STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. CONTRA COSTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-3182-E PERB Decision No. 2669 September 17, 2019

Appearances: Eric M. Moberg, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo, by Georgelle C. Cuevas and Joshua E. Morrison, Attorneys, for Contra Costa Community College District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Eric M. Moberg (Moberg) to a proposed decision of an administrative law judge (ALJ). The complaint alleged that the Contra Costa Community College District (District) violated the Educational Employment Relations Act[1] (EERA) by taking adverse actions against Moberg in retaliation for his protected activities. After Moberg rested his case at the evidentiary hearing, the District moved to dismiss the complaint. The ALJ orally granted the motion and then issued a proposed decision.

The proposed decision found that Moberg engaged in the conduct alleged in the complaint solely for his own benefit and that such conduct was not a logical continuation of group activity. The decision accordingly concluded that Moberg's alleged conduct was not

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

protected by EERA, and thus dismissal was appropriate because Moberg had not established a prima facie case of retaliation. For the reasons discussed below, we reverse the dismissal and remand this case for further proceedings consistent with this decision.

BACKGROUND[2]

During the relevant period, Moberg was an adjunct instructor at Diablo Valley College (DVC), a college in the District. Prior to October 7, 2016, Moberg repeatedly complained to the District that Vice Chancellor Eugene Huff (Huff) violated EERA and argued the District should fire Huff. On October 7, 2016, DVC Vice President of Instruction Rachel Westlake (Westlake) e-mailed Moberg to schedule a meeting.

On October 12, 2016, Moberg and his union representative attended a meeting with Westlake and Marlene Sacks (Sacks), outside counsel for the District. During the meeting, he characterized Sacks' law firm as "sleazy," accused her of attempting to bully him, and accused her of lying. He also complained about not being offered classes to teach.

On November 10, 2016, DVC Interim President Ted Wieden (Wieden) issued Moberg a letter of reprimand. The letter of reprimand discussed the October 12 meeting and other instances of alleged misconduct.[3]

On November 30, 2016, Wieden terminated Moberg's employment with the District. The termination letter does not state any reasons for the termination.

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[2] Since this case was decided on a motion to dismiss at the close of Moberg's case-in-chief and he was the only witness, we treat his testimony as undisputed for the purpose of our present review. These findings, however, do not preclude the ALJ from making contrary factual findings should the District present conflicting evidence in its presentation on remand.

[3] The letter of reprimand suggests that the District scheduled the October 12 meeting to "address concerns related to several emails [Moberg] had sent and flyers [he] had distributed." However, the ALJ did not make any findings about the purpose of the meeting.

On May 11, 2016, Moberg filed the unfair practice charge in this case, which he amended five times. On July 26, 2017, PERB issued a complaint. On August 17, 2017, the District filed an answer which admitted the alleged conduct by Moberg at the October 12, 2016 meeting, denied other substantive allegations, and raised several affirmative defenses.

On April 10, 2018, the ALJ held a pre-hearing conference at which the parties discussed the witnesses they intended to call. After subpoenas issued for Moberg's witnesses, the District filed a motion to quash all of Moberg's subpoenas. The ALJ granted the motion on June 13.

The formal hearing commenced on June 19, 2018. Moberg presented his case-in-chief as his only witness, testifying in a narrative fashion. He testified that, at the October 12, 2016 meeting, he complained that he was being retaliated against, about his working conditions, and about not being offered classes to teach. He also testified that he objected to the District bringing a lawyer to the meeting without telling him, which he asserted was a violation of a standard procedure, and to Sacks' approach, which he characterized as bullying and intimidating. He further testified that he complained at the meeting that the District was using Sacks to harass him because of prior protected activities and that his statements at the meeting were part of complaining about the District picking on him. After his testimony, Moberg rested his case.

The District then orally made a motion to dismiss the complaint. After hearing oral argument from both parties, the ALJ ordered a recess for the rest of the day to deliberate on the motion. After the hearing concluded for the day, Moberg e-mailed the ALJ a motion to amend the complaint to include new factual allegations. On June 20, the ALJ orally granted the District's motion to dismiss and denied Moberg's motion to amend. On June 26, the ALJ

issued the proposed decision, which explained the rulings on the motions to dismiss and to amend.

DISCUSSION

I. Motion to Dismiss the Complaint

To establish a prima facie case of retaliation in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer took adverse action against the employee, and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6.) The charging party has the initial burden, including demonstrating the "because of" element, that is, a causal connection or "nexus" between the adverse action and the protected conduct. (*Ibid*.) If the charging party establishes a prima facie case, the burden shifts to the employer to prove that its action(s) would have been the same despite the protected activity. (*Id.* at p. 14.)

The ALJ granted the District's motion to dismiss on the ground that Moberg failed to prove his conduct at the October 12, 2016 meeting was protected by EERA, i.e,. that he "exercised rights under EERA." This conclusion was based on the ALJ's finding that the conduct was for Moberg's own benefit and not a logical continuation of group activity. Moberg argues that he was not required to prove his conduct was related to collective activity to establish its protected status under EERA. We agree.

EERA expressly provides employees a right of self-representation. (Gov. Code, § 3543.) But this was not always the case. In 2000, the Legislature deleted the portion of EERA section 3543 that guaranteed employees the right to represent themselves in their

employment relations, only to restore the right of self-representation in 2008. (*Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*), p. 16, fn. 10.)

The ALJ found EERA's self-representation language protects only conduct that is a logical extension of group activity, relying in part on *Los Angeles Unified School District* (2003) PERB Decision No. 1552, which the Board decided during the period when section 3543 contained no self-representation language. In *Walnut Valley*, we disavowed *Los Angeles Unified School District* and related precedent to the extent it suggested that an employee's complaint to management about his or her own working conditions is only protected when it is a logical continuation of group activity. (*Walnut Valley*, *supra*, PERB Decision No. 2495, pp. 18-19; see also, e.g., *Antelope Valley Union High School District* (2019) PERB Decision No. 2631, p. 8 [discussing the significant change in PERB precedent set forth in *Walnut Valley*].) Applying *Walnut Valley*, we find that Moberg's comments at the October 12 meeting were an exercise of his right of self-representation because his comments, which criticized the District's employment investigation of him and complained about his working conditions, were adequately tethered to his employment relations with the District. (*Walnut Valley*, *supra*, PERB Decision No. 2495, pp. 19-20.)[4]

Because the ALJ dismissed the complaint solely on the basis that Moberg failed to prove he engaged in EERA-protected activity, we leave it to the ALJ to determine on remand whether Moberg established a prima facie case of retaliation, and, if so, whether the District

[4] The parties do not address whether Moberg's speech at the October 12 meeting lost statutory protection for being sufficiently "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference in the workplace." (See *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 16.) On remand, the parties may choose to present evidence and argument on this issue.

proved it would have taken the same adverse actions had Moberg not engaged in protected activity.

II. Motion to Quash Subpoenas

On June 13, 2018, the ALJ granted the District's motion to quash six subpoenas issued on behalf of Moberg. The ALJ found that Moberg failed to properly serve the subpoenas on the witnesses and thus granted the motion. As an initial matter, the District urges that Moberg's exceptions concerning the motion to quash are untimely because the ALJ's ruling on the motion was an administrative decision subject to a ten-day deadline to appeal pursuant to PERB Regulation 32360.[5] The District emphasizes that the ALJ's written ruling on the motion notified Moberg of his appeal rights under section 32360. The District's argument lacks merit because the procedures set forth in section 32360 do not apply to an ALJ's ruling on a motion.

PERB Regulations 32350 through 32380 govern appeals of administrative decisions. Section 32360(a) provides that "[a]n appeal may be filed with the Board itself from any administrative decision, except as noted in section 32380." Section 32380 (Limitations on Appeals) provides in relevant part that, "The following administrative decisions shall not be appealable: . . . (b) Except as provided in Section 32200, any interlocutory order or ruling on a motion." Section 32200 (Appeal of Rulings on Motions and Interlocutory Matters), in turn, creates a separate process whereby "[a] party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself." But the Board may only consider the request if "the Board agent joins in the request," and section 32200 sets rules for when the Board agent can do so.

[5] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Addressing the application of these regulations in circumstances similar to those here, the Board ruled in *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2136-S that Regulation 32200 does not provide the exclusive means of appealing an ALJ's ruling on a motion. "Nothing in PERB's regulations precludes a party from forgoing an interlocutory appeal and challenging the Board agent's ruling on the motion in its exceptions."[6] (*Id*. at p. 7.) Consequently, failure to seek Board review pursuant to section 32200 does not preclude a party from taking exceptions to an ALJ's ruling on a motion, as Moberg did here.

On the substance of the motion, Moberg argues the ALJ improperly granted the motion because she interpreted PERB's service requirements too narrowly. In his exceptions, Moberg largely repeats the arguments he made to the ALJ in favor of a more permissive approach to service. However, Moberg has not offered any persuasive reason to disturb the ALJ's finding that he failed to serve the subpoenas in accordance with PERB regulations.

III. Motion to Amend the Complaint

Moberg made a motion to amend the complaint after he closed his case-in-chief, while the District's motion to dismiss was under consideration by the ALJ, and before the District presented any evidence. The ALJ denied the motion, finding the amendment would be prejudicial to the District, and found that the proposed new allegations did not meet the requirements for an unalleged violation. As part of this ruling, the proposed decision asserts that the standard applicable to motions to amend during a hearing is substantially similar to the

[6] As the Board noted, allowing this option "avoids the filing of numerous interlocutory motions for fear of waiving an appeal." (*State of California (Department of Corrections & Rehabilitation)*, *supra*, PERB Decision No. 2136-S at p. 8.)

unalleged violations test. We disagree and remand for consideration of the proposed amendments under the standard articulated below.

Pursuant to PERB Regulation 32648, a party may amend a complaint during a hearing unless the amendment "would result in undue prejudice to other parties." (*Fresno County Superior Court* (2017) PERB Decision No. 2517-C, p. 11 (*Fresno*), partially set aside on other grounds, *Superior Court v. Public Employment Relations Board* (2018) 30 Cal.App.5th 158.) The rationale behind requiring a respondent to show undue prejudice in order to prevent an amendment at hearing is that a lenient amendment standard promotes judicial economy (*id*. at pp. 12-13), and the ALJ can and should give the respondent additional time to respond to any such amendment. (See, e.g., *Regents of the University of California* (1987) PERB Decision No. 615-H, adopting proposed decision at p. 3.)

After all parties have rested and the hearing record is closed, matters that do not fall within the ambit of the complaint may only be considered if they qualify under the stricter unalleged violations standard. (*Fresno*, *supra*, PERB Decision No. 2517, pp. 12-13.) "Unlike the more lenient standards under PERB Regulation 32648 [for] amending a complaint during a hearing, the criteria for considering unalleged matters effectively *presumes* prejudice." (*Id*. at p. 13, emphasis in original.) PERB therefore may only consider allegations not included in the complaint when "(1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint." (*Ibid*.)

While satisfying the unalleged violations doctrine would also satisfy the standard to amend a complaint during a hearing under PERB Regulation 32648, the converse is not true. Thus, amendment of a complaint during a hearing may be appropriate where the unalleged violations standard would not be satisfied if the new allegation were raised after the hearing.

In this case, Moberg made the motion in question during the hearing. While the proposed decision suggests that was not necessarily the case given that the hearing did not resume after Moberg's motion, we disagree with that analysis. Moberg made the motion prior to the District's responsive case and Moberg's opportunity to introduce rebuttal evidence. Given that Moberg sought to amend the complaint to add new allegedly protected conduct, including, apparently, additional conduct for which he may have been disciplined, Moberg presumably hoped to reopen his case-in-chief and provide more evidence before the District began its responsive case. Thus, this was not an instance in which a party makes a motion to amend just prior to the time when all parties and the ALJ believed the hearing would likely conclude. A motion to amend filed that late in a hearing may pose slightly different considerations from one filed at the outset or, as here, the halfway point. But the same core question must be answered in all of these scenarios: Is there undue prejudice that cannot be sufficiently mitigated by scheduling additional hearing time after an appropriate continuance? On remand, the ALJ shall apply this standard to Moberg's motion to amend the complaint and to any other motion to amend made before the close of the hearing.

ORDER

The dismissal of the complaint and unfair practice charge in Case No. SF-CE-3182-E is REVERSED and the matter is REMANDED to the Public Employment Relations Board, Division of Administrative Law, for further proceedings consistent with this decision.

Members Shiners and Krantz joined in this Decision.