

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES
ASSOCIATION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (SONOMA),

Respondent.

Case No. SF-CE-716-H

PERB Decision No. 1755-H

March 1, 2005

Appearance: Susan Kizzie, Labor Relations Representative, for California State Employees Association.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State Employees Association (CSEA) of a Board agent's dismissal of its unfair practice charge. The unfair practice charge alleged that the Trustees of the California State University (Sonoma) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by discriminating against VaLinda Kyrias (Kyrias) for her protected activities.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, and CSEA's appeal. As discussed below, the Board partially adopts the dismissal and remands the remainder of the charge to the General Counsel's office for issuance of a complaint.

¹HEERA is codified at Government Code section 3560, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

Kyrias is employed by CSU as an administrative coordinator in the School of Social Sciences (School) and is CSEA's chief job steward. CSU and CSEA are parties to a collective bargaining agreement that expires on June 30, 2005.

The School employs several administrative coordinators, including Kyrias and Cookie Galvan (Galvan). Galvan is a probationary employee. Jane Wright (Wright) is a supervisor in the School. The School also employs Connie Lewsadder (Lewsadder), assistant to the Dean, and Erica Wilcher (Wilcher), operations analyst. Lewsadder and Wilcher work in the Dean's office.

Kyrias' Alleged Statements to Wilcher

In April 2004², one of the employees in the School received a negative probationary evaluation. The evaluation noted that the employee required more supervision than expected. The employee apparently filed a grievance over the evaluation. Although Kyrias was not the job steward representing this employee, she was privy to information disclosed during the grievance process. According to Kyrias, the information disclosed was that other rank and file employees had reported this particular employee's deficiencies to management.

Kyrias came to the conclusion that Wilcher was the one reporting to management. According to documents in the record, Kyrias approached Wilcher on April 9 and accused her of doing the Dean's office "dirty work." It was also alleged that Kyrias told Stephanie Wilkinson that Wilcher was a "danger to employees" and that Wilcher would "set them up to fail." Wilcher reported these comments to Wright. Although Kyrias does not

²All further dates are in 2004, unless otherwise noted.

specifically deny making these statements, in her amended charge she asserts that the alleged statements attributed to her are "nothing but office gossip" spread by Wilcher.

Kyrias' Alleged Statements to Galvan

The record contains copies of letters Galvan and others submitted to management complaining about Kyrias. According to those letters, Kyrias visited Galvan's office on May 4 and warned Galvan not to trust the administrative staff in the Dean's office and not to ask them for help because they were logging all information and would use it against Galvan in the probationary evaluation. Later that day Kyrias telephoned Galvan two additional times to reiterate her earlier comments about not trusting the Dean's office administrative staff and not asking for assistance from other administrative personnel.

In the amended charge, Kyrias admits that she paid a social visit to Galvan on May 4. During the course of a casual conversation, Galvan mentioned that she had often gone to the Dean's office for help. Kyrias asserts that in response, she told Galvan, "to be cautious about how much help she asked for from the Dean's office because it could end up in her probationary evaluation." Kyrias asserts that her warning to Galvan was based on facts gathered from a grievance involving another employee's probationary evaluation (discussed above). Kyrias further asserts that Galvan had approached her in the past over Galvan's probationary evaluation and that Kyrias had no reason to believe that Galvan would be offended over her comments.

On May 5, Galvan met with Wright concerning Kyrias' statements. Galvan was in tears when she recounted Kyrias' statements. She informed Wright that she was worried about retaining her job given Kyrias' statements, and that she did not wish to be involved in "this high school behavior". After this meeting with Wright, Galvan and Wilcher went to lunch

together. During lunch Galvan informed Wilcher about the "vicious and malicious" statements that Kyrias had made about Wilcher.

Reprimand of Kyrias

On May 13, Wright and Elaine Ledder, Dean of the School, called Kyrias into a meeting to hand her a written reprimand. The reprimand stated, in relevant part:

In the past few weeks, it was reported that you approached several staff members in the School of Social Sciences and told them something approximating 'not to trust the Dean's Office' and that they should not ask the Dean's office personnel for assistance because 'the Dean's office logs everything down and will use it against you in your performance evaluation.' An employee indicated that, in their mind, your comments were a vicious and malicious portrayal of the personnel who work in the School of Social Sciences Dean's Office.

.....

As an employee of this institution, you are expected to conduct yourself in a professional manner at all times, which includes being cooperative. Furthermore, your job description requires that you establish cooperative working relationships with faculty and staff and demonstrate excellent interpersonal skills and a strong customer-service orientation. Your divisive and inappropriate behavior over the past few weeks is adversely affecting the efficiency of the school, staff morale, and is counter productive to the goals of this University. Additionally, your conduct impairs the ability for our employees to have effective interaction or working relationships with other employees, thereby negatively impacting the success and function of the school. [Emphasis added.]

The reprimand also accused Kyrias of telling Wright in a May 7 meeting that Kyrias "did not trust anyone in the Dean's office, which includes Elaine Ledder, Connie Lewsadder, Erica Wilcher, and myself (Jane Wright)." In her amended charge, Kyrias denies the May 7 statement attributed to her by Wright.

Information Request

CSEA also alleges that CSU failed to provide documents in response to an information request. After receiving her reprimand, Kyrias demanded her personnel file, which CSU provided. Kyrias then demanded additional reference material and evaluations which she believed CSU possessed. CSU responded that no such documents existed.

DISCUSSION

Discrimination

CSEA's primary allegation is that CSU discriminated against Kyrias for her protected speech. To demonstrate unlawful discriminatory conduct in violation of HEERA section 3571 (a), the charging party must show that: (1) the employee exercised rights under HEERA; (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; Carlsbad Unified School District (1979) PERB Decision No. 89.)

It is undisputed that CSU reprimanded Kyrias for statements she made to Galvan and similar statements made to others.³ The primary issue then is whether those statements are protected under HEERA. For purposes of establishing a prima facie case, the Board finds that they are protected.

³The Board notes that the reprimand does not appear to be based on the statements Kyrias made to Wilcher. Those statements were arguably made to respond to Wilcher for communicating with management about another employee. Because the reprimand does not appear to be based on these statements, it is not necessary to address whether they are protected as part of this decision. To the extent this issue is raised at hearing, it can be addressed by the administrative law judge (ALJ).

HEERA protects a wide-range of employee speech. PERB has found that employee criticism of a supervisor on employment-related subjects is protected when its purpose is to advance the employees' interests in working conditions. (Regents of the University of California (1984) PERB Decision No. 449-H (adopting ALJ's proposed dec. at p. 143).) This protection extends to speech that is uncomplimentary to the employer; and even to speech containing inaccuracies and exaggerations. (Pomona Unified School District (2000) PERB Decision No. 1375; State of California (Department of Transportation) (1983) PERB Decision No. 304-S.) It is only when the speech is "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption" or "material interference" that it loses its protection. (Rancho Santiago Community College District (1986) PERB Decision No. 602 (Rancho Santiago).) As the Board stated in San Ramon Valley Unified School District (1982) PERB Decision No. 230:

[T]he danger of the exclusive representative being bypassed in negotiations was not serious enough to warrant the curtailment of any citizen's speech, irrespective of his employment status or content of his speech. [Quoting from City of Madison v. Wisconsin Employment Relations Commission (1976) 429 U.S. 167 [93 LRRM 2970], at pp. 14-15.]

In this case there is a factual dispute over what was said. Where there is a material factual dispute at this stage of the proceedings, the charging party's allegations must be accepted as true. (Golden Plains Unified School District (2002) PERB Decision No. 1489.) Accordingly, the Board must accept Kyrias' assertion that she only told Galvan "to be cautious about how much help she asked for from the Dean's office because it could end up in her probationary evaluation."

There is little dispute that Kyrias' statements involved working conditions. The statements were made in response to Galvan's comments regarding her frequent visits to the

Dean's office for help, and concerns over her probationary evaluation. Thus, Kyrias' statements are presumptively entitled to protection. This is especially true given Kyrias' position as chief job steward with its incumbent responsibilities. Thus, the sole remaining issue is whether her statements were so malicious or defamatory that they lost their protection. When compared to the facts in the cases cited above, the Board finds that Kyrias' statements did not lose their protection. For example, Rancho Santiago involved an employee who accused various supervisors of criminal activities and referred to them as "vindictive sadists," among other choice terms. In contrast, Kyrias simply told Galvan to be cautious of how much help she asked of the Dean's office. For purposes of establishing a prima facie case, the Board finds that Kyrias' statements were protected under HEERA. Accordingly, that portion of the dismissal is reversed and remanded to the General Counsel's office for issuance of a complaint.

Information Request

CSEA also alleges that CSU failed to provide necessary and relevant information in response to a request. According to the charge, CSEA requested a copy of Kyrias' personnel file which CSU provided. CSEA then requested additional reference material and evaluations regarding Kyrias. CSU responded that it did not possess these documents. CSEA has provided no facts suggesting that CSU was not being truthful. There is no allegation that even CSEA believes such documents exist. Accordingly, CSEA has failed to demonstrate that CSU failed to provide necessary and relevant information and that portion of the dismissal is affirmed.

ORDER

The Board partially AFFIRMS the dismissal in Case No. SF-CE-716-H and REVERSES and REMANDS the remainder of the charge to the Office of the General Counsel for issuance of a complaint.

Member Whitehead joined in this Decision.

Chairman Duncan's dissent begins on page 9.

DUNCAN, Chairman, dissenting. I respectfully dissent. As the majority points out, under the Higher Education Employer-Employee Relations Act the charging party must show that: (1) the employee exercised rights; (2) the employer had knowledge of the exercise of those rights; and (3) the employer took adverse action as a result of the exercise of those rights. Unlike the majority, I do not believe that the statements that VaLinda Kyrias (Kyrias) will admit she made were made in the exercise of her rights.

In setting forth examples of the wide range of employee speech that is protected, the majority gives examples of criticism of a supervisor, not applicable here, and speech that contains inaccuracies and exaggerations.

The majority states there is a factual dispute over what was said by Kyrias. Kyrias denies what a number of other employees have documented. She does, however, admit certain statements were made to others, particularly Cookie Galvan (Galvan), while Galvan was working.¹

The majority believes that this makes Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains) applicable and thus a complaint should issue.

In Golden Plains, the Board found that the essential facts of the charge must be accepted as true. Kyrias admits she told Galvan "to be cautious about how much help she asked for from the Dean's office because it could end up in her probationary evaluation." Contrary to the majority opinion that "[

is little dispute that Kyrias' statements involved working conditions and are presumptively entitled to protection," I believe that is an inaccurate legal conclusion.

¹Although Kyrias alleges that in every instance she made statements to Galvan during Galvan's work time, she herself was on a break.

A legal conclusion is not an essential fact. Without accepting that flawed legal conclusion, there is no prima facie case and I would therefore dismiss the charge.