



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

GINGER LYNN CAIN,

Charging Party,

v.

SOLANO COUNTY COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. SF-CE-3254-E

PERB Decision No. 2708

April 16, 2020

Appearances: Law Offices of Randal M. Barnum by Randal M. Barnum, Attorney, for Ginger Lynn Cain; Erickson Law Firm by Joshua Taylor, Attorney, for Solano County Community College District.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Solano County Community College District (District) of an administrative law judge's (ALJ) notice of withdrawal and dismissal of complaint. The District contends that the ALJ improperly granted charging party Ginger Lynn Cain's (Cain) request for withdrawal of her unfair practice charge without determining whether it was with or without prejudice, as expressly required by PERB Regulation 32625.¹ For the following reasons, we grant the appeal.

Cain, a faculty member of the District, filed the original charge on December 11, 2017, alleging that the District discriminated against her because she engaged in

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

statutorily protected activities. On April 10, 2019, after the filing of amended charges and an investigation that resulted in the dismissal of certain allegations, PERB's Office of the General Counsel (OGC) issued a complaint alleging two discrete instances of discrimination, one occurring in 2017 and the other in 2018. When settlement discussions failed, the matter was set for hearing on November 6, 2019.

Cain filed a request to withdraw her charge five days before hearing. In her request, Cain did not indicate whether she intended the withdrawal to be with or without prejudice. Without clarifying Cain's request or soliciting the District's position, the assigned ALJ granted that request in a notice dated November 4, 2019, which also did not indicate whether the withdrawal was with or without prejudice. The District requested that the ALJ clarify whether the withdrawal was with or without prejudice. In subsequent correspondence with the ALJ, Cain responded that she intended the withdrawal to be without prejudice. The ALJ refused to clarify her notice and instead instructed the District to file an appeal with the Board if it was dissatisfied with the dismissal.

PERB Regulation 32625 provides, in pertinent part:

"Any request for withdrawal of the charge shall be in writing, signed by the charging party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. Request for withdrawal of the charge before complaint has issued shall be granted. Repeated withdrawal and refiling of charges alleging substantially identical conduct may result in refusal to issue a complaint. *If the complaint has issued, the Board agent shall determine whether the withdrawal shall be with or without prejudice.*" (Emphasis added.)

Here, the ALJ's notice of withdrawal did not comply with the express requirements of Regulation 32625 because it failed to indicate whether the withdrawal was with or without prejudice.² This was clear error insofar as the regulation gave the ALJ no authority to grant withdrawal of the charge without such a determination. (See, e.g., *UPTE, CWA Local 9119 (Booth, et al.)* (2006) PERB Decision No. 1831-H, pp. 3-4.) At a minimum, the ALJ should have solicited Cain's intent and the District's position before granting the withdrawal. Similarly, when the District brought the error to her attention, the ALJ should have undertaken the required determination and corrected the notice to comply with the regulation. Since the ALJ did not do so, we must grant the District's appeal.

However, rather than remand the matter to the ALJ, we will make the necessary determination ourselves. In the statement filed in response to the District's request for clarification, Cain stated that she intended her withdrawal to be without prejudice. Under the circumstances present here, which include the fact that Cain received no consideration from the District in exchange for her withdrawal, we will give effect to her desire to withdraw her charge without prejudice. We note, however, that in this case (like most cases except those involving a continuing violation), the distinction between a withdrawal with prejudice and one without prejudice is meaningless because the underlying claims were already more than six-months old at the time of the withdrawal, and thus could not form the basis for a new complaint. (See Gov. Code, § 3541.5, subd. (a)(1) [PERB shall not "(i)ssue a complaint in respect of any charge based upon

² We also note that Cain's November 1, 2019 withdrawal request did not comply with Regulation 32625 because it failed to "state whether the party desires the withdrawal to be with or without prejudice."

an alleged unfair practice occurring more than six months prior to the filing of the charge”].)³ In addition to being subject to dismissal for untimeliness, OGC could decline to issue a complaint should Cain file a new charge alleging substantially identical conduct. (PERB Reg. 32625.)

ORDER

The appeal by Solano County Community College District is GRANTED. The unfair practice charge in Case No. SF-CE-3254-E is hereby DISMISSED WITHOUT PREJUDICE.

PER CURIAM

³ Of course, PERB may consider evidence of events lying outside the limitations period to “show the true character” of the events at issue in an unfair practice case, including “whether [the] respondent acted for an unlawful purpose in cases where motive is an issue.” (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 34.) Thus, even a dismissal with prejudice would not bar Cain from alleging the facts in her withdrawn charge as evidence of the District’s unlawful motive in a future charge based on different conduct by the District.