STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. NAPA VALLEY COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-3166-E PERB Decision No. 2563 May 25, 2018

Appearances: Eric M. Moberg, on his own behalf; Liebert Cassidy Whitmore by Laura Schulkind, Attorney, for Napa Valley Community College District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Eric M. Moberg's (Moberg) appeal from the dismissal of his unfair practice charge by PERB's Office of the General Counsel. The charge, as amended, alleged that the Napa Valley Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by withdrawing an offer of employment to Moberg and terminating his access to the District's e-mail system in retaliation for his protected activity.

The Office of the General Counsel dismissed the charge after determining that the only protected activity alleged was Moberg's filing of PERB charges against a previous employer approximately seven years earlier, and that the District did not have knowledge of that protected activity. The Office of the General Counsel also concluded that even assuming the

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory referenced are to the Government Code.

District's knowledge of Moberg's protected activity, the charge did not allege sufficiently close timing between the protected activity and the adverse action, or any other facts establishing an unlawful motive.

The Board has reviewed the case file in its entirety, Moberg's appeal of the dismissal, and the District's opposition to the appeal. As we explain below, we conclude that Moberg also engaged in protected activity, with the District's knowledge, by sending certain e-mails to his co-workers and to District administrators. We affirm the dismissal of the charge, however, because it does not allege sufficient facts to establish an unlawful motive.

SUMMARY OF FACTUAL ALLEGATIONS[2]

In 2009, Moberg entered into a settlement agreement with the San Mateo County Office of Education (SMCOE). The agreement resolved a number of disputes arising from SMCOE's termination of Moberg's employment, including several PERB unfair practice charges. One of the terms of the agreement was that Moberg "shall attach to this AGREEMENT his signed letter of resignation of employment for personal reasons, dated February 27, 2009, to be effective June 30, 2009."

Also in 2009, Moberg was hired by the Monterey Peninsula Unified School District (MPUSD). On January 11, 2013, the Sixth District Court of Appeal issued an unpublished

[2] On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 4 [Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, provided it is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Regulation 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.)

decision in *Moberg v. Monterey Peninsula Unified School District Board of Education* (H037865). That decision affirmed a judgment by the Monterey County Superior Court that upheld MPUSD's decision to dismiss Moberg in 2010. According to the decision, MPUSD charged Moberg with: (1) evident unfitness to teach; (2) persistent violation of or refusal to obey school laws and regulations; and (3) dishonesty. The dishonesty charge was based on a statement on Moberg's employment application that he had left his employment with SMCOE to "seek better opportunities and avoid budget and program cuts," when he had actually resigned pursuant to the settlement agreement. The superior court rejected the dishonesty charge, because this single instance of dishonesty did not establish a "disposition to deceive." But the superior court upheld the other charges, and the Court of Appeal affirmed.

In 2014, Moberg applied for a temporary position with the District as a part-time adjunct instructor. The District's employment application required applicants to list their teaching experience, most recent first, with space for four entries. Moberg listed the following former employers: Menlo College from August 2013 to present; Evergreen Valley College from August 2010 to present; Skyline College from August 2000 to December 2013; and SMCOE from August 1994 to June 2009. As his reason for leaving SMCOE, Moberg wrote "To move out of area." The application also included space for non-teaching experience, which Moberg left blank. Moberg alleges that he did not list his employment at MPUSD because it did not qualify as "non-teaching experience," and because it was his "tenth most recent employer" at the time of his application.[3] Above the signature line on the application is the following statement: "I certify that the statements in this application are true and I

[3] Moberg alleges that his curriculum vitae (CV) included Monterey Adult School, which was his assigned school site during his employment at MPUSD. He also suggests that the District had his CV, but does not allege that he submitted it with his application.

understand that any misrepresentation or omission of materials [*sic*] facts in this application may be cause for dismissal."

During Moberg's interview for the position, he was not asked any questions regarding his application or his former employers. He was hired.

On September 9, 2015, Napa Valley College Faculty Association (Association) President Dianna Chiabotti (Chiabotti) sent an e-mail to all full-time and part-time faculty reminding them of an Association meeting scheduled for the following day. In between the details of the meeting appears a message from a part-time faculty member, Fayez El Giheny (El Giheny), urging that adjunct instructors get paid on the same salary scale as full-time instructors and arguing that an increase in adjunct faculty pay would not require more money from taxpayers, but a more equal distribution between full-time and adjunct faculty.[4]

The following day, El Giheny responded to all faculty in an e-mail, stating that he would not be able to attend the Association meeting that day, but offering an analysis of the discrepancy in pay between full-time and adjunct faculty.

On September 12, 2015, Moberg responded to all faculty, suggesting: "How about we take some money from the bloated Pentagon budget that funds death and destruction instead of education and enlightenment."

On September 15, 2015, another faculty member, Mary Shea (Shea), responded directly to Moberg that, as the mother of a soldier killed in Iraq, she was disturbed by Moberg's e-mail. Shea also sent her message to Department Chair Tia Madison (Madison), Dean of Human Resources Laura Ecklin (Ecklin), and Vice President of Instruction Terry Giugni (Giugni).

[4] The placement of El Giheny's message within an otherwise unrelated e-mail message, as well as the lack of response from Chiabotti, suggests that Chiabotti may have included El Giheny's message by mistake.

On September 15, 2015, Moberg responded to Shea: "Thank you for joining our discussion. I stand by my suggested solution to low pay for educators, which is a working condition that I find both unsatisfactory and remediable."

The following day, Madison asked Moberg to "honor [Shea's] request to exclude politics, etc. from this discourse," and referred Moberg to the District's e-mail use policy. Ecklin also responded, "I would like to add that issues of compensation and working conditions should be brought to the leadership of the Faculty Association since that body is the official representative of the faculty."

On September 17, 2015, Chiabotti sent the following message to the full-time and part-time faculty:

> As the President of the Faculty Association, I am notifying all faculty and NVC Management that an Online Union Meeting is NOT taking place.
>
> This email chain is not sanctioned by the Association and it should not be considered the work of the Association.
>
> Our Faculty Association has been very clear over the past couple years that any official online business of the Association will be conducted via our off-campus emails, and that NVC emails are used solely for distribution of reminders for meetings, survey links, and general Association Board relay of information.
>
> Any continuation of this chain of emails is not sanctioned by the Faculty Association and will not be consider[ed] the work of the Association.

At some point after September 17, Moberg filed a grievance regarding the directive to refrain from using the District's email system to discuss pay issues with fellow faculty members. The grievance alleged that the directive violated the collective bargaining agreement (CBA) between the District and the Association. On October 6, 2015, Moberg received a letter from Acting Dean of Instruction Diane White (White), in which White

declined to respond to a grievance filed by Moberg, on the grounds that he was not a "unit member" as defined by the CBA.[5]

On October 10, 2015, Moberg sent an e-mail to Ronald Kraft (whose position is not identified), the District's Board of Trustees, and others, including Ecklin and Giugni. Moberg's message stated:

> ***Moberg UN-AMERICAN OPPRESSION CONSPIRACY GRIEVANCE Level Three***
>
> Dear Colleagues: Dean White's October 6 non-response only furthers the conspiracy and insults the dignity of Professor Moberg with the inhuman argument that Moberg enjoys NO CONTRACTUAL RIGHTS WHATEVER at NVC! [Outrage added.] Even more disturbing is the fact that White's letter mentions neither "education" nor "student" once—Moberg's grievance included 13 such references. This speaks volumes about the NVC management and its view of non-administration human beings on campus as unwashed masses worthy of no rights or even mention—adjunct professors are merely annoying legal problems to dismiss summarily, and students occupy no space whatever in the collective consciousness of the Kraft Administration.
>
> Please find Level Three attached with the infamous White letter as final exhibit.

(Brackets in original.)

On January 6, 2016, Moberg submitted a work order to restore his District e-mail account.

On January 7, 2016, Giugni sent Moberg a letter withdrawing his offer of employment for the Spring 2016 semester. Giugni wrote:

> It has recently come to our attention that your application included misrepresentations and omitted material facts. On that basis, the District will not employ you.

[5] According to White's response, "unit member" included part-time faculty who have taught three out of the last five semesters. She asserted that Moberg had only taught two out of the last five semesters.

Specifically, we have determined that:

1. Your stated reason for leaving your employment with the San Mateo County Office of Education ("SMCOE") is false. You certified as true that you left SMCOE to "move out of the area". In fact, you resigned your position as a term of a settlement agreement with SMCOE.

2. You failed to disclose in your application both that you had been employed by [MPUSD] and that you were terminated by MPUSD for cause. A prior termination for cause from a teaching position is clearly a material fact when seeking employment as an instructor. Moreover, its materiality was made evident by the application itself—which requires applicants to state the reason for leaving each position listed. Thus, we further conclude that you omitted your employment with, and termination from, MPUSD knowing that these were material facts that would likely result in the District not offering you a position.

3. While such misrepresentations and omissions in the application process provide a sufficient basis for dismissal, I further confirm that had the District been aware of the facts underlying your termination from MPUSD, you would not have been offered a position by the District. (See *Moberg v. Monterey Peninsula Unified School District* (1/11/13) Cal. Court of Appeals No. M109124.)

Moberg was later informed that his e-mail access had been disabled at the direction of District management.

THE DISMISSAL

The Office of the General Counsel applied the Board's test for a prima facie case of retaliation, which requires evidence that: (1) the employee exercised protected rights; (2) the respondent had knowledge of the employee's exercise of those rights; (3) the respondent took adverse action against the employee; and (4) the respondent took action because of the exercise

of those rights, i.e., had an unlawful motive. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6.)[6]

The Office of the General Counsel determined that Moberg engaged in protected activity by filing PERB charges against SMCOE, but concluded that Moberg's e-mail messages or what it termed his "purported grievance" did "not appear to be protected activity." (Dismissal letter, p. 4.)

The Office of the General Counsel then determined that there were no facts establishing that Giugni, who withdrew the offer of employment, knew of Moberg's PERB charges. It rejected Moberg's argument that Giugni's knowledge of the SMCOE settlement agreement necessarily demonstrated knowledge of the PERB charges that it resolved. The Office of the General Counsel also noted that while Giugni appeared to have been aware of the Court of Appeal's decision in his case, that decision did not mention Moberg's PERB charges.

The Office of the General Counsel then concluded that the withdrawal of the employment offer was an adverse action,[7] but that the allegations were insufficient to establish unlawful motive. It determined that Moberg's charges against SMCOE were too remote in time to serve as evidence of motive, and that the facts alleged did not support Moberg's claims

[6] Moberg's First and Second Amended Charges appear to allege that Ecklin and Madison's e-mails to him interfered with his rights under EERA. The Office of the General Counsel did not address this allegation, and Moberg's appeal does not mention it. Because the issue is not raised in the appeal, we do not consider it. (See PERB Regulation 32635, subd. (a)(1) [appeal must "[s]tate the specific issues of procedure, fact, law or rationale to which the appeal is taken"].)

[7] Moberg also asserted that the disabling of his e-mail account was an adverse action. In the warning letter, the Office of the General Counsel allowed that this could be an adverse action, but noted that "it appears that at the time Moberg may have no longer been employed by the District." Moberg does not challenge this conclusion in his appeal, and has therefore abandoned the issue.

that Giugni offered exaggerated reasons for the adverse action, performed a cursory investigation, or departed from its usual procedures.

APPEAL

Moberg's appeal identifies nine errors in the Office of the General Counsel's dismissal, which generally take issue with the conclusions that Moberg's e-mails and grievance were not protected, and that there was no evidence of unlawful motive. Moberg also claims, citing *Los Angeles Unified School District* (2016) PERB Decision No. 2479 (*Los Angeles*), that the Office of the General Counsel failed to apply the "but for" test in its analysis of his charge.

DISCUSSION

I. The "But For" Test

Preliminarily, we reject Moberg's claim that the Office of the General counsel erred by "fail[ing] to apply the 'but for' test, required even for 'at will' public employees," citing *Los Angeles*, *supra*, PERB Decision No. 2479. The "but for" test is how PERB assesses the employer's affirmative defense once a charging party has established a prima facie case of retaliation under *Novato, supra*, PERB Decision No. 210. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21.)[8] Because the Office of the General Counsel was analyzing whether Moberg's charge stated a prima facie case, the "but for" test was irrelevant.

[8] Under *Novato*'s burden-shifting framework, the employer bears the burden of proving it would have taken the same action even in the absence of the protected activity. (*Novato, supra*, PERB Decision No. 210 at p. 4.) The Board asks whether the adverse action would not have occurred "but for" the employee's protected activity. (*Chula Vista Elementary School District*, *supra*, PERB Decision No. 2221 at p. 21.)

II. Prima Facie Case

A. Protected Activity

We first address Moberg's contention that he engaged in protected activity by submitting a grievance and moving it to level three by his October 10, 2015 e-mail, and sending the e-mails on September 12 and 15, 2015.

EERA gives public school employees the "right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," as well as the "right to represent themselves individually in their employment relations with the public school employer." (Gov. Code, § 3543, subd. (a).)

Considering first Moberg's October 10, 2015 e-mail moving his grievance to level three after White's refusal to respond to the merits of the grievance, the Office of the General Counsel determined that this e-mail was not protected because the text of the e-mail did not assert a violation of the CBA, the grievance purportedly attached to the e-mail was not included with the charge, and the charge did not allege that the CBA provided for a grievance process. The charge does, however, allege that the grievance asserted violations of various provisions of the CBA. And whether the CBA contained a grievance process is not relevant. An employee engages in protected activity by asserting a violation of a labor agreement even outside the contractual grievance process. (*Mammoth Unified School District* (1983) PERB Decision No. 371, adopting proposed decision at p. 38.) It is also beyond dispute that grievance processing, whether done by an individual seeking to invoke the protections or benefits of a collectively bargained agreement, or by the exclusive representative seeking to enforce its agreement, is protected activity. (*Trustees of the California State University*

(East Bay) (2014) PERB Decision No. 2391-H; *Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Therefore, we conclude that Moberg's filing and processing his grievance as evidenced by his October 10, 2015 e-mail message was protected activity.

We turn next to Moberg's e-mail messages of September 12 and 15, 2015, in which Moberg responded to his co-workers' messages about adjunct faculty pay with his own solution: adjusting the federal government's spending priorities. The Office of the General Counsel concluded that these messages were not protected because they "do not appear to address collective concerns of the bargaining unit or seek to enforce rights stated in the CBA." We disagree with this analysis.

Necessarily included in the right to "form, join, and participate" in the activities of an employee organization is the right of employees to "discuss[] wages, hours and working conditions at the workplace." (*Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 8.) Such discussions better equip employees "to make a free and informed choice about whether to exercise their right . . . to form, join or participate in a union." (*Ibid.*) In general, an employee's speech is protected if it is "related to matters of legitimate concern to the employees as employees." (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12; *San Diego Community College District* (1983) PERB Decision No. 368. pp. 16-17.)

This right of discussion is not limited to conversations about matters specific to the bargaining unit. The Board has held that "'[s]chool employees and employee organizations have a right to communicate at the worksite, free from employer restriction, about specific terms and conditions of employment as well as matters of more general political, social or

economic concern to employees.'" (*Wilmar Union Elementary School District* (2000) PERB Decision No. 1371, p. 17, opn. of Caffrey, Chair, quoting *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99.) This right is limited if "the relationship between the political activity and the employment relationship [is] so attenuated as to lose its protection." (*Id.* at p. 18, citing *Eastex, Inc. v. National Labor Relations Board* (1978) 437 U.S. 556, 567-568 [union newsletter urging members to write legislators to opposed "right-to-work" legislation and to register to vote fairly characterized as protected concerted activity].)

Here, the relationship between federal government spending on defense and education and the employment and/or wages of Moberg and other District faculty is not so attenuated that the e-mails lost their protection under EERA. Although Moberg's proposed solution was not within the District's control, increased adjunct professor pay is a possible, if not inevitable, result of increased federal spending on education. It also bears emphasis that Moberg was responding to his colleagues' e-mails, beginning with that of the Association president, that directly concerned adjunct professor pay.[9] EERA should not be construed to protect some parts of this debate but not others.

Because we disagree with the Office of the General Counsel that the contents of Moberg's September 12 and 15, 2015 e-mails were unprotected, we find it necessary to address

[9] That the Association president retroactively disavowed the discussion that followed her own e-mail does not change our conclusion. The right conferred by EERA is to "form, join, and participate in the activities of employee organizations." (§ 3543, subd. (a).) This right is not textually limited to those activities sanctioned by the exclusive representative. (Cf. *N.L.R.B. v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 326.) Additionally, the Board has long held that this right extends to participation in *group* activity—or actions that are the logical continuation of group activity—not merely employee organization activity. (See, e.g., *Jurupa Unified School District* (2012) PERB Decision No. 2283, pp. 15-16; *State of California, Department of Transportation* (1982) PERB Decision No. 257-S, p. 7.)

a question not considered by the Office of the General Counsel: whether Moberg had the right to disseminate these statements via the District's e-mail system.

PERB has held that employees' use of their employer's e-mail system is protected only if it falls within the range of "permissible non-business use" under the employer's e-mail use policy. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 15 (*LA Superior Court*).) In other words, an employer cannot maintain a discriminatory policy, or enforce its policy in a discriminatory way, to prohibit e-mails related to union business or other protected activity. (*Ibid.*; see also *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S, (*Personnel Administration*), proposed decision at p. 45.) In *LA Superior Court*, the Board relied in part on a National Labor Relations Board (NLRB) decision, *The Register-Guard* (2007) 351 NLRB 1110 (enf. den. in part on other grounds (D.C. Cir. 2009) 571 F.3d 53). That case has since been overruled. (*Purple Communications, Inc.* (2014) 361 NLRB No. 126 (*Purple Communications*).)

Because federal law is only persuasive and not controlling authority for interpreting the statutes within our jurisdiction, our previous decision to follow federal authority on this issue does not bind us automatically to subsequent developments in federal law. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 28.) This case presents our first opportunity to consider whether to continue to adhere to our reliance on *The Register-Guard* or to instead follow *Purple Communications*. We begin by examining each case.

In *The Register-Guard*, *supra*, 351 NLRB 1110, a divided NLRB held that an employer's ban on employee use of e-mail for all "nonjob-related solicitations" did not

interfere with employee rights under section 7 of the National Labor Relations Act (NLRA).[10] The majority relied principally on the NLRB's line of cases holding that an employer's "basic property right" allows it to restrict employees' use of its "'equipment or media,' as long as the restrictions are nondiscriminatory." (*Id.* at p. 1114.) The majority rejected the dissent's argument that the question should be resolved under *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793 (*Republic Aviation*), "by balancing employees' Section 7 rights and the employer's interest in maintaining discipline, and that a broad ban on employee nonwork-related e-mail communications should be presumptively unlawful absent a showing of special circumstances." (*The Register-Guard*, *supra*, at p. 1115.) The majority found *Republic Aviation* inapplicable, because it involved prohibitions on in-person solicitation and distribution of literature. The majority concluded that e-mail is not "traditional, face-to-face solicitation," and that the employer's use of e-mail had not eliminated face-to-face employee communication or "reduced such communication to an insignificant level." (*Ibid.*)

Seven years later, the NLRB, again divided, overruled *The Register-Guard*, *supra*, 351 NLRB 1110. In *Purple Communications*, *supra*, 361 NLRB No. 126, the majority concluded that "[b]y focusing too much on employers' property rights and too little on the importance of email as a means of workplace communication, [*The Register-Guard*] failed to

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[10] Codified at 29 U.S.C. § 157, this section provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

adequately protect employees' rights under the Act and abdicated its responsibility 'to adapt the Act to the changing patterns of industrial life.'" (*Id.* at p. 1.) The majority recognized that "employees' exercise of their Section 7 rights 'necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.'" (*Id.* at p. 6, quoting *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 491-492.) It also concluded that e-mail "has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations" in many workplaces. (*Id.* at p. 8.) With respect to the employer's property interest, the majority distinguished e-mail from the types of "employer equipment" addressed in other cases, namely, bulletin boards, copy machines, public address systems, and telephone systems. In contrast to those media, the NLRB concluded that e-mail's "flexibility and capacity make competing demands on its use considerably less of an issue," in that "[e]mployee email use will rarely interfere with others' use of the email system or add significant incremental usage costs." (*Id.* at p. 9.) Ultimately, the majority adopted the *Republic Aviation* framework that had been advanced by the dissent in *The Register-Guard*:

> [W]e will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, we anticipate that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees. In more typical cases, where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline.

(*Purple Communications, supra*, at p. 10, footnotes omitted.)

In determining whether to follow *Purple Communications*, *supra*, 361 NLRB No. 126, we find it significant that PERB has frequently found the NLRB's use of the *Republic Aviation* framework persuasive in determining employee rights to communicate at the workplace. This right of communication includes wearing union buttons (*State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S; *East Whittier School District* (2004) PERB Decision No. 1727) and other insignia (*County of Sacramento* (2014) PERB Decision No. 2393-M). It also includes distribution of literature and in-person solicitation. (*Long Beach Unified School District* (1980) PERB Decision No. 130, p. 7.) In terms of the employee rights at issue, there is no material distinction between employee rights under section 7 of the NLRA and employee rights under section 3543 of EERA. Despite differences in wording, we have long recognized that "[t]he only difference . . . between the [NLRA] right to engage in concerted action for mutual aid and protection and the [EERA] right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 62.) And in terms of the employer's interests in maintaining production and discipline, the *Republic Aviation* framework allows for variation in different types of workplaces by allowing the employer to prove that special circumstances justify restrictions on the employee right in question. Thus, we can conceive of no sound reason why we should not also apply the *Republic Aviation* framework to the context of employee communication through e-mail.

If anything, the case for finding an employee right to use the employer's e-mail system for otherwise protected communications is even stronger under our statutes than it is under the

NLRA. PERB has disapproved of employers' arguments that access rights may be restricted absent proof that alternative channels of communication are insufficient or that the restrictions discriminate against the union. As the Board noted in *County of Riverside* (2012) PERB Decision No. 2233-M, p. 7, the rejection of this approach is based in significant part on "the inherent and substantial distinction between the property interest of the private employer which drives access policy under the NLRA and the public nature of facilities operated in the public interest by employers subject to our statutes." (See also *State of California (California Department of Corrections)* (1980) PERB Decision No. 127-S, p. 8.) Moreover, under all of our statutes, employee organizations have a right of access to employees at their work site.[11] And under EERA and HEERA, employee organizations have "the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times." (§§ 3543.1, subd. (b), 3568.)[12] Although these rights attach to employee organizations, not individual employees (*Santa Ana Educators Association (O'Neil, et al.)* (2009) PERB Decision No. 2087, p. 20), their existence necessarily reduces an employer's claim to a unique dominion over its property and its means of communication.

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[11] In the case of EERA and the Higher Education Employer-Employee Relations Act (HEERA [§ 3560 et seq.]), this right is express. (§§ 3543.1, subd. (b), 3568.) Under the other statutes, it is implied. (See *County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7; *State of California (California Department of Corrections)*, *supra*, PERB Decision No. 127-S, p. 5.)

[12] In *Personnel Administration*, *supra*, PERB Decision No. 1279-S, the Board declined to find an implied right to use "other means of communication" under the Ralph C. Dills Act (Dills Act) [codified at Gov. Code, § 3512 et seq.]. In *LA Superior Court*, *supra*, PERB Decision No. 1979, the Board specifically declined to consider the existence of such a right under the Trial Court Employment Protection and Governance Act (Trial Court Act [§ 71600 et seq.]). (*LA Superior Court*, *supra*, PERB Decision No. 1979-C at pp. 9-10.) It has not considered the question under the MMBA.

LA Superior Court, *supra*, PERB Decision No. 1979-C, in relying on *The Register-Guard*, *supra*, 351 NLRB 1110, failed to consider whether the primary justification for that decision—the property interest of the employer and its right to control its equipment—was present in the public sector. As a result of this failure, we find *Purple Communications* more persuasive than *LA Superior Court*.

LA Superior Court also relied on *Personnel Administration*, *supra*, PERB Decision No. 1279-S, but we find that earlier case problematic as well. In *Personnel Administration*, the Board considered whether the Dills Act gives employees or employee organizations a right to use, among other things, the employer's e-mail system for union business. It noted that, unlike EERA and HEERA, the Dills Act does not confer on employee organizations a "statutory right of communication through the 'use [of] institutional bulletin boards, mailboxes and other means of communication.'" (*Personnel Administration*, *supra*, proposed decision at p. 41, quoting §§ 3543.1, subd. (b), 3568.) Accordingly, the Board concluded:

> If employees or employee organizations have a right to use State e-mail, computers and facsimile machines for union business that right is not found in the text of the Dills Act. . . . In the absence of Dills Act language granting employee organizations the right to use 'other means of communication,' PERB has no power to create such a guaranteed right.

(*Id.* at p. 42.) Instead, the Board determined, such a right could be found only if "(1) the usual means of communication are ineffective or unreasonably difficult, or (2) the employer's prohibition on access is discriminatory on its face or as applied." (*Ibid.*, see also *NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105.)

The flaw in *Personnel Administration*'s analysis is that it drew a conclusion about *employee* rights based on whether the Dills Act included an express statutory right for *employee organizations*. (*Personnel Administration*, *supra*, PERB Decision No. 1279-S.) The

presence or absence of such an employee organization right does not determine the extent of employee rights. Under the NLRA, for instance, employee organizations have no statutory right of access, but employees are presumed to have a right to solicit and distribute literature on the employer's property. (*Republic Aviation*, *supra*, 324 U.S. 793.) Under EERA, employee organizations have a right to use the employer's bulletin boards, mailboxes, and other means of communication, but employees do not necessarily have the same right. (*Santa Ana Educators Association (O'Neil, et al.)*, *supra*, PERB Decision No. 2087, p. 20.) Thus, by conflating employee and employee organization rights, *Personnel Administration* shortchanged employee rights.

LA Superior Court, *supra*, PERB Decision No. 1979-C added little to the analysis of this issue. It merely noted the Board's holding in *Personnel Administration* and observed that *The Register-Guard* applied a similar approach.

Therefore, we conclude that *LA Superior Court* and *Personnel Administration* erred in their analysis of whether employees have a right to use the employer's e-mail system for otherwise protected communications. We hereby disapprove of them on this point. Recognizing that e-mail is a fundamental forum for employee communication in the present day, serving the same function as faculty lunch rooms and employee lounges did when EERA was written, we conclude the better rule which reflects this change in the contemporary workplace, presumes that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify

restricting its employees' rights.[13] This framework is compelled by the right of employees to "form, join, and participate in the activities of employee organizations" (EERA, § 3543, subd. (a)), which necessarily includes the right to communicate with each other in the workplace. As the U.S. Supreme Court observed in *Eastex, Inc. v. NLRB, supra*, 437 U.S. 556, 574, the workplace is a particularly appropriate place for employees to exercise their statutory rights to engage in concerted activity because "it is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."

In this case, it is clear that Moberg had access to the District's e-mail system. The District does not claim that Moberg's e-mails were sent during his working time. We therefore presume he had a right to use the e-mail system for EERA-protected communications. Accordingly, we conclude that, for purposes of pleading a prima facie case, the content of Moberg's e-mails and his use of the District's email system were protected activity.

Employer Knowledge

Because the Office of the General Counsel determined that Moberg's e-mails on September 12, 15, and October 10, 2015 were not protected, it did not consider whether Giugni, the decisionmaker responsible for withdrawing Moberg's offer of employment, had knowledge of that protected activity. By alleging that Giugni was sent copies of these e-mails, the charge adequately alleges Giugni's knowledge of Moberg's protected activity.

[13] As this case concerns only employee rights, we leave for another day whether the right of employee organizations to use the employer's "other means of communication" includes a right to use its e-mail system.

Moberg also argues that Giugni knew about Moberg's unfair practice charges against SMCOE, owing to Giugni's familiarity with the SMCOE settlement agreement. We agree with the Office of the General Counsel that knowledge of the settlement agreement does not necessarily imply knowledge of its contents. And here, there is a readily apparent explanation for Giugni's knowledge of the SMCOE settlement agreement: it is discussed in the Court of Appeal decision affirming Moberg's dismissal from MPUSD, which Giugni cited in his letter to Moberg. The Court of Appeal's decision does not mention Moberg's PERB charges, but states only that "Moberg had actually entered into a settlement agreement with the San Mateo County Office of Education that resolved dismissal proceedings against him and required him to resign." (District's Position Stmt., Exh. B, p. 5.) Therefore, we agree with the OGC that Moberg has not sufficiently alleged Giugni's knowledge of Moberg's prior PERB charges.

Nexus

Unlawful motive is the nexus between the charging party's protected activity and the adverse action. It may be established by either direct or circumstantial evidence. (*Omnitrans* (2010) PERB Decision No. 2121-M.) Contrary to the Office of the General Counsel, which found neither type of evidence, Moberg claims both types are present here.

Moberg argues that Giugni's reference to Moberg's settlement agreement with SMCOE constitutes direct evidence of unlawful motive. The Board has found direct evidence of motive when an employer announces that it is taking or has taken an adverse action because of or in response to an employee's protected activity. (See, e.g., *Regents of the University of California* (2012) PERB Decision No. 2302-H, proposed decision, p. 19 [notice of intent to suspend employee issued for "continued argumentative, insolent, and insubordinate behavior" during protected communications]; *Omnitrans*, *supra*, PERB Decision No. 2121-M, p. 10

[notice of proposed dismissal for absences on dates employee requested to take union leave]; *LA Superior Court, supra*, PERB Decision No. 1979-C, p. 19 [notice of discipline described union-related e-mail as "inappropriate"]; *Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H [employer explained that because of employees' complaints, it "saw no other option but to lay off" the employees]; *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6 [disciplinary memorandum issued in direct response to employee's protected communication]; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, p. 19 [disciplinary memorandum issued in direct response to protected safety complaint].)

Giugni's letter does not contain this type of direct evidence. The letter stated that Moberg's offer of employment was being withdrawn due to Moberg's "false" statement that he had resigned from SMCOE to "move out of the area," when, in fact, he had resigned pursuant to a settlement agreement, as well as his omission of his employment at and reason for leaving MPUSD. Under the circumstances, as alleged in the charge, Moberg's statements on his job application regarding his employment history were not protected by EERA. As a result, Giugni's letter does not provide direct evidence of unlawful motive.

We turn then to whether there is sufficient circumstantial evidence of unlawful motive. When relying on circumstantial evidence, the charge must include allegations of: (1) close timing between the protected activity and the adverse action; and (2) some other facts indicating an unlawful motive, such as disparate treatment, departure from established procedures, a cursory investigation, or providing either no explanation for the action or explanations that are contradictory. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 29-30.) Although Moberg's protected activity in September and

October 2015 was sufficiently close in time to the District's January 7, 2016 withdrawal of his offer of employment, we find no other evidence of unlawful motive.[14]

Moberg claims there is such evidence because Giugni "falsely claim[ed] that the SMCOE settlement agreement is the reason for Moberg leaving, when the document clearly states on page 1 that the reason was 'personal.'" Taking adverse action for unsubstantiated reasons may be evidence of unlawful motive. (*San Joaquin Delta Community College District* (1982) PERB Decision No. 261, p. 7.) Here, however, Giugni's statement was not unsubstantiated. Giugni stated that Moberg "resigned [his] position as a term of a settlement agreement with SMCOE." The Court of Appeal decision that Giugni cited in his letter stated that the settlement agreement required Moberg to resign. And the settlement agreement itself states that Moberg "shall attach to this AGREEMENT his signed letter of resignation of employment for personal reasons dated February 27, 2009, to be effective June 30, 2009."

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[14] Moberg's appeal takes issue with the Office of the General Counsel's conclusion that Moberg's PERB charges against SMCOE—which were resolved seven years before the adverse action in this case—were too remote in time to establish circumstantial evidence of nexus. Moberg argues that Giugni "clearly learned of the SMCOE settlement in January 2016."

We agree with Moberg that for purposes of a prima facie case of retaliation, the determinative date is when the employer learned of the protected activity, not when the employee engaged in it. For example, when the adverse action precedes the employer's knowledge of the protected activity, there would be no prima facie case. (See *City of Modesto* (2008) PERB Decision No. 1994-M, pp. 11-12 [employer must have actual or imputed knowledge of protected activity "at the time" adverse action taken].) Conversely, when the employer learns of protected activity well after it occurs but before taking an adverse action, we see no reason to foreclose a prima facie case. "'When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.'" (*Porter v. California Dept. of Corrections* (9th Cir. 2005) 419 F.3d 885, 895.) It goes without saying that the employer's previous lack of knowledge of the protected activity is a valid reason why the adverse action was not taken sooner. (See *Wyatt v. City of Boston* (1st Cir. 1994) 35 F.3d 13, 16.)

In this case, however, there is no factual allegation that Giugni knew of Moberg's PERB charges against SMCOE, either in January 2016 or any other time.

Because Moberg's resignation was plainly a term of the settlement agreement, Giugni's statement was accurate. It does not provide evidence of unlawful motive.

Moberg also claims that "Giugni falsely accuse[d] Moberg of hiding MPUSD from Moberg's application to NVC." This argument rests on the facts that MPUSD was not one of Moberg's four most recent employers, and that, in any event, Moberg listed "Monterey Adult School"—the MPUSD school site where he was assigned—on his CV. Neither fact suggests that Guigni's accusation was false. It is true that the District's employment application only had space for the four most recent employers under the heading of "teaching experience." But Moberg's application listed his employment at SMCOE, which *predated* his employment at MPUSD. Thus, it would have appeared to anyone reviewing Moberg's application, who was aware of his dismissal from MPUSD, that he had omitted MPUSD from his application.

As for Moberg's claim that he included Monterey Adult School on his CV, the application states, "Do not substitute resume," and requires the applicant to certify their understanding "that any misrepresentation or omission of material facts *in this application* may be cause for dismissal." (Emphasis added.) Thus, Giugni's letter accurately stated that Moberg "failed to disclose in [his] application both that [he] had been employed by [MPUSD] and that [he was] terminated by MPUSD for cause." As a result, neither the fact that MPUSD was not one of Moberg's four most recent employers, nor the fact that Moberg listed Monterey Adult School on his CV, establishes that Giugni's reason for withdrawing his employment was unsubstantiated.[15]

[15] We distinguish this case from *Cabrillo Community College District* (2015) PERB Decision No. 2453 (*Cabrillo*), another case in which Moberg was accused of having failed to disclose his MPUSD employment. In that case, Moberg listed Monterey Adult School on his application and provided the contact information for an MPUSD administrator. We found that

Moberg also claims the Office of the General Counsel ignored evidence that the District conducted a cursory investigation. Moberg cites the fact that Giugni's letter cited a "non-existent Court of Appeals [*sic*] case number" in his letter. Giugni cited the decision of the Court of Appeal upholding Moberg's dismissal from MPUSD as "Cal. Court of Appeals No. M109124." According to the caption of the decision, M109124 was the case number in Monterey County Superior Court, not the Court of Appeal. But we see no reason—and Moberg does not offer one—to conclude that such a minor error indicates that Giugni conducted a cursory investigation. Giugni correctly cited the date and caption of the decision, and Moberg ultimately does not dispute that he is the Eric Moberg referenced in the decision.

Moberg also cites, as evidence of Giugni's purportedly cursory investigation, the fact that Giugni never interviewed Moberg about his failure to disclose his employment at MPUSD or his reason for leaving SMCOE. However, the failure to interview an employee before taking adverse action is evidence of unlawful motive only if the employer "routinely interviews employees under such circumstances." (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 15.) Moberg does not allege that the District routinely interviews temporary employees before withdrawing offers of employment. Therefore, the charge fails to establish that Giugni's failure to interview Moberg is evidence of unlawful motive.

Moberg also reiterates two conclusory allegations that were rejected by the Office of the General Counsel: that "[n]o other similarly situated outstanding career educator such as Moberg

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the employer's claim that Moberg did not disclose his MPUSD employment sufficiently suspect to constitute prima facie evidence of unlawful motive. (*Id.* at p. 20.)

Here, by contrast, Moberg did not list Monterey Adult School on his application, but only on his CV—a document he was specifically admonished not to rely upon—and there is no allegation that he provided the District with any other information about his employment there. Additionally, the District in this case, unlike the employer in *Cabrillo*, accused Moberg of failing to disclose the fact of his dismissal from MPUSD.

was locked out of email or fired by withdraw[al] of future contracts for having honestly completed the NVC job application," and that "[i]t is established practice that [the District] rehire or continue to employ outstanding career educators such as Moberg." These are nothing more than conclusory allegations of disparate treatment and departure from established procedures, without any supporting facts. As such, they are insufficient to support a prima facie case.

Thus, the charge does not allege sufficient facts, other than suspicious timing, to suggest that the District had an unlawful motive for withdrawing its offer of employment to Moberg. Therefore, the charge was properly dismissed for failure to state a prima facie case.[16]

ORDER

The unfair practice charge in Case No. SF-CE-3166-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this decision.

[16] In his appeal, Moberg does not argue that Madison and Ecklin's admonishments regarding Moberg's use of the District's e-mail system are evidence of unlawful motive. We therefore do not consider this issue.