, but did not name any other worker as having complained at that time. Rodriguez purportedly told her to stop "rousing up people."

Santiago further testified that she and other (unnamed) workers on her crew complained to Rodriguez's supervisor, David Martinez Garcia (Martinez) when Rodriguez had them pick in fields with little fruit. Martinez, in his testimony, denied Santiago made this complaint. Rodriguez did not testify. Santiago contended that Rodriguez retaliated by giving her undesirable row assignments and taking away boxes she had picked. Santiago testified she asked Martinez to put her on a different crew, and this was granted. A month later, her application to become a puncher-trainee was accepted.

Santiago trained to be a puncher until the harvest ended, in mid-December, at which point, she was assigned general labor duties. Her crew consisted of three forepersons, Juana Barroso Mesa (Barroso), Patricia Jimenez Cervantes (Jimenez) and Elsa Aburto Aguilera (Aburto); and three other puncher-trainees, Adela Riveros Badillo, Alejandra Sanchez Pena (Sanchez) and Alejandra Rocio Garcia (Rocio Garcia). Santiago took vacation time in late December, returning on January 3, 2012.[2]

Santiago testified that when she returned, Martinez told her that "management" had ordered that she was not permitted to speak with other employees. Anything she had to say to her co-workers had to be communicated through her forepersons. Santiago asked Martinez why this rule had been imposed, but he refused to tell her. Hildeliza Ferrel, who was part of a pruning crew that worked with Santiago's crew in January,

[2] All dates hereinafter refer to 2012, unless otherwise indicated.

testified that Patricia Jimenez told her and the other pruners, in January, that they were not permitted to speak with the punchers, and that the punchers were not supposed to speak with them. Jimenez and Martinez denied that such a rule existed, or that they said this to Ferrel or Santiago, respectively. Chris Hogan denied that he ever implemented such a rule.

Based on the foregoing, it is found that if any such directive was given, it was that the pruning crew and punchers could not speak to each other, as Ferrel testified, not that only Santiago was prohibited from speaking with her co-employees. The evidence fails to establish any reason why Respondent would have singled out Santiago, at that point. Santiago had not engaged in any Union activity, and even if credited regarding her disputes with foreman Rodriguez, this had taken place months earlier, and was followed by Respondent granting Santiago's request to be transferred, and accepting her application to train as a puncher. In addition, it would have been virtually impossible for Santiago to not speak with the other puncher-trainees, and her own testimony shows that she continued to speak with them thereafter.

Santiago testified that sometime in January, apparently about January 17, she complained to supervisor Cain Ireta Lopez (Ireta) that Barroso was delaying her crew's lunch breaks. Barroso purportedly told the crew she was delaying their lunch breaks so they would not be with the male crews. Santiago does not contend that any other worker was present when she complained to Ireta, or if so, joined her in this complaint. Santiago testified that lunch breaks were also delayed by as much as a half hour when Barroso and Jimenez talked with other employees. Santiago testified that she and other crew members

had complained about this among themselves, but she alone complained to the forepersons. Ireta and other workers on Santiago's crew testified that the breaks were only briefly delayed on occasions when the crew was being moved from one location to another.

Santiago testified that a few days later, on January 20, she complained to foreperson Patricia Jimenez about working in the rain. Jimenez purportedly told her that since other employees had to work in the rain, it would set a bad example for the puncher-trainees to stop working. According to Santiago, "we" later again complained about working in the rain. Santiago, again, did not identify who else complained. At some point thereafter, Cain Ireta told the crew to stop working, because the rain intensified.

Jimenez drove the crew out of the field in a pickup truck that hauls portable toilets. The truck became stuck in the mud. According to Santiago, Jimenez demanded that she and two other workers attempt to push the truck out of the mud. She testified that all three of them told Jimenez it was impossible to do this with the toilets attached, and that when Jimenez repeated the demand, Santiago told Jimenez to call someone who could pull the vehicle out with a tractor. An irrigator arrived, driving a tractor, and unhooked the portable toilet. Jimenez allegedly continued demanding that the workers push the toilet out of the mud, but the irrigator said he would tow it. Santiago claimed that Jimenez appeared upset with her after the incident.

Jimenez and the other three workers who were in the truck testified that Jimenez did not order Santiago, who was seated in the rear of the pickup, out, and that only

Jimenez and the worker next to her, in the front seat, left the vehicle. They did not attempt to push the truck; instead, they unhooked the portable toilets, so that an irrigator could tow the pickup. The undersigned found Jimenez and the other workers to be more credible than Santiago. In particular, the undersigned finds it incredible that Jimenez would have refused to allow Santiago and the other workers to unhook the trailer before pushing the pickup, as alleged by Santiago.

Santiago testified that on January 24, her crew was pruning the raspberry vines. The pruning crew was also working in the field. Respondent was utilizing a different type of pruning shears, and they were hurting Santiago's hands, making them swell. On direct examination, Santiago testified that, after discussing this with her co-workers, she complained about the shears to Barroso, asking if another type of shears were available. Two other workers (again unidentified) also individually complained, and then Santiago and another (unidentified) worker complained together. On cross examination, Santiago testified that she and the three other puncher-trainees collectively complained to Barroso.

Santiago testified that the problem was only resolved when her son gave her a different type of shears to use. Barroso testified that she could not recall Santiago ever complaining to her about the pruning shears, or being aware that Santiago's hands were swollen. Barroso did recall that Santiago changed the type of shears she was using, and that her pruning improved "about 70%."

The other puncher-trainees, Badillo, Sanchez and Garcia, testified they observed Santiago complain to Barroso about the shears on one occasion, but denied ever complaining about the shears themselves, or authorizing Santiago to speak on their behalf

with respect to that, or any other issue. According to Badillo, only the puncher-trainee crew was present at that time.[3] According to Santiago, Barroso replied that the employees should continue working, and complained they were not pruning fast enough.

Santiago testified that she again complained to Barroso about the shears on the following day. Cain Ireta arrived later, and called Santiago away from her work area to speak with him. Santiago complained about the shears to Ireta, telling him "we" were hurting. Ireta told Santiago they would continue using the same type of shears.

According to Ireta, he spoke with Santiago, who was by herself, about the shears, on one occasion. Chris Hogan, however, testified that Ireta reported to him that Santiago raised this complaint at a group meeting, where Ireta, Barroso and the other puncher-trainees were present. According to Ireta, Santiago told him the shears were hurting her hands, "a little," and he told her this was normal on the first day. Ireta acknowledged that other workers had complained about the shears, although their problem was that the shears became stuck when dirt became lodged between the blades. These workers obtained other shears to use.

Based on the foregoing conflicting testimony, it is found that Santiago, alone, complained about the shears, in the presence of the other puncher-trainees, Barroso and Ireta. Santiago had discussed her problems using the shears with other workers, but no

[3] Hildeliza Ferrel, who was working as a pruner, testified that Santiago discussed the shears with her, in the presence of others working on the pruning crew. Ferrel testified that Santiago told her she was going to complain to Barroso, but did not state that she observed Santiago do this. Ferrel further denied authorizing Santiago to speak on her behalf regarding the shears.

one authorized her to speak on his or her behalf. Two workers from the pruning crew had also complained to Ireta about the shears, but for a different reason.

Santiago testified that she also became involved in the Union's organizing campaign, which began in early January. On January 5, Jesus Corona, an organizer for the Union, met with Santiago at her home. He contacted her, because the Union was attempting to organize Respondent's workers, and some of them had told him Santiago was someone who had stood up for other employees in the past. After discussing the benefits of unionization, Santiago signed an authorization card. Santiago testified she met with Corona on many other occasions at her home in January, alone, and on one occasion at the Union's office, in late January, with three other (unnamed) co-workers. Corona, however, testified he does not believe that any meetings were conducted for Respondent's employees at the Union's office until after Santiago's discharge.

Santiago testified she had two conversations concerning unionization with the other punchers in her crew in January. These took place in the fields, away from any supervisors. On the first occasion, Santiago mentioned that her son worked at a company where the workers were represented by a union, and asked how they would feel about working with union benefits. On the second occasion, Santiago asked how they felt about being represented by a union. Her co-workers allegedly told her to shut up, and to not even think about it.

General Counsel accuses Adela Badillo of informing Barroso of Santiago's pro-Union sentiments. Her proof consists of a hearsay statement allegedly reported to

Santiago, which was stricken from the record.[4] Badillo denied that Santiago said anything to her about the Union, union benefits, or her son working in a union shop. Badillo was clearly a more credible witness than Santiago, and her denial is credited.[5] Chris Hogan and Respondent's controller, Mel Garcia, denied any knowledge of Santiago's Union activity as of the date of her discharge, or that the Union was conducting an organizing campaign.[6]

Santiago was General Counsel's primary witness concerning the events leading to her discharge. Respondent called Hogan, Garcia, Martinez and Ireta as its primary supervisory witnesses on this issue. Of these, the undersigned found Garcia to be the most reliable. Santiago was far from a model of clarity in her testimony, tended to exaggerate and the undersigned believes she gave false testimony on several issues, most glaringly, the incident where the pickup became stuck in the mud. Hogan, Martinez and

---

[4] General Counsel continues to protest this ruling in her brief. Apparently, General Counsel wishes to rewrite the Evidence Code. If General Counsel considers this evidence to be critical, she could have ascertained the name of the declarant from Santiago, and subpoenaed him or her to testify, or at least explained, on the record, why this could not be accomplished.

[5] General Counsel alleges that because Badillo testified that she heard Santiago mention she had a son, and candidly admitted that Santiago complained about Respondent's wages and health insurance, this shows that Badillo was lying when she denied Santiago spoke to her about her son working at a unionized facility, or talking up union benefits. The undersigned considers this argument to be specious. More likely, Santiago, being very fearful of being found out as a Union supporter, raised these issues without liking them to unions.

[6] General Counsel contends that because, as discussed below, two forepersons asked about Santiago's Union activities, commencing some two weeks after her discharge, this shows that Respondent knew about her Union sentiments prior thereto. This argument is unconvincing, given the passage of time. In addition, even if these individuals did know or suspect that Santiago supported the Union, they played no role in her discharge, and Hogan, the decision maker, credibly denied such knowledge.

Ireta were not infrequently evasive, non-responsive and prone to conceal facts they felt would damage Respondent's case, although Hogan did candidly admit he was highly displeased with Santiago for voicing complaints in front of her crew. Furthermore, they contradicted each other and themselves on several occasions. The following represents what the undersigned is able to piece together, based on testimony from, other than Mel Garcia, less than reliable witnesses:[7]

Barroso, Ireta and Martinez were displeased with Santiago, primarily because of her complaints, in particular, when she complained about the pruning shears in front of her crew. At the time, Respondent considered punchers to be part of management,[8] and felt they owed it a duty of loyalty. This included not placing Respondent in a bad light by voicing complaints in the presence of non-supervisory workers. As management employees, such complaints were to be directed to the forepersons, supervisors, Hogan and Garcia. Hogan testified that he was aware that Santiago had complained about the pruning shears at a meeting attended by Ireta, Barroso and "the women in the fields." Hogan denied being aware that any other worker complained about the shears at that meeting.

Martinez and Ireta requested that Hogan meet with Santiago to discuss these matters. On February 1, Ireta met Santiago in the fields, and told her that Hogan wanted

[7] All testimony to the contrary is discredited.

[8] In March, Respondent hired a labor relations consultant, in response to the Union's organizing campaign. The consultant conducted a meeting, to instruct supervisors on how to conduct themselves. The attendance sheet shows that the puncher-trainees attended this meeting. Respondent, apparently on the advice of the Salinas regional staff, subsequently changed its position on the supervisory status of punchers.

to speak with her. He drove her to the office, where Hogan and Garcia, were present. Hogan told Santiago that, as a puncher, she would be expected to show loyalty to Respondent. The manner in which she was voicing complaints was inappropriate, because she was doing this in front of other workers, thus agitating them. Hogan reminded Santiago that she was on probation, and told her that at this point, she was not qualified to be a puncher. Hogan further told Santiago that if she did not successfully complete her probation, there might not be any further work for her.[9]

Santiago testified that after Ireta drove her back to the fields, Alejandra Sanchez asked her why she had been called to the office. Santiago told her she did not know, and asked Sanchez and Adela Badillo, who was also present, if they knew the reason. She also asked if she was treating the other trainees badly, and they denied feeling that way. According to Santiago, she told her co-workers she had been told she was still on probation, and the next time, she would be fired. She asked Sanchez and Badillo if they knew why, but they said they did not know. According to Santiago, Sanchez and Badillo told her they were no longer on probation, at that time. Badillo and Hogan credibly testified that the puncher-trainees were still on probation as of February 1.

Adela Badillo testified that after Santiago returned from her meeting with Hogan and Garcia, she told the other puncher-trainees that she had been discharged, because Hogan and Garcia did not want to be dealing with women, and that they were going to be discharged for the same reason. Alejandra Sanchez testified that Santiago told them that

[9] Hogan testified that Respondent's policy is to discharge employees who fail probation for management positions, rather than returning them to their prior jobs.

none of them would qualify as punchers, and they would be fired after the pruning was completed. In addition, Santiago told them they would not be permitted to return as harvesters. Rocio Garcia testified that Santiago first told them that this might be, and then said it was her last day. Garcia testified that Santiago told them that Hogan had stated he did not like working with women. Garcia first testified that Santiago told them they were going to be laid off as well, and then testified that Santiago told them they might be laid off. Although Santiago denied telling her co-workers that they were going to be fired or laid off, General Counsel did not recall her to respond to the additional allegations made by these witnesses.

Based on the undersigned's observations of these witnesses, it is concluded that Badillo's testimony was the most accurate. She was generally impressive as a witness, from the standpoint of her demeanor and, as discussed below, other than mistakenly recalling meeting with Hogan, rather than Mel Garcia, demonstrated a superior recall of the events than did Sanchez or Rocio Garcia. In addition, Badillo candidly admitted that Santiago frequently complained at work about a number of issues. Rocio Garcia, it should be noted, appeared nervous and uncomfortable about testifying against Santiago.

Badillo testified that the following day, she saw that Santiago was still working, and was puzzled by this. She asked Juana Barroso if she knew when she and the other trainees were going to be fired. Barroso said she did not, and called Ireta, asking him to meet with Badillo. Ireta initially met with Badillo and Barroso, but they were later joined by Sanchez, Rocio Garcia and David Martinez. Badillo told Ireta that Santiago had told the puncher-trainees they were going to be discharged, and Barroso could not tell her

when this was going to take place. Ireta told her that no co-worker could tell her that she would be fired, and that such a decision would be delivered directly from the office. When the other trainees arrived, they expressed similar fears for their jobs, and received assurances that their positions were secure. Sanchez and Rocio Garcia essentially corroborated Badillo's testimony, although Sanchez believes the meeting took place two or three days after Santiago's comments to them, rather than the following day.[10]

Ireta testified that Barroso called him on the telephone, stating that Adela Badillo wanted to speak with him. Ireta drove to the field, and met with Badillo and Barroso. Badillo asked if they were going to be fired. Ireta told Badillo he did not know what she was talking about. Badillo told him that Santiago had told them that she was working her last day, and they were also going to be discharged when the pruning work ended, because Hogan did not like working with women. Ireta told Badillo that if Santiago had been fired, Respondent would have given her a final paycheck. Ireta also told Badillo that Respondent employed several female forepersons, so he did not understand what Santiago was talking about. Ireta contacted David Martinez, and they met with the three puncher trainees and Juana Barroso. According to Ireta, the other trainees confirmed what Badillo had told them.

