

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



VANESSA K. HAMILTON,

Charging Party,

v.

ORANGE COUNTY EMPLOYEES  
ASSOCIATION,

Respondent.

Case No. LA-CO-215-M

Request for Reconsideration  
PERB Decision No. 2674a-M

PERB Decision No. 2674b-M

May 28, 2020

Appearance: Vanessa K. Hamilton, on her own behalf.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on Vanessa K. Hamilton's request for reconsideration of the Board's decision in *Orange County Employees Association* (2019) PERB Decision No. 2674a-M. In the underlying decision in this case, *Orange County Employees Association* (2019) PERB Decision No. 2674-M, we affirmed an administrative law judge's (ALJ) conclusion that the Orange County Employees Association (OCEA) breached its duty of fair representation under the Meyer-Milias-Brown Act (MMBA)<sup>1</sup> by failing to file a grievance signed and approved by Hamilton that included race and gender discrimination and retaliation claims, and instead, without informing Hamilton,

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq.

filing a different grievance on her behalf that omitted the discrimination and retaliation claims. We disagreed, however, with the portion of the ALJ's proposed remedy ordering OCEA to pay reasonable attorney fees Hamilton incurred pursuing a lawsuit over the termination of her employment.

In *Orange County Employees Association, supra*, PERB Decision No. 2674a-M, we denied Hamilton's request to reconsider our decision not to order OCEA to pay her attorney fees, finding that Hamilton failed to establish either of the grounds for reconsideration under PERB Regulation 32410.<sup>2</sup> Hamilton now attempts to cure the defects of her first request for reconsideration. For the following reasons, we deny Hamilton's second request for reconsideration.

#### DISCUSSION

A "party may file only one request for reconsideration of a Board decision, except in those cases where a prior request for reconsideration has resulted in the issuance of a completely revised decision." (*County of Santa Clara* (2013) PERB Order No. Ad-398-M, p. 5; *Bassett Unified School District* (1979) PERB Order No. Ad-67, p. 4.) Our denial of Hamilton's request for reconsideration in *Orange County Employees Association, supra*, PERB Decision No. 2674a-M resulted in no revisions to the Board's underlying decision. Thus, Hamilton's second request for reconsideration does not fall under the narrow exception allowing a party to file such a request.

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<sup>2</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Furthermore, Hamilton's second request does not satisfy either of the grounds for reconsideration under PERB Regulation 32410. Under subdivision (a) of the regulation, the grounds for requesting reconsideration of a final Board decision are limited to claims that: "(1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence." (PERB Reg. 32410, subd. (a).)

Hamilton first contends the Board's underlying decision contains a prejudicial error of fact because it inferred from evidence showing Hamilton obtained a "right to sue" letter that she intended to sue her employer, the County of Orange (County), over her termination, as opposed to the earlier acts of discrimination and retaliation alleged in her original, unfiled grievance. Hamilton points to other evidence in the record to establish that her right to sue letter related to the earlier discrimination and retaliation allegations, not her termination. As we stated in our denial of Hamilton's first request for reconsideration, a party may not use the reconsideration process to re-litigate issues that have already been decided or simply to ask the Board to "try again." (*Jurupa Unified School District* (2015) PERB Decision No. 2450a, p. 3; *Chula Vista Elementary School District* (2004) PERB Decision No. 1557a, p. 2; *Redwoods Community College District* (1994) PERB Decision No. 1047a, pp. 2-3.) We thus find no basis to reconsider our factual findings regarding the right to sue letter.

Attempting to satisfy the second ground for reconsideration, Hamilton provides a copy of the complaint in her civil lawsuit against the County, with a declaration under penalty of perjury explaining why the civil complaint could not have been discovered

prior to the underlying hearing and was not presented to PERB until now. Specifically, Hamilton declares the civil complaint was filed on June 21, 2018—over seven months after the November 28, 2017 hearing in this case—and she did not obtain a copy of the complaint from her attorney until November 1, 2019. She further declares that the civil complaint shows the allegations in her lawsuit against the County are the same as those in the unfiled grievance, and therefore she should be awarded attorney fees under *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270.

“A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.”

(PERB Reg. 32410, subd. (a).) We need not address whether Hamilton’s declaration establishes the first four elements because it fails to establish the fifth—that the civil complaint “impacts or alters the decision of the previously decided case.”

The civil complaint alleges the County discriminated against Hamilton because of her race when it canceled her vacation in May 2016 but did not cancel the vacations of other employees of different races. Substantively, this allegation is similar to the discrimination allegations in the grievance OCEA failed to file on Hamilton’s behalf. The civil complaint alleges this conduct violated the California Fair Employment and Housing Act (FEHA)<sup>3</sup> and 42 U.S.C. § 1981, which prohibits race discrimination in the

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<sup>3</sup> The FEHA is codified at Government Code section 12900 et seq.

creation and enforcement of contracts. Thus, there is a colorable argument that the civil complaint seeks to enforce Hamilton's right under the OCEA-County Memorandum of Understanding (MOU) not to be subject to discriminatory application of the MOU's terms—the same right she sought to enforce through the unfiled grievance.

The complaint also alleges, however, that the County terminated Hamilton's employment in retaliation for her prior discrimination lawsuit against the County and for protesting the cancellation of her vacation as discriminatory, and that this conduct also violated FEHA and 42 U.S.C. § 1981. As noted in the underlying decision, OCEA was willing to pursue through arbitration the grievance it filed over Hamilton's termination, but Hamilton chose to withdraw the grievance and instead pursue a civil lawsuit. (*Orange County Employees Association, supra*, PERB Decision No. 2674-M, pp. 6-7, 11.) The civil complaint thus encompasses the allegations in both the grievance OCEA failed to file on Hamilton's behalf *and* the grievance OCEA filed over Hamilton's termination.

When a plaintiff prevails on a FEHA claim, the court "may award to the prevailing party . . . reasonable attorney's fees and costs." (Gov. Code, § 12965, subd. (b).) "Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories.' [Citation.] [Nor is] [a]pportionment . . . required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 159

(*Graciano*.) “Employment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 431, citation and brackets omitted.)

Because they are based on the same core set of facts, the civil complaint’s discrimination causes of action that mirror the allegations OCEA omitted from the first grievance are inextricably intertwined with the retaliation causes of action challenging the termination of Hamilton’s employment. Therefore, it would be “impractical or impossible” to apportion the time her attorney spends on the discrimination causes of action versus the retaliation causes of action. (*Graciano, supra*, 144 Cal.App.4th at p. 159.) Because of the inability to isolate time spent on the allegations mirroring those in the unfiled grievance, ordering OCEA to pay Hamilton’s attorney fees necessarily would require OCEA to pay the cost of litigating her termination claims, which OCEA was willing to pursue in arbitration. Thus, even assuming that Hamilton is obligated to pay her attorney out of pocket, ordering OCEA to pay the cost of litigating Hamilton’s termination claims is not necessary to make her whole.<sup>4</sup> Nor is such a broad remedy essential to deter OCEA from engaging in future violations like the one found here. Under these circumstances, ordering OCEA to pay attorney fees

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<sup>4</sup> Because there is no evidence before us of any fee agreement between Hamilton and her attorney, we need not address whether such an agreement might impact a charging party’s ability to obtain attorney fees as damages for a breach of the duty of fair representation. Similarly, given our finding in the underlying decision that we need not determine whether the grievance OCEA failed to file was meritorious because Hamilton did not meet the threshold requirement for an award of attorney fees (*Orange County Employees Association, supra*, PERB Decision No. 2674-M, p. 10, fn. 8), we need not address whether a potential award of attorney fees under a fee-shifting statute such as FEHA might impact a charging party’s ability to obtain attorney fees as damages for a breach of the duty of fair representation.

Hamilton incurs in her civil lawsuit against the County would not effectuate the purposes of the MMBA. (See *Sonoma County Superior Court (2017) PERB Decision No. 2532-C*, p. 30, citing *San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 13* [PERB “has discretion to withhold various remedies at its disposal when doing so effectuates the purpose of the labor relations statute”].)

In sum, this request for reconsideration does not fall under the narrow exception in *County of Santa Clara, supra*, PERB Order No. Ad-398-M permitting a second reconsideration request in the same case. We also find no prejudicial error of fact in the underlying Board decision, nor does the newly-submitted civil complaint warrant reversal of our decision not to order OCEA to pay attorney fees Hamilton incurs in her civil lawsuit against the County. Because Hamilton has not established a basis for reconsideration under PERB Regulation 32410, her request is denied.

#### ORDER

Vanessa K. Hamilton’s request for reconsideration of the Public Employment Relations Board’s decision in *Orange County Employees Association (2019) PERB Decision No. 2674a-M* is DENIED.

Members Banks and Krantz joined in this Decision.