

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JAN SMITH,)
)
 Charging Party,) Case No. LA-CE-275-H
)
 v.) PERB Decision No. 858-H
)
 REGENTS OF THE UNIVERSITY OF) December 17, 1990
 CALIFORNIA,)
)
 Respondent.)
 _____)

Appearances: Jan Smith, on her own behalf; Anthony A. Giorgio, Labor Relations Manager, for Regents of the University of California.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (Board) on appeal by Jan Smith (Smith) of a Board agent's dismissal (attached hereto) of her charge that the Regents of the University of California (University) violated section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA).¹ Specifically, Smith alleges that the

¹**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

University engaged in retaliatory conduct when it terminated her employment on February 1, 1989, allegedly because Smith contacted the University Ombudsman concerning harassment by a supervisor. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as a Decision of the Board itself.²

The unfair practice charge in Case No. LA-CE-275-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Shank joined in this Decision.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

²In adopting the dismissal, the Board notes that the Board agent incorrectly cites California State University, San Diego (1989) PERB Decision No. 178-H. The correct cite for the jurisdictional requirement that a complaint may not be issued on any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge is California State University, San Diego (1989) PERB Decision No. 718-H.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127



August 29, 1990

Jan Smith

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CE-275-H, Jan Smith v. Regents of the
University of California

Dear Ms. Smith:

I indicated to you in my attached letter dated August 15, 1990, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to August 22, 1990, the charge would be dismissed.

On August 20, 1990, you filed (by certified mail) a First Amended Charge. In this amended charge, you argue in part that the statute of limitations in your case should be tolled pursuant to Government Code section 3541.5(a)(2). As indicated in my August 15 letter, however, your case is subject to Government Code section 3563.2(a) of the Higher Education Employer-Employee Relations Act (HEERA), which does not provide for tolling. Government Code section 3541.5(a)(2) is part of the Educational Employment Relations Act (EERA), which applies to employees of school districts. HEERA, not EERA, applies to employees of the University of California.

In the amended charge, you make reference to an adverse action of which you became aware for the first time within the six months before you filed your charge: an adverse memo in your personnel file that you saw for the first time on March 26, 1990. When we discussed this memo in a telephone conversation on July 23, 1990, however, you told me that the adverse memo was dated April 29, 1988, and therefore preceded your supervisor's first knowledge (in October, 1988) of your contact with the University Ombudsman.

You also mention that in April, 1990 (within the six months before your filed your charge), University Affirmative Action Officer Peggy Kerley would not allow you to get a statement from University Student Affairs Officer Poinka Wong about a position Wong had offered you in November, 1988. You contend that this was "interference." It is not apparent, however, how this was interference with any rights you had under HEERA. It does not

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appear to have been interference with your right to present your grievance effectively, since the processing of your grievance apparently had come to an end on March 1, 1990, when you were sent notice that the grievance would not go to arbitration.

You seem to argue generally that the statute of limitations should be satisfied because within the six months before you filed your charge additional events and information confirmed your belief that your termination was retaliatory. It is clear, however, that you had reason to believe that your termination was retaliatory by November 1, 1989, when you wrote a letter so asserting. Your limited opportunity to file an unfair practice charge within six months is not extended by later events and information that neither constituted nor revealed additional adverse actions against you.

The other issues mentioned in the amended charge shall not be addressed in this letter, either because they were dealt with in my August 15 letter or because they fall outside the six-month statute of limitations. I am therefore dismissing the charge based on the facts and reasons contained in this letter and in my August 15 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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

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Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

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

Final Date

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

Sincerely,

JOHN W. SPITTLER
General Counsel

By _____
Thomas J. Allen
Regional Attorney

TJA:rdw

Attachment

cc: Edward M. Opton, Jr.
Anthony Giorgio

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127



August 15, 1990

Jan Smith

RE: WARNING LETTER, Unfair Practice Charge No. LA-CE-275-H, Jan Smith v. Regents of the University of California

In the above-referenced charge, you allege that the University of California (University) retaliated against you, in alleged violation of Government Code sections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA).

My investigation of this charge revealed the following facts.

You were employed by the University as a Senior Clerk. When you were harassed by your supervisor, you contacted the University Ombudsman. Your supervisor learned of this contact in October, 1988, when the Ombudsman contacted her. Thereafter, your supervisor increased her harassment of you. On February 1, 1989, you received a termination notice, and you later filed a grievance challenging the termination. Although the grievance procedure provided for binding arbitration, the exclusive representative finally decided, on March 1, 1990, not to take your grievance to arbitration.

You filed your unfair practice charge on June 27, 1990. You had previously filed a complaint of physical handicap discrimination with the U.S. Department of Labor. You allege that in January, 1990, the University lied about you to the Department of Labor during the investigation of your complaint.

Based on the facts stated above, the charge does not state a prima facie violation of the HEERA, within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3563.2(a) provides in part that PERB "shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." PERB has held that this six-month limit is jurisdictional and cannot be waived. California State University. San Diego (1989) PERB Decision No. 178-H. On July 3, 1990, PERB held that the six-month limit is not tolled by the

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pursuit of a grievance concerning the same dispute. Regents of the University of California (1990) PERB Decision No. 826-H. Your termination and the harassment that preceded it occurred over sixteen months before you filed your unfair practice charge.

You allege that within the six months before you filed your charge the University lied about you to the Department of Labor, which was investigating your complaint of physical handicap discrimination. You contend that this was in further retaliation for your contact with the Ombudsman.

To demonstrate retaliation, a charging party must show that: (1) the employee exercised statutory rights, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H. The timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, but it does not, without more, demonstrate a violation of the EERA. Moreland Elementary School District (1982) PERB Decision No. 227.

In the present case, there is no close temporal proximity between the alleged lies to the Department of Labor (in January, 1990) and your contact with the Ombudsman (which became known to your supervisor over a year earlier, in October, 1988). Furthermore, the University's motive in lying to the Department of Labor would presumably be a desire to cover up the alleged physical handicap discrimination that the Department was investigating. If the University was not covering up physical handicap discrimination, then it is not apparent how what it told the Department could actually harm you. There are no facts that show that the University's alleged lies to the Department were, or were intended to be, retaliatory in themselves, as well as part of a possible cover-up.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended

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Charge. contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 22, 1990, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney