STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SATICOY BERRY FARMS, INC., Respondent, and SOILA MENDEZ, Charging Party, and ALFONZO AGUILAR Charging Party.	)	Case Nos. 2017-CE-071-SAL 2017-CE-072-SAL 2018-CE-011-SAL **DECISION AND RECOMMENDED ORDER**

The Agricultural Labor Relations Act (the Act)[1] provides, in relevant part, that agricultural employees have the right to engage in concerted activities for the purpose of mutual aid or protection.[2] Thus, the Act recognizes that employees may band together, that is, act in concert, for their mutual aid to present matters to their employer regarding any issue arising from their employment, their wages, theirs hours, and their working conditions.[3]

It is an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in their right to engage in protected, concerted activity.[4] Further, it is an unfair labor practice for an employer to

[1] The Act is set forth in California Labor Code §§1140-1166.3.
[2] § 1152 of the Act.
[3] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12 at 18; *D'Arrigo Brothers* (1987) 13 ALRB No. 1, JD at 23.
[4] § 1153(a) of the Act provides, "It shall be an unfair labor practice for an agricultural employer . . . (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152."

discharge or otherwise discriminate against an employee because the employee has filed charges with the Agricultural Labor Relations Board (ALRB).[5]

At issue in this proceeding[6] is whether Saticoy Berry Farms, Inc. (Respondent) interfered with, restrained, or coerced employees or retaliated against employees by the following actions:

1. Telling employee Soila Mendez (Mendez) on April 8, 2017,[7] not to report workers' complaints about terms and conditions of employment to Human Resources;
2. Changing employee Mendez' work conditions after April 8, by watching her more closely and demanding proof for an absence from work;
3. Reprimanding Mendez for an argument on October 5;
4. Silencing employee Alfonzo Aguilar (A. Aguilar) when he spoke up at crew meetings about a safety issue on October 18 and 21;
5. Refusing to allow employees A. Aguilar and his son, Hugo Aguilar (H. Aguilar), to work on October 23 (H. Aguilar) and 24 (A. Aguilar) and issuing each employee a disciplinary ticket;
6. Offering A. Aguilar the opportunity to return to work on October 25 as long as he did not speak up about work-related concerns;
7. Terminating Mendez' employment on October 26 in retaliation for her complaints about employees' terms and conditions of employment; and

[5] § 1153(d) of the Act provides that it is an unfair labor practice for an agricultural employer to "discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony. . . ."
[6] All parties agree that the ALRB has jurisdiction of this proceeding. The hearing in these consolidated cases was held in Oxnard, California on April 9 to 12, 2019. Post-hearing briefs were filed on May 24, 2019.
[7] All dates are in 2017 unless otherwise referenced.

8. Changing A. Aguilar's work assignment on January 22, 2018, and issuing him a disciplinary ticket on January 26, 2018, in retaliation for his filing an unfair labor practice charge.

Witness credibility has been assessed relying on factors such as witness demeanor, context, quality and consistency, the presence or absence of corroboration, established or admitted facts, inherent probability, and reasonable inferences that may be drawn from the record as a whole.[8]

All parties were afforded full opportunity to present witnesses and exhibits and to examine and cross-examine witnesses. On the record as a whole, and after thorough consideration of briefs filed by the parties, the following findings of fact and conclusions of law are made.

Finding of Fact: Respondent Grows and Harvests Strawberries in Ventura County, California. It Has both a Summer Season and a Winter Season

Respondent produces both summer and winter strawberries. Summer strawberries are produced at the Xerox field on Rice Avenue in Oxnard. The summer harvest typically runs from September through December. Winter strawberries are grown at Patterson Ranch, also in Oxnard. The winter planting is around October through January of each year and the winter harvest is from January through June.

Finding of Fact: In 2017, Respondent Employed Five Crews of Agricultural Employees under the supervision of Forepersons, also referred to as Crew Bosses and, over them, a Superintendent

[8] See *Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1 at 2, fn. 1; *Double D Construction Group, Inc.* (2003) 339 NLRB 303, 305; *Daikichi Sushi* (2001) 335 NLRB 622, 623 (citing *Shen Automotive Dealership Group* (1996) 321 NLRB 586, 589, enfd. sub nom. (D.C. Cir. 2003) 56 Fed. Appx. 516). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, p. 4 fn. 5; *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders, Inc.* (2008) 352 NLRB 1262, 1262 fn. 2.

The parties agree that in 2017, as relevant here, there were five strawberry crews, each directly reporting to a foreperson. A superintendent had overall responsibility for these five crews.

Conclusion of Law: Forepersons Ricardo Barajas (Barajas), Eloy Gutierrez (E. Gutierrez), and Jose Manuel Villanueva (Villanueva) are admitted statutory supervisors.

Respondent admitted the complaint allegation of statutory supervisory authority for these individuals. The remaining two forepersons were not named in the complaint.[9]

Conclusion of Law: Superintendent Arturo Fernandez (A. Fernandez) and Supervisor Leticia Fernandez (L. Fernandez) are admitted statutory supervisors.

A. Fernandez and L. Fernandez are husband and wife. The parties agree that they are both statutory supervisors. The record reflects that superintendent A. Fernandez is in overall charge of the strawberry crews. There is little evidence regarding L. Fernandez and her duties.

Conclusion of Law: The record does not support a finding that Julieta Gonzalez (Gonzalez) is a statutory supervisor.

The complaint[10] alleges that Gonzalez is a supervisor. Respondent denied this allegation. Gonzalez identified her position as office administrator. There is no evidence of record upon which to find that Gonzalez is a statutory supervisor. One of her duties is to document complaints regarding workplace safety issues. Gonzalez submits such reports to supervisors to investigate these matters.

Thus, the record indicates that her duties are solely to document the reports but not to investigate or act on the reports. There is no evidence that Gonzalez took

[9] Forewoman/crew boss/row boss/row leader (all of these terms were used) Elizabeth Ortega (Ortega) testified at the hearing. She is not alleged in the complaint to be a supervisor and her supervisory status was not litigated at the hearing.

[10] Complaint par. 13 identifies Gonzalez as Human Resources personnel administrator.

part in assessing disciplinary issues attached to the investigations. The record indicates that Gonzales had no authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline or to responsibly direct, adjust grievances, or effectively to recommend such action utilizing independent judgment. Accordingly, she is not found to be a statutory supervisor.

Conclusion of Law: The record does not support a finding that consultant Jose Gutierrez (J. Gutierrez) is a statutory supervisor of Respondent.

J. Gutierrez is an employee of Respondent's insurance company. From time to time, he presents lectures on safety to assembled crews of Respondent's employees. As relevant here, he also submitted reports regarding employee conduct at one meeting that he conducted. There were no disciplinary recommendations contained in his report. This is the sole evidence regarding his duties.

He is alleged to be a statutory supervisor of Respondent. Respondent denied this allegation. The record does not indicate that J. Gutierrez had any authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline or to responsibly direct, adjust grievances, or effectively to recommend such action utilizing independent judgment. Accordingly, he is not found to be a statutory supervisor.[11]

Finding of Fact: A Harvest Pro machine is driven in the fields in front of crews engaged in strawberry harvesting

In order to harvest the strawberries, a Harvest Pro strawberry harvest machine is driven in front of the rows of workers who are picking the berries. The

[11] Were it necessary to analyze whether J. Gutierrez might be an agent of Respondent, it might be possible to determine, under all the circumstances, that he might have had limited agency status regarding safety standards. That is, employees might reasonably believe J. Gutierrez' safety comments reflected company policy and that he was speaking on behalf of management regarding safety. See, e.g., *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 322 cited in *Corralitos Farms, LLC (*2013) 39 ALRB No. 8 at 14-16. However, this matter was not litigated at hearing and no finding is made.

machine has wing-like extensions at each side spanning around 10-12 rows of strawberries. Alberto "Beto" Rosales (Rosales) drove one such machine for the E. Gutierrez crew. Charging Party Mendez is his wife.

Each time a picker collected a full box of strawberries, the picker walked forward in the row to the Harvest Pro strawberry harvest machine. The full containers of strawberries were checked by puncher Lidia Perez Manriquez (Perez), who rode on the Harvest Pro machine. Perez sometimes rejected containers.[12]

Finding of Fact: In April, Mendez was assigned to the crew headed by E. Gutierrez

Mendez worked for Respondent "a long time." She did not recall any dates and explained that she does not read or write, except for her signature. The parties agree that in April, Mendez was assigned to a crew headed by foreman E. Gutierrez. A. Fernandez was her superintendent. Mendez' duties included picking strawberries and other strawberry production work as assigned.

Finding of Fact: Respondent maintains movable restrooms in the fields.

Respondent maintains restrooms for its agricultural employees. As applicable here, the typical configuration is three portable restrooms situated on a movable trailer. As the crews move around the fields, the restroom trailers are moved by forepersons using a small tractor.

Finding of Fact: Company policy requires that before moving the restroom trailer, the foreperson must knock on restroom doors to ensure there are no occupants.

Only supervisory individuals, typically forepersons, can move restroom trailers. There is no dispute that company policy provides that forepersons are required to knock on each restroom door before moving the trailers.

[12] Both L. Fernandez and puncher Lidia Perez Manriquez (Perez) were referred to at times as "Ms. Letty." Perez is not alleged in the complaint to be a statutory supervisor. L. Fernandez is an admitted statutory supervisor." Within the context of the testimony, it is possible to determine which of them is the object of the testimony.

Finding of Fact: On an unspecified date in 2016, foreman E. Gutierrez moved a restroom trailer while Mendez was inside one of the restrooms

There is no dispute that on an unspecified date in 2016,[13] Mendez was inside a restroom when E. Gutierrez moved the restroom trailer. The parties dispute the speed and distance the trailer traveled. The parties dispute whether E. Gutierrez knocked on the bathroom doors before moving the trailer. The parties dispute whether Mendez had on headphones or ear buds. None of these disputes are material here.

Finding of Fact: After this 2016 incident, on an unspecified date, Respondent retrained its forepersons to knock on doors before moving the bathroom trailers.

Mendez testified that she spoke with E. Gutierrez and A. Fernandez on the day of the 2016 incident and later that day she reported this incident to the office.[14] Gonzalez testified that she did not receive a report from Mendez regarding this 2016 incident. Nevertheless, Gonzalez did recall that the incident triggered retraining of the forepersons. There is no dispute that "after" this incident, forepersons were retrained to knock on the bathroom doors before moving the trailers. No date in 2016 is specified regarding when the retraining occurred.

Finding of Fact: On or about April 7, Elizabeth Ortega (Ortega) moved a restroom trailer without first knocking while agricultural worker Griselda Nestor (Nestor) was in one of the restrooms

On Friday, April 7,[15] Mendez spoke to a coworker, whose name she did not know. The coworker was later identified as Griselda Nestor (Nestor). Nestor told

[13] Mendez could not recall the year or date this occurred nor could E. Gutierrez. Gonzalez recalled that this incident occurred in 2016, about a year before an April 7, 2017 incident, and that forepersons were retrained in 2016 regarding the need to knock on bathroom doors prior to moving the trailer. Her undisputed testimony provides the sole basis for determining the year the retraining took place.

[14] Mendez could not identify the person she spoke with in the office.

[15] Mendez did not recall this date but relevant documents place the incident on April 7.

Mendez that Ortega,[16] whom Mendez referred to as "forewoman Lizbeth," had moved the restroom trailer while Nestor was inside one of the restrooms. Ortega did not first check to see if any of the restrooms was occupied.

