STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERNEST MARCOS SAENZ, Charging Party, v. COUNTY OF SAN DIEGO (HEALTH & HUMAN SERVICES), Respondent.	Case No. LA-CE-314-M PERB Decision No. 2042-M June 29, 2009

Appearance: Ernest Marcos Saenz, on his own behalf.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Ernest Marcos Saenz (Saenz) of the dismissal by an administrative law judge (ALJ) (attached) of his unfair labor practice charge. The charge alleged that the County of San Diego (Health & Human Services) violated the Meyers-Milias-Brown Act (MMBA)[1] by discriminating against him for engaging in protected conduct. Saenz alleged that this conduct constituted a violation of MMBA sections 3502 and 3506.

The ALJ ruled that the unfair practice charge was filed outside of the six-month statute of limitations. Accordingly, the ALJ concluded the charge was not timely filed and dismissed the complaint.

We have reviewed the entire record in this matter and find the proposed decision was well-reasoned, adequately supported by the record and in accordance with applicable law.

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

Accordingly, the Board hereby affirms the ALJ's dismissal of the instant unfair practice charge and adopts the proposed decision as a decision of the Board itself, subject to the following discussion regarding the commencement of the statute of limitations.[2]

DISCUSSION

In his appeal, Saenz claims he did not have actual knowledge that he was being retaliated against until an April 2006 hearing before the Civil Service Commission in which his employer allegedly admitted that Saenz was sent for a fitness for duty examination because he wanted to start a union. The Board, however, has long held that the six-month limitation period commences on the date that the conduct constituting an unfair labor practice is discovered, and not the date of discovery of the legal significance of that conduct. (*Compton Unified School District* (2009) PERB Decision No. 2016; *Empire Union School District* (2004) PERB Decision No. 1650.) Consequently, we find the statute of limitations did not commence in April 2006.

In the instant case, Saenz was aware of the January 2005, administrative leave and fitness for duty examination, as well as the January 2006 demotion. Consequently, the statute of limitations commenced in this case in January 2005 and January 2006, respectively. Because Saenz filed his claim on August 15, 2006, these adverse actions occurred outside the six-month statutory period. Accordingly, Saenz' charge was not timely filed.

[2] In *Long Beach Community College District* (2009) PERB Decision No. 2002, the Board held that the statute of limitations is not an affirmative defense, but an element of the charging party's prima facie case. In light of this holding, we do not adopt the statement on page 5 of the proposed decision that states, "[t]he statute of limitations is an affirmative defense that has been raised by the respondent County in this case."

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-314-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ERNEST MARCOS SAENZ, Charging Party, v. COUNTY OF SAN DIEGO (HEALTH & HUMAN SERVICES), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-314-M PROPOSED DECISION (6/29/2007)

Appearances: Ernest Marcos Saenz, on his own behalf; William H. Songer, Senior Deputy County Counsel, for County of San Diego (Health & Human Services).

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a public employee alleges that a public agency retaliated against him for union activities, in violation of the Meyers-Milias-Brown Act (MMBA).[1] The agency denies any retaliation and contends the charge was untimely.

Ernest Marcos Saenz (Saenz) filed an unfair practice charge against the County of San Diego (County) on August 15, 2006. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the County on September 29, 2006. The County filed an answer to the PERB complaint on October 20, 2006, contending in part that the charge was untimely.

PERB held an informal settlement conference on October 25, 2006, but the case was not settled, so PERB held a formal hearing on February 20-21, 2007. With the receipt of the final post-hearing brief on April 9, 2007, the case was submitted for decision.

[1] MMBA is codified at Government Code section 3500 and following.

FINDINGS OF FACT

Saenz is a public employee under MMBA, and the County is a public agency under MMBA. The PERB complaint alleges in part:

> 3. Beginning on or about October 2004, and continuing to the present, Charging Party [Saenz] exercised rights guaranteed by the Meyer-Milias-Brown Act by discussing with his coworkers the possibility of unionizing their job classification.
>
> 4. On or about January 14, 2005, Respondent [the County], acting through its agent, Jolie Ramage, took adverse action against Charging Party by placing him on administrative leave and ordering that he undergo a fitness for duty examination.
>
> . . .
>
> 6. On or about January 17, 2006, Respondent took adverse action against Charging Party by demoting him from a Program Specialist II to a Program Specialist I.

The PERB complaint further alleges that the County took the adverse actions because of Saenz's protected activities and thus violated MMBA section 3506.

As previously noted, Saenz filed his charge on August 15, 2006. This was more than six months after the alleged adverse actions of January 14, 2005, and January 17, 2006. In its position statement responding to Saenz's charge, the County argued in part that the charge was therefore "stale." PERB nonetheless issued a complaint; the official file does not indicate why.

As also previously noted, the County contended in its answer to the PERB complaint that Saenz's charge was untimely. In his post-hearing brief, Saenz does not directly address this contention.

In these findings of fact I shall focus on the contention that Saenz's charge was untimely, because if that contention is correct I have no basis for otherwise considering the facts of the case. I shall begin with October 2004, because that is when the PERB complaint alleges that Saenz began discussing with his co-workers the possibility of unionizing their job

classification. I shall rely entirely on Saenz's own allegations, evidence and arguments, as presented in his charge, at the hearing, and in his post-hearing brief.

In his brief, Saenz says that County management harassed him even before October 2004, but that "when I [Saenz] began discussing organizing a union with my peers, the harassment and intimidation intensified." He further states that "as soon as I started union organizing, the hostility increased and my managers were joined by the Personnel Department to ensure that I would sooner or later be fired."

Saenz testified that at a holiday party in December 2004 he gathered the names of fellow employees who were interested in a union, and that immediately thereafter his manager told him he would be written up and probably given a Performance Improvement Plan (PIP). He further testified that every time he brought up the union he was immediately reprimanded.

On January 7, 2005, Saenz received from management both a Letter of Warning and a PIP, which he says in his brief was the first in a series that led to his demotion. Saenz also states that he asked management "that I be allowed to have another person present at the meeting as provided by the personnel policy of my Employer, but they denied my request."

The PIP was based in part on a Counseling Memo dated September 9, 2004. Saenz states in his brief that his response to the Counseling Memo had "disproved the allegations" contained therein, and that a subsequent Counseling Memo dated September 28, 2004, had rescinded some accusations and minimized others, making the statements in the January 7, 2005 Letter of Warning and PIP "false and invalid." According to Saenz, management "completely disregarded [his] response and accompanying evidence [citation to record omitted]." Saenz adds, "My Employer has used this method of denying me due process and falsifying the outcome of Counseling Memos and verbal warnings I was issued since I began my union activities in October 2004."

On January 14, 2005, Saenz was placed on administrative leave, and on January 28, 2005, he was referred for a fitness for duty examination. According to Saenz, management refused to tell him why he was being referred. Also according to Saenz, the doctor who examined him said the referral was "inappropriate."

Saenz's PIP ended May 9, 2005. On May 10, 2005, he was informed he still did not meet expected performance standards. On August 26, 2005, he completed another PIP, and on August 31, 2005, he was again informed he did not meet expected performance standards. Saenz testified he was not given the resources, assistance and training necessary for him to successfully complete either PIP.

In early November 2005, Saenz discussed unionization at a staff meeting. On November 8, 2005, his manager sent him an e-mail message stating in part, "You are not to take apart [sic] in planning any future meetings." Also on November 8, 2005, Saenz had a meeting with management, who according to his notes did the following:

> - Informed me [Saenz] that management was aware of my contacting the union & talking to staff about unionizing our classification
>
> - Ordered [Saenz] to stop all communication about the union w/ staff; stop contacting union; leave union matters to shop stewarts [sic]

In his post-hearing brief, Saenz states:

> Indeed, I felt so intimidated after meeting with [management] that a week later I informed [a manager] that I ceased all union activities and had learned my lesson. She responded by saying that I had made a "wise choice" and that is why I believe that I was demoted instead of terminated on January 17, 2006 [citation to record omitted].

Saenz was indeed demoted on January 17, 2006, partly on the basis of his failure to successfully complete either PIP. As previously noted, he filed his unfair practice charge on August 15, 2006, almost seven months later.

ISSUE

Is the charge timely?

CONCLUSIONS OF LAW

PERB is prohibited 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. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) 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.)[2] The statute of limitations is an affirmative defense that has been raised by the respondent County in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) As the charging party, Saenz therefore 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).

Because Saenz filed his unfair practice charge on August 15, 2006, the question in this case is whether he knew or should have known of the conduct underlying the charge before February 15, 2006, six months before the charge was filed. Saenz's own allegations, evidence and arguments show that he knew about the alleged adverse actions -- the January 2005 administrative leave and fitness for duty referral and the January 2006 demotion -- when they happened. Saenz offers no reason why the limitations periods with regard to these alleged adverse actions did not begin to run in January 2005 and January 2006 respectively, and I can see no such reason.

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[2] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

I conclude, on the basis of Saenz's own allegations, evidence and arguments, that Saenz knew or should have known about the alleged retaliation against him well before February 15, 2006, and should therefore have filed his charge well before August 15, 2006. Saenz's charge was thus untimely, and the PERB complaint based on it must be dismissed.[3]

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No. LA-CE-314-M, Ernest Marcos Saenz v. County of San Diego (Health & Human Services), are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an extension of time to file exceptions must be filed with the Board itself (Cal. Code Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

[3] Because I conclude the charge was untimely, I make no findings and reach no conclusions as to whether there actually was retaliation against Saenz. I have not found it necessary to consider the County's evidence and arguments that there was no retaliation.

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130 and Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge