

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,**

Plaintiff,

OLIVIA TAMAYO,

Plaintiff-Intervenor,

v.

HARRIS FARMS, INC.,

Defendant.

CIV F 02-6199 AWI LJO

**ORDER ON PLAINTIFF'S
MOTION TO AMEND
JUDGMENT TO INCLUDE
EQUITABLE RELIEF AND
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

After a 23 day jury trial that began in December 2004 and ended in January 2005, a jury awarded Plaintiff-Intervenor Olivia Tamayo (“Tamayo” or “Ms. Tamayo”) approximately \$1 million. Plaintiffs now seek a permanent injunction that has roughly 10 facets. Plaintiffs have also submitted 94 proposed findings of fact and 8 conclusions of law, which are intended to be the basis for the injunctive relief requested.¹ The 10 facets of injunctive relief requested against

¹Defendant has filed a general objection against the proposed findings of fact in which it argues that findings and conclusions are inappropriate as a jury has already made all necessary findings. The Court does not find Defendant’s objection persuasive because a jury may decide some issues while the court may decide others, and 42 U.S.C. § 2000e-5(g)(1) is premised on a finding of intentional conduct by the Court. See 42 U.S.C. § 2000e-5(g)(1); Rutherford v. Harris County, 197 F.3d 173, 177-79 (5th Cir. 1999); Gotthardt v. National Railroad Passenger Corp., 191 F.3d 1148, 1152-53 (9th Cir. 1999); EEOC v. E.I Du Pont de Numours & Co., 2005 U.S. Dist. LEXIS 46 (E.D. La. January 4, 2005); Sherman v. Kasotakis, 314 F.Supp.2d 843, 848, 880 (N.D. Iowa 2004); Reiter

1 Defendant are: (1) General injunction against Defendant prohibiting sex discrimination and
2 retaliation; (2) Hire an independent consultant (“IC”) with Title VII experience to enforce
3 Defendant’s harassment policy; (3) Revision of the sex harassment policy through the IC w/in 45
4 days of injunction; (4) Creation of complaint procedure w/in 45 days through the IC that
5 encourages employees to report harassment; (5) Force Defendant to impose “substantial
6 discipline” on any supervisor or manager who engaged in or permitted “harassment”; (6)
7 Harassment/Retaliation training for employees w/in 90 days, 4 hours for employees and 8 hours
8 for supervisor; (7) Use an independent, certified translator for complaints and training; (8) For
9 five years and twice every year, send reports and documentation to the EEOC; (9) Post the terms
10 of the injunction; and (10) Duration of the injunction shall be 5 years and all costs shall be borne
11 by Defendant.

12 After denials of Defendant’s post trial motions, the Court requested additional
13 information from Defendant in order to resolve Plaintiff’s motion for injunctive relief.
14 Specifically the Court requested that Defendant explain its current policies and procedures, who
15 administers the policies, and that person’s qualifications. Defendant has now submitted the
16 additional requested information.

17 The Court will grant in part Plaintiffs’ motion as described below.

18
19 **INJUNCTION STANDARDS**

20 As part of the remedies available to a successful Title VII plaintiff, the court may impose
21 an injunction against the employer/defendant. In relevant part, 42 U.S.C. § 2000e-5(g)(1) reads:

22 If the court finds that the respondent has intentionally engaged in or is
23 intentionally engaging in an unlawful employment practice charged in the
24 complaint, the court may enjoin the respondent from engaging in such unlawful
25 employment practice, and order such affirmative action as may be appropriate,
26 which may include, but is not limited to, reinstatement or hiring of employees,
with or without back pay (payable by the employer, employment agency, or labor
organization, as the case may be, responsible for the unlawful employment

27

v. Metropolitan Trans. Auth. of New York, 2003 U.S. Dist. LEXIS 17391 (S.D. N.Y. September 30, 2003).

1 practice), or any other equitable relief as the court deems appropriate.

2 42 U.S.C. § 2000e-5(g)(1).

3 The decision to award or deny injunctive relief is reviewed for an abuse of discretion and
4 the application of correct legal principles. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1518 (9th
5 Cir. 1989). Although referencing racial discrimination, the Supreme Court has admonished that
6 district courts have “not merely the power but the duty to render a decree which will so far as
7 possible eliminate the discriminatory effects of the past as well as bar like discrimination in the
8 future.” Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Thus, once intentional
9 discriminatory or unlawful employment conduct is found, “district courts have broad equitable
10 powers to fashion relief for violations of Title VII that will eliminate the effects of past
11 discrimination.” Bouman v. Block, 940 F.2d 1211, 1233 (9th Cir. 1991); see also Ilona of
12 Hungary, 108 F.3d at 1578. However, the court’s discretion in fashioning injunctive is not
13 unlimited and provisions of an injunction may be improper “if they are broader than necessary to
14 remedy the underlying wrong.” EEOC v. HBE Corp., 135 F.3d 543, 557 (8th Cir. 1998) (citing
15 Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263 (8th Cir. 1985)). Because the EEOC acts to
16 vindicate the public interest and to protect similarly situated employees from retaliation and
17 unlawful discrimination, the EEOC need only identify one or a mere handful of aggrieved
18 employees in order to obtain injunctive relief. See EEOC v. Frank’s Nursery & Crafts, Inc., 177
19 F.3d 448, 467-468 (6th Cir. 1999); see also Hacienda Hotel, 881 F.2d at 1519. “The EEOC may
20 obtain a permanent injunction even where it does not allege a pattern or policy of
21 discrimination.” Frank’s Nursery, 177 F.3d at 468.

22 “Permanent injunctive relief is warranted where . . . defendant’s past and present
23 misconduct indicates a strong likelihood of future violations.” Orantes-Hernandez v.
24 Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990). “In seeking a permanent injunction, the moving
25 party must convince the court that relief is needed: ‘The necessary determination is that there
26 exists some cognizable danger of recurrent violation, something more than the mere possibility
27

1 which serves to keep the case alive.” Cummings v. Connell, 316 F.3d 886, 898 (9th Cir. 2003)
2 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)); see also HBE Corp., 135
3 F.3d at 558 (holding specific injunction provision was unnecessary as it only addressed
4 “speculative future harm”). A determination that danger of reoccurrence exists must “be based
5 on appropriate findings supported by the record.” United States v. Laerdal Mfg. Corp., 73 F.3d
6 852, 854-855 (9th Cir. 1995); Federal Election Comm’n v. Furgatch, 869 F.2d 1256, 1263 (9th
7 Cir. 1989); see also Fed. R. Civ. P. 65(d). Evidence relied on to show a cognizable danger of
8 recurrent violation should not be “stale” or too far removed from the present. See Webb v.
9 Missouri Pacific Railroad Co., 98 F.3d 1067, 1068-69 (8th Cir. 1996) (and cases cited therein)
10 (holding that past conduct cannot support an injunction issued five years after the close of
11 evidence). In making this finding, the court may consider “the degree of scienter involved; the
12 isolated or recurrent nature of the infraction; the defendant’s recognition of the wrongful nature
13 of his conduct; the extent to which the defendant’s professional and personal characteristics
14 might enable or tempt him to commit future violations; and the sincerity of any assurances
15 against future violations.” Laerdal Mfg. Corp., 73 F.3d at 854-855; Furgatch, 869 F.2d at 1263
16 n.5.

17 A defendant may resist an injunction by showing that “there is no reasonable expectation
18 that the wrong will be repeated;” in other words, the issue or claim is moot. W.T. Grant, 345
19 U.S. at 633; see also Hacienda Hotel, 881 F.2d at 1518-19; EEOC v. Goodyear Aerospace Corp.,
20 813 F.2d 1539, 1544 (9th Cir. 1987). However, the burden of showing no reasonable expectation
21 of repeating the wrong is heavy. See W.T. Grant, 345 U.S. at 633. Generally, victims of
22 employment discrimination are entitled to an injunction against future discrimination unless the
23 employer proves it is unlikely to repeat the practice. See Hacienda Hotel, 881 F.2d at 1819;
24 Goodyear Aerospace, 813 F.2d at 1544. Moreover, an “employer that takes curative actions only
25 after it has been sued fails to provide sufficient assurances that it will not repeat the violation to
26 justify denying an injunction.” Hacienda Hotel, 881 F.2d at 1519; Goodyear Aerospace, 813

1 F.2d at 1544. Where individuals who are found to have discriminated remain as a defendant's
2 primary decision maker, injunctive relief may be justified. Ilna of Hungary, 108 F.3d at 1579.

3 If a court issues an injunction, the court must *inter alia* set forth the reasons for issuance.

4 Federal Rule of Civil Procedure 65(d) reads:

5 Every order granting an injunction and every restraining order shall set forth the
6 reasons for its issuance; shall be specific in terms; shall describe in reasonable
7 detail, and not by reference to the complaint or other document, the act or acts
8 sought to be restrained; and is binding only upon the parties to the action, their
officers, agents, servants, employees, and attorneys, and upon those persons in
active concert or participation with them who receive actual notice of the order by
personal service or otherwise.

9 Fed. R. Civ. Pro. 65(d).

10 TRIAL

11 The EEOC brought suit in this Court on September 30, 2002, and Olivia Tamayo filed
12 her complaint in intervention on January 1, 2004. Trial began on November 29, 2004, and ended
13 on January 21, 2005, with a jury verdict. The matters presented to the jury for resolution were
14 Plaintiff's claims as to liability and economic damages, non-economic damages, and punitive
15 damages. The jury found in favor of Plaintiffs on both Title VII and California Fair Employment
16 and Housing Act claims. Specifically, the jury found:

- 17 a. hostile environment sexual harassment by her supervisor, Rene Rodriguez;
- 18 b. hostile environment sexual harassment by co-workers through sexual
19 rumors/gossip in late 2000/early 2001;
- 20 c. retaliation against Tamayo for complaining of co-worker sexual harassment; and
- 21 d. constructive discharge.

22 The jury awarded Tamayo \$350,00 in compensatory damages, \$53,000 in front pay, and
23 \$91,000 in back pay. The jury further found that Defendant acted with malice or in reckless
24 disregard of Tamayo's federally protected rights and awarded \$500,000, which was later reduced
25 to \$300,000, in punitive damages.

26 This Court now enters the following findings of fact and conclusions of law regarding
27

1 injunctive relief in accordance with 42 U.S.C. § 2000e-5(g)(1) and Rule 65(d). To the extent that
2 any findings of fact are included under conclusions of law, they shall be deemed findings of fact.
3 To the extent that any conclusions of law are included under findings of fact, they shall be
4 deemed conclusions of law.

5 FINDINGS OF FACT²

6 1. The Court adopts the jury's verdict as its findings with respect to Defendant's
7 liability under Title VII. Further, in February and March 2001, Defendant took adverse
8 employment actions against Tamayo by refusing to reassign her to a position where she would
9 not be required to work alone, by refusing to supply her with a radio, by suspending her for one
10 day, and for issuing her a final written warning. These adverse actions were in retaliation for
11 Tamayo's complaints of co-worker harassment in 2001. Although Defendant argued that
12 Tamayo had participated in inappropriate sexual gossip and comments, the real reason was
13 retaliation.

14 2. Tamayo was subjected to a hostile work environment created by sexual assault
15 (which occurred between 1993 and 1994), physical assault, repeated unwelcome comments and
16 sexual advances, and threats of bodily injury by her supervisor, Rene Rodriguez ("Rodriguez").

17 3. Tamayo first complained about Rodriguez to the Harris Farms front office on July
18 26, 1999.³ Tamayo complained that Rodriguez grabbed her in a violent manner while she was
19 working in a field because she had been talking to another man. Tamayo did not complain that
20 Rodriguez had raped her.

21
22 ²Plaintiffs have proposed many findings of facts. However, Plaintiffs do not provide an adequate basis for
23 the court to adopt each of the proposed findings or conclude that the proposed findings are accurate since there are
24 no citations to the record or to transcripts, to other evidence, or to declarations for support. To the extent that a
proposed finding is not utilized, the Court finds that either insufficient support has been presented/cited or that the
proposed finding is unnecessary to the resolution of this motion.

25 ³Plaintiffs propose findings of fact that Tamayo had complained in late 1998 to her then supervisor, Audelio
26 Corona, that Rodriguez would bother her every time Rodriguez came around her. However, Tamayo's complaint to
27 Corona was ambiguous at best. Tamayo complained to Corona about Rodriguez's placement of portable toilets for
the agriculture crew and that Rodriguez would bother her by asking about where her crew would be moving.
28 Tamayo's complaint to Corona did not indicate sexual harassment.

1 around the Almond Department and that Human Resources needed to investigate.

2 19. In 2000, Gomez was appointed the full time Human Resources Director at
3 Harris Farms. Gomez was originally hired by Harris Farms as a Human Resources Assistant in
4 May 1999. One of her primary duties when hired in 1999 was to translate Spanish to English and
5 vice versa. Gomez has taken some college level courses, but does not have a college degree and
6 is not a certified interpreter/translator. While Ollech was the human resources consultant,
7 Gomez was not a decision maker and did not have authority to discipline employees, but would
8 take a complaint and schedule a meeting if Ollech was not available. Prior to working at Harris
9 Farms, Gomez had conducted one harassment investigation that was unrelated to discrimination.

10 20. On February 2, 2001, without having heard from the front office, Tamayo went to
11 the office in order to talk to Chrisco. Tamayo complained of the sexual gossip and threats
12 directed towards her.⁴ Tamayo revealed that she had been working alone and was frightened.
13 Gomez acknowledged knowing about the problems.

14 21. On February 3, 2001, Gomez began investigating. Gomez drove out to the
15 Almond Department, accompanied by the department manager, and conducted interviews in the
16 field, where other workers could possibly observe the interviews. Gomez had not yet
17 interviewed Tamayo and the department manager knew of no reason why interviews of Almond
18 Department employees could not have been conducted in the office. Gomez did not interview
19 each of the potential witnesses in the Almond Department.

20 22. Also on February 3, 2001, Gomez informed Tamayo that Gomez had spoken with
21 Chrisco and that Tamayo's request not to work alone was denied.

22 23. Sometime after February 3, 2001, Tamayo requested that she and two witnesses
23 (Gustavo and Lourdes Ramirez) meet with Chrisco.

24 24. Between February 3 and 21, the work vehicles of Gustavo and Lourdes Ramirez
25

26 ⁴The gossip and rumors involved Tamayo's sexual habits and a threat that Rene Rodriguez was going to pay
27 people money to drug Tamayo and then take naked pictures of Tamayo so as to break up Tamayo's marriage.

1 were vandalized. The hydraulic brake line of Lourdes's vehicle was severed and the rear tires of
2 Gustavo's truck were punctured.

3 25. Chrisco did not meet with Tamayo and the Ramirezes until February 21, 2001.
4 Although Chrisco knew about the nature of the rumors and gossip, he did not meet with Tamayo
5 sooner because he wanted Human Resources to be present and Gomez was unavailable for
6 personal reasons. No other person filled in for Gomez while she was unavailable with regard to
7 Tamayo's harassment complaint.

8 26. At the February 21, 2001, meeting, the nature of the gossip and threats against
9 Tamayo were explained and the Ramirezes told about the vandalism and that co-workers had
10 threatened retaliation.

11 27. After the meeting, Chrisco recommended suspending everyone involved in
12 the complaint for two weeks irrespective of culpability.

13 28. Gomez concluded that there was a lot of "he said/she said," and that there were
14 two groups involved: one group was Tamayo and the Ramirezes, the second group was made of
15 employees Mosqueda, Mendoza, and Hernandez. Gomez also concluded that everyone in both
16 groups engaged in inappropriate behavior and should be disciplined.

17 29. Mosqueda, Mendoza and Lourdes Ramirez were all terminated as they had prior
18 final written warnings.

19 30. Hernandez and Gustavo Ramirez were given final written warnings and
20 Hernandez was suspended.

21 31. On March 12, 2001, Gomez informed Tamayo that, as a result of the
22 investigation, Tamayo was suspended for one day and given a final written warning. The final
23 written warning indicated that it was for harassment.

24 32. Gomez refused to answer Tamayo's question about what would happen to the
25 other employees involved in the complaint.

26 33. At trial, Gomez testified that Tamayo had been disciplined for participating in
27

1 sexual gossip. However, no documentation was introduced that supported this conclusion.
2 Additionally, Gomez indicated that some of her documentation was intended for her personal use
3 only and was not intended to be read by others.

4 34. Approximately six weeks elapsed from the time of Tamayo's complaint in late
5 January to resolution on March 12, 2001. Part of the reason for delay was that Gomez was
6 unavailable because of other duties and personal reasons.

7 35. Hermalinda Reyes ("Reyes"), who is currently employed in a supervisory position
8 at Harris Farms, testified that she had heard gossip about concerning Tamayo. However, Reyes
9 testified that she believed that she did not have an obligation to report harassment in the
10 workplace and that it is the responsibility of the "harassee" to complain.

11 36. The operative anti-harassment policy for both Tamayo's 1999 and 2001
12 complaints was adopted in 1989, and had not been updated. The 1989 policy was printed in both
13 English and Spanish in the Employee Handbook.

14 37. Among other things, the 1989 harassment policy did not describe prohibited
15 conduct, contain any confidentiality guarantee, contain an anti-retaliation provision, state that
16 employees who violate the policy would be disciplined, and required that reports be made to the
17 "executive director or the manager" even though it is unclear who those persons are.

18 38. The Human Resources consultants used by Harris Farms between 1996 and 1999
19 were supposed to have updated that 1989 harassment, but failed to do so. Both the President,
20 John Harris, and the then Vice-President, Erick Johnson, knew that the 1989 policy should be
21 updated.

22 39. Tamayo participated in sexual harassment training seminars twice in 1996.
23 Although the programs were translated into Spanish, Tamayo recalled that there were times that
24 she did not understand all of the words that were used.

25 40. Both Ollech and Kelle Butler (the human resources consultant from 1996
26 to 1999) acknowledged that the education level of many Harris Farms employees was low.

1 41. Other than Tamayo not understanding some of the words used during the 1996
2 harassment training, no further specific examples or specific evidence of Harris Farms employees
3 not understanding or comprehending training, policies and procedures, or harassment related
4 documents has been presented or identified to the Court.

5 42. Also in December 1996, Martinez complained that Rodriguez had
6 telephoned her house expressing a romantic interest in her and had parked outside her house.
7 Kelle Butler investigated the complaint. Martinez was hesitant to complain, however, because
8 she was concerned about retaliation. It was determined that Rodriguez had inappropriately called
9 Martinez at home. On January 22, 1997, Rodriguez was required to have additional harassment
10 training, was suspended without pay for 3 days, and informed that similar conduct or retaliation
11 would result in further discipline, up to and including termination. See Bates No. 0066. There is
12 no indication that Martinez was subsequently retaliated against.

13 43. In April 2001, Defendant conducted a sexual harassment seminar for its
14 managers/supervisors. The program was presented by Richard Alaniz and discussed employer
15 liability, what harassment was, and stopping sexual gossip. See Bates Nos. 1131-44.

16 44 With the assistance of experienced and board certified labor and employment law
17 counsel, in 2003, Defendant revised its sexual harassment policy. See Alaniz Declaration at ¶¶
18 3-6, 14.

19 45. In 2004, Defendant created a New Employee Orientation packet. The orientation
20 packet is distributed to all new employees. The orientation packet includes documents entitled:
21 “Policy Against Harassment,” “Harris Farms Sexual Harassment Policy,” “Procedures for
22 Reporting Harassment or Discrimination,” and “Harris Farms Open Door Policy.” See Gomez
23 Declaration at ¶ 15(a); Exhibit P.⁵

24 46. Also included in the orientation packet is a pamphlet from the California
25

26 ⁵Unless otherwise noted, all references to “Exhibit” refer to exhibits attached to the September 12, 2005
27 declaration of Sylvia Gomez.

1 Department of Fair Employment and Housing (“DFEH”). The pamphlet discusses violence and
2 sexual harassment, gives examples of harassment, explains an employer’s obligations and
3 possible liability, and provides information for contacting the DFEH. See Exhibit P.

4 47. The “Harris Farms Sexual Harassment Policy” in the orientation packet reads:

5 Harris Farms, Inc., is committed to providing a work environment free of
6 unlawful harassment. Company policy prohibits harassment because of sex (which
7 includes sexual harassment, gender harassment and harassment due to pregnancy,
8 childbirth or related medical conditions) and harassment because of race, religious creed,
9 color national origin or ancestry, physical or mental disability, medical condition, marital
10 status, age, sexual orientation or any other basis protected by federal, state, or local law,
11 ordinance or regulation. ALL SUCH HARASSMENT IS UNLAWFUL.

12 The Company’s anti-harassment policy applies to all persons involved in the
13 operation of Harris Farms, Inc., and prohibits unlawful harassment by any employee of
14 the Company.

15 Prohibited unlawful harassment because of sex (sexual harassment, gender
16 harassment and harassment due to pregnancy, childbirth or related medical conditions),
17 race, religious creed, color, national origin or ancestry, physical or mental disability,
18 medical condition, marital status, age, sexual orientation, or any other protected basis
19 includes, but is not limited to the following behavior:

- 20 a. Verbal conduct such as epithets, derogatory jokes or comments, slurs or
21 unwanted sexual advances, invitations or comments; (Examples: name
22 calling belittling, sexually explicit or degrading words to describe an
23 individual, sexually explicit jokes, comments about an employee’s
24 anatomy and/or dress, sexually oriented noises or remarks, questions about
25 a person’s sexual practices, verbal abuse, graphic verbal commentaries
26 about the body.) and
- 27 b. Visual conduct such as derogatory and/or sexually-oriented posters,
28 photography, cartoons, drawings or gestures; (Examples: displaying sexual
pictures, writings or objects, obscene letters or invitations, staring at an
employee’s anatomy, leering, sexually oriented gestures, mooing,
unwanted love letters or notes.) and
- c. Physical conducts such as assault, unwanted touching, blocking normal
movement or interfering with work because of sex, race or any other
protected basis; (Examples: touching, pinching, patting, grabbing, rubbing
against or poking another employee’s body, hazing or initiation that
involves a sexual component, requiring an employee to wear sexually
suggestive clothing.) and
- d. Threats and demands to submit to sexual requests as a condition to
continued employment, or to avoid some other loss, and offers
employment benefits in return for sexual favors; (Examples: continued
requests for dates, any threat of demotion, termination etc., if requested
favors are not given making king or threatening reprisals after a negative

1 response to sexual advances, propositioning an employee.) and

- 2 e. Retaliation for having reported or threatened to report harassment.
3 Prohibited retaliation includes but is not limited to: demotion, suspension,
4 failure to hire or consider for hire, failure to give equal consideration in
5 making employment decisions, failure to make impartial employment
6 recommendations, adversely affecting working conditions or otherwise
7 denying any employment benefit to an individual.

8 If any employee believes that he or she is the victim of any type of harassment,
9 including sexual harassment, that employee should immediately report the incident to
10 their Supervisor. If an employee is uncomfortable in reporting the incident to their
11 Supervisor, the incident should be reported to the Human Resource Department. The
12 Company will promptly and clearly inform the employee of his or her rights to assistance
13 and how to protect and preserve those rights.

14 Harris Farms, Incl, will fully and effectively investigate any such report and will
15 take whatever corrective action is deemed necessary, including disciplining or
16 discharging any individual who is believed to have violated this prohibition against
17 harassment. The complaining employee will be informed of the action taken. The
18 Company will also take action to protect the complaining employee and to prevent further
19 harassment for retaliation. Finally, the complainant will be made whole to the extent
20 possible, for his or her losses.

21 The Company clearly does not tolerate harassment on the basis of any of the
22 categories discussed in this policy and will take appropriate disciplinary action whenever
23 such harassment is demonstrated. **Any individuals engaging in such conduct contrary
24 to Company policy may be personally liable in any legal action brought against
25 them.**

26 The Company encourages all employees to report any incidents of harassment
27 forbidden by this policy so that complaints can be quickly and fairly resolved. It is
28 important that employees utilize this internal procedure.

Exhibit P (emphasis in original).

48. The "Procedures for Reporting Harassment" in the orientation packet reads:

Any form of harassment or discrimination in our workplace is contrary to Harris Farms, Inc. personnel policies. We will take prudent and continual action to prevent any harassment or discrimination from occurring in our workplace. However, if you believe that you have been unlawfully harassed or discriminated, we urge you to report the incident immediately so that your complaint can be resolved quickly and fairly. We recommend that you take the following steps in such a case:

1. When possible, confront the harasser and request him/her to stop.
2. Inform your supervisor, or any other Company supervisor, manager or representative of the Company, as soon as possible. To the extent possible, include all details on the incident(s), names of individuals involved, and the names of any witnesses.

- 1 3. Supervisors will refer any harassment or discrimination complaints to the
2 Human Resources Department. The Company will immediately undertake
3 a thorough and objective investigation of the harassment allegations.
- 4 4. If the Company determines that any unlawful harassment has occurred, it
5 will take effective remedial action as warranted by the circumstances. Any
6 employee the Company determines to be responsible for unlawful
7 harassment will be subject to appropriate disciplinary action, up to and
8 including termination.
- 9 5. The Company will take appropriate action to remedy any loss to you
10 resulting from harassment.
- 11 6. The Company will not retaliate against you for filing a complaint and will
12 not tolerate or permit retaliation by any Company management, employee,
13 or co-workers.
- 14 7. As an alternative to the above notification procedures, we have established
15 the Harris Farms Employee Assistance Hot Line You can leave a
16 confidential message on this special telephone line with any appropriate
17 information 24 hours per day, 365 days per year. Upon receipt of
18 information into our Hot Line we will immediately follow-up with you and
19 proceed with any appropriate investigations and actions as the situation
20 may warrant.
- 21 8. Additionally, you may contact Sylvia Gomez, Human Resources Manger
22 at any time with any question or concerns on these or other issues. Her
23 telephone number is . . . ext. . . ; her pager number is

24 Exhibit P.

25 49. The "Open Door Policy" in the orientation packet reads:

26 Harris Farms, Inc., has an open door policy and encourages all employees to contact their
27 immediate supervisor or the Human Resources Department with any concerns, conflicts,
28 or issues they have regarding their work environment, assignments or treatment.
Alternatively, employees should also feel free to contact the Farm Manager, the Farms
Controller, or the Company President with such issues if they so prefer.

The Company recognizes that from time to time there will be conflicts and employees
will disagree with a management decision. We believe that open communications are the
best way to resolve differences and to promote a positive work environment and working
relationship. Issues brought forward will be dealt with in an objective, fair and
professional manner. No employee will be retaliated against for utilizing this policy.

Numbers of contacts:

Harris Farms, Inc. . . .

Steve Ozuna – Farm Manager . . .

Sylvia Gomez – Human Resources office . . .

29 Exhibit P.

1 50. The “Policy Against Harassment” in the orientation packet reads:

2 Harris Farms, Inc. Is committed to providing a workplace free of sexual harassment as
3 well as harassment based on such factors as race, color religion, national origin, ancestry,
4 age, medical condition, marital status, disability or veteran status. Harris Farms, Inc.
5 Strongly disapproves of and will not tolerate the harassment of employees by managers,
6 supervisors or co-workers. Harris Farms, Inc. Will also attempt to protect employees
7 from harassment by non-employees in the workplace.

8 Harassment includes verbal, physical, and visual conduct that creates an intimidating,
9 offensive or hostile working environment or that interferes with work performance.
10 Some examples include racial slurs, ethnic jokes, posting of offensive statements, posters
11 or cartoons or other similar conduct. Unwelcome sexual advances, requests for sexual
12 favors and other verbal or physical conduct of a sexual nature constitute sexual
13 harassment when (1) submission to conduct is made either explicitly or implicitly a term
14 or condition of an individual employment; (2) submission to or rejection of such conduct
15 of an individual is used as the basis for employment decisions affecting such individual;
16 or (3) such conduct has the purpose or effect of unreasonably interfering with an
17 individual’s work performance or creating an intimidating, hostile or offensive working
18 environment.

19 Any incident of harassment including work-related harassment by any company personnel
20 or any other agent of the company should be reported promptly to the employee’s
21 supervisor or to the Human Resources Department. Managers who receive complaints or
22 who observe harassing conduct must inform the Human Resources Department or the
23 Farm Manager immediately. Harris Farms, Inc. Emphasizes that an employee is not
24 required to complain to his/her supervisor if that supervisor is the individual who is
25 harassing the employee.

26 Every complaint of harassment that is reported to company management will be
27 investigated thoroughly, promptly and in a confidential manner. In addition, Harris
28 Farms, Inc. Will not tolerate retaliation against any employee for making a complaint, or
for participating in an investigation of harassment.

If harassment is established, Harris Farms, Inc. will discipline the offender. Disciplinary
action for the violation of this policy can range from verbal or written warning up to and
including immediate, depending upon the circumstances (With regard to acts of
harassment by customers or vendors, corrective action will be taken after consultation
with the appropriate management personnel). Employees who knowingly make false
claims of harassment will be faced with disciplinary action and possible termination.

REMEMBER The SAFE WAY is always the BEST WAY to work!

Exhibit P (emphasis in original).

51. The “Policy Against Harassment,” “Harris Farms Sexual Harassment Policy,”
“Policy for Reporting Harassment or Discrimination,” and “Open Door Policy” found in the
orientation packet are provided in both English and Spanish. See Exhibit P.

52. The “Open Door Policy” is also found in the 2003 and 2005 Employee Handbook.

1 53. The “Harris Farms Sexual Harassment Policy,” is found in the 2003 and 2005
2 Employee Handbook, but is entitled “Policy Against Harassment and Discrimination.” The
3 sexual harassment policy in the 2005 handbook contains two additional sentences, compared to
4 the 2003 Employee Handbook and the 2004 orientation packet:

5 a. “The Company will attempt to keep the investigation as confidential as an
6 effective investigation allows.”

7 b. “The Company cannot do anything to stop offensive conduct if you do not
8 report it.”

9 Cf. Exhibit P with Bates No. 1078-1080.

10 54. The 2005 Employee Handbook contains the “Procedure for Reporting Harassment
11 or Discrimination,” but is entitled “Complaint Procedure.” See Exhibit P.

12 55. Defendant’s Employee Handbook is provided in both English and Spanish. See
13 Exhibit P; see also Bates No. 1043-1100.

14 56. Since Tamayo’s constructive discharge in March 2001, Defendant has instituted,
15 with the aide of counsel, the following practices and policies for preventing and deterring
16 harassment:

17 a. At initial employment, every employee receives an orientation packet which
18 includes the Harris Farms Sexual Harassment Policy, Procedures for Reporting
19 Harassment or Discrimination, Harris Farms Open Door Policy, a pamphlet on
20 harassment and discrimination from the California DFEH, the employee
21 handbook, and general orientation materials.⁶ The materials were prepared in
22 2004, and the employee handbook was updated in 2005 and contains the
23 harassment policy and reporting procedures.⁷ A “Complaint Procedure” card is
24 also distributed to employees, which provides contact information and states that
25 Defendant will not retaliate or tolerate retaliation against an employee who makes

23 ⁶The orientation packet is attached as Exhibit P.

24 ⁷Defendant’s sexual harassment and retaliation policies are reviewed annually and revised with the
25 assistance of Alaniz & Schraeder. See Alaniz Declaration at ¶ 14. Richard Alaniz is a partner in Alaniz &
26 Schraeder, a Houston, Texas based law firm that specializes in labor and employment issues. Mr. Alaniz is board
27 certified in labor and employment law and he and his firm regularly advises clients regarding harassment issues,
28 provides counsel for policies and procedures and investigation, presents seminars and training on harassment issues,
conducts investigations for clients. See id. at ¶¶ 3-10.

1 a complaint.⁸

2 b. After the policies and procedures are reviewed with the employee, the employee is
3 shown a video made by Farm Employers Labor Service on sexual harassment.⁹

4 c. Every January, each employee is again given materials relating to sexual
5 harassment and reporting to remind them of the policies and procedures.

6 d. Posters regarding harassment and discrimination, as well as the reporting
7 procedure, are posted at four different bulletin boards and the portable toilets in
8 the fields.

9 e. Each manager and supervisor undergoes annual training on harassment prevention
10 and deterrence, the most recent being April 2005.¹⁰ Alaniz & Schraeder has
11 provided similar training for many years and will continue to train managers and
12 supervisors on a regular basis.¹¹

13 f. Additionally, employees attend regular meetings and “tail-gate” training on
14 different topics, including sexual harassment. The most recent training occurred
15 in May 2005, and included a sexual harassment video, training on violence and
16 sexual harassment, company policies, and interactive scenarios. The employees
17 were provided information on the law prepared by the DFEH, as well as a card
18 containing contact information and emergency numbers.¹² This type of training
19 has been utilized by Harris Farms since 2002. Training on sexual harassment and
20 other employment issues will occur at a minimum of three times per year, with the
21 next “tail-gate” training session to occur in October 2005.

22 Gomez Declaration at ¶ 14.

23 57. Since June 2002, Defendant has conducted approximately 14 “tail-gate” safety
24 meetings in which sexual harassment is a topic for discussion. See Exhibit T.

25 58. The content of the tail-gate meetings and the person who conducts each of the tail-
26 gate meetings is unclear, although Gomez has conducted several tail-gate meetings. See id.

27 ⁸See Gomez Declaration at ¶ 13(a); Exhibit I.

28 ⁹The video is attached as Exhibit Q. Defendant initially submitted Exhibit Q as a DVD disk, but the Court and Plaintiffs were unable to view the disk for technical reasons. Defendant has resubmitted Exhibit Q in the form of a VHS video-cassette and no further technical problems have been encountered to the Court’s knowledge.

¹⁰See Alaniz Declaration at ¶ 17.

¹¹The certificates of completion and sign-in sheets are attached as Exhibit R and the materials presented at the training sessions are attached as Exhibit S.

¹²The contact card is Exhibit U.

1 Additionally, the law firm of Alaniz & Schraeder have assisted in the design and implementation
2 of the tail-gate meetings. See Alaniz Declaration at ¶ 10.

3 59. Notes behind the May 2004 tailgate meetings show that it was discussed that a
4 victim does not have to be of the opposite sex/the harasser may be man or woman; the harasser
5 may be a supervisor, an agent of the employer, a supervisor of another area, a co-worker, or a
6 non-employee; the victim does not necessarily have to be the one who is harassed, but could be
7 anyone affected by the offensive conduct; sexual harassment may occur without economic injury
8 or discharge; and the harasser's actions must be unwelcome. See Exhibit T.

9 60. Defendant has provided the sign-in sheets for each of the tail-gate meetings from
10 June 2002 to the present. Behind nearly every sign-in sheet for these tail-gate meetings is some
11 combination (in both Spanish and English) of Harris Farms's harassment policy, a DFEH sexual
12 harassment pamphlet with DFEH contact information, and a Farm Employer Labor Services
13 handout on harassment.¹³ The Court concludes that the documents behind the sign-in sheets are
14 copies of documents distributed to Defendant's employees at these meetings.¹⁴ See Exhibit T.

15 61. Additionally, at the most recent tail-gate meeting in May 2005, Defendant
16 distributed emergency contact numbers to its employees. The telephone numbers for the Farm
17 Manager, the Shop Manager, Human Resources, the Irrigation Manager, the Almond Manager,
18 the Tomato Manager, and the Vegetable Manager are all included and the card is in both English
19 and Spanish. See Gomez Declaration at ¶ 15; Exhibit U.

21 ¹³Behind the most recent tail-gate meeting sign-in sheet (May 2005), is a memorandum that indicates the
22 Sexual Harassment Policy, the Open Door Policy, the Complaint Procedure, State of California handout on
23 harassment, and an emergency contact card was distributed and a video was played. See Exhibit T.

24 ¹⁴The supplemental information, including the contents of Exhibit T, were prepared by Defendant's
25 counsel, Alaniz & Schraeder of Houston, Texas. At oral argument, Defendant was represent by local counsel from
26 McCormick, Barstow, Sheppard, Wayte & Carruth. The Court asked local counsel whether the documents behind
27 the sign-in sheets were distributed at the tail-gate meetings. Local counsel replied that he did not know. However,
given that there is some combination of the documents behind the sign-in sheets, and the same combinations are not
behind the sheets, and given that Gomez declares that sexual harassment training occurs and that materials were
distributed in the most recent tail-gate meeting (May 2005), see Gomez Declaration at ¶ 15, the Court believes that
the documents behind the tail-gate sign-in sheets were distributed to Defendant's employees.

1 62. Since Tamayo reported co-worker harassment in January 2001, no evidence has
2 been presented that there have been any other complaints of sexual harassment at Harris Farms to
3 date.

4 63. There has been no evidence presented that any conduct similar to that of
5 Rodriguez by any other Harris Farms employee has occurred since Rodriguez's retirement in
6 December 1999. Further, no evidence has suggested that Rodriguez's conduct was in any way
7 typical of other supervisors or employees at Harris Farms.

8 64. Since Tamayo's constructive discharge in March 2001, Defendant has developed
9 the following procedures for investigating harassment complaints:

- 10 a. If a complaint is brought, an interview with the complaint is set up as
11 promptly as possible, ideally on the same day. The interview is to take
12 place in a comfortable, confidential place away from other employees. If
13 the employee is not comfortable with an interview on the premises, an off-
14 site location will be arranged. At the beginning of the interview, it is first
15 determined whether the employee requires a translator. If a translator is
16 needed, the employee is give the choice of having Gomez or someone else
17 to translate for them. Any written translations of statements will be
18 prepared by Oscar Olvera.¹⁵
- 19 b. The employee is asked whether he or she is comfortable having their
20 interview tape-recorded.¹⁶
- 21 c. Once those preliminary matters are taken care of, the employee is assured
22 of the confidentiality of his or her statements and participation, and
23 reminded that there will be no retaliation resulting from that participation.
- 24 d. The employee is interviewed, using the guidelines provided by the 2005
25 California Chamber of Commerce Harassment Investigation Checklist¹⁷
26 and Interview Guidelines,¹⁸ as well as the interview questionnaire
27 developed by Harris Farms.¹⁹

28 ¹⁵The election of translators form is Exhibit J.

¹⁶The tape-recording form is Exhibit K.

¹⁷The chamber of commerce investigation checklist is Exhibit L.

¹⁸The chamber of commerce interview guidelines are Exhibit M.

¹⁹The Harris Farms questionnaire is Exhibit N (questions for complainant) and Exhibit O (questions for
alleged harasser).

- e. After the preliminary interview, counsel is contacted if significant issues or potential problems are revealed.
- f. All potential witnesses, including the accused harasser, are interviewed in a like manner.
- g. Follow-up interviews are conducted as necessary in order to clarify, corroborate, or obtain additional information.
- h. After all potential witnesses and employees with knowledge of facts are interviewed and re-interviewed, any additional investigation is conducted at that time, using the above-referenced guidelines and the guidelines provided by the seminars. Additional evidence, if any, is gathered and counsel is consulted with issues and concerns.
- i. A follow-up conversation is had with the complaining employee and the results of the investigation are discussed.
- j. The situation continues to be monitored to ensure that no retaliation or retribution results from the investigation or subsequent action.

Gomez Declaration at ¶ 13.²⁰

65. Gomez is the person primarily responsible for investigation of harassment complaints and will consult labor and employment attorneys (Alaniz & Schraeder) when she believes it is necessary. See Gomez Declaration at ¶ 12.

66. Since July 2004, Gomez has taken seven classes and/or seminars regarding the prevention and investigation of sexual harassment.

67. In July 2004, Gomez completed:

- a. an 18 hour course on internal investigation presented by the Council on Education Management, in association with George Washington University School of Business. The course's focus was conducting harassment investigations and preventing harassment and retaliation.²¹
- b. an 18 hour certificate program for human resources generalists, also presented by the Council on Education Management, in association with George Washington University School of Business. The subject matter included discrimination, harassment and retaliation investigation and

²⁰Plaintiffs have made no criticisms about the substantive provisions of this investigative procedure. Rather, Plaintiffs primary complaint is that Gomez will be the person conducting the investigations.

²¹The course materials and certificate of completion are Exhibit A.

1 prevention.²²

- 2 c. a 12 hour continuing education course entitled *Employment*
3 *Discrimination Law Update*, presented by the National Employment Law
4 Institute. The subject matter of the course included significant
developments in the law of harassment, training on conducting
investigations, and preventing harassment and discrimination.²³

5 See Gomez Declaration at ¶¶ 4-6.

6 68. In 2005, Gomez completed

- 7 a. a program entitled *AB 1825: California Training Mandate for Supervisors*,
8 presented by TPO Human Resources Management. The program focused
9 directly on harassment law, investigation and prevention.²⁴ (February
10 2005)
- 11 b. a training program presented by Alaniz & Schraeder, L.L.P., entitled
12 *Sexual Harassment Training for Managers and Supervisors*. The training
13 focused on sexual harassment investigation and prevention.²⁵ (April 2005)
- 14 c. an interactive course entitled *Sexual Harassment Prevention and Training*,
15 presented by the California Department of Fair Employment and Housing
16 (“DFEH”). The training included prohibition, prevention, and correction
17 of harassment.²⁶ (July 2005)

18 See Gomez Declaration at ¶¶ 7-9.

19 69. Also in July 2005, Gomez attended a seminar entitled *EEOC @ 40*, presented by
20 the San Francisco office of the EEOC. The subject matter of the course included prevention and
21 investigation of harassment complaints.²⁷ See Gomez Declaration at 10.

22 70. If Gomez is unavailable, Steve Warren, the Human Resources Director for Harris
23 Ranch Restaurant, will conduct an investigation. See Gomez Declaration at ¶ . Warren’s
24 qualifications are not described other than his title with Harris Ranch Restaurant and that he

25 ²²The course materials and certificate of completion are Exhibit B.

26 ²³The course materials and certificate of completion are Exhibit C.

27 ²⁴The course materials are Exhibit D.

28 ²⁵The course materials and certificate of completion are Exhibit E.

²⁶The course materials and certificate of completion are Exhibit F.

²⁷The course materials and certificate of completion are Exhibit G.

1 attend in July 2005 the EEOC seminar described above. See September 2005 Declaration of
2 Marcia Mitchell at ¶ 8.

3 71. Ms. Gomez is quoted in a February 4, 2005, article in The Produce News as
4 saying that it had appeared that Rodriguez and Tamayo were having an affair, that some 30
5 employees supported this view, that Tamayo's story kept changing, that Tamayo was not
6 credible, that Tamayo was suspended for one day in March 2001, and that Tamayo then quit. In
7 the same article, John Harris, the President of Harris Farms, echoed similar sentiments through
8 an e-mail provided to The Produce News. The e-mail was purportedly sent to employees of
9 Harris Farms on January 24, 2005. See Exhibit B to Plaintiffs's Motion to Amend Judgment to
10 Include Equitable Relief.

11 72. Chrisco has retired and no longer is employed by Defendant.

12 73. Other than the Spanish language August 18, 1999, memorandum, no further
13 specific examples or specific evidence of nonsensical translations have been presented to or
14 identified for the Court.²⁸

17 ²⁸EEOC has submitted the declaration of Evangelina Hernandez. Hernandez was a co-counsel for the
18 EEOC at trial. In her declaration, Hernandez declares that she is fluent in Spanish, as it is her first language, and
19 took graduate level Spanish courses in the 1980's. Hernandez then translates a Harris Farms's permission to tape-
20 record form. Hernandez indicates that there are grammatical and spelling mistakes. However, unlike the court
21 interpreter/translator who translated the August 18, 1999, memo, there is no indication that Hernandez is approved
22 by all parties or is a certified translator. If Plaintiff believes that Defendant's Spanish translations are
23 incomprehensible or grossly mistranslated, then it should provide a translation from a certified translator or a
24 translator whom the parties stipulate as being qualified. That Ms. Hernandez may speak Spanish and have taken
25 graduate level Spanish classes approximately twenty-years ago does not mean that she is qualified to translate
26 documents or offer an opinion on the quality of a translation. Indeed, there is no indication that Ms. Hernandez
27 translates or has experience translating documents on any basis. Additionally, Ms. Hernandez objected to the quality
28 of the court interpreter's translation in front of the jury at trial, an interpreter supplied by the EEOC and whom
Defendant agreed was qualified. As the EEOC supplied the interpreters/translators during trial, there is no apparent
reason why these interpreters/translators could not also review documents that EEOC believed to be mistranslated or
poorly translated. An interpreter is subject to the rules of evidence relating to expert witnesses, see Fed. R. Evid.
604, and the "trial court has broad discretion in determining the fitness and qualifications of interpreters." Chee v.
United States, 449 F.2d 747, 748 (9th Cir. 1971). As such, the Court will disregard that portion of Hernandez's
declaration. However, even if considered, the translation of the recording form is not incomprehensible. The
translation could be "smoother," but the two translated sections by Ms. Hernandez indicate that either the employee
will consent to giving a tape-recorded statement or will instead give an unrecorded statement. The permission to
tape-record form is not nearly as poor as the August 18, 1999, memorandum.

1 **CONCLUSIONS OF LAW**

2 Based on the above findings, the Court makes the following conclusions of law:

3 1. Tamayo was retaliated against by Defendant in February/March 2001 for
4 complaining about sexual harassment and the retaliation was committed by Chrisco and Gomez.
5 Given the lack of support for a conclusion that Tamayo was herself engaging in inappropriate
6 sexual gossip/comments, the Court concludes that the retaliation was intentional for purposes of
7 42 U.S.C. § 2000e-5(g)(1).

8 2. Defendant’s conduct with respect to Tamayo’s 1999 and 2001 complaints of
9 sexual harassment was lacking and, at most, was negligent or reckless. The Court cannot
10 conclude, however, that Defendant engaged in intentional unlawful employment practices for
11 purposes of 42 U.S.C. § 2000e-5(g)(1).

12 3. The written sexual harassment policy in effect during Tamayo’s employment (the
13 1989 policy) was out of date. However, as of 2003, Defendant has adopted a much improved
14 written sexual harassment policy. The Ninth Circuit has held that a defendant’s harassment
15 policy may satisfy the first prong of the *Faragher/Ellerth* defense where those policies: (1)
16 defined sexual harassment; (2) set forth a reporting procedure; (3) stated that employees who
17 violated the policy would be disciplined; and (4) assured employees that no reprisals would be
18 made against those who complain. Nichols v. Azteca Restaurant Ent., 256 F.3d 864, 877 (9th
19 Cir. 2001); Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999). The “Harris Farms
20 Sexual Harassment Policy,” found in the 2004 orientation packet, and the “Policy Against
21 Harassment and Discrimination,” found in the 2003 and 2005 employee handbooks, exceed the
22 characteristics found to be reasonable in *Nichols* and *Montero*.

23 4. The examples of improper or harassing conduct described in the “Harris Farms
24 Sexual Harassment Policy” and the “Policy Against Harassment and Discrimination,” include
25 conduct that formed the basis of Tamayo’s 1999 and 2001 complaint, i.e. verbal conduct,
26 derogatory comments, questions about a person’s sexual practices, sexually oriented remarks,
27

1 physical conduct, assault, unwanted touching, and grabbing. See Exhibit P.

2 5. Since 2003, Defendant has regularly distributed its Sexual Harassment Policy,
3 materials from the DFEH and the Farm Employers Labor Service, and its open door policy.
4 Since 2004, Defendant has regularly distributed its procedures for making a complaint.
5 Following the policies and complaint procedures would eliminate the harassing conduct that
6 formed the basis of Tamayo's 1999 and 2001 complaints.

7 6. There has been no, or at least no sufficiently persuasive, evidence identified or
8 presented that shows that Defendant's employees do not understand or do not comprehend the
9 reporting procedures, the DFEH materials, the Open Door Policy, or the Sexual Harassment
10 Policy. The only evidence of non-comprehension was in 1996, when Tamayo did not understand
11 all of the words at the March 1996 harassment training. There is no current or recent evidence,
12 and the single 1996 evidence is stale.

13 7. Other than the August 18, 1999, memorandum, there has been no, or at least no
14 sufficiently persuasive, evidence identified or presented that shows Defendant mistranslates
15 documents or memorandum so poorly that the poor translations render anti-harassment efforts or
16 investigations inadequate or unreasonable. There is no current or recent evidence of poor or
17 nonsensical translations, and the single 1999 memo is stale.

18 8. Rodriguez has not worked for Defendant since December 1999. There has
19 been no, or at least no sufficiently persuasive, evidence presented or identified that shows
20 Rodriguez's conduct was typical of supervisors at Harris Farms. Given the new policies that are
21 in place and regularly distributed, the extreme nature of Rodriguez's conduct, Rodriguez's
22 absence from Harris Farms for nearly six years, and no indication that Rodriguez's conduct was
23 symptomatic of other supervisors, the Court cannot conclude that there is a reasonably
24 cognizable danger of harassment like Rodriguez's of recurring at Harris Farms.²⁹ See W.T.

25
26 ²⁹Similarly, although the Court has found that Defendant did not engage in intentional conduct that was
27 unlawful, given the extensive changes in policies, procedures, and investigative guidelines; the frequency with which
28 Defendant's employees are given information regarding harassment, complaint procedures, the Defendant's policies,

1 Grant Co., 345 U.S. at 633; Cummings, 316 F.3d at 898; HBE Corp., 135 F.3d at 558; Webb, 98
2 F.3d at 1068-69. Orantes-Hernandez, 919 F.2d at 564; Hacienda Hotel, 881 F.2d at 1819.

3 9. The procedures for investigating harassment have been in development since
4 2001. The substance of Defendant's investigative procedures are unchallenged by Plaintiffs and
5 reasonably and adequately address the criticisms and shortcomings of Defendant's 1999 and
6 2001 harassment investigations.

7 10. As shown by Reyes, at least some of Defendant's supervisors do not
8 realize that they have a duty and obligation to report harassment that they witness, even though
9 the "Policy Against Harassment" found in the 2004 orientation packet expressly states this
10 obligation. See Exhibit P.

11 11. Gomez remains in a high, decision-making capacity at Harris Farms. As Human
12 Resources Director, Gomez is responsible for sexual harassment investigation. Since the 2001
13 investigation, Gomez has undergone additional training with three of the classes/seminars alone
14 totaling 48 hours worth of instruction. Nevertheless, Gomez is responsible for investigation and
15 will still play a significant, if not dispositive, role in discipline. Furthermore, the quotes
16 appearing in The Produce News do not indicate remorse, nor has Gomez indicated remorse in her
17 September 2005 declaration. Injunctive relief is appropriate where the individual who has
18 discriminated remain a primary decision makers. See Ilona of Hungary, 108 F.3d at 1579.

