

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MATSUI NURSERY, INCORPORATED,)	
)	
Respondent,)	Case No. 78-CE-70-M
)	
and)	
)	
UNITED FARM WORKERS OF)	5 ALRB No. 60
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

On April 12, 1979, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions and a supporting brief, and Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,^{1/} and conclusions of the ALO and to adopt his recommended Order.

ORDER

Pursuant to Section 116Q.3 of the Agricultural Labor

^{1/}However, we reject the ALO's suggestion that an alleged discriminatee's role in protected concerted activity must be an active or vocal one to support a conclusion that his discharge violated Section 1153(a) of the Act.

Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: October 1, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Matsui Nursery, Incorporated (UFW)

5 ALRB No. 60

Case No. 78-CE-70-M

ALO DECISION

The ALO recommended dismissal of the complaint, finding that the General Counsel did not prove by a preponderance of the evidence that Respondent unlawfully discharged Daniel Mendoza for participating in protected concerted activity. Rather, the ALO credited Respondent's witnesses, and concluded that Respondent discharged Mendoza for cause, unsatisfactory performance.

BOARD DECISION

The Board adopted the ALO's rulings, findings, and conclusions, but rejected his suggestion that the General Counsel must prove that an employee was discharged because of active or vocal participation in protected concerted activity in order to establish a violation of Section 1153(a). The Board dismissed the complaint in its entirety.

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

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STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD



MATSUI NURSERY, INC. ,)

Respondent,)

and)

UNITED FARM WORKERS OF AMERICA, AFL-CIO,)

Charging Party,)

Case No. 78-CE-70-M

James Flynn, Esquire, for the
General Counsel;

Bronson, Bronson & McKinnon by
Frederick Morgan, for the "Respondent"^{1/}

BEFORE: Matthew Goldberg, Administrative
Law Officer

DECISION OF THE
ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

On May 31, 1978, the United Farm Workers of America, AFL-CIO (hereafter referred to as "UFW") filed a charge in the instant case alleging that Matsui Nursery, Inc. (hereafter referred to as "Respondent") discharged employee Daniel, Mendoza in violation of Section 1153(a) of the Act. Said charge was served on Respondent on

^{1/}The Charging Party did not enter an appearance in the Case.

the same date.

Based on this charge, the General Counsel for the Board Issued a complaint on January 17, 1979, alleging the aforementioned violations of the Act.^{2/} On January 26, 1979, Respondent filed an answer, denying, in substance, that it committed the unfair labor practices alleged.

A hearing was held in the matter before me in Salinas on March 5 and 6, 1979. The General Counsel and the Respondent appeared through their respective counsels, and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, and to submit oral arguments and briefs.

Upon the entire record in this case, from my observations of the demeanor of the witnesses, and having read and considered the briefs submitted subsequent to the hearing, I make the following:

FINDINGS OF FACT

I- Jurisdiction Of The Board

A. The Respondent is and was at all times material an agricultural employer within the meaning of §1140.4(c) of the Act.

B. The Union is and was at all times material a labor organization within the meaning of §1140.4(f) of the Act.

C. The alleged discriminatee, Daniel Mendoza, was at all times material an agricultural employee within the meaning of §1140.4(b) of the Act.^{3/}

II. The Unfair Labor Practice Alleged

A. The Business Of Respondent.

Respondent is a California corporation operating a nursery over some 50 acres in Salinas, California. The nursery is engaged in the propagation, packing and shipment for sale of two flower crops: chrysanthemums and roses. Around the time of the events in question, however, only the chrysanthemums were being

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^{2/}Copies of the complaint and notice of hearing were duly served on Respondent.

^{3/}The jurisdictional facts were admitted by Respondent in its answer.

marketed by Respondent. ^{4/}Two crews, comprised of between 12 and 16 employees, perform identical functions in preparing soil, picking shoots from mother plants, planting them in propagation beds, transplanting these shoots in the greenhouses for production, harvesting the mature flowers therefrom, and packing the blooms for shipment. These crews are each supervised by one supervisor and one foreman, respectively. Additional "contract" or piece rate crews are hired from time to time to perform functions such as removing side buds from the flower stems. Respondent also employs a "construction" crew of between four and 10 individuals which is responsible for construction of new greenhouses and for general maintenance functions, including the replacement of fiberglass exteriors on existing greenhouses. When there is little -or no maintenance work to be performed, the majority of the members of the construction crew are laid off, a skeleton crew is retained, and is usually reassigned to the production crews. The remainder of Respondent's employee complement consists of a part-time bookkeeper and a shipping clerk.

Employees work for Respondent six days each week for nine and one-half hours each day, thus totalling 57 hours per week.

B. The Testimony Of The Alleged Discriminatee, Daniel Mendoza.

Daniel Mendoza began working for Respondent on October 6, 1976. He was hired by Andy Matsui, and was placed on the construction crew. ^{5/}Mendoza worked continuously from that date until July 22, 1977, when he suffered a work-related injury caused by his being knocked off a greenhouse roof as he was unloading fiberglass sheets from a forklift. According to his testimony, following the accident, the doctor he was being treated by recommended that he remain off work for a five to six-week period.

Mendoza stated that around late August or September, he returned to Respondent's nursery to reapply for work. He testified that at this time he was informed by Andy Matsui that there was no work for him, that other workers had difficulties with him,

^{4/}According to Andy Matsui, Respondent's President and General Manager, market conditions were such in May of 1978 as to encourage the diminution of chrysanthemum production and the introduction of roses to Respondent's operation. Roses are not propagated by Respondent but instead are purchased from commercial propagators. Respondent starts shoots from these plants, pinches them back, supports the rose bushes with wire, then harvests, grades, bunches and packs the blooms. In May of 1978, Respondent had just completed the planting of its initial rose crop.

^{5/}Matsui testified that he could not recall hiring Mendoza.

but that Matsui would not name those other workers. Mendoza then stated that he would consequently file for unemployment benefits.

Subsequently, Matsui appeared at Mendoza's residence and offered to rehire him. Upon learning that he would receive the same hours and "bonus" pay 6/ that he had previously, Mendoza accepted the offer, and returned to work for Respondent on September 17, 1977.

Mendoza was again assigned to the construction crew. However, he informed Matsui via a note from his doctor that he should not be requested to perform "heavy" work. Nevertheless, Mendoza spent his first day back on the job digging ditches for the nine and one-half hour shift. As a consequence, Mendoza stated that he suffered a recurrence of his disability, and was told by his doctor to remain off work for an additional five to six weeks.

Sometime in January, 1978, Mendoza was released from his doctor's care and returned to work for Respondent on January 22. He once again presented Matsui with a note from his doctor which recommended certain work restrictions. At this time he was assigned to Supervisor Mike Toyokura's crew, cutting flowers, preparing soil, and packing blooms for shipment. Mendoza stated that Toyokura had no problems with the employee's job performance, although at times he would tell him, jokingly, to "hurry up, Gordo," a comment which he regularly made to other workers in the crew.

After about one month working with the chrysanthemums Mendoza was sent back to the construction crew. Mendoza testified that while with this crew, he discussed with his fellow workers his problems obtaining disability compensation, and that if the workers wished, he would attempt to start organizing activities, and would go to the Union in an effort to expedite matters. 7/ After meeting with UPW officials and three of his co-workers, it was concluded that no action would be taken at that time regarding organization, that they would "wait until they had a very good reason" before pursuing this issue. No evidence was presented, however, that any of Respondent's agents or supervisors were aware of Mendoza's

6/Respondent pays its employees certain determined multiples of three hours "bonus" pay for each full week worked in addition to their regular hourly pay. The multiple is determined according to a set schedule by the particular employee's longevity with the Company.

7/Mendoza also testified that in March or April of 1977, he set up an appointment with UFW personnel for his fellow employees to discuss organizing, due to a problem one employee was allegedly experiencing with a supervisor. No action, organizational or otherwise, resulted from this contact with the UFW.

activities concerning the "union" or the UFW.^{8/}

On April 12, 1978, Mendoza was once again assigned to the construction crew, and remained there', with the exception of a few days spent planting roses, until he was terminated on or about May 30, 1978.

On the Thursday prior to Memorial Day, 1978, or May 25, a notice appeared near the employee time clock which stated that Respondent was revising its holiday compensation and "bonus" pay policies. Prior to that time, on Memorial Day, July 4, and Labor Day, employees could work for one-half day. Following work on these days, Respondent would sponsor a Company barbecue, and would compensate employees double time for the holiday worked. Under the revised policy, employees who wished to work on these holidays,, would receive time and one-half and there would be no barbecue. Further, "bonus" pay was reduced by 50\$ for the holiday week if the employee chose to work on that holiday. However, workers would receive "holiday pay" whether they chose to work or not on the holiday.

Upon reading the notice, Mendoza commented to the approximately 12 employees assembled there, as well as the construction crew, that there was little difference if one worked or not, that one would receive only \$10.00 additional pay, that it was not required to work the holiday. His fellow employees, according to Mendoza, agreed with him, and decided to go as a group and discuss the matter with Matsui. 9/ Further, Mendoza, along with several other fellow employees, decided to and did go speak, on Friday morning, with members of other crews about confronting Matsui. The record is unclear as to whether Mendoza himself actually instigated this particular action. Mendoza testified, however, that he personally spoke with members of other crews about the problem.

On the following day, an additional notice was posted on the bulletin board in the employee lunch room. This notice contained the same information as that posted the day before, except that it set forth specific holiday wage and bonus pay rates, as revised. Mendoza stated that he had discussed the revision with members of another crew, in particular whether they agreed with the

8/The same was true concerning Mendoza's earlier contact with the UFW in 1977 referred to above.

9/Mendoza stated on direct examination that after he commented to his fellow workers that he would not come to work on the holiday because of the changes "they [emphasis mine] said it would be a good idea to go and talk to Mr. Matsui." Thus, it cannot be said that Mendoza was responsible for assembling the workers to speak with Matsui to discuss the revision.

change or whether they, if dissatisfied, should pursue the issue directly by speaking as a group with Matsui.

It was decided that the employees would speak with Matsui on Friday during the lunch break. About 24 to 26 employees, from both production crews and the construction crews, went to Matsui's residence, located on Respondent's grounds, to talk about the situation. Employee Antonio Savala, speaking through interpreter and co-worker Luis Sanchez, complained to Matsui about the change in holiday pay. Another employee, David Gomez, stated that the terms set out on the notice were unacceptable, and the workers wanted to negotiate these items. Matsui, according to Mendoza, then stated there was nothing he could do about it. Mendoza then testified that he openly stated to Matsui that if he was not willing to negotiate, then the workers should not come to work. The workers agreed, stating that they would not come to work, to which Matsui offered no response. 10/

Following the lunch break, all the employees returned to work, and worked for the rest of the day. Along with their paychecks which they usually received on Fridays, employees were given, for the first time, an employee handbook, which set forth, inter alia,³ that Memorial Day was indeed a recognized Company holiday.

Mendoza worked the next day, Saturday, and told the members of his construction crew that he would not be coming in on Monday, Memorial Day.^{11/} Mendoza's next day at work was Tuesday, May 30. He arrived between five and 15 minutes before the usual starting time, or 7:00 a.m. He noticed the absence of his time card from its usual place, and went to look for his foreman to inquire about the missing card. Mendoza located a supervisor, Ben Minami, who informed him, as he gave Mendoza his paycheck, that there was no job for him. Mendoza asked why, was it because he was not a good worker, and testified that Minami told him that it was because Matsui said that he was the one who organized the people not to work- during the holiday.^{12/} Mendoza purportedly

^{10/}Matsui testified that Mendoza did not say anything during this meeting. On cross-examination Mendoza substantially modified his testimony to the effect that the statement he made was not necessarily said directly to Matsui, but was a comment made to his assembled fellow workers.

^{11/}As it turned out, only six of Respondent's approximately 30 rank-and-file employees showed up for work on Memorial Day, and none of these were members of the construction crew.

^{12/}Minami denied that any remarks concerning worker organization were made during the course of this conversation. Mendoza stated on direct examination that the workers were present when the damaging remarks were allegedly made but - [continued]

insisted on having the reasons for his termination set forth in writing, but Matsui apparently would not do so at that moment. Mendoza then left work, first going home, then to the Union, only to return two hours later to the nursery.' At that time he again spoke with Minami, who gave him his final check and a note dated May 27, 1978, which stated "We are discharged: [sic] Daniel Mendoza by unsatisfactory work for us. Andy Matsui, Pres. "1.3/

c. The Testimony Of Respondent's Witnesses.

Andy Matsui, Respondent's President and General Manager, testified that after Mendoza's injury and claim for disability benefits, and his subsequent return to work, Matsui began to document Mendoza's work performance by notations made on papers contained in the employee's personnel file. This action was prompted by Matsui's previous negative experience with another employee who had filed for disability benefits, and by Matsui's understanding of the worker's compensation scheme, whose "disability rating" appeared antithetical to an employee's demonstrated ability to perform his pre-injury employment without difficulty. Accordingly, Mendoza's work was monitored and supervisor's observations were dated, noted and entered in Mendoza's personnel file. In fact, Matsui freely admitted that Respondent's renewed offer of employment to Mendoza in late 1977 was induced in large measure by Matsui's concern to toll the extent of disability benefits payable to Mendoza.14/

12/[continued]-none was called to corroborate Mendoza's initial version of the conversation. Furthermore, Mendoza essentially recanted on this point during examination by the Hearing Officer, stating that at the time Minami, in response to Mendoza's query why the Company was not satisfied with his work, simply denied having any problems with Mendoza and apologized for having to terminate him. In addition, Mendoza also stated that after he returned to Respondent's premises that same day to get his check and a note setting forth the reasons for his discharge, it was he who told Minami that Respondent was discharging him for organizing the people. Accordingly, I do not credit Mendoza's initial self-serving version of Minami's comments to him concerning the reasons for his discharge.

13/The discharge note, though dated on May 27. was actually drafted on May 30. It may be inferred that Matsui felt he should date the note as of the time when he wished to effectuate the discharge.

14/This interpretation of Matsui's actions in this regard is enhanced-by the fact that he sent copies of the letter offering Mendoza re-employment to the Worker's Compensation Appeals Board and to the Employment Development Department. Documents in Mendoza's personnel file also indicate that Respondent--[continued]

As previously noted, Mendoza returned to work for Respondent on February 22, 1979. Mendoza's supervisor, Mike Toyokura, was requested by Matsui to observe Mendoza's performance and determine if Mendoza had any problems, doing his work. Toyokura testified that while Mendoza was working in his crew the employee was a "below average worker": he would break flowers he had cut, he would talk to and disturb other workers, and was generally slow. The supervisor also stated that in his work from time to time he would warn Mendoza about talking.

After Mendoza was returned to the construction crew on April 12, Matsui himself had occasion to observe his performance. Matsui testified that although Mendoza was physically capable of doing the work he was "chattering" with other workers, 15/ slowing them down, and generally performing his assigned duties poorly. The construction crew supervisor, Ben Minami, corroborated these assertions. In one particular instance, Matsui observed Mendoza engaged in the hanging of steel tape used to support the rose bushes in the rose greenhouses. Mendoza, according to Matsui, was again "chattering," working slowly, and throwing nuts and bolts around without picking them up.

Respondent had no policy of issuing written warnings to employees whose job performances it felt, were creating problems. As such, Mendoza was not made aware, through written notices, of the aforementioned negative observations of his work.

Respondent held twice-weekly supervisors' meetings, on Tuesday and Friday mornings. At the meeting held on Friday, May 19 j Matsui discussed Mendoza's work performance with Minami, and it was decided that Mendoza be terminated. 16/ However, Minami noted that the termination should be postponed for at least one week, as Mendoza's services could be utilized for this period in order to complete some specific construction work.

Accordingly, at the supervisors' meeting held the following week on May 26, Minami and Matsui again discussed Mendoza, and formally concluded to discharge him at the next opportunity. This decision was also recorded in Mendoza's personnel file. Mendoza's actual termination, however, was dated as of May 27, and, as noted previously, he was not informed of this

14/[continued]-challenged Mendoza's continuing eligibility to receive benefits after the offer of re-employment was made,

15/Matsui stated that two employees had previously been terminated for "chattering."

16/Notation in Mendoza's personnel file as well as the testimony of Supervisor Minami corroborated Matsui's statements in this regard

action until he returned to work on May 30. Minami testified that as he handed Mendoza his final check, he apologized to him, but said that as the work he was involved in was nearly finished, Mendoza would be asked to leave.

ANALYSIS AND CONCLUSIONS OF LAW

It is concluded that the General Counsel has not demonstrated, by a preponderance of the evidence, that Respondent, in discharging Daniel Mendoza, violated the Act.

This conclusion is grounded on the uncontroverted and central fact that Respondent reached the decision to terminate Mendoza before it had any knowledge of his participation in protected, concerted activities.^{17/}

This Board has adopted a "but for" causational analysis in determining whether a discharge is in violation of the Act. *S. Kuramura, Inc.*, 3 ALRB No. 49 (1977). It cannot be said in the instant case that Daniel Mendoza would not have been terminated "but for" his participation in protected, concerted activities. The uncontradicted record evidence amply demonstrates that supervisors were experiencing problems with Mendoza's work performance, that he was slow, inattentive, careless, and disturbed other workers, and that these supervisors had concluded to discharge him for these reasons. The decision to discharge Mendoza, as it antedated Respondent's awareness of Mendoza's joining a group which questioned a change in pay policies, could not be said to have been prompted by his actions in this regard.

The General Counsel bases his contention that Mendoza was unlawfully discharged on two principal theories: that Mendoza was the "instigator" of the meeting with Matsui to discuss the holiday pay change, and fomented a "protest" among workers to absent themselves from work on Memorial Day, and that the documentary and testimonial evidence presented by Respondent in support of its position that Mendoza was discharged for cause was inherently unreliable.

Little, if anything, in the record indicates that Mendoza actually "instigated" the meeting with Matsui or the absenteeism which took place on the holiday. No evidence, save the testimony of Mendoza himself, was presented which would arguably support such an inference. The most apparent conclusions which can

^{17/}It is assumed that the employee gathering at Matsui's house on Friday, May 26, to protest and/or discuss the change in holiday pay policies was an activity of this type. *N.L.R.B. v. Empire Gas, Inc.*, 566 F.2d 681 (C.A. 10,); see also *Morrison Railway Supply Corp.*, 191 NLRB 487, 77 LRRM 1700 (197D; *George Arabelian Farms, Inc.*, 5 ALRB No. 10 (1979).

be gleaned from this record demonstrate that Mendoza merely expressed dissatisfaction to his fellow employees concerning the change in holiday pay, that these employees agreed with his dissatisfaction, but that "they" suggested the discussion with Matsui. Even if the argument is advanced, contrary to the aforementioned, that Mendoza planted the seeds of dissension among his fellow workers, there is no indication that Respondent was made aware of these actions at any time. Further evidence of Mendoza's lack of a leadership role in the discussion with Matsui is shown by the fact that at no time during the course of this confrontation did Mendoza appear to speak directly to Matsui on behalf of his fellow employees; he merely stood with the group while others voiced their opinions through the translator.

In addition, the General Counsel characterizes the failure of the great bulk of Respondent's work force to show up on Memorial Day as a "protest" of some sort against Respondent's change in holiday pay. This is an inference that finds little support in the record. Respondent's employees were under no obligation to report to work on Memorial Day, and would receive holiday pay, which they did not receive in years previous, whether they reported or not. It is just as logical to conclude from these circumstances that employees did not appear that day simply because they would gain little monetary advantage from working, and opted instead to enjoy their holiday.

Turning to General Counsel's second theory, that unreliable evidence was offered in support of the position that Mendoza was discharged for cause, the fact remains that criticism of Mendoza's work remained substantially un rebutted. In arguing that other employees had displayed failings similar to Mendoza, General Counsel neglects to take into account the cumulative effect of Mendoza's shortcomings on the job, as determined by several different supervisors over a period of time.

Despite the contentions made by the General Counsel in keeping with the above, the entries in Mendoza's personnel file were "made after the concerted activity and discharge," there is no support in the record for such a position, and it appears to be based on pure surmise.

General Counsel points to several seeming contradictions in the testimonies of several of Respondent's witnesses as justification for a finding that such testimony should not be credited. These contradictions, however, did not, for the most part, involve any of the central issues in the case and cannot be utilized as a basis for the wholesale discrediting of these witnesses. Problems were experienced with translations from Japanese to English, and vice versa, during the course of the testimony of Minami and Toyokura which may have caused some confusion on the part of these witnesses. In addition, while Matsui testified in English and was

reasonably articulate, at times his statements indicated a certain lack of understanding. I am unable to conclude that the accounts provided by these witnesses were basically untrustworthy. To the contrary, I find that their testimonies were substantially credible.

By contrast, Mendoza, in stating that he could not remember what holiday, the central focus of these events, the "protest" occurred around, but that "it could have been Labor Day," indicated a somewhat suspect recollection of events. The fact that much of his testimony was self-serving and supplied without corroboration also detracts from its-probative force.

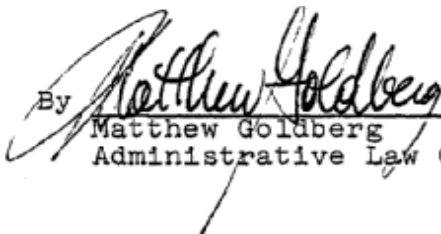
Admittedly, the timing of the notice of discharge renders the discharge itself somewhat suspect, as it occurred some four days after the decision to discharge Mendoza was reached and also after Mendoza's participation in concerted activities. Nevertheless, in the face of mutually corroborative testimony supplied by Respondent's witnesses and documentary evidence concerning this decision as being made before any knowledge of Mendoza's protected activity, General Counsel has not, by a preponderance of the evidence, demonstrated that Respondent violated the Act.

RECOMMENDED ORDER

It is hereby recommended that the complaint in this case be dismissed in its entirety.

Dated: April 12, 1979

AGRICULTURAL LABOR RELATIONS BOARD

By  _____
Matthew Goldberg
Administrative Law Officer