

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RICHARD VALENTINE MODIC, JR.,

Charging Party,

v.

SACRAMENTO MUNICIPAL UTILITY
DISTRICT,

Respondent.

Case No. SA-CE-365-M

PERB Decision No. 1838-M

May 10, 2006

Appearances: Richard Valentine Modic, Jr., on his own behalf; Bruce Notareus, Senior Attorney, for Sacramento Municipal Utility District.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Richard Valentine Modic, Jr. (Modic) of a Board agent's dismissal (attached) of his unfair practice charge for failure to state a prima facie case. The charge alleged that the Sacramento Municipal Utility District (SMUD) violated the Meyers-Milias-Brown Act (MMBA)¹ when it discriminated against Modic for engaging in protected activity. Specifically, Modic alleged that this conduct constituted a violation of the National Labor Relations Act (NLRA) (29 U.S.C. secs. 151-169, 185(a)).²

The Board reviewed the entire record in this case, including the unfair practice charge, the documents attached thereto, the warning and dismissal letters, Modic's appeal and

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

²The Board neither administers nor enforces the NLRA. For the purposes of this unfair practice charge, we considered applicable provisions of the MMBA.

SMUD's response. We find the Board agent's dismissal to be free of prejudicial error. In addition, the Board reviewed the first amended unfair practice charge, which was filed after the Board agent dismissed the charge, the documents attached thereto, and SMUD's response. The Board finds the first amended unfair practice charge was not timely filed and, therefore, not subject to review on the merits. For these reasons, the Board adopts the Board agent's dismissal as a decision of the Board itself.

BACKGROUND

On October 26, 2005, Modic, filed an unfair practice charge, alleging, among other things, that he was discriminated against for engaging in protected activities. On November 7, 2005, the Board agent dismissed the charge for failure to state a prima facie case. On November 8, 2005, after the initial charge was dismissed, Modic filed an amended unfair practice charge. Later, on November 28, 2005, Modic appealed the dismissal. Because the amended charge was filed after the issuance of the dismissal letter, Modic's first amended unfair practice charge was not considered by the Board agent.

As discussed above, the Board agent's dismissal of the initial charge was free from prejudicial error. The following discussion addresses the disposition of the first amended charge.

DISCUSSION

PERB Regulation 32621³ provides that a charging party may file an amended charge "[b]efore the Board agent issues or refuses to issue a complaint." Modic filed his amended charge on November 8, 2005. Since the charge was dismissed on November 7, 2005, the amended charge was not timely filed by operation of PERB Regulation 32621.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

The Board, in its discretion, is permitted to excuse a late filing upon a showing of good cause. In this case, Modic was informed in a warning letter dated, October 28, 2005, that his charge failed to state a prima facie case. The warning letter also informed Modic that, unless he amended his charge by November 4, 2005, it would be dismissed. Thus, the warning letter clearly informed Modic of his obligation to file an amended charge by November 4, 2005, or risk dismissal of his case.

By filing his charge on November 8, 2005, Modic failed to comply with both the deadline imposed by the warning letter and the limitation period imposed by PERB Regulation 32621. Since he presented no evidence to support a finding of good cause, Modic's late filing is not excused. Consequently, the first amended unfair practice charge was not timely filed and, therefore, not subject to review on the merits.

ORDER

The unfair practice charge in Case No. SA-CE-365-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377



November 7, 2005

Richard Valentine Modic, Jr.

Re: Richard Valentine Modic, Jr. v. Sacramento Municipal Utility Dist
Unfair Practice Charge No. SA-CE-365-M
DISMISSAL LETTER

Dear Mr. Modic:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 26, 2005. Your charge alleges that the Sacramento Municipal Utility District (SMUD) violated the Meyers-Milias-Brown Act (MMBA)¹ by discriminating against you for engaging in protected activity.

I indicated in the attached letter dated October 28, 2005, 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 by November 4, 2005, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, the charge is being dismissed based on the facts and reasons contained in the attached October 28, 2005 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 name and number, and the original and five (5) copies of all documents must be provided to the Board.

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.

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 _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Bruce Notareus

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377



October 28, 2005

Richard Valentine Modic, Jr.

Re: Richard Valentine Modic, Jr. v. Sacramento Municipal Utility District
Unfair Practice Charge No. SA-CE-365-M
WARNING LETTER

Dear Mr. Modic:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 26, 2005. Your charge alleges that the Sacramento Municipal Utility District (SMUD) violated the Meyers-Milias-Brown Act (MMBA)¹ by discriminating against you for engaging in protected activity.

The charge provides the following relevant factual allegations. You have been employed by SMUD as a meter reader since October 1, 2001. On September 26, 2005, your employment with SMUD was terminated.

The charge alleges that at some point you asked for a union representative. The charge also states that you were placed on involuntary leave. You contend that you were discharged from employment without just cause.

Based on the facts stated above, the charge does not state a prima facie case.

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.)

The charging party has the burden of providing specific evidence which demonstrates a prima facie violation of the MMBA. Your charge does not comply with PERB Regulation 32615(a)(5) by providing a "clear and concise statement of the facts."

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.

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 and the 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.).

The charge does not state a prima facie violation of discrimination under the MMBA. The evidence does not establish that you engaged in protected activity in close temporal proximity to the adverse action taken by the employer. Further, there is no evidence that the employer's conduct was motivated by any protected activity. Accordingly, the charge must be dismissed.

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

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amended charge or a request to withdraw the charge by November 4, 2005, your charge will be dismissed.

Sincerely,

Robin W. Wesley
Regional Attorney