STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARIKA GREGORY, Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2636-E PERB Decision No. 2061 September 10, 2009

Appearances: Sharika Gregory, on her own behalf; Martin H. Kresse, Staff Attorney, for Oakland Unified School District.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Sharika Gregory (Gregory) to the proposed decision of an administrative law judge (ALJ). The unfair practice charge alleged that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA),[1] section 3543.5(a), by discriminating against Gregory for engaging in protected activity when it terminated her employment. The ALJ concluded that Gregory failed to state a prima facie case and dismissed the case.

The Board has reviewed the proposed decision and the record in light of the exceptions, briefs and relevant law. Based on this review, the Board affirms the dismissal of the case for the reasons stated below.

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

PROCEDURAL HISTORY

Gregory filed an unfair practice charge against the District on August 15, 2007. On December 24, 2007, the Office of the General Counsel dismissed the charge as untimely filed. Gregory appealed the dismissal to the Board. On June 26, 2008, the Board issued *Oakland Unified School District* (2008) PERB Decision No. 1965 (*Oakland USD*), in which the Board reversed the dismissal and remanded the case to the PERB General Counsel's Office for issuance of a complaint.

On July 24, 2008, the General Counsel's Office issued a complaint alleging the District unlawfully terminated Gregory's employment in violation of EERA section 3543.5(a). The District answered the complaint on August 12, 2008, denying any violation of EERA. An informal settlement conference was held on August 19, 2008, but the matter was not resolved.

A formal hearing was conducted on November 19 and 20, 2008, and January 22, 2009 by Administrative Law Judge Philip E. Callis (ALJ Callis). On February 10, 2009, the case was transferred to Administrative Law Judge Shawn P. Cloughesy (ALJ Cloughesy) due to the retirement of ALJ Callis. The parties were given the opportunity to state their position regarding the reassignment of the case to ALJ Cloughesy. Neither party objected to the reassignment. Post-hearing briefs were filed on April 13, 2009, and reply briefs on May 1, 2009.

BACKGROUND

Gregory had been employed by the District as a Paraprofessional to Exceptional Children since October 4, 2004. Gregory was supervised by John Rusk (Rusk), Coordinator of Special Education for Young Adult Programs and High Schools. On August 2, 2006, Rusk notified Gregory that effective August 28, 2006, she would be transferred to Oakland Tech High School (Oakland Tech) to work with medically fragile students. Rusk informed Gregory

the transfer was due to program needs. In Gregory's prior assignment, she worked in the Community Immersion Program (CIP), a special education program with highly functional clientele between the ages of 18 and 22 years.

Gregory reported to Oakland Tech Supervising Teacher Meriel Templeton (Templeton) on August 28, 2006. Templeton told Gregory she already had enough aides. Templeton spoke to Rusk about being overstaffed and Rusk reassigned Gregory to Carl B. Munck Elementary School (Munck Elementary) the same day.

When she arrived at Munck Elementary, Gregory saw Janet McCarrol-Gregory (McCarrol) at a school assembly. McCarrol was involved in litigation with Gregory's father. To avoid any future confrontation, Gregory decided to request a transfer. On August 30, 2006, Gregory sent a written transfer request to Rusk.

After Gregory consulted with the American Federation of State, County and Municipal Employees, Council 57 (AFSCME), the exclusive representative for Gregory's bargaining unit, a union representative told Gregory to contact District Human Relations Analyst Bill Whyte (Whyte). On September 1, 2006, Gregory wrote to Whyte stating that she had consulted with a union representative and been advised to request an immediate transfer. Whyte did not tell Rusk that Gregory had conferred with a union representative.

Gregory was subsequently assigned to Brookfield Elementary School (Brookfield) on September 7, 2006. However, Gregory's assignment still required her to work with students with medical needs. One female student required catheterization for urination. Gregory had not received training to perform catheterization.[2]

[2] The Special Education program had nine nurses who trained paraprofessionals in certain medical procedures.

From the beginning of her assignment at Brookfield, Gregory expressed her concern to Rusk that she was not trained to perform some of the duties of her assignment, specifically the catheterization. Gregory's attendance during this time was sporadic. Gregory made numerous visits and calls to Rusk over the next month complaining about her lack of training, expressing concern that she was a liability to the District, and requesting to be returned to her previous assignment. While efforts were made to provide Gregory with training, Rusk directed her to report to work and perform those duties which did not require specific medical training. On or about October 10, 2006, Gregory stopped reporting to work.

Rusk had three meetings with Gregory in October 2006 to discuss her failure to report for work. Rusk asked Iris Wesselman (Wesselman), also a Coordinator of Special Education for Young Adult Programs and High Schools, to attend the meeting with Gregory held on October 26, 2006. Wesselman informed Gregory of her right to representation and Gregory waived that right. Wesselman stated that Gregory needed to complete absence forms for her absences. Gregory responded that she was not absent because she had never been assigned to Brookfield.[3] Wesselman asked Rusk whether he had Gregory's written assignment to Brookfield ready and he replied that he did, but he could not find it. At some point, Rusk terminated the meeting out of his frustration with Gregory and stated he would be arranging a meeting between Gregory and Whyte.[4]

[3] Gregory testified that she had never received a written notice of assignment to Brookfield.

[4] Rusk prepared two letters of reprimand, dated October 8 and 30, 2006, against Gregory for not reporting to work at Brookfield, among other things. The reprimands were forwarded to the District Human Resources Division for review. The reprimands were never issued to Gregory.

On December 19, 2006, Gregory sent Rusk a letter complaining that she was stuck in "limbo," and wanted to be returned to her prior CIP assignment. Gregory still had not reported for work at Brookfield.

On January 22, 2007, Gregory received a letter from the District Benefits Office informing her that she was eligible for "COBRA" health benefits because of her "recent separation from employment." This was the first notice Gregory had received that her employment had been terminated.

On January 26, 2007, Whyte sent Gregory a letter dated January 16, 2006, that was entitled, "Abandonment of Position - Special Education." The letter stated in part:

> The Human Resources Division has been notified that you have not reported to work since October 2006 nor have you notified anyone of what your plans are for the remainder of the school year. Your continued absence is considered unauthorized and therefore will be unpaid. According to Administrative Bulletin 8010, Personnel Procedures (f), abandonment of position is cause for dismissal.
>
> You have the right to a hearing to review your unauthorized absence. Your right to a hearing will be deemed waived and dismissal proceeding [sic] will be initiated if you do not contact the Human Resources Division within ten (10) working days.

Gregory received the January 16, 2007 letter on January 29, 2007. Gregory noticed that the letter was postmarked January 26, 2007. Gregory immediately called Whyte and requested a hearing, she also asserted she had not abandoned her job. Whyte told Gregory he would notify her when he set up the hearing.

The District's normal procedure for job abandonment actions is to send the employee a letter notifying them that they had abandoned their job, and stating the employee could reply or request a hearing. If the employee did not respond, the District terminated the employee for job abandonment. If the employee responded and requested a hearing, a hearing was

scheduled and the decision to terminate the employee for job abandonment was postponed until after the hearing.

Whyte verbally notified Rusk that a hearing would be held for Gregory. Rusk assumed Whyte would schedule the hearing and contact Gregory.

Gregory did not appear for the February 14, 2007 hearing. Gregory testified that Whyte did not tell her when the hearing would be held and she did not receive a written notice of the scheduled hearing. AFSCME Business Agent Jo Bates (Bates) testified that under the District's normal procedure written notice of job abandonment hearings is not provided.

When Gregory did not appear for the February 14, 2007 hearing, Whyte told Rusk he would attempt to reach Gregory by phone. Whyte returned and informed Rusk that the person who answered Gregory's phone stated that Gregory had gone to Africa. The District representatives at the hearing then decided that Gregory had abandoned her position at Brookfield, and a termination notice should be sent to her. On February 16, 2007, Whyte prepared a letter almost identical to the January 16, 2007 notification letter.

On February 28, 2007, Gregory contacted Bates for assistance. Ultimately, Bates arranged a meeting with the District. On August 17, 2007, Gregory and Bates met with Whyte and Rusk to discuss the termination of Gregory's employment. At the meeting, the District representatives stated that Gregory was terminated on January 16 and February 16, 2007. Whyte explained during the meeting that when he spoke with Gregory regarding her request for a hearing, they agreed to a location and date, but not a time. Bates did not remember Gregory contesting this assertion.

Gregory stated she did not come back to work because she had not been trained in the catheterization procedure. The District responded that Gregory should have reported to work to perform the other paraprofessional duties rather than unilaterally decide she could not work

at Brookfield. At the conclusion of the meeting, Whyte informed Gregory that the District would not alter the job abandonment termination.

DISCUSSION

Effect of Prior Board Decision

Gregory argued to the ALJ and on appeal to the Board, that the ALJ was bound by the Board's determination in *Oakland USD* that Gregory had established a prima facie case of discrimination in violation of EERA section 3543.5(a).

During the initial investigation of an unfair practice charge, the PERB General Counsel's office will issue a complaint if the charging party has alleged facts that, if proven true in a subsequent hearing, would state a prima facie violation of the EERA. During the formal hearing, the burden is on the charging party to present evidence to prove the allegations in the complaint. (*Los Angeles Unified School District* (1991) PERB Decision No. 874; *Grossmont Community College District* (1980) PERB Decision No. 117.)

Once a charging party has met its burden of proving a prima facie case, the respondent has the opportunity to put on evidence to rebut the charging party's claims. (*Service Employees International Union, Local 221 (Meredith)* (2009) PERB Decision No. 1982a.)

In the present case, Gregory bears the burden at the formal hearing of proving by a preponderance of the evidence the elements of a prima facie case of discrimination. Gregory's assertion that the Board's decision in *Oakland USD* meets that burden is rejected.

Discrimination

To demonstrate a prima facie case of employer discrimination 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*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).)

If a charging party establishes a prima facie case of discrimination, the employer then bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato*; *Martori Brothers Distributors v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 721, 729-30; *Wright Line, Inc.* (1980) 251 NLRB 1083, enforced in part (1st Cir. 1981) 662 F.2d 899.) This is the "but for" test, which is "an affirmative defense which the employer must establish by a preponderance of the evidence, once the charging party has proved antiunion animus played any part in the decision." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293.)

Gregory engaged in protected activity when she consulted with a union representative on September 1, 2006, regarding her desire to be transferred from Munck Elementary to her old assignment.

Further, the evidence establishes that a District official involved in the decision to terminate Gregory's employment had knowledge of her protected activity. Gregory followed the advice of the union representative and wrote to Whyte requesting a transfer. Gregory's letter specifically stated that she had consulted with the union. Thus, Whyte was aware of Gregory's protected activity, while Rusk, her immediate supervisor, was not.

In *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido*), a supervisor prepared a letter of reprimand against an employee. The supervisor did not know the employee had filed a PERB charge against the employer. The supervisor submitted the letter of reprimand to the personnel officer for review and assistance in completing the letter. The personnel officer was aware of the employee's unfair practice

charge. The Board held that knowledge of the protected activity was established because one of the employer's disciplinary agents knew of the employee's participation in protected activity and was involved in the issuance of the disciplinary letter.

In the present case, it was Rusk who initiated the employment action against Gregory by informing Whyte of Gregory's extended and unauthorized absence from work. However, it was Whyte who prepared and signed the job abandonment/termination notices sent to Gregory. As in *Escondido*, Whyte was a participant in the decision to issue the disciplinary action to Gregory. Since Whyte knew of the protected activity and participated in the disciplinary action, the knowledge element is established.

It is clear that an employer's termination of an employee's employment for job abandonment is an adverse action. (*Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H.)

In the absence of direct evidence of unlawful motivation, circumstantial evidence may establish a connection between the employee's protected activity and the employer's imposition of adverse action. (*Novato.*) 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. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Other factors that may demonstrate an inference of unlawful motive must also be present, including factors such as: (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; *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 addition to timing, nexus is established in this case by the District's departure from its procedures when it failed to notify Gregory of the date of the job abandonment hearing. Gregory testified that she was not given notice of the February 14, 2007 hearing. Rusk was verbally notified of the date by Whyte and he assumed Whyte would contact Gregory. However, the District did not establish that verbal or written notice was provided to Gregory. Gregory's failure to attend the hearing led to the District's decision to proceed with the termination of her employment. The evidence, therefore, establishes a prima facie case of discrimination.

It is clear, however, the District would have terminated Gregory's employment regardless of whether she had consulted with the union. Gregory had not shown up for work since approximately October 10, 2006. Rusk had numerous meetings with Gregory directing her to report for work. Although Gregory was not trained to perform the catheterization

procedure, Rusk directed Gregory to carry out the duties that did not require special training. Gregory did not comply.

Gregory's failure to report for work forced the District to terminate her employment rather than continue to carry her on its payroll. Thus, the Board finds the District would have terminated Gregory's employment regardless of her protected activity.

ORDER

The complaint and unfair practice charge in Case No. SF-CE-2636-E are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member McKeag joined in this Decision.