

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LISA A. MENGES,

Charging Party,

v.

TORRANCE UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5275-E

PERB Decision No. 2007

March 9, 2009

Appearances: Lisa A. Menges, on her own behalf; Parker & Covert by Spencer E. Covert, Attorney, for Torrance Unified School District.

Before McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (Board) on appeal by Lisa A. Menges (Menges) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Torrance Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by: (1) releasing Menges from a probationary position without providing the written notice required by the District's Personnel Commission Rules; (2) creating a hostile work environment; and (3) discriminating against her based on race. The Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the entire record in this matter, including but not limited to, the original and amended unfair practice charge, the District's position statement, the Board agent's warning and dismissal letters, Menges' appeal and the District's response thereto. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a

¹EERA is codified at Government Code section 3540 et seq.

correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-5275-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1020
Fax: (510) 622-1027



December 29, 2008

Lisa A. Menges

Re: Lisa A. Menges v. Torrance Unified School District
Unfair Practice Charge No. LA-CE-5275-E
DISMISSAL LETTER

Dear Ms. Menges:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 3, 2008.¹ Lisa A. Menges (Menges or Charging Party) *does not* identify a specific section of the Educational Employment Relations Act (EERA or Act)² that has been violated by the Torrance Unified School District (District or Respondent).

Charging Party was informed in the attached December 16 Warning Letter (Warning Letter) that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it prior to December 23, the charge would be dismissed.

On December 23, the undersigned called and spoke with Charging Party. Menges stated that she had just returned from the post office where she had mailed an amended unfair practice charge in response to the Warning Letter. On December 26, PERB received the amended unfair practice charge.

December 26 Amendment

The amendment contains the following new information. Charging Party was hired as a 3-hour food service worker on September 4 by Manager Karen Sopp (Sopp) and assigned to West High School. Menges had a good working relationship with her supervisors, Janet and Lourdes, and was extremely appreciative of her job. Charging Party attached an undated statement by Janet, Food Service Supervisor, wherein Janet praised Menges' level of

¹ All dates refer to calendar year 2008.

² 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.

enthusiasm and work ethic. Sometime thereafter, Menges was transferred by Sopp to South High School as a 1.5-hour food service worker.

Her assignment at South High School turned out to be a bad experience, with Charging Party describing the situation as a "hostile work environment." Menges felt intimidated and harassed by her supervisor, Gail Gramling (Gramling), and another co-worker, and suspects that she was being discriminated against because she was not African American.³ Menges did not seek assistance from Sopp or let her know about the intimidation and harassment at her new work site.

Charging Party states that she recently learned that Gramling submitted a statement to her boss, Lynette Rock (Rock), that the reason for Charging Party's termination on November 21 was that she was stealing.

Charging Party also states that Article 9.3.21 of the Personnel Commission Rules provides as follows:

A probationary classified employee who is to be dismissed shall be given a written notice of termination from probationary status prior to the date on which the probationary period ends.

Menges was not given a written notice of termination.

Discussion

Charging Party's Burden of Proof

As stated in the December 16 Warning Letter, PERB Regulation 32615(a)(5)⁴ requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Charging Party has not cured the following deficiencies highlighted in the Warning Letter: (1) failure to state what section(s) of the EERA has been violated by the District; (2) failure to provide a statement of facts and conduct alleged to constitute an unfair practice under EERA;

³ Gramling and the co-worker are African American.

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

and (3) failure to describe why and how her dismissal from her probationary food service worker position demonstrates that an unfair practice under EERA has occurred.

Charging Party alleges she was a hard-working and earnest employee. However, she has not defined any protected activity she engaged in while an employee of the District. PERB will not review disciplinary actions unrelated to activity protected by EERA. (San Ysidro School District (1980) PERB Decision No. 134.) Charging Party's allegations of harassment and intimidation against Gramling and a co-worker are also not sufficient to constitute an unfair practice under EERA. PERB does not have jurisdiction to adjudicate racial discrimination, "hostile work environment," or Personnel Commission Rule violations. (See, e.g., Barstow Unified School District (1997) PERB Decision No. 1138b; Barstow Unified School District (1996) PERB Decision No. 1138a; AFSCME Local 2620 (Moore) (1988) PERB Decision No. 683-S.)

Discrimination

Here again, Charging Party has failed to demonstrate that she was discriminated or retaliated against in violation of *EERA section 3543.5(a)*. As stated in the Warning Letter, Charging Party was directed to show that: (1) she 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 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro)). In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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;

Campbell, supra, 131 Cal.App.3d 416); (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; San Leandro, supra, 55 Cal.App.3d 553); (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; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (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 (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (Jurupa Community Services District (2007) PERB Decision No. 1920-M; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (North Sacramento School District, supra, PERB Decision No. 264; Novato, supra, PERB Decision No. 210.)

The amended charge is devoid of facts that establish that Menges engaged in *protected activities under EERA*. The lack of EERA protected activity is fatal to the charge since there can be no nexus assessment between any protected activity and Menges' dismissal from her probationary position.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above and in the December 16 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs, tit. 8, sec. 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 during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 32132.)

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Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Anita I. Martinez
Regional Director

Attachment

cc: Spencer Covert

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1020
Fax: (510) 622-1027



December 16, 2008

Lisa A. Menges

Re: Lisa A. Menges v. Torrance Unified School District
Unfair Practice Charge No. LA-CE-5275-E
WARNING LETTER

Dear Ms. Menges:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 3, 2008.¹ Lisa A. Menges (Menges or Charging Party) *does not* allege a specific section of the Educational Employment Relations Act (EERA or Act)² which has been violated by the Torrance Unified School District (District or Respondent).

My investigation revealed the following facts. Menges was a probationary food service worker³ in the District. On November 21, her supervisor, Gail Gramling (Gramling), asked Menges to turn in her visor and apron at the end of her shift and dismissed her from employment as a probationary employee. The reason given was that Menges was unable to perform the job properly. Charging Party asserts that she worked to the best of her ability, completing whatever tasks she was asked to perform, including washing dishes. Charging Party maintains that a co-worker, Margarita Jones (Jones), would watch her every move and report back to Gramling if Menges did anything wrong. Gramling would then call Menges into her office and talk to her.

Charging Party states that she was not provided with any training regarding the performance of her job duties at this particular school site.⁴ Charging Party states that she felt alone and discriminated against. Charging Party did not receive a written warning prior to her termination, and surmises that since Gramling was a new probationary supervisor, she herself had not been trained how to properly supervise employees.

¹ All dates refer to calendar year 2008.

² 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.

³ Charging Party does not provide her classification.

⁴ Charging Party had worked at another school site in the District.

Discussion

Charging Party's Burden of Proof

PERB Regulation 32615(a)(5)⁵ requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

The charge as filed is deficient for several reasons. First, it does not state what section of EERA has been violated by the District. Second, it does not provide a statement of facts and conduct alleged to constitute an unfair practice under EERA. Third, Menges simply describes her unhappiness at having been dismissed from her probationary position by a probationary supervisor, without describing why and how that action demonstrates that an unfair practice under EERA has occurred.

Discrimination

Since Menges did not specify what section of the EERA has been violated, the charge will be scrutinized utilizing a discrimination analysis.⁶ To demonstrate that an employer discriminated or retaliated against an employee in 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; (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 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

⁵ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies of the Regulations may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA, 95811-4124, and the text is available at www.perb.ca.gov.

⁶ Where a charging party fails to allege that any specific section of the Act has been violated, a Board Agent, upon a review of the charge, may determine under what section the charge should be analyzed. (Los Banos Unified School District (2007) PERB Decision No. 1935.)

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

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; Campbell, supra, 131 Cal.App.3d 416); (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; San Leandro, supra, 55 Cal.App.3d 553); (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; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (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 (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (Jurupa Community Services District (2007) PERB Decision No. 1920-M; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (North Sacramento School District, supra, PERB Decision No. 264; Novato, supra, PERB Decision No. 210.)

In this case, the charge is devoid of any and all facts that would establish that Menges engaged in protected activities under EERA; that Gramling had knowledge of those protected activities; and that Gramling released Menges from her probationary position because of the exercise of those EERA-protected rights. Without these three elements, it is impossible to assess whether there is a nexus between any protected activity by Menges and her dismissal from her probationary position.

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, Charging Party may 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 an authorized agent of 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

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served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **December 23, 2008**, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Anita I. Martinez
Regional Director