STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. CABRILLO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2994-E PERB Decision No. 2453 September 17, 2015

Appearances: Eric M. Moberg, in propria persona; Law Offices of Vincent P. Hurley by Vincent P. Hurley, Attorney, for Cabrillo Community College District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric M. Moberg (Moberg) from the dismissal by PERB's Office of the General Counsel of his unfair practice charge filed on February 1, 2013, against the Cabrillo Community College District (District). Moberg's charge, as amended, alleges that the District violated the Educational Employment Relations Act (EERA)[1] by retaliating against him for his protected conduct and interfering with his EERA protected rights when on November 6, 2012, it placed him on paid leave, directed that while on paid leave he should not attend his assigned classes or perform further work, and withdrew his tentative teaching assignment for the Spring 2013 semester.

We have reviewed Moberg's charge and amended charges, the District's responses, the warning and dismissal letters, Moberg's appeal, the District's response and Moberg's July 23,

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

2015, request to submit new evidence. Based on that review, we affirm dismissal of Moberg's interference claim, and reverse the dismissal of Moberg's retaliation claim, and we remand the case to the Office of the General Counsel for the issuance of a complaint in accordance with our discussion below.

PROCEDURAL HISTORY

On February 1, 2013, Moberg filed his initial unfair practice charge with PERB alleging that the District violated EERA section 3543.5 by retaliating against him for exercising EERA protected rights. On March 6, 2013, the District filed its initial position statement. On August 30, 2013, Moberg filed his first amended charge. On October 7, 2013, the District re-filed its initial position statement; submitted an objection to Moberg's first amended charge and also submitted a declaration by its Attorney, Vincent P. Hurley (Hurley), in support of its position statement and objection. On October 9, 2013, Moberg filed a response to the District's October 7, 2013, filings.

On October 24, 2014, Moberg filed a second amended charge. On November 17, 2014, the District filed its second position statement. On December 9, 2014, the Office of the General Counsel issued a warning letter notifying Moberg that his charge did not state a prima facie case. On January 15, 2015, Moberg filed a third amended charge. On February 6, 2015, the District filed its third position statement together with a declaration by District Director of Human Resources Loree McCawley (McCawley). On February 11, 2015, Moberg filed objections to the District's latest position statement and McCawley's declaration. On May 19, 2015, the Office of the General Counsel dismissed Moberg's charge.

On June 5, 2015, Moberg filed an appeal of the dismissal of his charge. On June 25, 2015, the District filed its response. On June 30, 2015, PERB's Appeals Assistant notified the

parties that the filings were complete and the case had been placed on the Board's docket. On July 23, 2015, Moberg submitted new evidence under PERB Regulation 32635(b).

FACTUAL BACKGROUND

Moberg was hired by the District as a part-time adjunct English instructor in January of 2012. Moberg was employed by the District for the Spring 2012 semester and part of the Fall 2012 semester. As a part-time adjunct instructor Moberg was represented by the Cabrillo College Federation of Teachers, Local 1493, AFT, AFL-CIO (CCFT), which maintained a collective bargaining agreement with the District.

On November 4, 2012, in an e-mail addressed to various union and community college employees including James Weckler (Weckler), division dean, at Cabrillo College, Moberg wrote:

> I understand that, here in California, Lozano Smith [a law firm] or Hartnell College has contacted some of my current and past employers on behalf of their clients: Monterey Adult School and Hartnell College. If you were contacted or are contacted in the future, please ask for any statements to be put in writing and forward the statements to me. Also, please ask about the attached police report, Petition for Writ of Mandate currently before the Sixth Court of Appeal, and the Hartnell PERB charge I have filed relating to racial discrimination against my students and retaliation against me as a whistleblower.

Moberg also sent copies of this e-mail to several Lozano Smith attorneys. Moberg's e-mail indicates that he attached copies of a "reply brief" and a document titled "Hartnell PERB." However, these documents were not included with the e-mail Moberg provided to PERB in his first amended charge and it is unclear whether the "police report" referred to in the e-mail was attached since it does not appear as an attached document in the e-mail.[2]

[2] A longer version of Moberg's e-mail was submitted by the District's attorney in his declaration and it includes an untitled document which appears to be a statement of facts for an unfair practice charge against Hartnell Community College District (Hartnell). As noted by

By letter dated November 6, 2012, Weckler placed Moberg on paid leave, withdrew his tentative assignment for the Spring 2013 semester and requested an interview with Moberg to discuss issues the District claimed to have regarding Moberg's academic credentials and employment history. Weckler's letter informed Moberg that the District's attorney would be present at the interview, which would be recorded. Weckler's letter further advised Moberg that he had a right to representation at the interview either through his union, CCFT or through his own attorney.

On November 7, 2012, according to Moberg's charge, McCawley told CCFT representative Maya Bendotoff that Cabrillo College administrators were concerned that Moberg had a reputation for being "litigious" including filing PERB charges.[3] Also on November 7, 2012, Moberg informed Weckler that he could not attend the interview on the date Weckler had requested (November 14, 2012). A subsequent December 3, 2012, interview date was scheduled and then cancelled by the District. Moberg was offered instead an opportunity to respond in writing to the District's issues regarding his academic credentials and employment history. On December 13, 2012, Kathleen Welch, the District's interim superintendent, notified Moberg that she had determined he was not qualified to teach as an adjunct English instructor, and that he would not be offered additional positions at Cabrillo College.

On December 30, 2012, Moberg filed a grievance over the withdrawal of his teaching assignments. On January 31, 2013, the District denied Moberg's grievance.

On March 19, 2013, Hurley, counsel for the District in the instant unfair practice proceedings, wrote to Moberg, cautioning, inter alia, that Moberg should "seriously consider the

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the Office of the General Counsel, the "Hartnell PERB" document contains neither a case number nor a copy of PERB's unfair practice charge form. (Warning Ltr., p. 2.)

[3] McCawley's February 6, 2015, declaration specifically denied this allegation.

consequences of your actions if you continue to attack District officials rather than deal with your qualifications to teach college English in California community colleges."

DISMISSAL

Retaliation/Discrimination

The Office of the General Counsel's warning and dismissal letters advised Moberg that in order to demonstrate a prima facie case of retaliation or discrimination under EERA section 3543.5(a), charging party must show that: (1) the employee exercised rights protected 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*).)

Protected Activity/Employer Knowledge

In both the warning and dismissal letters, the Office of the General Counsel determined that Moberg engaged in protected activity by filing PERB charges against previous employers, but that it was unclear whether representatives of Cabrillo College were aware that Moberg had previously filed unfair practice charges with PERB. The Office of the General Counsel found it significant that the document attached to Moberg's November 4, 2012, e-mail to several union and Cabrillo College employees and identified as "Hartnell PERB" did not include PERB's unfair practice charge form "nor was there a clear indication on the attachment itself that it had been filed as a PERB charge." (Warning Ltr., p. 6.)

In dismissing the charge, the Office of the General Counsel also found it significant that Weckler made reference to Moberg's employment with the Monterey Peninsula Unified School District (MPUSD) in two separate communications with Moberg, but "[n]either the November 6, 2012 letter nor the November 8 e-mail message says anything about a PERB

charge." (Dismissal Ltr., p. 3.) Therefore, the Office of the General Counsel determined that Moberg had failed sufficiently to allege that the District had knowledge of his protected activity.

Adverse Action

Both the warning and dismissal letters determined that the District's termination of Moberg's employment was an adverse action.

Timing/Nexus

The Office of the General Counsel also determined there was a close temporal proximity between Moberg's November 4, 2012, e-mail which mentioned the Hartnell unfair practice charge and the District's November 6, 2012, adverse action of terminating his employment. However, the Office of the General Counsel concluded that even assuming arguendo, the District had knowledge of the protected activity, there was no other circumstantial evidence showing that the District took the adverse action *because of* Moberg's protected activity.

The Office of the General Counsel rejected Moberg's contention that the District gave insufficient or inconsistent reasons for its adverse action, noting that the District based its decision on its doubts that Moberg met the minimum qualifications for his position and had not accurately reported his employment experience. The dismissal letter noted:

> These same questions were raised by Hartnell CCD, with respect to Charging Party's employment there, and are described in various documents submitted in connection with Case Number SF-CE-2984-E.

(Warning Ltr., p. 7.) The Office of the General Counsel also rejected Moberg's contentions that he was treated disparately from other employees; that the District departed from established procedures; that the District offered vague or exaggerated justifications for its actions; and that the District conducted a cursory investigation before taking adverse action.

Lastly, the Office of the General Counsel determined that neither McCawley's remark that Moberg was "litigious," nor Hurley's March 19, 2013, letter to Moberg asking him to "seriously consider the consequences of your actions if you continue to attack District officials," demonstrated union animus or implicated rights protected under EERA.

Interference

The dismissal letter, which noted that Moberg did not allege an interference violation until his third amended charge, advised Moberg that:

> [I]n order to state a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

(*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.) The dismissal letter emphasized that the right alleged to be violated must be provided by EERA.

The Office of the General Counsel discussed Moberg's allegation that the District interfered with his EERA protected rights when an unnamed "director" from the District informed an instructor who eventually was hired by the West Valley Mission Community College District (WVMCCD)—another district where Moberg was working—that Moberg had presented false credentials. Moberg's allegation was based on an October 12-14, 2013, e-mail exchange between Jeanette Richey (Richey), a newly-hired WVMCCD instructor, and Leslie Saito-Liu (Saito-Liu) a WVMCCD instructor and chairperson of the English department at WVMCCD. Richey initiated the e-mail exchange with Saito-Liu when Richey noticed Moberg's name on a list of e-mail recipients and informed Saito-Liu that she had heard from a "director" that Moberg had been dismissed from the District for presenting false credentials. Richey did not purport in the e-mail to have any direct knowledge of the circumstances surrounding Moberg's employment.

Moberg's contentions appear to be that McCawley was the unnamed director who informed Richey of the circumstances surrounding his dismissal, and that in addition to violating his privacy, this information interfered with his employment relationship with WVMCCD. The Office of the General Counsel determined that it was unclear how an e-mail exchange between employees in a different community college district nearly one year after Moberg's dismissal would interfere with EERA protected rights.

Thus, finding no prima facie case of retaliation or interference, the Office of the General Counsel dismissed Moberg's charge.

DISCUSSION

We begin with the standard of review for a dismissal of an unfair practice charge by the Office of the General Counsel and the elements of a prima facie case of retaliation or discrimination and interference. We then consider Moberg's July 23, 2015, request to present additional evidence.

We caution that our discussion treats charge allegations. We presume as we must that the facts alleged by the charging party are true.[4] We do not rely on the District's responses, including any affirmative defenses, if they are contradicted by the charging party. We do so because when assessing whether a charge dismissal is appropriate, we view a charging party's allegations in the light most favorable to the charging party. At hearing, Moberg will bear the significant burden of proving his allegations through persuasive, competent testimony and authenticated documentary evidence.

[4] At this stage of the proceedings, we assume as we must that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB* Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755. [*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.].)

Board Review of Dismissal

Because this case is an appeal from a dismissal and refusal to issue a complaint by the Office of the General Counsel, our inquiry at this stage is focused on the sufficiency of the charging party's allegations. In addition, we may also consider information provided by the respondent, but only when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M (*Adza*); *Lake Tahoe Unified School District* (1993) PERB Decision No. 994 (*Lake Tahoe*); *Riverside Unified School District* (1986) PERB Decision No. 562a (*Riverside*).) When the respondent can establish an affirmative defense as a matter of law based on undisputed facts, "the charge must be dismissed even when the charging party has otherwise established a prima facie case." (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M (*Metropolitan Water District*), p. 4, fn. 4, citing *Long Beach Community College District* (2003) PERB Decision No. 1568.)

In processing an unfair practice charge, the role of a Board agent is to investigate the charge to determine if an unfair practice has been alleged. However, the Board's regulations do not "empower agents to rule on the ultimate merits of a charge." (*City of Pinole* (2012) PERB Decision No. 2288-M, pp. 11-12 (*Pinole*), citing *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*); PERB Regs. 32620 and 32640.) "[W]here the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside,* p. 7.) The Board has construed this precept to mean that a

complaint should issue to test viable competing theories of law. (*Pinole*; *City of San Jose* (2013) PERB Decision No. 2341-M; *County of San Joaquin* (2003) PERB Decision No. 1570-M.)

Discrimination or Retaliation

1. The Prima Facie Case

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights. (*Novato, supra*, PERB Decision No. 210.)

Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. "[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Novato, supra*, PERB Decision No. 210, p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*); *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.)[5]

[5] When construing California Public Sector Labor Relations statutes, California courts and PERB may rely on decisions of the National Labor Relations Board (NLRB) and judicial decisions construing similar language in the National Labor Relations Act (NLRA) (*San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608), as well as decisions of California's Agricultural Labor Relations Board and judicial decisions construing similar provisions of California's Agricultural Labor Relations Act, which pursuant to California statute adhere to the jurisprudence of the NLRA. (Cal. Labor Code, § 1148.)

To assist with assessing circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors. Although the timing of the employer's action in close temporal proximity to the employee's protected activity is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary nexus between the employer's action and the protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227.)

Along with suspicious timing, facts establishing one or more of the following factors must also be present for a prima facie case: (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 (*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 (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists or employees engaged in protected conduct (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Jurupa Unified School District* (2012) PERB Decision No. 2283, pp. 9-10; *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, supra,* PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Where the employer's motive is the central issue, the fact finder must often rely heavily on circumstantial evidence and inferences. Only rarely will there be probative direct evidence of the employer's motivation. (*Carlsbad, supra*, (1979) PERB Decision No. 89, p. 11; *Shattuck Denn Mining Corp. v. NLRB* (9th Cir. 1966) 362 F.2d 466.) An illegal purpose harbored by a discriminating employer may be inferred from the circumstances surrounding the adverse action. These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification; or other failure to establish a business justification. (*Ibid.*) In such cases, the Board is free to draw inferences from all the circumstances, and need not accept an employer's self-serving declarations of intent, even if they are uncontradicted. (*NLRB v. Walton Mfg. Co.* (1962) 369 U.S. 404; *NLRB. v. Mark Coal Co.* (9th Cir. 1963) 322 F.2d 311; *NLRB v. Pacific Grinding Wheel Co., Inc.* (9th Cir. 1978) 572 F.2d 1343; *NLRB v. Warren L. Rose Castings, Inc.* (9th Cir. 1978) 587 F.2d 1005; *Royal Packing Co. v. Agricultural Labor Relations Bd.* (1980) 101 Cal.App.3d 826.)

2. The Affirmative Defense

If the charging party establishes a prima facie case, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same course of action, regardless of any protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, citing *Novato, supra*, PERB Decision No. 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) To prevail on its affirmative defense, the employer must establish *both* that a legitimate, non-discriminatory reason existed for taking the adverse action, *and* that the reason proffered was, in fact, the employer's reason for taking adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21.)

However, because the function of a Board agent investigating a charge is not to weigh evidence, determine credibility or make findings of fact (*Adza, supra,* PERB Decision No. 1632-M; *Lake Tahoe, supra,* PERB Decision No. 994; *Riverside, supra,* PERB Decision No. 562a), it is generally not appropriate at this stage of the proceedings to determine the employer's true motive for taking adverse action. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 12, fn. 8 (*Sacramento*).) An employer's affirmative defense should be considered at the charge-processing stage of unfair practice proceedings only if raised in a verified and properly served position statement (PERB Regs. 32140(a) and 32620(c); *County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 17-18), and only if the asserted defense rests on factual allegations that do not contradict those included in the charge, and which the charging party does not dispute. (*Oakland Unified School District* (2003) PERB Decision No. 1529, pp. 11-12; *Metropolitan Water District, supra*, PERB Decision No. 2055-M, p. 4, fn. 4.)

Interference

A finding of interference, coercion or restraint does not require evidence that any employee subjectively felt threatened or intimidated or was in fact discouraged from participating in protected activity; rather the inquiry is an objective one which asks whether, under the circumstances, an employee would reasonably be discouraged from engaging in protected activity. (*Clovis Unified School District* (1984) PERB Decision No. 389.)

If the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad, supra,* PERB Decision No. 89, p. 10; *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 6-7, see also *State of California (Department of Personnel Administration)* (2011) PERB Decision

No. 2106a-S.) If the harm to employee rights outweighs the asserted business justification, a violation will be found. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 22-24.)

Where the employer's conduct is inherently destructive of protected rights, it will be excused only on proof that it was caused by circumstances beyond the employer's control and that no alternative course of action was available. (*Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20, affirmed by *Santa Monica Community College District v. PERB* (1980) 112 Cal.App.3d 684; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 42 (*Monterey Peninsula*); *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

Whether Good Cause Exists to Consider New Evidence

On July 23, 2015, Moberg submitted a request to present new evidence consisting of two (2) work evaluations and a letter from the Commission on Teacher Credentialing (COTC) which notified Moberg that an accusation brought against him by one of his former employers had been dismissed.

Under PERB Regulation 32635(b) a charging party may not present new charge allegations or new supporting evidence on appeal from a dismissal unless good cause is shown. The Board has generally found good cause to do so when the new allegations or supporting evidence could not have been discovered by the charging party through the exercise of reasonable diligence before the charge was dismissed. (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S.)

Moberg's request claims that the evaluation evidence submitted demonstrates his qualifications to teach English at the community college level belying the District's claim that he did not meet the minimum standards for the profession. Moberg claims that the dismissal of charges brought against him by a former employer before the COTC demonstrates Hurley's union animus, because Hurley had referred to Moberg's legal actions against previous employers as "failings."

The Office of the General Counsel dismissed Moberg's charge on May 19, 2015. The first document submitted by Moberg was a work evaluation from Napa Valley College for the Fall 2014 semester. Moberg noted on this evaluation that he did not receive this document until "Spring 2015." The second document is a work evaluation from the University of San Francisco also for the Spring 2014 semester and Moberg notes on the document that he did not receive it until "May 2015." Both of the "dates" that Moberg purports to have received these documents are ambiguous and Moberg's request does not explicitly state that these documents were received after the dismissal of his amended charge on May 19, 2015. Therefore, Moberg has not met his burden of showing good cause to present either of these two documents as new evidence on appeal.

The third document Moberg submits is a letter from the COTC which is dated June 26, 2015. Moberg clearly could not have submitted this evidence prior to the Office of the General Counsel's dismissal of his charge. However, the letter announces dismissal by COTC of an accusation brought by a prior employer (MPUSD) challenging Moberg's qualifications. Moberg contends that this letter contradicts, and therefore establishes animus by, Hurley, who had previously remarked in correspondence to PERB that Moberg's legal actions related to his employment were "failings." We conclude that Moberg makes too much of this seeming contradiction. At best, it merely reflects Hurley's opinion concerning Moberg's legal

capability formed by Hurley without knowledge of the COTC's disposition described in the June 26, 2015, notice of which neither Hurley nor Moberg was aware until June 26, 2015. As such, it is too remote in time to the events of November 2012 to be relevant to our deliberations. We therefore conclude that although Moberg has established good cause to consider the July 26, 2015, letter for the reasons set forth above the information lacks relevance to the issues before us, viz., motivation of the District for its adverse actions against Moberg on and after November 6, 2012.

Whether Moberg has Demonstrated a Prima Facie Case of Retaliation/Discrimination

The first issue presented by Moberg's appeal is whether he alleged a prima facie case that the District retaliated against him for exercising rights protected under EERA by withdrawing its tentative offer of employment as an adjunct instructor for the Spring 2013 semester, placing him on immediate paid leave and determining that he would not receive offers of employment as an adjunct instructor in the future.

1. Protected Activity/Employer Knowledge

The Office of the General Counsel determined that Moberg had engaged in protected activity when he filed PERB charges against previous employers. Several District employees, including Weckler, received an e-mail from Moberg on November 4, 2012, which mentioned an unfair practice charge against Hartnell that Moberg was in the process of filing with PERB.[6] Moberg did not attach the complete unfair practice charge to the e-mail, only the statement of the case. The Office of the General Counsel concluded that it was unclear whether the recipients of Moberg's November 4, 2012, e-mail "understood the significance of the e-mail message that Charging Party was in the process of filing a charge with PERB." (Dismissal

[6] Moberg filed his charge against Hartnell on November 5, 2012. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 2.)

Ltr., p. 2.) Therefore, the Office of the General Counsel determined that Moberg had failed to sufficiently allege that the District had knowledge of his protected activity.

We do not read Moberg's allegations so narrowly. The body of Moberg's November 4, 2012, e-mail specifically mentions a PERB charge against Hartnell and a document titled "Hartnell PERB" is attached to the e-mail. While it is true that Moberg did not include the PERB unfair practice charge form and standing on its own Moberg's "Hartnell PERB" document would fail to meet all of PERB's requirements for filing an unfair practice charge,[7] the "Hartnell PERB" document itself mentions violations of EERA and cites to appropriate sections of the Government Code. We conclude therefore that Moberg's November 4, 2012, e-mail sufficiently informed its recipients that Moberg had engaged in protected activity by filing PERB charges against Hartnell.

On November 8, 2012, Weckler sent an e-mail to Moberg which stated,

> I am aware that your Cabrillo employment application was incomplete because in your e-mail to me earlier this week, you volunteered the information that you worked at Monterey Peninsula Unified School District.

(Weckler November 8, 2012, e-mail.) There is no allegation by the District that Moberg sent a different e-mail that mentioned his employment with MPUSD other than the November 4, 2012, e-mail during the week preceding November 8, 2012. The District does not deny that Weckler read Moberg's November 4, 2012, e-mail.

We conclude therefore that Moberg engaged in protected activity when he filed an unfair practice charge against Hartnell and that the District knew of Moberg's protected activity through Moberg's November 4, 2012, e-mail.

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[7] PERB Regulation 32615 describes the contents of an unfair practice charge filed with PERB, which coincidentally does not require use of PERB's unfair practice charge form.

2. Adverse Action

The Office of the General Counsel correctly determined that Weckler's November 6, 2012, withdrawal of Moberg's employment was an adverse action. Though not explicitly stated in the dismissal letter, the Office of the General Counsel also seems to have determined that the denial of future employment to Moberg is also an adverse action.[8] To the extent that the Office of the General Counsel determined that the withdrawal of tentatively scheduled employment and all future employment is an adverse action, we concur.

In addition, we conclude that placing Moberg on involuntary paid leave is an adverse action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980; *Oakland Unified School District* (2003) PERB Decision No. 1529.)

3. Nexus

The District learned of Moberg's protected activity on November 4, 2012, and took adverse action against him on November 6, 2012. Clearly, Moberg has demonstrated a close temporal proximity between the employer's knowledge of his protected activity and the adverse action. The Office of the General Counsel concluded, however, that Moberg had failed to allege other circumstantial evidence of unlawful motive. We disagree.

The record contains insufficient evidence to conclude that Moberg was treated disparately, or that the District departed from established procedures, or that the District displayed animosity towards union activists. However, Moberg has alleged that the employer's investigation of his alleged misconduct was cursory at best and possibly even pretextual. We explain.

[8] The dismissal letter cites two further communications from the District on December 13, 2012 and March 14, 2013, which confirm that Moberg would not be considered for any future employment by the District.

The District has consistently maintained that it withdrew standing and future offers of employment to Moberg, because it determined that he had presented false credentials and an incomplete employment history. The District claims that Prescott University, where Moberg obtained a master's degree and a Ph.D., is a "fake" university and that Moberg failed to inform the District of his prior employment with MPUSD. Moberg denies both of these contentions.

It is sufficient at this stage in the proceedings that Moberg denies the District's allegations regarding his degrees from Prescott University. Conflicting issues of material fact are to be resolved through PERB's hearing process. (*Sacramento, supra,* PERB Decision No. 2129). However, we note that the District has submitted unverified and undated evidence regarding its investigation of Prescott University. In addition, the District failed to indicate for how long it had investigated Moberg's credentials or when it first suspected there was an issue with them. The District raised no issue with Moberg's employment prior to November 4, 2012. After November 4, 2012, the District made an accusation against Moberg that was suspiciously similar to the October 2, 2012, justification for dismissing Moberg following an investigation by a Hartnell administrator:

> Moberg had engaged in "[m]ultiple instances of dishonesty" by providing false information in his employment application about his academic degrees, which Hartnell alleged were "fraudulent" or "fake" degrees provided by unaccredited "diploma mill[s]" [and] . . . asserted that, as part of his application for employment with Hartnell, Moberg omitted material information about his employment history, including information about instances in which Moberg had been terminated or had resigned in lieu of termination.

(*Hartnell Community College District, supra,* PERB Decision No. 2452, p. 9.)

This lack of evidence regarding an independent investigation by the District prior to its taking adverse action against Moberg suggests that the District's justification was pretextual. The District has not described how it conducted a thorough investigation of Moberg's

academic credentials in the two days between Moberg's November 4, 2012, e-mail and the District's November 6, 2012 adverse action. In addition, the undated evidence that was first submitted to PERB by the District in its March 6, 2013, position statement is arguably "after the fact," and therefore unconvincing justification for its November 6, 2012, adverse action. As such, it supports an inference of unlawful motive as an attempt to legitimize later its earlier decision to impose adverse action. (*Sacramento, supra*, PERB Decision No. 2129.) We conclude, therefore, that Moberg has sufficiently alleged that the District's motive for placing him on involuntary, paid administrative leave, withdrawing its tentative offer of employment for Spring 2013 and foreclosing the possibility of future employment with the District, was Moberg's protected conduct and not the District's concerns about Moberg's qualifications and or his alleged failure to document or disclose prior employment at MPUSD.

In addition, Moberg disputes the District's contention that he did not inform the District of his employment with MPUSD. The Office of the General Counsel noted that Moberg listed Monterey Adult School, not Monterey Peninsula Unified School District or MPUSD under "Other Employment References." In *Monterey Peninsula, supra,* PERB Decision No. 2381, we noted that Moberg was assigned by the MPUSD to the Monterey Adult School site (*Ibid.* at p. 4.) We also identified Heath Rocha (Rocha) (Moberg's contact person for Monterey Adult School on his employment application with the District) as an administrator with MPUSD. (*Ibid.* at p. 6.) Had the District called Rocha, it would have learned that Moberg was employed by MPUSD at the Monterey Adult School. On this basis, we conclude that Moberg has sufficiently disputed the District's allegation that he submitted an incomplete employment history. Thus, Moberg has sufficiently alleged that the District had an unlawful motive when it justified its adverse action based on his failure to list the MPUSD as a former employer.

Whether Moberg has Demonstrated a Prima Facie Case of Interference

Moberg contends that McCawley interfered with his EERA protected rights by informing WVMCCD that he was dismissed from the District for submitting false credentials. There is no evidence that McCawley made such a statement. Moberg does not affirmatively allege that McCawley made the statement to Richey; rather he submits an e-mail he sent to McCawley accusing her of having informed Richey that Moberg had been dismissed by the District for false credentials. For her part, McCawley denies giving Richey this information. Since Moberg's allegation appears to be based solely on speculation and he makes no affirmative allegation and provides no evidence that McCawley was, in fact, Richey's source of information, we may consider the District's uncontroverted evidence that McCawley did not inform Richey that Moberg was dismissed by the District for providing false credentials. Therefore, we conclude with the Office of the General Counsel that Moberg failed to allege a prima facie charge of interference.

Conclusion

Based on the foregoing discussion, we reverse the Office of the General Counsel's dismissal of Moberg's allegation that the District retaliated or discriminated against him for exercising rights protected by EERA. However, we conclude with the Office of the General Counsel that Moberg has failed to allege a prima facie case that the District interfered with his EERA protected rights.

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. SF-CE-2994-E is REVERSED and the matter is REMANDED to the Office of the General Counsel for issuance of a complaint alleging that the Cabrillo Community College District discriminated against Eric M. Moberg for exercising rights protected by the Educational Employment Relations Act in violation of section 3543.5(a), in accordance with this decision.

Chair Martinez and Member Banks joined in this Decision.