*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LATANJA CHAMBERS, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3141-E PERB Decision No. 2710 April 17, 2020

Appearances: Latanja Chambers, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Berkeley Unified School District.

Before Banks, Krantz, and Paulson, Members.

DECISION[1]

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of an administrative law judge (ALJ), dismissing Latanja Chambers' (Chambers) amended unfair practice charge against her employer, Berkeley Unified School District (District). Chambers alleged that she was terminated in retaliation for activity protected by the Educational

[1] Subdivision (d) of PERB Regulation 32320, as amended effective April 1, 2020, permits a majority of Board members issuing any decision or order to designate all or part of such decision or order as non-precedential. Based on all relevant circumstances, including the criteria set forth in Regulation 32320, subdivision (d), we designate the instant decision as non-precedential. (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

Employment Relations Act (EERA).[2] The ALJ found that Chambers demonstrated a prima facie retaliation case, but that the District met its burden to show that it would have taken the same action even in the absence of her protected activity based on her repeated and serious work performance problems.

Chambers filed exceptions with the Board, challenging many of the ALJ's factual findings and legal conclusions and attempting to introduce new evidence. The District filed no exceptions and urged the Board to affirm the proposed decision, simultaneously objecting to the form of Chambers' exceptions and opposing her attempts to reopen the record. Having reviewed the record in this matter and considered it in light of applicable law, we find the record supports the ALJ's factual findings on pages 7-30 of the proposed decision, and we adopt them as the Board's own factual findings. We affirm the ALJ's conclusion that the District did not violate EERA for the following reasons.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent exceptions merely reiterate factual or legal contentions resolved correctly in the proposed decision, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The majority of Chambers' exceptions raise arguments the ALJ considered and resolved appropriately, and we therefore do not address them here. We also decline to address arguments Chambers makes for the first time in her exceptions. (*Los Angeles County Superior*

[2] EERA is codified at Government Code §3540 et. seq. All references herein are to the Government Code unless otherwise indicated.

Court (2018) PERB Decision No. 2566-C, pp. 11-12; *Colusa Unified School District* (1983) PERB Decision No. 296, p. 4.)

Furthermore, the Board need not address alleged errors that would have no impact on the outcome of the case. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.) Some of Chambers' exceptions assert that certain findings constitute error but fail to explain how the alleged error impacts the outcome of her case. Absent such a showing, we need not consider these exceptions. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, p. 7; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 7-8.)

Although we decline to address many of Chambers' exceptions, we summarize the predominant reason Chambers has not established an EERA violation.[3] To establish a prima facie case of retaliation, the charging party has the burden to prove, by a preponderance of the evidence, that (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action

[3] After careful review, we find no reason to consider the various items of new evidence submitted with Chambers' exceptions. PERB Regulation 32300, subdivision (b) provides that "[r]eference shall be made in the statement of exceptions only to matters contained in the record of the case." We consider Chambers' attempt to include new evidence as a request to reopen the record. When considering a request to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410, subdivision (a) for a request for reconsideration based on the discovery of new evidence. (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) Chambers failed to meet both the procedural and substantive requirements of PERB Regulation 32410, subdivision (a).

against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which has been interpreted to mean that the protected activity was a substantial or motivating cause of the adverse action. If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred 'but for' the protected activity. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 40-41; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 56; *Wright Line* (1980) 251 NLRB 1083, 1086-1089.) To make this determination, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the employer's unlawful motive. (*Los Angeles County Superior Court*, *supra*, PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB

Decision No. 2376, p. 14; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 33.) As a result, the outcome of a discrimination or retaliation case ultimately is determined by the weight of the evidence supporting each party's position. (See *Novato Unified School District*, *supra*, PERB Decision No. 210, p. 14 ["After all the evidence is in, it is a question of the sufficiency of the proof proffered by the various parties."].)

In this case, no dispute remains regarding the elements of Chambers' prima facie case, as the District did not file exceptions to the ALJ's findings that Chambers engaged in protected activity, the District knew of that activity, the District took adverse action against her when it terminated her employment, and Chambers established nexus by demonstrating a departure from established procedures and other facts showing animus against Chambers' union and protected activity. The substantive question raised by Chambers' exceptions is the sufficiency of the District's affirmative defense. Based on a thorough review of the record, we find the ALJ correctly determined that the District established its affirmative defense that it would have taken the same actions even absent protected activity.

The ALJ's findings that Chambers committed numerous, serious, and repetitive work errors are amply supported by the record. The evidence that the District was motivated by Chambers' protected activities is comparatively limited, and an overwhelming amount of her protected activity occurred after the District issued a negative performance evaluation on August 28, 2013. The same pattern and kinds of performance problems identified in the evaluation were repeated and continued thereafter. Unlike the ALJ, we note that a limited amount of protected activity occurred

in advance of this performance evaluation. However, based on the weight of the evidence, we find the District convincingly demonstrated that Chambers' incompetent and inefficient work performance would have led to the same consequences even absent her EERA-protected activity.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-3141-E are DISMISSED.

Members Banks and Krantz joined in this Decision.