STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 575, Charging Party, v. LOS ANGELES COUNTY SUPERIOR COURT, Respondent.	Case No. LA-CE-2-C PERB Decision No. 1979-C October 7, 2008

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for American Federation of State, County and Municipal Employees, Local 575; Wiley, Price & Radulovich by Joseph E. Wiley, Attorney, for Los Angeles County Superior Court.

Before McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles County Superior Court (Court), to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the Court violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] by serving Court employee Carole Prescott (Prescott), who was also the president of American Federation of State, County and Municipal Employees, Local 575 (AFSCME), a notice of intent to suspend for five days without pay for violating the Court's e-mail use and courtroom reservation policies.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the

[1]The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

ALJ's proposed decision, the Court's exceptions and supporting brief, and AFSCME's response thereto. Based on this review, we find that the Court's discipline of Prescott, on the whole, did not violate the Trial Court Act for the reasons discussed below.

BACKGROUND

The Court employs approximately 5,000 employees at over 50 courthouses throughout Los Angeles County. AFSCME represents a bargaining unit of approximately 780 judicial assistants and court clerks with unit members at each of the courthouses. At all times relevant to this matter, Prescott was a judicial assistant at the Stanley Mosk Courthouse in downtown Los Angeles. She was also president of AFSCME during this time.

Court's E-mail Use Policy

Effective August 1, 2000, the Court adopted a policy for use of its electronic communications systems which provided in relevant part: "Computer systems, e-mail and the Internet should only be used to conduct Court business. Personal use is not acceptable."

Shortly thereafter, the Court began negotiating with its employee unions over issues arising from the unification of the superior and municipal courts as mandated by State law. As part of this process, in late 2003 AFSCME and the Court began negotiating over a new e-mail use policy. The parties exchanged several proposals on the subject. The Court proposed to prohibit all use of its e-mail system for union purposes. Conversely, AFSCME proposed that it be given unlimited access to the Court's e-mail system to communicate with bargaining unit members. The parties failed to reach agreement and the Court implemented its last, best and final offer on the e-mail use policy effective February 1, 2004.

The 2004 electronic communications systems policy states, in relevant part:

> The Court provides access to its electronic communications systems for the purpose of facilitating the performance of court-related business. . . . Employees may not use the system in a manner or to a degree that is disruptive or detrimental to the Court or to the employee's performance. . . . Any violation of this policy may subject an employee to discipline.

At the PERB hearing, Jeffrey Tend (Tend), the Court's former Assistant Director of Human Resources who was the Court's lead negotiator in the policy talks, testified that the 2004 e-mail policy acknowledged the reality that it is impossible for the Court to monitor every employee e-mail to determine whether or not it pertains to Court-related business. He also testified that in practice there was no difference between the 2000 and 2004 policies because the Court never disciplined employees for sending e-mail that it did not consider detrimental or disruptive to Court operations or employee performance. Thus, according to Tend, the 2004 policy codified how the Court had actually applied the 2000 policy.[2]

Tend testified that the 2004 policy revision was primarily concerned with prohibiting employees from sending non-Court business e-mails to a large number of recipients, i.e. "broadcast" e-mails. Tend acknowledged that the Court allowed e-mails between union stewards, including Prescott, and individual employees on representation matters, and also allowed AFSCME to send broadcast e-mails into the Court's e-mail system from the outside.

Prescott and AFSCME Representative Damian Tryon (Tryon), both of whom were on AFSCME's negotiating team during the policy negotiations, testified that while AFSCME was pleased with the Court's "relaxation" of the e-mail use policy, it had concerns about whether the Court would consider union e-mails on topics such as strikes to be detrimental or disruptive. According to Tryon, during negotiations AFSCME presented several hypotheticals to determine how the Court would apply this policy language. The Court's responses indicated it was concerned that excessive personal use of the e-mail system would have a negative impact on employee performance. However, Tryon did not recall the Court specifically expressing concern over broadcast e-mails.

[2]Because AFSCME did not rebut this testimony, we find that the practice codified in the 2004 e-mail use policy was in effect at all times relevant to this matter.

Prescott's E-mails

During 2002 and 2003, the Court disciplined Prescott three times for violating its e-mail use policy. On each occasion, she had sent a broadcast e-mail to bargaining unit members about AFSCME's position on a particular labor relations issue. Prescott received verbal counseling for the first two violations. For the third violation, she received a written reprimand.

During the summer of 2004, AFSCME and the Court were negotiating a successor memorandum of understanding to replace the one that had expired in March of that year. On August 12, 2004, Prescott sent an e-mail to all bargaining unit members in the Mosk Courthouse announcing a union meeting on August 17 in the Department One courtroom where she worked. The e-mail said the meeting would involve "business of importance regarding the status of your contract with the Court" and members should attend to "learn how the current status of the contract impacts you!" The e-mail also encouraged members to wear "REMEMBER 1997" buttons, a reference to a prior strike by judicial assistants and court clerks. Prescott testified that she called this meeting to get members' views about issues on which the Court and AFSCME had not yet reached agreement.

On August 13, 2004, Prescott sent an e-mail to all unit members countywide reminding recipients to wear their "REMEMBER 1997" buttons. A supervisor at the Santa Monica Courthouse, Janet Eggleston (Eggleston), responded to the e-mail. A series of e-mails between Prescott and Eggleston followed within the next hour. Each e-mail was sent to the entire list of employees who received Prescott's initial e-mail. Two unit members joined the exchange in support of AFSCME.

On September 17, 2004, Prescott sent an e-mail to all unit members countywide reminding them of a strike authorization vote to be taken at AFSCME's union hall on the

evening of September 21. On November 1, Prescott e-mailed all unit members countywide about upcoming nominations for union officers and executive board members.

Court's Courtroom Reservation Policy

On or about April 6, 1999, the Court adopted a written policy for use of its courtrooms by outside organizations. The policy provides that an organization wanting to use courtroom facilities must submit a written request to the Court's facilities services department. Except in the case of "Movie and Television Companies, Studios, Filming Schools," the organization must submit the request at least three weeks prior to the event.

The policy applies slightly different rules to certified employee organizations. To use Court facilities for business purposes, the employee organization must submit a written request to "the Court Operations (Human Resources) or District Manager" at least five business days prior to the proposed meeting. On August 16, 2004, Court Labor Relations Manager Fernando Becerra, Jr. (Becerra) sent a letter to the business agents of each of the employee organizations representing Court employees. The letter reminded them that use of court facilities for union business requires prior approval by the Court's "executive officer or designee" and that written requests must be submitted "as soon as possible prior to the date of the requested use."

A separate, unwritten rule applies when an employee wishes to reserve a courtroom in the courthouse where he or she works for non-Court business. First, the employee must have permission from the courtroom's judge to use the courtroom for the proposed use. Second, the employee must check with the court coordinator to make sure the courtroom is not being used for another purpose during the proposed time of use. If the courtroom is available at the proposed time, the court coordinator will reserve it for the employee.

Prescott's Courtroom Reservation

About a week before sending the August 12, 2004 meeting notice e-mail, Prescott asked Court Coordinator Charles Queen (Queen) whether she could use the Department One

courtroom in which she worked for a lunchtime union meeting on August 17. Finding no conflict, Queen scheduled the room and placed a corresponding notation on his calendar. Because Judge Carolyn Kuhl (Judge Kuhl), who was assigned to Department One, was on vacation at the time Prescott made the reservation, Prescott did not obtain her permission to use the courtroom on August 17.[3] The union meeting took place as scheduled, with 28 bargaining unit members attending.

Court's Investigation and Discipline of Prescott

On August 13, 2004, the Court's human resources department learned of Prescott's union meeting and button reminder e-mails. Later that day, Employee Relations Analyst Donna Lough (Lough) telephoned Prescott. Lough asked Prescott whether she had authorization to send the union meeting notice e-mail. Prescott responded that she believed she could send union meeting notice e-mails because of statements made to her in 2002 when she was disciplined for sending a union business e-mail. Lough told Prescott that her union meeting notice e-mail violated the e-mail use policy because it was not "Court-related business." Lough also asked Prescott if she had authorization to use the courtroom for the August 17 union meeting. Prescott replied that she did not get Judge Kuhl's permission because Judge Kuhl was on vacation.

On November 17, 2004, the Court delivered Prescott a letter of intent to suspend her for five days without pay for her violation of the e-mail use and courtroom reservation policies. The letter stated that "it is inappropriate for you to use the Court's computer system to conduct union business." It further noted that Prescott had previously been told not to use the Court's

[3]There is a factual dispute over whether Prescott told Court management during their investigation of her courtroom use that Judge Kuhl had previously told Prescott she did not need Judge Kuhl's permission to use the courtroom for meetings and only needed to check with Queen to make sure the courtroom was available at the proposed meeting time. However, because the Court disciplined Prescott for violating the written reservation policy applicable to outside organizations, not the employee reservation policy which requires a judge's permission to use the courtroom, we need not resolve this dispute.

e-mail system "for any purposes other than Court business." A copy of the 2000 e-mail use policy was attached to the letter. As for the courtroom meeting, the letter stated that "[i]t is also inappropriate for you to use Court facilities for union business without prior authorization" from management. No courtroom reservation policy was attached or referenced in the letter.

On January 21, 2005, the Court delivered Prescott a letter suspending her for three days without pay for the violations stated in the November 17, 2004 letter. This letter quoted from, and attached a copy of, the April 6, 1999 courtroom reservation policy for outside organizations. The discussion of Prescott's e-mail use was identical to that in the letter of intent.

ALJ's Proposed Decision

The ALJ found that by disciplining Prescott for union activity, the Court harmed or tended to harm both Prescott's and AFSCME's organizational rights under the Trial Court Act. The ALJ then examined whether the harm was justified by legitimate business reasons.

First, the ALJ found that the statutory language and stated purposes of the Trial Court Act grant a union a presumptive right of access to an employer's facilities and internal means of communication. Regarding the Court's e-mail use policy, the ALJ found the record did not establish that the e-mails for which Prescott was disciplined were disruptive because the Court did not discipline employees for sending non-union broadcast e-mails. However, "the more salient fact" to the ALJ was that the Court had sent broadcast e-mail to employees about its position on labor relations issues and therefore it was discriminatory for the Court to prohibit AFSCME from using the same means to express its position on those issues.

As for the courtroom reservation policy, the ALJ concluded that the Court's written reservation policy was not unreasonable "as it applies to non-employee AFSCME representatives." Nonetheless, the ALJ found Prescott's discipline discriminatory because she

was disciplined for following the same policy as other Court employees who had reserved courtrooms for non-union events such as baby showers and birthday parties.

Court's Exceptions

The Court exhaustively excepts to most of the ALJ's findings of fact and conclusions of law. The Court argues that its e-mail use policy is a reasonable restriction on union access because there are ample alternate means for AFSCME to communicate with bargaining unit members. The Court asserts that the ALJ erroneously ignored record evidence that Prescott's e-mails were disruptive. Further, the Court argues, the ALJ erred in finding its application of the e-mail use policy discriminatory because the six e-mails produced by AFSCME at hearing are insufficient to show that the Court routinely allows employees to send non-union broadcast e-mails. On the courtroom reservation issue, the Court asserts that it properly applied the policy for outside organizations to Prescott because she was acting as an agent of AFSCME when she reserved the Department One courtroom for the August 17, 2004 union meeting.

AFSCME's Response to Exceptions

In response, AFSCME asserts that the Trial Court Act grants unions a presumptive right of access to the trial court employer's facilities and e-mail system that may only be limited by a reasonable rule or regulation. AFSCME argues that the Court's evidence failed to show Prescott's e-mails were disruptive because all e-mails require an employee to at least glance at them and the Court can ensure that unintended recipients do not receive AFSCME e-mails by reviewing AFSCME's e-mail groups in advance. AFSCME further argues that the Court applied its e-mail use policy to Prescott in a discriminatory manner because the Court allows employees to send non-union broadcast e-mails and the Court itself sends anti-union emails to all employees. As for the courtroom reservation issue, AFSCME argues that it was discriminatory for the Court to apply the outside organization policy to Prescott because there

was no evidence the Court had ever previously required an employee to follow that policy to reserve a courtroom for a non-Court business purpose.

DISCUSSION

E-mail Use Policy

Both the Educational Employment Relations Act (EERA)[4] and the Higher Education Employer-Employee Relations Act (HEERA)[5] explicitly grant recognized employee organizations a right of access to the employer's "bulletin boards, mailboxes, and other means of communication." (EERA sec. 3543.1(b); HEERA sec. 3568.) In the absence of similar statutory language, PERB has declined to recognize a right of access to the employer's internal means of communication under the Ralph C. Dills Act (Dills Act)[6] but nonetheless has found that such access may be required under certain circumstances. (State of California (Department of Personnel Administration, et al.) (1998) PERB Decision No. 1279-S (State of California (DPA).) PERB has not addressed union access to internal means of communication under the other statutes it administers, all of which, like the Dills Act, are silent on the subject. Here, because the Court has adopted a local rule governing union access to its electronic communications systems,[7] the Board need not decide whether a right of access exists under the

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[4]EERA is codified at Government Code section 3540 et seq.

[5]HEERA is codified at Government Code section 3560 et seq.

[6]The Dills Act is codified at Government Code section 3512 et seq.

[7]The Trial Court Act allows a trial court employer to adopt its own rules governing union access to its internal means of communication. Section 71636(a) of the Trial Court Act states, in relevant part:

> A trial court may adopt reasonable rules and regulations, after consultation in good faith with representatives of a recognized employee organization or organizations, for the administration of employer-employee relations under this article. These rules and regulations may include provisions for:
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> . . . . . .

Trial Court Act to resolve the issues before it. Accordingly, we leave the general right of access question for another day.

Furthermore, the Board need not determine whether the Court's e-mail use policy is reasonable to decide this case. Neither the charge nor the complaint alleged that the Court's e-mail use policy was unlawful on its face. Rather, the charge alleged that "[t]he Court continues to exhibit a pattern and practice of discriminatory enforcement of Court policy and discipline." (Emphasis added.) Likewise, the complaint alleged that the Court interfered with Prescott's rights under the Trial Court Act by threatening to discipline her for violating the Court's e-mail policy. Thus, the only issue before the Board is whether the Court applied its e-mail use policy to Prescott in a discriminatory manner.

Unalleged Violation

Before addressing the Court's application of its e-mail use policy to Prescott, we must first determine the proper legal standard under which to analyze the Court's action. The complaint alleged that the Court's threatened discipline of Prescott for violating its e-mail use policy interfered with both Prescott's and AFSCME's rights under the Trial Court Act. As a result, the ALJ examined Prescott's discipline for e-mail use under PERB's interference standard. However, when a charge alleges that the employer took adverse action against an employee because of the employee's protected activity, PERB has uniformly applied a discrimination standard. (See Rancho Santiago Community College District (1986) PERB Decision No. 602 (Rancho Santiago) [finding that applying a discrimination standard is appropriate "where an employer not only interferes with the exercise of employee rights, but

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(7) Use of official bulletin boards and other means of communication by employee organizations.

While the Court's e-mail use policy does not pertain solely to union access, it nonetheless regulates AFSCME's access to the Court's e-mail system and was adopted after negotiations with employee organizations representing the Court's employees. Therefore, it constitutes a local rule governing union access pursuant to Trial Court Act section 71636(a)(7).

takes adverse personnel action against an employee because of the exercise of those rights"].) Here, the charge alleged that the Court took adverse action against Prescott because she used the Court's e-mail system to send e-mails containing union content. Therefore, the allegation involving Prescott's e-mail use is properly analyzed as a discrimination claim.

However, because the complaint alleged this as an interference claim, the Board can only address the Court's conduct under the discrimination standard if it meets the test for an unalleged violation. The Board may only consider an unalleged violation when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue." (Fresno County Superior Court (2008) PERB Decision No. 1942-C.) The alleged violation also must have occurred within the applicable statute of limitations period. (Id.) For the following reasons, we find that the Board may consider the unalleged discrimination violation in this case.

Though the complaint did not allege discrimination regarding e-mail use, the Court had adequate notice and opportunity to defend a discrimination allegation. In his opening statement, AFSCME's attorney stated that the City discriminated against Prescott for her union activities by suspending her. The Court did not object to this characterization and indeed proceeded to argue and present evidence that it did not act in a discriminatory manner. AFSCME argued both interference and discrimination in its post-hearing brief. Again, the Court did not object and, in fact, devoted two and one-half pages of its post-hearing brief to arguing that "Prescott Was Not Retaliated Against For Engaging In Protected Activity." Finally, the ALJ noted in his proposed decision that the Court defended "against both allegations on the alternative grounds of discrimination and interference." The Court did not except to this statement. Accordingly, the Court has waived its right to assert that it did not have adequate notice and opportunity to defend

against the discrimination allegation. (Santee Elementary School District (2006) PERB Decision No. 1822.)

As for the remainder of the unalleged violation test, discrimination is merely an alternate legal theory to be applied to the exact same conduct that gave rise to the interference allegation in the complaint. The parties presented extensive testimony and evidence regarding the Court's e-mail use policy and its application to various e-mails introduced by AFSCME as well as to Prescott's e-mails. Both parties examined and cross-examined witnesses about the policy and its application. Finally, because both the discrimination and interference allegations arise from the exact same facts, and the interference allegation was timely, the discrimination allegation is also timely.

Discrimination

To establish a prima facie case of discrimination in violation of Trial Court Act section 71635.1 and PERB Regulation 32606(a),[8] AFSCME must show that: (1) Prescott exercised rights under the Trial Court Act; (2) the Court had knowledge of the exercise of those rights; and (3) the Court imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced Prescott because of her exercise of those rights. (Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461]; San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856].)[9]

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

[9]When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (Trial Court Act sec. 71639.3; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Protected Activity

The unfair practice charge alleged that Prescott engaged in protected activity by sending four e-mails regarding union matters to members of her bargaining unit. An employee's speech is protected if it is "related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations." (Rancho Santiago.) At the same time, an employer may limit employees' non-business use of its e-mail system without committing an unfair practice as long as the limitation does not discriminate along union lines. As the following cases demonstrate, union e-mails that violate an employer's lawful restriction on non-business e-mail use do not constitute protected activity.

In State of California (DPA), PERB addressed employee use of an employer's e-mail system to send union business e-mails. In that case, the employer allowed "incidental and minimal" use of its e-mail system for non-business communications but prohibited employees from using its system to send union business e-mails. The Board reasoned that once an employer has opened its e-mail system to a certain level of non-business use, "it cannot prohibit employees from using the same forum for a similar level of communication involving employee organization activities." The Board then held that because the employer's policy discriminated among e-mails within the permissible range based solely on union content, the policy interfered with employees' protected rights. In so holding, the Board implicitly found that sending "incidental and minimal" union business e-mails was protected activity. However, the Board also found that the employer was not required to allow employees to use its e-mail system to send "regular and voluminous messages about Union business" because it had never allowed such use. Thus, any e-mails that fell outside of the permissible range were not protected activity and could be prohibited by the employer without violating the Dills Act.

The National Labor Relations Board (NLRB) adopted a similar approach in its recent decision in The Register-Guard (2007) 351 NLRB No. 70 [183 LRRM 1113] (Register-Guard). That case involved an employee who, like Prescott, was disciplined by her employer for using its e-mail system to send union business e-mails. (Id., at pp. *2-3.) The employer's policy prohibited using its e-mail system to send "non-job-related solicitations." (Id., at p. *7.) After observing that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status," the Board examined whether the employer applied its policy in a discriminatory manner to each of the three e-mails for which the employee was disciplined.[10] (Id., at p. *9, emphasis added.)

The employee's first e-mail clarified facts surrounding a union rally the day before. (Id., at p. *10.) The Board found this was not a solicitation but instead fell within the permissible range of non-business e-mail use allowed by the employer. (Id., at pp. *10-11.) As a result, the Board found the e-mail was protected activity. (Id., at p. *11.) Thus, because the employer disciplined the employee for sending that e-mail based solely on its union content, the discipline violated the NLRA. (Ibid.)

The employee's second and third e-mails asked employees to wear green to support the union and to participate in the union's entry in a local parade, respectively. (Id., at p. *10.) The Board found these e-mails constituted solicitations prohibited by the employer's policy and therefore they were not protected activity. (Id., at p. *11.) Consequently, the employer's discipline of the employee for sending those e-mails was lawful under the NLRA. (Ibid.)

Taken together, State of California (DPA) and Register-Guard require us to engage in a two-part analysis to determine whether the e-mails for which Prescott was disciplined

[10]Before conducting its "as applied" analysis, the Board found the policy did not violate the NLRA on its face because the policy's language did not discriminate among e-mails based on union content. (Id., at p. *7.)

constituted protected activity under the Trial Court Act. First, we must establish the extent of permissible non-business e-mail use under the Court's e-mail use policy. Then we must determine whether each of Prescott's e-mails fell within the range of permissible use and was therefore protected activity.

The Court's e-mail use policy prohibits use of the Court's e-mail system "in a manner or to a degree that is disruptive or detrimental to the Court or to the employee's performance." The policy does not define "disruptive or detrimental" but the Court's witnesses testified that the policy is primarily aimed at preventing employees from sending broadcast e-mails to large groups of recipients.[11] Because of the policy's ambiguity, we must examine the six e-mails introduced into the record by AFSCME to determine what constitutes permissible non-business e-mail use under the policy.

Judge's E-mail

On October 29, 2003, one of the Court's judges sent an e-mail to all Court staff urging support for a fellow judge who had been nominated to the United States Court of Appeals for the Ninth Circuit. According to the record, judges are not considered employees of the Court and therefore are not subject to the Court's e-mail use policy. For this reason, the judge's e-mail is irrelevant in determining the extent of permissible non-business use under the policy.

Court Executive Officer's E-mail

On July 16, 2004, the Court's Executive Officer/Clerk John Clarke (Clarke) sent an e-mail to all Court staff containing an update on contract negotiations between AFSCME and the Court. Clarke sent this e-mail in his capacity as an agent of the Court, not as an individual employee, and it addressed subjects of concern to Court employees. Accordingly, the e-mail was official Court business not subject to the Court's e-mail use policy. Clarke's e-mail

[11]The policy provides no guidelines for administrators to use in determining what constitutes "disruptive or detrimental" e-mail use nor does it provide clear guidance to employees about what type of e-mails would subject them to discipline under the policy.

therefore is of no use in establishing the extent of permissible non-business e-mail use under the policy.

E-mails Sent by Court Employees

On November 1, 2004, an employee at the Pomona North Courthouse sent an e-mail to all staff at that courthouse asking if anyone had a play pen for sale. The employee was verbally counseled by her supervisor that this e-mail violated the Court's e-mail use policy.[12] On November 22, 2004, another employee sent an e-mail to all Court employees countywide asking if anyone would adopt two dogs. This employee was also verbally counseled that her e-mail violated the Court's e-mail use policy.

On February 25, 2005, an employee sent an e-mail to all courtroom assistants in the Mosk Courthouse announcing the birth of a baby boy to one of the employees. On June 15, 2005, another employee sent an e-mail to the same group of employees regarding an employee birthday party. Neither of the employees who sent these e-mails were disciplined.[13]

[12]Verbal counseling is the first step in the Court's progressive discipline process.

[13]The Court argues that the birth announcement and birthday party e-mails were not subject to the e-mail use policy. Specifically, the Court contends that the e-mails were "Court business" because they "promote[d] camaraderie and team spirit, which, in the view of Court management, boosts employee morale and employee productivity." In State of California (DPA), the State argued that e-mails soliciting athletic club memberships and blood bank donations, announcing an employee club bicycle ride, and even announcing the sale of Girl Scout cookies were "part of the corporate culture and therefore State business." The Board rejected this argument, finding no reason why these e-mails but not those about collective bargaining would constitute State business. Similarly, we see no reason why an e-mail announcing a union meeting should be treated any differently than e-mails announcing births and birthday parties. Therefore, we find that the birth announcement and birthday party e-mails were subject to the Court's e-mail use policy and therefore can be considered in establishing the policy's parameters.

Based on these four e-mails, it appears that the Court allows employees to send non-business e-mails to a small group of employees at a single location but not to all staff at a single location or to all Court staff countywide.[14] Thus, we must examine each of Prescott's e-mails to see if it was sent to a group larger than that permitted by the e-mail use policy.[15] If the e-mail falls within the range permitted by the policy, it constitutes protected activity under the Trial Court Act.

[14]The Court argues that these four e-mails are insufficient to establish that it tolerated certain types of non-business e-mail use as a matter of policy. The Court correctly notes that the evidence here does not approach the large number of non-business e-mails presented in State of California (DPA). Even so, we find the evidence before us sufficient to establish the parameters of the Court's e-mail use policy, especially in light of both parties' failure to present additional e-mails to the ALJ.

[15]AFSCME argues that once the Court allowed Clarke's broadcast e-mail regarding contract negotiations, the Court could no longer prohibit broadcast e-mails by AFSCME members about labor relations issues. The Court is not required to provide AFSCME "equal time" use of its e-mail system under such circumstances. PERB has held that California public sector labor relations statutes provide employer free speech rights identical to those found in the NLRA. (City of Fresno (2006) PERB Decision No. 1841-M; Rio Hondo Community College District (1980) PERB Decision No. 128.) Interpreting the federal Act, the United States Supreme Court has found that unions "are not entitled to use a medium of communication simply because the employer is using it" to state its position on labor relations issues unless the union can show that it has no effective alternate means of communicating its position to employees. (NLRB v. United Steelworkers of America (1958) 357 U.S. 357, 364 [78 S. Ct. 1268].) In that case, the Court held the employer was not required to grant the union an exemption to its no-solicitation policy so that the union could counter the employer's anti-union statements via the same means of communication, particularly when the union failed to show that it had no other way to effectively communicate its position to employees. (Id., at pp. 362-363.) Here, the record is replete with evidence that AFSCME had ample alternate means of communicating with Court employees, such as e-mail between union stewards and individual employees, distribution of flyers in the courthouse, use of Court bulletin boards, and a telephone hotline and website where members could obtain information about bargaining and upcoming meetings. Indeed, the Court even allowed AFSCME to send broadcast e-mails into its system from the outside. In light of this evidence, the Court was not required to grant AFSCME an exemption from its e-mail use policy so that the union could state its position on labor relations issues via internally-generated broadcast e-mail as the Court had done.

Prescott sent her August 13, September 17 and November 1, 2004 e-mails to all bargaining unit members countywide. These e-mails were broadcast e-mails prohibited by the Court's e-mail use policy and therefore were not protected activity. As a result, the Court's discipline of Prescott for sending these three e-mails was lawful under the Trial Court Act.

We reach a different conclusion regarding Prescott's August 12, 2004 e-mail. Prescott sent that e-mail, announcing the August 17 lunchtime union meeting, to the approximately 55 court clerks in the Mosk Courthouse. Because it was sent to a small group of employees at a single location, this e-mail was within the range of permissible non-business e-mail use under the Court's policy. Thus, the August 12 e-mail was protected activity. Further, it is clear that the Court had knowledge of Prescott's protected activity because Lough's telephone call to Prescott on August 13 was the result of the Court's discovery of her August 12 e-mail.

Adverse Action

The unfair practice charge alleged that the Court took adverse action against Prescott by notifying her of its intent to suspend her for five days without pay. "[U]nequivocal notice of the employer's intent to impose discipline is an adverse action." (County of Merced (2008) PERB Decision No. 1975-M.) Thus, the Court's November 17, 2004, notice of intent to suspend Prescott constituted an adverse action. Furthermore, the January 21, 2005, letter informing her of the Court's final decision to suspend her for three days without pay also constituted an adverse action. (See Regents of the University of California (1983) PERB Decision No. 310-H [suspension is an adverse action].)

Nexus

To show that an adverse action was taken because of the employee's engagement in protected activity, the charging party must establish a nexus between the adverse action and the protected activity. In other words, AFSCME must prove that the Court acted with discriminatory intent in disciplining Prescott for sending the August 12, 2004 e-mail. "PERB

has long recognized that direct evidence of discriminatory intent - the proverbial 'smoking gun' - is rarely possible." (Berkeley Unified School District (2003) PERB Decision No. 1538 (Berkeley).) However, this is one of those rare cases where direct evidence of discriminatory intent exists.

On November 17, 2004, the Court presented Prescott with written notice of its intent to suspend her for five days, in part for violating the Court's e-mail use policy by sending the August 12, 2004 union meeting e-mail. The notice stated: "Ms. Prescott, it is inappropriate for you to use the Court's computer system to conduct union business." This statement indicates that the Court considered the August 12 e-mail to be a violation of its e-mail use policy because of its union content. Therefore, the Court admittedly disciplined Prescott because of her protected activity of sending the August 12 e-mail.[16] This constitutes direct evidence of the Court's discriminatory intent and is sufficient in itself to establish the required nexus between Prescott's suspension and her protected activity. (Berkeley.) Consequently, AFSCME has established a prima facie case of discrimination.

Courtroom Reservation Policy

The complaint alleged that the Court discriminated against Prescott by threatening to suspend her for five days for "inappropriate use of Court facilities" based on her failure to make a written request to use a courtroom for a union meeting. The ALJ applied PERB's interference standard to this allegation. However, because the complaint alleged adverse action against Prescott, it is properly analyzed under the discrimination standard. (Rancho Santiago.) Further, there is no unalleged violation issue here because the allegation was pled

[16]This is strikingly similar to Register-Guard, where the employer's written warning to the employee stated "you used the company's e-mail system expressly for the purpose of conducting Guild business." (Id., at p. *2.) Based on this warning, the Board found that the employer disciplined the employee because of the union content of her e-mail. (Id., at p. *11.)

as discrimination in the complaint. Accordingly, we apply discrimination analysis to the courtroom reservation allegation.

To establish a prima facie case of discrimination, AFSCME must establish that Prescott engaged in protected activity, the Court had knowledge of that activity, and the Court disciplined Prescott because of that activity. The unfair practice charge alleged that Prescott engaged in protected activity by reserving the Department One courtroom for a lunchtime union meeting on August 17, 2004. The Court disciplined Prescott because in making that reservation she did not follow its written courtroom reservation policy for outside organizations. Acting in one's capacity as a union officer is protected activity. (City and County of San Francisco (2004) PERB Decision No. 1664-M.) However, as with Prescott's e-mails, her reservation of the courtroom was protected only if it did not violate the Court's courtroom reservation policy.

The record establishes that there were two ways to reserve a courtroom for non-Court business use. A written policy required outside organizations to obtain prior written permission from the Court's facilities services department to use a courtroom during non-business hours. Certified employee organizations, however, were required to obtain prior written approval from human resources or the appropriate district manager. However, when an employee wished to reserve a courtroom in the courthouse where the employee worked, it was an unwritten rule that the employee only needed to obtain permission to use the courtroom from the assigned judge and, if the courtroom was not in use at the proposed meeting time, schedule the courtroom with the court coordinator.

The Court disciplined Prescott for not complying with the written reservation policy applicable to outside organizations. The Court claims that it applied this policy to Prescott because in reserving the courtroom for a union meeting she was acting as an agent of AFSCME. However, the record is devoid of evidence that any employee had previously been

required to submit a written request to use a courtroom in the courthouse where he or she worked for a union meeting. Indeed, both Becerra, the Court's labor relations manager and Prescott's predecessor as AFSCME president, and Sandra Ramey, a courtroom assistant and member of AFSCME Local 3022, testified they had always followed the unwritten reservation rule in reserving courtrooms in the courthouse where they worked for union meetings. Because the Court routinely allowed employees to reserve courtrooms for union meetings without submitting a written request, Prescott did not violate the Court's reservation policy in reserving the courtroom for the August 17, 2004 union meeting. Accordingly, Prescott's reservation was protected activity.

The Court knew of Prescott's protected activity because Lough asked Prescott about the upcoming meeting during their telephone conversation on August 13. As for adverse action, pursuant to the discussion above, both the Court's notice of intent to suspend and the final notice of suspension constituted actions adverse to Prescott.

Regarding the nexus between Prescott's protected activity and the adverse action, the record again contains direct evidence of the Court's discriminatory intent in disciplining Prescott. The November 17, 2004 notice of intent to suspend states: "It is also inappropriate for you to use Court facilities for Union business without prior authorization from Mr. Clarke or his designee." This indicates the Court disciplined Prescott for her protected activity of reserving the Department One courtroom for the August 17, 2004 union meeting. Again, the Court's written admission standing alone is sufficient to establish a nexus between Prescott's suspension and her protected activity. AFSCME has therefore established a prima facie case of discrimination.

"But For" Test

Because AFSCME has established a prima facie case of discrimination, the Court bears the burden of proving that it would have taken the adverse action even if Prescott had not

engaged in protected activity. (Novato Unified School District (1982) PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730 [175 Cal.Rptr. 626] (Martori Brothers); Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169].) Thus, where as here, it appears that the employer's adverse action was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (Martori Brothers.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304 [234 Cal.Rptr. 428].) For the following reasons, we find the Court has established this defense.

The Court's suspension of Prescott was "based on 'mixed' conduct, that is, conduct of which part is protected and part is unprotected." (Belridge School District (1980) PERB Decision No. 157 (Belridge).) In mixed conduct cases, the Board must determine what portion of the discipline is attributable to the unprotected conduct and therefore lawful. (San Ysidro School District (1980) PERB Decision No. 134 (San Ysidro).) If it is impossible to make that determination, the entire discipline must be rescinded. (Belridge; San Ysidro.) However, where it is possible to isolate the discipline imposed for unprotected conduct, the Board must determine whether the employer would have imposed the same discipline for the unprotected conduct standing alone as it imposed for the mixed conduct. (See Inglewood Unified School District (1986) PERB Decision No. 593 [assuming that employee's failure to meet with principal was unprotected, record did not establish that employer would have imposed the same discipline based solely on the failure to meet].)[17]

[17]Register-Guard was not a mixed conduct case because the employee received two separate written warnings, one based on protected conduct and one based on unprotected conduct. (Id., at p. *11.) Because the discipline for protected conduct was not intertwined with the discipline for unprotected conduct, the NLRB concluded that it need not conduct a "but for" analysis regarding the written warning based solely on protected conduct. (Ibid.) Here, because Prescott's suspension was based on both protected and unprotected activity, PERB case law requires that we conduct a "but for" analysis. Accordingly, we need not and

While the Court did not explicitly allocate Prescott's three-day suspension to particular violations, the record allows us to determine what portion of the discipline was based on unprotected activity. Both Tend and Venhuizen testified that even without the courtroom policy violation they would have suspended Prescott for her unauthorized e-mail use. AFSCME did not rebut this testimony. Thus, the suspension was based solely on Prescott's alleged e-mail use policy violations.

When conducting the "but for" analysis, the proper inquiry is whether the employer's true motivation for taking the adverse action was the employee's protected activity. (Regents of the University of California (1993) PERB Decision No. 1028-H (Regents of the UC).) On the record before us, we cannot find that Prescott's protected August 12, 2004 e-mail was the true motivation behind her suspension, particularly given the three unprotected broadcast e-mails for which Prescott was lawfully disciplined. As a result, we find that Prescott would have been suspended regardless of her protected activity of sending the August 12 e-mail. Moreover, PERB has no authority to determine whether a three-day suspension is an appropriate penalty for Prescott's unprotected conduct of sending three unauthorized broadcast e-mails. (Regents of the UC; San Ysidro [PERB has no authority to "review disciplinary actions unrelated to activity protected by EERA"].) Accordingly, because the Court has met its burden of showing that it would have imposed the same discipline absent Prescott's protected activity, the complaint and underlying unfair practice charge must be dismissed.

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do not decide whether it is appropriate for PERB to dispense with "but for" analysis when discipline is based solely on protected conduct.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-2-C are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.