STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLENE F. DAVIS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-3430 PERB Decision No. 1129 December 15, 1995

Appearance: Charlene F. Davis, on her own behalf.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Charlene F. Davis (Davis) of the administrative law judge's (ALJ) proposed decision (attached). In that decision the ALJ dismissed Davis' unfair practice charge which alleged that the Los Angeles Unified School District (District) violated section 3543.5(a)[1] of the Educational Employment Relations Act (EERA) by terminating her

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

employment with the LA's Best Program. The ALJ found that Davis had not proven that the District terminated her due to her protected activity.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits and Davis' statement of exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and, therefore, adopts them as the decision of the Board itself.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3430 are hereby DISMISSED.

Chairman Caffrey and Member Garcia joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLENE F. DAVIS (JOHNSON), Charging Party,	)	Unfair Practice Case No. LA-CE-3430
v.	)	
LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	PROPOSED DECISION (6/12/95)

Appearances: Charlene F. Davis (Johnson), on her own behalf, and Rochelle Montgomery, Attorney, for the Los Angeles Unified School District.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On March 29, 1994, Charlene Davis (Davis or Charging Party) filed this unfair practice charge against the Los Angeles Unified School District (District). On July 19, 1994, the general counsel's office of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1] The complaint alleged that the District terminated Charging Party from her position as a playground

[1]*The* EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5(a) states that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

assistant with the LA's Best Program because among other things, she filed complaints regarding safety issues.

A settlement conference was held but the parties were unable to resolve their dispute. A formal hearing was conducted on October 31 and November 1, 1994. Transcripts were prepared, and after several party initiated continuances, briefs were filed and the case was submitted for decision on March 21, 1995.

FINDINGS OF FACT

The District is an employer and the Charging Party is an employee within the meaning of the Act. There is no applicable collective bargaining agreement providing for binding arbitration of their dispute.

The two main participants in this dispute are the Charging Party and Gwen Turner, Principal of Alta Loma Elementary School. They have given diametrically opposing testimony on several issues. These factual findings and the decision based thereon are the result of the credibility determination of these two witnesses. Where their testimony is in dispute, I find that Turner is a more credible witness than Davis. I based this on two main factors. The first is that Turner's testimony was more consistent with the testimony of Everlena Morris regarding critical meetings in December 1992 and October 1993, and the testimony of Daniel Austin. Both Morris and Austin were very credible. The second factor was that the Charging Party's testimony was contradictory and internally inconsistent.

The Charging Party has been a teaching assistant at Alta Loma Elementary School for the past fourteen years. In 1992 she was also hired in an after school program called the LA's Best Program. That program was a joint effort between the District and the Los Angeles Mayor's Office.

In her role as a teaching assistant, Davis is a member of a classified bargaining unit. Davis' position with the LA's Best Program is not a bargaining unit position. She has no guarantee of employment with the LA's Best Program and serves at the will of the program.

Charging Party claims to have raised safety issues on two occasions. Davis testified that in December 1992 she verbally complained to Turner about a parent who came to pick up her child an hour late. Davis felt the parent was under the influence of alcohol or drugs. Davis told Turner that the parent had verbally abused her when she informed the parent that the child would have to be picked up at the police station if she continued to pick up her child an hour late. At that same time, Davis also complained to Turner that there was no telephone at the location where the students were being kept.

Davis also testified that in July or August of 1993, two transients came onto campus and became abusive when she asked them to leave. Davis contacted Everlena Morris, the LA's Best site administrator, who called campus police for assistance. When the police arrived, however, the two transients had already left the campus. Turner had not been informed of this incident

at the time, but later learned of it during a meeting on October 4, 1993.

On September 24, 1993, a group of parent volunteers were cutting the lawns of the school. It was a hot day and one of the parents asked Turner if they could have some drinking water. The school regularly keeps bottled water in the cafeteria, so Turner called the cafeteria manager and asked that she send some bottled water to the parents. The cafeteria manager said she had no one to deliver the water, so Turner told the cafeteria manager to contact the LA's Best Program and have them send a student to pick up the water and take it to the parents.

The cafeteria manager called the LA's Best Program and asked that a student be sent to deliver the bottled water to the parents. Mr. Nakia Davis, an employee in the LA's Best Program received the call from the cafeteria manager. He told the cafeteria manager that he would deliver the water himself. The cafeteria manager told him that Turner said to send a student rather than an adult. Nakia Davis reported this to the Charging Party, who told him not to send the student. The Charging Party believed that it was not safe for a student to deliver the water. No student was therefore sent for the water and it was not delivered to the parent volunteers.

After waiting for sometime for the water, one of the parents again asked Turner for water. By that time cafeteria manager had already gone home, so Turner had to send one of her office

clerical employees to unlock the cafeteria and get water for the parents.

Turner explained at the hearing that she felt it was completely safe to use students to deliver the water. Student monitors are used in numerous circumstances to deliver messages, or run errands at the school site. Turner testified that she did not want an adult to deliver the water because a class would then have to be left without adult supervision.

Turner sent a memo to the Charging Party telling her that she had caused a problem and that she should follow through on Turner's requests. Turner also scheduled a meeting for October 4, 1993, to discuss the matter and sent notice of the meeting to Charging Party. Everlena Morris was also invited to the meeting. On September 27, 1993, Charging Party filed a complaint about Turner with the regional administrator, Daniel Austin. Austin was Turner's immediate supervisor. The complaint alleged that Turner had requested that students be used to deliver drinking water and that the practice was unsafe due to shootings and other safety problems that had occurred.[2] The complaint also alleged that Turner had been verbally abusive to her.

On September 30, 1993, the Charging Party revised the complaint about Turner, and added more details to the complaint.

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[2]The complaint also alleged that Turner had asked that a student be used to deliver snacks to Turner from the cafeteria. The testimony regarding that issue was contradictory and inconclusive. There is not enough credible evidence in the record to conclude that the incident ever occurred.

Upon receiving the complaint about Turner, Austin contacted both Charging Party and Turner and talked to them about it. Austin was satisfied with the information he received from Turner and felt Turner had acted professionally. He did not pursue the matter any further. According to Austin his conversation with Turner was not disciplinary in any way.

On October 4, 1993, the previously scheduled meeting between Turner, Davis and Morris occurred. By that time Turner had received a copy of the complaint to Austin and was hoping to resolve their differences about what had happened. Turner had not immediately confronted Davis about the complaint, hoping that the passage of time would minimize the incident.

During the meeting, as Turner was reviewing the incident, Davis became agitated and called Turner a liar several times in a loud voice. Davis eventually walked out of the meeting before Turner could finish.

Turner had had some previous concerns about Davis' demeanor with other LA's Best staff and parents. The District offered testimony about incidents where the Charging Party had angry exchanges with other employees and parents. The evidence was offered not to prove that the actual incidents occurred, but only to prove Turner's state of mind (i.e., that she believed Davis has a history of angry inappropriate behavior). I make no findings regarding the truth of the alleged confrontations between Charging Party and other employees and parents. However, I do find that Turner believed them to be true. Based upon

Turner's belief that Davis had reacted inappropriately with other staff and parents in the past, and Davis' inappropriate behavior at the October 4 meeting, Turner then decided that she would terminate Davis from the LA's Best Program.

The Charging Party was terminated from her after school employment in the LA's Best Program, however her employment as a teaching assistant at Alta Loma Elementary School has not been altered in any way. She remains employed as a teaching assistant in the same position with the same number of hours as she previously held.

ISSUE

Did the District retaliate against Davis because she filed two safety complaints and a complaint against her supervisor?

DISCUSSION

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action

complained of, regardless of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal. Rptr. 626].)

Charging Party argues that she engaged in three protected acts. The first two were safety complaints. The third was the complaint to Austin.

The safety "complaints" however, were not so much complaints as they were simply reporting incidents that occurred. Nevertheless reporting an incident regarding a safety issue can be considered protected activity. (See Pleasant Valley School District (1988) PERB Decision No. 708, where an employee complained of unsafe equipment.)

The third action, filing the complaint with Austin, is also protected. (See State of California, Department of Transportation (1982) PERB Decision No. 257-S, where an employee distributed leaflets criticizing his supervisor.) Charging Party therefore has demonstrated that she engaged in protected activities.

Charging Party has also demonstrated knowledge of that protected activity by the employer. Turner had direct knowledge of the December 1992 incident and learned of the July or August 1993 incident during the October 4, 1993, meeting. Turner also had knowledge of Davis' complaint to Austin prior to deciding to terminate her.

The adverse action is undisputed. Turner terminated Davis' from the LA's Best Program.

Charging Party has, however, failed to prove a nexus between the protected activity and the adverse action. There was no credible evidence that either of the safety reports caused any resentment or animosity towards Davis. The incidents were distant in time and not particularly significant to begin with. While on its face the Austin complaint might have caused resentment, the evidence reflects that Turner had an interest in resolving the issue rather than escalating it. For example, Turner did not immediately confront Davis with the complaint, but rather waited, hoping that time would reduce the emotional volatility of the issue.

The evidence suggests that it was not until Davis began yelling at Turner, calling her a liar, then walking out of the October 4 meeting, that Turner decided to terminate Davis from the program. Turner's action appears to be related directly to her belief that Davis had acted inappropriately in the past with other program staff and parents, and was doing so again.

Turner's action was measured and appropriately limited to Charging Party's employment in the LA's Best Program. Turner took no action impacting Davis' other employment in the District where she was more closely supervised and had not exhibited inappropriate behavior.

SUMMARY

The Charging Party has not proven that Turner terminated her due to her protected activities. Further, even if Davis had shown that the adverse action was somehow related to her

protected activities, the District established that it would have taken the adverse action anyway, regardless of Davis' protected activities. The complaint is therefore dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge