STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREDERICK C. KING, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (UC DAVIS MEDICAL CENTER), Respondent.	Case No. SA-CE-296-H PERB Decision No. 2314-H March 21, 2013

Appearances: Frederick C. King, on his own behalf; Travis J. Lindsey, Employee & Labor Relations Manager, for Regents of the University of California (UC Davis Medical Center).

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Frederick C. King (King) from the dismissal of his unfair practice charge. The charge, as amended, alleges that the Regents of the University of California (UC Davis Medical Center) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by changing King's work schedule in retaliation for having engaged in protected activity. The PERB Office of the General Counsel dismissed the charge for failure to state a prima facie case. King filed a timely appeal. The University filed a timely statement in opposition to the appeal.

The Board has reviewed the record in its entirety and given full consideration to the issues raised on appeal. Based on the Board's review, we reverse the dismissal for the reasons discussed below and remand the case to the Office of the General Counsel for issuance of a complaint based on the alleged retaliatory conduct of the University.

[1] HEERA is codified at Government Code section 3560 et seq. All further statutory references are to the Government Code.

SUMMARY OF FACTUAL ALLEGATIONS[2]

King is a radiologic technologist employed by the University in a bargaining unit whose exclusive representative is American Federation of State, County and Municipal Employees Local 3299. King's supervisor is Darcie Abrams (Abrams). David DelPizzo (DelPizzo) is the manager of Imaging Services.

Since September 7, 2006, King had worked the same weekly swing shift schedule: Tuesday through Friday, 2:00 p.m. through 12:30 a.m., with Saturday, Sunday and Monday off. On August 3, 2011, Abrams sent the following e-mail to King and his fellow swing shift workers[3]:

> Subject: Voluntary shift change
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> Hi everyone,
> During our last Supervisor meeting, it was brought to my attention that the Monday swing shift is struggling because they are short staffed. We are unable to hire someone at this time, so we are asking someone to volunteer a shift change. The only criteria [sic] is that you work Monday from 1400-0030. You can pick any day off during the week with Saturday and Sunday off. Please talk this over with your family and let me know by August 19th. I know we all enjoy the schedule we have but if we can help to provide better patient care then lets [sic] do it.. [sic] Thank you.
> Darcie Abrams

[2] This summary is derived from the initial and amended unfair practice charge. In determining whether a charging party has stated a prima facie case, the Board must credit charging party's factual allegations over those of the other parties. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Additional facts provided by a respondent made under penalty of perjury, as provided for in PERB Regulation 32620, subdivision (c), and not contradicted by the charging party may be considered by PERB in determining whether a charge should be dismissed. (*King In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) In this case, however, the University chose not to submit a position statement during the charge processing and investigation stage of the proceedings. (PERB Regs. can be found at Cal. Code Regs., tit. 8, § 31001 et seq.)

[3] The e-mail was addressed to King, Jeffrey Trester, Martin Do and Liberty Prestoza. DelPizzo was copied on the e-mail.

No one on King's swing shift volunteered for the schedule change. On an unspecified date after Abrams sent the e-mail, Abrams approached King to inform him that, given his lack of seniority, he had been selected for the shift change. King responded that he would "go to the union to fight the shift change."

According to the amended charge, on March 1, 2012, Abrams approached King to inform him that he "was being forced to start working a split shift." By "split shift," King is referring to a shift in which the three days off are interrupted by a work day.[4] King was told his new swing shift schedule would be Monday, Wednesday, Thursday and Friday with Tuesday, Saturday and Sunday off.[5] King told Abrams that having to work a split shift was unfair. Abrams agreed.

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[4] We adopt King's meaning of split shift in this decision.

[5] Following King's March 1 encounter with Abrams, King sent his union representative, Puneet Kanur (Kanur), the following e-mail:

> Hello Puneet Kanur,
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> I'm Frederick King, and I work at UC Davis medical center in Sacramento, as an X-ray tech. I've worked here in radiology since September 7, 2006, on swing shift, tuesday through friday, from 2:00pm, till [sic] 12:30 am.
>
> My boss tells me that I am going to be forced to change my work days. New schedule will be Monday, take off tuesday, work wednesday through friday, Saturday and sunday off.
>
> My boss says they can do this because of shift seniority. I do have the lowest seniority on swing shift, but not in the department.
>
> I do not want to do this. The contract I signed when I was hired was not for working a split-shift.
>
> Radiology employs per diem persons, and there are many other workers with less seniority than me.
>
> Can I be forced to take this shift change?
>
> Thank you,
>
> Fred

On March 6, 2012, DelPizzo approached King to inform him that the 30-day countdown toward the schedule change had started.[6] King alleges that DelPizzo "behaved very aggressively, as if to physically intimidate me, getting very close, only inches from my face." King responded that he needed his days off "in one piece in order to recooperate [sic] from a physically difficult work week." According to King, DelPizzo told him that he was lucky to have a job. King interpreted DelPizzo's statement as a threat against his continued employment.

On March 29, 2012, King, his union representative Kanur, DelPizzo and two human resources representatives met to discuss the schedule change. King reiterated that he needed his three days off in a row. DelPizzo replied that the change was inconvenient, but that King had to do it. After the meeting, King talked to Kanur who agreed to speak to management about allowing King to work Monday through Thursday, so that his days off would not be interrupted by a work day. King never heard back from the union.[7] On April 16, 2012, King began working

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[6] Article 12 of the parties' agreement states: "In the event the University decides to abolish, establish or change work schedules in work areas, the University shall inform AFSCME at least thirty (30) calendar days prior to taking such action."

[7] By e-mail to Kanur dated April 5, 2012, King stated:

> hello Puneet,
>
> Have you said anything to management regarding changing the shift to monday through thursday, instead of the split week?
>
> Maybe we should talk again. I heard last night that we have two per diem workers that have been working full time for over six months, and are going to have to be hired full time , as per contract. It would seem to me that this might be used to help keep me from having to work a split week.
>
> Also, do I have the option to bump a less senior person, to avoid this bad shift change?
>
> Thank you,
>
> fred

his new schedule. As of the filing of the charge, King was the only employee in diagnostic radiology who was working 10- to 12-hour shifts without having three days off in a row.

King filed the initial charge on October 15, 2012. After receiving a warning letter pointing out the deficiencies of the charge allegations, King filed an amended charge on December 18, 2012. The amended charge clarified that the retaliatory act was in being forced to work a schedule in which he no longer would be permitted to take his three days off in a row or, as he (King) calls it, a split shift.

THE DISMISSAL OF THE UNFAIR PRACTICE CHARGE

The Office of the General Counsel determined that the charge allegations satisfied three of the elements of a prima facie case of retaliation. Regarding the element of protected activity, the Office of the General Counsel determined that "[s]ometime prior to March 1, 2012, King informed [the University] that he would go to the union and fight his shift change. Therefore, King engaged in protected activity by threatening to seek out union representation to address his concern." Regarding the element of employer knowledge, the Office of the General Counsel determined that "sometime prior to March 1, 2012, [King] told Abrams that he would go to the union and fight the shift change. Therefore, [King] has established that [the University] had knowledge of his protected activity." Regarding the element of adverse action, the Office of the General Counsel determined that reassigning King to a split shift constitutes adverse action for purposes of reprisal.

Regarding the fourth element, the Office of the General Counsel determined that the requisite nexus between the protected activity and the adverse action had not been satisfied because the adverse action pre-dated the protected activity. The Office of the General Counsel reasoned that King's statement to Abrams that he would go to the union to fight the schedule change occurred after the act of reassignment.

KING'S APPEAL AND THE UNIVERSITY'S OPPOSITION

King contends on appeal that the Office of the General Counsel erred in determining that the adverse action pre-dated the protected activity. As King's argument goes, Abrams first approached King only to inform him that he was going to be required to work Mondays, not that he would no longer have the option of choosing his third non-weekend day off. It was not until March 1, 2012, that Abrams informed King that he would be required to work a split shift. King's protected activity occurred at the earlier date when Abrams first informed him that he had been selected for the schedule change. Therefore, according to King, his protected activity pre-dated the adverse action.

The University makes three arguments in its opposition to the appeal. It contends that King has failed to state a prima facie case for the reason stated in the dismissal, i.e., King was informed of the shift change prior to threatening to seek union representation. The University did not address the specific nexus issue raised by King on appeal that the adverse action is not the imposition of the Monday swing shift, which he was apprised of by Abrams when she first approached him, but rather, the imposition of a split shift, which he was apprised of by Abrams when she approached him on March 1, 2012. The University also contends that the charge is untimely because King knew or should have known of the underlying conduct no later than March 1, 2012, when he contacted his union representative for assistance. Finally, the University contends that PERB should not consider new allegations raised by King for the first time on appeal.

DISCUSSION

New Allegations on Appeal

On appeal, King presents new allegations that were not presented in the initial or amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge

allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

The new allegations concern the assignment of employees from the weekend shift with less seniority than King to the Tuesday swing shift. King states that this occurred three weeks prior to being informed he would have to give up the Tuesday swing shift for the Monday shift. For purposes of reviewing the dismissal of King's charge, the Board declines to consider these new allegations. The date of the event concerning the reassignment of weekend shift employees alleged for the first time on appeal predates the dismissal of the charge, and the appeal provides no reason why these allegations could not have been provided in the initial or amended charge. Thus, the Board does not find good cause to consider these new allegations on review of the dismissal.

Timeliness of the Charge

PERB Regulation 32620, subdivision (b)(5), requires dismissal of a charge or any part thereof if it is determined that the charge is based upon conduct occurring more than six months prior to the filing of the charge. The statute of limitations is an element of the charging party's prima facie case. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) A charging party bears the burden of demonstrating that the charge is timely filed. (*County of Sonoma* (2012) PERB Decision No. 2242-M.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The statute of limitations for new allegations contained in an amended charge begins to run based upon the filing date of the amended charge (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458) unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) An amended charge relates back to the initial charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

King's new split shift began on April 16, 2012. He filed his unfair practice charge on October 15, 2012, just within the six-month limitations period. Therefore, King's initial charge is timely. The new allegations in the amended charge filed on December 18, 2012, clarify facts originally alleged in the initial charge. Thus, the new allegations relate back to the original allegations in the initial charge. The amended charge is also timely.

The University contends that the statute of limitations began to run on March 1, 2012, when King contacted his union for assistance. Although DelPizzo began the 30-day countdown on March 6, 2012, the split shift was not imposed until April 16, 2012. In the meantime, there was a meeting with DelPizzo, a union representative and human resources representatives on March 29, 2012. There was further e-mail correspondence with his union representative on April 5, 2012. Until the split shift was actually imposed on April 16, 2012, King continued to press for further consideration of his circumstances. Given that imposition of the split shift could have been further delayed, or possibly obviated by an alternate resolution of the issue, the date of imposition serves as the logical date to begin the running of the limitations period. (See, e.g., *Regents of the University of California* (2004) PERB Decision No. 1585-H [in cases involving allegations that an employee was terminated from employment in retaliation for having engaged in protected activities, the statute of limitations begins to run on the date of actual termination,

rather than the date of notification of the intent to terminate].) The Office of the General Counsel did not find King's charge to be untimely. We agree.

The Prima Facie Case

To establish a prima facie case that an employer discriminated or retaliated against an employee in violation of section 3571, subdivision (a),[8] the charging party must show that: (1) the employee exercised rights guaranteed by HEERA; (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 adverse action because of the employee's exercise of guaranteed rights. (*Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 555-556; *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

We agree with the Office of the General Counsel that the first three elements of the prima facie case are met. We briefly summarize that analysis here. Abrams first approached King after the August 3, 2011, e-mail requesting a volunteer for the schedule change to inform him that he had been chosen for the change. King responded that he would "go to the union to fight the shift change." Seeking the assistance of the exclusive representative in connection with a workplace issue is protected activity. (*County of Riverside* (2011) PERB Decision No. 2184-M.) Even had King not consummated his threat, communicating his intention to seek union representation in exercise of his guaranteed rights is sufficient to establish protected activity. (See, e.g., *Los Angeles Unified School District (Thomas)* (2005) PERB Decision No. 1787 [adopting the proposed decision of the administrative law judge, the Board found that the charging party

[8] Section 3571, subdivision (a) provides in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

engaged in protected activity when she told management that she intended to speak with her union about filing a grievance].) In addition, the element of employer knowledge is met because King told Abrams he would go the union to fight the charge. And, in satisfaction of the third element, the University took adverse action against King by requiring him to work a split shift. (*Regents of the University of California* (1984) PERB Decision No. 403-H [changing an individual's work schedule constitutes adverse action].)

The issue presented in this case is whether the element of nexus is met. "Unlawful motive is the specific nexus required in the establishment of a prima facie case." (*Trustees of the California State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.) Establishing an unlawful motive is essential to a charging party's retaliation case. In the absence of direct evidence of unlawful motivation, unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. (*Ibid.*)

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 activity is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary nexus between the adverse action and the protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland*).)

The premise of a retaliation case is that an employer has taken adverse action against an employee *because of* the employee's exercise of rights guaranteed under the applicable labor relations statutory scheme. Temporally, the protected activity must precede the adverse action. The Office of the General Counsel determined that the protected conduct did not precede the adverse action and, on that basis, concluded that there was no nexus between the two events.

(See *County of San Bernardino (County Library)* (2009) PERB Decision No. 2071-M [timing not established where the alleged adverse action predates the employee's protected activity].) We would agree with that analysis if the adverse action ultimately imposed on King were the same as the adverse action originally contemplated. In other words, if the adverse action had not changed from notification to imposition, we would conclude that King's protected activity could not be the basis for inferring unlawful motive even though it preceded imposition. (See, e.g., *Alameda County Medical Center* (2004) PERB Decision No. 1707-M [timing not met where employee was consistently reprimanded for her tardiness prior to engaging in protected activity]; *Riverside Unified School District* (1987) PERB Decision No. 639 [protected activity, after decision to take adverse action, cannot be basis for inferring unlawful motive].)

Where there has been a substantial change in the adverse action, as here, the temporal relationship between the relevant events changes. (See, e.g., *Los Angeles Unified School District* (1985) PERB Decision No. 550 [no nexus because alleged harassment began prior to protected activity and had not "appreciably changed in kind or increased in intensity" thereafter].) In such an instance, the protected activity will be found to have preceded the adverse action, thus establishing the correct temporal relationship for retaliation purposes. In the e-mail of August 3, 2011, King and his fellow Tuesday swing shift employees were told that the only criterion for the schedule change was that the selected employee would have to work the Monday swing shift. There were no restrictions on choosing a third day off in addition to Saturday and Sunday. Therefore, in order to maintain the swing shift practice of having three days off in a row, the selected employee could work Monday through Thursday under the schedule change as originally articulated in the e-mail. When Abrams first approached King to inform him that he had been selected, he responded by telling her he would go to the union to fight the change. When King was subsequently approached by Abrams on March 1, 2012, however, he no longer had the option

of choosing his third day off. He was informed that he would have to work a split shift, with his days off being Tuesday, Saturday and Sunday. Thus, given the factual allegations presented in the charge, we conclude that King's protected activity occurred prior to the adverse action of being required to work a split shift.

Turning to the nexus factors, we now examine the temporal proximity of the protected activity to the adverse action. The proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself. (*California Teachers Association, Solano Community College Chapter, CTA/NEA* (2010) PERB Decision No. 2096.) Where a charge fails to allege when the employee engaged in the protected activity, PERB is unable to measure temporal proximity for purposes of determining whether there is a sufficient nexus between the protected activity and the adverse action. (*County of San Diego* (2012) PERB Decision No. 2258-M.)

Here, King does not allege the date when Abrams first approached him to inform him that he had been selected for the change in schedule. That is when King alleges that he engaged in the protected activity of telling Abrams that he would go to the union to fight the change. We do know, however, that it occurred sometime between the e-mail of August 3, 2011, and the subsequent time Abrams approached King on March 1, 2012, to inform him that he was going to be required to work a split shift. The Board has found a six-month lapse in time to not constitute temporal proximity sufficient to support an inference of unlawful motive in *Los Angeles Unified School District* (1998) PERB Decision No. 1300. In another case, however, *North Sacramento, supra,* PERB Decision No. 264, PERB found an inference of unlawful motive where a teacher who had no reprimands in five years suddenly received repeated reprimands within a six-month period after filing a grievance over a negative evaluation. Thus, there is no "bright line" rule for determining how close in time the protected activity must be to the retaliatory conduct. We

conclude that there is only an arguably minimally sufficient temporal proximity between King's protected activity and Abrams' notification on March 1, 2012, that he would be required to work a split shift. Because temporal proximity goes to the strength of the unlawful motive, based on temporal proximity alone, the inference of unlawful motive, although present, is weak.

As stated above, timing alone is not determinative of unlawful motive. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected activity is an important factor (*North Sacramento, supra,* PERB Decision No. 264), it does not, without more, demonstrate the necessary nexus between the adverse action and the protected conduct. (*Moreland, supra,* 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 employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529)[9] or 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

[9] But see *Sacramento City Unified School District* (2010) PERB Decision No. 2129 (an employer's failure to give an "at will" employee a reason for dismissal does not indicate unlawful motive by itself in the absence of evidence that the employer was required by policy or past practice to do so).

No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Accepting King's allegations as true for purposes of evaluating the prima facie case (*Golden Plains Unified School District* (2002) PERB Decision No. 1489), we conclude that King has alleged the existence of several nexus factors sufficient to support an inference of unlawful motive. King is the only employee in diagnostic radiology who works 10- to 12-hour shifts without having three days off in a row. This allegation shows disparate treatment. (*University of California* (1984) PERB Decision No. 403-H [changing the longstanding work schedules of only two employees, including one who participated in an unfair practice hearing, out of a workforce of 20 employees constitutes unlawful disparate treatment].) The adverse action as originally contemplated would have allowed King to take three days off in a row, as he had done since September 6, 2006. The adverse action ultimately imposed did not allow King that option, and instead required him to work a split shift. This allegation shows an implied inconsistency in the University's justification for its actions.

Thus, the allegations of the charge are sufficient to support an inference of unlawful motive. We therefore conclude that King has set forth allegations sufficient to state a prima facie case of retaliation under HEERA. At a formal hearing, King bears the burden of proving the complaint by a preponderance of the evidence. (PERB Reg. 32178.) Under the burden-shifting framework in retaliation cases, once a prima facie case is established, the employer bears the burden of proving it would have taken the adverse action even in the absence of the protected activity. (*Novato, 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, "the question becomes whether the [adverse action] would not have occurred 'but for' the

protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd., 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.) The University will have every opportunity at the formal hearing to present an affirmative defense.

ORDER

The Board REVERSES the dismissal of the unfair practice charge in Case No. SA-CE-296-H and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Winslow and Banks joined in this Decision.