

Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act),² when it retaliated against him because he engaged in protected conduct.

We have reviewed the unfair practice charge, the three amended charges, the warning and dismissal letters, the appeal, and the entire record in light of relevant law. Based on this review, we affirm the dismissal for the reasons set forth below.

PROCEDURAL HISTORY

Siavash filed his initial unfair practice charge with PERB on January 28, 2013.³ He subsequently filed amended charges on February 5 and 24. On February 27, the Office of the General Counsel sent Siavash a warning letter which gave him until March 7 to amend or withdraw his charge. Siavash did not amend or withdraw his charge by March 7. On March 13, Siavash filed a third amended charge. Also on March 13, the Office of the General Counsel dismissed Siavash's unfair practice charge. Siavash timely filed his appeal of the Office of the General Counsel's dismissal on April 2. On April 22, the Appeals Office notified the parties that the filings were complete. With the exception of a notice of appearance on February 28, Caltrans filed no response or opposition to Siavash's charge or appeal.

FACTUAL BACKGROUND

Our discussion below addresses charge allegations. We presume the facts alleged are true. We do so, because when assessing the dismissal of an unfair practice charge, we view the allegations in the light most favorable to the charging party.⁴

² The Dills Act is codified at Government Code section 3512 et seq.

³ Unless otherwise noted, all subsequent dates refer to the 2013 calendar year.

⁴ At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

Siavash has been employed by Caltrans as an accounting officer specialist. On or about April 23, 2012, Siavash reported what he believed to be accounting improprieties at Caltrans to his Division Chief, Malcolm Dougherty (Dougherty). On or about September 14, 2012, officers from either the California Highway Patrol or the Sacramento County Sheriff's Department⁵ arrested Siavash at his cubicle in the Caltrans office and charged him with trespassing and resisting arrest. In the process, the 67-year-old Siavash was "tasered," handcuffed and physically removed from the Caltrans office. Siavash alleges that he was arrested on the orders of his Division Chief, Dougherty, because Siavash had reported to Dougherty the alleged Caltrans accounting improprieties.

The Office of the General Counsel's Dismissal

The Office of the General Counsel dismissed Siavash's charge on jurisdictional grounds,⁶ concluding that Siavash had failed to state a prima facie case for retaliation under the Dills Act. The dismissal letter concluded that PERB does not have jurisdiction to enforce the United States or California Constitutions. (*State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S.) Nor does PERB have jurisdiction over the Civil Rights Act of 1964, Equal Employment Opportunity Act, privacy protection laws, or the Occupational Health and Safety Act.

⁵ Siavash mentions both agencies.

⁶ In his initial and three amended charges Siavash alleges violations of the United States and California Constitutions, particularly the fourth amendment; the National Labor Relations Act section 7; California Labor Code section 132a; the California Government Code; the Occupational Health and Safety Act; Equal Employment Opportunity Act; the Americans with Disabilities Act; criminal, privacy and harassment laws; and violations of Caltrans Human Resources' policy and procedures.

DISCUSSION

PERB's jurisdiction is limited to the determination of unfair practices arising under the Dills Act and the other public sector employer-employee relations statutes which we administer. California state employees who report waste, fraud, abuse of authority, violations of law, or threats to public health are protected from retaliation by the California Whistleblower Protection Act (CWPA) (Gov. Code, § 8547 et seq.). The California State Auditor has been charged with the duty to administer the CWPA. PERB has previously held that it lacks jurisdiction over enforcement of the CWPA. (See *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.)

Nor does PERB have jurisdiction over employment-related discrimination claims arising under California's Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) which is enforced by the Department of Fair Employment and Housing and California courts. (*Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223.) Likewise PERB lacks jurisdiction over claimed violations of: the California Labor Code (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S); the California Penal Code (*State of California (Department of Corrections)* (2004) PERB Decision No. 1559a-S); and California's Worker's Compensation laws, including Labor Code section 132a (*Salinas City Elementary School District* (1996) PERB Decision No. 1131). Lastly, PERB lacks jurisdiction over claimed violations of the United States and California Constitutions as well as a variety of federal statutes which protect employees, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M; *California School Employees Association, Chapter 245 (Waymire)* (2001) PERB Decision No. 1448.)

We conclude, with the Office of the General Counsel, that Siavash's amended charge, alleging that he was retaliated against by Caltrans for reporting alleged Caltrans accounting improprieties to his Caltrans division manager, did not state conduct protected under the Dills Act. That Siavash has not stated conduct protected under the Dills Act ends our inquiry: we simply do not have jurisdiction over his claims.

ORDER

The unfair practice charge in Case No. SA-CE-1945-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



February 27, 2013

Saham Siavash

Re: *Saham Siavash v. State of California (Department of Transportation)*
Unfair Practice Charge No. SA-CE-1945-S
WARNING LETTER

Dear Mr. Siavash:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 28, 2013. Saham Siavash (Mr. Siavash or Charging Party) alleges that the State of California (Department of Transportation) (State or Respondent) violated the United States Constitution, the Civil Rights Act, the Health and Safety Act, the Equal Employment Opportunity Act, privacy protection laws, and labor laws.

Attached to the charge are over 100 pages of attachments including a copy of the United States Constitution and Bill of Rights, a September 18, 2012 e-mail message to the Deputy Director of the California Transportation Commission concerning Charging Party's alleged whistleblower conduct, a letter to the CALPERS Board of Administrators regarding Charging Party's Industrial Disability Retirement, Charging Party's Disability Application, numerous documentation related to Charging Party's prior workers' compensation matter, and documents related to a criminal matter involving Charging Party.

Charging Party is currently employed by the California Department of Transportation. At some point during his employment, Charging Party appears to have engaged in some alleged whistleblower activity where he attempted to show that the amount of cash and accounts receivable were overstated and not disclosed on the Department of Transportation's 2012 year-end financial statements.

Subsequently, Charging Party states that on September 14, 2012 the State enlisted the Sacramento County Sheriff's Department (Sheriff's Department) to enter Charging Party's cubical and torture, tazer, handcuff and ultimately arrest Charging Party for trespassing and resisting arrest.

Discussion

PERB's jurisdiction is limited and does not include enforcement of the U.S. or California Constitutions. (*State of California (Department of Transportation) (2005) PERB Decision No. 1735-S.*) Likewise, PERB's jurisdiction does not include enforcement of the Civil Rights Act, the Equal Employment Opportunity and Adverse Action, or privacy protection laws.

(*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M.) Therefore, PERB does not have jurisdiction over Charging Party's allegations that the Department violated the United States Constitution, the Civil Rights Act, the Health and Safety Act, the Equal Employment Opportunity Act, and privacy protection laws.

With respect to Charging Party's assertion that the State violated "labor laws," PERB Regulation 32615(a)(5)¹ requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In doing so, a charging party should allege sufficient facts to establish the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

To the extent that Charging Party is alleging retaliation for engaging in protected activity, to demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*)). In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the

¹ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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) 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 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, supra*, PERB Decision No. 210).

The charge states that Charging Party attempted to reported the misuse of State resources. As a result, on September 14, 2012, the State requested the assistance of the Sheriff's Department to remove Charging Party from his cubicle and arrest him. However, PERB has previously found that it lacks jurisdiction over whistleblower protection claims. (*Alvord Educator's Association (Bussman)*(2009) PERB Decision No. 2046.) Therefore, to the extent that Charging Party asserts protection under the Whistleblower Act, such conduct does not establish protected activity for purposes of a prima facie discrimination violation. Likewise, to the extent that Charging Party provides documentary evidence concerning his prior workers' compensation claim, the Board has held that such conduct is also not protected activity for purposes of a prima facie discrimination violation. (*State of California, Department of General Services* (1994) PERB Decision No. 1037-S.) As written, the charge provides no further information to establish that Charging Party engaged in any type of protected activity sufficient to establish a prima facie discrimination violation.

For these reasons the charge, as presently written, does not state a prima facie case.² If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be

² In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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served on the respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before March 7, 2013,³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nyman
Regional Attorney

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³ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



March 13, 2013

Saham Siavash

Re: *Saham Siavash v. State of California (Department of Transportation)*
Unfair Practice Charge No. SA-CE-1945-S
DISMISSAL LETTER

Dear Mr. Siavash:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 28, 2013. Saham Siavash (Mr. Siavash or Charging Party) alleges that the State of California (Department of Transportation) (State or Respondent) violated the United States Constitution, the Civil Rights Act, the Health and Safety Act, the Equal Employment Opportunity Act, privacy protection laws, and labor laws.

Charging Party was informed in the attached Warning Letter dated February 27, 2013, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before March 7, 2013, the charge would be dismissed.

On March 8, 2013, Charging Party filed a document titled "Fax Form" and attached three pages of documents. The "Fax Form" appears to be a letter to an SEIU Representative named Jessica. In the letter, Charging Party confirms a telephone conversation he had with Jessica during which he requested assistance from SEIU to file a grievance against the State. Attached to the letter are a two-page Request of Salary Advance form and a copy of a State check made out to Charging Party.

On March 13, 2013, without having requested an extension of time, Charging Party filed an amended charge. In the amended charge, Charging Party provides the following factual statement of charges:

I, Saham Siavash, a victim am 68 years old and an employee of the [State]. Pursuant to instructions from employees who wanted me out of my lawful place of work, I was tasered by Sgt Sofa and both my arms right wrist shoulders were injured. I was battered and taken to the hospital, body injuries as well as psych injuries. Work compensation claimed and State Fund Insurance adjuster denied due not to the work related Untruth Statement. I falsely

arrested by CHP Officer which is part of [the State] while I was lawfully employed at my work place. See attached the officer allow themselves to be used as "bouncers" to vent the spleens of Messers Barnes and Paulson. They were planning to force me into an early medical retirement but falsely told the officers I was an ex-employee.

I was a whistleblower to get the year-end financial statement right, Witness Director Malcolm Daugherty, Susan Branson and few managers at the audit and investigation at the time.

Retaliation to be a whistleblower vs. protection of whistleblower I am a victim on September 14, 2012, but I was charged with three criminal counts.

[The State] planned to give me Family Medical Leave but I submitted two doctors notes injured employee return to work but [the State] ignored that letter anyway.

I filed a claim of discrimination against Mr. Frank Garcia and Darwin Salmos at the office of Equal Employment Opportunity at [the State] but EEO office never investigated.

Managements planned to target my life and dignity for that they planned to order to arrest me but they have had an option putting me on disciplinary action

Managements have fully exhibited his hatred and want to destroy my life. I have no both financial and marital stressed.

Attached to Charging Party's amended charge is a "Statement of Financial Position In the Matter of Unfair Practice." This document states that it is a report that is to be used as a "tool" for the Board to facilitate comparison between Charging Party's statements and management's positions. The document appears to be a lengthy, detailed description of the State's purported misuse of State resources which lead to Charging Party reporting of said misuse and seeking protection under the Whistleblower Protection Act.

Also attached to the amended charge are a Verification of Employment form and two compact discs containing additional documentation. One disc contained two unreadable files. The second disc contained copies of (1) a letter to the Civil Rights office that was previously attached to the original charge; (2) a letter to the CalPERS Board of Administration that was previously attached to the original charge; (3) copies of a 40-page "employee perspective to the Status Quo employee IDP system" with supporting documentation; (4) a copy of Government Code 3565; (5) a "Financial Deposition" excel spreadsheet that appears to related to Charging Party's Whistleblower action; (6) a photograph of Charging Party; (7) a proof of service; (8) a second copy of Charging Party's "Statement of Financial Position In the Matter of Unfair Practice" previously identified above; (9) a copy of the documentation Charging Party filed on March 8, 2013; and (1) two unreadable files.

Discussion

As amended, Charging Party has failed to address any of the concerns articulated in the February 27, 2013 Warning Letter. The original Warning Letter informed Charging Party that PERB lacked jurisdiction over Charging Party's allegations that the State violated the United States Constitution, the Civil Rights Act, the Health and Safety Act, the Equal Employment Opportunity Act, and privacy protection laws. Nothing in Charging Party's March 8 filing or his amended charge address PERB's lack of jurisdiction with respect to these violations.

The original Warning Letter also informed Charging Party that, to the extent he was alleging a retaliation violation, the charge did not establish that Charging Party had engaged in any type of protected activity sufficient to establish a prima facie discrimination violation. As amended, Charging Party continues to allege that the State retaliated against him for his protected conduct under the Whistleblower Protection Act. However, Charging Party was expressly informed that, with respect to his attempt to report the misuse of State resources, PERB lacks jurisdiction over whistleblower protection claims. (*Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.)

With respect to the March 8 documentation, Charging Party does establish that he eventually sought out union assistance with filing a grievance. (*City of Santa Monica* (2011) PERB Decision No. 2211-M [seeking out union assistance constitutes protected activity].) However, such conduct occurred on March 7, 2013, well after any allegations of improper State conduct contained in the original charge. The Board has long held that the requisite timing element in establishing a retaliation violation is not established when the adverse action occurred prior to protected activity. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the February 27, 2013 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,¹ Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Katharine Nyman
Regional Attorney

Attachment

cc: Keith B. LaMar, Labor Relations Counsel