STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY AND FARMING, a sole proprietorship,	)	Case No. 2012-CE-010-VIS
Respondent,	)	40 ALRB No. 12
and	)	
ELVIA HERNANDEZ,	)	(November 13, 2014)
Charging Party.	)	

CORRECTED

DECISION AND ORDER

This case arises from an unfair labor practice (ULP) charge filed on May 25, 2012, by Elvia Hernandez alleging that Gurinder S. Sandhu dba Sandhu Brothers Poultry and Farming (Respondent) fired her in retaliation for her concerted activities in violation of section 1153(a) of the Agricultural Labor Relations Act (ALRA).[1]

The Respondent grows sweet potatoes and other produce on leased land in central California. Respondent's field supervisors during the relevant time period were brothers Kulbir (Kelly) Sandhu, Bhupinder (Rupy) Sandhu and Balwinder (Sodhi) Sandhu. Their brother Gurinder (Gary) Sandhu, the owner of the company, handled the office work for the business. The Charging Party, Elvia Hernandez (Hernandez), was

[1] The ALRA is codified at Labor Code section 1140 et seq.

hired by Rupy and harvested sweet potatoes for Respondent during the fall harvest season in 2011. Harvest season ended at the end of October 2011, and then Hernandez was rehired by Rupy on April 18, 2012, to do springtime work such as hoeing and root preparation. Her last day of work at Respondent's operation was Saturday, May 12, 2012.

The Administrative Law Judge (ALJ) issued the attached recommended decision and order on February 20, 2014. The ALJ found that Hernandez was engaged in protected concerted activity when she and other workers protested a change in work assignments and complained about accompanying issues such as payment for wait time and the untimely distribution of paychecks on the morning of May 12, 2012. The ALJ concluded that when Hernandez became very vocal about these issues, Kelly discharged her in retaliation for her protests.

The Board has considered the record and the attached ALJ decision in light of the exceptions and briefs and has decided to affirm in part and overturn in part the findings of fact, and conclusions of law of the ALJ.

ALJ Decision

The ALJ found that credited evidence established that on May 12, 2012, Hernandez and other workers showed up for work at 6:00 a.m. at a field near Crows Landing as they had been told to do the day before. After they had waited for their assignment for some time, Kelly told the assembled workers that there was no work in Crows Landing that day, rather there was hoeing work near Atwater, and the workers would need to drive there. Atwater was approximately a 45-minute drive from Crows

Landing. Many of the workers had already driven to Crows Landing from the Atwater area that morning, and expressed frustration with the change in work assignments. Hernandez approached Kelly and told him that she was not going to Atwater because she had not been paid and had no gas money. She also demanded to know if they would be paid for the time they had already spent waiting at the Crows Landing field, and asked when they would be getting their paychecks. The ALJ reasoned that these were all employment-related matters and because other workers joined in at least part of her protest, her conduct was protected concerted activity.

Hernandez testified that Kelly told her that she knew too much and would cause others to complain, so there was no more work for her. Co-worker Eliodoro Rivas corroborated Hernandez's testimony, stating that he heard one of the Sandhus tell Hernandez that she caused too many problems and there was no more work for her. Rivas testified that Hernandez told him that she was going home because she had been fired.[2] Jess Hernandez, Elvia Hernandez's brother testified that Elvia told him she had been fired because she demanded money Respondent owed her. On the other hand, the ALJ found that Kelly's blanket denials and his claim that he had never even spoken to Hernandez while she was employed by Respondent were untruthful. The ALJ also found that the testimony of Respondent's three corroborating witnesses was not convincing.

[2] The ALJ found Rivas' testimony to be particularly persuasive because he testified that he hoped to obtain seasonal work with the Sandhus in the future, thus the ALJ reasoned that Rivas' testimony was likely to be truthful as it was against his economic interests.

The ALJ concluded that Respondent's supervisor, Kelly Sandhu, fired Hernandez in retaliation for her protected concerted conduct.

There was extensive testimony at the hearing that Hernandez and other workers complained in 2011 about repeated sexual harassment by Rupy Sandhu and a co-worker, about dirty drinking water, about dirty toilets, about underpayment of wages and about having to wait long periods to be paid.

Specifically, Hernandez and one of her co-workers, Lorena Quezada, testified at length about sexual misconduct by Rupy and by a co-worker with the last name Librado. Rupy and his brothers flatly denied that the conduct occurred. While the ALJ found that it was undisputed that Hernandez's brother Jess came to the workplace to speak to Rupy about alleged sexual harassment in 2011, the ALJ pointed out that Jess testified that he told Rupy that his sister had complained about sexual harassment by a co-worker, and did not mention complaints about Rupy himself. On the other hand, the ALJ found that Hernandez's testimony concerning her complaints to Rupy and Kelly Sandhu was extensively corroborated.

On the second day of the hearing, during Quezada's testimony, the ALJ ruled that he was not going to allow further testimony simply corroborating the occurrence of sexual harassment; rather, unless a witness' testimony was offered to "show that Ms. Hernandez's complaints were a motivating factor in her discharge," he would not allow further questioning. (Hearing transcript (TR): Vol. II, pp. 100-104.) Quezada did go on to testify about her observations of Hernandez making complaints to Kelly about Rupy's behavior and about the drinking water and bathrooms in 2011. She

also testified there were instances where she helped translate for Kelly what Hernandez was saying using her because Hernandez spoke too fast for Kelly to understand. (TR: Vol. II, pp. 116 and 118.)

There was additional testimony about Hernandez's complaints about Rupy's behavior by worker Eva De La Paz Cardenas who stated that she saw Hernandez complain to Kelly Sandhu many times during the 2011 sweet potato harvest (TR: Vol. III, p. 100), and that she and her husband, Demetrio Quezada (Lorena Quezada's brother), also complained to Kelly about Rupy's behavior (TR: Vol. III, p. 103). Demetrio Quezada testified that he and De La Paz Cardenas joined Hernandez several times in complaining and that he told Kelly during the 2011 season that the women deserved respect. (TR: Vol. III, pp. 145-147).

Toward the end of the hearing, in response to the Assistant General Counsel's repeated attempts to cross examine Respondent's witnesses about the alleged sexual harassment complaints, the ALJ stated:

> "What I've heard is that she [Hernandez] was involved in a wage dispute and a dispute over having to go to another field on her last day of employment and it was joined in by other employees and because of that she was fired…. The sexual harassment from what I've heard so far is so tangential to all of this, I'm not going to make a finding as to whether or not sexual harassment took place." (TR: Vol. IV, p. 118.)

The ALJ ultimately did not reach any conclusions about whether the alleged sexual harassment took place or if so, who engaged in the conduct. (ALJ decision p. 7, fn. 7.)

With respect to the backpay portion of the remedy for the violation, the ALJ examined the issue of whether and when the Respondent made a valid offer of reinstatement to Hernandez. The ALJ also analyzed whether Hernandez was justified in rejecting an offer of reinstatement due to the working conditions at Sandhu Brothers.[3]

The ALJ found that the Respondent made a valid offer of reinstatement on June 21, 2012, while meeting with Agricultural Labor Relations Board (ALRB) staff investigating the ULP charge. The ALJ found that Rupy Sandhu told ALRB investigators that Hernandez was welcome to return to her job. The ALJ found that the Respondent met its burden of showing the offer was specific and unconditional. (*Hoffman Plastic Compounds, Inc*. (1994) 314 NLRB 683.) The ALJ reasoned that the offer was specifically for her former position and had no deadline for acceptance. In addition, since Hernandez was being paid minimum wage, the offer could not have been for a lower pay rate.

The ALJ found that there was nothing improper about making the offer of reinstatement through a Board agent, particularly where, as here, the discriminatee's address is not known. (*Harry Carian dba Harry Carian Sales* (1989) 15 ALRB No. 14; *Thalbno Corporation, et al*. (1997) 323 NLRB 630, 634.) The ALJ found that Hernandez credibly testified that ALRB agent Irma Luna informed her that Respondent said she was welcome to return to her job. The ALJ found that Hernandez rejected the offer.

[3] This case was initially presented as a consolidated liability and compliance case; however, on the second day of the hearing, the ALJ granted the Assistant General Counsel's motion to bifurcate the case. The ALJ's decision includes a discussion of back pay and reinstatement remedies, but contemplates a further compliance proceeding.

Hernandez explained during the hearing that she did not want to work for Respondent anymore because she "felt very frustrated and I had a lot of anger for the time I missed my pay." Hernandez obtained another job within a few weeks after being discharged. The ALJ found that neither Hernandez nor anyone from the ALRB informed Respondent that she had rejected the offer of reinstatement.

The ALJ addressed the General Counsel's contention that Hernandez's back pay liability should not be tolled because the working conditions at Respondent's operation justified her rejection of the offer of reinstatement. First, the ALJ examined the remedy of "front pay," or continued backpay after a refusal to accept an offer of reinstatement. The ALJ stated that neither the ALRB nor the National Labor Relations Board (NLRB) has awarded front pay because it is "probably" not authorized under either statute. (*International Union of Operating Engineers Local 68, AFL-CIO* (1998) 326 NLRB 1, p. 5, fn. 3.)

The ALJ found that *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, which the General Counsel argues permits a front pay remedy under the ALRA, was not applicable. The ALJ noted that while the Supreme Court held that NLRB precedents guide, but do not control remedies available under Title VII of the Civil Rights Act of 1964, it did not hold that remedies under the two statutes are co-extensive. Moreover, the ALJ reasoned, because front pay is an equitable remedy, and neither the National Labor

Relations Act (NLRA) nor the ALRA includes language allowing for equitable relief, front pay is not available under the NLRA.[4]

Next, the ALJ reasoned that even if front pay was authorized under the ALRA, absent special circumstances, the refusal to accept a bona fide offer of reinstatement tolls backpay. As the ALJ found that the Respondent met its burden of showing that it made a valid offer in good faith, the ALJ then held that the burden then shifted to the General Counsel to establish that special circumstances existed, as determined on an objective basis, which made it reasonable for Hernandez to refuse to accept the offer of reinstatement. The ALJ cited to case law holding that the reasonableness of the refusal is determined on the basis of facts known to the employee at the time of the refusal, and the ALJ pointed to a number of factors used to determine reasonableness including the degree of harassment directed at the worker, in particular evidence that she was harassed into quitting; evidence, preferably by a medical expert, that the employee's health would be endangered by returning to the workplace; continued hostility toward the employee during the litigation, the promptness of the offer; and the degree to which the employee and the manager(s) who engaged in the harassment would have to work in a close and confidential capacity. (ALJ Decision at p. 20, citing *Miano v.*

[4] However, see *NLRB v. Jones & Laughlin Steel Corp*. (1937) 301 U.S. 1 in which the Supreme Court upheld the NLRA as constitutional, and stated in a proceeding to obtain reinstatement and back pay, "money damages [in this case back pay] is an incident to equitable relief," and thus does not contravene the Seventh Amendment with respect to trial by jury. (*NLRB v. Jones & Laughlin Steel Corp*., *supra*, 301 U.S. 1, 48.)

AC&R Advertising, Inc., et al. (1995) 875 F.Supp. 204; *Lewis v. Federal Prison Industries, Inc*. (1992) 953 F.2d 1277.)

Applying the above factors, the ALJ concluded that the General Counsel did not meet her burden of proving the existence of special circumstances justifying Hernandez's refusal to accept the offer of reinstatement. The ALJ reasoned that even assuming the sexual harassment took place, it was, for the most part, remote in time from the discharge, and moreover, the occurrence of sexual harassment by itself does not justify a refusal to accept an offer of reinstatement. (Citing *Morris v. American National Can Corp.* (1989) 730 F.Supp. 1489.) The ALJ further noted that when Hernandez rejected the offer she did not cite Respondent's lack of assurances that this conduct would not happen in the future. In any event, the ALJ reasoned that, as determined on an objective basis, an employee discharged under the circumstances in this case would have reasonably understood that she was being discharged as a result of the workplace dispute over work assignments and payment of wages, not because she rejected sexual advances.

With respect to the other factors used to determine whether the refusal was reasonable, the ALJ found that the initial offer of reinstatement was made relatively soon after the discharge and Respondent never showed animus toward Hernandez during the course of the litigation. Additionally, the ALJ found that although Hernandez referred to an emergency room visit for work-related stress after she was discharged, there was no expert evidence that a return to work would endanger her health. Thus, the ALJ

concluded that Respondent's backpay liability terminated on the date Hernandez rejected the offer of reinstatement made on June 21, 2012.[5]

With respect to the remainder of the remedy sought by the complaint, the ALJ noted that NLRB precedent now requires that employees be compensated for any adverse tax consequences resulting from a lump-sum backpay payment. (*Latino Express, Ltd*. (2012) 359 NLRB 1.)

Finally, the ALJ rejected the sexual harassment training remedy sought by the General Counsel. The ALJ reasoned that although the Board has wide discretion in fashioning its remedies, it is not authorized to issue orders beyond the scope of its statutory mandate, and because prevention of sexual harassment is not within the mandate of the ALRA, the training remedy could not be granted.

Discussion and Analysis

a. Credibility Determinations

The Respondent filed a number of exceptions to the ALJ's decision based on Respondent's position that the ALJ's credibility determinations were incorrect. The Respondent maintains that Hernandez was never fired; therefore there was no violation. Specifically, the Respondent argues that the ALJ should not have credited the testimony of Hernandez and Eliodoro Rivas, and that he should have credited all of Respondent's witnesses.

[5] The ALJ did not determine what that date was. He recommended that if the parties were not able to agree on that date, it could be resolved in compliance proceedings. (ALJ decision, p. 21, fn. 14.)

We have carefully examined the record, and find no basis for disturbing the ALJ's credibility determinations. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence demonstrates that 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 544.) 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. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) In addition, it is both permissible and not unusual to credit some but not all of a witness's testimony. (*Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, citing 3 Witkin, Cal. Evidence (3d ed. 1986) § 1770, pp. 1723-1724.)

b. Hernandez's protected concerted activity and unlawful discharge on May 12, 2012

We also affirm the ALJ's conclusion that Respondent's supervisor, Kelly Sandhu, fired Hernandez in retaliation for her protected concerted conduct on May 12, 2012.

Section 1152 of the ALRA 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.* (1962) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at p. 2128.)

In order to be protected, employee action must be concerted in cases not involving union activity. This generally means that the employee must act in concert with, or in coordination with others (*Meyers Industries, Inc.* (1984) 268 NLRB 493, revd. (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882, affd. (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205) — in contrast to the Board's earlier acceptance of the proposition that a single employee could engage in concerted activity where the object of employee protest could be deemed to be collective by virtue of protective legislation. (*Alleluia Cushion Co.* (1975) 221 NLRB 999; contra, *Myth, Inc. dba Pikes Peak Pain Program* (1998) 326 NLRB 136, where a majority of the Board rejected the revival of this doctrine.)[6]

The subject itself must involve collective as well as individual employment conditions. Examination of this aspect of what constitutes protected activity frequently focuses upon the "mutual aid and protection" language in section 7 of the NLRA. The

[6] See Chairman Gould's dissent in *Myth, Inc. dba Pikes Peak Pain Program* (1998) 326 NLRB 136 at pages 136-142. The analysis employed in this decision is not predicated upon the acceptance of this dissent. Cf. *NLRB v. City Disposal Systems* (1984) 465 U.S. 822, where the protest of one employee could be deemed to be concerted, i.e., "constructive" concerted activity, by virtue of its reliance upon a collective bargaining agreement.

law contemplates "that an employee may … be motivated both by self-interest and collective well-being." (*NLRB v. White Oak Manor* (4th Cir. 2011) 452 Fed. Appx. 374, 381; cf. *Fortuna Enterprises, LP v. NLRB* (D.C. Cir. 2011) 665 F.3d 1295.) The object of protected concerted activity includes conduct arising from any issue involving employment, wages, hours, and working conditions. The means through which such activity may be manifested include protests, negotiations and refusals to work, arising from employment-related disputes. (*NLRB v. Washington Aluminum Co., supra*, 370 U.S. 9; see also *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41; *J & L Farms, supra*, 8 ALRB No. 46; *Lawrence Scarrone, supra*, 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al., supra*, 6 ALRB No. 22; *Giumarra Vineyards, Inc.* (1981) 7 ALRB No. 7.)

Credited testimony supports the finding that on May 12, 2012, Hernandez and other workers were frustrated and dissatisfied with the last minute change in work assignments which would require many of them to drive 45 minutes to Atwater after driving 45 minutes from Atwater early that morning to report to the Crows Landing field. Eliodoro Rivas credibly testified Hernandez was the most vocal in her protests about moving and about being paid for her waiting time. Because other workers joined in her complaints, she was engaged in protected concerted activity.

Under the *Wright Line*[7] test, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating

[7] *Wright Line* (1980) 251 NLRB 1083, 1089, enfd. (1st Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989. Cf. *NLRB v. Transportation Management Corp.* (1983)
(Footnote continued….)

factor in the employer's adverse employment action. (See *Donaldson Bros. Ready Mix, Inc*. (2004) 341 NLRB 958, 961.) The General Counsel satisfies this burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity. (*Ibid.)* Animus may be inferred from circumstantial evidence, including timing and disparate treatment. (*Camaco Lorain Mfg. Plant* (2011) 2011 NLRB Lexis 220, citing *Tubular Corp. of America* (2001) 337 NLRB 99; see also *Miranda Mushroom Farm, Inc. et al., supra,* 6 ALRB No. 22; *Namba Farms, Inc*. (1990) 16 ALRB No. 4.) If the General Counsel meets this burden, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (*Wright Line, supra* at p. 1089.)

Because we uphold the ALJ's credibility determinations, we agree that Kelly Sandhu's testimony that he did not speak to Hernandez or any of the workers assembled on May 12, 2012, is not credible. This is underscored by his incredible blanket denial that he ever spoke to Hernandez during the entire course of her employment at Sandhu Brothers. The record supports the conclusion that following Hernandez's vocal protests about the work assignment and related issues on May 12, 2012, Kelly Sandhu told her that she caused too many problems and there was no more

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(Footnote continued)
462 U.S. 393; *Frick Paper Company, d/b/a Paper Mart* (1995) 319 NLRB 9, 12 Chairman William B. Gould concurring.

work for her. The sentiment that Hernandez caused too many problems is direct evidence of Sandhu's animus toward her protected conduct. (See *Miranda Mushroom Farm, Inc. et. al., supra,* 6 ALRB No. 22 (direct evidence includes expression of anger by a supervisor to the protected activity).) In addition, Lorena Quezada testified that during the spring of 2012, she observed Hernandez checking the amounts on workers' paychecks and encouraging them to report missing time to Rupy. Quezada also testified that when Rupy saw Hernandez doing this he told her "shut up, you shut up," and he told her "you get out of here." (TR: Vol. II, p. 149.)[8] Moreover, the timing of Hernandez's discharge, coming immediately on the heels of Hernandez's complaints underscores that protected conduct was a motivating factor in Respondent's adverse employment action.

Respondent maintains that it never discharged Hernandez, rather she abandoned her job. It is well-settled that a discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged and in such circumstances it is incumbent upon the employer to clarify its intent. (*P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8; *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, p. 5, fn. 3; *Lassen Dairy, Inc*. (2009) 35 ALRB No. 7, citing *Boyd Branson Flowers, Inc., supra,* 21 ALRB No. 4.) We agree with the ALJ that Kelly Sandhu's statement to Hernandez that there was "no more work" for her reasonably caused Hernandez to believe she had been discharged.

[8] Although Kelly ultimately discharged Hernandez, there was testimony that the Sandhu brothers spoke to each other during workdays. (TR: Vol. II, p. 143.) Thus, the record supports the inference that Kelly's sentiment that Hernandez "caused too many problems" was influenced by Hernandez's conduct when Rupy handed out paychecks.

Therefore, we conclude that Respondent fired Hernandez in retaliation for her protected concerted activities in violation of section 1153(a) ALRA.

c. Hernandez's sexual harassment complaints and other complaints about working conditions

The General Counsel argues in support of her first exception to the ALJ's decision, that she preponderantly established that Hernandez's complaints of sexual harassment and other working conditions were made for mutual aid and protection and constituted protected concerted activity. She further argues that when Kelly Sandhu commented on May 12, 2012, that Hernandez knew too much or caused too many problems and there was no more work for her, this confirmed that his adverse action was motivated by her history of making complaints, including her sexual harassment complaints, not just the complaints she made on May 12, 2012.

We emphatically condemn sexual harassment of workers in the fields. The Supreme Court has recognized that sexual harassment is "every bit the barrier to sexual equality at the workplace as that racial harassment is to racial equality." (*Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57.) We note that the California Legislature has recognized that sexual harassment of farm workers is a significant problem, and that Governor Brown recently signed Senate Bill 1087 which requires additional training and testing of farm labor contractors concerning sexual harassment, and prohibits farm labor contractor licenses to be issued to any person who has been found by a court or administrative agency to have committed sexual harassment of an employee. However, we emphasize that the commission of sexual harassment by an

agricultural employer, repugnant as that may be, is not by itself, a violation of the ALRA. Agencies with the jurisdiction and expertise to examine the question of whether sexual harassment took place and to devise remedies for it are the California Department of Fair Employment and Housing (DFEH) and at the federal level, the Equal Employment Opportunity Commission (EEOC). As we make clear below, the role of the ALRB (and for that matter, the NLRB)[9] is a secondary one, focused on the protection of employee protests and complaints about sexual harassment and other working conditions.

We agree with the ALJ that the occurrence of sexual harassment and the details of such is a matter for the DFEH or EEOC to investigate and remedy under the Fair Employment and Housing Act and/or Title VII of the Civil Rights Act. Our Board, on the other hand, is concerned with whether there was unlawful retaliation for protected concerted activity concerning working conditions.

We ultimately conclude that Hernandez's sexual harassment complaints and other complaints about working conditions made in 2011 do not provide a basis for finding that an unfair labor practice violation occurred because the General Counsel did not meet her burden of establishing that Hernandez's protected activities in 2011 were a substantial or motivating factor in Kelly's decision to fire her in 2012. However, we do find that her complaints were protected concerted activity within the meaning of the Act for the reasons discussed in section *1.* immediately below.

[9] Section 1148 of the ALRA states that the Board "shall follow applicable precedents" of the NLRA.

1. Hernandez's sexual harassment complaints were protected concerted activity

Because the ALJ ultimately did not reach any conclusions about whether the alleged sexual harassment took place, and presumably because he found that evidence showing Hernandez's complaints were a motivating factor in her discharge was not presented at the hearing, the ALJ's decision contains no analysis of whether Hernandez's complaints were protected concerted activity. After a careful review of the record, we find under current law, that the General Counsel established that Hernandez was indeed engaged in concerted activity for the purpose of mutual aid or protection when she complained about sexual harassment.

Recently in *Fresh & Easy Neighborhood Market, Inc.* (2014) 361 NLRB No. 12,[10] the NLRB found that an employee who sought her co-workers' assistance in raising a sexual harassment complaint to management was engaged in concerted activity for the purpose of mutual aid or protection. In so finding, the NLRB overturned the ALJ's determination that the employee's complaints were personal and not shared by other employees, and that her goal was purely an individual one.[11]

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[10] The *Fresh & Easy* decision was issued after briefing was complete in the instant case.

[11] The Board explicitly overruled *Holling Press* (2004) 343 NLRB 301, a case in which a divided Board found that the charging party, who solicited a coworker to be a witness in support of her sexual harassment claim filed with a State agency, was engaged in concerted conduct; however, because her conduct was uniquely designed to advance her own cause, it was not engaged in for the purposes of mutual aid or protection, and thus not protected. In the *Fresh & Easy* decision, the Board noted that the *Holling Press* decision lay "far outside the mainstream of Board precedent," and "effectively created an exception from Section 7 for claims of sexual harassment in circumstances where those

(Footnote continued….)

In *Fresh & Easy*, the employee wrote a message to her supervisor on a whiteboard in the store's employee break room requesting that she be able to participate in a training related to the sale of alcohol known by the acronym "TIPS." The next day the employee noticed that someone had changed the word "TIPS" to "TITS," and had made an offensive drawing by the employee's name. The employee copied the altered whiteboard message onto a piece of paper and asked three coworkers to sign the document, essentially as her witnesses, explaining to them that she wanted to file a sexual harassment complaint. The employees did indeed sign the document.[12]

First, the NLRB found that although the employee did not intend to pursue a joint complaint, her testimony established that she wanted her coworkers to be witnesses to the incident, and that her conduct in approaching others to seek their support of her efforts constituted concerted activity under well-established precedent. (*Mushroom Transportation Co. v. NLRB* (3d. Cir. 1964) 330 F.2d 683, 685; *Whittaker Corp*. (1988) 289 NLRB 933; *Owens-Corning Fiberglas Corp. v. NLRB* (4th Cir. 1969) 407 F.2d 1357, 1356.) The NLRB reasoned that it is also well-established that an employee may act partly from selfish motivations and still be engaged in concerted activity even if she is the only immediate beneficiary of the solicitation. (*Fresh & Easy*

(Footnote continued)
claims, had they instead concerned discipline, safety, or many other matters similarly affecting working conditions, would have enjoyed the protection of the Act."

[12] The Board recognized that the concerted nature would not be diminished if the employees' co-workers did not agree with her complaint or want to sign the document. (*Fresh & Easy Neighborhood Market, Inc., supra*, 361 NLRB No. 12 at p. 4.)

Neighborhood Market, Inc., supra, 361 NLRB No. 12 at p. 4 citing *Circle K Corp.* (1991) 305 NLRB 932; *El Gran Combo* (1987) 284 NLRB 1115, 1117; and *Dreis & Krup Mfg. Co*. (1975) 221 NLRB 309, enfd. (7th Cir. 1976) 544 F.2d 320.)

The concept of "mutual aid and protection" which is analytically distinct from the concerted manner in which an employee's actions are linked to others focuses on the goal of concerted activity; primarily whether the employee involved is seeking to "improve the terms and conditions of employment or otherwise improve their lot as employees." (*Fresh & Easy Neighborhood Market, Inc., supra,* 361 NLRB No. 12 at p. 3, citing *Eastex, Inc. v. NLRB* (1978) 437 NLRB 556, 565.)

In finding that the employee's solicitation of support from her coworkers was engaged in for mutual aid and protection, despite the fact that she was confronting conduct seemingly directed at her alone, the NLRB cited to numerous cases grounded in the "solidarity" principle inherent in section 7 of the NLRA. (*NLRB v. City Disposal Systems* (1984) 465 U.S. 822; *NLRB v. Peter Cailler Kohler Swiss Chocolates Co*. (2nd Cir. 1942) 130 F.2d 503; *El Gran Combo de Puerto Rico v. NLRB* (1st Cir. 1988) 853 F.2d 996.) The NLRB found it significant that although the whiteboard alteration was directed only at the charging party, it affected others (it was posted publicly in the break room rather than communicated privately), and also noted that the employee testified that she carried through with her complaint to management not only because she

was offended, but because she thought other female employees were offended too, and because she hoped filing the complaint would prevent similar misconduct in the future.[13]

In the instant case, Demetrio Quezada testified that he and Eva De La Paz Cardenas joined Hernandez in complaining about Rupy's behavior several times, and that he told Kelly during the 2011 season that the women deserved respect. Hernandez testified that she was speaking for herself and "all the people" when she confronted Rupy and said "you no respect me or co-workers…no respect, you men or women… so stop." (TR: Vol. I, p. 129.) The record establishes the concerted nature of Hernandez's complaints.

The record also shows that concerns about harassment were shared by other women besides Hernandez in 2011. Lorena Quezada and Eva De La Paz Cardenas testified about how unwelcome the behavior was. Lorena Quezada testified that other workers were around when Hernandez complained to Kelly, and that "we were all talking about the same thing that was happening there, the group … and so all of them would say, that's how gross these people are." (TR: Vol. II, p. 124.) Lorena Quezada also testified that by a certain point, "they would act all in a group" so no one would be alone

[13] The NLRB ultimately found that the employer did not violate the NLRA because no adverse action was taken against the charging party for her protected concerted activity.

with Rupy. (TR: Vol. II, p. 134.)[14] Thus, the record also establishes that the complaints were engaged in for mutual aid and protection.

In sum, there is ample evidence that in 2011, Hernandez's activity was concerted activity for the purpose of mutual aid or protection when she complained to Kelly and Rupy about sexual harassment and about other working conditions.

In so finding, we do not overturn the ALJ's ultimate conclusions about the basis for the violation; however, the above discussion sets forth the correct standard for evaluating in the future whether complaints about sexual harassment are protected concerted activity under the ALRA.

2. The General Counsel failed to establish that Hernandez's protected concerted activity in 2011 was a motivating factor in Respondent's decision to fire her

The General Counsel argues in her exceptions that the ALJ improperly limited the testimony of corroborating witnesses because the ALJ improperly required the General Counsel to show a "direct link" or nexus between the sexual harassment complaints and Hernandez's termination. The General Counsel argues that her case was prejudiced as a result. She cites to *Praxair Distributing, Inc*. (2011) 2011 NLRB Lexis 220, in which the NLRB stated that the General Counsel's initial burden under *Wright Line* "does not include a fourth element…that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action."

[14] In addition, other workers testified that they heard Hernandez complain frequently to Kelly in 2011 about the foul-tasting drinking water, dirty restrooms and missing hours from her paycheck.

The General Counsel misunderstands the essential and relevant point of law here, i.e., that despite this language in *Praxair*, as part of her prima facie case, she still needs to preponderantly establish that an employee's protected concerted activity was a motivating factor for an adverse employment action.

"In addition to showing that the employee in question suffered an adverse employment action, there must be some showing that the employer bore animus toward the employee's protected activity." (*Fund for the Public Interest* (2014) 2014 NLRB Lexis 357, citing *Praxair Distribution* (2011) 357 NLRB No. 91; *Camaco Lorain Mfg. Plant* (2011) 356 NLRB No. 143.) "Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action." (*Fund for the Public Interest, supra,* 2014 NLRB Lexis 357, citing *North Hills Office Services* (2006) 346 NLRB 1099, 1100. Emphasis added. See also, *Phillips Elecs. N. Am. Corp*. (2014) 2014 NLRB Lexis 634; *Premiere Raspberries, LLC* (2013) 39 ALRB No. 6.)

A review of the transcripts indicates that the ALJ was not placing an additional evidentiary burden on the General Counsel, but was instead looking for evidence that would be a necessary part of the General Counsel's prima facie case, specifically that the complaints about harassment were a motivating factor in the discharge.[15] The ALJ made it clear numerous times during the hearing that while he was

[15] We find that the General Counsel overstates the extent to which the ALJ struck or limited corroborating witnesses' testimony. The ALJ also stated that the General

(Footnote continued….)

not going to allow further testimony simply corroborating the occurrence of sexual harassment, he would allow "testimony that would show that Ms. Hernandez's complaints were a motivating factor in her discharge." (TR: Vol. II, pp. 100-104.)[16]

The ALJ stopped Lorena Quezada from testifying further about Hernandez's complaints to Rupy, because the ALJ noted "Rupy is not the one who discharged her. And the fact is he [Rupy] did rehire her [in 2012]. Kelly Sandhu is the one who she says discharged her. I just don't see a link there." (TR: Vol. II. p. 104.) Quezada testified that on May 12, 2012, Hernandez called her to say she had just been fired by Kelly and that she believed Rupy had sent Kelly to fire her. The ALJ found there was no evidence that Rupy had told Kelly to discharge Hernandez. (ALJ Dec. p. 6.)

In sum, we find that the ALJ did not improperly limit the General Counsel's witnesses' testimony or misapply the test for causation. It was the General Counsel's burden to establish that Hernandez's protected activities in 2011 were a substantial or motivating factor in Kelly's decision to take the adverse employment action on May 12, 2012. In addition, we find no merit in the General Counsel's argument that the ALJ's limitations on testimony prejudiced her case-in-chief.

(Footnote continued)
Counsel's representatives could present additional evidence about working conditions by calling rebuttal witnesses; however, they chose not to do this.

[16] The ALJ stated that it was prejudicial to have extensive testimony about the sexual harassment itself "if there is no prima facie showing that it was a motivating factor in the discharge." He further stated, "[w]e're not litigating a sexual harassment lawsuit here, sorry." (TR: Vol. II, pp. 109-110.)

3. The General Counsel failed to establish Respondent's animus toward Hernandez because of her history of complaints

The General Counsel argues that Kelly Sandhu was motivated to fire Hernandez based on her ongoing and frequent complaints about Rupy and her overall causing of problems. The General Counsel argues that because Kelly knew of Hernandez's frequent complaints in the fall of 2011, there is a basis for inferring that by the time of the May 12, 2012 incident, Kelly was "simply fed up" with Hernandez and the cumulative problems she caused.

Animus may be inferred from circumstantial evidence. "The timing or proximity of the adverse action is an important 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*, 6 ALRB No. 22.)

In the instant case, the Respondent does not allege that Hernandez was engaged in any misconduct herself, and further denies that Hernandez was fired. Hernandez and others testified that Kelly either disbelieved or was indifferent to the complaints about Rupy's behavior in the fall of 2011, but there was no testimony establishing that Kelly was angry or retaliated in any way against Hernandez. In fact,

Hernandez was hired again to work in the spring of 2012.[17] The length of time that passed between the fall of 2011 and May 12, 2012, also cuts against a finding of animus on Kelly's part toward Hernandez for her sexual harassment complaints.

Although the ALJ made it clear that he was ready to hear testimony that would show that Hernandez's 2011 complaints were a motivating factor in her discharge, the General Counsel did not pay much attention to this element of her case-in-chief. Rather, the questions asked on direct examination were focused on the details about Rupy's misconduct and the fact that Hernandez made multiple complaints. Thus, there is not enough evidence in the record to infer that Kelly was motivated to fire Hernandez because of Hernandez's complaints in 2011.

d. The Remedy

1. *The ALJ properly denied the sexual harassment training remedy*

The General Counsel's complaint sought that as a remedy, Respondent's supervisors be required to undergo 20 hours of sexual harassment training, the training to be conducted or determined by the General Counsel. The General Counsel argues that the ALJ improperly failed to order sexual harassment training as a remedy.

We find that the ALJ properly denied the sexual harassment training remedy. Even if there had been a finding that Hernandez had been discharged in

[17] Quezada testified that at the end of the 2011 season, Rupy told her that he didn't want Hernandez there anymore because she talked too much and could get him into trouble. Nevertheless, Rupy rehired Hernandez in the spring of 2012 and she began working one or two days after Quezada started work.

retaliation for concertedly complaining about sexual harassment, it would still be beyond the Board's authority to order sexual harassment training. Rather, the remedy would be the standard cease and desist, reinstatement and backpay remedy available for unlawful discharges under the ALRA. Inasmuch as other federal and state agencies possess the requisite specialized expertise to intervene in this area, the ALJ is correct that the Board does not have the authority to issue orders beyond the scope of its statutory mandate which is the prevention of unfair labor practices, not the substantive prevention of sexual harassment. Again, the Board has a role to play with regard to this subject matter. But it is a secondary role which is focused not on the question of whether substantive sexual harassment exists but rather on the protection afforded employees to protest such working conditions.

2. The Respondent's offer of reinstatement was sufficient and was conveyed to Hernandez

The General Counsel argues that Respondent's offer of reinstatement was neither valid nor sufficient. General Counsel argues that Hernandez was never contacted directly by the Respondent, and there was no evidence that if an offer was made, it was unequivocal and specific.

"It is well settled that an offer of employment must be specific, unequivocal and unconditional in order to toll backpay and satisfy a respondent's remedial obligation." (*Holo-Krome Co*. (1991) 302 NLRB 452-454; *Hoffman Plastic Compounds, Inc.* (1994) 314 NLRB 683.) We find the ALJ's analysis of the validity of the offer to be sufficient. The ALJ reasoned that the offer was specifically for her former position, and was

unconditional in that it had no deadline for acceptance. In addition, since Hernandez was being paid minimum wage, the offer could not have been for a lower pay rate.

While the General Counsel takes issue with the ALJ's conclusion that "there is nothing improper about making an offer of reinstatement through a Board agent," the cases cited by the General Counsel do not stand for the proposition that an offer of reinstatement made through a Board agent is per se invalid. The NLRB has, however, indicated that when an employer chooses to offer reinstatement through third parties, the employer bears the risk if the indirect communication results in confusion. In *Seligman and Associates, Inc.* (1984) 273 NLRB 1216, cited by the General Counsel, the NLRB upheld an ALJ's conclusion that the employer did not make a firm, unconditional offer of reinstatement sufficiently unequivocal as to toll backpay because: (1) the reinstatement offer received by the employees from a Board agent was hypothetical, and therefore did not provide them with the opportunity to make a considered choice whether to accept reinstatement; (2) the employees were offered similar but not equivalent jobs at a different apartment complex from the complex where they had worked prior to their unlawful discharge, and such offers of work at a different location and for different management are not sufficient to toll backpay; and (3) the employer, by electing to convey its reinstatement offer through a Board agent instead of proffering it directly, was bound by any resulting confusion. (*Seligman and Associates, Inc., supra,* 273 NLRB 1216, 1217.)

The General Counsel argues that confusion created by the Respondent having conveyed the offer of reinstatement through Board agents weighs against finding

that Hernandez received an offer, and the ALJ's decision to the contrary must be reversed. However, the General Counsel fails to show that Hernandez was unsure that she had received an offer to return to her position with Respondent or was otherwise confused. Rather, Hernandez was quite clear that she had been told about Respondent's offer of reinstatement.

The ALJ found that Hernandez credibly testified that an ALRB agent informed her that on June 21, 2012, the Respondent had said Hernandez was welcome to return to her position with Respondent. (TR: Vol. I, p. 171.) Despite Hernandez's clear admission, the General Counsel seems to be arguing that for technical reasons, such as the lack of evidence that the Respondent specifically requested that ALRB agents convey the offer to Hernandez, and the fact that ALRB agents did not believe a valid offer had been made, the Board should reverse the ALJ's finding that an offer was conveyed. We do not find merit in these arguments.

3. Hernandez's rejection of the offer of reinstatement was justified

The General Counsel argues that the ALJ improperly concluded that the evidence failed to establish the existence of special circumstances justifying Hernandez's refusal to accept the offer of reinstatement. In particular, the General Counsel argues that the ALJ failed to consider whether an employee would have reasonably rejected offers of reinstatement given the allegations of sexual harassment.[18] We find merit in the General

[18] The ALJ stated that that "the occurrence of sexual harassment in itself, does not justify a refusal to accept an offer of reinstatement." The ALJ cites to *Morris v.*

(Footnote continued….)

Counsel's argument. We find that the ALJ's analysis of whether it was objectively reasonable for Hernandez to reject the offer of reinstatement failed to consider the context and circumstances of the instant case; therefore, we overturn the ALJ's conclusion with respect to this issue, and find that Hernandez's rejection of the offer of reinstatement was justified.

In *Ford Motor Co. v. Equal Employment Opportunity Commission* (1982) 458 U.S. 219, the Supreme Court held that in an action under Title VII of the Civil Rights Act, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. Thus in general, the relevant period for measuring backpay liability is the time between the termination and the plaintiff's action upon an offer of reinstatement. (*Morris v. American National Can Corp.* (8th Cir. 1991) 941 F.2d 710 at 713, citing *Fiedler v. Indianhead Truck Line, Inc.* (8th Cir. 1982) 670 F.2d 806.) A plaintiff's refusal of a reinstatement offer is measured by an objective standard, and the trier of fact weighs the evidence to determine whether a reasonable person would refuse an offer of reinstatement. (*Fiedler v. Indianhead Truck Line, Inc.*, *supra*, 670 F.2d 806 at 808.)

In *Domsey Trading Corp*. (1993) 310 NLRB at 778, fn. 3, enfd. (2nd Cir. 1994) 16 F.3d 317, the board held that former strikers had legitimate reasons for declining facially valid offers of reinstatement where the record clearly disclosed that

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(Footnote continued)
American National Can Corp. (1989) 730 F.Supp.1489. We find that this statement is overbroad and we reject it.

they knew from conversations with previously recalled strikers that employer was physically and verbally harassing returning strikers. In enforcing the Board's order in *Domsey Trading Corp. v. NLRB* (1994) 16 F.3d 517, the court stated that while "generally … an employee who fails to respond to an offer of reinstatement loses his or her right to it … we believe that this rule does not apply where the record demonstrates that: (i) reinstatement would not have occurred, or would have been attended by egregiously unlawful conduct, including physical abuse; and (ii) there is evidence that some absent employees were aware of these facts."

Recently this Board held in *George Amaral Ranches, Inc.* (2014) 40 ALRB No. 10, that three unlawfully discharged employees' refusal to accept reinstatement was reasonable in light of the employer's behavior, which included attempting to unlawfully remove a union organizer from employer's property when the organizer had a legal right to be there, behaving in an angry and aggressive manner towards both the organizer and the three employees, yelling at the employees and behaving as if he might fight with one of them, making incidental physical contact with the organizer and then angrily terminating the employees while they were engaged in protected activity.

In *Maturo v. National Graphics, Inc*. (1989) 722 F.Supp. 916, cited by General Counsel in support of her exceptions, the court found that a plaintiff reasonably rejected an offer of reinstatement where the plaintiff's supervisors had displayed an utter lack of concern about the harassment she endured, and the reinstatement offer would have had plaintiff working in relatively close proximity to her assailant without any

reasonable assurance that she could trust the management to protect her from abuse or assaults. The court concluded that under the circumstances an employment relationship between plaintiff and defendants quite simply could not be reestablished.

We find that the record supports the conclusion that Hernandez's refusal to accept reinstatement was objectively reasonable under the circumstances. The ALJ pointed out that when Hernandez rejected the offer of reinstatement, she did not cite Respondent's lack of assurances that Rupy's misconduct would not happen in the future; however, we find, contrary to the ALJ, that there is ample evidence showing that Hernandez had no reasonable assurances from Respondent that the work environment had changed.[19] Given Rupy Sandhu's conduct in 2012, especially when viewed against the backdrop of his conduct in 2011, it was objectively reasonable for Hernandez to conclude that she would continue to face onerous working conditions if she returned to her job after her discharge. While Hernandez was not the sole target of Rupy's lewd comments in 2012, the record supports the conclusion that the abusive work environment continued at Sandhu Brothers in 2012.

[19] The ALJ stated, as part of his rationale for his conclusion that it was not reasonable for Hernandez to have rejected the reinstatement offer, that Hernandez would have reasonably understood that she was being discharged as a result of the workplace dispute over work assignments and payment of wages, not because she rejected sexual advances. Even though we agree with the ALJ that the record does not support a finding that Hernandez was fired because of concerted complaints about sexual harassment, we see no reason to hold that the onerous working conditions giving rise to Hernandez's refusal to accept reinstatement must correspond solely to the unfair labor practice violation in order for Hernandez's refusal to be objectively reasonable.

We reiterate that we are not making any finding that sexual harassment was the basis of an unfair labor practice in this case—nor could it be under the NLRA, the applicable precedent of which we are obliged to follow. However, in examining whether Hernandez was obliged to accept reinstatement, we will consider evidence about sexual harassment in the workplace just as we would consider evidence of any other type of onerous working conditions. The fundamental inquiry must focus upon the objective establishment of such acceptable non-onerous standards.[20]

When Hernandez went back to work for Respondent in the spring of 2012, she worked with Quezada for four or five days and then Rupy sent Quezada to do the planting, while Hernandez stayed under the supervision of Rupy at Crows Landing. Hernandez testified that she "was more completely alone with different people," while Rupy worked in close proximity to her, positioning himself behind her, and made unwanted comments to her such as "hi, Sweetie." (TR: Vol. I, pp. 140-141.) Before Quezada went to work in a different location, Hernandez heard Rupy tell Quezada "Your body is very nice. Come with me, let's go to the hotel. How much?" (TR: Vol. I, p. 147.) Hernandez also heard Rupy say to a new worker, Maria Hernandez, "Oh very nice, I like it." Maria told Hernandez that she did not like Rupy's comments and asked "why would he say that?" (TR: Vol. I, p. 147.) Hernandez testified that she told Rupy to stop, that he was harassing them and not respecting them again. (TR: Vol. I, p. 148.) Hernandez's co-worker Lorena Quezada, testified that Rupy made her "feel really bad,"

[20] In connection with such, see footnote 28, *infra*.

(TR: Vol. II, p. 167) and when asked why she did not go back to work for Respondent after the spring of 2012, testified that "she was afraid her husband would find out everything that had happened there." (TR: Vol. II, p. 162.) Quezada testified that Quezada also filed a complaint with the EEOC on September 14, 2012, and the parties stipulated at hearing that the EEOC case was settled. (TR: Vol. II, p. 165.)

The ALJ, in finding Hernandez's refusal to accept reinstatement was not objectively reasonable, found that Respondent made the initial offer of reinstatement relatively soon after the discharge and observed that Respondent never showed animus toward Hernandez during the course of the litigation. However, we find that the fact that the Sandhu brothers welcomed Hernandez back without showing any ill will is not indicative that Hernandez acted unreasonably in rejecting the offer, especially given the Sandhus' incredible blanket denials during the hearing. Indeed, the Sandhus' apparent "friendliness" toward Hernandez, viewed from a victim's perspective, could be considered just another part of the cycle of abuse rather than an assurance that working conditions would change. From this perspective we believe that there was no indication that this misconduct had been brought to an end given the record before us.

