STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL T. BAUBLITZ, Charging Party,	)	Case No. S-CE-53-H
v.	)	PERB Decision No. 998-H
UNIVERSITY OF CALIFORNIA (LAWRENCE BERKELEY LABORATORY), Respondent.	)	May 26, 1993

Appearance; Michael T. Baublitz, on his own behalf.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Michael T. Baublitz (Baublitz) of the Board agent's dismissal, attached hereto, of his unfair practice charge alleging that the University of California (Lawrence Berkeley Laboratory) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1].

[1]HEERA is codified at Government Code section 3560 et seq. HEERA section 3571 states, in relevant 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.

The Board has reviewed the Board agent's warning and dismissal letters, and finding them to be free of prejudicial error, adopts them as the decision of the Board itself together with the following discussion.

DISCUSSION

Baublitz's charge was dismissed for failing to state a prima facie case. On appeal he presents additional evidence in support of his allegations. However, PERB Regulation 32635(b)[2] prohibits the introduction of new evidence on appeal absent a showing of good cause.

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

Therefore, as Baublitz has not alleged any facts to show good cause, the Board cannot consider the new evidence presented in his appeal.

ORDER

The unfair practice charge in Case No. S-CE-53-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

February 26, 1993

Michael T. Baublitz

Re: Michael T. Baublitz v. University of California (Lawrence Berkeley Laboratory)
Unfair Practice Charge Case No. S-CE-53-H
DISMISSAL LETTER

Dear Mr. Baublitz:

On January 29, 1993, you filed a charge in which you allege that the University of California Regents, (Lawrence Berkeley Laboratory) (University), violated section 3571(a) of the Government Code (Higher Education Employer-Employee Relations Act (HEERA or Act)) by **denying** your request for reasonable accommodation, **by denying your** request be reinstated to full-time status with **an accommodation to** work part time at home and by terminating your **employment.**

I indicated **to** you, in **my** attached letter dated February 4, 1993, 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** which would correct the deficiencies explained **in that** letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 11, 1993, the charge would be dismissed.

On February 10, 1993, you spoke to Regional Attorney Bernard McMonigle and requested an extension of time until February 18, 1993 to file an amended charge. Regional Attorney McMonigle agreed to give you an extension of time until February 18, 1993. On February 19, 1992, you filed an amended charge.

On February 22, 1993, I spoke with you and informed you that your charge did not contain a proof of service indicating that you had served the respondent with a copy of the amended charge. You responded that you did not feel you were given enough time to file an amended charge and that you did not recall if you had served the respondent with a copy of the amended charge. On February 24, 1993, you telephoned me and stated that you had been confused regarding the proof of service and would send me a completed proof of service.

I have summarized the following allegations contained in your amended charge:

> On August 21, 1992, the management of Medical Services (persons unknown) cancelled a meeting arranged weeks in advance between the Director, Dr. Henry Stauffer, Workers Compensation Attorney Jim Kreelie [sic] and yourself to address a long standing request to be transferred out of Department due to job stress and for health reasons.
>
> All your requests for medical release and "reasonable accommodation" in order to fulfill approved "career plan" were denied.
>
> Department Head, Robert Fink acted on orders of his superiors to have you suspended from your job for three (3) days, without pay and you were threatened with further action leading to dismissal.
>
> On September 17, 1992, a letter of intent to dismiss was presented to you by Mr. Fink with a threatened termination date of October 1, 1992, to deny you any recourse to a grievance hearing.
>
> On or about September 17, 1992, you asked your supervisor, Linda Smith to postpone any issuance of papers for one day, which the Department Head rejected.
>
> On or about September 17, 1992, when you told your supervisor that you were so upset by the impending threat of termination and asked to go to Medical Services to see the Doctor in charge, Mr. Fink proceeded to come into your office unannounced and delivered a sealed envelope to you by dropping it on your chair. You informed Mr. Fink that "I believe my rights are being denied. I am entitled to have representation. . .I asked my supervisor to defer this until tomorrow and allow me to go to medical. . ." Mr. Fink replied "I don't think so."
>
> Mr. Fink continued to intimidate threaten and anger you by assuming all supervisory

> functions; even denying you meetings with your supervisor.
>
> Mr. Fink's calculated steps to remove you from your job in effect terminated your "career plan" which was approved for several years in order to allow you advancement to a full time career position based *on* your attaining an advanced degree (MA) which would entitle you to do research with and for your employer as well as conduct "educational outreach" in the interests of science education.
>
> You were denied any opportunity to pursue your long approved "career plan" in effect denying you any career advancement and equal opportunity for full employment at UC-LBL.

Your amended charge appears to allege that the University denied your request for representation during a meeting on September 17, 1992, when Mr. Fink delivered a letter of intent to dismiss you.

In NLRB v. Weingarten, Inc. (1975) 420 US 251 the U.S. Supreme Court upheld the right of an employee to have a union representative present at an investigatory interview with the employer which the employee reasonably believes may result in disciplinary action. The rule includes all offenses, but excludes "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." Quality Mfg. Co., (1972) 195 NLRB No. 42 at 122. In Baton Rouge Water Works Company (1979) 246 NLRB 995, the NLRB reaffirmed its rule that the right to union representation applies to a disciplinary interview, whether labeled investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

The Public Employment Relations Board (PERB or Board), in Regents of the University of California (1983) PERB Decision No. 310-H adopted the Weingarten rule as applying to employees covered by the HEERA. PERB, in Rio Hondo Community College District (1982) PERB Decision No. 260, also adopted a rule affording Weingarten rights to employees. However, quoting from Baton Rouge, supra, PERB stated:

> To the extent that the Board has in the past distinguished between investigatory and

> disciplinary interviews. In light of Weingarten and our instant holding, we no longer believe such a distinction to be workable or desirable. It was this distinction which Certified Grocers abandoned, and to that extent we still believe the decision was correct. Thus the full purview of protections accorded employees under Weingarten apply to both "investigatory" and "disciplinary" interviews, save, only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action" Baton Rouge Water Works Company, supra at p. 997.

The facts alleged in your charge indicate that Mr. Fink came into your office and delivered a sealed envelope to you which contained a letter of intent to dismiss, effective on October 1, 1992. The purpose of the September 17, 1992 meeting between you and Mr. Fink was to give you the letter of intent to dismiss. Therefore, the University did not violate your rights by refusing to provide you with a representative when Mr. Fink presented you with the letter of intent to dismiss.

None of the remaining allegations contained in your amended charge demonstrate a prima facie violation of the HEERA. As I informed you in my February 4, 1993 letter, to demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (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 employees 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.)

Under HEERA an employee has 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. See Government Code section 3565.

Your amended charge fails to establish that you engaged in protected activity. Even assuming you engaged in protected activity, your charge fails to establish that the University knew that you had engaged in protected activity or the University took

adverse action against you because of your engaging in protected activity. Therefore, your amended charge fails to state a prima facie violation of the HEERA.

I am therefore, dismissing your charge based on the facts and reasons contained in this letter and my February 4, 1993 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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 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 (3) calendar days before the expiration of the time required for filing the document.

The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By _
Michael E. Gash
Regional Attorney

Attachment

cc: Regents of the University of California
Susan M. Thomas, University Counsel
Office of the General Counsel
300 Lakeside Drive, 7th Floor
Oakland, CA 94612-3565

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

February 4, 1993

Michael T. Baublitz

Re: Michael T. Baublitz v. University of California (Lawrence Berkeley Laboratory). Unfair Practice Charge No. S-CE-53-H

WARNING LETTER

Dear Mr. Baublitz:

On January 29, 1993, you filed a charge in which you allege that the University of California Regents, (Lawrence Berkeley Laboratory) (University), violated section 3571(a) of the Government Code (Higher Education Employer-Employee Relations Act (HEERA or Act)) by denying your request for reasonable accommodation, by denying your request to be reinstated to full-time status with an accommodation to work part time at home and by terminating your employment.

On February 3, 1993, I spoke with you and informed you that your charge failed to set forth any dates when the alleged conduct occurred. I also informed you that the Public Employment Relations Board (PERB or Board) has a six month statute of limitations. You responded that you had recently learned about the existence of PERB and that you thought it was unfair for PERB to have such a short statute of limitations. You also informed me that most of the University's conduct occurred beyond the statute of limitations, however, you were served with the intent to dismiss letter on September 25, 1992.

In order to state a prime facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194.

Government Code section 3563.2(a) states in relevant part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board

> 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.

Your charge was filed with PERB on January 29, 1993, which means that any alleged unfair practice should have occurred during the six-month statutory period which began on July 29, 1992. The allegations contained in your charge fail to set forth any dates therefore, those allegations must be dismissed.

During our telephone conversation of February 3, 1992, you stated that you received your intent to dismiss letter on September 25, 1992. To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (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 employees 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.)

As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of HEERA section 3571(a).

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 additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by 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 February 11, 1992, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Regional Attorney
Michael E. Gash