STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EMMA YVONNE ZINK, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6141-E PERB Decision No. 2634 March 22, 2019

Appearances: Mary E. Bain, Representative, for Emma Yvonne Zink; Paul, Plevin, Sullivan & Connaughton by J. Rod Betts, Attorney and Sandra T.M. Chong, Assistant General Counsel II, for San Diego Unified School District.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Party Emma Yvonne Zink (Zink) to a proposed decision of an administrative law judge (ALJ). The complaint alleged that respondent San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] when it: (1) retaliated against Zink for engaging in protected activity by (a) assigning her to a non-classroom tutoring position; (b) placing her on administrative leave; and (c) reassigning her from a high school teaching position to a middle school teaching position; and (2) interfered with her right to engage in protected activity by issuing a directive that prohibited her from discussing a pending investigation "with any staff member."

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

The ALJ found that Zink did not establish a prima facie case of retaliation with respect to her reassignment to a non-classroom tutoring position. The ALJ found that Zink did establish a prima facie case that her protected activity was one cause of the District's decision to place her on administrative leave and transfer her to a middle school. However, the ALJ then found that the District met its burden to show that it would have taken the same actions in the absence of protected activity. Lastly, the ALJ found that the District's February 1, 2016 directive to Zink constituted unlawful interference with Zink's right to engage in protected activity, and ordered the District to cease and desist from future interference and rescind or remove reference to that instruction. Zink filed exceptions, mainly arguing that (1) the proposed decision improperly concluded that the District established its affirmative defense that it would have placed Zink on administrative leave and transferred her to a middle school even absent her protected activity; and (2) the ALJ's proposed remedy is not broad enough to address all District activity which could interfere with her exercise of protected rights. The District did not file exceptions and urges us to affirm the proposed decision.

The Board has reviewed the record in this matter. We affirm the proposed decision's dismissal of the retaliation claims, as well as its finding that the February 1, 2016 directive constituted interference with Zink's protected rights, for the reasons set forth below.

FACTUAL BACKGROUND[2]

The Parties and the Exclusive Representative

Zink is a public school employee within the meaning of EERA section 3540.1, subdivision (j), and is employed by the District as a math teacher.

[2] Our factual findings are largely drawn from the ALJ's proposed decision.

The District is a public school employer pursuant to EERA section 3540.1, subdivision (k).

The San Diego Education Association (SDEA) is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e), and represents a unit of certificated employees within the District that includes Zink.

At all relevant times, SDEA and the District were parties to a collective bargaining agreement (CBA) whose term was July 1, 2014, through June 30, 2017.

Background

The District hired Zink in 1986 as a math teacher at Point Loma High School. She worked there for two years before moving to La Jolla High School (LJHS), where she worked continuously until the administrative transfer at issue in this case. Parents in La Jolla are active in school affairs and have set up the La Jolla Cluster Association, which is a group of parents from the five District schools in La Jolla. LJHS also has an active Parent Teacher Association (PTA) and its own Foundation that raises money for LJHS. Zink lives in La Jolla. Her commute to LJHS was 10 minutes each day.

Zink's most recent evaluation was in the 2013-2014 school year. She has not been evaluated since then. Charles Podhorsky (Podhorsky) has been the principal of LJHS since February 2014. Zink never received a classroom observation from Podhorsky or written notes on any deficiencies and how to improve them. Her grading practices are set forth in the course syllabus, which Podhorsky approves.

Zink's colleagues voted her Teacher of the Year in the 2014-2015 school year.

Complaints Against Zink

Article 14.12 of the CBA sets forth the procedure for handling complaints against teachers. Complaints must be brought promptly to the teacher's attention, and the identity of the complainant must be disclosed to the teacher. The teacher's supervisor is required to attempt to resolve the complaint informally by asking the complainant to contact the teacher directly to resolve the problem. If that does not resolve the issue, the supervisor can schedule a meeting between the complainant and the teacher, if all parties agree. If the issue remains unresolved, the complainant may contact the appropriate division head to request direct intervention and then submit a complaint to the District's Board of Education to request a formal hearing.

In Fall 2014, Podhorsky began receiving parent complaints about Zink regarding her classroom management style, demeanor toward students, and grading policies. He offered to set up meetings with the parents and Zink to discuss their concerns.[3] As the number of complaints continued to rise, he e-mailed Zink on September 28, 2014, to schedule a time to meet with her to discuss her homework and grading policies. However, as discussed below, the District placed Zink on leave before this meeting could take place.

On October 6, 2014, a student in Zink's class filed a complaint against Zink alleging she grabbed his arm and scratched him while trying to remove earphones from his ears. The incident was reported to the District's Human Resources Services Division (HR), and the District placed Zink on paid administrative leave pending an investigation by Jose Gonzales (Gonzales), the Interim Human Resources Officer.

Parents continued to complain about Zink after she was on leave. On November 3, 2014, parents delivered a petition to remove Zink from LJHS. Parents of current and former LJHS

[3] The record is unclear if these meetings took place.

students had signed the petition. It requested that Zink not be allowed to return to LJHS, and it claimed as follows:

> Since hearing of Mrs. Zink's dismissal, we have chronicled a list of abuses that Mrs. Zink has levied on our children. They include but are not limited to: physical abuse, verbal abuse, emotional and psychological abuse; all of which are well documented in school files.[4]

Many of the parents who signed the petition were active in LJHS's PTA and Foundation. Podhorsky testified he believed the allegations in the petition to be true based on the identity of the parents who signed. However, he did not conduct an investigation to verify the complaints. Although Podhorsky sent the petition to his superiors in the District, the record does not contain any evidence that the District investigated all of the allegations in the petition.

On April 14, 2015, Gonzales issued his findings regarding the investigation into the earphone incident in October 2014. He concluded Zink "used extremely poor judgment when she reached for [the student's] earphones and earphones cord and pulled the left earphone out of [the student's] ear" and that she should not engage in self-help in trying to enforce the school's policies regarding prohibited electronic devices. Gonzales recommended that a written warning issue.[5]

After Gonzales issued these findings, he and Zink discussed her return to work. The District proposed placing Zink at an alternative education program site where she would provide tutoring and assistance to students. However, that assignment turned out to be unavailable, and the District instead offered to permit Zink to apply for a position in the Information Technology

[4] The petition did not detail the alleged instances of abuse.

[5] The record does not reflect whether the District ever issued a written warning.

Department working with staff to develop an online math program for District students. Zink objected to the assignment and ultimately remained at LJHS.

Reassignment to a Non-Classroom Tutoring Position

Article 12.7 of the CBA sets forth the procedure for involuntary transfers. The site administrator may initiate a transfer based on the negative impact of the teacher's behavior/actions, if the transfer is in the best interests of the District, school, students, and the teacher. The site administrator's belief must be supported by evidence. If the site administrator believes there is evidence to support a transfer, he or she must meet with the teacher to discuss the behavior/actions, their negative impact, and the possible consequences of continuing the behavior. During the meeting, the site administrator must notify the teacher of the possibility of a transfer, the expectations for future behavior, and a time frame to meet those expectations. Throughout the process, the site administrator must create a written record of the conferences and interventions.

On September 2, 2015, Podhorsky issued a letter to Zink recommending her transfer from LJHS. His reason for the transfer was as follows:

> The school received repeated complaints about your teaching methodology from the parents of students in your classes. It is in your best interests, and in the best interests of the District and its pupils, that you be transferred to a different work site.

Zink met with Podhorsky on October 14, 2015, to discuss his recommendation. The meeting did not change his recommendation, and Zink appealed the decision to Timothy Asfazadour (Asfazadour), the District's Chief Human Resources Officer.

On January 14, 2016, Asfazadour met with Zink and reversed Podhorsky's recommendation that Zink be transferred out of LJHS. He determined that the administrative transfer was not appropriate at that time because the District had not notified Zink of

expectations for future behavior or given her a timeframe to meet those expectations prior to initiating the administrative transfer. Accordingly, the District gave Zink a number of expectations to follow upon her return to LJHS. Additionally, Asfazadour notified Zink that although she was returning to LJHS, he was reassigning her from a classroom teaching position to that of a small group individual math tutor. Asfazadour testified he reassigned Zink to small group instruction because he wanted her return to be successful, and he believed putting her in a classroom would cause an uproar in the campus community that would be antithetical to her success.

Second Administrative Leave

Natascha Vossen (Vossen) was a parent of an LJHS student. She testified she became alarmed when she heard parents of LJHS students discussing plans to stage walkouts, pickets, and media involvement in response to Zink's return to campus. In an attempt to prevent parents from taking such drastic action, on January 20, 2016, Vossen created a petition asking the District not to allow Zink to return to LJHS. Vossen created the petition on the Wufoo website, and it came to be known as the "Wufoo petition." The petition asked individuals for their name, e-mail address, relationship to Zink, and any comments they wished to add. No one at the District had any involvement in creating the petition.

On January 21, 2016, Vossen attended a La Jolla Cluster Association meeting. Podhorsky and Mitzi Merino (Merino), the District's Area 5 Superintendent, both attended. Vossen was upset she could not get the parents to calm down regarding Zink's return to LJHS. She informed Podhorsky and Merino that she had created the Wufoo petition because she was trying to prevent parents from taking more drastic actions.

The following week, several parent leaders met with Podhorsky and Merino at Vossen's home. Present were Vossen, the Foundation President, the PTA President, and several members of the PTA and the Foundation. The parents made it known to Podhorsky and Merino that they were contemplating walkouts, picketing, and contacting the media in response to Zink's return to LJHS. Following the meeting, Vossen e-mailed the Wufoo petition to Podhorsky and Merino. Podhorsky testified he was unaware of any complaints similar to those in the Wufoo petition being documented in Zink's personnel file and was otherwise unaware of any documents that would support the allegations in the petition. Podhorsky forwarded Vossen's e-mail to Carolanne Buguey (Buguey), the District's Human Resources Officer, who determined it was necessary to initiate an investigation into the allegations.

On February 1, 2016, Buguey and Erin Houston (Houston), a Labor Relations Specialist at the District, met with Zink. At that meeting, Houston handed Zink the Wufoo petition, a legal brief that referenced Zink's classroom conduct in unflattering terms, and a November 16, 2014 e-mail from a parent complaining about Zink to Merino and District Superintendent Cindy Marten. At the time, the Wufoo petition had 252 entries in favor of removing Zink from LJHS, and many of those entries included supporting comments. However, there were no names or other identifying information attached to the entries or the comments. Zink made it clear to the District she would not respond to the comments in the Wufoo petition because they were anonymous and because she believed the District's reliance on them violated the CBA.

Following the meeting with Buguey and Houston, Zink received a letter from Buguey dated February 1, 2016, that placed her on paid administrative leave pending an investigation into the allegations in the Wufoo petition. The letter directed Zink not to report to work or

appear on the LJHS campus or any other campus until notified otherwise by District HR. The letter went on to state:

> You are not to discuss the matters of this investigation with any staff member. Should you choose not to follow this directive, we will consider this misconduct, hindering a fair and thorough investigation. Nothing in this letter is intended to restrict your ability to communicate with your union representative or legal counsel about these allegations or any other matter.

Buguey testified she placed these restrictions on Zink so she would not "stir up staff members to submit petition comments, additional comments on the Wufoo petition" that "may look differently than other comments that [were] already submitted." She also testified she was concerned that Zink might contact parents and students, which could further inflame the situation.

On April 13, 2016, Buguey contacted Vossen and asked her to verify the comments in the Wufoo petition. Vossen's verification process consisted of e-mailing people who had first person accounts of Zink's teaching and requesting permission to send their information to the District. As to those who granted such permission, Vossen sent their names and their comments from the Wufoo petition to Buguey, who followed up with them. Buguey took the comments in the petition at face value and did not use school records to verify whether the students identified as having been in Zink's class actually had her as a teacher.

On May 3, 2016, Buguey sent Zink a letter with an attachment containing the names and comments of 47 individuals who had agreed to make their identities known to Zink. The letter invited Zink to respond to the comments if she chose to do so.

On May 10, 2016, Zink e-mailed Buguey restating her position that she would not respond to the comments in the Wufoo petition based on her belief that the District's reliance on them did not comply with the CBA.

On June 3, 2016, Buguey issued a letter to Zink stating she had concluded her investigation and determined that the 47 individuals "appear to have bona fide concerns and in good faith expressed their honest and true feelings." The letter further stated she was closing the investigation of the Wufoo petition and Podhorsky would contact her to discuss next steps regarding her placement the following school year. Buguey testified she concluded the 47 individuals' concerns were made in good faith based on the fact that each entry was unique and yet there was a pattern throughout the comments regarding Zink's mistreatment of students. As part of her investigation, Buguey did not review Zink's personnel file or interview her colleagues.

Administrative Transfer

On June 13, 2016, Podhorsky issued a letter stating he was recommending Zink be transferred to a different work site the following school year. The letter stated:

> The reason for the transfer is due to the written complaints and concerns in a document called 'Wufoo' petition received by the District in late January 2016, when students, parents, and community members found out about and objected to your intended return to [LJHS] on February 1, 2016. Therefore, it is in your best interests and the best interests of students and the school that you be administratively transferred to another work location.

Podhorsky testified he made the decision to transfer Zink based on the comments in the Wufoo petition and his belief that some prominent parents at LJHS would organize picketing, walkouts, and media involvement if Zink were to return to campus, which would be a major disruption. Furthermore, he did not think Zink could be successful at LJHS in that kind of hostile environment.

Zink met with Podhorsky to discuss his recommendation that she be transferred. The meeting did not change Podhorsky's recommendation, and Zink appealed the decision to

Asfazadour. On August 9, 2016, Asfazadour met with Zink for an administrative transfer appeal meeting. Following the meeting, Asfazadour issued a letter to Zink on August 17, 2016, upholding Podhorsky's recommendation that Zink be transferred out of LJHS. The letter stated:

> After careful consideration, I believe it is in the best interests of the students, school, District, and you to administratively transfer you to a different school. Please report to Marshall Middle School on August 29, 2016.

Asfazadour testified he decided to transfer Zink to Marshall Middle School (MMS) as a math teacher because the school had a very strong math program, and he believed she could be successful at the school. MMS has high performing students and is a highly rated school in the District. Asfazadour testified his decision to transfer Zink to MMS was based on information from Podhorsky, information from HR staff working on the investigation of the Wufoo petition, and information Zink provided. Asfazadour further testified that he determined the Wufoo petition to be a true, honest representation of comments of the individuals who made them. He did not consult Zink's personnel file as part of his decision.

Zink's transfer to MMS increased her commute time each day to 60 minutes.

Zink's Alleged Protected Activity

On December 24, 2015, Zink filed an unfair practice charge against the District (PERB Case No. LA-CE-6095-E).

On February 15, 2016, Zink filed a grievance based on the District's reliance on the anonymous complaints in the Wufoo petition to place her on administrative leave. Accompanying the grievance was a letter of the same date outlining what Zink believed to be the District's violations of the CBA.

On April 11, May 24, and June 13, 2016, Zink sent letters to the District stating that her treatment while on administrative leave violated the CBA.

On June 17, 2016, Zink filed a grievance challenging Podhorsky's recommendation that she be administratively transferred from LJHS. Accompanying the grievance was a letter of the same date outlining what Zink believed to be the District's violations of the CBA.

DISCUSSION

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (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, pp. 5-6 (*Novato*).)[6]

When it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros.*); *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22. Thus, in a "mixed motive" case in which the charging party

[6] PERB generally analyzes allegations of employer reprisal and discrimination under two lines of cases, which can be distinguished primarily by the manner in which they permit the charging party to prove nexus. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 8.) Under *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 423-424 (*Campbell*), a charging party may establish "discrimination in its simplest form" via evidence of "employer conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred without specific evidence." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14.) In the absence of evidence sufficient to trigger the *Campbell* standard, we apply the *Novato* analysis of nexus factors. (*Los Angeles County Superior Court*, *supra*, at pp. 14-15.) The *Novato* factors have undoubtedly become the primary avenue for proving discrimination or retaliation allegations, and we rely on them where, as here, the employer's conduct is not inherently discriminatory and neither party argued that the adverse action was discriminatory on its face under *Campbell* and its progeny. (*County of Santa Clara*, *supra*, PERB Decision No. 2629-M, pp. 8-9.)

has proven that discrimination or retaliation contributed to the employer's decision, but the employer asserts that one or more other nondiscriminatory reasons also exist, the burden shifts to the employer to establish as an affirmative defense that it would have taken the same action(s) even absent any protected activity. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *Martori Bros., supra*, 29 Cal.3d at pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) The employer must establish the "but for" affirmative defense by a preponderance of the evidence. (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.)[7]

In the proposed decision, the ALJ found that Zink failed to establish that her reassignment to a non-classroom tutoring position constituted an adverse action and, therefore, that Zink failed to establish a prima facie case with regard to that allegation. Conversely, the ALJ found that Zink did establish a prima facie case of retaliation based on her placement on administrative leave and transfer to the middle school, but the District proved its affirmative defense that it would have taken the same actions even in the absence of protected activity. Zink argues that the ALJ made several errors.[8] We address each in turn.

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[7] While a respondent is free to assert this affirmative defense in any case in which it claims it took adverse action for a reason other than protected activity, it is often appropriate to separately analyze the affirmative defense when the evidence reveals mixed motives. Ultimately, however, the interplay between the charging party's burden to establish nexus and the respondent's burden to prove an affirmative defense is less formulaic than it may appear from our usual articulation of the *Novato* standards. In some cases, there is no need to separately assess the employer's affirmative defense, if the charging party has already disproven the defense in the course of establishing nexus.

[8] There is no dispute that Zink engage in protected activity by: (1) filing an unfair practice charge on December 24, 2015; (2) filing grievances on February 15 and June 17, 2016; and (3) sending letters to the District on February 15, April 11, June 13, and June 17, 2016, objecting to her treatment. However, we note that in analyzing Zink's activities, the ALJ relied on a line of cases that we partially disavowed in *Walnut Valley Unified School District* (2016) PERB Decision No. 2495, pp. 17-19 (*Walnut Valley*). There is also no dispute that the District officials responsible for the adverse acts knew of the protected activity.

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25.) "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." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

Zink excepts from the ALJ's finding that she failed to establish her reassignment to a tutoring position following her first administrative leave constituted adverse action. In evaluating whether an involuntary reassignment of duties effectuated while misconduct allegations are pending is objectively adverse to employment, "the charging party must 'present facts demonstrating that a reasonable employee would consider the transfer an adverse action.'" (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342, adopted proposed decision at p. 17 (internal citation omitted).) Zink had been a certified, secondary math teacher for approximately three decades and a classroom math teacher at LJHS for most of that time. We find Zink's exception on this point well-taken. No reasonable person under these circumstances would find that an involuntary transfer from a classroom teaching position to a non-classroom tutoring assignment was anything but adverse. (*Id.* at p. 18 [transferring biology and chemistry teacher to a program where he was no longer able to teach laboratory sciences constituted adverse action].)[9]

There is no dispute that the District took adverse action against Zink when it placed her

[9] Although we find merit in Zink's exception, it will not affect the outcome of the case because, as discussed *post*, the District prevailed in its affirmative defense by showing that Zink's protected conduct was not a but-for cause of its adverse actions.

on administrative leave and transferred her to a middle school. Neither party excepted to these findings, so they are not before us. (PERB Regulation 32300, subd. (c);[10] *County of Santa Clara* (2018) PERB Decision No. 2613-M, p 7 (*Santa Clara*).) Although Zink argues that we should also find adverse action because she was assigned no duties at MMS, we need not reach this exception given that it would not impact the outcome of the case. (PERB Regulation 32300, subd. (c); *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 12 (*LACCD*).) We also decline to reach this exception because Zink's job duties at MMS are the subject of a separate pending unfair practice charge, PERB Case No. LA-CE-6207-E.[11]

The ALJ took note of the District's timing and apparent procedural irregularities, and therefore found that there was sufficient evidence that the District was at least partially motivated by unlawful animus against Zink's protected activity. Neither party excepted to this finding, and it is therefore not before us. (PERB Regulation 32300, subd. (c).)

Zink takes issue with the ALJ's conclusion that the District would have taken the same adverse actions against her based solely on nondiscriminatory reasons. Like the ALJ, we find that the record is replete with evidence that the District would have taken these actions whether or not Zink had participated in protected activities. Beginning in November 2014, an active parent group led a sustained campaign to remove Zink from her position, making numerous

[10] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[11] Zink filed two other unfair practice charges claiming retaliation against the District. When the instant matter was heard, PERB Case No. LA-CE-6095-E was on appeal to the Board following dismissal by the Office of General Counsel (OGC). Thereafter, the Board upheld the dismissal of some allegations and remanded the remaining allegations in LA-CE-6095-E to the OGC for issuance of a complaint. (*San Diego Unified School District* (2017) PERB Decision No. 2538.) Thereafter, in September 2018, PERB Case No. LA-CE-6095-E and Case No. LA-CE-6207-E, which concerns Zink's job duties at Marshall Middle School, were consolidated for hearing. The consolidated matter is currently pending before an ALJ.

allegations that could have warranted significant discipline if proven, and which, at the very least, made a transfer a logical option for the District to implement, irrespective of any protected activity. Parents vigorously demanded Zink's removal from LJHS and threatened to call increasing community attention to their campaign and to cease or impede fundraising efforts on behalf of the school district if the District did not meet their demands. The District proved that it sought to defuse this situation, and would have done so even without any protected conduct. Although Zink contends "that it is highly questionable as to whether or not such outraged parents actually existed," we credit Podhorsky and Vossen, who both testified that they personally met with the Area Superintendent and parent leaders, who advised of parent plans to organize student walkouts, picket the school, and contact the media if the District brought Zink back to LJHS.

The record is clear that the District ceded to, and sought to defuse, parent and student concerns about Zink's classroom conduct, and would have done so even in the absence of Zink's protected activity.[12] The ALJ was correct in dismissing Zink's retaliation claims.

[12] We take no position as to the veracity of the claims made in the Wufoo petition and whether those claims provided just cause for any adverse action. Zink may have had another forum available to raise such issues, and for that reason nothing in our decision today necessarily allows a California public school to wholly defer to allegedly unwarranted parent pressure in its treatment of teachers, particularly where such teachers are protected by contractual, statutory, and constitutional protections. In applying the *Novato* standard, we often compare the employer's proffered reasons with the parties' evidence regarding any alleged wrongdoing "to determine if the employer exaggerated or otherwise mischaracterized what occurred, thereby evidencing an unlawful motivation." (*Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 11.) Here, the record does not allow us to determine the strength of the allegations against Zink. In the absence of such evidence, there was still sufficient evidence of procedural irregularities by the District to find that Zink's protected activity contributed to the District's actions. However, there was also sufficient evidence that the District had other, stronger motivations, thereby leading us to conclude that Zink's protected conduct was not a but-for cause of the District's actions.

Interference

EERA section 3543 protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer employee relations. PERB's interference test does not require evidence of unlawful motive, only that the employer conduct at issue has a tendency to create at least "slight harm" to employee rights. (*LACCD*, *supra*, PERB Decision No. 2404, p. 5; *Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17.) To establish a prima facie case, the charging party must demonstrate that the employer's conduct tends to *or* does result in harm to employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10 (*Carlsbad*).) If the prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 17, citing *Carlsbad*, *supra*, at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid.*) "Where the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid.*)

In the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct. (*LACCD*, *supra*, PERB Decision No. 2404, p. 6. In *LACCD*, the employer placed an employee on leave while it initiated a fitness-for-duty examination. (*Id.* at p. 2.) In doing so, it issued the employee a letter that stated, "You are hereby directed not to contact any members of the faculty, staff or students." (*Ibid.*) The Board held the directive interfered with the employee's rights under EERA because it could reasonably be construed to prohibit the employee from participating in a variety of protected activities, including discussing his working conditions with his coworkers.

(*Id.* at p. 9.)[13] It further held the employer did not meet its burden to establish why the directive was necessary to preserve the integrity of its investigation. (*Id.* at p. 13.)

The District's directive to Zink, like the directive in *LACCD*, can reasonably be construed as prohibiting protected activity, such as Zink's right to speak to her coworkers about her working conditions. Although the directive allows Zink to speak to her union representative and legal counsel, requiring her to communicate with her coworkers through intermediaries necessarily infringes on her right to speak to them uninhibited. (*Santa Clara*, *supra,* PERB Decision No. 2613-M, p. 15.) Therefore, the directive causes at least slight harm to Zink's protected rights under EERA, and accordingly Zink has established a prima facie case for interference. (*Id*. at p. 9 [union established prima facie case of interference where "gag rule" in directive resulted in some harm to employee's right to discuss working conditions with fellow employees].)

Here, the District did not establish any operational necessity for its directive. Buguey testified the reason for this restriction was so Zink would not "stir up staff members to submit petition comments, additional comments on the Wufoo petition" that "may look differently than other comments that [were] already submitted." This is an insufficient justification to outweigh Zink's right to engage in protected activity, particularly as the justification is explicitly premised, in part, on preventing Zink from defending herself by finding supportive staff members to weigh in.

While Zink established that the District's directive prohibiting her from discussing the pending investigation with any staff members constituted unlawful interference, we decline to

[13] See also *Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 8, quoting *LACCD*, *supra*, PERB Decision No. 2404, p. 11, fn. 5 [there is "no more fundamental right afforded employees under the statutory scheme than the right to communicate with others about working conditions"].)

grant Zink's exception in which she asks us to find that District also violated EERA when it prohibited her from appearing on District property during her administrative leave. Given that the complaint did not contain such an allegation, and Zink did not move to amend the complaint or otherwise litigate the issue in front of the ALJ, there is no cause for us to consider it here. (*Walnut Valley*, *supra*, PERB Decision No. 2495, p. 7, fn. 6; PERB Regulation 32635, subdivision (b); see also *City of Davis* (2018) PERB Decision No. 2582-M, p. 17 [no compelling reason to consider matter not litigated before the ALJ].) Moreover, Zink does not argue that we should analyze this exception under our unalleged allegation doctrine. (*County of Santa Clara* (2017) PERB Decision No. 2539-M, pp. 14-17.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the San Diego Unified School District (District) violated the Educational Employment Relations Act, Government Code section 3543.5, subdivision (a), by issuing Emma Yvonne Zink (Zink) a directive not to "discuss the matters of this investigation with any staff member." All other allegations are dismissed.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with Zink's protected rights.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind or remove the directive contained in the February 1, 2016 letter that Zink not "discuss the matters of this investigation with any staff member."

2. Within ten (10) workdays after this decision is no longer subject to appeal, post at all work locations where notices to certificated employees in the District are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with certificated employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Zink.

Members Banks and Paulson joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-6141-E, *Emma Yvonne Zink v. San Diego Unified School District*, in which all parties had the right to participate, it has been found that the San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by issuing Emma Yvonne Zink (Zink) a directive not to "discuss the matters of this investigation with any staff member."

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with Zink's protected rights.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Rescind or remove the directive contained in the February 1, 2016, letter that Zink not "discuss the matters of this investigation with any staff member."

Dated: _____ SAN DIEGO UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.