In *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, the court stressed the importance of evaluating sexual harassment by considering the victim's perspective rather than analyzing the facts from the alleged harasser's viewpoint, stating that "Sexual harassment is a major problem in the workplace. Adopting the victim's perspective ensures that courts will not 'sustain ingrained notions of reasonable behavior fashioned

by the offenders.'" (*Ellison v. Brady, supra*, 924 F.2d 872 at 881, citing *Lipsett v. University of Puerto Rico* (1st Cir. 1988) 864 F.2d 881 at 898.)[21]

Thus, there was a high likelihood that Hernandez, if reinstated, would have continued to work in relatively close proximity to Rupy without any reasonable assurance that she could trust Respondent's supervisors to protect her from abuse. After weighing all of the evidence, we find that under the circumstances presented here, Hernandez was justified in rejecting the offer of reinstatement communicated to her by the ALRB field examiner; therefore, Respondent's backpay liability did not terminate on the date Hernandez rejected the offer.

4. Front Pay

We disagree with the ALJ that continued backpay after Hernandez refused to accept the offer of reinstatement (or "front pay") is not an available remedy under the ALRA, and we hold that, in addition to backpay extending from the date of Hernandez's unlawful termination until the date of this order, under the circumstances of this case, an award of "front pay" continuing beyond the date of this order is appropriate for the reasons discussed below.[22]

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[21] In the same vein, we find that it was not necessary for the General Counsel to prove with testimony by a medical expert, that Hernandez's health would be endangered by returning to the workplace.

[22] The ALJ stated that "[n]either our Board, nor the NLRB, has ever awarded front pay." The type of "front pay" to which the ALJ intended to refer is not entirely clear from his decision. His decision indicates that, had he concluded that Hernandez's refusal to accept Respondent's offer of reinstatement was reasonable, back pay would not have been terminated and would have continued, suggesting that he did not view such an award as being beyond his authority. Furthermore, it is unlikely that he viewed an award

(Footnote continued….)

The NLRB's General Counsel has indicated that while front pay is not a replacement for the standard remedy of reinstatement, there are limited areas where it would be appropriate to seek front pay in lieu of reinstatement as a remedy. (See General Counsel Guideline Memorandum Concerning Front Pay, 2000 NLRB GCM LEXIS 75.) In *Pollard v. E.I. Du Pont De Nemours & Co.* (2001) 532 U.S. 843, the U.S. Supreme Court noted that the NLRB has consistently made awards of what it had called "back pay" up to the date the employee was reinstated or returned to the position he should have been in had the NLRA violation not occurred even if such event occurred after judgment. (*Pollard v. E.I. Du Pont De Nemours & Co., supra,* 532 U.S. 843, 849, citing *Nathanson v. NLRB* (1952) 344 U.S. 25; *NLRB v. Reeves Broadcasting & Development Corp*. (1964) 336 F.2d 590; *NLRB v. Hill & Hill Truck Line, Inc*. (1959) 266 F.2d 883; *Berger Polishing, Inc*. (1964) 147 NLRB 21; *Lock Joint Pipe Co*. (1963) 141 NLRB 943.) The Court went on to explain that front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. For example, in situations where, when an appropriate position is not immediately available

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(Footnote continued)
of back pay continuing beyond the date of judgment as being beyond his authority as the availability of such remedy is well-established. (*Pollard v. E.I. Du Pont De Nemours & Co., supra*, 532 U.S. 843, 849; *Oasis Ranch Management, Inc.* (1995) 21 ALRB No. 11, p. 11 (ordering that "backpay shall continue to accrue until . . . reinstatement."); *Valley Farming Co.* (1994) 20 ALRB No. 4, p. 8; *Mario Saikhon, Inc.* (1991) 17 ALRB No. 10, pp. 2-3.) To the extent that the ALJ was intending to refer to front pay in lieu of reinstatement, it is true that such a remedy has never yet been awarded by our Board or the NLRB. (See *HTH Corporation dba Pacific Beach Hotel* (2014) 361 NLRB No. 65, p. 51 ("the Board has never awarded front pay in lieu of reinstatement to a victim of unlawful discrimination under the Act . . .").)

without displacing an incumbent employee, courts have ordered reinstatement upon the opening of the appropriate position and have ordered front pay to be paid until reinstatement occurs.[23] (*Pollard v. E.I. Du Pont De Nemours & Co., supra,* 532 U.S. 843, 846 citing *Walsdorf v. Board of Comm'rs,* (1988) 857 F.2d 1047; *King v. Staley* (1988) 849 F.2d 1143.) Also, in cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement. (*Pollard v. E.I. Du Pont De Nemours & Co., supra,* 532 U.S. 843, 846 citing *Gotthardt v. National R. R. Passenger Corp*. (1999) 191 F.3d 1148; *Fitzgerald v. Sirloin Stockade, Inc*. (1980) 624 F.2d 945.) Arbitrators have also awarded front pay. (See, e.g., *Safeway Stores, Inc. and Retail Clerks Union Local 775,* 64 Lab. Arb. Rep. (BNA) 563 (Gould, Arb. 1974), providing pay in lieu of reinstatement.)

More recently, under other statutes modeled on the NLRA, such as Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act, courts have awarded front pay under circumstances where reinstatement was not feasible. For example, front pay may be appropriate where an employer's extreme hostility renders a

[23] The lead cases establishing this proposition in the employment discrimination arena prior to *Pollard* are *United States v. Georgia Power Co*. (1971) 1971 WL 162, and *Stamps v. Detroit Edison Co.*, (1973) 365 F.Supp. 87, revd. in part on other grounds, *EEOC v. Detroit Edison Co*. (1975) 515 F.2d 301. Chairman Gould was lead counsel for private plaintiffs in the *Stamps* case. These cases provided front pay until the employee was offered his or her rightful place in the job progression ladder that would have been obtained in the absence of prohibited discrimination.

productive and amicable working relationship impossible, or "if the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit." (*Abuan v. Level 3 Communications, Inc*. (2003) 353 F.3d 1158, 1176, quoting *Anderson v. Phillips Petroleum Co.* (1988) 861 F.2d 631 at 638.) "Under such circumstances, an award of future damages in lieu of reinstatement furthers the remedial purposes of the [statute] by assuring that the aggrieved party is returned as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct." (*EEOC v. Prudential Fed. Sav. & Loan Ass'n* (1985) 763 F.2d 1166, 1173.) "If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return." (*Ibid*.)

Recently, the NLRB addressed the option of front pay in lieu of reinstatement in a case where the NLRB observed that there was a "serious question" under the circumstances of the case as to whether reinstatement would make a discriminatee whole. (*HTH Corporation dba Pacific Beach Hotel* (2014) 361 NLRB No. 65.) In that case, the discriminatee was discharged unlawfully, *twice*, and had been subject to multiple instances of retaliation for supporting a union.[24] While the NLRB ultimately decided to defer consideration of its authority to award front pay in lieu of reinstatement, the NLRB indicated that such an award could be appropriate in future

[24] The NLRB noted that evidence suggests that reinstatement has proven an ineffective remedy for employees discharged for union activity in violation of section 8(a)(3) of the NLRA. (See West, *The Case Against Reinstatement in Wrongful Discharge* (1988) U. Ill. L.Rev. 1, 29-31 and fns. 138-141.)

cases, and noted that front pay in lieu of reinstatement is currently being included in NLRB settlements.[25]

We find that the NLRB's decision in *HTH Corporation dba Pacific Beach Hotel, supra,* 361 NLRB No. 65, and the U.S. Supreme Court's decision in *Pollard* provide strong support for finding that an award of front pay in lieu of reinstatement falls within the Board's broad remedial authority.[26] In the instant case, Hernandez was justified in rejecting Respondent's offer of reinstatement. Had Hernandez returned to the Sandhu Bros. operation when the initial offer of reinstatement was made, there was no reasonable assurance that she could trust Respondent's supervisors to protect her from sexual harassment. Thus, Respondent's financial liability has not yet terminated, and Hernandez is entitled to backpay and front pay under the remedial provisions of section 1160.3 of the ALRA.[27] Accordingly, we award backpay from the date of Hernandez's

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[25] See General Counsel Memorandum Concerning the Inclusion of Front Pay in Board Settlements (GC 13-02, dated January 9, 2013), in which the Acting General Counsel of the NLRB modified then existing policies to permit the inclusion of front pay in NLRB settlement agreements.

[26] The Supreme Court has recognized that the NLRB's remedial power is broad and discretionary. (*NLRB v. Seven-Up Bottling Co. of Miami* (1953) 344 U.S. 344, 346; *NLRB v. J.H. Rutter-Rex Mfg. Co*. (1969) 396 U.S. 258, 262-263.) At this stage in the proceeding, it is not necessary to decide the issue of whether front pay in lieu of reinstatement would be appropriate in the event that a valid offer of reinstatement cannot be implemented.

[27] The Supreme Court upheld the statutory provision which is the antecedent of both employment discrimination law and section 1160.3 of the ALRA itself--NLRA section 10(c)--in *NLRB v. Jones & Laughlin Steel Corp., supra,* 301 U.S. 1, noted above in footnote 4. Again, in *Jones & Laughlin*, the Court found the statutory authority of the NLRB to be akin to or a modern version of equitable relief. In *Nathanson v. NLRB* (1952) 344 U.S. 25, 29-30, the Court acknowledged that back pay amounts are often

(Footnote continued….)

discharge to the date of judgment in this matter, and we award front pay for Hernandez's lost compensation during the period between judgment and the time that Respondent makes a valid offer of reinstatement which assures there are no continued onerous working conditions at Respondent's operations.[28] [29]

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Gurinder S. Sandhu dba Sandhu Brothers Poultry and Farming, a sole proprietorship, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Discharging, or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

(Footnote continued)
computed after an enforcement order issues, and the Court confirmed that such awards have been consistently made by the NLRB in applying section 10(c) in *Pollard v. E.I. Du Pont De Nemours & Co., supra*, 532 U.S. 843, 849.

[28] The Board has the authority to enter into cooperative arrangements with federal and state agencies such as the EEOC and DEFH, and is exploring such to facilitate the adoption of effective standards as to what constitutes onerous working conditions in the compliance phase of this case on the basis of the expertise of such agencies in the sexual harassment arena. In addition, those agencies may utilize their expertise to remedy such conditions where they are found to exist.

[29] The award is, of course, subject to Hernandez's duty to mitigate damages, e.g. *Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177, 197-200; *NLRB v. Seven-Up Bottling Co., supra*, 344 U.S. 344, 346; *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726.

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

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

(a) Rescind the discharge of Elvia Hernandez Palacios and offer Elvia Hernandez Palacios employment in the job classification in which she was most recently employed by Respondent, or, if her position no longer exists, to substantially equivalent employment, without prejudice to her seniority and other rights and privileges of employment. The offer of employment is not valid until Respondent can make assurances that onerous working conditions—including a sexually abusive environment—no longer exist.

(b) Expunge any discharge notice issued to Elvia Hernandez Palacios from her personnel file.

(c) Make whole Elvia Hernandez Palacios for all wages or other economic losses she suffered as a result of her unlawful discharge, to be determined in accordance with established Board precedent and the above Decision. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge up to the date Respondent makes a valid offer of reinstatement as described in section 2 (a) above. The award shall also include interest to be

determined in accordance with *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21.

(d) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning May 12, 2012, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(e) 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.

(f) 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional

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

(h) 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 May 12, 2012 to May 11, 2013, at their last known addresses.

(i) 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.

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

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Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

DATED: November 17, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia 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 Elvia Hemandez Palacios, because she concertedly protested her conditions of employment.

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

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

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

Because you have these rights, we promise that:

WE WILL NOT discharge, or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment.

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

WE WILL offer Elvia Hernandez Palacios immediate reinstatement to her former position of employment and will make her whole for any loss in wages and other economic benefits she suffered as the result of her unlawful discharge.

