STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELAINE LAVAN, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2350-E PERB Decision No. 1702 November 5, 2004

Appearance: Elaine Lavan, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Elaine Lavan (Lavan) of a Board agent's dismissal (attached) of her unfair practice charge. The unfair practice charge alleged that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA) [1] by discriminating against her. Lavan alleged that this conduct constituted a violation of EERA section 3543.5(a) and (b).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the warning and dismissal letters, and Lavan's appeal. The Board finds the dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

[1] EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

ORDER

The unfair practice charge in Case No. SF-CE-2350-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

October 16, 2003

William H. Hanson, Attorney
1160 Brickyard Cove Road,#200
Point Richmond, CA 94801

Re: Elaine Lavan v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2350-E; First Amended Charge
DISMISSAL LETTER

Dear Mr. Hanson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 3, 2003. Elaine Lavan alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by discriminating against her.

I indicated to you in my attached letter dated October 8, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 15, 2003, the charge would be dismissed.

On October 14, 2003, I received a first amended charge. Facts presented in the original and amended charges are as follows.

On March 20, 2003, Ms. Lavan entered into an argument with a community member visiting her class room. During the argument, which was witnessed by several students and District employees, Ms. Lavan used profanity and made racial remarks towards the community member. On that same date, the community member filed a complaint against Ms. Lavan. On March 28, 2003, Ms. Lavan spoke with District officials about the incident. During that phone conversation, you were informed that you were being placed on paid administrative leave until June.

On April 3, 2003, Ms. Lavan was issued a letter of reprimand by Berkeley Adult School Principal Margaret Kirkpatrick. The letter of reprimand indicates that several witnesses confirmed the community member's version of the March 20, 2003, incident. Additionally, the letter of reprimand charged Ms. Lavan with unprofessional conduct and ordered her to

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

attend anger management classes. The letter further indicated that Ms. Lavan had 30 days to respond to the reprimand.

On or about April 5, 2003, Ms. Lavan received notice that she was being terminated for failure to comply with the reprimand. It is unclear what portion of the reprimand Ms. Lavan failed to comply with. However, Charging Party contends she was terminated for failing to attend anger management classes.

On April 18, 2003, Ms. Lavan responded to the letter of reprimand and provided her own version of the incident. Ms. Lavan's response admits making the racial statement and admits to use of profanity as described in the letter of reprimand. Ms. Lavan's response does not mention the anger management classes.

Based on the above provided facts, the charge still fails to state a prima facie violation of the EERA, for the reasons provided below.

Charging Party asserts her termination is discriminatory. To demonstrate a violation of EERA section 3543.5(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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

As indicated in my October 8, 2003, letter, in order to demonstrate a prima facie case of discrimination, you must demonstrate the Charging Party engaged in protected activity under the EERA. Herein, Ms. Lavan did not engage in any protected activity prior to her letter of

reprimand or notice of termination. While she did respond to the letter of reprimand, and while such activity may constitute protected activity, this response occurred April 18, 2003, well after Ms. Lavan was terminated. As such, the charge fails to demonstrate a prima facie case.

Even assuming Ms. Lavan had engaged in protected activity prior to her termination, the charge fails to demonstrate the requisite nexus. The District followed proper procedures in issuing the letter of reprimand, did not offer shifting justifications for its decision to terminate Ms. Lavan, and did not engage in disparate treatment. While Charging Party asserts the District violated Ms. Lavan's due process rights, Charging Party fails to provide any specific facts regarding this alleged due process violation. Moreover, while Charging Party further asserts that Ms. Lavan's termination was based on her desire to respond to the letter of reprimand, nothing in the charge indicates the termination was based on Ms. Lavan's response. Moreover, the District itself was the party that informed Ms. Lavan of her right to respond to the letter. As such, this allegation fails to state a prima facie violation of the EERA.

Finally, Charging Party asserts that she was not obligated to attend the anger management classes and cannot be charged with insubordination for her failure to do so. In support of this contention, Charging Party cites Moosa v. State Personnel Board (2002) 102 Cal.App.4th, 1379. However, this case does not support Charging Party's claim and does not assist in demonstrating a prima facie case of discrimination. In Moosa, the California State University demoted a professor based upon his failure to provide a teaching plan as ordered by his supervisor. The supervisor's order was inconsistent with the parties' collective bargaining agreement which provided strict guidelines on requiring such teaching plans. Herein, the District's order of anger management classes is not inconsistent with the parties' MOU. In fact, the MOU is silent with regard to such remedial activities. As such, this case does not support Ms. Lavan's charge.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

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

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON

General Counsel

By
Kristin L. Rosi
Regional Attorney

Attachment

cc: BUSD

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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1330 Broadway, Suite 1532
Oakland, CA 94612-2514
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October 8, 2003

William H. Hanson, Attorney
1160 Brickyard Cove Road,#200
Point Richmond, CA 94801

Re: Elaine Lavan v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2350-E
WARNING LETTER

Dear Mr. Hanson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 3, 2003. Elaine Lavan alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by discriminating against her.

Investigation of the charge revealed the following. Ms. Lavan was employed by the District as a Teacher at Inter City Services, an Adult School. As such, Ms. Lavan is exclusively represented by the Berkeley Federation of Teachers.

On March 20, 2003, Ms. Lavan entered into an argument with a community member visiting her class room. It is unclear from the charge what the argument was about, however, it appears the community member filed a complaint against Ms. Lavan with the District.

On April 5, 2003, Ms. Lavan was issued a letter of reprimand by Berkeley Adult School Principal Margaret Kirkpatrick. A copy of this letter was not provided with the charge. The letter of reprimand charged Ms. Lavan with unprofessional conduct and ordered her to attend anger management classes. Ms. Lavan informed the District that she would not attend anger management classes.

On or about April 14, 2003, Ms. Lavan received notice that she was being terminated for failure to comply with the reprimand. Charging Party contends the District failed to do a proper investigation and failed to handle the public complaint in a manner consistent with the collective bargaining agreement. A copy of the collective bargaining agreement was not provided with the charge.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Based on the above stated facts, the charge as presently written, fails to state a prima facie case of discrimination, for the reasons provided below.

To demonstrate a violation of EERA section 3543.5(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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Herein, the charge contends Ms. Lavan was discriminated against in her termination. However, nothing in the charge indicates that Ms. Lavan engaged in any protected activity, let alone protected activity in close temporal proximity to the issuance of the termination notice. Moreover, nothing herein demonstrates the District's decision to terminate Ms. Lavan was based on anything more than her failure to attend anger management courses. As such, this charge fails to state a prima facie case of discrimination.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an

amended charge or withdrawal from you before October 15, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR