STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOLLETT JONES-BOYCE, Charging Party, v. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, Respondent.	Case No. LA-CE-419-M PERB Decision No. 2066-M September 29, 2009

Appearance: Lollett Jones-Boyce, on her own behalf.

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

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lollett Jones-Boyce (Jones-Boyce) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Metropolitan Water District of Southern California (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by placing Jones-Boyce on paid administrative leave and later terminating her employment and health benefits in retaliation for her "exercis[ing] rights guaranteed under the MMBA." The Board agent dismissed the charge for failure to state a prima facie case of retaliation.

The Board has reviewed the dismissal and the record in light of Jones-Boyce's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

BACKGROUND

The charge, amendments and exhibits in this matter total more than 400 pages. Most of these documents are relevant to claims Jones-Boyce has pursued or is pursuing against the District with other agencies or in court. However, few of them are germane to the issue before the Board on appeal: whether the District took adverse action against Jones-Boyce because of her exercise of rights granted by the MMBA. Only the facts relevant to this issue are set forth here.

Between 2003 and 2006, Jones-Boyce filed several complaints/claims against the District: (1) a discrimination complaint with the California Department of Fair Employment and Housing; (2) a civil lawsuit in Los Angeles County superior court; (3) an internal discrimination complaint; and (4) a claim for workers' compensation benefits. Jones-Boyce was placed on medical leave in October 2003. She returned to work in February 2006 and was placed on paid administrative leave two months later. She returned to work again on October 2, 2006.

Soon after her return in October 2006, Jones-Boyce began to miss work for various medical and legal appointments. On December 11, 2006, Jones-Boyce's supervisor, Bobbi Becker (Becker), informed her that she had until January "to come to work five days per week without taking any time off including appointments." On February 6, 2007, Becker issued Jones-Boyce a written directive requiring her to request leave at least 48 hours in advance for medical appointments and five days in advance for non-medical appointments.

Over the next two weeks, Becker and Jones-Boyce met several times to discuss Jones-Boyce's alleged failure to comply with Becker's directive. At each meeting, Jones-Boyce was accompanied by a representative from the American Federation of State, County and

Municipal Employees, Local 1902 (AFSCME), first Steve Koffroth (Koffroth), then Carlos Castrillo (Castrillo).

On February 15, 2007, Jones-Boyce and Castrillo discussed filing a grievance over Becker's directive. Castrillo suggested that Jones-Boyce file a PERB charge because the grievance process could be lengthy. On February 20, Castrillo told Becker that AFSCME would file a grievance if she did not accommodate Jones-Boyce's medical appointments. Becker responded that she intended to place Jones-Boyce on a 90-day corrective action plan for her continued unauthorized absences.

On the morning of February 21, 2007, Castrillo informed Jones-Boyce of Becker's response. Later that morning, Jones-Boyce left the office ill after informing Becker by email that her condition was becoming worse. The District placed Jones-Boyce on unpaid medical leave that same day.

Sometime after February 21, 2007, Castrillo again offered to file a grievance over Becker's conduct on Jones-Boyce's behalf. Jones-Boyce alleged she told Castrillo "it was too late to do so" and she "could not wait for the grievance process since [Castrillo] informed me that process is lengthy." AFSCME never filed a grievance over the matter.

On April 19, 2007, Jones-Boyce notified the District of her intent to file a claim for long-term disability benefits. The following day, Jones-Boyce signed a settlement agreement resolving her civil suit against the District. Section 1.4 of the agreement provided that the District would place Jones-Boyce on paid administrative leave for 180 days following the governing board's approval of the settlement.[2] Section 1.5 provided that Jones-Boyce would

[2] The District provided a copy of the settlement agreement as part of its position statement. In evaluating whether an unfair practice charge states a prima facie case, PERB is not required to ignore facts provided by the respondent and consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

"resign or retire" at the end of the 180-day leave period or when the California Public Employees Retirement System (CalPERS) granted her request for disability retirement, whichever came first.

Although the settlement agreement provided that Jones-Boyce's paid administrative leave would not begin until the governing board approved the agreement, the District nonetheless placed her on paid administrative leave effective April 20, 2007. The District did not notify Jones-Boyce of her placement on paid leave at this time; she learned of the status change from the District's disability insurance carrier in response to her claim for benefits. Jones-Boyce's attorney later informed her that the extra paid leave time was a "gift" from the District.

The District's governing board approved the settlement agreement on May 8, 2007. Jones-Boyce signed a request for dismissal of her civil case on May 11 and the case was dismissed by the superior court at a hearing on May 15. Jones-Boyce did not attend the hearing because she was hospitalized the day before. On July 3, the District's disability insurance carrier denied Jones-Boyce's claim for long-term disability benefits.

On December 6, 2007, the District's general counsel informed Jones-Boyce by letter that her "employment relationship with Metropolitan ended on November 5, 2007, pursuant to the terms of the Settlement Agreement signed on April 20, 2007." By letter of that same date, the District's human resources department informed Jones-Boyce that her medical coverage would terminate on December 31, 2007, and that she may elect to continue her coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985, or COBRA.

Dismissal and Appeal

Jones-Boyce filed the instant unfair practice charge on November 28, 2007, and amended it eight times. On October 17, 2008, the Board agent dismissed the charge for failure to state a prima facie case of retaliation. The Board agent found the charge failed to allege that Jones-Boyce engaged in any activity protected by the MMBA. He also found that her placement on paid administrative leave and discharge were not adverse actions.

On appeal, Jones-Boyce contends the Board agent failed to properly consider the totality of the circumstantial evidence of retaliation presented in her charge. She argues that, based on this circumstantial evidence, "a trier of fact can and should have reasonably inferred that the District violated Appellant's rights under the MMBA and such violations were based on a wrongful motive."

DISCUSSION

1. Late Filed Addendum to Appeal

PERB Regulation 32635(a)[3] requires that an appeal of a Board agent's dismissal of an unfair practice charge be filed within 20 days of the date the dismissal is served on the charging party. The charging party is free to supplement the appeal during the 20-day period. (See *San Leandro Unified School District* (2007) PERB Decision No. 1924 [Board accepted three addendums to appeal filed during 20-day appeal period].) However, an addendum filed after the 20-day period has expired is untimely unless good cause is shown for the late filing pursuant to PERB Regulation 32136.[4] (*San Leandro Unified School District* (2007) PERB

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

[4] PERB Regulation 32136 states in full: "A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations."

Order No. Ad-366.) The Board has found good cause when a party makes a conscientious effort to timely file and the late filing was caused by circumstances beyond the party's control, such as a mailing or clerical error. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) If the reason for the untimely filing is "reasonable and credible," the Board evaluates whether the opposing party would suffer any prejudice as a result of the excused late filing. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.)

The Board's Appeals Assistant granted Jones-Boyce an extension until April 30, 2009, to file her appeal in this matter and she did so on that date. On July 31, 2009, Jones-Boyce filed an addendum consisting of a letter to her attorney (along with supporting documents) in which she discussed a proposed settlement of her workers' compensation claim and informed him that CalPERS was assisting with reimbursement of medical expenses she paid during her 2003-2006 medical leave. The addendum provides no reason for the late filing. Further, nothing in the addendum indicates Jones-Boyce intended for it to be filed on or before April 30, 2009, and that it arrived at PERB late as a result of circumstances beyond her control. Therefore, Jones-Boyce has failed to establish good cause for the Board to accept her late-filed addendum.

2. Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the exercise of those rights.

(*County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M; *Novato Unified School District* (1982) PERB Decision No. 210.)[5]

a. *Protected Activity*

The statutes administered by PERB, including the MMBA, regulate specific conduct by public employers and employee organizations concerning employer-employee relations. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.) These statutes do not regulate every aspect of the public employer's conduct. (*Ibid.*) Thus, PERB may only remedy retaliation that was taken because an employee exercised rights granted by one of the statutes PERB administers.

The primary allegation in Jones-Boyce's charge is that the District placed her on paid administrative leave because she informed the District of her intent to file a claim for long-term disability benefits. Because the MMBA does not grant an employee the right to file a claim for disability benefits, that conduct is not protected under the statute. Similarly, Jones-Boyce's discrimination complaints[6] and workers' compensation claim do not constitute protected activity under the MMBA because they do not implicate rights granted by the statute. (*State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S; *Salinas City Elementary School District* (1996) PERB Decision No. 1131.)

Nevertheless, the charge did allege that Jones-Boyce engaged in two activities protected by the MMBA: (1) utilizing AFSCME representation in her dispute with the District over Becker's leave notice directive (*County of Merced* (2008) PERB Decision No. 1975-M;

[5] 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. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[6] Jones-Boyce did not provide copies of the discrimination complaints or details of their contents.

Los Angeles Unified School District (1992) PERB Decision No. 957); and (2) filing the instant unfair practice charge (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270; *Riverside Unified School District* (1987) PERB Decision No. 639).

In her appeal, Jones-Boyce asserts that she "participated in union activity" by sending a complaint letter to a member of the District's governing board on September 11, 2006. Making a complaint to the employer about working conditions that affect employees generally is a protected activity. (*Los Angeles Unified School District* (1999) PERB Decision No. 1338; *The Regents of the University of California (Berkeley)* (1983) PERB Decision No. 308-H.) Here, Jones-Boyce complained to the District board member about the conduct of the law firm representing the District in her civil action, not about working conditions. Further, there is no indication that AFSCME was involved in the complaint in any way. Therefore, Jones-Boyce's September 11, 2006 letter did not constitute protected activity under the MMBA.

b. *Employer's Knowledge of Protected Activity*

To prove that an employer took adverse action against an employee because of the employee's protected activity, the charging party must establish that the employer had knowledge of the employee's protected activity. (*Los Angeles Community College District* (2004) PERB Decision No. 1668.) PERB may impute a subordinate employee's knowledge of protected activity to the decision maker if the subordinate employee was directly involved in the adverse action. (*City of Modesto* (2008) PERB Decision No. 1994-M.) PERB will not impute such knowledge to the decision maker when the employee's protected activity was known only to employees who played no role in the adverse action. (*Sacramento City Unified School District* (1985) PERB Decision No. 492.)

Clearly, Becker had knowledge of Jones-Boyce's use of AFSCME representation in February 2007 because she attended meetings where Jones-Boyce was represented by Koffroth

or Castrillo and Castrillo spoke with Becker about her directive to Jones-Boyce. However, the charge does not show that Becker had any role in placing Jones-Boyce on paid administrative leave or terminating her employment and health benefits. Consequently, we cannot impute Becker's knowledge of Jones-Boyce's use of union representation to the District. Nor does the charge allege that any District employee other than Becker was aware of AFSCME's efforts on Jones-Boyce's behalf in February 2007. Thus, the charge failed to establish that the District employees who decided to place Jones-Boyce on paid administrative leave and terminate her employment and health benefits knew of her use of AFSCME representation. It is undisputed, however, that the District had knowledge of Jones-Boyce's unfair practice charge, as the charge was properly served on the District and the District filed a position statement in response to the charge.

c. *Adverse Action*

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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; fn. omitted.)

PERB has held that placing an employee on involuntary paid administrative leave is an adverse action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980; *Oakland Unified School District* (2003) PERB Decision No. 1529.) However, in both of those cases the employee went from full employment status to paid administrative

leave. In contrast, Jones-Boyce was on unpaid medical leave at the time the District placed her on paid administrative leave. Applying the objective test from *Newark Unified School District, supra*, we conclude this was not adverse to Jones-Boyce's employment because she gained pay as a result of the status change.

Nonetheless, Jones-Boyce contends that her placement on paid administrative leave was an adverse action because it prevented her from obtaining long-term disability benefits. While the charge presented evidence that the District's disability insurance carrier denied Jones-Boyce's claim for long-term benefits, it failed to allege facts to establish that benefits were denied because she was on paid administrative leave. Thus, the charge does not establish that the District took adverse action against Jones-Boyce by placing her on paid administrative leave.

It is well-established that termination of employment is an adverse action. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H.) However, the District did not terminate Jones-Boyce's employment on November 5, 2007. Rather, it merely implemented her voluntary resignation on that day pursuant to the April 20, 2007 settlement agreement. Under these circumstances, the District's conduct did not constitute an adverse action.

Additionally, Jones-Boyce appears to allege that the District's termination of her health benefits was an adverse action. However, the District terminated Jones-Boyce's health benefits because she resigned. Thus, termination of her health benefits did not constitute an adverse action.

d. *Nexus Between Protected Activity and Adverse Action*

Even if the District's placement of Jones-Boyce on paid administrative leave and termination of her employment and health benefits constituted adverse actions, the charge

failed to establish the required nexus between these actions and her filing of the instant unfair practice charge.[7] As Jones-Boyce points out in her appeal, "[u]nlawful motive is the specific nexus required in the establishment of a prima facie case. . . . Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Trustees of the California State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.)

To guide its examination of circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors that may be used to establish a prima facie case. 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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the

[7] Because the charge failed to establish that the District employees who placed Jones-Boyce on paid administrative leave and later terminated her employment and health benefits knew of her use of AFSCME representation in February 2007, we need not examine whether the charge established a nexus between her use of AFSCME representation and the alleged adverse actions.

employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District*, *supra*; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*; *Novato Unified School District*, *supra*.)

Typically, the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself. (*Moreland Elementary School District*, *supra*; *Regents of the University of California* (1998) PERB Decision No. 1263-H; *American Thread Co. v. National Labor Relations Bd.* (4th Cir. 1980) 631 F.2d 316, 322.) However, when the adverse action was taken *before* the protected activity occurred, a prima facie case cannot be established because the employee's future protected activity could not have motivated the employer to take the adverse action. (*Berkeley Unified School District* (2004) PERB Decision No. 1702.)

The District placed Jones-Boyce on paid administrative leave on April 20, 2007 and terminated her employment pursuant to the April 20, 2007 settlement agreement on November 5, 2007. She filed the instant unfair practice charge on November 28, 2007. Thus, both of these alleged adverse actions occurred before Jones-Boyce filed her charge. Therefore, pursuant to *Berkeley Unified School District*, *supra*, the timing precludes finding a causal relationship between the filing of the charge and her placement on paid administrative leave and termination.

The District notified Jones-Boyce on December 6, 2007, that her health benefits would terminate on December 31, 2007. While this occurred shortly after Jones-Boyce filed the

instant charge, nothing in the charge or supporting documents indicates that the termination of benefits was motivated by the filing of the charge. Instead, as discussed above, the termination of benefits was a result of her resignation effective November 5, 2007. Accordingly, the charge failed to establish a nexus between the filing of Jones-Boyce's unfair practice charge and the District's termination of her health benefits.

In sum, the charge failed to establish a prima facie case that the District placed Jones-Boyce on paid administrative leave and later terminated her employment and health benefits because she used AFSCME representation and filed an unfair practice charge. Accordingly, because the charge did not allege facts sufficient to show that the District took adverse action against Jones-Boyce because she exercised rights granted by the MMBA, we affirm the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. LA-CE-419-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.