Ortega agreed. She testified that on this occasion she did not knock on the restroom doors before moving the trailer because a machine was coming to that site to enter the field and it was an emergency to get the restroom trailer out of the way of the machine. She moved the trailer about 10 feet so the machine could move into the rows. According to Ortega, when Nestor asked her why she moved the trailer without first knocking, Ortega explained the emergency situation and told Nestor she was sorry. Nestor did not testify.

Finding of Fact: Mendez and Nestor discussed the problem of moving the bathroom trailers without knocking first. Mendez advised Nestor to report the incident.

Mendez and Nestor discussed the problem of forepersons moving bathrooms without knocking and the need to prevent this from happening again. Mendez told Nestor she should report the incident.[17] Ortega was present during some or all of this discussion.

Finding of Fact: Mendez and Nestor separately reported the incident to Gonzalez

Later that day, Mendez reported to Gonzalez that the "crew boss" moved the trailer without first knocking. Mendez complained that Ortega failed to check the

[16] Ortega is not alleged to be a statutory supervisor. However, Respondent referred to her as a "foreman" in its brief. (R. Br. 3:8-9). At the hearing, Gonzalez referred to Ortega as "crew boss." (Tr. II, 17:3-12). Respondent referred to Ortega as a row boss at times: "Q: At that time [April] were you a row boss for one of the harvest crews? A' "Yes." Further, Ortega testified, ". . . is it row worker or row boss? I don't know between these terms. I was in charge of 17 people at that time." (Tr. III, 136:10-13). The witness referred to herself as a "row leader." (Tr. III 148:17). No party argues that Ortega is a statutory supervisor.

[17] According to Mendez, Ortega came to where Mendez and Nestor were talking and said to Nestor, "not to be with that snake [meaning Mendez], because she's not going to give you good advice." Ortega testified that when she approached Mendez and Nestor, Mendez called her a tattletale for always talking to A. Fernandez. Ortega denied using profanity or calling Mendez a snake. To the extent that this exchange is relevant, Ortega's denial is credited. She was a reliable witness with excellent recall who readily admitted she did not knock on the restroom doors before moving the trailer.

occupancy of the restrooms before moving them and, in fact, one of them was occupied. Mendez reminded Gonzalez that this had happened on an earlier occasion to her. According to Mendez, Gonzalez told her to call the office anytime something happened.

Company records indicate that Nestor called 20 minutes after Mendez called and spoke with Gonzalez about the incident. The report indicated that Nestor told Gonzalez the forewoman did not knock on the bathroom doors before moving the trailer.

Allegation 1: On the day after Mendez and Nestor reported the Nestor/Ortega incident, Superintendent A. Fernandez told Mendez not to report workplace incidents to the Human Resources Office.[18]

The complaint[19] alleges that Respondent restrained and coerced employees in the exercise of their protected, concerted activity when on April 8, superintendent A. Fernandez told Mendez not to report work-related complaints to the office.

Finding of Fact Regarding Allegation 1: A. Fernandez stated to Mendez: "Why do you go complain to the office first? You have to tell me first."

Mendez testified that after the incident involving Ortega and Nestor, A. Fernandez told her: "Why do you go complain to the office first? You have to tell me first."[20] Mendez responded that A. Fernandez should speak to E. Gutierrez

[18] The complaint uses the term "Human Resources Office." There is no specific evidence that Respondent maintains a "Human Resources Office." The Handbook references a personnel office. Thus, it is assumed that the personnel office is intended to be referenced here.

[19] Complaint paragraphs 19, 21, 22, 23, 24, 53 and 54. The complaint identifies foreman E. Gutierrez as the individual involved in both the 2016 and 2017 trailer incidents. However, the record clearly identifies Ortega as the individual who moved the trailer in 2017.

[20] Mendez further testified, "he [A. Fernandez] stated "later on" when she brought another complaint, "you have to tell me. There's no reason why you should go personally to the office." Mendez replied that she could not tell him, "because they told me to go to the office." The events in this segment of testimony are undated and not relied upon as occurring at the time of the complaint allegation because Mendez clearly testified that this dialogue occurred later - on a different [undated] occasion – when she brought a different complaint. A later question by counsel attempts to tie these two conversations together by leading the witness. "Q: Okay, And you've now told us that Supervisor Arturo [Fernandez] told you not to report things to the office, is that correct? A. Yes." (Tr. I, 76:21-24). "Q: Okay.

about checking restrooms before he moved them. In Mendez' view, A. Fernandez made this statement to her in a way that indicated he was upset, that is, he did not display his usual comfortable, smiling demeanor. A. Fernandez did not testify about this conversation.

Analysis of Allegation 1

Statements that have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their protected rights, when taken in context, violate the Act.[21] Statements are assessed contextually as to whether they would tend to coerce a reasonable employee.[22] The standard for assessing alleged threats is objective, not subjective.[23] Subjective interpretation from an employee is not of any value to this analysis.[24]

As found above, after Mendez reported to office administrator Gonzalez that Ortega, without first knocking, moved the restroom trailer with a coworker inside it, A. Fernandez stated to Mendez, "Why do you go complain to the office first? You have to tell me first."

The General Counsel relies on a portion of Mendez testimony that has been rejected as it relates to a different interaction than the one found to have occurred following the Nestor incident.[25] Thus, General Counsel asserts that A. Fernandez told Mendez not to report these incidents to the office but to tell him instead. The

---

Did Supervisor Arturo [Fernandez] tell you that after you called the office about your coworker being in the restroom when the trailer was moved? A: Yes. I already report that when he told me that." (Tr. I, 76:25 to 77:3). This attempt to link the two conversations fails not only due to the nature of the questioning but also due to the vagueness and ambiguity of the responses. Moreover, the witness returned to her earlier testimony stating, "No. That's all he said to me. He told me that whenever something happened to let him know first." (Tr. I, 78:11-12).

[21] *Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1, p. 9: "[T]he legal test for unlawful employee coercion is whether the employer's conduct would tend to coerce a reasonable employee in the exercise of his or her rights." See also *Erickson's, Inc.* (2018) 366 NLRB No. 171, slip op. at 2, n. 6.

[22] *Monterey Mushrooms, Inc.*, supra; see also *Westwood Health Care Center* (2000) 330 NLRB 935, 940 n. 17.

[23] *Monterey Mushrooms, Inc.*, supra, citing *S&J Ranch, Inc.* (1992) 18 ALRB No. 2, p. 9 fn. 9: see also, *Multi-Ad Services* (2000) 331 NLRB 1226, 1228, enfd. 255 F.3d 363 (7th Cir. 2001).

[24] *Miami Systems Corp.* (1995) 320 NLRB 71 at n. 4.

[25] See footnote 20, supra.

record does not support a finding that this is what A. Fernandez said to Mendez following the Nestor/Ortega incident. The record does support a finding that A. Fernandez told Mendez to report these incidents to him first.

Perhaps in recognition of such a finding, the General Counsel argues that workers may reasonably be deterred from reporting incidents involving their supervisor if they are required to report to that supervisor himself. However, this argument is also unavailing as A. Fernandez was not the supervisor involved. The individual who moved the trailer was Ortega.

Respondent notes that the evidence establishes only that A. Fernandez told Mendez to tell him first. He did not state, as alleged in the complaint, that she could not report such matters to the office. Further, Respondent notes that A. Fernandez' instruction to Mendez was consistent with the handbook which states, "if you have any difficulties on the job . . . consult your supervisor." The handbook further provides, "any question or observations regarding safety rules, field safety, or the health of employees should be directed your Foreman and Supervisors."

Conclusion of Law Regarding Allegation 1: Respondent did not restrain or coerce employees when A. Fernandez told Mendez on April 8 that she should contact him first to report safety matters.

This is not a case where employees must report incidents of discrimination to the very supervisor involved. Under all the circumstances, A. Fernandez' directive to tell him first would not be reasonably understood contextually to interfere with, restrain, or coerce employees in acting together to advocate safe working conditions. No surrounding circumstances[26] indicate any animosity

[26] For instance, Mendez did not testify that A. Fernandez told her he was called into the office by Gonzalez who spoke to him about the incident as set out in complaint par. 24.

toward Mendez and Nestor acting in concert to report a work safety matter. A. Fernandez did not admonish Mendez for acting on behalf of Nestor. He did not tell her, for instance, to mind her own business. His instruction was to tell him first. He indicated no problem in her calling the office afterwards.[27] Thus, in the absence of circumstances which might indicate contextually that a reasonable employee would perceive that concerted activity was implicated, it is recommended that this allegation be dismissed.

Allegation 2: Respondent changed Mendez' working conditions after she reported the Nestor/Ortega incident to the office.

The complaint[28] alleges that "after" Mendez reported the Nestor/Ortega restroom trailer issue to the office, A. Fernandez and puncher Perez required Mendez to provide proof of an absence and her work was scrutinized more closely by supervisor A. Fernandez and puncher Perez. The complaint did not specify any date for these allegations but it may be inferred that the time frame is between April 7 and October 5.[29]

Finding of Fact Regarding Allegation 2: Following her conversations with Gonzalez and A. Fernandez, Mendez and others in the crew were told to work faster. "They're here to work, not to rest."

Following the conversations with office administrator Gonzalez and superintendent A. Fernandez about Nestor's trailer experience, Mendez stated that foreman E. Gutierrez pressured or pushed her more. The only specific instance of

[27] Cf., *Clean-Up Technology* (1994) 1994 NLRB LEXIS 418 (In questioning employee about signing a union authorization card, employer representative said, "nobody does that on my jobsite, first you come to me and discuss it before you bring a union, you must tell me first." Contextually, these comments supported finding the interrogation unlawful).

[28] Complaint pars. 25, 26, 55 and 56.

[29] See complaint par. 25 ("after" Mendez made reports on April 7), par. 26 ("after" Mendez made reports on April 7), and par. 27 (A. Aguilar began working on October 5) for the factual allegations. Because the complaint factual allegations are in chronological order, it may be inferred that the date of the alleged changes in working conditions is sometime between April 7 and October 5.

such pressure she testified about was one occasion on an unspecified date when A. Fernandez instructed E. Gutierrez to tell the crew to work faster. "They're here to work, not to rest."[30] This happened when Mendez was behind in her work due to tiredness. Mendez testified that puncher Perez did not treat her any differently.

Finding of Fact Regarding Allegation 2: Following Mendez' report regarding Nestor, Mendez was told on one undated occasion by A. Fernandez to bring a proof of absence when she missed a day of work. According to Mendez, this was a change from prior policy.

Mendez testified that on an unspecified date after she complained to the office about the forewoman moving the restroom trailer while Nestor was inside without first knocking, A. Fernandez required her to bring a proof of absence when she missed a day of work. According to Mendez, this was a change from his prior behavior. No further details were elicited. The testimony[31] was as follows:

> Q: And after you called the office, did Supervisor Arturo [Fernandez] ask you to bring the proof of absence when you missed a day of work?
> A: Yes.
> Q: And before you made the report to the office, was that different to you than before you made the report to the office when you missed work?
> A: Yes. I also saw that change there. Because I would go and give the complaint at the office, I saw a change in him with that, too.

Analysis Regarding Allegation 2

This allegation alleges retaliatory treatment of an employee after the employee engaged in protected, concerted activity. Respondent denies that it took this action but, if it is found that it did so, Respondent claims it took this action for

[30] Tr. I 89:1-9.
[31] Tr. I 90:7-16.

valid business reasons. Allegations involving dual motivations utilize the *Wright Line*[32] shifting burden analysis.

In order to satisfy the initial burden of persuasion imposed on the General Counsel in a dual motivation case, the General Counsel must show by a preponderance of the evidence that protected conduct was a motivating factor, in whole or in part, for Respondent's adverse employment action. This burden is satisfied if the General Counsel produces evidence 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.[33] Such a showing creates an inference of unlawful motivation.

Proof of an inference of unlawful motivation may be based on direct evidence or can be inferred from circumstantial evidence.[34] The unexplained timing of an adverse employment action may be indicative of animus[35] or motivation.[36] Other factors such as disparate treatment and failure to follow established rules or procedures are sometimes found indicative of animus[37] or true motive.[38]

To rebut the General Counsel's evidence, the employer must show that it would have taken the same action for legitimate business reasons in the absence of

---

[32] *Wright Line, Wright Line Div.* (1980) 251 NLRB 1083, enfd (lst Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989.
[33] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12, p. 14.
[34] *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, p. 3; *Camaco Lorain Mfg. Plant* (2011) 356 NLRB 1182, 1184-1185.
[35] *H & R Gunland*, supra, 39 ALRB No. 21, p. 3; *N.C. Prisoner Legal Services* (2007) 351 NLRB 464, 468, citing *Davey Roofing, Inc.* (2004) 341 NLRB 222, 223; *Electronic Data Sys. Corp.* (1991) 305 NLRB 219, 220, enfd. in relevant part (1993 5th Cir.) 985 F.2d 801.
[36] *H & R Gunland*, supra, 39 ALRB No. 21, p. 3.
[37] See, e.g., *CNN America, Inc.* (2014) 361 NLRB 439, 457-459; *Brink's, Inc.* (2014) 360 NLRB 1206, n. 3.
[38] *H & R Gunlund*, supra, 39 ALRB No. 21, pp 3-4: An inference of true motive may be proven by circumstantial evidence of 1) timing, 2) disparate treatment, 3) failure to follow established rules or procedures, 4) cursory investigation of alleged misconduct, 5) false or inconsistent reasons given for the adverse action, or belated addition of reasons for the adverse action, 6) the absence of prior warnings, and 7) the severity of punishment for the alleged misconduct.

the employee's protected conduct.[39] The employer's defense that it would have taken the same action in any event fails by definition if the General Counsel shows that the employer's rationale for its adverse action is pretextual – either false or not actually relied upon.[40]

Clearly, the General Counsel has shown that Mendez engaged in protected concerted activity on April 7 when she and Nestor discussed the safety of moving bathroom trailers in the field without first ascertaining that the restrooms are unoccupied.[41] Thus, activity has been established.

Both Mendez and Nestor reported the problem to the office administrator. Mendez told the office administrator that she had discussed the issue with Nestor and the office administrator's report clearly indicates that Mendez called on behalf of Nestor. In the ordinary course of business, the April 7 reports were called to the attention of A. Fernandez for his investigation. On receipt of the report, A. Fernandez, and thus Respondent, had knowledge of Mendez acting on behalf of Nestor.[42]

As to animus, the General Counsel notes that A. Fernandez spoke to Mendez on April 8 in an angry tone of voice and told her to report these safety incidents to him first. The statement itself has been found lawful. Making a lawful statement in an angry tone of voice does not suffice to raise the statement to one of animus

---

[39] *Wright Line,* supra, 251 NLRB at 1089.

[40] *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 759 fn. 7, cert. denied (1984) 466 U.S. 972 (where ALRB concludes that employer's purported business justification is pretextual, *Wright Line* dual motive analysis is irrelevant since there is only one remaining cause: union animus); *David Saxe Prods. LLC* (2016) 364 NLRB No. 100, slip op. at 4, remanded on other grounds, (D.C. Cir. 2018) 888 F.3d 1305; *Rood Trucking* (2004) 342 NLRB 895, 898 (quoting *Golden State Foods Corp.* (2003) 340 NLRB 382, 385).

[41] See, e.g., *Oceanview Produce Co.* (1995) 21 ALRB No. 8, pp. 12-13 (employees were engaged in protected concerted activity when they sought clarification of a safety training sheet before agreeing to sign it); *Anton Caratan & Sons* (1982) 8 ALRB No. 82, p. 4 (employees who left their work area to present their complaint to higher management were engaged in protected concerted activity).

[42] A supervisor's knowledge of protected concerted activities is imputed to an employer in the absence of credible evidence to the contrary. See *State Plaza, Inc.* (2006) 347 NLRB 755, 757; *Dobbs Int'l Services* (2001) 335 NLRB 972, 973.

toward protected, concerted activity.[43] Thus, it is concluded that for lack of animus there is insufficient evidence to establish a prima facie case.

Assuming, however, for the sake of argument, that the General Counsel has established a prima facie case, the single statement to Mendez and the crew that workers are not at work to rest can hardly be viewed as a retaliatory change in working conditions or of watching Mendez specifically more closely. Likewise, Mendez subjective feeling that she was being watched more closely is not objective evidence of a change in working conditions.[44] Moreover, the record supports a finding that other workers have been similarly admonished.[45] Thus, even were there a prima facie case, it is recommended that the allegation that "after" Mendez engaged in protected, concerted activity her working conditions were altered by closer supervisory scrutiny in retaliation for that activity be dismissed.

Similarly, the allegation that Mendez' terms and conditions of employment were changed in retaliation for her protected, concerted activity by making her bring proof in support of absence from work fails for lack of a prima facie case. As stated above, activity and knowledge have been shown but there is no evidence of animus to associate with this undated single occurrence.

Not only was the evidence in support of this allegation adduced through leading questions, the timing was extremely vague in that there was only a date sometime "after" the complaint was made to the office. This could have been days

---

[43] See in general, *Pictsweet Mushroom Farms* (2002) 28 ALRB No. 4, p. 22 (if lawful statements of displeasure with union activity are utilized to support a finding of animus, there must be additional evidence of animus to support that finding); see also, *Harry Carian Sales* (1998) 6 ALRB No. 55, p. 26 (in addition to commission of unfair labor practice such as laying off pro-union employees, additional animus found by vulgar and derogatory comments about female employees to organizer and by distribution of a leaflet with a thinly disguised message likening female employee organizers to prostitutes)

[44] An objective test is applied to determine if an employer's conduct would reasonably tend to interfere with protected rights. Whether particular employees subjectively felt coerced is not a relevant consideration, nor is the employer's subjective intent. *Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1, p. 9.

[45] See, e.g., testimony of F. Vasquez that foreman Villanueva was yelling at him because he was standing – not working. Tr. Vol. III 35:19-22.

or months. Further, nothing was elucidated regarding the nature of the absence prior to the request for proof and the nature of this particular absence which required proof.

In fact, Respondent's handbook contemplates that employees may be requested to provide medical evidence of illness or ability to return to work.[46] There is no evidence regarding the length of Mendez' absence. Thus, potentially, no change at all has been shown. But, the record is simply devoid of details one way or the other.

Conclusion of Law Regarding Allegation 2: Respondent did not restrain or coerce employees by stating that workers are not at work to rest or by telling a worker on one undated occasion that a proof of absence for an unspecified absence must be provided.

Due to lack of proof of animus, it is recommended that allegation 2 be dismissed. Further, even were there a showing of animus, there is a lack of proof that any change in working conditions occurred regarding closer supervision or requiring proof of absence. The record indicates that workers have been told on other occasions that they are not at work to rest. Being told on one undated occasion that one is at work to work – not to rest does not constitute a change in working conditions. Similarly, the requirement of proof of absence on an unknown occasion for an unknown absence fails because there is no showing of a change. Due to this vagueness, it is recommended that even if the initial burden had been met, this allegation should be dismissed because it impossible to discern whether any change occurred.

[46] See R.Ex. 11, Handbook pp. 42-44: "If you are absent for more than three (3) days due to illness or injury, medical evidence of your illness and/or medical certification of your fitness to return to work satisfactory to the Company may be required.

Allegation 3: Mendez was reprimanded on October 5 for arguing with a coworker in retaliation for her protected concerted activity

The complaint[47] alleges that Mendez was reprimanded on October 5 for an argument that she did not start while the worker who started the argument, identified by Mendez as Josefina,[48] was not reprimanded.[49] Thus, the complaint alleges that Mendez was reprimanded due to her protected concerted activity in April.

Finding of Fact Regarding Allegation 3: On or about August 21-28, Mendez was reprimanded for an incident.

Mendez testified that she could not remember any dates – not the year or the month. However, Mendez recalled that coworker Josefina and her sister, whose name Mendez did not know, had an argument with her while they while they were walking from one block of field to the next block:[50]

> Well, I was ahead [walking to another block], and then I came back to look. And on purpose, she [Josefina] was provoking me. And she grabbed her sister [Sandra] and pushed her towards where my husband [Rosales] was walking [behind Josefina and Sandra]. . . . And she [Josefina] said to me, if you want, you know, we can get into it right away. . . . After that I just stood there, and then she came in front of me. . . . And she said, well, go at it. And I did nothing. I just stood there. . . . And I told her that I know what the rules are at work. . . that's not allowed here.

[47] Complaint paragraphs 30, 53, and 54.
[48] The coworker was actually Salustina Zaragoza Aguilar (Zaragoza). Her sister is coworker Sandra Zaragoza. In setting forth this narrative, the name "Josefina" as utilized in the transcript is set forth here. Zaragoza was called by Respondent and testified regarding her recollection of this and another incident involving Mendez.
[49] There was no love lost between these witnesses. The General Counsel presented evidence that on another occasion, Mendez reported to A. Fernandez that Josephina and her sister were calling Mendez names – telling her that her face was like that of a monster or a mummy. Salustina denied that she told Mendez that her face was like that of a monster but Salustina testified that they called each other bitches and told each other they were fat. (Tr. III 130:13-16).
[50] This testimony was elicited through multiple questions and answers. Some questions, some portions of the answers, as well as objections and rulings have been omitted. Tr. Vol I, p. 93:20 through p. 96:4.

The General Counsel argues that Respondent treated Mendez disparately in retaliation for Mendez' protected concerted activity. Zaragoza started the argument but Mendez alone was punished. However, based upon Mendez testimony alone, it is unclear who or what actually prompted this verbal altercation. Thus Mendez testified that while she was walking ahead of her husband and Zaragoza and her sister, without explanation, Mendez went back to look. Zaragoza and her sister were behind Mendez along with Rosales who was walking behind the sisters. At that point, as Mendez walked back, according to Mendez, Zaragoza pushed her own sister toward Rosales and, issued a threat: "If you want, we can get into it right away."

Zaragoza testified that after an exchange of harsh words,[51] Mendez threatened her with scissors. Zaragoza responded by telling Mendez to hit her. This was in August or September, according to Zaragoza. Mendez denied that she ever threatened anyone with scissors.

At this point, Mendez, her husband Rosales,[52] Zaragoza, and her sister[53] approached a trailer to go into the next block. A. Fernandez was present at that location and talked to the workers. According to Mendez, Zaragoza told A. Fernandez that Mendez, "wanted to hit her" and threatened her with scissors. Mendez told A. Fernandez that "it was a lie." Mendez explained to A. Fernandez that Zaragoza was the one who was provoking her.[54] A. Fernandez sent Zaragoza and her sister to work and told Mendez, "the one who is provoking here is you."[55]

[51] Zaragoza's testimony is credited to the extent that she explained that Mendez and she called each other "bitch" and told each other that the other was "fat" as it provides meaningful context to understand why Mendez turned around to face those behind her.
[52] Rosales did not testify.
[53] The sister did not testify.
[54] Tr. Vol. I, 98:20-25 to 99:1-11.
[55] Tr. Vol I, 99:13-19.

A memorandum prepared by Gonzalez[56] memorializes report of this incident.[57] The memorandum, dated September 11, indicates that Gonzalez received a report from Santiago Vazquez (S. Vasquez) regarding an incident which occurred two to three weeks prior to September 11. In the absence of a date provided by Mendez and without explanation for the date set forth in the complaint, October 5, it is found that the incident described above by Mendez occurred on or about August 21-28, two to three weeks before the report date.

Mendez' testimony indicates only that A. Fernandez told her, "the one who is provoking here is you." Apparently this is the "reprimand" alleged in the complaint. Mendez did not testify that she saw or heard A. Fernandez reprimand Zaragoza or her sister. Zaragoza did not testify whether she was reprimanded. A follow-up memorandum indicates that A. Fernandez reported to Gonzalez that both workers were given a first verbal warning. A. Fernandez did not confirm the warnings in his testimony.

Analysis Regarding Allegation 3

The *Wright Line* shifting burden analysis, referenced above, is appropriately employed whenever dual motivation is involved in alleged discriminatory retaliation. In this instance, the General Counsel argues that Mendez alone was disparately disciplined because she engaged in protected concerted activity while Respondent urges that Mendez was disciplined for legitimate business reasons and would have been so disciplined even in the absence of her protected concerted activity.

As set forth above, the record supports a finding that Mendez engaged in protected, concerted activity in early April and that A. Fernandez, and thus

[56] The memorandum was initially referred to as R.Ex. 3 (Tr. II 25:14-18). Later it was corrected to R.Ex. 4 as an earlier exhibit had already been marked as R.Ex. 3 (Tr. II 31:11-15).
[57] R.Ex. 5.

Respondent, had knowledge of this activity. Activity and knowledge are proven. As to discipline, about four to five months later, Mendez was reprimanded, i.e., "the one who is provoking here is you," for an argument in the field. There is no evidence that this reprimand constituted a disciplinary action although a memorandum in Respondent's files indicates that both Mendez and Zaragoza were given a first verbal warning.

As to animus, the third prong of the General Counsel's initial *Wright Line* burden of persuasion, the August 21-28 argument in the field is remote in time from the April 7 report about moving bathroom trailers without first knocking. Thus the timing does not supply animus. There is no other evidence of animus. Accordingly, it must be concluded that the General Counsel has not shown by a preponderance of the evidence that Respondent's motivation in telling Mendez that she was the one provoking the argument was unlawful.

Further, even were the General Counsel's evidence sufficient to shift the burden of persuasion, the record does not indicate that Mendez was treated any differently than her co-worker. No disparate treatment has been shown. The record only indicates that Mendez did not hear A. Fernandez say anything to Zaragoza and her sister except to send them to another location. Accordingly, it is recommended that this allegation be dismissed.

Conclusion of Law Regarding Allegation 3: There is insufficient evidence to establish that Mendez was disparately disciplined in August in retaliation for her protected, concerted activity in April.

Finding of Fact: On October 5 and 6, respectively, Alfonzo Aguilar (A. Aguilar) and his son Hugo Aguilar (H. Aguilar) were hired and soon thereafter assigned to E. Gutierrez' crew.

A. Aguilar was hired by Respondent on October 5. H. Aguilar, his son, was hired by Respondent on October 6. After a short time of "table work," both were assigned to work for foreman E. Gutierrez.

Finding of Fact: On October 16, Claudia Aguilar (C. Aguilar), A. Aguilar's daughter, was taken from a field via ambulance due to an accident involving A. Fernandez.

On the morning of October 16, an accident occurred at Respondent's property involving A. Fernandez and C. Aguilar. A. Fernandez, who was driving a vehicle in the field, took responsibility for the accident and ordered an ambulance to take agricultural worker C. Aguilar for medical attention.

Finding of Fact: At a Wednesday, October 18, safety meeting, A. Aguilar and Mendez raised work-related safety concerns. A. Aguilar spoke about work-related safety concerns at an October 21 safety meeting.

On October 18, a safety meeting was conducted by safety and risk management consultant Jose Gutierrez (J. Gutierrez) and superintendent A. Fernandez. As might be expected, there was emotion and tension at the October 18 meeting. Two days earlier, A. Fernandez was involved in an accident. At the meeting on October 18, he took responsibility for the accident involving C. Aguilar, the daughter of A. Aguilar. A. Aguilar had worked the entire day of the October 16 accident without receiving any notice of the accident until later in the day.[58] He was understandably upset by lack of timely notice and by the accident itself.

J. Gutierrez recalled that he wanted to get the meeting started and found A. Fernandez by a trailer talking with members of C. Aguilar's family. A rather heated conversation ensued by all accounts. The smaller group meeting by the

[58] Respondent attempted to provide notice by calling a phone number which was believed to be that of C. Aguilar's husband.

trailer broke up so the safety meeting could begin. All crews were present at the safety meeting.

J. Gutierrez spoke initially about safety issues surrounding the Harvest Pro machine. Then he spoke about employee use of earphones. From there he moved to general safety regarding other vehicles in the fields. J. Gutierrez testified that A. Aguilar interrupted him and said, "Well, you know, it's not just us that have to be careful. The – the people driving the vehicles need to be careful as well." J. Gutierrez stated that he agreed with A. Aguilar and A. Aguilar continued talking. J. Gutierrez decided to "let him vent."[59] According to J. Gutierrez, A. Aguilar began making personal remarks, pointing his finger at J. Gutierrez, and cussing.[60] Then, according to J. Gutierrez, A. Aguilar calmed down when A. Fernandez stated, "I feel awful about what happened yesterday."[61]

A. Fernandez recalled that A. Aguilar said that "everything that we were saying there wasn't any good for him. . . [H]e didn't like the way we worked. . . . all of us, you know, foreman, or he was also talking about the company."[62] A. Fernandez did not corroborate J. Gutierrez' testimony about A. Aguilar making personal remarks, pointing his finger at J. Gutierrez, and cussing at this meeting.

A. Aguilar testified that he spoke up about supervisors needing to be more careful when driving vehicles at the fields. Specifically, A. Aguilar stated, "Mr. Arturo [Fernandez] is not very careful." At some point, A. Fernandez responded that he did not want A. Aguilar to talk anymore.[63] A woman coworker [name unknown] addressed A. Fernandez saying, "Let him – let him speak. This is what – this is what – what this meeting is for."[64] The meeting ended at this point.

[59] Tr. IV 24:6-12.
[60] Tr. IV 27-28.
[61] Tr. IV 31:16-23.
[62] Tr. IV 113:4-11.
[63] Tr. II 83:24 – 85:10.
[64] Tr. II 85:12-18.

Fernando Vasquez (F. Vasquez), a picker, recalled that at the October 18 meeting, A. Aguilar said that the supervisor should drive with caution so the workers would not get hurt. "He was just mainly focusing on the safety of the other workers because of what happened to his daughter." Right after that, according to F. Vasquez, A. Fernandez told everyone to go back to work, the meeting was over. F. Vasquez then heard two unidentified women asking that A. Aguilar be allowed to speak. H. Aguilar also heard this request stated. F. Vasquez did not hear A. Aguilar threaten anyone, use profanity, or move toward anyone while he was speaking. He did not point at anyone. His hands were at his side.

Araceli Lopez Diaz (Lopez), a strawberry picker, also attended the meeting. She recalled that after J. Gutierrez told the workers they needed to be careful where they walked, A. Aguilar stated that drivers should also be careful about how they drove. A. Aguilar referred to it being dark early in the day before work started. Lopez observed that A. Aguilar looked as if he were going to cry. Several coworkers spoke at that time asking that A. Aguilar be allowed to speak.

Mendez recalled that at a safety meeting[65] she asked, "[W]hat can we do regarding the trailer? . . . For the foreman to be more careful before moving the trailers." Mendez testified that "Ms. Letty," (apparently L. Fernandez) responded that workers who went into the bathroom with their headsets on might not hear the foreman knock.

[65] The record is unclear whether Mendez testified about one or two safety meetings. The record reflects there was a safety meeting on October 18 and a food safety meeting on October 21. At one point during her testimony about the October 18 meeting, Mendez asked, "You're talking about another meeting, right?" General Counsel responded, "Correct." (Tr. Vol. I, 123:6-13). It is unnecessary to resolve this temporal ambiguity because it is undisputed that Mendez spoke up at the October 18 group meeting about safety issues surrounding moving the bathroom trailer. Further, the complaint does not allege that she spoke at the October 21 meeting.

A. Aguilar heard Mendez speak up about knocking on restroom doors before moving the trailers.[66] F. Vasquez also recalled that a woman[67] was asking that supervisors knock on the portable toilet doors so that no workers were inside the toilets when they are moved to a different place. F. Vasquez heard A. Fernandez say, yes, we've already talked about that.[68] F. Vasquez testified that A. Fernandez laughed when he said this.

A food safety meeting was held on October 21. A. Aguilar spoke at that meeting telling A. Fernandez that he was violating safety rules: "I told Supervisor Arturo, how could he be talking safety when he, himself, is violating the rules?"[69] According to A. Aguilar, he spoke with coworkers about safety concerns between the October 18 meeting and the October 21 meeting.

Allegation 4: At the October 18 and 21 safety meetings A. Fernandez told A. Aguilar to stop talking when A. Aguilar voiced safety concerns

The complaint[70] alleges that during the October 18 and October 21 safety meetings, A. Fernandez told A. Aguilar to be quiet in front of the workers. The directive to stop talking is alleged to violate §1153(a) by interfering with, restraining, or coercing employees' rights to engage in activities for their mutual aid and protection.

Finding Regarding Allegation 4: At the October 18 meeting, A. Fernandez precipitously ended the meeting thereby precluding A. Aguilar from speaking

[66] J. Gutierrez recalled that a woman spoke up about another topic, that is, something not involving the C. Aguilar accident. He did not recall the topic and did not know the worker's name.
[67] F. Vasquez did not know the woman's name. She was a picker in the crew - a short lady. For the record, Mendez' stature was short. F. Vasquez also identified this lady as "a worker from the crew." (Tr. Vol. III 33:24-34:4). F. Vasquez and Mendez were on the same crew at that time.
[68] F. Vasquez thought this was at a later meeting than the meeting on October 18. However, Mendez did not testify that she spoke up at a later meeting and other corroborating witnesses clearly placed Mendez' comment as occurring during the October 18 meeting.
[69] Tr. Vol. II 91:7-11.
[70] Complaint paragraphs 33, 35, 36, 37, 38, 39, 40, 53, and 54.

further. There is no evidence that A. Fernandez precipitously ended the meeting or told A. Aguilar to Quit Speaking at the October 21 Meeting

A. Aguilar testified that at the October 18 safety meeting, after he stated that A. Fernandez was not careful, A. Fernandez responded that he didn't want A. Aguilar to talk anymore. H. Aguilar recalled that when A. Aguilar began speaking, A. Fernandez told everyone that the meeting was over and they should go to work. H. Aguilar heard a woman say to let A. Aguilar speak.

F. Vasquez recalled that A. Aguilar was focusing on the safety of the other workers because of what happened to his daughter. Then, according to F. Vasquez, A. Fernandez told everyone to go back to work but the meeting was still happening when he stated this.[71] Lopez also testified that several coworkers asked to let A. Aguilar keep speaking.

A. Fernandez agreed that he could not complete the meeting[72] and ended it early. He denied that he told A. Aguilar he could not talk any more. A. Fernandez did not testify regarding the pleas of employees to let A. Aguilar keep talking. When asked how long the meeting lasted, A. Fernandez testified, "I wasn't able to do it – do the whole meeting. . . ." ". . . I wasn't even able to – to read the pamphlet. I wasn't even able to read it."[73]

Although A. Fernandez denied that he told A. Aguilar he could not talk any more, A. Fernandez admitted that he ended the meeting early. This is consistent with the testimony of employee witnesses. The employee witnesses were reliable, credible witnesses with recall for detail and their testimony is credited. None of

[71] F. Vasquez explained that the safety consultant had finished talking but employees were still talking.
[72] Although A. Fernandez testified that he was describing the October 21 meeting, on the record as a whole, it is found that A. Fernandez was describing the October 18 meeting. A. Fernandez testified that J. Gutierrez was present at this meeting. J. Gutierrez was present for the October 18 meeting but not for the October 21 meeting. Moreover, there is no evidence that the October 21 meeting was ended early.
[73] Tr. Vol. IV 117:14-16. An objection was lodged that the response was nonresponsive. Further questions were propounded to rectify and then the second statement was made at Tr. Vol. IV 118:8-13.

them corroborated A. Aguilar's recollection that A. Fernandez told him he did not want him to talk anymore. However, all of them recalled requests that A. Aguilar be allowed to continue talking. Thus, it is found that A. Fernandez told workers to go back to work and ended the meeting while employees were requesting to hear A. Aguilar speak.

Analysis of Allegation 4

As mentioned before, statements that have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their right to engage in protected, concerted activity, when taken in context, violate Section 1153(a) of the Act. Statements are assessed in the context in which they are made and whether they would tend to coerce a reasonable employee. The standard for assessing alleged unlawful threats is objective, not subjective. Any subjective interpretation from an employee is not of any value to this analysis.[74]

A. Aguilar raised a work safety-related concern by stating that A. Fernandez was not careful in the work place. This statement obviously referenced the accident of October 16 which involved A. Aguilar's daughter and A. Fernandez. Ultimately, A. Fernandez responded by precipitously ending the meeting while employees were requesting that A. Aguilar be allowed to continue talking. Certainly such action restrains and coerces a reasonable employee from speaking about work-related safety concerns.

Respondent, referencing a pre-safety meeting conversation between, among others, A. Fernandez and A. Aguilar, claims that A. Aguilar's statement at the safety meeting was a purely personal gripe that he was not informed immediately of his daughter being involved in the accident. However, A. Aguilar's statement at the meeting did not deal with lack of notice to the family. It dealt with general

[74] Authority for the statements in this paragraph may be found, supra, at fns. 21, 22, 23, and 24.

worker safety. Indeed, it is true that due to his daughter's involvement in an accident on company property while she was working, A. Aguilar had a strong interest in the safety of workers – his daughter being a coworker. However, it does not logically follow that A. Aguilar's interest was "purely personal."[75]

Thus, A. Fernandez effectively prohibited voicing of employee safety concerns at a group meeting. Absent a business justification for not allowing employees to speak, such conduct restrains and coerces protected activity.[76]

Conclusion of Law Regarding Allegation 4: It is recommended that it be found that Respondent interfered with, restrained, and coerced its employees in violation of §1153(a) by silencing A. Aguilar when he spoke up about work safety at the crew meeting on October 18. It is recommended that the allegation that Respondent violated the Act by silencing A. Aguilar at the October 21 crew meeting be dismissed for lack of evidence.

Allegation 5: H. and A. Aguilar Were Not Allowed to Work and Issued Disciplinary Tickets on October 23 and 24, respectively

The complaint[77] alleges that by refusing to allow H. Aguilar, who arrived late to work on October 23, while allowing another worker who arrived late to work and by issuing him a disciplinary ticket, Respondent chilled employee rights in violation of §1153(a). The complaint further alleges that by not allowing A. Aguilar to work on October 24 and issuing him a disciplinary ticket, Respondent chilled employee rights in violation of §1153(a).

[75] Respondent further argues that even if A. Fernandez told A. Aguilar to quit talking, A. Aguilar was able to speak at length about his concerns. Accordingly, Respondent urges that any admonition to quit talking was ineffective. This argument is rejected. It is the fact that the admonition was made which harms employee rights.
[76] See, e.g., *Central States Southeast and Southwest Areas* (2015) 362 NLRB No. 155, slip op. at 2, by analogy, (employer violates Act by prohibiting employees from speaking about terms and conditions of employment unless it can prove a specific legitimate and substantial business justification); cf., *Electrolux Home Products* (2019) 367 NLRB No. 136, slip op. at 8-9 (telling employee at captive audience pre-election meeting to "shut up," rude as it might be, is not evidence of union animus. The admonition was not separately pled as a violation of the Act.)
[77] Complaint paragraphs 41-45, 53 and 54.

Finding Regarding Allegation 5: Respondent did not allow H. Aguilar to work on October 23 and issued a disciplinary ticket to him for reporting to work late that date and for failure to work, as scheduled, on the prior day.

On Monday, October 23, A. Aguilar was ill. He asked his son H. Aguilar to let foreman E. Gutierrez know that he could not work due to illness. According to A. Aguilar, when he first began working, he asked E. Gutierrez for his phone number but E. Gutierrez did not give it to him. E. Gutierrez told A. Aguilar, "there was no problem."[78] A. Aguilar's coworkers told him they did not have the number either.

In any event, H. Aguilar, who worked in a different crew than his father, arrived for work about two to five minutes late on Monday, October 23, along with another worker who was similarly late. H. Aguilar went into his row to begin working. Foreman Barajas[79] sent H. Aguilar home and issued him a disciplinary ticket for reporting late and failing to report to work on the previous day, Sunday, October 22, when he was scheduled to work. H. Aguilar believed that the other worker who arrived late was allowed to work.

H. Aguilar did not inform A. Aguilar's foreman E. Gutierrez that his father would not be at work that day due to illness. However, H. Aguilar did speak to A. Fernandez about Barajas' refusal to let him work. A. Fernandez told H. Aguilar that the foreman knew what he was doing. There is no evidence that H. Aguilar told A. Fernandez that his father was ill and would not be at work that day.

Finding Regarding Allegation 5: Respondent did not allow A. Aguilar to work on October 24 and issued a disciplinary ticket to him for failure to give proper notice of his October 23 absence.

[78] Tr. Vol. II 154:2-8.

[79] H. Aguilar could identify this individual only as foreman Ricardo. A. Aguilar testified that there were two forepersons named Ricardo. (Tr Vol II 85:25-87:4). However, only one such foreman is alleged in the complaint – Ricardo Barajas. Accordingly, this name is utilized herein.

On Tuesday, October 24, A. Aguilar reported for work. Foreman E. Gutierrez told A. Aguilar that he would not be allowed to work because he failed to give proper notice for his absence on Monday, October 23. A. Aguilar spoke with A. Fernandez who told A. Aguilar that he was being disciplined. A. Aguilar left the field. He was issued a disciplinary ticket for failure to give proper notice of his absence.[80]

Relevant Handbook Provisions

Respondent's Employee Handbook (revised effective June 30, 2017), Working Hours and Wages, provision 1, provides in relevant part:

a. You must report to work every workday and you must report to work on time. . . . The Company's telephone number is [set forth here].
b. If, for any reason, you are not able to report to work, you must notify the foreman in advance, giving him a reason or explanation for your inability to report for work. It is the responsibility of each worker to obtain his/her foreman's telephone number. If you cannot reach your foreman, you must notify the Personnel Department.

A. Aguilar testified that he could not read. This testimony is credited. Thus it must be concluded that he could not have read these handbook provisions. There is no evidence one way or the other regarding whether A. Aguilar was told during orientation about the notification requirement. Nevertheless, he did know that he might need his foreman's phone number because he requested it from E. Gutierrez but did not receive it. A. Aguilar also requested his son provide notice to E. Gutierrez. Thus, it appears obvious that he knew of this requirement.[81]

[80] The witness was shown a document marked as R.Ex. 8 dated October 23. The witness does not read or write and could not identify it. It was not offered into evidence then or at a later time.

[81] Maithe Casimiro testified that she provided orientation to A. Aguilar. Regarding the specific issue of advising him of the need to notify his foreperson if he was going to be absent, it is unclear that this specific admonition was included. In describing pamphlets that she provided, she stated there was one about "leave or caring for a sick relative." Tr. Vol. III 70:19-71:1. It is unclear whether the notice of absence would have been set forth in such a pamphlet. In the absence of such evidence it is found that it was not in the pamphlet.

There is no evidence that Respondent did not uniformly enforce its attendance and notification policies. As set forth in the handbook, the general guidelines for discipline designate progressive discipline as optional. Verbal counseling, first written warnings, final written warnings, and termination are envisioned. Any or all of the steps may be utilized.

Analysis of Allegation 5

The General Counsel has shown that A. Aguilar was engaged in protected activity. His speaking out about work safety in a group setting where other employees voiced support by asking that A. Aguilar be allowed to continue talking constitutes such activity.[82] Respondent's management was present at the meetings and had knowledge of A. Aguilar's actions. The timing of the discipline as well as A. Fernandez' precipitous ending of the safety meeting constitute animus.[83] Thus, the General Counsel has shouldered the initial burden required by *Wright Line.*

Nevertheless, Respondent has shown that the same action would have been taken in any event. The record is silent regarding whether any other informal practices may be in place regarding notification of absence. The handbook requires that employees notify their foreperson in advance if the employee is unable to report for work. The handbook also references the main office number if the foreman cannot be reached. Clearly A. Aguilar failed to report that he would be absent on October 23. Although he could have called the main office, instead he entrusted his son to relay his illness to appropriate personnel. His son, however, was not allowed to work and could not notify his father's foreperson.

[82] *Neff-Perkins Co.* (1994) 315 NLRB 1229, n. 1; see generally, *Meyers Industries, Inc.* (1986) 281 NLRB 882, 886-887 (a lone employee acting on behalf of other workers by bringing group complaints to the attention of management is engaged in concerted activity).

[83] This unfair labor practice has been found and can be viewed as animus. See, e.g., *Grand View Heights Citrus Assn* (1986) 12 ALRB No. 28, fn. 3 (Respondent's animus established by black listing of union advocates found to be unfair labor practice).

When A. Aguilar reported to work the following day, he was penalized and not allowed to work that day. On October 25, he was allowed to work and given a disciplinary ticket for missing work without providing notice. There is no evidence that any other employee would have been treated more leniently. In other words, there is no showing that A. Aguilar was treated disparately.

The record does not indicate that H. Aguilar engaged in protected activity. Nevertheless, if H. Aguilar was targeted for retaliatory treatment due to his father's protected activity, a violation might be found.[84]

After missing work on Sunday, October 22, H. Aguilar was not allowed to work on Monday, October 23, because he reported for work late. Based on the activity, knowledge, and animus found attached to A. Aguilar's absence,[85] it is concluded that the General Counsel has shouldered the initial *Wright Line* burden of persuasion.

As Respondent points out, H. Aguilar did not give notice that he was going to be late on Monday, October 23, and he had missed a prior day of work without giving notice. Thus, for the same reasons set forth above regarding A. Aguilar, it is found that Respondent would have taken the same action in any event.

Conclusion of Law Regarding Allegation 6: It is recommended that this allegation be dismissed as Respondent has shown it would have refused to let A. Aguilar and his son H. Aguilar work and given them disciplinary tickets in any event.

---

[84] Family members of activists may not be lawfully targeted for discrimination. See, e.g., *Anton Caratan & Sons* (1982) 8 ALRB No. 83, p. 2, modified on other grounds (1983) 9 ALRB No. 37, (employer's discrimination against an employee because of familial relationship with activist may violate ALRA); cf. *Lightning Farms* (1986) 12 ALRB No. 7, pp. 4-5 (family membership by itself may not support a finding of a violation where to lay off the activist was to layoff the family member as well).

[85] The General Counsel asserts that animus is also shown by Respondent treating H. Aguilar disparately. In fact, H. Aguilar saw a coworker arrive late, around the same time that he arrived, and he believed she was allowed to stay and work. This employee reported to a different crew. H. Aguilar's statement of belief is less than a positive affirmation that, yes, he knew the employee was allowed to stay. Moreover, it is possible this employee had given advance notice that she would be late that date. Thus, it is not possible to find disparate treatment based on the fact that another employee on a different crew was allowed to work even though she and H. Aguilar arrived at the same time..

Allegation 6: On Wednesday, October 25, A. Aguilar's return to work was conditioned on his agreeing not to speak up about work-related concerns.

The complaint[86] alleges that on October 25, A. Aguilar reported to work and was told by A. Fernandez that he could return to work but he could not speak up anymore.

Finding Regarding Allegation 6: On Wednesday, October 25, A. Aguilar told A. Fernandez that he was going to work. A. Fernandez said, "That's fine, go work, but don't say anything else."

A. Aguilar testified that when he reported to work on October 25, his foreman E. Gutierrez told him he had to speak with A. Fernandez. A. Aguilar spoke with A. Fernandez and told him he was reporting for work. When it was starting time, A. Aguilar told A. Fernandez that he was going to go to work. A. Fernandez replied, "That's fine, go work but don't say anything else." [87] A. Fernandez did not testify about this allegation.

Analysis of Allegation 6

As mentioned before, statements that have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their right to engage in protected, concerted activity, when taken in context, violate Section 1153(a) of the Act. The statement is assessed in the context in which it is made and whether it tends to coerce a reasonable employee. The standard for assessing alleged unlawful threats is objective, not subjective. Any subjective interpretation from an employee is not of any value to this analysis.[88]

The admonition, "don't say anything else," clearly relates to the October 18 and 21 meetings at which A. Aguilar expressed safety-related work problems.

[86] Complaint paragraphs 45, 53, and 54.
[87] Tr. Vol. II 101:2-8.
[88] Authority for the statements in this paragraph may be found, supra, at fns. 21, 22, 23, and 24.

Contextually, the admonition had nothing to do with the disciplinary ticket that A. Aguilar had received. Thus, it must be concluded that A. Fernandez warned A. Aguilar not to talk about work-related safety issues as a condition of returning to work. Such an instruction clearly constitutes restraint and coercion of employee rights. A reasonable employee would view this instruction as requiring that he forego all statutory right to discuss his work-related safety concerns as a condition of employment.[89]

Conclusion of Law Regarding Allegation 6: It is recommended that a violation of the Act be found.

Finding of Fact: Mendez and coworker "Lucy" [Lusila Cervantes] were involved in a workplace argument on October 20. Mendez was suspended. Cervantes quit.

Mendez recalled that on her last day of work, she spoke with Lucy, a coworker. Lucy or Placida, another coworker, asked Mendez about a cart that was not being used and Mendez said that the cart did not work. According to Mendez, Lucy then said Mendez was offending her and, "if you don't like me, just say it to my face."

E. Gutierrez was in the vicinity. A. Fernandez arrived. A. Fernandez asked what was happening. Both Lucy and Mendez responded.[90] According to Mendez, E. Gutierrez told A. Fernandez that Mendez was the one who provoked the incident. A. Fernandez said that Mendez was always provoking other people and she was suspended. Mendez asked for a document or signature. A. Fernandez handed a paper to E. Gutierrez which E. Gutierrez gave to Perez, the puncher.

[89] See, e.g., *Double D. Constr. Group, Inc.* (2003) 339 NLRB 303, 323 (supervisor's warning to an employee not to engage in protected activity would reasonably tend to interfere with the free exercise of section 7 rights to engage in protected concerted activity under the NLRA).

[90] It is unclear whether Mendez gave her version of the events to A. Fernandez. When he arrived, Mendez testified that he asked what was happening. "And I [Mendez] told him, well, Eloy [E. Gutierrez] said that that's what was happening. . . . Well, he said that I was the one who had provoked this." (Tr. Vol I, 130:7-13).

A. Fernandez testified that on October 20, he was advised by puncher Perez of an incident involving Mendez and coworker Cervantes. On investigation, he discovered that Cervantes had left the crew allegedly due to Mendez. On contacting Cervantes, she related that Mendez was "bothering" her claiming that Cervantes was looking at Rosales too much. Cervantes told A. Fernandez that she was simply working and not looking at Rosales at all. A. Fernandez advised Cervantes that he would switch her to a different crew. Cervantes declined this offer.

In a memorandum of October 20 regarding this incident, A. Fernandez wrote that Cervantes reported that Mendez asked her what she had going on with Mendez' husband Rosales. A. Fernandez did not testify about what he might have said to Mendez about the situation although he did state that he spoke with her and that she did not deny the report of Cervantes.

E. Gutierrez suspended Mendez after this incident. Mendez then spoke with Gonzalez in the office. Gonzalez told her Respondent would investigate the matter.

Allegation 7: Mendez was discharged on October 26 in retaliation for engaging in protected, concerted activity.

The complaint[91] alleges that Mendez was discharged in violation of §1153(a) of the Act in retaliation for engaging in the protected, concerted activity of discussing with her coworkers and complaining to management about moving restrooms while workers were inside them. Respondent counters that Mendez was discharged for her dangerous behavior.

Finding of Fact Regarding Allegation 7: Mendez was discharged on October 26. The reason given by Respondent for the discharge was dangerous behavior.

[91] Complaint paragraphs 34, 37, 46, 55 and 56.

Mendez was terminated on October 26. The personnel action form stated that the discharge was for "Dangerous behavior because she wants to fight and go at it with the first person she runs into." Mendez' son wrote his mother's statement regarding the incident and gave the paper to Gonzalez.[92]

Analysis of Allegation 7

The General Counsel has shown that Mendez engaged in protected, concerted activity by discussing working conditions with co-worker Nestor in April and by voicing an opinion about working conditions during the October 18 safety committee.[93] Her October 18 statement was in the presence of forepersons and superintendent A. Fernandez.[94] As previously mentioned, superintendent A. Fernandez was also aware that Mendez and Nestor spoke concertedly about the restroom issue in April. Thus, knowledge of Mendez protected, concerted activities is established.

As to animus, the General Counsel asserts that A. Fernandez:

> bore animus against [Mendez] because her complaints to Respondent's management in April and October 2017 subjected him to unwanted scrutiny from his superiors and required him to attend a retraining.[95]

[92] See G.C.Ex. 6, as translated by the court translator: "Donia Placcida asked me about the cart, and I told her that it was not working. And Ms. Lucy became upset and said that I was like making fun of her, but it was not like that. She took it as if I was saying something bad about her." Tr. Vol. I, 209:1-5,

[93] *Quicken Loans* (2019) 367 NLRB No. 112, p. 2 (whether employee actions are concerted depends on the manner the action may be linked to those of coworkers, citing *Fresh & Easy Neighborhood Market* (2014) 361 NLRB 151, 152-153). See, also, *Nash-De Camp Co. v. ALRB* (1983) 146 Cal.App.3d 92, cited by the General Counsel. General Counsel further notes that in a group context, a concerted objective may be inferred from the circumstances citing *Whittaker Corp.* (1988) 289 NLRB 933.

[94] The fact that a statement is made at a meeting will not automatically make it concerted. However, a reasonable inference may be drawn from the totality of the circumstances based on such factors as whether the purpose of the meeting is to announce a decision regarding employee terms and conditions, whether the decision affects multiple employees at the meeting, the employee who speaks does so to protest or complain, the speaker is talking about the effect on more than himself, and it was the first opportunity for the employee to speak. *Allstate Maintenance* (2019) 367 NLRB No. 68.

[95] General Counsel's Post-Hearing Brief at p. 17, lines 15-17.

This assertion must be viewed as an attempt to create an inference of animus. As found above, however, there is no direct evidence of "unwanted scrutiny" of A. Fernandez from any superiors after Mendez reported Nestor's incident in April 2017. Moreover, A. Fernandez did not move the trailers in either the 2016 or 2017 incidents. The first safety complaint was made about E. Gutierrez in 2016 and the second concerned Ortega in April 2017. Under the circumstances, an inference of animus from the fact that Mendez made two safety-related complaints is unsupported and unwarranted. The record reflects that safety meetings are routine. It strains reason to find that retraining in 2016 created any animus on the part of Respondent, much less a sustained animus toward Mendez from 2016 into late 2017 when she was discharged. Thus, the General Counsel's assertion of animus on this basis is rejected.

The General Counsel also asserts that animus may be inferred from the fact that when Mendez complained about forepersons failing to knock on bathroom doors at the October 18 meeting, according to F. Vazquez, A. Fernandez said he had already talked about that and then laughed.[96] The fact that one witness claimed that A. Fernandez laughed but no other witness corroborated this is troubling. Although it might be possible to make an inference of animus based on A. Fernandez' laughing, this is a very slim reed – not to mention an ambiguous one - upon which to find animus. In the absence of any other credible claim of animus, it is found that laughing alone, if it occurred, is insufficient to support the requisite animus.

Finally, the General Counsel asserts that animus may be inferred from the timing of the discharge, only eight days after Mendez spoke up at a safety meeting. Indeed, as mentioned earlier, the unexplained timing of an adverse employment

[96] General Counsel's Post-Hearing Brief, p. 18, lines 1-2.

action may allow for an inference of animus. However, in this case, the timing is not unexplained. Rather, the timing is explained by an incident that occurred on October 20 along with other similar incidents as Respondent's reason for discharge.

Thus, the General Counsel has not shown by a preponderance of the evidence that Mendez' protected conduct was a motivating factor, in whole or in part, for Respondent's discharge of her. Although the General Counsel has shown activity and knowledge, there must be a showing of animus sufficient to warrant an inference of unlawful motivation. As found above, evidence of animus has not been found. It must be concluded that there can be no inference of unlawful motivation due to lack of direct or circumstantial evidence of animus.

In any event, Respondent presented evidence indicating that within three months of her discharge, Mendez was involved in three incidents with female coworkers concerning her husband. Mendez agreed that the incidents occurred. She did not deny that she accused female coworkers of paying too much attention to her husband. However, from Mendez' perspective, the arguments were always started by coworkers when they flirted with her husband. Mendez also claimed that she did not threaten anyone.

Assuming that a preponderance of the evidence did warrant finding an inference of unlawful motivation, examination of Respondent's business justification results in a finding that even if the General Counsel had satisfied the preliminary burden of persuasion, Respondent has shown that it would have taken the same action for legitimate business reasons in the absence of Mendez protected activity. Respondent relies on a series of incidents between Mendez and co-workers.

Reports directed to the office and to A. Fernandez indicated that Mendez was involved in at least three incidents with her coworkers immediately before her

discharge.[97] In each of these incidents, Mendez perceived that a female coworker was paying too much attention to her husband. These reports came from various sources, that is uninvolved observers as well as coworkers involved in the arguments. One report was from supervisor L. Fernandez, at least two were from coworker Zaragoza, and one from coworker Santiago Vasquez (S. Vasquez). Two of these reports indicated that a threat of violence was made by Mendez in late August.

- August Incident

This is the first of two incidents involving Mendez and her coworkers Salustina Zaragoza Aguilar (Zaragoza), who Mendez referred to as Josephina, and Zaragoza's sister Sandra Zaragoza (Sandra Zaragoza). Unfortunately, at times the testimony of the witnesses regarding the two incidents is confusing as to which of the two incidents is being described. This is due in part to the witnesses' uncertainty of the dates.

Mendez and Zaragoza testified at length regarding these incidents. It is important to note, however, that no supervisory personnel were present during their exchanges. When supervisors were called to the scene, an investigation was undertaken. In any event, suffice it to say, the actual words and actions of the participants were never heard by supervision. Rather, the participants and bystanders were contacted and their accounts along with the participants' accounts were relied on.

Office administrator Gonzalez documented a phone call from S. Vasquez on September 11.[98] S. Vasquez reported that Mendez "wanted to hurt another woman

[97] A December 2016 report from Ortega indicated that Mendez asked Ortega what was going on with Beto (Mendez' husband) and then said, "You better be careful. I'll be watching you." Ortega reported this incident to A. and L. Fernandez. It is not clear that Respondent considered this report in determining to discharge Mendez.
[98] The report document (R.Ex. 4) was received in Spanish. (Tr. Vol. II 32:12-14) after the document was translated into English by the official court interpreter/translator. (Tr. Vol. II 31:23-32:10).

with the scissors they used to cut the runner." The words used by Mendez, per S. Vasquez, were, "that she was going to f__k them up." The memorandum reflects that S. Vasquez thought the incident was two or three weeks prior to his reporting it. S. Vasquez did not testify.

A. Fernandez followed up on this report. He received different versions of the incident from Mendez and Zaragoza. After the incident, A. Fernandez sent Zaragoza and her sister to another ranch and Mendez stayed at the Xerox ranch. As to the substance of the dispute, Mendez denied at the hearing that she threatened any employee with scissors[99] while Zaragoza claimed that Mendez did so. Mendez was reprimanded: "The one who is provoking here is you."

September Incident

In September, L. Fernandez alerted A. Fernandez of a problem between Zaragoza and Mendez. In addition, A. Fernandez received a report of the incident from Zaragoza and her sister. As a result of these communications, A. Fernandez testified that he spoke with Mendez, Zaragoza, and Rosales to hear their versions of the conflict. A. Fernandez told Mendez that she must work with her coworkers. Further, he advised that her jealousy regarding her husband Rosales prevented her from working properly.

Zaragoza and her sister told A. Fernandez they could not continue to work for Respondent due to Mendez' threat. A. Fernandez spoke to Zaragoza and told her to ignore Mendez and just continue to work. He sent Zaragoza and her sister to

[99] During cross-examination, Mendez answered that, yes, she had threatened employees Zaragoza and her sister with a knife. (Tr. Vol. I 169:6-10). On redirect, Mendez stated that she had not threatened any employee with a knife. (Tr. Vol. 1 188:15-189:4). The General Counsel asked on redirect if Mendez was intimidated by Respondent's counsel when she said "yes," that she had threatened someone with a knife. Mendez said she was intimidated. General Counsel argues that this is the reason Mendez answered yes, that she had threatened employees. That argument is rejected. Nevertheless, Mendez' cross-examination testimony that she had threatened employees with a knife is not credited because it is totally inconsistent with the entirety of her prior testimony and, as the General Counsel points out, Mendez was surprised when she was told on redirect that she had answered "yes" to the question. Moreover, Zaragoza never testified that Mendez threatened her with a knife.

work in a different area. A. Fernandez also spoke to Rosales and urged him to speak to Mendez. A memorandum of September 18 memorializes A. Fernandez' investigation and action.

October Incident

On October 20, A. Fernandez was advised by puncher Perez of an incident involving Mendez and coworker Lusila Cervantes (Cervantes). On investigation, he discovered that Cervantes had left the crew allegedly due to Mendez. On contacting Cervantes, she related that Mendez was "bothering" her claiming that Cervantes was looking at Rosales too much. Cervantes told A. Fernandez that she was simply working and not looking at Rosales at all. A. Fernandez advised Cervantes that he would switch her to a different crew. Cervantes declined this offer. In a memorandum of October 20 regarding this incident, A. Fernandez wrote that Cervantes reported that Mendez asked her what she had going on with Mendez' husband Rosales. A. Fernandez did not testify about what he might have said to Mendez although he did state that he spoke with her and that she did not deny the report of Cervantes.

E. Gutierrez suspended Mendez after the October 20 incident[100] and she was terminated on October 26. The personnel action form stated that the discharge was for "Dangerous behavior because she wants to fight and go at it with the first person she runs into." By letter of November 14, 2017, and a phone call from

[100] A. Aguilar testified he overheard conversation between A. Fernandez and Mendez on Mendez' last day of work. E. Gutierrez and Perez were present as well. According to A. Aguilar, A. Fernandez told Mendez that she was creating problems and acting like a child. The testimony includes statements made loudly by a coworker whose husband is Jorge, "I want you to say it to my face." According to A. Aguilar, Mendez was calm. (Tr. Vol. II 105:16 – 106:10). This testimony indicates that Mendez was calm and not speaking as loudly as a coworker whose name is Jorge. However, assuming that this coworker is Zaragoza, the evidence of who speaks more loudly does not assist in determining whether Respondent validly considered this incident when deciding to discharge Mendez.

Gonzalez on the previous day, Respondent offered Mendez an unconditional opportunity to return to work. Mendez declined the offer.[101]

Respondent must demonstrate that it would have taken the action in the absence of the protected conduct.[102] The evidence relied upon by Respondent constitutes a legitimate business reason for discharge. If, however, the evidence indicates that the proffered reason for an employer's action is pretextual, the employer fails.[103] That is not the case here. Respondent's policy, as set forth in its handbook, does not tolerate threats of violence.[104] There is no evidence that threats of violence have been tolerated in other instances. Thus it is found that even if the General Counsel carried the initial *Wright Line* burden, Respondent has shown that it had a reasonable belief that Mendez had committed the offense and, acting on this belief, it would have discharged Mendez in any event.[105]

Conclusion of Law Regarding Allegation 7: It is recommended that Allegation 7 be dismissed because the General Counsel did not show by a preponderance of the evidence that protected activity was a motivating factor in Mendez' discharge. Moreover, assuming the General Counsel did make such a showing, it is nevertheless recommended that Allegation 7 be dismissed because Respondent has shown that it would have taken the same action for legitimate business reasons in the absence of Mendez' protected conduct.

Allegation 8: A. Aguilar's work assignment was changed and he was issued a disciplinary ticket in retaliation for his filing an unfair labor practice change

[101] A. Aguilar filed the unfair labor practice charge in 2017-CE-071-SAL on November 6. Mendez filed the unfair labor practice charge in 2017-CE-072-SAL on November 6. The fact that Respondent made an unconditional offer to Mendez immediately after the charge was filed is not probative of the merits of the discharge but indicative only of a desire to limit any backpay liability.
[102] See, e.g., *Boothwyn Fire Co. No. 1* (2016) 363 NLRB No. 191, slip op. at 7, citing authorities.
[103] See, e.g., *Golden State Foods Corp.* (2003) 340 NLEB 382, 385.
[104] See Handbook, R.Ex. 11 at p. 21: "Violence . . . will not be tolerated. . . . If you receive or overhear any threatening communications from an employee . . . report it to your supervisor at once."
[105] See, *SBM Site Services, LLC* (2019) 367 NLRB No. 147, slip op. at 3: "To meet its defense burden, the Respondent must show that 'it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharge [the employee].'" [citing cases]

A. Aguilar filed an unfair labor practice charge in Case 2017-CE-072-SAL on November 6. The complaint[106] alleges that on January 22, 2018,[107] A. Aguilar was transferred from E. Gutierrez' crew to a crew led by foreman Villanueva. The complaint alleges on January 26, Villanueva gave A. Aguilar a disciplinary ticket and told him if he did not like working there with him, to get out. The transfer of A. Aguilar to a new crew and issuance of a disciplinary ticket are alleged to violate §1153(d) in retaliation for his filing an unfair labor practice charge.[108]

Finding of Fact Regarding Allegation 8: On January 22, A. Aguilar and other employees were transferred to perform plastic cleanup work. The work is typically performed at the end of each season. Each foreperson sends five or six crew members to perform this work.

On Monday, January 22, A. Aguilar and a few others in his crew were transferred to a crew led by foreman Villanueva to perform "plastic" work. A. Fernandez explained that at the end of each season he asks each foreman to send five or six workers out of each crew to perform plastic cleanup work. For the 2017 summer harvest, this cleanup was in January 2018. F. Vasquez recalled that he and more than 15 other workers were performing this work which entailed shoveling dirt, which had built up over the season, away from the plastic irrigation lines. F. Vasquez explained that the plastic cleanup work, digging up the irrigation pipes, is normal at the end of each harvest. At the time F. Vasquez was transferred to perform this work, some workers were still picking.

[106] Complaint pars. 47, 51, 52, 55.
[107] All January dates are in 2018 unless otherwise referenced.
[108] See complaint paragraphs 47-52, 59 and 60. A. Aguilar's November 6 unfair labor practice charge alleged that Respondent discriminated against A. Aguilar and his son by not allowing them to work in late October. A return receipt indicates that Respondent received a copy of the charge on November 9. That charge supported complaint allegations 4, 5, and 6, which have already been discussed.

F. Vasquez explained, "It was hard work digging with the shovel."[109] About January 24, Foreman Villanueva yelled at F. Vasquez because he was standing briefly. When F. Vasquez stood upright to catch his breath, Villanueva came over and told F. Vasquez to hurry up. Villanueva told F. Vasquez he should not be standing – to keep working. A. Aguilar overheard Villanueva speaking harshly to F. Vasquez so he approached. F. Vasquez explaining that F. Vasquez speaks Mixteco. A. Aguilar speaks Spanish and Mixteco. Villanueva spoke Spanish.

In any event, A. Aguilar told Villanueva that this was pretty heavy work and F. Vasquez should be allowed to stand up and to get a cup of water. F. Vasquez testified that Villanueva told A. Aguilar he was not talking to him.

A. Aguilar also heard Villanueva tell F. Vasquez that he was being a "lazy ass" and to work harder. A. Aguilar told foreman Villanueva that he did not need to insult his coworker. Villanueva responded, according to A. Aguilar, "You hurry up with your work. I'm not talking to you."[110] Villanueva added he would get the supervisor to come: "When supervisor Arturo [Fernandez] comes over, you tell him." No supervisor came to the location.

A. Fernandez denied that A. Aguilar was transferred to do plastic cleanup work in Villanueva's crew in January 2018 because he filed an unfair labor practice charge in November 2017. A. Fernandez stated that this transfer is normal. Further, A. Fernandez testified that at the end of each season, employees are transferred to perform "plastic pickup work." It was not because A. Aguilar filed an unfair labor practice charge. A. Fernandez testified that he was not aware that A. Aguilar had filed an unfair labor practice charge.[111]

---

[109] Tr. Vol. III 35:3-13.

[110] F. Vasquez heard Villanueva say to A. Aguilar, "Yeah, you shouldn't talk. You should basically shut your mouth. I'm not talking to you. I'm talking to the worker."

[111] On January 24, after being transferred to plastic work, A. Aguilar filed unfair labor practice charge 2018-CE-011-SAL. He had not yet received a warning ticket. However, the allegation regarding the warning ticket relates back to the charge in that it is closely connected to the allegation in the charge. Respondent argues that the charge cannot

Finding of Fact Regarding Allegation 8: On January 26, A. Aguilar was given a warning ticket by foreman Villanueva for not performing his work quickly.

After the plastic work was finished, A. Aguilar was transferred to another field to pick remaining berries and remove weeds and move plants. On Friday, January 26, foreman Villanueva approached A. Aguilar and told him he was not performing his work of moving a plant correctly or quickly enough. A. Aguilar responded that he was performing his work like his coworkers. A. Aguilar further accused foreman Villanueva of singling him out because he spoke up on behalf of his coworkers. Foreman Villanueva gave A. Aguilar a disciplinary ticket for not working quickly enough and told him if he did not like working there with him to leave.[112] According to A. Aguilar, A. Fernandez approached around this time and told A. Aguilar to do what the foreman said.

Analysis of Allegation 8[113]

Utilizing the *Wright Line* analysis,[114] the record reflects that A. Aguilar filed an unfair labor practice charge[115] in November 2017 and Respondent timely received a copy of the charge. Thus activity (filing a charge) and knowledge (receipt of the charge) have been proven. However, there is no evidence of animus

possibly support the allegation regarding the warning ticket because the warning ticket was issued after the charge was filed. Contrary to Respondent's argument, it is well established that a charge is not a pleading, and its function is not to apprise Respondent of the exact nature of the allegations against it. Rather, a charge serves only to initiate an investigation by the regional office to determine whether to issue a complaint. *National Licorice Co. v. NLRB* (1940) 309 U.S. 350, 368-369 (actions which occurred after the unfair labor practice was filed are properly included in the complaint); *NLRB v. Fant Milling Company* (1959) 360 U.S. 301, 307 (reaffirming holding in *National Licorice*); *Duke Wilson Company* (1986) 12 ALRB No. 19, p. 4-5. It is the complaint which notifies Respondent of the allegations against which it must defend.

[112] The recitation above is based on the testimony of F. Vasquez, A. Aguilar, and A. Fernandez. Villanueva did not testify. Although a January 24 ticket was marked for identification as R.Ex. 9, A. Aguilar, who cannot read, could not identify it. The actual document remained unauthenticated and was not offered on the record.

[113] The General Counsel did not brief this allegation although at the hearing, the General Counsel stated that she was pursuing this allegation. (Tr. Vol. III 7:1-8:7). No explanation was provided for failure to brief. In the absence of withdrawal of the complaint allegation, it will be analyzed.

[114] *O. P. Murphy Produce Co., Inc.* (1978) 4 ALRB No. 106, ALJD p. 16 (elements of proof in an 1153(d) violation are the same as those required in an 1153(c) violation); NLRB authority is the same. A *Wright Line* approach is also used for analyzing alleged violations of the Act based on retaliation for filing an unfair labor practice charge. *Newcor Bay City Division*, (2007) 351 NLRB 1034 fn. 4; *All Pro Vending, Inc.* (2007) 350 NLRB 503, 515.

[115] Case No. 2017-CE-071-SAL.

directed at A. Aguilar for having filed a charge. Thus, a preponderance of the evidence does not support an inference of unlawful motivation in A. Aguilar's transfer to plastic work.

Assuming for the sake of argument that the record would support an inference of unlawful motivation, Respondent has nevertheless shown that it would have transferred A. Aguilar to the plastic shovel work. The record indicates that this work was routinely performed at the end of each season. About 15 workers from various crews were transferred to perform this work. There is no indication that A. Aguilar was chosen for this work in retaliation for filing the unfair labor practice charge in November or for his prior protected activity in October.

A. Fernandez specifically denied that he caused A. Aguilar's transfer. A. Fernandez noted that his practice is to ask each foreperson for a few workers to perform this work. A. Fernandez testimony is credited in this regard. In fact. F. Vasquez' testimony supports A. Fernandez' testimony in that he agreed a crew of 15 workers was assembled for the plastic work. Thus, Respondent has shown that it would have transferred A. Aguilar in any event for a legitimate business reason.

As to the disciplinary ticket, the evidence indicates that A. Aguilar came to the defense of his coworker F. Vasquez on January 24. A. Aguilar protested Villanueva's treatment of F. Vasquez. This is classic protected concerted activity.[116] A. Aguilar acted on behalf of coworker F. Vasquez, who did not speak the same language as the foreman, regarding their terms and conditions of employment.

Villanueva's animus toward A. Aguilar was immediate and vocal. "If you don't like working with me right now . . . go to the other crew."[117] "You hurry up

[116] See, e.g., *Sabor Farms* (2016) 42 ALRB No. 2, fn. 2 (two employees left work together over dispute involving working assignment); *Mardi Gras Mushroom Farms* (1984) 10 ALRB No. 8, ALJD at 10 (employees protesting layoff out of order of seniority were engaged in protected concerted activity);
[117] Tr. Vol. II 114:1-7.

with your work. I'm not talking to you."[118] "Yeah, you shouldn't talk. You should basically shut your mouth. I'm not talking to you. I'm talking to the worker."[119]

Of course, the theory of the complaint allegation is that A. Aguilar was given the disciplinary ticket in January 2018 because he filed an unfair labor practice charge in November 2017. Knowledge and activity are proven on this theory but animus is not.

The theory that A. Aguilar was given the disciplinary ticket on January 26, 2018, due to his protected, concerted activity on January 24, 2018, is based on the same type of theory – retaliation – and this theory was fully litigated at hearing. A violation not alleged in the complaint may nevertheless be found when the unlawful activity is related to and intertwined with the complaint allegations and the matter has been fully litigated.[120] Direct relation to the complaint allegation of issuance of a disciplinary ticket in retaliation for filing an unfair labor practice charge is present. The allegation that the disciplinary ticket was issued due to protected, concerted activity is based on a similar legal theory. The facts of unfair labor practice charge retaliation are identical with the facts of protected, concerted activity retaliation. The record is complete and contains all the facts necessary for making a legal conclusion.

Activity, knowledge, and animus are present. Respondent's reason for giving the ticket was that A. Aguilar was not working fast enough while he was engaged in transplanting plants. A. Aguilar credibly testified that he has about 23 years' experience in this work and he was working as quickly as the fragility of the plants allowed. Respondent did not present any evidence to support the ticket.

[118] Tr. Vol. II 116:21-23.
[119] Tr. Vol. III 37:13-17.
[120] *George Amaral Ranches, Inc.* (2014) 40 ALRB No. 10, pp. 16-17 (threat to call law enforcement was not alleged in complaint but was related to and intertwined with complaint allegations and was fully litigated).

Thus, Respondent has failed to show that it would have issued a disciplinary ticket to A. Aguilar in any event.

Conclusion of Law Regarding Allegation 8: It is recommended that the portion of allegation 8 regarding transfer to plastic work be dismissed. It is recommended that the portion of allegation 8 regarding retaliatory disciplinary ticket being issued to A. Aguilar on January 26, 2018, be found.

CONCLUSIONS OF LAW

It is recommended that the following violations be found:

Allegation 4: Respondent interfered with, restrained, and coerced employees by silencing employee A. Aguilar when he spoke up about terms and conditions of employment at a crew meeting on October 18.

Allegation 6: Respondent interfered with, restrained, and coerced employees by conditioning A. Aguilar's return to work on October 25 on his not speaking up about work-related concerns.

Allegation 8: Respondent issued a disciplinary ticket to A. Aguilar on January 26, 2018, in retaliation for his protected, concerted activity.

It is recommended that the following allegations be dismissed:

Allegation 1: Telling employee Mendez on April 8 not to report workers' complaints about terms and conditions of employment and reprimanding her for doing so;

Allegation 2: Changing employee Mendez' working conditions after April 8, by watching her more closely and demanding proof for an absence from work;

Allegation 3: Reprimanding Mendez in August in retaliation for her protected, concerted activity;

Allegation 4: Telling A. Aguilar to stop speaking about terms and conditions of employment at a safety meeting on October 21.

Allegation 5: Refusing to allow employees A. Aguilar and H. Aguilar to work on October 23 and 24 and issuing each employee a disciplinary ticket;

Allegation 7: Terminating Mendez' employment on October 26 in retaliation for her complaints about employees' terms and conditions of employment; and

Allegation 8: Changing A. Aguilar's work assignment on January 22, 2018, in retaliation for his filing an unfair labor practice charge.

REMEDY

Having concluded that Respondent violated the Act by precipitously ending a meeting on October 18, 2017, thereby precluding A. Aguilar from speaking about safety matters; by conditioning A. Aguilar's return to work on October 25, 2017, on his not speaking up about work-related concerns; and by issuing a disciplinary ticket to A. Aguilar on January 26, 2018 in retaliation for his speaking up for a coworker, Respondent will be ordered to cease and desist from the unlawful conduct and take certain affirmative action to remedy the unlawful conduct.

Respondent will be required to mail signed copies of the attached Notice to Agricultural Employees to all agricultural employees, including FLC workers if employed during the period from October 18, 2017 to October 18, 2018. Respondent will also be required to grant ALRB agents access to work sites where their agricultural employees are employed at mutually arranged times to provide a reading of the attached Notice outside the presence of supervisory personnel. Following the reading, Respondent's agricultural employees must be provided a reasonable period of time in which to ask questions of the ALRB agents about the Notice or about their rights under the Act. The time spent during the reading and the question and answer period shall be compensated by Respondent at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period. In addition, Respondent

must post the Notice at its work sites for a period of 60 days during the period of peak employment; provide access during the period to ALRB agents to ensure compliance with this notice posting requirement; and provide a signed copy of the Notice to each person it hires for work as an agricultural employee during the twelve-month period following the issuance of the ALRB's order in this case.

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, Respondent Saticoy Berry Farms, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
   (a) Precipitously ending a safety meeting to stop an employee from talking about safety matters;
   (b) Telling an employee that his reinstatement was conditioned on not talking about safety matters;
   (c) Issuing a disciplinary ticket to an employee because he assisted a coworker in a confrontation with a foreman; and
   (d) In any like or related manner interfering with, restraining, or coercing its agricultural employees in the exercise of the rights guaranteed them by section 1152 of the Agricultural Labor Relations Act.
2. Take the following affirmative actions necessary to effectuate the policies of the Act:
   (a) Rescind the disciplinary ticket of January 26, 2018, given to Alfonzo Aguilar and expunge such ticket from his personnel file.
   (b) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(c) Mail signed copies of the attached Notice to the last known address of all agricultural employees it employed, including those employed by farm labor contractors, during the period from October 18, 2017 to October 18, 2018.

(d) Grant ALRB agents access to work sites where the agricultural employees work at mutually arranged times in order to read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

(e) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for sixty (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) Provide access during the notice-posting period to ALRB agents to ensure compliance with the notice-posting requirements of this Order.

(h) Provide a signed copy of the Notice to each person it hired for work as an agricultural employee during the 12-month period following the issuance of the ALRB's Order in this case.

(i) Notify the Regional Director in writing within thirty (30) days after the date of issuance of this Order of the steps Respondents have

taken to comply with the terms and, on request, also notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: August 6, 2019

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing in which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (ALRB) found that we violated the Agricultural Labor Relations Act (Act) by restraining and coercing employees as alleged in a complaint issued by the ALRB's General Counsel.

The ALRB has told us to post, publish, and abide by the terms of this Notice. The 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 prohibit employees from speaking at safety meetings, condition reinstatement on employees not speaking further about safety matters, or issue a disciplinary ticket to an employee because he assisted another employee in a confrontation with a foreman about a work-related matter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of the rights set out above.

DATED: _____ _____

SATICOY BERRY FARMS, INC.

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board (ALRB). The nearest ALRB office is located at 1901 N. Rice Avenue, Suite 200, Oxnard, CA 93030-7912; phone (805) 973-1251.

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