19 _____
20 and are encouraged to make complaints; the termination of two of the three individuals who gossiped/threatened
21 Tamayo, and the absence of complaints since 2001, the Court concludes that recurrence of conduct forming the basis
22 of Tamayo's 2001 complaint of sexual harassment is speculative and not reasonably cognizable. See W.T. Grant
23 Co., 345 U.S. at 633; Cummings, 316 F.3d at 898; HBE Corp., 135 F.3d at 558; Webb, 98 F.3d at 1068-69. Orantes-
24 Hernandez, 919 F.2d at 564; Hacienda Hotel, 881 F.2d at 1819. Although some of the changes are recent, the
25 changes in investigation protocol began in 2001, changes in the harassment policy have been in place for
26 approximately two years, Defendant frequently distributes these policies and procedures and raises harassment issues
27 during tail-gate meetings which occur approximately three times per year, Defendant did have an anti-harassment
policy (although out of date) during 2001, Defendant successfully addressed Martinez's 1996 complaint of sexual
harassment, and Defendant provided sexual harassment training seminars for management/supervisors in 1996,
2001, and 2005. The Court does not believe that Defendant's conduct is the type of suspect, "last minute" changes
condemned in Goodyear Aerospace. Cf. Goodyear Aerospace, 813 F.2d at 1544-45 (holding that a company that
stopped discriminating against an employee, who had filed two complaints with the EEOC, by promoting the
employee and promising not to retaliate a second time did not provide sufficient assurance that further discrimination
and retaliation would not occur).

1 Although Defendant’s policies encourage reporting and state numerous times that the Defendant
2 will not retaliate or permit retaliation, Gomez still remains responsible for investigations and
3 plays a role in discipline, has not shown remorse, and Defendant has not shown any “checks or
4 balances” over Gomez. Given these considerations, the Court finds that there is cognizable
5 danger of retaliation for making complaints. See Ilona of Hungary, 108 F.3d at 1579; Hacienda
6 Hotel, 881 F.2d at 1819.

7 13. Injunctive relief is appropriate to remedy an unlawful employment practice where
8 the defendant has intentionally engaged in that unlawful employment practice. See 42 U.S.C. §
9 2000e-5(g)(1).

10 14. In order to make out a prima facie case of retaliation under Title VII, a plaintiff
11 must show that (1) she engaged in a protected activity; (2) she suffered an adverse employment
12 action; and (3) there was a causal link between her activity and the employment decision. Elvig
13 v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004). Proximity of time between
14 protected conduct and an adverse employment action may support an inference of causation, but
15 the timing may not exceed three months. See Mannatt v. Bank of America, 339 F.3d 792, 802
16 (9th Cir. 2003) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) for the
17 proposition that a lapse of three to four months between protected activity and adverse action was
18 insufficient to establish causation); Yartsoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)
19 (lapse of under 3 months sufficient to raise inference of causal connection). Conduct “is
20 cognizable as an adverse employment action if it is reasonably likely to deter employees from
21 engaging in protected activity.” Elvig, 375 F.3d at 965; Ray v. Henderson, 271 F.3d 1234, 1243
22 (9th Cir. 2000).

23 15. Defendant intentionally engaged in an unlawful employment practice by
24 retaliating against Tamayo in 2001 for her complaint of sexual harassment, and Defendant has
25 not provided sufficient assurances that there is no reasonably cognizable danger of retaliation
26 recurring. See Ilona of Hungary, 108 F.3d at 1579; Hacienda Hotel, 881 F.2d at 1819.

1 b. At all further “tail-gate” meetings or other training sessions, which occur at least
2 three times per year as per company policy, see Gomez Declaration at ¶ 15(f), the current Farm
3 Manager or another upper level management official other than Ms. Gomez, will appear,
4 encourage employees to make a harassment complaint if they have one, and assure the employees
5 that the Defendant will not retaliate or permit retaliation against them.³⁰

6 **2. Record Keeping and Reporting**

7 a. Defendant will keep records of its investigation into, and copies of documents
8 related to, complaints of sexual harassment. Defendant will also keep records regarding whether
9 a person who has complained about harassment or who has participated as a witness in an
10 investigation of sexual harassment has been disciplined.³¹ Defendant will inform the EEOC in
11 writing regarding an employee if discipline occurs within three months of that employee’s sexual
12 harassment complaint or participation as a witness in a sexual harassment investigation.
13 Defendant will so inform the EEOC on the first day of May and November. If the EEOC
14 reasonably believes that retaliation may have occurred, the EEOC may make additional written
15 requests for the documents/records relevant to the harassment investigation and the disciplined
16 employee. Defendant will make this information available to the EEOC within fourteen (14)
17 days of such written requests.

18 b. Defendant will also provide documentation that, as part of Defendant’s annual
19 harassment prevention and deterrence training, it has expressly informed its managers and
20 supervisors that they are obligated, and have the duty, to report any retaliation or harassment that
21 they witness, irrespective of whether the harassee makes a complaint. Defendant is to send this
22 documentation to the EEOC within fourteen (14) days of completion of the annual training.

23 c. Defendant will also provide documentation that, at all further “tail-gate”
24

25 ³⁰This is not to say that Gomez may not conduct the employee training meetings. Rather, an additional
26 member of Defendant’s upper management must also appear.

27 ³¹For purposes of this order, a person accused of harassing behavior as part of an initial sexual harassment
28 complaint is not considered a witness who participated in a sexual harassment investigation.

1 meetings or other training sessions, which occur at least three times per year as per company
2 policy, the current Farm Manager or another upper management official other than Ms. Gomez,
3 appeared, encouraged employees to make a harassment complaint if they had one, and assured
4 the employees that the Defendant will not retaliate or permit retaliation against them. Defendant
5 is to send this documentation to the EEOC within fourteen (14) days of completion of the tail-
6 gate meetings or scheduled harassment training session.

7 **3. Posting**

8 Defendant will post the following notice, or a notice agreed upon by Defendant and the
9 EEOC, in both the English and Spanish languages in a clearly visible location frequented by
10 employees at each location owned and/or operated by Defendant within fourteen (14) days from
11 entry of this Order:

12
13 NOTICE TO ALL EMPLOYEES

14 This notice is being posted by order of the Court in a lawsuit brought against Harris
15 Farms, Inc. by the Equal Employment Opportunity Commission and Olivia Tamayo. [CIV F 02-
16 6199 AWI LJO] On January 21, 2005, a federal jury determined that Harris Farms violated Title
17 VII of the Civil Rights Act of 1964 by subjecting Ms. Tamayo to a sexually hostile work
18 environment, retaliating against her when she complained, and constructively discharging her.

19 Under the Court's Judgment, Harris Farms has been ordered not to retaliate against
20 employees who make a complaint of sexual harassment or participate as a witness in a sexual
21 harassment investigation.

22 Should you have any complaints of retaliation, you can contact the Fresno Office of the

23 EEOC at: Fresno Local Office
24 1265 W. Shaw Ave., Suite 103
25 Fresno, CA 93711
26 Tel: (559) 487-5793
27 Fax: (559) 487-5053
28 Toll Free: (800) 669-4000

The EEOC charges no fees for its services, and has employees that speak languages other

1 than English, including Spanish.

2 THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

3
4 **4. Cost and Duration of Injunctive Relief**

5 Defendant will bear the costs of all injunctive relief. The duration of the specific
6 injunctive relief under this order is five (5) years from the entry of this order. The general
7 injunctive relief is permanent.

8
9 Accordingly, IT IS HEREBY ORDERED that the Plaintiffs' Motion to Amend Judgment
10 to include Equitable Relief is GRANTED in part. The judgment is hereby amended to include
11 the injunctive relief described under the "Equitable Relief" section of this order.

12
13 IT IS SO ORDERED.

14 **Dated: September 30, 2005**
15 0m8i78

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE