

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RAFAEL R. RIVERA,

Charging Party,

v.

SEIU, UNITED HEALTHCARE WORKERS
WEST,

Respondent.

Case No. SF-CO-178-M

PERB Decision No. 2025-M

May 15, 2009

Appearance: Rafael R. Rivera, on his own behalf.

Before McKeag, Neuwald and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Rafael R. Rivera (Rivera) of a Board agent's dismissal of his unfair practice charge. The charge alleged that SEIU, United Healthcare Workers West (UHW) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to fairly represent Rivera regarding the termination of his employment with the Salinas Valley Memorial Hospital. The Board agent dismissed the charge for lack of timeliness.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the Board agent's warning and dismissal letters, and Rivera's appeal.² Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

¹ MMBA is codified at Government Code section 3500 et seq.

² UHW did not file a response to the charge or the appeal.

BACKGROUND

Rivera was a patient transporter at Salinas Valley Memorial Hospital and a member of the bargaining unit represented by UHW. On September 24, 2007, Rivera was called into a meeting with Terry Aaore, the director of the hospital's heart center, Charm Patton (Patton), the hospital's vice president of human resources, and UHW representative Esther Nunez (Nunez). Rivera was informed that sexual harassment allegations had been made against him based on his conduct on September 17 and 18.³ Rivera said he had no recollection of the alleged incidents. The hospital placed Rivera on administrative leave while it conducted an internal investigation of the allegations.

Two weeks later, during a meeting at which Nunez was present, Patton informed Rivera that the investigation had concluded there was insufficient evidence to support the sexual harassment allegations. Nonetheless, Patton told Rivera he would be terminated pursuant to the hospital's "no tolerance" sexual harassment policy. Patton provided Rivera with the option to resign in lieu of termination. She told him that if he resigned, the hospital would pay for six months of COBRA health benefits but he would not be eligible for unemployment insurance benefits. Nunez encouraged Rivera to accept the offer. When Rivera asked her why, Nunez responded that the hospital's lawyers had enough evidence to support the sexual harassment claim and that she could do nothing more for him.

Rivera signed the resignation agreement and his employment with the hospital ended as of October 15, 2007. After this date, Rivera continued to ask UHW for assistance regarding his termination but each time UHW refused.⁴ On May 2, 2008, an administrative law judge at

³ The charge did not describe the allegedly harassing conduct.

⁴ Rivera made these allegations in a phone conversation with the Board agent after he received the warning letter indicating the charge was untimely. The dismissal letter mentions the allegations but does not state when the requests for assistance were made or denied.

the Unemployment Insurance Appeals Board found that Rivera was entitled to unemployment benefits because he was “discharged from his most recent work for reasons that do not constitute misconduct.”

Unfair Practice Charge and Dismissal

On June 16, 2008, Rivera filed his unfair practice charge. The charge alleged that UHW breached its duty of fair representation because, instead of challenging the termination, Nunez encouraged him to accept the hospital’s offer of resignation in lieu of termination. Rivera claimed he was wrongfully terminated because he did nothing wrong and was “blackmailed” into signing the resignation agreement because he needed to maintain health insurance to cover his wife’s diabetes treatments.

In the warning letter, the Board agent found that Rivera knew or should have known no later than October 15, 2007, that UHW would not provide him any further assistance regarding his termination. The Board agent concluded the charge was untimely because it was filed more than six months after October 15, 2007. In a phone conversation with the Board agent after he received the warning letter, Rivera claimed he had continued to ask UHW for assistance after October 15, 2007, but each request was refused. In the dismissal letter, the Board agent found that at no time after October 15, 2007, could Rivera have reasonably believed that UHW would assist him. The Board agent therefore dismissed the charge for lack of timeliness.

Rivera’s Appeal

On appeal, Rivera does not challenge the Board agent’s conclusion that the charge was untimely. He reasserts that UHW did not fairly represent him regarding his termination, which he now claims was the result of his inquiries into why the hospital failed to perform requested tests on his wife. Attached to the appeal are many pages of his wife’s medical records and

correspondence from the National Labor Relations Board and the California Department of Fair Employment and Housing.

DISCUSSION

1. New Allegations and Supporting Evidence On Appeal

Rivera's appeal contains allegations and supporting evidence not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).)⁵ The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)⁶

Attached to Rivera's appeal are approximately two dozen new exhibits not presented to the Board agent. Some exhibits are dated prior to November 14, 2008, when the charge was dismissed, while others are dated after that date. However, the exhibits all relate to the allegation raised for the first time on appeal that Rivera was terminated because he questioned the hospital about why it did not perform certain medical tests on his wife. Rivera alleged that he asked these questions prior to his termination in October 2007. Thus, this allegation could have been made to the Board agent prior to the dismissal of the charge. Moreover, the new allegation relates to Rivera's termination by the hospital, not to UHW's alleged failure to represent him regarding the termination. Accordingly, nothing in the record establishes good cause for the Board to consider this new allegation and the documents provided in support of it.

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

⁶ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

2. Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

(Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. *(Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. *(Long Beach Community College District* (2009) PERB Decision No. 2002.)

In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. *(Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889; *United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441.) Repeated union refusals to assist a unit member with the same issue do not start the limitations period anew. *(California State Employees' Association (Calloway)* (1985) PERB Decision No. 497-H.)

Sometime in early October 2007, Nunez told Rivera he should accept the hospital's offer of resignation in lieu of termination because the hospital had enough evidence to support the sexual harassment claims against him. She also told Rivera that she could do nothing more for him. At this point, Rivera knew or should have known that UHW would provide him no further assistance regarding the termination of his employment. Even though the record does not contain the exact date of the conversation between Rivera and Nunez, it is reasonable to conclude that Rivera knew UHW would provide no further help as of the effective date of his

termination, October 15, 2007. Further, even though Rivera continued to request assistance from UHW regarding his termination after October 15, 2007, UHW did not indicate at any time after that date that it would assist him on the issue. Instead, Rivera alleged that UHW continued to deny assistance. Thus, there are no facts alleged to establish that the statute of limitations period began anew after October 15, 2007. (See *California State Employees Association, SEIU Local 1000 (Sutton)* (2003) PERB Decision No. 1553-S [“Once the statute (of limitations) begins to run, the employee cannot cause it to begin anew by making the same request over and over again.”].) Rivera did not file his charge until June 16, 2008, eight months after October 15, 2007. Consequently, Rivera’s charge was untimely.

ORDER

The unfair practice charge in Case No. SF-CO-178-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.