

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ALFRED MCKNIGHT,
Charging Party,
v.
CITY OF SANTA MONICA,
Respondent.

Case No. LA-CE-523-M
PERB Decision No. 2211-M
October 24, 2011

Appearances: Vida M. Holguin, Attorney, for Alfred McKnight; Barbara C. Greenstein, Deputy City Attorney, for City of Santa Monica.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Santa Monica (City) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the City violated the Meyers-Miliias-Brown Act (MMBA)¹ by terminating the probationary employment of Alfred McKnight (McKnight) in retaliation for having filed grievances concerning his employment with the City. The ALJ determined that the City violated section 3506 of the MMBA, thereby committing an unfair practice under MMBA section 3509(b). The City excepts to the ALJ's proposed decision.

The Board has reviewed the proposed decision and the record in light of the City's exceptions, McKnight's response to the exceptions, and the relevant law. Based on this review, the Board reverses the proposed decision for the reasons discussed below.

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

FACTUAL AND PROCEDURAL SUMMARY

McKnight was hired by the City on September 10, 2007 as a Motor Coach Operator (MCO), or driver, for the City's public transit service known as the "Big Blue Bus."

McKnight was part of a bargaining unit of employees represented by United Transportation Union, Local 1785 (UTU). After completing his training in November 2007, McKnight was assigned a driving route on a part-time basis. In December 2007, two passengers filed complaints against him alleging that he passed up passengers on his route and was rude to a passenger. McKnight filed two written responses denying the accusations.

On December 5, 2007, an incident occurred in which Transit Services Superintendent, Ernie Crespo (Crespo), criticized McKnight in the presence of others for not having his shirt tucked in. On December 17, 2007, Crespo issued a write-up to McKnight concerning this incident.²

On April 30, 2008, McKnight received his three-month probationary performance evaluation covering the period November 18, 2007 through February 18, 2008. While the performance evaluation is generally positive in the categories of knowledge/job skills, quantity of work, quality of work, working relationships, and communication skills, it notes deficiencies in the areas of work habits/reliability and customer service skills. The performance evaluation gives McKnight an overall performance rating of "Further Development Needed" and states the following under "General Comments":

During this evaluation period operator Alfred McKnight has zero sick incidents, one late report on 1-16-08 and two miss outs

² According to McKnight, Crespo embarrassed him by saying, "[L]ook at you, you don't look professional at all. You look all stressed out. . . . You need [your] B vitamins, don't you," and then started laughing. The next day, McKnight and Training Supervisor Jose Ramirez (Ramirez), went to Crespo's office, where Crespo said he did not mean to embarrass McKnight. McKnight denied that he acted inappropriately and claimed his shirt had come up while driving.

on 4-07-08, 4-11-08.^[3] He received one supervisor write up on 12-05-07 for improper uniform and deliberately ignoring a supervisors' [sic] request. He also accumulated two customer complaints for being off route and passenger pass up. The late report and supervisor write up will lower his overall performance rating to further development. Employee is also aware that further infractions/write-ups will lead to disciplinary actions up to and including termination.

On June 26, 2008, McKnight received his six-month probationary performance evaluation covering the period November 18, 2007 through May 18, 2008. Because it covered the entire six-month period of his probationary employment, the evaluation repeats information contained in the three-month evaluation. In addition, it notes that McKnight received a write-up on February 22, 2008 after he was observed leaving the terminal late, but also states that he did not accumulate any other write-ups during the evaluation period. The evaluation also states that McKnight received two complaints on December 7, 2007 and January 14, 2008 for passing up bus stops, but that those incidents were "under observation and currently do not count as incidents."⁴ The evaluation continues to rate McKnight as "Further Development Needed" and states under "General Comments":

He is receiving a further development due to miss outs he received on 4-07-08 and 4-11-08. He also received a late report on 1-16-08. Mr. McKnight also received a supervisors' [sic] write up for improper uniform on 12-05-07.

On June 27, 2008, McKnight's status was changed from part-time to a full-time driver. At the end of his first full-time shift that day, he submitted an "Operator's Report to Transit Service/Operations Managers," also known as a "GM" ("general memo"), to Crespo

³ A "late report" is when an employee reports to work late but within one hour of the scheduled start time. A "miss out" is a failure to report within 60 minutes of the scheduled start time.

⁴ The evaluation also notes that McKnight received customer compliments on ten dates.

complaining that he had seen no other bus traveling in either direction during his route. The

GM states:

While working Line #1 in bound at 7:46 pm. I did not see any other bus. Working Line #1 out bound or in bound. For the rest of the night from 7:46 pm. to 12:33 am. I work the whole Line #1. The passenger's [sic] were complaining [sic] no bus show up. At all[.] This is not right nor is it fair to me. Please do something about this. It's the second time this happen to me on this Line #1.

McKnight did not receive a response to this complaint.

On July 3, 2008, McKnight was rear-ended by another vehicle while driving a bus and suffered injuries that caused him to go on medical leave and seek workers' compensation benefits. While he was on leave, on August 10, 2008, UTU General Chairman Adhi Reddy (Reddy) filed a grievance contending that McKnight had not been receiving any pay while he was on leave. On August 19, 2008, Crespo responded in writing to the grievance and informed Reddy that McKnight's workers' compensation claim was in "delayed status"⁵ and that, pursuant to the memorandum of understanding (MOU) between the parties, McKnight needed to make an irrevocable choice in writing if he wanted to use his accrued sick or vacation time while his claim was pending.

McKnight returned to work on November 28, 2008. The City's existing practice is to require any driver who has been away from the workplace for more than 30 days be assigned to training prior to resuming driving duties. Accordingly, McKnight was assigned to take another training class prior to resuming his bus route.

On December 11, 2008, McKnight met with his immediate supervisor, Crystal Buckner, and Crespo for his nine-month performance evaluation. His written performance evaluation

⁵ According to Crespo, the workers' compensation claim was delayed while the City was investigating it.

covers the period November 18, 2007 through August 18, 2008.⁶ The performance evaluation reiterated information from the prior evaluations concerning the two miss outs on April 7 and 11, 2007,⁷ and the late report on January 16, 2008, and the supervisor write-up on December 5, 2007. The evaluation also notes that of eight customer complaints for passenger pass-ups and rude behavior, three were verified for December 7, 2007, and January 14 and June 30, 2008.⁸ The performance evaluation continues to rate McKnight as "Further Development Needed" and states that development and training is needed to reduce his late reports and miss outs, and to practice his customer service skills, including attending training. The performance evaluation further states as general comments:

Operator McKnight is receiving a Further Development Needed due to his miss-outs on 4/07/08 and 4/11/08, on late report on 1/16/08 and his supervisor write-up on 12/05/07 for improper uniform. He also received complaints for rudeness and passenger pass-ups.

Crespo informed McKnight that the number of passenger complaints he received was too high and warned him that if he got any more complaints he would not pass probation. According to McKnight, he asked why he was being evaluated again so soon after his return to work, to which Crespo responded, "When I get ready to terminate you, I would need a paper trail." Crespo denied making this statement.

During the December 11, 2008 meeting, Crespo also informed McKnight that his probationary period was being extended to April 2009. McKnight became upset and said that

⁶ Because McKnight was on medical leave from July 3 until November 28, 2008, his performance evaluation was delayed until he returned to work.

⁷ The evaluation states that McKnight will bring in documentation to justify one of the miss outs and that, if he does not submit the appropriate forms, the incident will remain on his evaluation.

⁸ The evaluation also notes that McKnight received customer compliments on twelve dates.

he believed the extension was unwarranted and unfair, and that he believed he was being harassed because of the July 3 accident that he believed was not his fault. By letter dated January 7, 2009, the head of the City's Transit Department informed McKnight that recent amendments to the City's Municipal Code required the City to extend the probationary period for any employee on leave for more than 30 days by the number of days on leave.

After the December 11, 2008 meeting, McKnight became concerned for his job and contacted Reddy.

According to McKnight, at some time in December 2008, Crespo criticized him for running late with his route. After McKnight protested that it was not his fault because the driver ahead of him had not made all the stops along the route, Crespo responded that he needed a "paper trail" in order to fire McKnight. Crespo testified that McKnight had ongoing problems with lateness on his route, but that he would not have been terminated based upon the lateness alone.

On December 27, 2008, Assistant Director Joe Sticher authorized a pay increase for McKnight effective retroactively to his one-year anniversary date, November 18, 2008.⁹ The pay increase was finalized on January 13, 2009.

The January 9, 2009 Incidents

The bulk of the hearing focused on two incidents in which two different bus drivers filed complaints accusing McKnight of unsafe driving on January 9, 2009.

Wheelchair Incident

On January 9, 2009, driver Marvin Morales (Morales) stopped Transportation Safety Officer Al Davis (Davis) in the hallway and told him that, while driving his route, he had seen McKnight offload a wheelchair passenger unsafely. Davis suggested that Morales submit a

⁹ Although not entirely clear in the record before us, it appears that the one-year increase was granted pursuant to the terms of the MOU governing McKnight's employment.

GM. Morales did so in a GM dated January 9, 2009.¹⁰ In that GM, Morales stated that, while he was getting ready to pull out of a bus stop, McKnight's bus pulled in front of his bus and proceeded to unload two passengers in wheelchairs into the traffic lane. The GM asserts that McKnight's bus blocked both Morales's bus and a lane of traffic for approximately five minutes, making Morales late.

Each bus carries six cameras that record activity in and around the bus from six different angles simultaneously. The recordings are not ordinarily retained for more than a few days, but may be retrieved before they are recorded over at the discretion of management. After receiving Morales's GM, Davis directed that a digital video recording (DVR) be made of all six cameras located in McKnight's bus.

Westwood Incident

On January 12, 2009, another driver, Stephanie Wright (Wright) submitted a GM stating that, while she was at a bus stop on Westwood and Weyburn, McKnight's bus pulled ahead of her and loaded passengers who crossed in front of her bus to reach McKnight's bus from the traffic lane as she was pulling out on a green light. The GM was stamped received at 11:23 p.m. on January 12, 2009.

After receiving Wright's GM, Davis directed that a DVR be made of this incident as well. After viewing both DVRs to ensure their accuracy, Davis gave them to Crespo.

Crespo viewed the DVRs and determined that McKnight had violated safety procedures in the first incident by blocking Morales's bus and offloading a wheelchair passenger in the traffic lane. As to the second incident, Crespo determined that McKnight violated safety procedures by allowing a bicycle to be loaded on the front of the bus in the middle of traffic and by opening his doors to allow passengers to board in the traffic lane. Crespo did not

¹⁰ The record does not indicate when it was received by the City.

interview any of the percipient witnesses to the incidents, but relied upon the DVRs in making his determination.

After viewing the DVRs, Crespo contacted Stephanie Negriff (Negriff), director of transit services, and informed her of the driver reports and the DVRs. Negriff viewed the first DVR involving the wheelchair incident and determined that McKnight had engaged in unsafe practices by stopping his bus in a lane of traffic, blocking another bus from leaving, and offloading wheelchair passengers into a street with oncoming traffic. Initially, Negriff testified that she decided to recommend that McKnight's employment be terminated based solely upon this incident, and that she did not view the second DVR because the incident reflected in the first DVR was "heinous enough that I didn't feel that I needed to review the second one." Later in her testimony, Negriff stated, consistent with documentary evidence, that she had reviewed both DVRs.¹¹

There was much testimony over the proper procedures to be followed when a bus driver arrives at a stop that is either occupied by another bus or obstructed in some manner. According to Ramirez, who trains the City's drivers, the driver of the second bus should pull behind the first bus at the curb and wait for it to leave before opening the doors. If there is an obstruction, the driver is to pull behind the obstruction and wait for the other vehicle to leave. The driver should not pull alongside another bus in service, but if the vehicle is unoccupied and the driver cannot stop behind it, he may stop parallel to it, slightly ahead of the other vehicle's front bumper. The driver must, however, ensure that any offloading wheelchair passengers make it safely to the curb. If a driver approaches a stop and there are no passengers who have requested to get off and no passengers waiting to get on, the driver may bypass the stop.

¹¹ The ALJ made a credibility determination that Negriff watched only the first DVR, not the second. We do not find this issue to have a material outcome on this case.

According to McKnight, he was instructed in training that, if another vehicle is in the bus stop zone, the driver is to pull up parallel to the other vehicle to load and offload passengers. McKnight also testified that he was required to stop if passengers were waiting within 40 feet of the bus, even if not in a designated stop.

The UTU Grievances

On January 12, 2009, UTU filed three grievances each dated January 11, 2009, on McKnight's behalf. They alleged: (1) Crespo and Buckner had been harassing McKnight since his July 3, 2008 accident, and he believed he would be terminated; (2) two supervisors had pressured McKnight to drive faster in violation of federal regulations; and (3) McKnight had not received his one-year pay increase.¹² Each of the grievances bears a handwritten notation indicating it was received by the City at 4:20 p.m. on January 12, 2009, and were stamped received by the City at 4:41 or 4:42 p.m. the same date.

Termination of Employment

On January 14, 2009, Crespo sent Negriff an email recommending that McKnight be terminated. The email refers to the eight customer service complaints received by McKnight as well as the two complaints concerning the incidents of January 9, 2009. The email concludes:

Both of these actions are unsafe and his ability to make sound and safe decisions comes into question. We are in a business where one incorrect safety decision can cost someone their life. Mr. McKnight's overall performance is not meeting expectations. He is a liability to the City.

¹² As indicated above, on January 13, 2009, the City finalized McKnight's pay increase retroactive to November 18, 2008. The pay increase had previously been authorized by Stitcher on December 27, 2008. According to Crespo, the pay increase was delayed due to confusion over the extension of McKnight's probationary period.

Crespo testified that the decision to terminate McKnight on probation was based upon his entire employment history. He acknowledged, however, that McKnight likely would have passed probation but for the incidents of January 9, 2009.

On January 20, 2009, Negriff forwarded Crespo's email to Donna Peter (Peter), director of human resources, along with the following note:

I am recommending separation of MCO Alfred McKnight for the reasons stated below. I have personally reviewed the video footage of Mr. McKnight's most recent complaints and found his behaviors totally unacceptable.

On January 20, 2009, Peter forwarded both messages to City Manager P. Lamont Ewell (Ewell). In her message, she stated:

I am recommending approval of this request but I also want to make you aware that this individual has filed three grievances. One for harassment based on his Worker's Comp Claim. He did not like his previous evaluation where 6 complaints were mentioned and he was unhappy that his probation was extended due to his being out for a period more than thirty days on a Worker's Comp Claim. He feels management is "papering" him so that he won't pass probation. . . .

These two latest incidents were based on complaints from other drivers and were serious safety issues.

At the hearing, Peter explained that she told Ewell about the grievances so that he would have this information before he made his final decision in case he felt that further investigation was warranted or that the department was not making a fair assessment of the employee.

On January 22, 2009, Crespo informed McKnight that his employment was being terminated. When McKnight asked the reason, Crespo told him only that he was not meeting the expectations of the Big Blue Bus, but did not identify any specific reasons for the termination.

THE ALJ'S PROPOSED DECISION

The ALJ found that McKnight engaged in protected activities when: he filed a GM on June 27, 2008, complaining that he saw no other bus during his route; UTU filed a grievance on his behalf on August 10, 2008, complaining that McKnight had not received any pay while on medical leave; and UTU filed three grievances dated January 11, 2009 alleging harassment, pressure to drive faster, and not receiving a one-year pay increase. The ALJ further found it undisputed that Crespo knew about all of these complaints and that McKnight suffered adverse action by being discharged. In analyzing whether a nexus existed between McKnight's protected activity and the City's decision to terminate his employment, the ALJ found no evidence of disparate treatment, anti-union animus, or departure from established procedures. The ALJ found, however, that the City did not conduct a thorough investigation of the January 9, 2009 incidents, failed to give McKnight any reason for his discharge, and gave him conflicting reasons. Thus, the ALJ concluded, a sufficient nexus between McKnight's protected activities and his discharge to establish a prima facie case of retaliation. Finally, the ALJ found that McKnight's performance on January 9, 2009 did not violate the City's regulations and warranted only minor correction. Therefore, the ALJ concluded that the City failed to meet its burden of establishing that McKnight would have been discharged in the absence of his complaints and grievances, but instead the incidents were used as a pretext to mask the City's true motivation, i.e., McKnight's complaints and grievances. Accordingly, the ALJ concluded that the City retaliated against McKnight because of his protected activities, in violation of MMBA section 3506.

THE CITY'S EXCEPTIONS AND RESPONSE

In its 37 exceptions, the City raises the following arguments:

1. The ALJ erroneously failed to consider evidence of resume fraud and fitness for duty in ordering McKnight reinstated.

2. The ALJ erred in excluding opinion testimony by Ramirez as to McKnight's driving during the two incidents on January 9, 2009.

3. The ALJ erroneously substituted her own judgment as to safety for the requirements set forth in state and local laws, and the City's policies.

4. The evidence does not support the ALJ's conclusion that the City's investigation of the January 9, 2009 incidents establishes nexus.

5. The failure to give McKnight any reasons for termination other than that he was not meeting the expectations of a probationary employee does not establish nexus.

In his response to the exceptions, McKnight generally agrees with the ALJ's determination on all issues.

ISSUE

Did the City reject McKnight on probation in retaliation for having engaged in activity protected under the MMBA?

DISCUSSION

To establish a prima facie case that an employer retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a),¹³ the charging party must show that: (1) the employee exercised rights guaranteed by the MMBA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took an adverse action against the employee; and (4) the employer took the action because of the employee's exercise of guaranteed rights. (*County of Riverside* (2011) PERB Decision No. 2184-M; *Santa Clara*

¹³ Under PERB Regulation 32603(a), it is an unfair practice for a public agency to

[i]nterfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

County Counsel Attorneys Assn. v. Woodside (1994) 7 Cal.4th 525, 555-556; *Novato Unified School District* (1982) PERB Decision No. 210.)¹⁴

1. Protected Activity and Employer Knowledge

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 guaranteed by one of the statutes PERB administers.

The filing of grievances has long been held to be protected activity under the MMBA. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M.) Likewise, the use of union representation in a work-related dispute is a protected activity. (*County of Merced* (2008) PERB Decision No. 1975-M; *Regents of the University of California* (1995) PERB Decision No. 1087-H; *Los Angeles Unified School District* (1992) PERB Decision No. 957.)

McKnight's use of UTU to file a grievance on his behalf on August 10, 2008, and the three grievances on January 12, 2009, was protected activity.¹⁵ Although Negriff did not have knowledge of McKnight's grievances prior to recommending his termination, it is undisputed that Crespo and had knowledge of the filing of the grievances and that Peter also had knowledge of the three January 12, 2009 grievances when she recommended that McKnight's

¹⁴ 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.)

¹⁵ Given the Board's finding that McKnight engaged in protected activity in connection with the grievances filed on his behalf by UTU, it is unnecessary to reach the issue whether McKnight's June 27, 2008 GM also entailed an activity protected under MMBA section 3502.

probationary employment be terminated. Therefore, we find that the knowledge element has been met.

2. Adverse Action

PERB has long held that the termination of a probationary employee is an adverse action. (*County of Riverside, supra*, PERB Decision No. 2184-M; *California State University, Fresno* (1990) PERB Decision No. 845-H.) Thus, the City took adverse action against McKnight when it terminated his probationary employment on January 22, 2009.

3. Nexus Between Protected Activity and Adverse Action

“Unlawful 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 Cal. State Univ. 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 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 offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *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*, PERB Decision No. 264; *Novato Unified School District, supra*, PERB Decision No. 210.)

On January 14, 2009, two days after UTU filed three grievances on McKnight's behalf, Crespo recommended that McKnight's employment be terminated. Thus, the timing element is established.

We agree with the ALJ that there is no evidence of disparate treatment, anti-union animus, or departure from established procedures in this case. We disagree, however, that any other nexus factors have been established. An employer's failure to interview an employee in connection with a disciplinary matter evidences unlawful motive only when the employer routinely interviews employees under such circumstances. (*County of Riverside, supra*, PERB Decision No. 2184-M; citing *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) Here, there is no evidence that the City regularly interviewed probationary employees before releasing them. Nor is there any evidence that the City had a practice of interviewing individuals who complained about a driver's performance when a videotape of the incident was available. Accordingly, we find that the City's failure to interview McKnight, Morales, or Wright about the January 9, 2009 incidents does not support an inference of unlawful motive.

We also find that the City's failure to provide McKnight with reasons for releasing him on probation does not support an inference of unlawful motive. An employer's failure to give a probationary, "at-will" employee a reason for dismissal does not indicate unlawful motive in the absence of evidence that the employer was required by law, policy or past practice to do so. (*County of Riverside, supra*, PERB Decision No. 2184-M; *Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Thus, where the employer's practice was not to give a probationary employee a reason for releasing the employee on probation, the failure to do so did not support an inference of unlawful motive. (*County of Riverside, supra*, PERB Decision No. 2184-M.) Similarly, in this case, the City's practice when releasing probationary employees was to inform the employee only that the employee had failed to meet the expectations of a probationary employee. Accordingly, we do not find that the failure to provide McKnight with the reasons for terminating his probationary employment to be indicative of unlawful motive. Thus, McKnight has failed to establish a prima facie case of retaliation.

Affirmative Defense

Assuming for the sake of argument that McKnight had established a prima facie case of retaliation, we nonetheless would conclude that the City established that it would have rejected him on probation despite his protected activity of seeking UTU's assistance in filing grievances.

Once a prima facie case is established, the employer bears the burden of proving it would have taken the adverse action even if the employee had not engaged in protected activity.

(*Novato Unified School District, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line*

(1980) 251 NLRB 1083, 1089.) Thus, when it appears that the adverse action was motivated by both valid and invalid reasons, “the question becomes whether the [adverse action] would not have occurred ‘but for’ the protected activity.” (*Martori Brothers Distributors, supra*, 29 Cal.3d at p. 729.) The “but for” test is “an affirmative defense which the employer must establish by a preponderance of the evidence.” (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

When conducting the “but for” analysis, the proper inquiry is whether the employer’s true motivation for taking the adverse action was the employee’s protected activity. (*Regents of the University of California* (1993) PERB Decision No. 1028-H.) In making this determination, “PERB weighs the employer’s justifications for the adverse action against the evidence of the employer’s retaliatory motive.” (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) PERB’s inquiry is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason. (*Ibid.*, citing *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169.) Once PERB determines that the employer did not take action for an unlawful reason, its inquiry is at an end; PERB has no authority to determine whether adverse action not motivated by protected activity was just or proper. (*Regents of the University of California, supra*, PERB Decision No. 1028-H; *San Ysidro School District* (1980) PERB Decision No. 134.)

The record before us contains ample evidence that McKnight was advised repeatedly of his performance deficiencies long before UTU engaged in protected activity on his behalf by filing a grievance in August 2008 and three grievances on January 12, 2009. While these deficiencies alone may not have caused the City to reject him on probation, both Crespo and Negriff testified that they considered the January 9, 2009 incidents to be sufficiently egregious to warrant releasing him from probation.

The issue before the Board is not whether the employer had just cause to discipline or terminate the employee, but rather whether the true motivation behind the employer's decision was the employee's exercise of protected activity under the MMBA. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) Thus, we do not determine whether the City was correct in its determination that McKnight violated safety procedures, or whether good cause existed to terminate his employment. In this case, weighing the abundant evidence that his supervisors were dissatisfied with McKnight's performance throughout his employment against any possible inference of retaliatory motive, we do not find that McKnight's protected activity was the true motivation for the recommendation to terminate his probationary employment. We conclude that Crespo came to an independent decision to reject McKnight from probation based on work-related factors, and there was no credible evidence of anti-union animus. Even were we to find that Crespo harbored any ill-will toward McKnight, we cannot conclude that Crespo's decision to release McKnight from probation had at its source McKnight's protected activities.¹⁶

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-523-M are hereby DISMISSED.

Chair Martinez and Member McKeag joined in this Decision.

¹⁶ Given our conclusions set forth above, we find it unnecessary to address the City's remaining exceptions.