STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL MENASTER, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES), Respondent.	Case No. SF-CE-240-S PERB Decision No. 2072-S October 27, 2009

Appearances: Michael Menaster, on his own behalf; State of California (Department of Personnel Administration) by Frolan R. Aguiling, Labor Relations Counsel, for State of California (Department of Social Services).

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

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Michael Menaster (Menaster) to the proposed decision (attached) of an administrative law judge (ALJ). The PERB complaint alleged that the State of California (Department of Social Services) (DSS or State) violated Ralph C. Dills Act (Dills Act) section 3519(a)[1] by: (1) denying Menaster the right to be represented by his employee organization at a meeting to discuss Menaster's behavior; and (2) retaliating against Menaster for engaging in protected activity by issuing him an expectations memo and memo for record, placing him on administrative leave as part of the process to reject him on probation, and failing to reinstate him following his separation from employment.

[1] The Dills Act is codified at Government Code section 3512 et seq.

BACKGROUND[2]

Since shortly after his hire in 2005, Menaster was the subject of numerous employee complaints concerning his behavior, including comments that he was intrusive, loud, gossiped, talked excessively, and made inappropriate and offensive comments to and about co-workers. In addition, he made numerous complaints about his working conditions to his employee representative. After an incident on February 1, 2006, in which he made an agitated phone call to his union representative, DSS placed Menaster on administrative time off (ATO) while it prepared to reject him on probation. The central issues in this case are whether DSS denied Menaster representation during a meeting with management and retaliated against Menaster for engaging in protected activity.

After a hearing on the merits, the ALJ found that the State did not violate Menaster's rights under the Dills Act and dismissed the complaint and underlying unfair practice charge.

The Board has reviewed the entire record in this case. Based upon this review, we find the proposed decision was well-reasoned, adequately supported by the record, and generally in accordance with applicable law. We therefore adopt the proposed decision as a decision of the Board itself, subject to the following discussion of the analysis of whether the decision to place Menaster on ATO in preparation for rejecting him on probation was made for retaliatory reasons.[3]

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[2] The Board summarizes the facts only briefly here. The full statement of facts is set forth in the ALJ's proposed decision.

[3] In adopting the ALJ's proposed decision, we do not adopt the following statement at page 33: "A document which is placed in an employee's personnel file after he leaves employment may interfere with the free exercise of such rights, if not with the past covered employer, but a future covered employer, or may have other negative consequences, for example, in the search for new employment." Given our adoption of the ALJ's conclusion that the draft documents that were placed in the supervisor's drop file but were never placed in his personnel file did not constitute adverse action, we will not speculate on the impact the

DISCUSSION

Administrative Time Off

Menaster excepts to the ALJ's conclusion that DSS did not place him on ATO or seek to reject him on probation in retaliation for having engaged in protected activity. We agree with the ALJ that, while Menaster established a prima facie case of discrimination, the State adequately rebutted the prima facie case by presenting substantial evidence that the decision to place Menaster on ATO was based upon performance issues as reflected in the history of counseling Menaster regarding his problems relating to coworkers, his failure to exercise sound discretion in interacting with them, the unprofessional nature of the content of his communications with them, and the degree to which he caused interference with the work of others as well as himself. We decline to adopt, however, the statement at page 35 of the proposed decision that the decision to reject Menaster on probation was not alleged in the complaint. The complaint states: "Respondent, acting through its agent Schoenfelder, took adverse action against Menaster by . . . placing Menaster on administrative leave as a part of the process to reject Menaster on probation." (Emphasis added.) The complaint can reasonably be construed to include the rejection on probation as part of the alleged adverse action taken against Menaster. In addition, even an unalleged violation can be used to support a charge where: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue.

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placement of such documents in a personnel file might have on an employee's future employment.

(*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C (*Fresno County*).) The alleged violation also must have occurred within the applicable statute of limitations period. (*Fresno County*.)

By alleging that the placement of Menaster on administrative leave was part of the process to reject Menaster on probation, the complaint put the State on notice that the decision to reject Menaster on probation was included within the scope of the complaint. Moreover, the record of the hearing before the ALJ reveals that the State presented substantial evidence to explain the basis for its decision to reject Menaster on probation. The record also reveals that the decision to reject Menaster on probation was intimately related to the decision to place him on ATO. As found by the ALJ, DSS placed him on ATO for the specific purpose of enabling it to develop the necessary documentation to reject him on probation. The rejection decision was fully litigated and the parties had ample opportunity to examine and cross-examine on the issue. Therefore, we find that the decision to reject Menaster on probation was properly included within the scope of the hearing.

We also find that that the State met its burden of establishing that it was motivated by legitimate business reasons in deciding first to place Menaster on ATO and then to reject him on probation. As a state civil service employee, Menaster was subject to rejection during the probationary period for reasons relating to his qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility, so long as the rejection was not taken for any cause constituting prohibited discrimination as set forth in Sections 19700 to 19703 of the Government Code. (Gov. Code, § 19173(a).) Under the state civil service laws, a rejected probationer may be restored to his position only if the State Personnel Board determines, after hearing, that there was no substantial evidence to support the reason or

reasons for the rejection, or that the rejection was made in fraud or bad faith. (Gov. Code, § 19175(d); *Boutwell v. State Board of Equalization* (1949) 94 Cal.App.2d 945.) Subject to rebuttal by the employee, it is presumed that the rejection was free from fraud and bad faith, and that the statement of reasons in the notice of rejection is true. (Gov. Code, § 19175(d).)[4]

An employee's protected activity does not insulate him from adverse actions by the employer. (*State of California (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S (*Department of Industrial Relations*).) PERB will not review whether "just cause" for discharge exists or whether the discharge was otherwise unlawful, but will only review whether it was taken for reasons protected by the statutes administered by PERB. (*Moreland Elementary School District* (1982) PERB Decision No. 227.)

In *Department of Industrial Relations*, PERB found that the State provided sufficient justification for rejecting an employee on probation notwithstanding his protected activity, where the State's expectations and concerns with the employee's performance were thoroughly and consistently explained and documented throughout the probationary period. Similarly, DSS in this case consistently explained and documented its expectations and concerns with Menaster's performance prior to placing him on ATO and making the decision to reject him on probation. Therefore, the Board agrees with the ALJ's conclusion that DSS's decision to place

[4] In reaching its decision, PERB does not apply the civil service standards for rejection during probation, but sets them forth herein to clarify that they are different from the Education Code provisions at issue in *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, relied upon by the ALJ, which was certified for partial publication only on the issue of remedy for the unlawful denial of tenure to a probationary teacher based upon participation in protected activity under the Educational Employment Relations Act (EERA). (EERA is codified at Gov. Code, § 3540 et seq.)

Menaster on administrative leave for the purpose of moving toward rejection on probation was motivated by legitimate business reasons.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-240-S are hereby DISMISSED.

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL MENASTER, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES), Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-240-S PROPOSED DECISION (5/01/2009)

Appearances: Michael Menaster, in pro per; Frolan R. Aguiling, Labor Relations Counsel, Department of Personnel Administration, for the State of California, Department of Social Services.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

On July 19, 2006, Michael Menaster initiated this case by filing an unfair practice charge against the State of California. On December 9, 2006, he amended the charge. On December 20, 2006, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint, alleging that the State (1) denied Menaster the right to be represented by his employee organization during a meeting with management; and (2) discriminated against him because of the exercise of rights under the Ralph C. Dills (Dills Act) (Gov. Code, § 3515 et seq.)[1] by issuing him an Expectations Memorandum and a Memorandum for Record, placing him on administrative leave, and failing to reinstate him to his former position following his separation from employment. This conduct is alleged to

[1] Hereafter all statutory references are to the Government Code unless otherwise stated.

violate section 3519(a) of the Act. On the same date, the Office of the General Counsel dismissed other allegations contained in the unfair practice charge.

On January 5, 2007, Menaster filed an amended unfair practice charge. No immediate action was taken on the matter.

On January 10, 2007, the State answered the complaint, denying the material allegations and asserting a number of affirmative defenses.

On January 25, 2007, an informal settlement conference was held, but the matter was not resolved.

On January 29, 2007, Menaster filed a request for injunctive relief, citing ongoing violations of his Dills Act rights by the State. On February 6, 2007, PERB denied the request.

On February 8, 2007, a second informal settlement conference was held, again without resolution.

On November 5, 2007, the undersigned denied Menaster's motion to amend the complaint based on the amended unfair practice charge filed on January 5, 2007.

Beginning March 17, 2008, and continuing for 10 non-consecutive days through November 8, 2008, a formal hearing was conducted by the undersigned.

On March 20, 2009, the matter was submitted for decision following the receipt of the parties' briefing.

FINDINGS OF FACT

Menaster is an employee within the meaning of section 3513(c). The respondent is the State employer within the meaning of section 3513(j) of the Dills Act.

Menaster's Hiring by the Determination Division

On October 31, 2005, Menaster began employment with the California Department of Social Services (Department) as a medical consultant I, assigned to the Determination

Division. The Department contracts with the United States Social Security Administration to make eligibility determinations for the federal disability benefits program. The primary responsibility for this task is assigned to the position of disability evaluation analyst (DEA) within the Department. The DEA reviews the applicant's medical files together with other lay evidence (e.g., vocational and social) against the claim for benefits. In each case the DEA determines whether the disability conforms to one of the Social Security Administration's listed disabilities and/or whether that disability is severe enough to qualify the applicant. DEA's are not medical professionals and do not make any clinical judgments in their case adjudications. The DEA writes up an opinion (a "consult") and shares it with a medical consultant, who states an opinion as to whether he/she agrees or disagrees, or has a different opinion. Since disability may be established on the basis of psychiatric, as well as medical impairment, both medical physicians and psychiatric physicians are employed as medical consultants by the Department. Menaster, a licensed psychiatric physician, was assigned to review applications based on psychiatric disability.

The Determination Division has 11 branches, including offices in Sacramento and Oakland. At the time of the events in question, the Sacramento branch was operated under Branch Chief Margaret Harbridge. Harbridge reported to Assistant Deputy Director for Disability Evaluation Robert Stavis. Two case adjudication bureau chiefs, who reported to Harbridge, supervised seven disability evaluation services administrators, known as team managers. Each team included DEA's, medical consultants, and related support staff. Robert Schoenfelder was Menaster's team manager and first-line supervisor.

Due to difficulty filling psychiatric medical consultant positions in the Sacramento branch at the budgeted salary, the Department opened its recruitment to applicants residing outside of Sacramento, contemplating a pilot plan to have its cases reviewed remotely in

another branch office. As the successful candidate, Menaster, a resident of San Francisco, was hired to be the first medical consultant under the plan. He was to receive training in Sacramento for two months, followed by a transfer to the Oakland branch.

During the interview process, the Department conducted a background check on Menaster to verify that he maintained active medical licensure. The inquiry disclosed that Menaster had been placed on probation by the state licensing board, but successfully completed his probation thereafter. Schoenfelder was a member of the interview panel. Menaster revealed some background related to the medical board complaint, citing certain improper practices regarding prescriptions and possession of medication. At Menaster's suggestion, Schoenfelder discussed the disciplinary action with the psychiatric physician who supervised Menaster during his probation. Following the physician's endorsement, Schoenfelder recommended that Menaster be hired. Stavis approved the hiring decision.

Medical consultants are exclusively represented by the Union of American Physicians and Dentists (UAPD). UAPD has two job stewards working in the Sacramento office working as medical consultants. Sandra Clancey is a surgeon by training. Vallabhaneni Meenakshi is a psychiatric physician. She reviewed the same types of cases as Menaster.

Training in Sacramento

Immediately upon his arrival in Sacramento, Menaster introduced himself to staff in the Department and engaged them in social conversation. One manager was pleasantly surprised by Menaster's enthusiasm and gregarious nature. However, within days of his employment, Schoenfelder began receiving reports that Menaster had contacted numerous employees either to "gather lots of information or just socialize." Schoenfelder began documenting these reports

and placing his notes in a "drop file."[2] Schoenfelder's first memorandum included an observation or concern on each of the first six days of Menaster's employment. The memorandum indicates that Schoenfelder discussed "social interactions" with Menaster on November 4; that Menaster asked him if he should ignore someone wearing provocative clothing (Schoenfelder testified that came up in a conversation around the time it had been reported to him that Menaster asked a female employee for her telephone number); and that a female coworker expressed concerns about Menaster's request of that employee that he be able to call her from home on his day off for advice on a case. On the following day, a Friday, Schoenfelder added a note that Menaster asked if he "was in trouble." Menaster also asked Schoenfelder if he could see previous grievances to know which employees to avoid. Menaster offered that he might need guidance on how to operate in a "government environment." On the Monday following the weekend, Schoenfelder documented that he had received numerous comments that Menaster was "intrusive, loud, [and] talking to anyone he could engage." Schoenfelder also made a note that these days were followed by a short period of good productivity, consistent with his testimony to the same effect. In addition, Schoenfelder documented a concern about Menaster's impatience in getting answers as part of his training and setting out on his own to find answers. Schoenfelder cited Menaster raising an issue about the effective date of dental care, and rather than waiting for an answer from the personnel staff, he contacted his union representative. A few days later, a trainer reported to Schoenfelder that he doubted Menaster was a good fit for the organization, being too argumentative and not a team player. It was reported to Schoenfelder that Menaster was asking about how to "manipulate" the system to obtain the productivity bonus.

[2] Consistent with a practice of many employers, the Department places documentation of potential disciplinary matters in an informal collection file, separate from the employee's official personnel file.

In late November, Schoenfelder documented a complaint from an employee who asked Menaster to be quiet following a "loud sustained conversation" with another employee. The same day a third employee complained that she was offended not only by the loudness of Menaster's voice but by comments that were racially offensive to her. Schoenfelder's notes document a counseling session on November 23 in which he mentioned to Menaster that in response to his monopolizing the conversation at an office birthday party, several of the staff gave Schoenfelder the "eye roll." This incident prompted Schoenfelder to suggest that Menaster do more listening. In short, as a result of these matters, Schoenfelder advised Menaster to stay at his desk and "under the radar."

In the course of these interactions, a number of employees shared confidences with Menaster. For example, he heard a rumor that a certain employee was having an affair with Les Payton, one of Sacramento's two case adjudication bureau chiefs, and Schoenfelder's immediate supervisor. Menaster later asked the female employee if the rumor was true. She denied it.

Menaster's knowledge of the rumored office affair was reported to another team manager, Jan Morell, who relayed it to Payton. The woman complained that Menaster made her uncomfortable by raising the matter with her. To Menaster the coworker did not appear uncomfortable discussing the matter. I discount this claim because it is inconsistent with the employee voluntarily complaining about it later.[3]

Payton ordered Menaster into a meeting on December 7 to discuss the matter of the rumored affair. Schoenfelder attended as an observer. Payton's intention was to counsel

[3] Menaster was surprised that the woman had complained, because when he initially asked her about it, she laughed it off in the course of denying it. Then she teased she might take Menaster and flirt with him in front of Payton to make Payton jealous.

Menaster regarding gossiping and inappropriate comments in the workplace, so as to "nip [the problem] in the [bud]."

Payton began by advising Menaster that team leaders and bureau chiefs have authority to supervise medical consultants, despite not being licensed physicians. Menaster had heard from other medical consultants that team managers do not have such authority to the extent it might interfere with the physicians' professional medical judgment. UAPD shares this view as well. The Department does not take issue with that proposition directly, but maintains that team managers may supervise medical consultants in all other matters and that with respect to the outcome on disability determinations the Department is not required to adhere to the judgments of the medical consultants. In addition, since the physicians are not treating the claimants, they are not providing a clinical diagnosis.

Next, Payton addressed the issue of sharing of personal information. He asked Menaster if he had inquired of the coworker about his alleged affair with her. Menaster admitted doing so. Payton told Menaster he was offended by the comments and threatened that if Menaster wanted to make an issue of it, the matter could be referred to the EEO officer for an investigation. Although he did not specifically reference it at the time, the basis for such a referral would have been pursuant to the Department's "zero tolerance" policy, covering sexual harassment and unprofessional conduct in the workplace.[4] Payton then identified a separate complaint from Morell. Morell had e-mailed Menaster a counseling memorandum with copies to Payton and Schoenfelder expressing that she had been offended when in the course of

[4] "Sexual harassment" is defined by reference to state and federal equal employment opportunity (EEO) law. "Unprofessional conduct" is broadly defined as conduct inconsistent with courtesy, consideration, respect and professionalism. "Discourteous actions" are described as including inappropriate remarks, slurs or jokes of a sexual, sexual orientation, or obscene nature, repeated propositions, threats, or suggestive or insulting sounds. Employees believing they have been subjected to unprofessional conduct have an obligation to report a potential policy violation to their supervisor or the Department's EEO office.

discussing a case with a bipolar diagnosis, Menaster volunteered that he knew that someone in her family had the condition (but had been advised to avoid the topic with her).

Following the December 7 meeting, Payton e-mailed Harbridge to give her an account of his counseling of Menaster, including the e-mail string beginning with Morell's note. Payton also memorialized the meeting in an e-mail to Menaster, in which he reiterated the three matters discussed. Harbridge received a copy of that e-mail as well.

Menaster disputed the Morell incident as it was recounted in her e-mail. He stated that Morell first volunteered that a family member had the condition and only in response did he acknowledge having known of it through Schoenfelder. Morell then asked if he knew any other gossip about her. After Menaster denied further knowledge, Morell suggested that "people must think that I have some competency problems or I'm not a good supervisor, something to that effect." I find Menaster's account implausible, as it sounded contrived, was vague and illogical (i.e., a bipolar condition in the family rarely relates to professional competence and is also a private matter one would be disinclined to reveal to a mere acquaintance). I do not believe the bad-supervisor comment would be made by a supervisor under those circumstances or any circumstances, especially to an employee with the reputation for gossip Menaster appears to have so quickly established.

Menaster testified that he has an anxiety problem causing him to become giddy at times and making him prone to offer inappropriate comments. He was under treatment for the condition at the time. Menaster wanted very strongly to make a good impression with his coworkers, and so he did socialize with many of them. Yet what the Department characterized as socializing was really only interfacing for the purpose of becoming accepted and learning the work styles of his coworkers. Menaster admitted that his gossiping early on was excessive, but he asserted that he corrected it.

The day after the Payton meeting, Menaster shared a rumor with Clancey that several employees, including Harbridge were lesbian. She warned him against repeating it. Later in a meeting the same day with Harbridge and Clancey to discuss Menaster's complaint about Payton's meeting tactics, Menaster mentioned it to Harbridge in Clancey's presence, resulting in an awkward interlude. According to Menaster, the same employee who denied the rumored affair volunteered the rumor the about Harbridge. Menaster asserted his point was simply to show that others gossiped as well.

A good summary of the Department's assessment of Menaster following his first month is contained in a contemporaneous note Schoenfelder made of a "long" discussion he had with Menaster on December 7, following the meeting with Payton. The memorandum was offered into evidence by Menaster for the purpose of discrediting Schoenfelder's claim he was unaware Menaster was in treatment for a psychiatric disorder—a conclusion I do not draw from the document because it is not necessarily inconsistent with Schoenfelder's testimony on the point[5]—describes how Menaster was anxious and fearful about his job status following Payton's threat to initiate an EEO investigation. Schoenfelder attempted to disabuse Menaster of his belief that management was "set against [him]," noting that management had gone to "great lengths" to arrange for his hiring with the remote office assignment. Schoenfelder wrote:

[5] Schoenfelder admitted that he had spoken with Menaster's supervising psychiatrist as a reference prior to the offer of employment. The reference explained he had treated Menaster for anxiety and depression during his probationary period. The psychiatrist's statement that Menaster was now "fit as a fiddle" led Schoenfelder to believe treatment was not continuing. Meenakshi was under the impression that Schoenfelder had discussed Menaster's anxiety condition with the psychiatrist and told Harbridge so. Harbridge told Meenakshi she thought such a discussion would have been inappropriate on Schoenfelder's part. Toward the very end of Menaster's employment, Meenakshi reported the nature of Menaster's ongoing treatment directly to Schoenfelder.

> I [told Menaster] that we all want this situation to work out and that all he needed to do was stay at his desk[,] focus on his work[, and] refrain from extensive socialization and inappropriate comments, joking around. I said there is no need for him to go around talking with everybody about everything and named a few examples like why he had arrived the first day of work with his car covered in un-removed wax, or that [sic] why everybody in the building knew the story of his fan shearing off into his radiator.[6] I mentioned that some team member had complained that he was talking to them [too] frequently and one mentioned that he went to talk to her nine times during the course of one particular morning. I stated that sometimes he is provided information so that he understands the lay of the land or that staff provide personal information which he seems to repeat to others trying either to ascertain its correctness or to obtain additional information about any numbers [sic] of work or personal related issues. I stated that he must utilize discretion with information he obtains . . . I stated that he had been there about a month and has already obtained the personal scoop on virtually everyone here and he had mentioned stories about me though I never asked to hear what they were. I also mentioned I had heard stories of him approaching female staff and in some cases requesting their phone numbers. I stressed to Dr. Menaster that he needed to act professionally. I again stated that he should refrain from making jokes or comments about fellow [medical consultants]. I have repeatedly heard him make comments about [a particular doctor] having a rubber stamp denial tendency, [and another] being a skirt chaser. I stated that he needs to stay near his desk, and his team.

The memorandum concludes with two other issues: Menaster's tendency to find applicants to be non-severe when they are otherwise, and his assertion based on the advice of colleagues that managers are not permitted to review the decisions of medical consultants. In regard to the latter, Schoenfelder explained to Menaster, as Payton had, that such review was necessary to ensure compliance with the "administrative aspects of the program."

[6] Menaster asserted that he ended up explaining the radiator incident after he was paged on the overhead by the security guard when a radiator for him was delivered to the office.

The characterization in the memorandum that Menaster was away from his desk a lot was reported to Payton, who in turn reported the same to the other Sacramento case adjudication bureau chief, Kay Schlegel. Stavis became aware of the reports as well.

Union Representation

On his first day of work in Sacramento, Menaster was introduced to Clancey. Clancey informed Menaster that she was available to serve him as a representative of UAPD. She gave him a copy of the UAPD memorandum of understanding (MOU) and provided him with an overview of his rights as a union member. Menaster began sending Clancey e-mails on a frequent basis, including seeking information on his rights as a unit member. Clancey corroborated Schoenfelder's observations (both those to which he testified and those recorded in his drop file notes) regarding excessive gossiping. Menaster asked Clancey for "all the juicy stuff" about other staff members. He also brought gossip about Clancey back to her, such as the fact that she could help him obtain employment outside of the office and that she liked to date younger men. Clancey advised Menaster it would behoove him to curtail his gossiping. Clancey also testified that as a steward she had never had a medical consultant ask as many personnel (employment condition) questions as Menaster did.

Menaster testified that it was Clancey who shared with him the fact that she liked to date younger men. I discount this claim, as it came across as too convenient a response, and was inconsistent with the reports of other incidents involving gossiping on Menaster's part that were provided by a number of witnesses at the hearing. At some point Menaster disclosed to Clancey that he was under treatment for a mental condition. Over time Menaster established the ability to get Clancey to interrupt her work and go to a private conference room to discuss his workplace issues.

In early December, Menaster approached Schoenfelder with Clancey and a psychiatric medical consultant to object to Schoenfelder's instruction that Menaster change the primary diagnosis on one of his cases. Menaster testified that Schoenfelder responded with an implied threat to report him to the state medical board, a claim Schoenfelder flatly denied. He also testified that Clancey advised him a grievance could not be filed on his behalf because he would be fired as a result of it. Meenakshi testified that she recognized that Schoenfelder had to referee more disputes between Menaster and the DEA's than with other medical consultants. Typically the issue involved whether or not the mental disability was non-severe.[7]

Menaster testified that the Payton meeting unnerved him and increased his level of anxiety. He immediately complained to Clancey about the lack of union representation during that meeting. Clancey was beginning to feel the need of assistance as a result of these events and contacted Meenakshi to assist her with Menaster's situation. Meenakshi agreed. Meenakshi, called by Menaster in his case-in-chief, also corroborated Schoenfelder's reports about excessive socializing. Meenakshi testified that two or three other employees complained that Menaster disturbed them by visiting. She advised one of them to raise the matter with Menaster directly, which the employee claimed she did, but with only a temporary corrective response by Menaster. Meenakshi testified that only one other medical consultant "wanders" around the office and socializes, but she believes it is because he has completed his work.

Menaster complained to Meenakshi about his working conditions. He complained there was too much noise in the office, too much foot traffic around him, and too many people coming into this office, all of which affected his productivity. Meenakshi believed Menaster's

[7] According to Meenakshi a DEA had to go through the team manager if he/she wanted to ask a medical consultant to change their opinion. However, she also admitted that when a medical consultant disagreed with the DEA, it was virtually assumed that the DEA would want the medical consultant to change their opinion. Schoenfelder admitted that the Department will ask medical consultants to consider changing their opinion, but never insists. If there is no change the Department seeks a second opinion.

noise complaints were excessive. Menaster explained to Meenakshi, too, that he was under psychiatric treatment, receiving counseling, and taking an anti-depressant medication to control his anxiety. When he complained to her about Schoenfelder "micromanaging" him, she asked for an explanation. Menaster cited a number of examples suggesting that Schoenfelder was closely supervising his case work. He claimed that Schoenfelder ordered him to change his opinions, though she had nothing to corroborate his claim that it was a mandatory instruction. Menaster e-mailed her almost daily to complain about some DEA asking him to change his decision.

Menaster testified that he informed both Payton and Schoenfelder of his psychiatric condition. Schoenfelder did not specifically deny that but was unwilling to concede that Menaster told him he was being treated by a psychiatrist.

December 14 Meeting

Consistent with Schoenfelder's memorandum quoted above, Menaster acknowledged that he was counseled about his contact with other employees in the office immediately after the December 7 meeting. Schoenfelder advised him he had a tendency to "overstay his welcome" with coworkers. According to Schoenfelder himself, his approach was to "get [Menaster] pointed in the right direction; move on and get some work done." Schoenfelder agreed that after Menaster was counseled, his socializing and roaming ceased to be an issue.

Clancey arranged for a UAPD meeting with Harbridge on December 14 to discuss Menaster's employment situation. In her mind, the union had a concern about Menaster passing probation, and the goal of the meeting was to lay some groundwork to address that concern. Clancey readily conceded that Menaster was competent in terms of the knowledge and skill requirements of his position. Clancey consulted with UAPD Business Agent Jim Moore.

Separately, Meenakshi took it upon herself to speak with Harbridge informally in advance of the meeting for approximately 15 minutes. This discussion took place two days after the Payton meeting. Meenakshi inquired of Harbridge whether Menaster could be assigned a cubicle in a corner of the office where there would be less traffic. That cubicle was also closer to hers, allowing Menaster to consult with her on his cases. Meenakshi explained she believed Menaster's noise complaints stemmed from his psychiatric condition. Harbridge did not agree to the new cubicle but did take Meenakshi up on her offer to provide mentoring.

The December 14 meeting was attended by Harbridge, Payton, Schoenfelder, Clancey, Meenakshi, Moore, and Menaster. UAPD did not explicitly announce their goal as passing probation, though its list of items to discuss ended with an inquiry about the upcoming first probationary report. The meeting began with certain disputes Menaster had pertaining to travel checks, overtime, and annual leave, the specifics of which are unimportant. The next topic concerned Menaster's schedule at Oakland and the date of his transfer there. Harbridge explained that the timing was contingent on the Department being satisfied that Menaster's initial training had been completed. Someone noted that Menaster had concerns about the availability of trainers (i.e., mentors) and that the problem had been largely addressed once Meenakshi began working with him. The parties agreed that Meenakshi and Schoenfelder would provide the primary feedback to Menaster on cases.

The issues concerning Menaster's gossiping and the December 8 meeting were also discussed. Schoenfelder reported that he had been counseling Menaster on the issue since he began employment. Clancey expressed concerns about Payton being "heavy handed" in the December 8 meeting, and raised the issue about the right to representation at such meetings. While Payton asserted that routine encounters with staff do not trigger the right, Schoenfelder advised Menaster that if at any time he felt the need for a representative, he should ask.

Harbridge agreed to send a communication to staff that when management believes the right is involved it will notify the employee prior to such a meeting.

Moore expressed his view that the Department should do more to "accommodate" Menaster's particular needs. Harbridge demurred, insisting that Menaster did not need any special accommodation and that all employees in the Department were treated equally. Meenakshi believed in the Department's need to reasonably accommodate an employee, but acknowledged that UAPD was not referring to that concept in terms of the Americans with Disabilities Act.

Toward the end of the meeting, Schoenfelder expressed that Menaster's behavior in the past few days was exactly what management was expecting and that while some issues that had surfaced would be reflected in the first probation report, if Menaster "does well, completes his work, and does not have interaction issues," he would be fine. After the meeting, and after consultation with labor relations staff, Harbridge issued a memorandum reminding the staff of their right to request union representation.

First Probation Report

Menaster was issued his first probationary report on December 29. Schoenfelder prepared the report. He gave Menaster a summative rating of borderline "standard." A high standard rating was given for Menaster's enthusiasm for work. "Improvement needed" was in two of the six categories, specifically in the areas of "work habits" and "relationships with people." The latter category had a low, "improvement needed" grade. In the explanatory comments, Schoenfelder cited the excessive socialization had been followed by improvement. As to the relationships rating, Schoenfelder cited Menaster's over-familiarity with staff, the gossiping, and inappropriate comments. When presented with the report, Menaster refused to

sign the report until UAPD had reviewed it. After Clancey and Meenakshi had an opportunity to review it, they both believed it to be fair. The report remained unsigned.

Transfer to Oakland

After consulting with Meenakshi, Schoenfelder deemed Menaster's training to be sufficient to permit him to begin working in Oakland. Menaster began work in the Oakland office on January 17. Schoenfelder was present the first two days to ensure there was a smooth transition. He advised Menaster to stay at his desk and not "make a splash." Menaster denied Schoenfelder made such a statement. I believe such a warning was given—even if those precise words were not used—since it was consistent with the prior history of counseling and Schoenfelder's decision to be in Oakland the first two days. In addition, Schoenfelder documented his use of that phrase in a contemporaneous note to himself.

Almost immediately, Schoenfelder began receiving reports that Menaster was "out and about." By the end of the first week, Schoenfelder e-mailed Menaster to remind him he was a Sacramento employee who was to have minimal interaction with Oakland staff. In response to other reports from Sacramento staff, Schoenfelder also advised Menaster to avoid making long distance calls to Sacramento staff if they were not work related.

Annabella Ramos was Menaster's on-site supervisor in Oakland. She was only to address Menaster's immediate issues and be a conduit of information to Schoenfelder. Ramos advised Menaster to stay at his desk, after hearing reports he wandered around the office, socialized too much, and made a coworker across the aisle from his cubicle feel uncomfortable. On January 25, Ramos reported to Schoenfelder and Harbridge by e-mail a 30-minute telephone call by an upset Menaster, prompting complaints from staff. Ramos, whose office was within eyesight of his, noticed herself his voice was loud, especially when he got "quite upset and agitated" on the telephone. She became concerned when he was unable or unwilling

to moderate a loud cough he had. When she brought his loudness to his attention, Menaster criticized others for also being loud, leading Ramos to believe he complained too much. When Menaster defended his wandering by saying he was looking for his union steward, Ramos advised him to try contacting the steward by e-mail.

Beginning the week following Schoenfelder's counseling e-mail, Schoenfelder received reports through Harbridge of three female Oakland staff members complaining to Ramos about Menaster's "expressions of friendliness." One claimed that Menaster sat on her desk close to her while conversing with her, making her uncomfortable. Another reported he announced he was socially available. A third complained that Menaster was walking around the office in his stocking feet.[8] No investigation of these complaints was undertaken because the Oakland office and Schoenfelder believed them to be "borderline." Separately, Payton received comments from his counterpart in the Oakland office about Menaster taking up the time of other consultants, asking questions in excess, throwing a tantrum about his office location, and his over-familiarity with staff.

Soon after his arrival in Oakland, Menaster complained to Schoenfelder about his working conditions, noting his cubicle was too noisy. Menaster's cubicle was adjacent to one hallway and close to another. He was also adjacent to an area containing copiers and scanners,

[8] Menaster recalled that he happened upon the three women together in a group; someone asked if he was gay or straight, married or single. The questions made him uncomfortable. He answered he was single, and the women misconstrued his intent by then offering to set him up on dates and identifying for him a couple of other women in the office who were single. Menaster denied sitting on the second coworker's desk, but acknowledged leaning against it at a distance of about three feet. Menaster testified that he walked around the office in his socks because his feet hurt and he believed it to be acceptable having witnessed the practice by others in Oakland and Sacramento. I did not find this account credible. If the conversation with the women had really made him uncomfortable, I doubt he would have ended up alone with one of the women, as he testified, continuing a conversation leaning up against her desk in which she went on, according to Menaster, to share her religious beliefs with him.

which were noisy and where employees would converse. He complained about the computer system being too slow, a complaint Schoenfelder acknowledged he heard from others as well.

Menaster admitted that Ramos advised him to stay at his desk. But he asserted that Ramos was never available at times when he wanted to complain about noise or coworkers bothering him, a claim I reject given that her office was 15 feet from his. Ramos accommodated the request for a different cubicle, but its location did nothing to ameliorate his issue with noise. The new cubicle was also close to two hallways, and because the adjacent cubicle was empty, the telephone would ring for long periods with no one answering it. Menaster contacted the Oakland office UAPD steward, Stewart Bussey, shortly after his arrival in Oakland. He complained to Bussey about the noise. Bussey informed him he should not pursue a grievance because the Department would fire him. Bussey did not testify.

Menaster had concerns about Schoenfelder's productivity expectations once in Oakland. Menaster complained to Schoenfelder about a medical consultant in the Oakland office being unavailable for mentoring. Also, beginning in Sacramento and continuing once in Oakland, Menaster received more "aged" cases, which involve more information and take longer to process. Menaster felt he was being singled out for such cases. The computers in Oakland took longer to log on and transfer files than those in Sacramento because of an issue with the servers.

January 25 and 26 Meetings

Clancey, with Meenakshi and Moore's assistance, scheduled a meeting with Harbridge on January 26 to again discuss Menaster's situation. Clancey also arranged for a pre-meeting with management on January 25 without Menaster. The goal of the pre-meeting was to establish groundwork for a productive meeting on the 26th. At the January 25 meeting, also attended by Schoenfelder, Meenakshi, and Moore, the participants talked candidly about

Menaster's Oakland assignment and what could be done to improve it. One or both of the stewards acknowledged that Menaster was calling almost daily to complain about noise, the slowness of the computers,[9] the absence of an on-site mentor, the absence of a steward, the order in which to take cases ("aged" cases were first), and Schoenfelder's productivity requirements. Harbridge agreed to have Schoenfelder investigate the matters.[10]

According to Schoenfelder's notes of the January 25 meeting, Moore agreed the first probation report was fair, and all in the meeting agreed that Menaster's "problems seem to be very significant and the way he reacts to issues and fellow staff cause significant disruption in the work environment." Schoenfelder's notes further state: "It was acknowledged by all that [w]e have only a certain amount of resources that we can devote to individual employees." In that context, it was UAPD's desire to make a final attempt to help Menaster pass probation. UAPD described the situation as Menaster "engaging in behaviors that take him down the wrong road." UAPD indicated that Menaster "may" need some type of "reasonable accommodation," like a "blind or deaf person." The Department's goal for the January 26 meeting was to "restate" the plan to Menaster, namely, to avoid being visible and curtail fraternization.

On January 26, the UAPD group caucused prior to the meeting with management. Moore advised Menaster to let UAPD do the talking and not complain. Menaster asked that he

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[9] Schoenfelder acknowledged that electronic cases were better suited to the medical consultant position held by Menaster because he was stationed remotely. Indeed, use of the technology had been factored into the plans for the new position.

[10] Schoenfelder inferred that UAPD's purpose for the January 26 meeting was to address Menaster's Oakland situation in light of the fact that he had gotten off to a "shaky start." Clancey corroborated that view, testifying that UAPD viewed Menaster's situation as "problematic" and that the union wanted to acknowledge the continuing behavioral issues, including his heavy communication with Sacramento staff. Clancey received a myriad of e-mails from Menaster, many that were disputatious in character and contained little substance of import to her.

be reassigned to different supervisor, believing he had a right to such under the state constitution. The matter of a grievance came up. Moore advised against it, saying it would lead to his termination.

The formal meeting with Harbridge was also attended by Payton, Schoenfelder, Moore, Meenakshi and Menaster. Moore began the meeting asserting that everyone had a common goal of improving Menaster's productivity. Harbridge interrupted and began describing the Oakland situation and mentioning that Menaster was "driving the union stewards crazy." Moore became angry. He objected to Harbridge's comments as turning the meeting into a "counseling session." An awkward silence was broken by Meenakshi. The parties then focused on solutions to Menaster's complaints. Moore proposed the notion of "accommodating" Menaster—though again not in the sense of the legal duty to accommodate for disability, but addressing Menaster's particular needs—analogizing him to a person "not having a leg or an eye." Clancey testified it was used in the sense of recognizing Menaster's heightened sensitivity (to external stimuli).[11] Harbridge maintained that Menaster would be treated like other employees until the Department was informed differently (i.e., that he had a specific condition).

During the meeting, Schoenfelder cited the fact that Menaster had sent him 35 e-mails in one day but had not closed any cases. Harbridge appeared angry to Menaster after that comment. Menaster defended himself saying he had closed nine cases that day. Schoenfelder expressed concern that Menaster declined to sign for receipt of his probation report and wanted UAPD involved. The matter of the female Oakland workers was discussed. Menaster was

[11] An incident in the hearing corroborates the fact that Menaster is highly sensitive to distracting noise. While he was examining Schoenfelder, he abruptly turned to opposing counsel and complained about a tapping sound made by either his fingers or pen. Counsel was taken aback. The hearing officer did not hear the noise.

reminded of the Department's zero tolerance policy. Schoenfelder noted that Menaster's cubicle had been moved and that a minimum of 15 minutes of daily mentoring had been arranged. Harbridge warned that Menaster on his part would have to "cease and desist."[12] A comment was made that Menaster tended to over-react to situations. Menaster felt Schoenfelder was overly accusatory and he feared his job was in jeopardy after the meeting.

Immediately after the meeting, Schoenfelder met privately with Menaster. According to Menaster, Schoenfelder's mien was conciliatory, conceding the earlier meeting had been "tough." He told Menaster that the complaints by the Oakland women were not a major concern.[13] However, he informed Menaster that he needed to process 20 cases each day. This caused Menaster to cry. Schoenfelder stepped away, came back, and then admitted the figure was too high. He advised Menaster to just "stick to his work." At the hearing, Meenakshi agreed this expectation was unreasonable for a new medical consultant. Schoenfelder admitted as much, explaining his figure was intended more as a goal, and when Meenakshi raised it with him, he reported back to her that Menaster had been assured of such.

Schoenfelder also instructed Menaster to cease complaining and direct all issues to him. Menaster testified that after January 26, he couched his complaints to Schoenfelder concerning his ongoing issues more "subtly." Clancey received copies of Menaster's e-mails during this period of time. She received between 13 and 33 e-mails daily, many of which she did not read. Shortly after the meeting, Schoenfelder began drafting a memorandum to Menaster to

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[12] Menaster complained to Meenakshi about his other medical consultant mentors confusing him and diminishing his productivity because they disagreed with each other, leaving him unsure of which analysis to follow. The January 26 meeting was intended to channel most consultations through Meenakshi and Schoenfelder. Schlegel testified that one of the reasons why multiple mentors are arranged for new medical consultants is to allow them to experience the range of perspectives.

[13] At some point, the Oakland office requested that Menaster have no further contact with staff. Thereafter, Menaster never saw the three women who complained.

memorialize the agreements from the meeting. He advised Ramos of the same, emphasizing that Menaster was to direct his issues to him. Later, sometime after an incident that occurred on February 1, Schoenfelder would title the document an "expectations memo."

Complaint About the February 1 Bake Sale

On the morning of February 1, the Oakland office was conducting a charitable fundraising bake sale in one of its rooms. The event was held with the knowledge and assent of Oakland Branch Chief Lucy Washington. Menaster became anxious because of the distractions caused by staff walking to and from the room, talking loudly. In addition, Menaster was upset with e-mails from some analysts earlier in the morning asking him to change his opinion, as well as a problem with information not loading on his computer. He decided to contact Meenakshi (by e-mail and telephone) to complain and "vent [his] frustrations." Unable to reach Meenakshi, he called Clancey. Menaster left the building with his cell phone, hoping a brisk walk might help calm him down. Menaster believed the bake sale constituted an "incompatible activity" on the part of Department employees. He felt it hypocritical of the Department to curtail his socializing, when the bake sale amounted to the same.

Shortly before 9:00 a.m., just as Clancey was arriving in her office, she picked up Menaster's call. The caller was so agitated ("ranting and raving)" that Clancey was unable to ascertain who it was and almost hung up. She finally recognized the caller. Menaster was complaining ("I can't stand this"; "I've got this going on and that going on"; "I've got to quit"; "[I'm] being micromanaged"). Menaster mentioned a "god damn" "noisy" bake sale was going on. He also complained about a computer technician. At some point, Menaster let out a "primal scream" (a "wild animal-type scream"). Clancey attempted to use crisis-hotline skills she had learned to calm Menaster down. She began asking him a series of

questions. Clancey suspected Menaster was outside somewhere; she asked him where he was calling from. After she heard a passerby say something like "Hey, buddy," she heard Menaster respond with "Shut up and mind your own fucking business."

Menaster admitted screaming and swearing about the bake sale to Clancey, but claimed only then a passer-by overheard him, prompting the person to tell him "fuck you" and "shut up." He responded back in kind, "fuck you."

Clancey testified she asked Menaster what UAPD could do for him, to which he answered "not a god damn thing; UAPD has never done anything," at which point he hung up on her. Menaster described the call ending differently. He asked for UAPD to file a grievance for him, which she dismissed because the Department would fire him. He thought about her response, decided he would make the best of the situation, told Clancey he would be fine and could "deal with it," thanked her for listening, and then hung up. I find the latter description implausible, for reasons explained below.

Clancey had concerns for Menaster's personal well-being and safety (more so for him than for others whom he might harm). She attempted unsuccessfully to contact Moore. Clancey then looked for one of the bureau chiefs, again to no avail. She testified she was in a panicked state. Some time passed before Clancey located Schoenfelder and related the situation to him. She described Menaster as having troubles and being fearful for him. Schoenfelder, who had talked to Menaster around 7:45 a.m. that morning, agreed to call Menaster. Clancey stayed in the room. Schoenfelder held the receiver away from his ear so she could listen. Schoenfelder resumed a discussion about the problem the two had communicated about earlier in the morning and Menaster appeared to be in control, though he talked loudly at times. After attempting to get Menaster re-focused on work, Schoenfelder concluded that the situation had been resolved. In the days that followed, Schoenfelder did not

believe the incident was of major concern, but neither was it "insignificant." Schoenfelder intended to bring the matter to Payton's attention, but due to the press of other business and Payton's schedule he never reported the matter up the chain.

At Clancey's suggestion, Meenakshi also called Menaster, spoke to him, and concluded he was okay. Meenakshi had received a call from Menaster earlier in the morning as well, involving a complaint about an analyst asking him to change his opinion. Meenakshi believed that to be the real cause of his upset that morning. When Meenakshi spoke to Clancey, she was "worried about [Menaster] as well as to what [he was] going to do." She told Meenakshi that Menaster was "screaming so much" and "didn't sound like [he was] listening to her." Meenakshi believed Clancey was "worried about her interaction" with Menaster and "wanted something to be done." Meenakshi corroborated Menaster's recollection to a degree, explaining that Clancey told her Menaster ended the call by saying he would "take care of [himself]." But Menaster did not specifically deny criticizing UAPD with profanity for not doing anything to help him. On the basis of this corroboration of Clancey's account, I reject Menaster's account of how he ended the call.

Schoenfelder's February 9 Call

The February 1 incident might have passed without further incident but for a meeting Clancey had with Schlegel, her supervisor. On February 6, Schlegel went to Clancey's office to inquire about the status of her backlogged cases. Clancey offered some reasons for her lack of progress, touching on some personal matters. She also cited her UAPD work. Schlegel advised Clancey some of her cases would be transferred to other staff. Schlegel saw Clancey's in-box screen full of messages from Menaster and suggested how a separate folder could be created for them. In that context, Clancey noted the February 1 incident. Clancey described Menaster as "going postal." Schlegel instructed Clancey to repeat the account to Harbridge,

and she reported the same to Harbridge. Harbridge inquired with Schoenfelder about the incident. Schoenfelder wrote a document memorializing the February 1 incident which was incorporated in the expectations memo. At some point after it was written, Schoenfelder was instructed to remove the February 1 references to Menaster contacting his union representative in order to reflect that the interference transcended union/non-union lines within the staff.

By the end of the first week in February, Harbridge believed that the events were "definitely" leading to a decision to reject Menaster during probation. She informed Stavis of that. Stavis suggested immediately placing Menaster on administrative time off. He also asked Harbridge to get statements from those involved in the February 1 incident. In the meantime, both Schlegel and Payton expressed to upper management that "it was not working out." Stavis testified that the main purpose of placing Menaster on leave was to allow the Department to complete the paperwork for rejection on probation. His intention was to obtain sufficient documentation for that purpose, and only to go beyond that if the personnel department deemed it necessary. He had concerns about the safety of his staff in light of the reports suggesting that Menaster had an explosive temper.

Payton testified he became very concerned about Menaster's repetitive behavior problems. In his mind, the purpose of placing Menaster on administrative leave was to "do our investigation and see where we are." But he also made clear that he did not orchestrate the investigation and that theoretically an investigation might involve Menaster or it might not.

In the meantime, Harbridge directed Schoenfelder to call Menaster to obtain his side of the February 1 incident.[14] Schoenfelder called Menaster on February 9, the same day he received Harbridge's instruction, and announced his purpose. He described the incident as it

[14] Payton discussed the proposed call with Schoenfelder. Payton appears to have viewed the call as having an investigative purpose, testifying of his concern he might later be questioned and needing "back-up." Stavis was more secure with the decision and only would have done further investigation if the personnel or legal section requested it.

had been described to him by Clancey. He asked Menaster if the account was accurate and whether he "had anything to add." Schoenfelder denied asking Menaster to "admit" anything. Menaster declined to provide any information without his union representative. Schoenfelder did not offer Menaster union representation, nor did he expressly deny him that right. Schoenfelder testified that he asked Menaster three times whether he wanted to provide any information, but each time Menaster refused to "confirm or deny" without his representative. Schoenfelder testified he repeated the question not for the purpose of eliciting any admissions, but to make sure Menaster understood he was being provided an opportunity to provide his side. Menaster asked if the incident was a "problem." Schoenfelder admitted that, "clearly, this is an issue of some sort." Menaster did not seek to terminate the call however. Rather he attempted to elicit more information from Schoenfelder as to his status.

Menaster's recollection of the call differed to some degree. He testified that Schoenfelder began with an "irritated" tone of voice and that he wanted "either an admission or a statement" about the call. Schoenfelder persisted in asking him to admit the "primal scream," the yelling, and the swearing. Schoenfelder reminded him he was to bring issues up with him first, and then added that he wanted to know "what issues he was bringing to the union representative," with his tone getting angrier. Before ending the call, Schoenfelder did say that it was okay for Menaster not to provide any response. Menaster was suspicious about Schoenfelder knowing what transpired during the call with Clancey. Menaster acknowledged that he understood he had a right to remain silent in investigatory meetings while requesting representation based on previous advice. His belief as well that he could not terminate the call—because it might be construed as insubordination—explains why he remained on the call.

Later that day, Menaster called and asked Clancey if she had been the source of the disclosure. Clancey admitted she was, explaining that she thought he might "hurt himself or

others." Menaster "thanked" Clancey for "turning on him," which Clancey found offensive. Clancey then went to Schoenfelder and angrily blamed him for the disclosure of her as the source of the report on the February 1 call. Clancey feared she was going to get into trouble for it.

Also on February 9, Harbridge informed Schoenfelder that management had made the decision to reject Menaster on probation.[15] Schoenfelder was instructed to commence documentation for that purpose. He was also instructed not to share the Department's plan with Menaster.

Schoenfelder continued working on the expectations memo he had started. The memorandum began by recounting the February 1 events and then tied into the counseling during the January 26 meeting. Schoenfelder objected to the offensive language Menaster used with an unidentified coworker (Clancey) and his failure to channel work complaints to him as the supervisor. He also began preparation of Menaster's second probationary report.

On February 10, Menaster called Schoenfelder to complain that he had been denied his right to a representative during their call. Menaster again asked about his status, to which Schoenfelder responded he did not know what the Department was planning.

Schoenfelder recalled Menaster asserting that Clancey's disclosure was a breach of her duty of confidentiality (as a union representative). At the hearing, Schoenfelder admitted he was untruthful in not telling Menaster that the Department intended to reject him on probation, but claimed he failed to do so because he was under orders not to.

Schoenfelder testified that the expectations memo he was writing went through a number of iterations. The one produced for the hearing from the drop file is dated February 10. In it, Schoenfelder includes the statement: "Due to these continued acts of behavior, I will

[15] Stavis confirmed he made that decision, though for it to have been formally adopted he needed his superior's approval.

be recommending a Rejection on Probation." He later circled the sentence by hand, added three question marks and the question to himself: "Keep?" Another version of the same document, also dated February 10, he titled "memo for record." These drafts had input from Payton and Harbridge.

On February 14, Schoenfelder went to Oakland with the administrative-time-off (ATO) letter that had been prepared and personally delivered it to Menaster. Shortly after, Menaster called Moore. Moore relayed information the union had received that the Department planned to terminate him and that the paperwork was pending. Moore advised Menaster that his options were to "resign or be fired." Meenakshi discussed the matter with Moore and concurred with his advice.

Menaster had his psychiatrist contact Schoenfelder to request an explanation of the reasons for the ATO letter. After checking with Harbridge, Schoenfelder declined to offer one.

On February 17, Menaster tendered his resignation in writing. The paperwork for rejection on probation was never completed. The expectations memo and memo for record were retained in their last version for the drop file. Neither was ever given to Menaster nor was either placed in his personnel file.

Following Menaster's resignation, the Department advertised for a psychiatric medical consultant in the Sacramento branch. Menaster submitted a letter to Schlegel dated September 11, requesting reinstatement to his former position in the Sacramento branch. Stavis forwarded it to the personnel section in Sacramento. Menaster received no response from Sacramento. Menaster sent a similar request to Washington and received a response from her dated September 12, 2006, stating the office had no vacancies. In January 2007, the Department again advertised for psychiatric consultants for positions in a number of its branches, including Sacramento.

ISSUES

1. Did the Department deny Menaster his right to a representative in the telephone call on February 9, 2006?

2. Did the Department discriminate against Menaster because of his exercise of Dills Act rights by issuing him the expectations memo or the memo for record?

3. Did the Department discriminate against Menaster because of his exercise of Dills Act rights by placing him on administrative time off?

4. Did the Department discriminate against Menaster because of his exercise of Dills Act rights by failing to reinstate him to his position as a psychiatric medical consultant?

CONCLUSIONS OF LAW

Lack of Representation During the February 9 Call

Under the statutes administered by PERB, including the Dills Act, employees have a right of participation by their employee organization representative in meetings conducted by the employer and its agents, which are investigatory in nature or which otherwise present circumstances that can be described as "highly unusual." (*State of California (Department of Forestry)* (1988) PERB Decision No. 690-S; *Rio Hondo Community College District* (1982) PERB Decision No. 260; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 626.) This right parallels the longstanding rule of the National Labor Relations Board (NLRB), as described in *NLRB v. J. Weingarten* (1975) 420 U.S. 251. The *Weingarten* right attaches to the meeting whether or not the employer chooses to label it "investigatory" in nature. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 260, p. 17.) However, it does not attach to "run-of-the-mill," "shop-floor conversations." (*Regents of the University of California* (1983) PERB Decision No. 310-H, p. 28.)

Because a meeting with management whose essential purpose is to elicit inculpatory evidence has potential to impact the employment relationship, denial of the assistance of the employee organization frustrates the statutory purposes of representation. (*Placer Hills Union School District* (1984) PERB Decision No. 377, pp. 38-40.) But if the meeting's purpose is otherwise, such as when the employer simply intends to deliver notice of a disciplinary decision already made, the right does not attach. (*Id.* at p. 38; *Trustees of the California State University* (2006) PERB Decision No. 1853-H.)

For a violation to be found, the employee must have (a) requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. The employer is under no obligation to inform the employee of the right to representation. If the employer insists that no discipline will result, a violation may nonetheless be found if the employer persists in conducting the interview; the employee need not repeatedly invoke the right. (*Lake Elsinore Unified School District* (2004) PERB Decision No. 1648.) If upon assertion of the right, the employer dispenses with the interview, no violation occurs. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting the administrative law judge's proposed decision, at pp. 62-63.) But if the employer persists in seeking information to support its potential case for discipline, a violation occurs. (*California State University, Long Beach* (1991) PERB Decision No. 893-H.)

I find that Menaster would reasonably have believed his answers could be used to support disciplinary action. His contemporaneous inquiries to Schoenfelder as to his status reflect his concern for adverse action occurring. And his record of counseling and the number of complaints lodged by coworkers had certainly set the stage for formal discipline. Although the call came from Schoenfelder unannounced and did not take place in person, I find that it

constituted more than a run-of-the-mill, shop-floor conversation. The question whether Menaster requested representation is perhaps questionable based on the evidence. He knew based on his prior experience with Payton and Harbridge that he had a right to request a representative. So his assertion that he would not answer any questions without a representative, coupled with his attempt to obtain additional information from Schoenfelder, demonstrates something less than an unequivocal request. However, the import of his statement was sufficiently clear to satisfy the requirement. I find that an investigatory meeting occurred, which Menaster reasonably believed might result in disciplinary action, and Menaster communicated a request for representation.

The pivotal issue revolves around the fact that despite Menaster's refusal to provide any answers without a representative, Schoenfelder persisted in questioning him. Schoenfelder asked three times whether Menaster had any information to provide. Menaster responded that he would neither confirm nor deny matters concerning the February incident without the presence of a representative. But Schoenfelder did not seek to obtain any admissions of wrongdoing by Menaster by repeating his question, so much as to make sure that Menaster understood the opportunity he was being offered. (Cf. *Placer Hills Union School District*, *supra*, PERB Decision No. 377.) Further, Menaster successfully invoked his right to silence, without providing any damaging information or admissions. (*California State University, Long Beach*, *supra*, PERB Decision No. 893-H.) Nor did Schoenfelder explicitly deny the request. Ultimately, he honored the request by ceasing questioning, after he was clear in his mind that Menaster had no interest in providing information to help his cause. To the extent the meeting was investigatory, the Department dispensed with the interview. (*San Bernardino City Unified School District*, *supra*, PERB Decision No. 1270; *NLRB v. J. Weingarten*, *supra*, 420 U.S. at pp. 258-259 [employer may carry on an investigation without interviewing the

employee, leaving the employee with the choice of interview unaccompanied by representative or having no interview and foregoing any benefits that might be derived from one].)

Expectations Memo and Memo for Record

To prove a violation involving discrimination, Menaster bears the initial burden of showing evidence that he engaged in protected activity, that the State knew of the activity, that the State imposed adverse action, and that the protected activity was a "motivating factor" in its decision to impose the adverse action alleged to have occurred. (*Novato Unified School District* (1982) PERB Decision No. 210.) Motivation may be proven by either direct or circumstantial evidence, or a combination of both. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) Types of circumstantial evidence probative of unlawful intent include: (1) timing of the adverse action (*North Sacramento School District* (1982) PERB Decision No. 264); (2) inadequate, inconsistent, or shifting justification for the adverse action (*Novato Unified School District, supra*); (3) disparate treatment of the employee (*Regents of the University of California* (1984) PERB Decision No. 403-H); (4) departure from standard procedures (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (5) cursory investigation (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); and (6) pattern of antagonism toward the union or individuals engaging in protected activity (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572).

Once protected activity is established to be a motivating factor, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (*Novato Unified School District, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 730.)

The expectations memo and memo for record are drafts of the same document. The memorandum was originally intended as a counseling instrument, which became supplemented with the concerns the February 1 call to Clancey. Schoenfelder reiterated the substance of the verbal counseling he gave Menaster following the January 26 meeting as it related to the Department's expectations of his conduct in the Oakland office. This was consistent with Schoenfelder's approach throughout Menaster's tenure. He had consistently been willing to overlook past transgressions in return for a steady focus on work from Menaster. At no time did Schoenfelder ever recommend formal discipline be imposed against Menaster.

There is no violation on the basis of the preparation of the two memoranda because they were never issued to Menaster and never placed in his personnel file. They remained documents in the drop file.[16] Therefore they do not constitute adverse action, which is a prima facie requirement for establishing a discrimination violation. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) A document which is unknown to the employee during his employment cannot have a chilling effect on the exercise of guaranteed rights, which is the basic purpose of the proscription against discrimination. (See *Visalia Unified School District* (2004) PERB Decision No. 1687 [fear of negative evaluation insufficient to demonstrate constructive discharge].) A document which is placed in an employee's personnel file after he leaves employment may interfere with the free exercise of such rights, if not with the past covered employer, but a future covered employer, or may have other negative consequences, for example, in the search for new employment. However, that did not occur here either.

[16] Menaster discovered the documents as a result of other litigation in which he compelled production of the drop file.

ATO Letter

Menaster contends that he repeatedly brought complaints concerning his working conditions to the attention of management and that his requests were consistently ignored. The February 1 call to Clancey, itself a request for UAPD assistance, was also the triggering event for the alleged adverse actions. He argues that the alleged adverse actions all took place in an attempt by the Department to suppress that protected activity. Specifically with regard to the ATO decision, he argues that evidence of discriminatory animus is demonstrated by the Department's failure to conduct any investigation of his side of the story. He contends that the Department departed from standard procedures by doing so. The element of timing is present because Menaster engaged in protected activity beginning from his first day of work (meeting with Clancey), invoking representation from UAPD, through Clancey, Meenakshi and Moore, in December 2005 and January 2006, and communicating with Clancey on February 1 for the purpose of seeking representation. The Department was aware of Menaster's protected activity. The ATO letter was delivered two weeks later, and it constituted an adverse action. I find that Menaster has stated a prima facie case in terms of discriminatory intent, based on timing, lack of investigation (the decision to place on Menaster on administrative leave was made before the Department's investigation commenced and before Menaster was offered an opportunity to provide input), and failure to provide an explanation for the adverse action (Schoenfelder declined to provide one to Menaster's request through an intermediary).

The Department's decision resulted from a discussion between Stavis and Harbridge. The triggering event was Schlegel's discovery of the February 1 incident described to her as Menaster "going postal" on Clancey. Schlegel reported the incident to Harbridge because of her concern with not only the call itself, but Clancey's complaint about how much of her time was occupied with Menaster's issues.

The record establishes that Schoenfelder was not involved in the decision to place Menaster on administrative leave. In that light, the record suffers somewhat from the absence of Harbridge as a witness for the State. The appropriate inquiry concerns the motives of the employer in taking the adverse action, and Harbridge was the one who appears to have been the primary decision maker with regard to Menaster's employment status, though she obviously had input from both Payton and Schlegel.

Notwithstanding Harbridge's failure to testify,[17] the decision to place Menaster on involuntary leave was adequately explained by Stavis. His explanation was presented directly and convincingly, and corroborated by the events leading up to it. The purpose of placing Menaster on leave was to allow the Department to develop the necessary documentation to reject Menaster of probation. Thus, the decision to reject on probation, which had already been made, was the real impetus for placing Menaster on leave.

Still, the two decisions are intertwined, and so the inquiry necessarily turns to whether the decision to reject on probation was taken because of discriminatory intent, notwithstanding the absence of this allegation in the complaint.[18] On this score, the State presented affirmative evidence that a decision to reject on probation was justified by the history of counseling of Menaster regarding his problem relating to coworkers, his failure to exercise sound discretion in interacting with them, the unprofessional nature of the content of his communications with them, and the degree to which he caused interference with the work of others as well as himself.

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[17] Harbridge had retired from the Department at the time of the hearing.

[18] Menaster's motion to amend the complaint to include a claim that he was constructively discharged was denied before the hearing.

An employee alleging discrimination in a case involving a decision to reject on probation bears a heavy burden in overcoming the employer's case for non-discriminatory motive. (See *McFarland Unified School District v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166 [probationary teachers may be dismissed without cause]; cf. *Moreland Elementary School District* (1982) PERB Decision No. 227 [regardless of employee's status, employer in discrimination case need not prove just cause].) In contrast, in the case of a permanent employee, a lengthy work history without consequence typically raises suspicions about discriminatory intent if such history is overlooked or disregarded in arriving at the decision to take the challenged adverse action. These principles apply here. Despite the general concession that Menaster had the skills necessary to perform his job, the Department had undertaken unusually concerted efforts during the probationary period to successfully counsel Menaster away from inappropriate behaviors in an effort to have the special pilot plan succeed. It had engaged in two formal meetings with UAPD attempting to establish an understanding of what would be expected for Menaster to pass probation. The issue for the Department was as much Menaster's apparent inability to comply with those expectations, as it was a pattern of behavior that predicted even more counseling and resources dedicated to a problematic situation in the future.

The record fairly establishes that the Department's arrangement to have Menaster work remotely in Oakland was contingent upon his being able to focus on his cases with relatively minimal day-to-day supervision. Menaster's difficulties adapting to the Sacramento office, which had led to the borderline-standard first probation report, began to repeat themselves when he was transferred to Oakland, providing a reasonable basis for the Department to consider the risk of continuing his employment too great. As characterized by the anonymous staffer to Schoenfelder early on, Menaster did not appear to be a "good fit" in the Department's

view; he lacked "team player" skills—in a position whose role was more consultative than advocate. Menaster's aptitude for advocacy, as borne out through the course of his employment and the hearing, has never been in question.

Therefore I find that the Department's decision to place Menaster on administrative leave for the purpose of moving toward rejection on probation was motivated by legitimate business reasons.

Failure To Reinstate

Here I find that there is insufficient evidence to state a prima facie violation. The element of timing is the only one present to establish discriminatory intent. Only one Sacramento branch office position was ever established in the Oakland office and it was filled by Menaster. That arrangement was novel and considered as an experiment. As explained above, that experiment with Menaster was unsuccessful in the Department's view. Menaster demonstrates nothing to establish that the Department's failure to offer him re-employment or consider him for such was a departure from normal procedures.

Accordingly, I find that the State did not violate any rights of Menaster under the Dills Act.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and underlying unfair practice charge in Case No. SF-CE-240-S, *Michael Menaster v. State of California (Department of Social 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 statement of exceptions with the

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. 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

In accordance with PERB regulations, 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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a), 32130; see also Gov. Code, § 11020, subd. (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, subdivision (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, § 32135, subds. (b), (c), (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32130.)

Donn Ginoza
Administrative Law Judge