Ireta and Mel Garcia testified that after this meeting, Ireta informed Garcia about these allegations. Garcia testified that Adela Badillo came to the office that afternoon, looking for Hogan, but he was not there. Instead, she met with Garcia. An office worker

[10] Badillo signed a declaration stating she met with Ireta and Martinez on February 3. Her testimony, that this actually took place on February 2, is credited.

was also present. Garcia testified Badillo stated that Santiago had told the puncher-trainees they were going to lose their jobs after the pruning season. Garcia took a statement from her, but Respondent did not produce it at the hearing. Badillo testified that she met with Hogan on February 2, but it is found that she was mistaken on this point, and she actually met with Garcia.[11]

Hogan testified that the three punchers met with him on February 3, and told him what Santiago had said. His testimony was contradicted by the other witnesses, who stated he first met with the three trainees on February 4, after Santiago was discharged. Mel Garcia testified that Hogan told him, on February 3, that he was already aware of the incident involving Santiago, when Garcia reported it to him. Based on the foregoing, it is found that Hogan was informed of the incident, first by Ireta, and then by Garcia on February 3, but he did not meet with the puncher-trainees until February 4.

Santiago testified that near the end of the work day, on February 3, she injured her foot. Patricia Jimenez saw that Santiago had hurt herself, and asked if Santiago wanted to see a physician. Santiago told her this was not necessary. Jimenez told Barroso to complete a Refusal of Medical Treatment Report, reflecting that Santiago had declined to seek medical attention. Barroso did not have the correct form, so she used a blank disciplinary action notice to report the injury, which only states that Santiago had injured her foot, and did not consider the injury to be serious. Barroso asked Santiago sign the form, but Santiago protested that it was not an accident report. Barroso told Santiago she

[11] Badillo's declaration states that she met alone with both Mel Garcia and Hogan.

did not have an accident report form, but this was the same thing. Eventually, Santiago signed the report. Barroso had Patricia Jimenez sign as a witness.

Respondent denies that Santiago was disciplined because of the injury. Barroso testified that she used the disciplinary form, because she believed the office was closed when Santiago was injured. She informed Ireta and Martinez that she had used a disciplinary form that afternoon. Barroso intended to give Santiago the proper report form the following day, but did not, because Santiago was discharged.[12]

Santiago testified that she reported for work shortly before 6:00 a.m. on February 4. David Martinez told Santiago not to report to the fields, because Hogan wanted to speak with her. When Santiago arrived at Hogan's office, he and Mel Garcia were waiting for her. According to Santiago, Hogan told her she knew why she had been called in, because he had told her that the next time, she would be fired. Hogan allegedly told Santiago *she* had threatened to fire the other punchers, and had been warned not to discuss their previous meeting. Santiago denied having been so warned, or that she had threatened her co-workers, thus scaring and "rousing up the people." Hogan showed Santiago a discharge form, citing insubordination and poor work performance as the reasons. Santiago refused to sign. After leaving the office, Santiago saw the other punchers trying to hide from her near a pickup truck.

Hogan testified that on the morning of February 4, he told Santiago she was being discharged for lying to her co-workers about being discharged from their employment. Santiago denied the allegations, but Hogan did not believe her. After discussing the

---

[12] Santiago signed the proper form after she was reinstated.

matter for 30-45 minutes, Hogan asked Santiago to sign her termination notice, which she refused to do, and for receipt of her final paycheck, which she did. According to Hogan and Garcia, Santiago told him that she would do whatever she could to break the company. Hogan denied making any of the statements attributed to him by Santiago.

Hogan and Garcia met with the three puncher-trainees on February 4, after Santiago was discharged. Hogan assured the workers that he had never said the things attributed to him by Santiago, and their jobs were secure. He also informed them that Santiago had been discharged.

The Alleged Interrogations

Employee and Union supporter, Avelino Aquino Venegas (Aquino) testified that on February 17, two of his co-workers asked him if he planned to continue attending Union meetings, and he responded affirmatively. Foreperson Elsa Aburto,[13] apparently hearing this, approached Aquino, and asked him if he had "signed for the Union." Aquino responded that he had. Aquino initially testified that Aburto told him she had found out that Santiago supported the Union, but corrected this, stating that she asked him if Santiago was also involved (as alleged in the complaint). Aquino told her both of them were involved with the Union. Aquino further testified that Aburto asked him if his sister was involved, but Aquino refused to answer that question. After asking these questions, Aburto remained in the vicinity.

[13] The complaint does not allege that Aburto was a statutory supervisor, but Respondent stipulated to such status.

Elsa Aburto denied asking Aquino anything about who was supporting the Union. The undersigned does not believe that, as a current employee, Aquino was making this incident up, thus exposing himself to potential retaliation. Aburto appeared denial-bound, also denying every allegation made involving her by Lucia Barajas, discussed below. Although Barajas was not, herself, a reliable witness, it seems improbable that every interaction she reportedly had with Aburto was pure fantasy. Accordingly, Aquino's testimony is credited.

Norma Morales Moreno (Morales) has worked as a harvester for five seasons. In February, she was working on the pruning crew. Morales became involved in the Union campaign in early February.

Morales testified that on February 20, Juana Barroso, her foreperson, sent her to work on Patricia Jimenez's crew. Jimenez approached Morales, and asked her what she knew about the Union. Morales replied, "Not much." Morales told Jimenez that some people had come to her house the day before, and Jimenez asked if Santiago had been there. Morales said no, and Jimenez asked who had been at her home. Morales told Jimenez that some Union representatives had visited her. Jimenez asked how they had obtained her address, and Morales replied she did not know, but they had talked to her about the Union. Jimenez asked what she thought about this, and Morales replied she thought it was a good thing, because she had not known about her rights before. Jimenez told Morales that the workers in Aburto's crew were organizing, and Morales replied that if that were really true, it was a good thing. Jimenez told Morales this was true.

Morales testified that a co-worker, who apparently saw them talking, came over to her after Jimenez left, and asked what they had been discussing. Morales told the worker that Jimenez had been asking her about the Union. The worker told Morales that forepersons should not be questioning them about the Union, and she should report it to the Union representatives. Morales became a crew representative for the Union, but this was after Jimenez questioned her. Morales and Jimenez did not have a social relationship, at the time of this incident.

Jimenez denied that this incident took place. Again, the undersigned doubts that a long-term employee such as Morales would have invented such a story, thus exposing herself to potential retaliation. Her testimony concerning this incident is credited.

The Union filed a Notice of Intent to Take Access on March 9. Avelino Aquino testified that after Aburto questioned him, Juana Barroso informed his crew that the Union was going to take access. Barroso told the crew that if the representatives came to speak with her, she would refuse, because, "I protect and take care of my job."[14]

Carlos Amador Cruz Hernandez (Cruz) has been employed by Respondent as a harvester for over five years. He began work in 2012 on March 20. Before returning to work, Cruz had attended at least one Union meeting, and has been one of its active supporters. On the day he returned to work, during the Union's access period, Cruz was elected as one of two employee Union representatives for his crew. His foreman, Juan

[14] Aquino erroneously placed this incident in February. Respondent contends that the allegations involving Aquino and Morales are "entirely new." Paragraph 31 of the complaint refers to these alleged violations, and although they were not the subject of a specific charge, they are sufficiently related to the charge filed on behalf of Carlos Cruz to be included therein. These allegations were fully litigated at the hearing.

Carlos Chavarin Martinez (Chavarin) was advised, by a Union representative, that Cruz was one of the crew representatives.

Cruz testified that, at the end of March, he was conducting a poll, at the Union's request, of who supported the Union. Cruz had a writing tablet, and was marking down the responses of the employees on his crew. After doing this for about 15 minutes, he approached a worker close to Carlos Chavarin, who was in a pickup truck. After speaking with the worker, Chavarin motioned for Cruz to come over to him.

Cruz asked Chavarin what he wanted, and Chavarin asked what he was doing. Cruz responded he was speaking with his co-workers, and Chavarin asked what they were talking about. Cruz told Chavarin they were talking about the Union. Chavarin told Cruz he knew that, and implied that Cruz could not discuss the Union, because he was not an organizer taking access. Cruz reminded Chavarin that he was a crew representative, and told him was free to speak with his co-workers during his breaks. Chavarin agreed, and Cruz left.

Cruz then observed Chavarin on a company radio, and heard him report that a poll was being taken. Cruz reported the incident to his crew members, and to Norma Morales, now a crew representative on Barroso's crew. Cruz testified that in April, after the Union filed a charge on his behalf, he saw Cain Ireta and someone he did not know, speaking with Chavarin. They told him to deny everything, because it could not be proved.

According to Chavarin, all he did was to ask Cruz what he was doing. Cruz replied he could do what he wanted on his lunch break, and Chavarin agreed with him. Chavarin denied any of the additional statements attributed to him. Cruz appeared to be a

credible witness, and the undersigned doubts that he would have complained about this incident, if it were as innocent as Chavarin claims. In addition, Cruz's account of the incident was corroborated by Morales, in her testimony regarding his report thereof to her.[15] Cruz's testimony is credited.

The Alleged Access Violation

As noted above, the Union filed a Notice of Intent to Take Access on March 9. Rogelio Hernandez Huerta (Hernandez) testified that on March 20, he took access to Juana Barroso's crew with Union organizer, David Rojas.[16] Hernandez was a volunteer, and was assisting Rojas in his access visit. When the lunch break began, Rojas introduced himself to Barroso, and asked her to leave the area, because they were going to take access. Instead, Barroso and Elsa Aburto went to the cab of the truck that tows the portable toilets, about 20 to 30 feet from where the access meeting was taking place, and began eating their lunches.[17] After about 10 minutes, Hernandez realized that Barroso and were still in the vicinity and, after consulting with Rojas, asked Barroso to leave. Barroso refused to do so, remaining there until the end of the access period.

---

[15] Morales' testimony is hearsay, but Respondent did not object to it. In addition, it is admissible as corroborating Cruz's direct testimony.

[16] Rojas was unavailable to testify in this proceeding.

[17] Respondent contends that Barroso was already in the truck when the meeting began, and did not realize that the meeting was being conducted within 100 feet of where she and Aburto were eating their lunches. It further contends that the Union conducted the meeting where it did intentionally, in order to fool Barroso and Aburto, and establish an unfair labor practice. This was not the first time the Union had taken access to this crew, and Barroso did not contend the meetings had previously taken place somewhere else. In addition, Barroso and Aburto should have moved further away, once the meeting began, since the credited facts show that they would have been able to hear what was being said. Even if this were not the case, they should have moved when Hernandez asked them to do so.

Hernandez was uncertain if any of the workers knew that the forepersons were in the area, but Norma Morales credibly testified that she saw Barroso in the truck, and heard her refuse to leave the area.

Hernandez testified that after the access period ended, he and Rojas saw Barroso in the parking area. Hernandez took photographs of Barroso with his cell phone, to identify her as the one who had refused to leave the area. When Barroso saw him doing this, she told the representative she was going to write down everything she had heard during the access meeting.

Barroso testified that the organizers did not tell her to leave the area when they arrived that day, but admitted she had been informed of this requirement by Respondent. She further testified that she was 80-90 feet away from the access meeting, which appears to be an overstatement, given the distance between the truck cab and the portable toilets. Barroso admits that she did not leave when later asked to do so, but contends she only remained in the truck for a few minutes, before leaving. Barroso did not deny the statement attributed to her by Hernandez, when he was photographing her. Hernandez and Morales were more credible witnesses than Barroso, and their account is credited over hers. Furthermore, Barroso implicitly admitted she could hear what was being said at the meeting, when she said she was going to write down everything that was said, which would have been unlikely had she been 80 to 90 feet away.

Additional Allegations Involving Dalia Santiago

On March 15, General Counsel obtained a Temporary Restraining Order in Santa Cruz County Superior Court, ordering Respondent to cease and desist from committing

the unfair labor practices alleged to that date. General Counsel obtained a Preliminary Injunction against Respondent, dated April 13, ordering it, inter alia, to reinstate Dalia Santiago. Santiago, accompanied by representatives of the Union and ALRB, and some of her co-workers, presented herself for reinstatement, but Respondent refused to do so. General Counsel obtained a contempt order against Respondent, and Respondent reinstated Santiago on May 12. Respondent states that it has appeals pending to contest the preliminary injunction and contempt order.[18]

Santiago testified that since her reinstatement, Barroso has continuously stared at her at work, being so preoccupied with this that Barroso purportedly did not perform any of her duties as foreperson, other than leading the morning exercises, for well over a month. Santiago testified that puncher, Juan Ortega, also stared at her. Barroso and Ortega denied staring at Santiago. As noted above, Santiago's false testimony regarding the incident where the pickup was stuck in the mud, and additional discredited testimony, detailed above, makes this testimony suspect. Even assuming Santiago sincerely believes Barroso stared at her excessively, the undersigned found her to be overly sensitive to the conduct of those she perceives are against her and, in fact, she grossly overstated the extent to which this actually occurred.

Santiago testified that on two occasions, Barroso yelled at her, in front of the entire crew. Santiago admitted she has observed Barroso raise her voice when addressing

[18] Respondent contends that this allegation is not set forth in the complaint. Complaint paragraph 35 states that Respondent refused to reinstate Santiago after the temporary restraining order, which is true. The fact that paragraph 35 does not specifically refer to Respondent's refusal to reinstate Santiago after the preliminary injunction is of little import, and Respondent suffered no prejudice thereby.

other workers, but claimed Barroso, on these occasions, was louder with her. Barroso denied raising her voice to Santiago. The undersigned does not believe that a credibility resolution, between two unreliable witnesses, is required regarding two brief instances of alleged loud conduct in the four months following Santiago's reinstatement.

Finally, Santiago testified that on June 11, Barroso required her to clean portable toilets for 15-20 twenty minutes after her regular workday, and then signed her out at the normal ending time.[19] Barroso testified that she and Santiago were the only ones available to clean the restrooms, and Santiago did not object to working overtime. Barroso denied clocking Santiago out early. Respondent paid Santiago for the extra time she claimed she worked, after being served with an unfair labor practice charge that included this incident.

The Allegations Involving Lucia Barajas

Lucia Barajas Ruelas (Barajas) has been employed as a harvester for four years. Barajas began attending Union meetings and speaking to co-workers in favor of the Union in April 2012. In mid-May, ALRB representatives met with Respondent's employees. Barajas attended a meeting conducted for two of Respondent's crews. No supervisors were present, but punchers were invited to attend. Barajas testified that she spoke in favor of the Union at the meeting. Puncher-trainee Alejandra Sanchez stated that what the Union's representatives were saying was not true, and that they were paying

[19] Some of Respondent's employees had engaged in a work stoppage that day, but Santiago was not involved. General Counsel, in her brief, does not contend that Barroso's conduct on that day was motivated by any involvement by Santiago in the work stoppage.

workers $20.00 to sign authorization cards. Barajas asked Sanchez to identify those people, and told her she had signed a card, without being paid.

Barajas testified that after the meeting, Sanchez was circulating what was apparently a petition to "get rid of" Dalia Santiago. Sanchez asked two employees to sign, and also asked Barajas. Barajas refused, since Santiago had never done anything wrong to her.

That afternoon, at the request of employees, Hogan met with the crews. This time, foreperson Patricia Jimenez, one of Respondent's supervisors and a labor relations consultant were present. The consultant told them the Union would make them pay dues, and made additional anti-Union comments. Barajas asked if Respondent had hired him, and how much he was being paid. She also asked what benefits he was offering to the workers.

During the meeting, an unidentified worker said that someone was complaining about Respondent. Barajas approached him, and said that she was the employee. Barajas told the worker about her problems with Elsa Aburto in 2011.[20]

---

[20] General Counsel elicited testimony from Barajas concerning incidents involving Aburto and David Martinez that took place on unspecified dates in 2011. When asked the relevance of this testimony, General Counsel stated that Barajas had been "constructively demoted." None of the charges alleges such a violation, this is not set forth as a violation in the complaint and General Counsel does not argue it as such in her brief. At the time of these events, there was no Union activity involving Respondent's employees, and Barajas' testimony fails to show any protected concerted activity by her at the time. Rather, Barajas made individual complaints concerning her co-workers, Aburto in particular. The most significant thing about this testimony is that it shows Barajas to be an unreliable witness, because she contended she was promoted, by her foreperson, to be a puncher, while the other evidence clearly shows that, in fact, she was chosen to be a table helper.

Barajas testified that she complained to Hogan about a disciplinary notice she had received, because she was ill and had missed work, but was unable to afford seeing a physician. Hogan told her she had to bring in "proof." Barajas allegedly told Hogan the workers needed a Union to obtain affordable health insurance, so they would not be disciplined, as she had. Hogan allegedly told Barajas to "shut up," because this was not the topic under discussion. Hogan told Barajas to discuss her complaints at the office. Barajas told Hogan that their complaints had not been resolved at the office, and that is why the workers would seek help from the Union.[21]

Later that day, in the fields, Sanchez passed near Barajas. According to Barajas, Sanchez said it was good "she" was going to die, and Sanchez would put more dirt on her [grave] to make sure she could not get out. Sanchez denied making such a statement, and appeared genuinely shocked that such an allegation had been made. Barajas testified that Sanchez also rejected two boxes of raspberries, without justification, and laughed at her, in front of the crew, for bringing a box with different colored berries. Sanchez also denied engaging in this conduct. Barajas only testified as to one day that this purportedly took place. The undersigned does not believe that any credibility resolutions are necessary with respect to these allegations.

Barajas also testified concerning an incident, which took place in about June. Barajas was harvesting in her regular crew, and there were no more berries to pick. Her

[21] Hogan had a considerably different version of these events. Inasmuch as he is not alleged to have acted unlawfully against Barajas, his testimony will not be detailed, and no credibility resolutions will be made. It is noted, however, that General Counsel did not produce the disciplinary notice Barajas claims she received.

foreperson sent her to work with Barroso's crew, who was harvesting at the same ranch, but at some distance. Barajas did some harvesting work, and then asked if she should continue picking. Barroso told her to get some more baskets. When Barajas returned, Barroso and another worker, who Barajas variously identified as "Adela," "Martine" and "Elsa" laughed at her. Barroso told her the others had left. Barajas contended that because of this, and the time it took to return to the other side of the ranch, she worked 20 to 30 minutes of overtime without pay.[22] Barroso denied that Barajas even worked on her crew that day.

Barajas admitted that the forepersons honk vehicle horns and/or shout out to crews for breaks, and to signal the end of the work day. Barroso testified that she sounds the pickup's horn to signify these times, and goes out into the fields to advise employees that the work day is over. Barajas also testified that there were tractors being operated in the field that day.

ANALYSIS AND CONCLUSIONS OF LAW

The Discipline and Discharge of Dalia Santiago

In order to establish a prima facie case of unlawful retaliation against employees for engaging in union activity, General Counsel must show that the employees engaged in such activity, the employer had knowledge thereof (or suspected this), and the union activity was a motivating factor in an adverse employment decision. Once the prima facie case has been established, the burden shifts to the employer to show that the adverse action would have been taken, even absent the union activity. *Wright Line, A Division of*

[22] At the time, Barajas was being paid on an hourly basis.

Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enfd. (CA 1, 1981) *NLRB v. Wright Line, Inc.*662 F.2d 899 [108 LRRM 2513], cert. denied (1982) 455 U.S. 989 [109 LRRM 2079].

General Counsel has established that Dalia Santiago engaged in Union activity. The evidence, however, fails to show that Respondent was aware of that activity at the time she was disciplined or discharged. There is no direct evidence of such knowledge, and Santiago admittedly tried to conceal her Union support from management.

General Counsel contends that one or more of the other punchers informed management of Santiago's activities in support of the Union. It has been found that while Santiago complained about Respondent's wages and benefits to the punchers, she never specifically suggested that they support a union. Even if she had, the mere suspicion that an employee is an informant is insufficient to establish that he or she, in fact, did this. *Mario Saikhon, Inc.* (1978) 4 ALRB No. 107, at page 3, footnote 3. Testimony that Respondent considers the punchers its "eyes and ears" in the fields hardly establishes that any of the trainees knew of, or reported Santiago's meetings with the Union's representative at her home, or that they even knew, no less reported, that she had signed a Union card.

Absent direct evidence of employer knowledge, this may be established by circumstantial evidence. In determining whether knowledge has been established, it is appropriate to examine the record as a whole. The primary factors considered are the timing of the adverse action with respect to the union activity, the employer's general knowledge that employees are engaging in organizational activity, the employer's animus

toward such activity, and whether the reasons advanced for the adverse action are pretexts. *Regional Home Care, Inc.* (1999) 329 NLRB 85 [166 LRRM 1117]; *Glassforms, Inc.* (2003) 339 NLRB 1108 [173 LRRM 1156].

Timing is an important circumstantial consideration, but in itself does not establish knowledge or unlawful motivation. The timing of Santiago's discipline and discharge, about one month after she commenced her Union activity, is somewhat suspicious. Nevertheless, several cases have found that employer knowledge was not established, even though the adverse action followed closely on the heels of the protected activity. *Del Mar Mushrooms* (1981) 7 ALRB No. 41; *BLT Enterprises of Sacramento, Inc d/b/a Sacramento Recycling and Transfer Station* (2005) 345 NLRB 564 [178 LRRM 1353]; *Rust Craft Broadcasting Company, a wholly owned subsidiary of Rust Craft Greeting Cards, Inc.* (1974) 214 NLRB 29, at pages 32-33 [88 LRRM 1174]; *Gold Coast Restaurant Corp., d/b/a Bryant & Cooper Steakhouse* (1991) 304 NLRB 750 [139 LRRM 1256]; *Lab Glass Corp.* (1989) 296 NLRB 348, at page 356 [133 LRRM 1175].

As noted above, the second primary circumstantial consideration to establish employer knowledge is its general knowledge that some of its employees are organizing for a union. Even if the employer has such general knowledge, there still must be sufficient other evidence to show that it knew the alleged discriminatee was involved in those activities. *Harvey Engineering and Manufacturing Co.* (1979) 209 NLRB 766, at page 772 [85 LRRM 1498]. Thus, general knowledge of union activities, in itself, does not establish knowledge that a particular employee has engaged in such activities. The evidence herein fails to establish that Respondent was generally aware that the Union was

attempting to organize its employees. Most of the campaign was conducted away from the fields, as of the time Santiago was disciplined and discharged.

With respect to the employer's animus against the union, lawful expressions of opposition to unionization may assist General Counsel's case, but do not, in themselves, establish employer knowledge. *Kawano, Inc. v. ALRB* (1980) 106 Cal.App.3d 937, at page 943 [165 Cal. Rptr. 492]. More telling are unlawful expressions of animus toward employees who support unionization, such as discipline, threats and interrogations. *Glassforms, Inc.,* supra. As detailed below, the evidence shows that Respondent harbored animus toward Santiago's complaints, not her Union activity. Although, as will further be discussed below, Respondent did commit a few, relatively minor unfair labor practices directed against Union supporters, these occurred after Santiago's discharge, and primarily involved low-level supervisors.

Under the *Wright Line* analysis for cases of employment discrimination, once a prima facie case of discrimination is established, the employer's defense is first evaluated on the basis of whether the non-protected conduct proffered is totally without merit, or was a motivating factor in the adverse employment decision. The first category of this defense is commonly known as a pretext, while the latter is often referred to as a mixed motive. In establishing the prima facie case, a finding that the reason given for the discipline or discharge was pretextual is relevant in determining employer knowledge, in addition to determining the post-prima facie defense asserted. As will be discussed below, the reason given for Santiago's discharge was far from pretextual.

Thus, the circumstantial evidence fails to preponderantly establish that Respondent was aware of Santiago's Union activities, when she was discharged. In addition, Hogan, the manager who imposed the discipline, credibly denied such knowledge. Therefore, General Counsel has failed to establish a prima facie case that anti-Union considerations were a motivating factor in these actions, and they will be dismissed.[23]

Section 1152 of the Act grants agricultural employees the right, inter alia, "to engage in . . . concerted activities for the purpose of mutual aid and protection." Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 1153(a). *J. & L. Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

Protected 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,

[23] General Counsel's reliance on *Vibra-Screw, Incorporated (*1991*)* 301 NLRB 371 [137 LRRM 1119] to circumstantially establish Respondent's knowledge of Santiago's Union activity is misplaced. In that case, unlike here, the union had served a petition for election on the employer, shortly prior to the commencement of retaliatory actions, the first discrimination was against employees who had openly reported what had transpired at a union meeting throughout the plant, and the employer subsequently committed numerous additional unfair labor practices. In addition, the judge found that the employer's stated reasons for the adverse actions were "baseless."

(1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. This is often true even if the employees stop working in pursuing the protest. *Giannini Packing* (1993) 19 ALRB No. 16; *M. Caratan, Inc.* (1978) 4 ALRB No. 83.[24]

In order to be protected, the work-related activity must also be concerted. This generally means that the activity must be engaged in by more than one employee, or by one employee, acting on the authority of at least another worker. Personal requests and complaints are not protected under section 1153(a). *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.[25]

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

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

[25] General Counsel, citing pre-*Meyers* cases, incorrectly asserts that in order to be concerted, it is sufficient for an individual's complaint to be "of concern" to other workers. This concept was specifically rejected by the National Labor Relations Board in *Meyers*, and said interpretation was adopted by the Board in *Gourmet Farms*.

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].

Santiago testified as to various work-related complaints she made to Respondent's supervisors, one of which has not been credited. Hogan admitted being aware that Santiago had complained about the new pruning shears, and that she had done this in front of her co-workers. There is also credible evidence, even from Respondent's

witnesses, that Santiago's complaints annoyed her supervisors, Juana Barroso, Cain Ireta and David Martinez, and they had asked Hogan to meet with Santiago.

Inasmuch as there is no credible evidence that any other employee joined Santiago in any of her complaints, or authorized her to speak for them, there is an issue as to whether the complaints amounted to concerted activity. Ireta's testimony, that other employees had also complained about the pruning shears, could be construed as showing Santiago's complaint, although made individually, was part of a group protest, even if the basis for her complaint differed from the others.

In addition, since the issuance of *Myers Industries*, the NLRB, with court approval, has issued a series of decisions finding that where an employer calls a group meeting to announce changes in work rules or working conditions, an employee, even speaking alone, and without prior authority to speak on the behalf of others, is engaged in concerted activity by protesting the changes, since this is viewed as a call to action for other employees to support the protest. *Caval Tool Division, Chromalloy Gas Turbine Corp.* (2000) 331 NLRB 858 [168 LRRM 1067], enfd. (C.A. 2, 2001) 262 F.3d 184 [168 LRRM 2180]; *Neff-Perkins Company* (1994) 315 NLRB 1229 [148 LRRM 1103]; *Grimmway Enterprises, Inc.* (1995) 315 NLRB 1276, at page 1279 [148 LRRM 1247]; *Whittaker Corp.* (1988) 289 NLRB 933 [130 LRRM 1247]. The object of inducing group action need not be expressed, nor does the employee have to verbally solicit the support of others. *Sprint/United Management Company* (2003) 339 NLRB 1012, at page 1017 [173 LRRM 1445]; *Cibao Meat Products* (2003) 338 NLRB 934 [172 LRRM 1097].

The NLRB has also found an employee's complaints to a supervisor protected and concerted. *Kathleen's Bakeshop, LLC* (2002) 337 NLRB 1081 [171 LRRM 1131], enfd. *NLRB v. Kathleen's Bakeshop, LLC* (C.A. 2, 2003) 173 LRRM 2576; *Bowling Transportation, Inc.* (2001) 336 NLRB 393 [170 LRRM 1227]. In both of those cases, however, another employee was at least apparently supporting the protester. Nevertheless, Santiago had previously spoken with other employees about the pruning shears and, while Respondent could have resolved her complaint by giving her a different type of shears or work gloves, her complaint did pertain to a tool used by other pruners. Thus, her complaint arguably was protected and concerted.

Assuming the facts establish protected concerted activity, however, it must be established that the employer had knowledge of the concerted nature of the activity. In this case, the facts indicate that Ireta was aware that other employees had complained about the pruning shears, but they also indicate that Hogan, who made the discharge decision, was only aware of Santiago's individual complaint. Nevertheless, Hogan was aware that Santiago spoke out regarding the pruning shears at a group meeting, and that her supervisors were annoyed with her complaints, in general, because they were agitating the other workers. Therefore, it is at least arguable that Hogan was aware of the concerted nature of Santiago's protected activity.

The complaint alleges that, by issuing a new rule prohibiting Santiago from speaking with her co-workers, on January 3, Respondent violated the Act. In her brief, however, General Counsel does not argue why said conduct was unlawful. The credited facts show that, at the most, one or more of Respondent's supervisors told employees that

punchers should not speak with pruners.[26] Said directive, if made, did not apply only to Santiago. Furthermore, she had yet to engage in any Union activity, and her most recent alleged protected concerted activity had taken place months earlier. Accordingly, the evidence fails to establish that the directive, even if issued, was motivated by Santiago's Union or protected concerted activity, and the allegation will be dismissed.

It is unclear whether the complaint is alleging that Respondent violated the Act when Patricia Jimenez ordered Santiago to push the truck out of the mud. General Counsel does not argue this in her brief. In the event General Counsel is maintaining that this constituted a violation, Santiago's testimony has been discredited. Even crediting her testimony, the directive was issued to two other puncher trainees, and there is insufficient evidence that the others were included so as to mask Jimenez's unlawful intent to coerce Santiago. Accordingly, this allegation will also be dismissed.

The complaint alleges that Respondent issued Santiago a written warning in response to her protected activities. The evidence, essentially undisputed, shows that when Santiago suffered a minor work injury, her supervisor did not have a form to report the incident, and Santiago's decision to decline medical attention. The undisputed evidence is that Santiago was told that this was the reason for using the disciplinary action form to report the injury. No wrongdoing is alleged on the form, and no punishment is indicated. The fact that Santiago was asked to sign the form is of little import. Irrespective of Santiago's or General Counsel's subjective interpretations of the

[26] Inasmuch as this did not take place during the harvest season, it would not have been impossible to comply with such a directive.

report, the evidence clearly shows that, in fact, Santiago was not being disciplined. The report did not constitute an adverse action and, on an objective basis, an employee would not reasonably have been intimidated by its issuance. Accordingly, this allegation will also be dismissed.

The credible evidence, however, does show that during Hogan's meeting with Santiago on February 1, Santiago reasonably understood that she was being disciplined for voicing complaints, particularly her complaint about the pruning shears, in the presence of her co-workers. Hogan made these statements, because Santiago's supervisors had complained to him, and because he felt it was inappropriate for an employee, who he then thought was part of management, to be doing so. It is also clear that Hogan at least implied that if Santiago continued to speak out in the presence of nonsupervisory employees, she would fail probation, and quite possibly lose her job.

The NLRB has held that even where the activity leading to discipline, in itself, is not protected and concerted, if the discipline is phrased so as to also encompass future activity that would be within the employee's statutory rights, it is unlawful. *SKD Jonesville Division L.P.* (2003) 340 NLRB 101 [174 LRRM 1011]. Thus, even if Santiago's complaints, in themselves, were not concerted, she would have reasonably understood the threatened discipline to prospectively apply to raising any work-related complaints, in the presence of other workers. Since Santiago was not a statutory supervisor, and was entitled to collectively raise work-related complaints, said admonition was clearly overbroad. Therefore, Respondent violated section 1153(a) of the Act.

Turning to Santiago's discharge on February 4, assuming Santiago's complaints about the pruning shears constituted protected concerted activity, to the knowledge of Hogan, her discharge took place shortly thereafter. It is clear Hogan was angered by the raising of this issue, in the presence of other employees. Although Hogan denied that the complaint played any role in the decision to discharge Santiago, he had just disciplined her for this, and her other complaints, three days earlier. Therefore, assuming the pruning shears complaint was concerted, General Counsel has arguably established a prima facie case that it was a motivating factor in the discharge decision.

General Counsel points to conflicts in testimony, an allegedly cursory investigation of misconduct and alleged fabrications by Hogan concerning his role in that investigation, arguing that Respondent has thus failed to establish that Santiago would have been discharged, absent her protected concerted activity. Irrespective of any inconsistencies in testimony or embellishments by Hogan as to his role in the investigation, the evidence shows that Santiago, in fact, lied to her co-workers concerning her and their employment status, and falsely accused Hogan of saying he did not want to deal with women. Said statements were clearly highly disruptive in the workplace. It is also readily inferable that Santiago, believing she was about to be discharged, was attempting to establish false grounds for gender discrimination litigation against

Respondent.[27] When Hogan was advised of Santiago's conduct, he promptly discharged her.

Therefore, in accord with other cases that have found such misconduct sufficient to establish a defense, it is concluded that Respondent has preponderantly demonstrated that it would have discharged Santiago, even absent any protected activity she might have engaged in. *ACA/Portsmouth Regional Hospital* (1995) 316 NLRB 919 [149 LRRM 1254]; *Beverly California Corporation f/k/a Beverly Enterprises* (1993) 310 NLRB 222, at pages 224-226 [142 LRRM 1169]. Having established its defense, the allegations concerning Santiago's discharge for engaging in protected concerted activity will be dismissed.[28]

The Alleged Interrogations

It is a violation of section 1153(a) for an employer to coercively interrogate employees concerning their Union activities, sympathies or desires. In determining the coercive nature of the interrogation, the Board considers all of the surrounding circumstances, including the identity of the questioner, the place where the interrogation took place, the identity of the person questioned, the nature of the questioning and whether the employer committed other unfair labor practices. *Rossmore House* (1984)

---

[27] At the hearing, the Union advised that Santiago, in fact, has initiated gender discrimination litigation against Respondent, although it is unclear whether the events discussed herein are involved.

[28] Based on this conclusion, even if General Counsel had established that Santiago's Union activity was a motivating factor in her discharge, Respondent would have succeeded in its defense.

269 NLRB 1176 [116 LRRM 1025], affd. (C.A. 9, 1985) 760 F.2d 1006 [119 LRRM 2624]; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11.

It has been found that Respondent, acting through Elsa Aburto, questioned Avelino Aquino concerning his, and other employees' Union activities. At the time, Aquino was not known as a Union supporter. Even if Aburto's questions were prompted by Aquino discussing his Union activities with other employees in a place where she could hear him, the undersigned does not believe this entitled her to join the conversation, and ask him whether he had signed for the Union, and it certainly did not entitle her to ask about the Union activities of Santiago or Aquino's sister. Under these circumstances, Aburto's questioning reasonably tended to coerce employees in the exercise of their statutory rights, and Respondent thereby violated section 1153(a). On the other hand, Aburto's failure to leave the area, in itself, did not constitute surveillance of employee Union activity. This incident took place in a location Aburto was otherwise privileged to be, and the employees, being aware of her presence, were free to stop discussing the Union, or move elsewhere.

Similarly, at the time Patricia Jimenez questioned her, Norma Morales was not an open Union supporter. Jimenez was not her regular foreperson, and approached Morales, unsolicited. She questioned Morales concerning her Union support, her meeting with Union organizers and the Union activities of Dalia Santiago. Under these circumstances, the questioning was coercive, and violated the Act.

At the time of his conversation with Carlos Chavarin, Carlos Cruz was an open Union supporter, and discussed the poll he was taking at a location where he reasonably

knew Chavarin could hear him. Nevertheless, the undersigned does not believe this entitled Chavarin to call Cruz over, and to question him as to what he was doing. Furthermore, Chavarin challenged Cruz's right to take the poll, and apparently, reported this to higher management, in Cruz's presence. Contrary to Respondent's argument, this was hardly a friendly conversation. Under these circumstances, Chavarin's conduct reasonably tended to coerce Cruz in the exercise of his statutory rights, and Respondent thereby violated Section 1153(a).[29]

Juana Barroso's statement to her crew, that she would not speak with the Union's access representatives because, "I protect and take care of my job," does not constitute an interrogation. It is further concluded that the statement is too vague and ambiguous to constitute a threat. Therefore, this allegation will be dismissed.

The Alleged Access Violation

The mere presence of supervisory personnel during a Union access meeting does not constitute unlawful surveillance; however, if the supervisors do not leave the area when requested to do so, it may be found that they are engaging in unlawful surveillance, or that they have created the impression thereof. *Ukegawa Brothers, Inc.* (1983) 9 ALRB No. 26. In this case, the Union had been taking access for over a week, when the incident involving Juana Barroso and Elsa Aburto took place. Therefore, they knew full

[29] The fact that Cruz continued his organizing activities does not mean that the interrogation was not coercive, as Respondent contends. General Counsel alleges that by telling Cruz he knew he was discussing Union matters, Chavarin also gave the impression he was engaging in unlawful surveillance. Since Cruz had conducted part of his polling activities in close proximity to Chavarin, he would have reasonably understood that Chavarin simply overheard him, at a location Chavarin was entitled to be, rather than engaging in eavesdropping. Said allegation will be dismissed.

well that they were supposed to leave the area. In addition, testimony that they were also advised, on that occasion, to leave, at the outset of the access meeting has been credited. Furthermore, it is undisputed that they were asked to leave, during the access meeting, and refused.

At least one employee saw Barroso and Aburto near the meeting. While they were not in the middle of the group, as in *Ukegawa Brothers, Inc.*, they were close enough that employees would reasonably believe their purpose in being there was to engage in unlawful surveillance. Barroso circumstantially corroborated this impression, when she told the organizers she was going to write down everything that had been said at the meeting, implying she would report this to her superiors. Under these circumstances, it is concluded that Respondent, because of this conduct, violated section 1153(a) of the Act.

Additional Allegations Involving Dalia Santiago

It is undisputed that Respondent refused to reinstate Dalia Santiago when she appeared at its facilities after the April 13 preliminary injunction issued. Labor Code section 1160.4(c) specifically states that when injunctive relief is ordered under section 1160, no stay shall be granted. Respondent sought such a stay, and it was refused.

It is clear Santiago was aware that Respondent refused to reinstate her, and the evidence shows that other employees were with her when the refusal occurred. Even though it has been found herein that Respondent rebutted the arguable prima facie case that Santiago's discharge was unlawful, the status of the case, at that time, was that a California court had ordered Santiago reinstated, based on a showing that her discharge was unlawful. Respondent openly defied the order. The entire purpose of such interim

relief is to minimize the harm resulting from extended litigation, where a showing of unlawful conduct and irreparable harm has been made. By defying the preliminary injunction, Respondent reasonably caused workers to believe that even in the face of a court order, it would resist complying with the law. Under these circumstances, it is concluded that Respondent violated section 1153(a) of the Act.

With respect to Barroso's alleged harassment of Santiago after her reinstatement, it has been found that Santiago's claim concerning Barroso continually staring at her was, at best, grossly exaggerated. If, in fact, Barroso shouted at Santiago twice over a four-month period, this also fails to amount to retaliatory harassment. Finally, with respect to the incident where Santiago worked a brief period of overtime without being paid, this fails to establish that the assignment was retaliatory, rather than work Barroso, who joined in, felt was necessary, in the absence of anyone else being present to perform it. While Barroso's conduct may have constituted a wage and hour violation, General Counsel has not established that it also violated section 1153(a). Thus, the credited evidence fails to establish that Barroso's conduct, considered individually or collectively, reasonably coerced Santiago in the exercise of her rights under section 1152, and these allegations will be dismissed.

<u>The Allegations Involving Lucia Barajas</u>

As noted above, Lucia Barajas testified that puncher, Alejandra Sanchez stated, in her presence, that it would be good when "she" died, and Sanchez would put more dirt on her grave. Barajas further testified that on one day, Sanchez improperly rejected her boxes of raspberries and laughed at her, purportedly in retaliation for her Union support.

General Counsel does not contend that Sanchez was a statutory supervisor, but argues that she acted as Respondent's agent.

In cases where a nonsupervisory employee is alleged to be acting on behalf of the employer, the test is whether, under all the circumstances, other employees would reasonably believe that the employee was reflecting company policy, and acting for management. This requires that the employer held out the worker as being someone privy to management's voice about the matters in question, or that the other employees reasonably perceived such a role. *Omnix International Corporation d/b/a Waterbed World* (1987) 286 NLRB 425 [126 LRRM 1248]. The fact that an employee shares his or her employer's anti-union views does not, in itself, establish the employee as an agent. *St.Paul's Church Home, Inc.* (1985) 275 NLRB 1242 [120 LRRM 1030]. Even if an employee has apparent authority to speak on behalf of management on some personnel issues, this does not mean that if the employee makes a death threat, this would reasonably be interpreted as reflecting management's position, at least absent similar statements by management employees. *Von's Grocery Company* (1995) 320 NLRB 53 [151 LRRM 1173]. Beyond citing generalized testimony, that punchers are the "eyes and ears" of Respondent's management, and evidence that Sanchez opposed the Union, General Counsel produced no evidence that employees would reasonably view her as speaking or acting for Respondent, and certainly not when she made the alleged statements concerning Barajas' death.

Regarding the alleged incident involving Juana Barroso, where Barajas purportedly worked overtime without pay, the undersigned, based on the testimony, fails

to see how Barroso could have intentionally informed everyone, except Barajas, that it was quitting time.[30] Conversely, if Barroso had already alerted the crew that the workday had ended, before she sent Barajas to get more baskets, it is virtually impossible that Barajas would not have noticed the crew leaving the field. It is far more likely that Barajas, who acknowledged that tractors were being operated in the fields, simply did not hear Barroso sound the horn, when she went to get the baskets. If, in fact, Barroso and the puncher laughed when Barajas returned, this probably did not result from any intentional conduct by Barroso, but was because they found it amusing that she failed to hear the horn. In any event, the delay could not have been very significant, because Barroso and the puncher were still in the work area when Barajas arrived.

Based on the foregoing, it is concluded that the evidence fails to establish that Respondent harassed or discriminated against Barajas in retaliation for her Union activity. Therefore, these allegations will be dismissed.

THE REMEDY

Having found that Respondent violated section 1153(a) of the Act, I shall recommend that it cease and desist there from and take affirmative action designed to effectuate the purposes of the Act. In fashioning the affirmative relief delineated in the following Order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the

[30] It is also noted that Barajas did not contend that Barroso was present at the meetings where she displayed her pro-Union sentiments.

conditions among farm workers and in the agricultural industry at large, as set forth in *Tex-Cal Land Management, Inc.* (1977) 3 ALRB No. 14.

On the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Premiere Raspberries, LLC, d/b/a Dutra Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Warning employees not to raise work-related complaints in the presence of other employees, and threatening them with discipline, up to and including discharge, if they do not comply,

   (b) Interrogating employees concerning their Union activities, sympathies and desires, or those of other workers,

   (c) Engaging in the surveillance of employee Union activity, or creating the impression thereof,

   (d) Refusing to obey court-issued preliminary injunctions, ordering interim relief for the commission of unfair labor practices, and

   (e) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

(c) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all no hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period February 1, 2012 to January 31, 2013, at their last known addresses.

(e) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

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

3. All other allegations contained in the Amended Consolidated Complaint are hereby dismissed.

Dated: January 7, 2013

____

Douglas Gallop
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by United Farm Workers of America (Union) in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by coercing employees in the exercise of their rights under the Act.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

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

Because you have these rights, we promise that:

WE WILL NOT warn employees not to raise work-related complaints with other employees, or threaten them with discipline, up to and including discharge, if they fail to comply.

WE WILL NOT interrogate employees concerning their Union activities, sympathies and desires, or those of other workers.

WE WILL NOT engage in the surveillance of employee Union activity, or give the impression thereof.

WE WILL NOT refuse to comply with court-issued preliminary injunctions ordering relief for the commission of unfair labor practices.

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

DATED: _______________ PREMIERE RASPBERRIES, LLC,
dba DUTRA 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 ALRB. One office is located at, 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.