

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KARIN CHEN,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
TRANSPORTATION),

Respondent.

Case No. LA-CE-625-S

PERB Decision No. 1735-S

January 19, 2005

Appearance: Karin Chen, on her own behalf.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Karin Chen (Chen) of a Board agent's dismissal (attached) of her unfair practice charge. The unfair practice charge alleged that the State of California (Department of Transportation) violated the United States Constitution, the California Constitution and various sections of the California Government Code.

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

In addition, the Board notes that Chen has alleged violations of the United States Constitution, the California Constitution, and various sections of the Government Code. Unless violation of these provisions also allege an independent violation of the Ralph C. Dills

Act (Dills Act)¹, the Board lacks jurisdiction over violations of these statutes. (See e.g., State of California (Department of Corrections) (2004) PERB Decision No. 1559a-S.)

ORDER

The unfair practice charge in Case No. LA-CE-625-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

¹The Dills Act is codified at Government Code section 3512, 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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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
Tammy Samsel
Regional Attorney

Attachment

cc: Linda Nelson

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027



August 3, 2004

Karin Chen

Re: Karin Chen v. State of California (Department of Transportation)
Unfair Practice Charge No. LA-CE-625-S
WARNING LETTER

Dear Ms. Chen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 13, 2004. Karin Chen alleges that the State of California (Department of Transportation) violated the Ralph C. Dills Act (Dills Act)¹ by violating the United States Constitution, State of California Constitution and California Government Code. On August 3, 2004, I spoke with Chen regarding this charge. I explained the statute of limitations period and PERB's limited jurisdiction. My investigation revealed the following information.

Chen is employed by the State of California, Office of Engineering Services, and supervised by Jai Paul Thakur. On November 28, 2003, Thakur issued Chen a warning letter.

In January 2004, Chen began a series of email communications with Thakur regarding her job duties. Chen complained about the warning letter Thakur issued and requested clarification regarding how to properly perform her job. For example, on January 14, 2004, Chen requested that her duty statement be updated and that Thakur clarify which part of the contract renewal process was her responsibility. On April 2, 2004, Chen complained to Thakur about employee Vanessa Bow supervising her work, after Thakur had indicated Bow was not her supervisor. In addition to complaints and questions regarding her working conditions, these emails also referred to other employees' attendance, tardiness and conduct. The charge lists the dates Bow and another employee were late, and what time they arrived for work.

Chen's doctors instructed her to avoid Bow.² Bow's attorney wrote to Chen demanding she cease and desist from filing false, defamatory claims against Bow.

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² It is not clear from the charge exactly what transpired between Bow and Chen, but it appears there were issues between them which date back to at least 2003.

On June 3, 2004, Chen wrote to Thakur regarding the OES' move to a new building, and her work station's placement next to Bow.

On June 18, 2004, Thakur issued Chen an Expectations Memorandum, which advised her of his expectations of her conduct in the workplace. The memo indicated, in pertinent part:

You are hereby instructed that effective immediately, you are to have no further contact of any kind with Vanessa Bow. If a situation arises at work that involves Vanessa, you are expected to bring it to my attention and I will resolve the issue.

As we have previously discussed, your job duties do not require you to interact with Vanessa. You are expected to take direction from me, and if you have any questions about your work, I am available to assist you.

I want to ensure that my expectations are clear, so I want to give you specific examples of contact with Vanessa that are unacceptable:

You may not speak to Vanessa and you may not send her emails. You may not send emails to other employees in which you comment on Vanessa's attendance, job performance or conduct in the workplace.

You may not monitor Vanessa's attendance, conduct, or job performance.

* * * * *

I have previously told you that it is unacceptable for you to monitor the attendance, conduct or job performance of other employees, but you have continued to do so. You are expected to perform your job duties as described on your duty statement. These duties include backing up your co-worker when he is absent from work. As we have previously discussed, I will advise you when I want you to perform these back-up duties. If I do not tell you to perform these duties, I do not expect you to perform them. When I do assign these duties, I expect you to perform them without comment on the attendance, job performance, conduct of your coworker or any other employees. If you are unable to perform any duty I assign you, I expect you to immediately advise me.

The above-stated information fails to state a prima facie violation for the reasons that follow.

As we discussed on the telephone, PERB's jurisdiction is limited and does not include enforcement of the U.S. or California Constitutions. Nor does PERB's jurisdiction include enforcement of Government Code sections 19572. Thus, these allegations are dismissed.

Dills Act section 3514.5(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 statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The charge alleges Thakur issued Chen a Warning Letter on November 28, 2003. As Chen filed this charge on July 13, 2004, the six-month statute of limitations period does not extend back to cover this conduct. Thus, this allegation must be dismissed.

The charge also alleges Thakur issued Chen an Expectations Memorandum. Although the charge does not specifically allege Thakur retaliated against Chen for her participation in protected activities, it will be analyzed as such.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (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 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.]

Chen engaged in protected activities by asking her supervisor about and complaining about her working conditions throughout 2004. Thakur was aware of Chen's activities as he responded to her emails. The charge does not, however, demonstrate Thakur took adverse action against Chen. The Expectations Memorandum is merely a clarification of Chen's job duties and does not appear to be disciplinary in nature. Moreover, it appears that Chen requested such clarification from Thakur as she wrote several emails to Thakur regarding her confusion about when to back up other employees. Even if the memo is considered an adverse action, the charge does not demonstrate the requisite nexus.

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 August 12, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney

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