

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARILEE DE LAUER,

Charging Party,

v.

SANTA ROSA JUNIOR COLLEGE,

Respondent.

Case No. SF-CE-2317-E

PERB Decision No. 1612

April 2, 2004

Appearance: Marilee DeLauer, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Marilee DeLauer (DeLauer) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Santa Rosa Junior College violated the Educational Employment Relations Act (EERA)¹ by retaliating against DeLauer for protected activities.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charges the warning and dismissal letters and DeLauer's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

¹EERA is codified at Government Code section 3540 et seq.

ORDER

The unfair practice charge in Case No. SF-CE-2317-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



March 10, 2003

Marilee de Lauer

Re: Marilee de Lauer v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-2317-E
DISMISSAL LETTER

Dear Ms. de Lauer:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 15, 2003. Marilee de Lauer alleges that the Santa Rosa Junior College violated the Educational Employment Relations Act (EERA)¹ by retaliating against you because of your protected activity.

I indicated to you in my attached letter dated February 20, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 27, 2003, the charge would be dismissed.

On February 27, 2003, Charging Party filed a first amended charge. The amended charge adds the following facts.

In the Spring of 2000, Charging Party requested a 90 day leave of absence from her bus driver position at the Sonoma Valley Unified School District to study in Italy pursuant to her studies at the Junior College. This request was denied by the District and Charging Party was forced to resign her position. Upon her return from Europe, Charging Party was placed in a substitute driver position with a significant change in benefits. Charging Party asserts this "demotion" took place because of her protected activity of complaining about sexual harassment. It is unclear when these complaints took place.

Based on the above stated facts and those provided in the original charge, the charge still fails to state a prima facie case.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) As the alleged conduct took place almost three years ago, this charge is untimely filed and must be dismissed. Moreover, it is unclear what, if any, adverse action the school took against Charging Party. As such, this charge fails to state a prima facie case.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Robert Henry

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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February 20, 2003

Marilee de Lauer

Re: Marilee de Lauer v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-2317-E
WARNING LETTER

Dear Ms. de Lauer:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 15, 2003. Marilee de Lauer alleges that the Santa Rosa Junior College violated the Educational Employment Relations Act (EERA)¹ by retaliating against you because of your protected activity.

The charge states in its entirety as follows:

Retaliation for filing a PERB. The Santa Rosa Junior College officials and the compliance officer directed me to file a formal sexual harassment (sic) against a former instructor. This was to be protected activity. The compliance officer and the professor shared only selective information and lectured publicly this biased information to the faculty and staff of the college education community. All information I supplied to the compliance officer, President of Santa Rosa Junior College District, and the Chancellor's Office of California Community Colleges was protected activity. The criticism of the professor and the Santa Rosa Junior College was about performances and the protection of public health and safety only; not any personal grudges.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

It appears from facts provided in other unfair practice charges filed by the Charging Party, that she is not employed by the Junior College, but is in fact a student at the college.² Charging Party is, however, a substitute bus driver in the Sonoma Valley Unified School District.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation of the EERA, for the reasons provided below.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) Herein, the charge fails to provide any relevant facts regarding the allegations, and as such, it is impossible for PERB to determine the merits of the charge.

Even assuming Charging Party provided the relevant dates and facts, the charge still fails to state a prima facie case of retaliation. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572.); or (7) any other facts which

² Unfair Practice Charges SF-CE-2258, SF-CE-2268, SF-CO-608, SF-CO-609, and SF-CO-613.

might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

While Charging Party engaged in protected activity in her position with the Sonoma Valley Unified School District, the actions discussed above do not constitute protected activity. As such, it is unclear how the Junior College became aware of Charging Party's protected activity as an employee of the District. Additionally, the charge fails to provide any facts demonstrating nexus. As such, the charge fails to state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 27, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR