STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DORIAN FRANCIS CORLISS, Charging Party, v. EASTERN MUNICIPAL WATER DISTRICT, Respondent.	Case No. LA-CE-1335-M PERB Decision No. 2715-M May 13, 2020

Appearance: Atkinson, Andelson, Loya, Ruud & Romo by Nate J. Kowalski and Eric T. Riss, Attorneys, for Eastern Municipal Water District.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Eastern Municipal Water District (District) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by terminating Dorian Francis Corliss (Corliss) in retaliation for his protected activities, and by interfering with employee rights. In a pre-hearing memorandum, the ALJ found that the District's answer admitted most material facts and raised no properly pled

[1] The MMBA is codified at Government Code section 3500 et seq.

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

affirmative defenses. At Corliss's request, the ALJ authorized the parties to file motions for summary judgment in advance of the formal hearing, and Corliss did so. On the two dates set for formal hearing, the ALJ denied the District's requests to amend its answer, and granted Corliss's summary judgment motion as to his retaliation claims and one of his two interference claims. After hearing limited testimony, the ALJ dismissed the remaining interference claim. The ALJ explained his rulings in a lengthy proposed decision.

In its exceptions, the District mainly contends the ALJ erred in these conclusions: that the District admitted facts establishing a prima facie case of retaliation; that the District waived all affirmative defenses by not sufficiently pleading them in its answer; that allowing the District to amend its answer to cure the perceived pleading defects would prejudice Corliss; and that partial summary judgment should be granted in Corliss's favor. Corliss did not file an opposition to the District's exceptions and filed no exceptions of his own. Having reviewed the record in this matter and considered it in light of applicable law, we reverse the grant of partial summary judgment and remand for further proceedings consistent with this decision.

BACKGROUND

Corliss filed the instant unfair practice charge on October 3, 2018. The District responded by filing a five-page position statement with attached exhibits. The District generally denied that Corliss's rights had been violated "in any way." More specifically, the District contended that Corliss was terminated for "legitimate reasons of multiple violations of policies as noted in the Notice of Proposed Discharge and final Order of Discharge[,]" that Corliss engaged in threatening and insubordinate behavior,

and that Corliss's inappropriate behavior raised concerns of safety in the workplace. The discharge notices and supporting materials originally attached to those documents, totaling about 220 pages, constituted the exhibits to the position statement.

On December 4, 2018, PERB's Office of the General Counsel issued a complaint. Paragraph 3 alleged that Corliss participated in certain activity protected by the MMBA, including, on April 10, 2018, informing District Human Resources Director Laura Zamora (Zamora) that "he was not happy with [announced] major job changes and that he intended to file a grievance," and on April 11, 2018, invoking his "*Weingarten* rights" during a meeting with one of the District's managers.[3] In paragraphs 4 and 6, the Complaint identified three adverse actions allegedly taken in reprisal for Corliss's protected activity: that on April 12, 2018, the District served Corliss with a Notice of Proposed Discharge and an Administrative Leave Letter, and on May 1, 2018, the District finalized his proposed discharge. Paragraphs 5 and 7 alleged that the District took these adverse actions because of Corliss's various protected activities described elsewhere in the Complaint.

The Complaint also alleged two counts of interference with employee rights. Paragraphs 8 and 9 alleged the District's Administrative Leave Letter interfered with protected rights by prohibiting Corliss from entering District property or "contact[ing]

[3] In *National Labor Relations Board v. J. Weingarten, Inc.* (1975) 420 U.S. 251, the U.S. Supreme Court affirmed that an employer must grant an employee's request for union representation during an investigative interview which the employee reasonably believes may result in discipline. (*Jurupa Unified School District* (2015) PERB Decision No. 2450, p. 15, fn. 8; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.)

any District employee," other than Corliss's designated representative, without first contacting Zamora (the "gag order" allegation). Paragraphs 10 and 11 alleged that Zamora interfered with protected rights when she "laughed very loudly" and yelled at Corliss in the District's parking lot after Corliss expressed his dissatisfaction with proposed job changes and said he intended to file a grievance over the matter (the "parking lot" allegation).

On December 17, 2018, the District timely answered the Complaint by admitting certain facts, including that it had taken the adverse actions against Corliss described in paragraphs 4 and 6, and that it had issued the "gag order" described in paragraph 8. The District's answer generally and specifically denied that Corliss had engaged in protected activity, as alleged in paragraph 3, and likewise generally and specifically denied that it took any actions against Corliss because of protected activity.

The District's answer asserted two affirmative defenses. Its first affirmative defense stated: "The charging party fails to state an unfair labor practice. The Respondent's position is set forth in a November 6, 2018 letter to PERB, incorporated herein by reference."[4] The District's second affirmative defense stated: "The charging party has provided no evidence of a prima facie case that the District has committed an unfair practice under MMB[A] and/or PERB Regulations."

[4] The "November 6, 2018 letter to PERB" was the District's initial position statement, which we summarize *ante* at pages 2-3. The ALJ referred to the same document by the date that PERB actually received it, which was November 7, 2018. We refer to the position statement without mentioning either its letterhead date or its receipt date, except when we quote the District or ALJ in their references to such dates.

Thereafter, the matter was transferred to PERB's Division of Administrative Law, and the assigned ALJ noticed the matter for formal hearing. Corliss requested leave to file a summary judgment motion, which the District opposed. On July 9, 2019, the ALJ issued a pre-hearing memorandum "clarifying the issues in advance of the hearing," and addressing Corliss's request for leave to file a summary judgment motion. The ALJ observed that the District admitted in its answer that it took adverse actions against Corliss, as alleged in Complaint paragraphs 4 and 6, and that it issued the "gag order" as alleged in paragraph 8. The ALJ continued:

> "The District's answer also asserts two affirmative defenses: that Corliss has failed to state a legal claim and a prima facie case of an unfair labor practice under the MMBA and PERB Regulations. Although the District's answer seeks to incorporate by reference the contents of its November 7, 2018 position statement, it does not specifically assert business necessity, waiver by contract, or any other legal or equitable doctrine cognizable as a 'but for' defense to the reprisal allegations of paragraphs 3 and 6 of the Complaint. Nor does it assert any legitimate business justification in response to the interference allegations in paragraphs 9 and 11 of the Complaint."

The ALJ granted Corliss leave to file a summary judgment motion.

On July 22, 2019, Corliss filed a summary judgment motion and supporting documents. Corliss's motion relied throughout on the above-quoted passage from the ALJ's pre-hearing memorandum. On August 2, 2019, the District filed its Opposition to Corliss's motion, reiterating affirmative defenses to the retaliation claims first raised in its position statement, asserting a business justification defense to the "gag order" interference allegation, and disputing multiple facts raised in Corliss's motion.

On August 7, 2019, the first day of hearing, the District made the first of two oral motions to amend its answer. In this initial motion, the District sought to include additional affirmative defenses asserting that issue preclusion and/or claim preclusion applied based on concluded District administrative proceedings upholding Corliss's discharge. The ALJ denied the District's motion, finding these defenses to be untimely and unduly prejudicial to Corliss.[5] The ALJ then issued a tentative ruling granting Corliss's summary judgment motion as to the retaliation claims and the "gag order" allegation.

On August 12, 2019, the second and final day of hearing, the District made an oral motion to continue the hearing to allow it to amend its answer to state more particularly which defenses in its November 2018 position statement it asserted as affirmative defenses to the Complaint. In the absence of a joint agreement on a continuance, the ALJ denied the District's request. The ALJ found the motion was untimely and would result in unfair prejudice by permitting the District to raise new affirmative defenses while Corliss's summary judgment motion was pending.

On September 30, 2019, the ALJ issued the proposed decision, explaining his reasons for dismissing the parking lot claim and granting Corliss summary judgment with respect to the retaliation claims and the "gag order" interference claim.[6] The District filed timely exceptions to the proposed decision.

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[5] Corliss explained that he had relied on "the existing state of the pleadings when moving for summary judgment," and consequently had not addressed defenses that had not been raised.

[6] The ALJ permitted testimony on the parking lot interference allegation but did not permit testimony on any other allegations. In describing the parking lot incident,

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) The Board may affirm, modify, or reverse the proposed decision, order the record re-opened for the taking of further evidence, or "take such other actions as it considers proper." (PERB Reg. 32320, subd. (a)(2); *Regents of the University of California* (2018) PERB Decision No. 2601-H, p. 12 (*Regents*).)

I. PERB's Liberal Pleading and Amendment Standards

Sound public policy reasons support PERB's preference for hearing cases on their merits, notwithstanding technical non-compliance with matters of form. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 7, citing *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916.) "We are sensitive to the fact that PERB is not a court, but an administrative agency, and that the formalities of practice and procedure in the judicial system are not always appropriate for fulfillment of PERB's mission, which includes assisting parties and representatives who are laypersons." (*County of San Luis Obispo* (2015) PERB

Zamora denied that she "laughed very loudly" or yelled. Corliss presented no contravening testimony. At the close of Corliss's case-in-chief, the ALJ granted the District's oral motion to dismiss the parking lot interference allegation for lack of proof. Neither party filed exceptions regarding the parking lot allegation. Accordingly, the ALJ's conclusions regarding that issue are not before the Board and we do not disturb the ALJ's decision to dismiss that allegation.

Decision No. 2427-M, p. 28.) Generally, "[a]dministrative proceedings are not bound by strict rules of pleading." (*City of Davis* (2018) PERB Decision No. 2582-M, p. 11, fn. 5, quoting *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 862.) Thus, PERB has observed that so long as a party is informed of the substance of the charge or defense and afforded the basic, appropriate elements of procedural due process, the party "cannot complain of a variance between administrative pleadings and proof." (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 23.)

PERB similarly favors the liberal amendment of pleadings, "so that parties are not deprived of the opportunity to have their issues heard on the merits due to legal technicalities." (*Regents*, *supra*, PERB Decision No. 2601-H, p. 12.) PERB Regulations explicitly provide that a party may amend a complaint during a hearing unless the amendment "would result in undue prejudice to other parties." (PERB Reg. 32648; *Contra Costa Community College District* (2019) PERB Decision No. 2669, p. 8 (*Contra Costa*), citing *Fresno County Superior Court* (2017) PERB Decision No. 2517-C, p. 11, partially set aside on other grounds, *Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158.) Even if an amended pleading would prejudice the other party, it is appropriate to grant the requested amendment if the ALJ can order accommodations that sufficiently alleviate the prejudice, typically a continuance that allows additional time to prepare the case. (*Contra Costa*, *supra*, PERB Decision No. 2669, p. 8.) Although PERB Regulations do not explicitly reference amendments to an answer, we hold that a Board agent's broad

powers under Regulation 32170 warrant treating motions to amend an answer on the same basis as motions to amend a complaint.

Contra Costa, *supra*, PERB Decision No. 2669, issued just days before the instant proposed decision, is particularly instructive. There, after the charging party rested his case-in-chief, the respondent made a motion to dismiss the complaint. After hearing oral argument from both parties, the ALJ ordered a recess for the rest of the day to deliberate on the motion. During that recess, and before the respondent presented any evidence, the charging party e-mailed the ALJ a motion to amend the complaint to include new factual allegations. (*Id*. at p. 3.) The ALJ granted the respondent's motion to dismiss and denied the charging party's motion to amend, finding the amendment to be untimely and prejudicial. (*Id.* at p. 7.)

On appeal, we disagreed and remanded for consideration of the proposed amendments. We explained that the "rationale behind requiring a respondent to show undue prejudice in order to prevent an amendment at hearing is that a lenient amendment standard promotes [fairness and] judicial economy [citation], and the ALJ can and should give the respondent additional time to respond to any such amendment," thereby alleviating any prejudice. (*Contra Costa*, *supra*, PERB Decision No. 2669, p. 8; see also, e.g., *Regents of the University of California* (1987) PERB Decision No. 615-H, adopting proposed decision at p. 3.) We contrasted the lenient amendment standard which arises before or during a hearing with the stricter unalleged violations standard which attaches after all parties have rested and the hearing record is closed. (*Contra Costa*, *supra*, PERB Decision No. 2669, p. 8.) We found that a motion to amend made at the halfway point in the hearing is less likely to

cause non-mitigable prejudice than a motion made at the close of a hearing. (*Ibid.*) We instructed that the same core question must be answered, however, no matter when the motion is made: Is there undue prejudice that cannot be sufficiently mitigated by scheduling additional hearing time after an appropriate continuance? (*Ibid.*)[7]

In some cases, however, a proposed amendment may cause so little prejudice that there is no need for a continuance. For instance, in *Orcutt Union Elementary School District* (2019) PERB Decision No. 2626, on the first day of hearing the charging party moved to dismiss respondent's newly amended answer alleging two additional affirmative defenses. The ALJ found there was no prejudice to the charging party in accepting the respondent's amended answer "because the facts and argument underlying the [respondent's] impossibility and business necessity defenses have been known to the [charging party] since the [respondent] filed its position statement." (*Id*., adopting proposed decision at pp. 2-3.)

[7] In *Beverly Hills Unified School District* (1990) PERB Decision No. 789 (*Beverly Hills*), we affirmed the ALJ's finding that the respondent could not raise an untimely contract waiver defense, because the ALJ had directly inquired about the potential relevance of the contract at the outset of the hearing and the respondent at that time stated it would not rely on the contract as a defense. (*Id*. at p. 13, adopting proposed decision at pp. 18-19.) Similarly, in *Los Angeles Unified School District* (1988) PERB Decision No. 659, the ALJ directly asked the parties if a particular issue would be in dispute and received assurances that it would not. We therefore affirmed the ALJ's decision not to allow the charging party to amend the complaint late in the hearing, after the respondent (relying on the earlier assurance) had already presented its case. (*Id.* at p. 13, adopting proposed decision at pp. 42-44.)

II. The District's Motions to Amend its Answer

As noted above, the District moved to amend its answer on both of the two hearing days. The second of these motions directly sought to address the ALJ's belief that the District had not adequately pled its affirmative defenses in its answer. Specifically, at the start of the second day of hearing, before Corliss opened his case-in-chief, the District sought to continue the hearing and amend its answer to state more particularly which defenses in its November 2018 position statement it was asserting as affirmative defenses to the Complaint. The ALJ denied the motion, concluding that Corliss would be unfairly prejudiced if the District raised new affirmative defenses while the summary judgment motion was pending.

In rejecting the District's effort to cure perceived procedural defects in the answer, the ALJ apparently believed that to avoid prejudice to Corliss, the District was required to move to amend its answer before Corliss filed his motion. But, as we held in *Contra Costa*, there is no absolute bar to curing or otherwise amending a pleading while a dispositive motion is pending. Indeed, we reached the same result in *Contra Costa.* (*Contra Costa*, *supra*, PERB Decision No. 2669, pp. 7-9; see also *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662-1663 [party opposing summary judgment motion should be given opportunity to amend its pleading before entry of judgment, when it appears from opposition materials that opposing party could cure deficiency].)

Furthermore, prejudice typically means that a party has been prevented from preparing or presenting evidence or argument. It does not typically mean that an amendment improves one party's pleadings and thereby presents an additional

obstacle to the opposing party; were that the case, nearly every proposed amendment would be prejudicial. If Corliss was prejudiced by the District's proposed amendments, the ALJ could have granted a continuance to allow him to amend his summary judgment motion and/or prepare for the hearing.[8]

We therefore answer in the negative our core inquiry: Corliss would not have suffered undue prejudice if the District had been allowed to amend its answer at the hearing, and if some prejudice was shown, it could have been mitigated sufficiently via an appropriate continuance.[9]

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[8] We need not determine whether Corliss had sufficient grounds to obtain such a continuance. However, we note that Corliss apparently was (or should have been) aware of certain affirmative defenses prior to the District's motions to amend. The District's primary affirmative defense—its alternative, non-discriminatory basis for its adverse actions—was clear in the District's November 2018 position statement. To the extent the District's position statement did not spell out legitimate business justification as an affirmative defense to the "gag order" interference allegation, the District's opposition to Corliss's summary judgment motion made it express.

[9] We note significant contrasts between the instant case and *Regents*, *supra*, PERB Decision No. 2601-H, on which the ALJ heavily relied. There, the respondent filed no answer whatsoever. On the day prior to the hearing, the respondent sought to avoid a default judgment by seeking leave to file a tardy answer. (PERB Reg. 32644, subd. (c) explicitly provides that a respondent waives any right to a hearing by failing to file an answer.) However, the respondent's counsel admitted that he had been aware of the need to file such a motion for more than eight weeks, yet waited until the day before the hearing to do so. (*Id*. at p. 16.) The ALJ found, and the Board affirmed, that the respondent failed to establish good cause for the late filing. (*Id*. at p. 17.) Thus, as in *Beverly Hills*, *supra*, PERB Decision No. 789, and *Los Angeles Unified School District*, *supra*, PERB Decision No. 659, PERB's liberal pleading and amendment rules were not allowed to make gamesmanship permissible. In contrast, here the District filed an answer that generally and specifically denied critical elements of Corliss's retaliation case and asserted affirmative defenses. The District sought to amend its answer only after the ALJ pointed out perceived deficiencies in the answer. Although it did not move to amend immediately upon being notified of those deficiencies, the District nonetheless moved to amend the answer prior to any

III. Corliss's Summary Judgment Motion

A Board agent may reach a final decision on the merits without holding an evidentiary hearing if the pleadings (together with any stipulations and any facts that may be administratively noticed) establish that there are sufficient undisputed facts to make a hearing unnecessary. (PERB Reg. 32207; see, e.g., *Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 2.) This case does not fall into that category of cases, however, as there are facts in dispute that are material to the outcome.

For instance, while the District's answer admitted taking the adverse actions alleged in paragraphs 4 and 6 of the Complaint, the District generally and specifically denied that Corliss engaged in protected activity (paragraph 3) or that it took adverse action against Corliss because of his protected activity (paragraphs 5 and 7). The District's general and specific denials of both the protected activity and the nexus allegations in the Complaint provided notice to Corliss that it would attempt to rebut these prima facie elements of the retaliation claim. (*Regents*, *supra*, PERB Decision No. 2601-H, p. 14; *Beverly Hills*, *supra*, PERB Decision No. 789, pp. 12-13.) Likewise,

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evidence being presented at the hearing. Because this delay does not indicate gamesmanship, the District should not be penalized for waiting until the start of the second day of hearing to move to amend its answer. (*Contra Costa*, *supra*, PERB Decision No. 2669, pp. 7-9.)

Moreover, having found that the ALJ should have permitted the District to amend its answer, we need not determine whether the District initially stated its affirmative defenses in a defective manner. Resolving that issue would require us to address a procedural question of first impression: whether a respondent's answer may properly incorporate by reference all or some of the respondent's earlier position statement. We express no opinion on that issue, as it is immaterial to the outcome and does not appear to be a recurring issue in need of resolution.

the District's general and specific denials in paragraph 9 of the answer that the "gag order" interfered with protected rights put Corliss on notice that the District would attempt to rebut the prima facie elements of that interference claim. Accordingly, Corliss was required to establish those contested elements at hearing, regardless of affirmative defenses put forward by the employer. (*Grossmont Community College District* (1980) PERB Decision No. 117, pp. 3-4.) Thus, even if the District's affirmative defenses were procedurally deficient, and even setting aside our conclusion that the District should have been permitted to amend its answer, summary judgment was still inappropriate as to the retaliation claim and the "gag order" interference claim, as it remained Corliss's burden to introduce sufficient evidence to establish a prima facie case. (*Ibid.*; *San Bernardino County Superior Court* (2014) PERB Decision No. 2392-C, p. 8, fn. 11 ["Even if this matter were treated as a motion for summary judgment, a moving party bears the burden of proving that no disputed issue of fact exists and that it is entitled to judgment as a matter of law."].)[10]

[10] We note that discrimination and retaliation cases are particularly ill-suited to resolution by motion without a hearing. In deciding such a case, "we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the employer's unlawful motive." (*San Diego Unified School District* (2019) PERB Decision No. 2666, p. 7.) Evidence offered in support of the charging party's prima facie case may undermine or support the respondent's affirmative defense, while evidence offered in support of the defense may undermine or support the prima facie case. (See, e.g., *Regents of the University of California* (2020) PERB Decision No. 2704-H, pp. 24-41, 44-45 [employer's cursory investigation of employees' alleged misconduct indicated unlawful motive and undermined justification for adverse action].) "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." (*San Diego Unified School District*, *supra*, PERB Decision No. 2666, p. 7.) Because discrimination and retaliation cases are inherently fact-specific, it is the rare case that can be decided on a dispositive motion.

In sum, the proposed decision erred by: (1) granting partial summary judgment to Corliss despite the presence of material disputed facts; and (2) failing to apply the proper lenient amendment standard to the District's motion to amend its answer, and instead finding the equivalent of a waiver or technical default. In doing so, the proposed decision departed from PERB's longstanding policy of "not depriv[ing parties] of the opportunity to have their issues heard on the merits due to legal technicalities." (*Regents*, *supra*, PERB Decision No. 2601-H, p. 12.)

An ALJ's primary responsibility is to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered." (PERB Reg. 32170.) Consistent with this mandate, ALJs should decide the merits of a case on a dispositive motion only when the facts truly are undisputed and the parties have had full opportunity to assert any claims or defenses that do not prejudice the other party.

ORDER

For the foregoing reasons, the partial grant of summary judgment in Case No. LA-CE-1335-M is hereby REVERSED and the matter is REMANDED to the Division of Administrative Law. The only part of the proposed decision that shall remain in force as the law of the case is the ALJ's dismissal of the allegations contained in paragraphs 10 and 11 of the Complaint.

On remand, the assigned ALJ shall set a deadline by which the District may file a renewed motion to amend its answer to plead the affirmative defenses the District raised in its oral motions on August 7 and August 12, 2019. The ALJ shall resolve any such renewed motion in a manner consistent with this decision. The ALJ shall then resolve the merits of the parties' claims and defenses based upon the evidence

presented at hearing and any stipulations, as well as any facts that may be subject to administrative notice.

Members Banks and Shiners joined in this Decision.