DATED: _____

SANDHU BROTHERS POULTRY
AND FARMING

By: _____
(Representative), (Title)

If you have questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1642 W. Walnut Ave., Visalia, California. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

GURINDER S. SANDHU dba SANDHU BROS. POULTRY & FARMING
(Elvia Hernandez)

40 ALRB No. 12
Case No. 2012-CE-010-VIS

This case arises from an unfair labor practice (ULP) charge filed on May 25, 2012, by Elvia Hernandez (Hernandez) alleging that Respondent, Sandhu Bros. Poultry & Farming violated the Agricultural Labor Relations Act (ALRA) by firing her on May 12, 2012, for engaging in protected concerted activity.

Administrative Law Judge (ALJ) Decision

The ALJ found that Hernandez engaged in protected concerted activity when she and other workers protested a change in work assignments and complained about accompanying issues such as payment for wait time and the untimely distribution of paychecks. The ALJ concluded that when Hernandez became very vocal about these issues, Respondent's supervisor, Kelly Sandhu, discharged her in retaliation for her protests. Although there was testimony at the hearing in this matter that Hernandez and several of her co-workers complained during the 2011 harvest season about sexual harassment by another supervisor, Rupy Sandhu, the ALJ ultimately did not reach any conclusion about whether the alleged sexual harassment had taken place because he found that the General Counsel failed to offer evidence that Hernandez's 2011 sexual harassment complaints were a motivating factor in her 2012 discharge. With respect to the remedy for the unlawful discharge, the ALJ found that Respondent had made a valid offer of reinstatement to Hernandez, and that the General Counsel did not meet her burden of showing that there were special circumstances which made it objectively reasonable for Hernandez to reject the offer of reinstatement. Thus, the ALJ found that Respondent's backpay liability terminated on the date Hernandez rejected the offer of reinstatement. In discussing the remedy, the ALJ noted that continued backpay after a refusal to accept an offer of reinstatement is often referred to as "front pay" and that neither the ALRB nor the National Labor Relations Board (NLRB) has ever awarded front pay because it is "probably" not statutorily authorized. Finally, the ALJ rejected the sexual harassment training remedy sought by the General Counsel because this remedy was beyond the scope of the Board's statutory mandate.

Board Decision and Order

The Board affirmed in part and overturned in part the decision of the ALJ. The Board affirmed the ALJ's conclusion that Kelly Sandhu fired Hernandez in retaliation for her protected concerted conduct on May 12, 2012. While the Board affirmed the conclusion that the record did not support a finding that Hernandez's complaints about sexual

harassment made in 2011 were a basis for the unfair labor practice violation in 2012, the Board explained that Hernandez's sexual harassment complaints were protected concerted activity. Citing the recent decision by the NLRB, *Fresh and Easy Neighborhood Market, Inc*. (2014) 361 NLRB No. 12, the Board found there was ample evidence that in 2011, Hernandez was engaged in concerted activity for the purpose of mutual aid and protection, and the Board emphasized that its discussion set forth the correct standard for evaluating in the future whether complaints about sexual harassment are protected concerted activity under the ALRA.

The Board affirmed the ALJ's conclusion that Respondent's offer of reinstatement was sufficient and was conveyed to Hernandez; however, the Board found that Hernandez's rejection of the offer of reinstatement was objectively reasonable under the circumstances, because the record supported the conclusion that there was a high likelihood that Hernandez, if reinstated, would have to work in close proximity to Rupy Sandhu without any reasonable assurance that she could trust Respondent to protect her from abuse. Therefore, the Board found that Respondent's backpay liability did not terminate on the date Hernandez rejected the offer of reinstatement. The Board disagreed with the ALJ that continued backpay after Hernandez refused to accept the offer reinstatement (or "front pay") is not an available remedy under the ALRA, and the Board held that, in addition to backpay extending from the date of Hernandez's unlawful termination until the date of the Board's order, under the circumstances of this case, an award of "front pay" continuing during the period between the Board's order and the time that Respondent makes a valid offer of reinstatement which assures there are no continued onerous working conditions at Respondent's operations was appropriate.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GURINDER S. SANDHU dba SANDHU BROTHERS POULTRY & FARMING, Respondent, and ELVIA HERNANDEZ, Charging Party.	Case No. 2012-CE-010-VIS

Appearances:

Alegria De La Cruz
Vivian Velasco-Paz
Salinas ALRB Regional Office
For General Counsel

Armand George Skol
Helen Mays
Arata, Swingle, Sodhi & Van Egmond
Modesto, California
For Respondent

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Modesto, California on November 19-22 and 25, 2013. The case is based on a charge filed by Elvia Hernandez Palacios (Hernandez), alleging that Gurinder S. Sandhu dba Sandhu Brothers Poultry and Farming (hereinafter Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act or ALRA) by discharging Hernandez, in retaliation for her protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint and amended complaint (hereinafter complaint) alleging said violation. Respondent filed answers denying the commission of unfair labor practices, and asserting affirmative defenses. The Charging Party appeared at the hearing, but did not intervene. On January 30, 2014, General Counsel and Respondent submitted post-hearing briefs, which have been carefully considered.[1]

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and other arguments made by counsel,[2] I make the following findings of fact and conclusions of law.

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[1] The motion of Respondent's counsel to submit his declaration and attachments as a late exhibit, contained in the brief, is denied as unnecessary.

[2] In her closing oral argument, Regional Director De La Cruz made the following statement:

> Elvia shared her pain and frustration of trying her best to explain the frustration of being here (sic). And this, her moment of justice, and your Honor, you did not allow her to express that in her moment of justice. You allowed the Sandhu's contempt for her feelings to continue.
>
> Workers' testimony about what they witnessed to explain why they join (sic) their co-workers was wrongly prohibited at this hearing, and the result (sic), they were silenced. They were ignored. They were stricken from the record. (sic)

In fact, Ms. Hernandez was permitted to testify on virtually every topic General Counsel wished to explore, for one and one-half days of the hearing. The undersigned did limit some testimony by General Counsel's corroborating witnesses, as part of the case in chief. General Counsel's representatives were advised that if they wished to present additional evidence regarding the working conditions in Respondent's fields, they could call them as rebuttal

FINDINGS OF FACT

Jurisdiction

The charge was filed and served in a timely manner. Respondent grows produce, including sweet potatoes, on leased properties in central California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. While employed by Respondent, Elvia Hernandez was an agricultural employee within the meaning of section 1140.4(b). It is undisputed that at all times material to this case Kulbir (Kelly) Sandhu and Bhupinder (Rupy) Sandhu were supervisors of Respondent within the meaning of section 1140.4(j).

The Alleged Unfair Labor Practice

Elvia Hernandez was hired by Respondent to work as a harvester in late September 2011. She was paid the hourly minimum wage. Hernandez had previously taken courses in labor and employment law, and was familiar with, and trained others, in such areas as the operations of OSHA, health and wage laws, and sexual harassment. Hernandez was laid off after about one month.

Hernandez was rehired on April 18, 2012. She worked in root preparation, hoeing and packing. Her last day of work was May 12, a Saturday, which was supposed to be the workers' payday.

Hernandez testified that on May 12, she and other workers arrived at a field near Crows Landing, California, as they had been directed the day before. Well after their

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witnesses, and the undersigned would permit the testimony, if relevant. They chose not to do this. With respect to striking witness testimony, the undersigned struck two statements by a witness, on motions by Respondent, because they were not responsive to the questions asked. TR Vol. III, at pages 117 and 130-133. Those rulings stand. The above-cited portion of the closing argument is stricken from the record.

scheduled starting time, Kelly Sandhu arrived, and went into the office. The workers asked a co-worker with some bilingual skills, Nereda Villa, what was going on, but she replied that she did not make decisions, and did not know. Kelly Sandhu later joined the group, and Hernandez and the other workers asked why they had not started working. Sandhu replied he did not know, and was waiting for Rupy Sandhu to contact him.

According to Hernandez, the workers complained that they had arrived at the time they were supposed to, and were not being paid. She told Kelly Sandhu Respondent would have to pay them for the time they were there. Sandhu then stood aside from the group. Apparently, Rupy Sandhu contacted Kelly Sandhu, who then returned, telling the workers to gather their belongings, because they were moving to a field near Atwater, about a 45-minute drive. This was particularly exacerbating, because several of the workers lived in, or near Atwater, and had just driven from there to the field near Crows Landing.

Hernandez testified that all of the workers complained about having to drive to the Atwater-area field. She approached Sandhu and told him she was not going to Atwater, because she had no money for gas, and Respondent had not paid her. Sandhu offered to drive her to the other field, but Hernandez declined, telling him she had driven her car there, and needed money for gasoline and lunch. Other workers voiced their agreement with Hernandez.

According to Hernandez, Kelly Sandhu told the workers they would have to return to the Crows Landing-area field to pick up their paychecks, further upsetting them. Sandhu told the workers they did not have to return from Atwater, but if they did not,

they would not receive their paychecks until the following Monday. Hernandez, raising her voice, told Sandhu to pay them now. In response, Sandhu told Hernandez that she knew too much and was going to cause other workers to complain, so there was no more work for her. Hernandez testified that Sandhu said this in Spanish.

Hernandez became upset and, raising her voice further, told Sandhu he was firing her because she knew her rights, and demanded to be paid. Sandhu told her that someone would arrive later with her paycheck. Other workers asked if Respondent would retaliate against them if they did not work at the other field. Sandhu said no, but those who went there would only begin getting paid when they arrived. Hernandez decided to wait for the office to open, so she could get her paycheck. She also told some of her co-workers she was going to call the police. At that point, the workers still at the field told her they were going home, and would return later. Hernandez waited about an hour, and since there was still no one in the office, she then left.

Eliodoro Rivas Saavedra (Rivas) was a co-worker of Hernandez. Rivas was not employed by Respondent as of the hearing, but hoped to obtain seasonal employment with it in the future. Rivas testified that one of the Sandhu brothers[3] told the crew, at the field near Crows Landing, that they would have to move to the field near Atwater. The workers complained about this, and then, Sandhu and Hernandez became involved in an argument. Rivas heard Sandhu tell Hernandez that she caused too many problems, and there was no more work for her, or words to that effect. Rivas initially testified that he

[3] Rivas identified Gurinder Sandhu as the brother who told the crew to move to the other field. Gurinder and Kelly Sandhu are similar enough in appearance to conclude that Rivas was mistaken in his identification and, in fact, his testimony pertained to Kelly Sandhu.

did not know if Sandhu said this in English, but then stated he did. After the other workers had left, Rivas spoke to Hernandez, who told him she was going home, because she had been fired. Rivas wished her good luck in the future.

Lorena L. Quezada de Raymundo (Quezada), a co-worker and friend, testified that Elvia Hernandez called her and said Kelly Sandhu fired her that day from her position with Respondent. Hernandez believed Rupy Sandhu had told Kelly Sandhu to discharge her, but there is no evidence this took place.[4] Jess Adan Hernandez, Elvia Hernandez's brother, also testified that Hernandez told him she had been fired from her job, because she demanded money owed to her by Respondent.[5]

Kelly Sandhu testified he arrived at the Crows Landing area field at about 6:00 a.m. and told Nereda Villa that Rupy Sandhu had called him, stating there would be no work there, but to tell the employees there was work at the Atwater area field. According to Sandhu, he did not even leave his truck when he spoke with Villa. Sandhu testified he left for Atwater at that point, and did not return that day. He denied speaking with any other worker at Crows Landing. Sandhu further denied he had the authority to hire or discharge workers, or that he ever did this.[6] Sandhu denied that Elvia Hernandez ever complained to him about any working condition or, for that matter, that he had ever spoken to her.

[4] As noted above, Kelly Sandhu spoke with his brother prior to the workers being informed they would have to move to the other field, and before the alleged argument involving Hernandez ensued. Thus, it is highly unlikely that Rupy Sandhu would have told his brother to discharge Hernandez.

[5] Jess Hernandez also testified he believes his sister continued working for Respondent after the incident where the workers were told to drive to the Atwater-area field. Although this is clearly incorrect, the undersigned does not believe this impacts on the credibility of his testimony, that she informed him Respondent had discharged her.

[6] In its answer to the amended complaint, Respondent admitted that Kelly Sandhu was a statutory supervisor.

There was extensive testimony at the hearing that Hernandez and other workers complained to both Rupy and Kelly Sandhu about a number of perceived undesirable working conditions. These included allegations of sexual harassment by Rupy Sandhu and a nonsupervisory employee; dirty drinking water; portable toilets that were dirty, had no toilet paper and were positioned far from where the work was being performed; late and underpayment of wages; and having to wait, without pay, for substantial periods of time, to be paid. It is undisputed that Hernandez, in 2011, sent her brother to speak with Rupy Sandhu about alleged sexual harassment,[7] that Quezada filed a complaint against Respondent for this, and that Hernandez filed a wage complaint with the Labor Commissioner's office, after May 12.

Nereda Villa testified that on May 12, 2012, Kelly Sandhu arrived at the field near Crows Landing and told her that, due to an equipment malfunction, there would be no work there that day, but to tell the workers they could go to the Atwater-area field to hoe, if they did not wish to miss a day of work. She told the workers this, and Elvia Hernandez asked if they were going to be paid for show-up time and gas money for the trip to the Atwater area. According to Villa, she told Hernandez the workers would be paid show-up time, but not for gas. Villa did not explain how she knew this.

[7] No conclusions are reached as to whether any sexual harassment took place, or if so, who engaged in such conduct, or the extent thereof. It is noted, however, that although Hernandez testified at length concerning gross, repeated misconduct by Rupy Sandhu, her brother, after prefacing his testimony by stating she had complained about a couple of workers, who he did not identify, only discussed the alleged misconduct by Hernandez's co-worker with Rupy Sandhu. Jess Hernandez did not testify that he told Rupy Sandhu his sister had complained about sexual harassment by him. Sandhu, in his testimony, agreed that Jess Hernandez only discussed the alleged misconduct by the co-worker with him.

According to Villa, Hernandez said she was not going to go to Atwater, and wanted to be paid show-up time, for her gasoline and to be given her paycheck for that week's work. Hernandez asked when the office would be open, and Villa told her what her understanding was on that. Villa denied that Kelly Sandhu was present during this meeting.

Villa gave conflicting testimony as to whether other workers complained about the change in work assignment. Villa alternately testified that many workers were "talking" when she informed them of the change in work location, then denied that anyone else complained, and then admitted she had previously told Board agents that other workers complained about the lost work time and travel expense. Villa further admitted that Eliodoro Rivas also refused to move to the Atwater-area field.

Virginia Barrios testified that she was employed by Respondent, and reported to the Crows Landing area field on May 12. "The Employer," arrived and spoke with Nereda Villa. According to Barrios, all of the workers heard him "authorize" Villa to tell them to change work locations. At the same time, Barrios contended Sandhu never left his truck.

Barrios testified that Villa subsequently spoke with the workers, and told them they were to report to the Atwater-area field. Elvia Hernandez became "hysterical" and demanded she be paid for her gas. According to Barrios, none of the Sandhu brothers was present during this meeting, and no one told Hernandez she was discharged. She also testified that Hernandez was the only worker who refused to travel to the other field.

Barrios denied discussing this case with Respondent's attorney or paralegal prior to testifying, while Respondent's other witnesses, if asked, acknowledged such discussions.

Maria DeLourdes Espinoza testified that she was employed by Respondent, and reported to the Crows Landing-area field for work on May 12. Contradicting the other witnesses, Espinoza testified a crew worked at that field until about 9:00 a.m., at which point, Kelly Sandhu arrived and spoke with Nereda Villa. Villa then told the workers that "the plants had finished," and they needed to transfer to Atwater.

Espinoza denied being told that the move was necessitated by a mechanical breakdown. According to her, there had been a mechanical breakdown earlier that day, but it had been resolved. Espinoza testified that Hernandez told Villa she was not going to go, because it was too far away. Espinoza initially claimed that no one else voiced any concerns about the change in work location, but after repeated questions on cross examination, acknowledged that some of the workers did not agree with this decision.

Elvia Hernandez and Kelly Sandhu are clearly interested parties in this case. Hernandez's testimony, that she was discharged on that date was circumstantially corroborated by other witnesses, who credibly testified she told them this had taken place. As will be discussed below, Hernandez candidly admitted she was advised, after her discharge, that Respondent had offered to reinstate her. Hernandez, who is knowledgeable in labor and employment law, must have realized that this testimony was against her financial interest.

On the other hand, Sandhu's testimony, that Hernandez had never voiced complaints to him, and that they had never spoken to each other, is incredible. There is

no dispute that Hernandez complained about the work assignment on May 12, and she appeared very much the sort of individual who would complain about other work-related matters. Her testimony concerning complaints to Rupy and Kelly Sandhu was extensively corroborated, and Kelly Sandhu's blanket denials are found to be untruthful.

With respect to the other witnesses to the May 12 meeting, one may reasonably anticipate that employees are more likely to testify truthfully when they provide information harmful to their employer's interest, than when they testify in support, since they rely on the employer for their livelihood. Accordingly, the testimony of Eliodoro Rivas is particularly persuasive, because he would be unlikely to testify untruthfully, thus risking his future employment. Although Rivas and Hernandez differ as to whether Kelly Sandhu spoke in English or Spanish when he discharged Hernandez, this does not render their testimony as to the fact of the discharge incredible. In this regard, it is clear that Rivas was uncertain as to which language Sandhu used.

On the other hand, the undersigned has problems with the credibility of Respondent's three corroborating witnesses. Nereda Villa was evasive and inconsistent in her testimony concerning the complaints of the other workers present. Her testimony concerning responses she allegedly made to Hernandez's inquiries concerning show-up pay and gasoline expenses is highly suspect, since it is unlikely that Kelly Sandhu would have given her any directions concerning such unanticipated issues.

It is also unlikely that no other worker would have expressed any discontent about the changed work assignment, as contended by Virginia Barrios and, until repeatedly prodded, Maria Espinoza. It is also unlikely that "all" of the workers would have heard

Sandhu "authorize" Villa to speak with the workers, as contended by Barrios, or if he spoke to Villa in the fields, as contended by Espinoza, if he never left his truck. In addition, contrary to other witnesses called to testify by Respondent, Barrios unconvincingly denied that Respondent prepared her prior to her testimony.

Considering all of the above factors, it is concluded that when Kelly Sandhu informed the workers, on May 12, that they would have to travel to the Atwater-area field, Hernandez and other employees complained about the change in work assignments, and associated issues. When Hernandez persisted, refusing to go and loudly demanding her paycheck, Sandhu discharged her.

Respondent's Offers of Reinstatement

Respondent cooperated in the investigation of this charge, and permitted Assistant General Counsel, Francisco T. Aceron, Jr. and Field Examiner, Irma Luna to interview its witnesses, on June 21, 2012.[8] Rupy Sandhu, corroborated by paralegal, Helen Mays, testified that he told Aceron and Luna that Hernandez was welcome to return to her job. At the time, Respondent did not know Hernandez's address. General Counsel called Aceron as a witness and, although not specifically corroborating Respondent's witnesses, admitted that Respondent's representative denied Hernandez had been discharged, and

[8] Regional Director De La Cruz stated, at the hearing, that this Agency's policy is to not take sworn declarations from witnesses furnished by cooperating charged parties, during Board investigations. No reason was given for such policy, and it is contrary to the practice by the National Labor Relations Board (NLRB). Instead, the Board agents took notes of what Respondent's witnesses said during their interviews, and counsel then attempted to impeach their testimony, relying on the notes. It is certainly easier and more convincing to impeach a witness by showing inconsistent statements made in a sworn statement he or she has executed. In the absence of a written declaration, General Counsel has seen the need to call Board agents to testify, if the witness does not agree to having made the prior statement to them. The NLRB's General Counsel avoids calling Board agents as witnesses, because it gives the impression that it is acting in a partisan manner, rather than impartially enforcing the law. *Frank Invaldi*, et al. (1991) 305 NLRB 493 [138 LRRM 1306].

told the Board representatives she had her job. The undersigned found Mays to be a very convincing witness, and based on this, and subsequent events consistent with the making of an offer, it is found that Respondent informed the agents that Hernandez was welcome to return to her job.

On June 25, one of Respondent's attorneys sent a letter to Aceron, stating, inter alia:

> As previously stated at the meeting held in our office on June 21, 2012, my client has no objection with Ms. Hernandez returning to work when the opportunity arises.

Respondent also requested that Aceron provide it with Hernandez's address. There is no evidence that Hernandez was made aware of the contents of this letter.

Rather, Hernandez testified that a Board agent informed her that she was welcome to return to her position with Respondent.[9] In response to a question from the undersigned, Hernandez stated that no Board agent advised her whether or not to accept the offer. After this clear acknowledgement by Hernandez, General Counsel elicited testimony from Aceron, contending that the Agency's "practice" is *not* to inform alleged discriminatees that they have been offered back their jobs, and denying that Respondent's offer was related to Hernandez. It is clear to the undersigned that Aceron had little recall concerning these events, and presented an insufficient foundation concerning the alleged Agency "practice." In any event, Hernandez indicated it was Irma Luna who related the

[9] On direct examination, Hernandez began testifying that Irma Luna informed her of the offer, but Regional Director De La Cruz cut her off. TR Vol. I, at pages163-164. De La Cruz then elicited misleading testimony from Hernandez, that no one *from Respondent* had offered her reinstatement, implying no offer was made at all.

offer to her, so it may be that Aceron was unaware this had occurred.[10] Hernandez's testimony on this point is credited. In explaining why she would not return to work for Respondent, Hernandez stated:

> I felt very frustrated and I had a lot of anger because for the time I missed my pay. I did not attend to my son during that period of time. Because of the stress and all of that I ended up going to the emergency because of all the helplessness that I was feeling during the situation.

Hernandez obtained other employment shortly after being discharged.

Neither Hernandez, nor anyone from the ALRB informed Respondent that Hernandez had refused its offers of reinstatement, objected to the form or contents of the offers, or had any questions concerning reinstatement. Instead, about one week prior to this hearing, General Counsel issued a specification seeking over $19,000 in backpay and interest, and continuing. General Counsel now contends that the offers of reinstatement were insufficient. General Counsel moved to bifurcate the backpay hearing when Respondent attempted to question Hernandez as to her work authorization.[11] The motion was granted.

Respondent again offered Hernandez reinstatement while she was testifying. At the request of General Counsel, the undersigned granted Hernandez two weeks to make up her mind. The undersigned requested that the parties advise him of the status of the

[10] General Counsel also called Luna to testify. At the outset of cross-examination, Respondent requested a copy of Luna's notes, which she reviewed, in preparing to testify. General Counsel opposed the request, based on "Agency privilege." The undersigned offered to conduct an in camera inspection of the notes, in order to rule on the objection. Counsel refused to produce the notes for inspection and, instead, moved to withdraw Luna's testimony. The motion was granted.

[11] Regional Director De La Cruz threatened Respondent with unspecified reprisals if it pursued that line of questioning. TR Vol. II, at page 61. The undersigned assumes she was referring to sanctions for allegedly failing to document the work authorizations for its employees.

offer. In her brief, General Counsel stated that Hernandez had rejected the offer of reinstatement, and attached a letter from Hernandez to Respondent, dated December 12, 2013. Inasmuch as the letter was not authenticated, constitutes hearsay and Respondent did not have the opportunity to cross-examine Hernandez on the contents thereof, it will not be considered in this Decision.

ANALYSIS AND CONCLUSIONS OF LAW

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

In order to be protected, employee action must be concerted, in cases not involving union activity. This generally means the employee must act in concert with, or on behalf of others. Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work, arising from employment-related disputes are protected activities. *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987)

835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41. The merits of the work-related complaints 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.[12]

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 the employer suspected this; 2) that the employer had knowledge (or a suspicion) of the concerted nature of the activity; and 3) that a motive for the adverse action taken by the employer was the protected concerted activity. *Meyers Industries, Inc., supra; Gourmet Farms, Inc., supra; Reef Industries, Inc.* (1990) 300 NLRB 956 [136 LRRM 1352]. Unlawful motive may be established by direct or circumstantial evidence. Direct evidence would include statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the activity is an important circumstantial consideration. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment; interrogations, threats and promises of benefits directed toward the protected activity; the failure to follow established rules or procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; false or inconsistent reasons given for the adverse action; the absence of prior warnings and the

[12] 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.

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. If the reasons given are pretextual, the inquiry into the employer's defense ends there. *J & L Farms*, supra; *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169].

The credited evidence establishes that Elvia Hernandez protested the change in work assignments and accompanying issues, such as whether they would be paid for the time spent at the Crows Landing area field, gasoline expenses for driving to Atwater and when they would receive their paychecks. These are all employment-related matters, so the activity was protected under section 1152. Since other workers joined in at least some of this activity, it was concerted. When Hernandez became more vocal in protesting these issues, Kelly Sandhu discharged her, and she did not quit, as contended by Respondent. Therefore, Respondent, by its conduct, violated section 1153(a).

THE REMEDY

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

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

It is concluded that Respondent made a valid offer of reinstatement for Hernandez, at the investigatory meeting on June 21, 2012, which she rejected, when the ALRB agent informed her thereof. It is Respondent's burden to establish that it made an unconditional offer of reinstatement, so as to terminate backpay liability. The offer may be oral or written, but must be specific and unconditional. *Hoffman Plastic Compounds, Inc.* (1994) 314 NLRB 683 [146 LRRM 1287]. By specific, the offer must be for the same, or substantially equivalent employment the discriminatee previously held, but the validity of the offer does not depend on whether it provides all of the details surrounding reinstatement, such as the return date, who to report to and rate of pay. If the discriminatee requires such additional information in order to make a decision, he or she may request that it be provided. *Beverly California Corporation*, et al. (1999) 329 NLRB 977 [167 NLRB 1155]; *Verde Produce Company, Inc.* (1984) 10 ALRB No. 35. An employee who does not respond to an unconditional offer of reinstatement may be deemed to have rejected it. *Abatti Farms, Inc., and Abatti Produce, Inc.* (1988) 14 ALRB No. 8, at page 7. There is nothing improper in making an offer of reinstatement through a Board agent, particularly where the discriminatee's address is not known. *Harry Carian, Individually, and dba Harry Carian Sales* (1989) 15 ALRB No. 14; *Thalbo Corporation*, et al. (1997) 323 NLRB 630, at page 634 [155 LRRM 1050].

On June 21, Rupy Sandhu told the Board investigators that Elvia Hernandez was welcome to return to her job, and Hernandez testified that this was the offer she was

informed of. In light of the terms used, it was unnecessary for Respondent to use the word, "unconditional," in order to validate the offer. The offer was specifically for her former position, and had no deadline for acceptance. Since Hernandez was being paid at the minimum wage, it could not have been for a lower rate. Inasmuch as the work was not performed at the same location every day, it would have been impossible for Respondent to inform Hernandez what field and supervisor to report to, because this would depend on when she wished to resume her employment.

The subsequent letter sent to Assistant General Counsel Aceron, stating that Respondent was not opposed to Hernandez returning, when the opportunity arose, taken in the context of the offer made by Sandhu, did not constitute a retraction or modification of the earlier offer. Respondent's operations are seasonal, and if no one was working in Hernandez's former position, or in substantially equivalent employment, by the time she accepted the offer, it would have been impossible to immediately reinstate her. In any event, the offer related to, and rejected by Hernandez was, simply, that she was welcome to return. Based on the foregoing, it is concluded that Respondent made a valid offer of reinstatement, which was communicated to, and rejected by Hernandez.

General Counsel alternately contends that Hernandez's backpay should not be tolled, because the allegedly abhorrent working conditions she worked under justified her refusal of Respondent's offers of reinstatement. General Counsel does not specifically state when, and under what conditions, backpay would terminate. Continued backpay after a refusal to accept an offer of employment is often referred to as "front pay."

Neither our Board, nor the NLRB, has ever awarded front pay. This is because it is probably not authorized under either of the statutes they enforce. See *International Union of Operating Engineers, Local 68, AFL-CIO (Ogden Allied Eastern States Maintenance Corp.)* (1998) 326 NLRB 1, at page 5, footnote 3 [160 LRRM 1031]. General Counsel cites *Ford Motor Co. v. Equal Employment Opportunity Commission* (1982) 458 U.S. 219 [102 S.Ct. 3057] as permitting such a remedy in cases under the ALRA. *Ford Motor Co.* was an action under the Equal Employment Opportunities Act (EEOA).[13] While the Court held that NLRB precedents guide, but do not control remedies available under the EEOA, it did not hold that the remedies available under both statutes are co-extensive. This is certainly not the case today, since the EEOA now allows for the award of compensatory and punitive damages, and attorney fees, none of which are available under the ALRA or NLRA.

Front pay is an equitable remedy. *Wells-Hingos v. The Raymond Corporation* (2004) 104 F.Appx. 773, at page 776. Section 2000e-5(g)(1) of the EEOA specifically provides that in addition to reinstatement and backpay, the trial court may award "any other equitable relief as the court deems appropriate." This language does not appear in either the ALRA or NLRA. Said omission cannot be deemed unintentional; rather, the logical interpretation is that the drafters of these acts did not intend to vest such remedial authority in the enforcing boards.

Even if front pay is authorized under the ALRA, there is a strong preference for reinstatement as a remedy for unlawful discharges and, absent special circumstances, a

[13] 42 USCS 2000e et seq.

refusal to accept a bona fide offer of employment tolls backpay. Once the employer establishes that it made the offer of employment in good faith, it is the worker's burden of proof to establish that such special circumstances existed or, in this case, the burden is on General Counsel. Whether such special circumstances exist is determined on an objective basis, and not the subjective opinions of the affected employee. The reasonableness of a refusal to accept employment is determined on the basis of the facts known to the employee at the time of the refusal. The factors that have been considered, in determining whether the refusal was reasonable, include the degree of harassment directed toward the worker, in particular, evidence that he or she was harassed into resigning; evidence, preferably by medical experts, that the worker's health would be endangered by a return to that workplace; continued hostility, berating and harassment by the employer during litigation; the promptness of the offer; and the degree to which the worker and management personnel who engaged in the harassment would have to work in a close and confidential capacity. *Miano v. AC&R Advertising, Inc.*et al. (1995) 875 F.Supp. 204; *Lewis v. Federal Prison Industries, Inc.* (1992) 953 F.2d 1277.

General Counsel does not contend that Respondent's offers of reinstatement to Hernandez were made in bad faith, and it is found that they were bona fide. On an objective basis, there is insufficient evidence to conclude that Hernandez reasonably refused to accept the offers. In this regard, the initial offers were made relatively soon after her discharge, her work performance has never been denigrated by Respondent and there is no evidence that Respondent has shown any animus toward her during the course of this litigation. Although Hernandez referred to one emergency room visit related to

work-related stress, after her discharge, and she and other witnesses referred to her upset at the treatment she was receiving, there is no expert evidence that a return to work would endanger her health.

Even assuming that the sexual harassment alleged by Hernandez actually took place, it was, for the most part, remote in time from her discharge. It is noted that in rejecting the offer, Hernandez did not cite the lack of assurances from Respondent, that such conduct would not occur in the future. The occurrence of sexual harassment, in itself, does not justify a refusal to accept an offer of reinstatement. *Morris v. American National Can Corporation* (1989) 730 F.Supp. 1489. In any event, an employee discharged under the circumstances presented herein would reasonably understand that it resulted from a workplace dispute over work assignments and remuneration, and not because she had rejected alleged sexual advances. A discharge, under these circumstances, does not present special circumstances justifying the rejection of reinstatement offers. Accordingly, Hernandez's backpay shall terminate on the date she rejected Rupy Sandhu's offer.[14]

The Board has adopted the NLRB's holding that interest on backpay awards be compounded on a daily basis, as requested by General Counsel. *H & R Gunlund Ranches, Inc.*, supra, adopting *Jackson Hospital Corporation d/b/a Kentucky River Medical Center* (2010) 356 NLRB 1 [189 LRRM 1280]. The undersigned agrees that NLRB precedent now also requires that employees be compensated for any adverse tax

[14] If the parties are unable to agree as to that date, it may be resolved in compliance proceedings, along with Respondent's inquiry into Hernandez's work authorization, should it wish to pursue that matter.

consequences resulting from a lump-sum payment of backpay. *Latino Express, Ltd.* (2012) 359 NLRB 1 [194 LRRM 1309]. Board precedent already provides for reimbursement of expenses incurred while seeking employment, also sought by General Counsel.

The complaint seeks, as a remedy, that Respondent's supervisors undergo 20 hours of training on the subject of sexual harassment. General Counsel did not discuss this requested remedy, during the hearing, or in her brief. While the Board, in some egregious cases, has ordered Agency-conducted notice readings and meetings with the employer's supervisory staff, on the subject of unfair labor practices, neither it, nor the NLRB, has ever ordered training on sexual harassment. Although the Board has wide discretion in fashioning its remedies, it is not authorized to issue orders beyond the scope of its statutory mandate. Since the prevention of sexual harassment is not within the mandate of the Act, this remedy cannot be granted. *Vincent B. Zaninovich & Sons* (2008) 34 ALRB No. 3.

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, Gurinder S. Sandhu dba Sandhu Brothers Poultry and Farming, a sole proprietorship, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Discharging, or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

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

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

   (a) Rescind the discharge of Elvia Hernandez Palacios.

   (b) Expunge any discharge notice issued to Elvia Hernandez Palacios from her personnel file.

   (c) Make whole Elvia Hernandez Palacios for all wages or other economic losses she suffered as a result of her unlawful discharge, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in accordance with *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21.

   (d) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning May 12, 2012,

preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(e) 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.

(f) 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a

reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(h) 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 May 12, 2012 to May 11, 2013, at their last known addresses.

(i) 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.

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

Dated: February 20, 2014

Douglas Gallop
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia 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 Elvia Hernandez Palacios, because she concertedly protested her conditions of employment.

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

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

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

Because you have these rights, we promise that:

WE WILL NOT discharge, or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment.

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

WE HAVE offered Elvia Hernandez Palacios immediate reinstatement to her former position of employment and will make her whole for any loss in wages and other economic benefits she suffered as the result of her unlawful discharge.

DATED: _____

SANDHU BROTHERS POULTRY AND FARMING

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 1642 W. Walnut Ave., Visalia, California. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE