

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DIANNE HUNTSBERRY,
Charging Party,
v.
COUNTY OF ALAMEDA,
Respondent.

Case No. SF-CE-215-M
PERB Decision No. 1708-M
November 16, 2004

Appearance: Dianne Huntsberry, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dianne Huntsberry (Huntsberry) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the County of Alameda wrongfully terminated her in violation of the Meyers-Milias-Brown Act (MMBA)¹.

The Board has reviewed the entire record in this matter, including the original and amended charge, the warning and dismissal letters and Huntsberry'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, subject to the discussion below.

DISCUSSION

Huntsberry alleges for the first time on appeal that she was denied representation during an investigatory interview. However, Huntsberry has not demonstrated good cause for

¹MMBA is codified at Government Code section 3500, et seq.

presenting this new allegation on appeal. (PERB Reg. 32635(b)².) Further, even if the Board were to consider this allegation, the dismissal would still be sustained as Huntsberry has failed to provide specific factual allegations to support her claim.

ORDER

The unfair practice charge in Case No. SF-CE-215-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 4, 2004

Dianne Huntsberry

Re: Dianne Huntsberry v. County of Alameda
Unfair Practice Charge No. SF-CE-215-M
DISMISSAL LETTER

Dear Ms. Huntsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 2004. Dianne Huntsberry alleges that the County of Alameda violated the Meyers-Milias-Brown Act (MMBA)¹ by wrongfully terminating her.

I indicated to you in my attached letter dated July 15, 2004, 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 July 22, 2004, the charge would be dismissed.

On July 22, 2004, I received a first amended charge. The first amended charge corrects my misstatement that you were represented by the Association at your criminal hearing. In fact, you were represented by a private attorney. The charge does not, however, address any of the deficiencies noted in my July 15, 2004. More specifically, I informed you that in order to demonstrate that your termination violated the MMBA, you must present facts demonstrating you engaged in protected activity and were terminated because of this protected activity. The amended charge fails to provide any such facts, and as such the charge is dismissed for the reasons provided in my July 15, 2004, letter.

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

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

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

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. (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

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.)

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August 4, 2004
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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: Michael Baldwin

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1330 Broadway, Suite 1532
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July 15, 2004

Dianne Huntsberry

Re: Dianne Huntsberry v. County of Alameda
Unfair Practice Charge No. SF-CE-215-M
WARNING LETTER

Dear Ms. Huntsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 2004. Dianne Huntsberry alleges that the County of Alameda violated the Meyers-Milias-Brown Act (MMBA)¹ by wrongfully terminating her.

Investigation of the charge revealed the following. Charging Party is employed by the County of Alameda, Department of Probation, as a Group Counselor 2. As such, you are exclusively represented by the Alameda County Probation Peace Officers Association. With regard to Civil Service Code violations, Section 20(B) of the parties' Agreement provides as follows:

Exclusion of Civil Service Matters. The grievance procedure herein established shall have no application to matters over which the Civil Service Commission has jurisdiction pursuant to the County's charter or rules adopted thereunder.

On April 10, 2001, you were involved in an incident of child endangerment. More specifically, you witnessed a staged fight between two minors in County custody. This fight was staged by two of your fellow employees, who then made wagers on the outcome of the fight. The County contends that during this altercation you failed to assist the minors or call for help.

On April 26, 2001, the County instructed you to report for administrative interview regarding the above referenced incident. During this interview, you stated that you did not witness the incident nor did you witness your co-workers making any wagers during the fight. Subsequent witness statements indicated that you were standing within close proximity of the altercation and that you must have overheard your co-workers making bets on the outcome of the fight.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On June 14, 2001, the County placed you on administrative leave pending a complete investigation of the above incident. On or about July 12, 2001, the County's District Attorney filed criminal charges against you alleging two misdemeanor counts of child endangerment.

On July 18, 2002, the County issued you a notice of termination. The notice of termination indicated you were being terminated for multiple violations of the civil service code and the Probation Department juvenile hall manual. Additionally, the notice of termination indicated you had the right to appeal this decision to the County's Civil Service Commission.

On November 12, 2002, an Alameda County jury convicted you of two misdemeanor counts of child endangerment. During your criminal hearing, you were represented by an attorney selected and paid for by the Association. On December 27, 2002, your attorney, Christopher Miller, sent you a letter regarding your civil service appeal. In this letter, Mr. Miller advised you that success on appeal was extremely remote because of your criminal conviction. Mr. Miller indicated the same evidence presented at trial would be presented at your civil service hearing. Given that the burden of proof at the civil service hearing was lower than the burden of proof in a criminal trial, the County's Civil Service Commission would likely re-impose dismissal.

On June 3, and June 5, 2003, you participated in a civil service hearing regarding your prior termination. During this hearing, the County relied entirely on an argument of collateral estoppel. However, as the hearing officer noted, the County failed to provide a copy of the transcripts of your hearing and failed to provide sufficient evidence regarding the issues presented during your criminal trial. Given the County's failure to provide any of the pertinent information, the hearing officer rejected County's argument of collateral estoppel and ordered your reinstatement.

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

You contend the County wrongfully terminated you based on its investigation of the April 2001 incident. However, the concept of "wrongful termination" is not covered by the MMBA, but is instead codified in the Labor Code and other anti-discrimination statutes. As PERB lacks jurisdiction over alleged violations of the Labor Code, this charge must be dismissed.

While PERB lacks jurisdiction over Labor Code violations, PERB does have exclusive jurisdiction over allegations that the County discriminated against you because of your protected activity. To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (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 employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra.); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra.); (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; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

However, the charge fails to present any facts demonstrating you engaged in protected activity prior to your investigation and dismissal. As such, the charge still fails to state a prima facie violation of the MMBA.

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 July 22, 2004, 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