

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KEVIN J. REDDINGTON,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
FORESTRY & FIRE PROTECTION),

Respondent.

Case No. SA-CE-1435-S

PERB Decision No. 1690-S

September 17, 2004

Appearance: Kevin J. Reddington, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kevin J. Reddington (Reddington) of a Board agent's dismissal (attached) of his unfair practice charge.

Reddington had filed an unfair practice charge against the State of California (Department of Forestry & Fire Protection) (State) alleging a violation of the Ralph C. Dills Act (Dills Act) section 3519(a)¹ by the State's actions in terminating his employment, taking other adverse actions against him, and creating a hostile work environment.

The Board has reviewed the entire record in this case, including the initial and amended unfair practice charge, warning and dismissal letters and Reddington's appeal. The Board finds the warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

¹The Dills Act is codified at Government Code section 3512, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

DISCUSSION

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

The Board agent advised Reddington that to meet this test under the Novato standard he would need to include more than just a statement that there was a “premeditated conspiracy” against him. The Board agent advised that he must show protected conduct, that the employer knew of the conduct and that there was a nexus between the protected conduct and any adverse actions. Although Reddington filed an amended claim he did not include evidence of protected conduct prior to events he believed were adverse actions nor did his charges contain evidence that the employer knew of any protected activity or evidence of a nexus between adverse actions and protected conduct.

We believe that Reddington has failed to state a prima facie case and the case must be dismissed.

ORDER

The unfair practice charge in Case No. SA-CE-1435-S is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



August 2, 2004

Kevin J. Reddington

Re: Kevin J. Reddington v. State of California (Department of Forestry & Fire Protection)
Unfair Practice Charge No. SA-CE-1435-S
DISMISSAL LETTER

Dear Mr. Reddington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 21, 2004. You allege that the State of California (Department of Forestry & Fire Protection) violated the Ralph C. Dills Act (Dills Act)¹ by dismissing you from your employment without cause, taking other false adverse actions against you, and creating a hostile work environment.

I indicated to you in my attached letter dated July 8, 2004, 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 July 16, 2004, the charge would be dismissed. On July 13, 2004, we discussed your charge and my letter by telephone. Your request for additional time in which to amend the charge was granted, and a First Amended Unfair Practice Charge was timely filed on July 27, 2004.

The allegations of your original charge were summarized in my earlier letter as follows:

Your charge includes the following information and allegations. You have been employed by the California Department of Forestry & Fire Protection (State or Department) as an office technician since March 26, 2000. You allege that certain named managers in the Department created a hostile work environment; made false adverse actions against you on January 9, 2002, August 22, 2002, and September 8, 2003; abused their power to the detriment of your well being; and used their power to "fraudulently and wrongfully" dismissing you from employment.

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

You also reference the denial of your request for voluntary transfer on March 20, 2003, and an incident on January 13, 2004, where you contacted the California Highway Patrol and were yelled at "for no justified reason" by two of the managers. In February 2004, you were first placed on administrative leave and then dismissed on February 22 based on "contrived and false allegations" contained in a memo written on January 14, 2004.

Finally, you indicate it is your belief that there was a "premeditated conspiracy" by the named managers to give you bad reports, create a hostile work environment, set you up for failure, and dismiss you from employment.

Your amended charge does not add any additional facts to the charge. The only changes made in the amended charge involve the insertion of the comment "Protected Conduct" in brackets next to the paragraphs regarding the denial of your request for transfer in March 2003 and the January 2004 incident where you contacted the California Highway Patrol (CHP). From our telephone conversation of July 13, 2004, it is my understanding that you called the CHP because the two named managers were in your cubicle, yelling at you and preventing you from leaving the cubicle.

Discussion

In my July 13 letter, I reviewed the standards for finding a violation of Dills Act section 3519(a) and concluded, in relevant part, that

Your charge does not allege evidence of protected conduct that preceded any of the adverse actions, nor evidence of employer knowledge of such conduct, nor evidence that would demonstrate the necessary connection or "nexus" between any of the adverse actions and the protected conduct. Thus, while the charge does allege evidence of adverse action, the charge fails to allege a prima facie case of discrimination in violation of the Dills Act.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Thus, labeling certain conduct as "Protected Conduct" is not sufficient to establish that it is such under applicable precedent. In this case, you are apparently alleging that the protected conduct that preceded and motivated the subsequent adverse action was your request for a

voluntary transfer in March 2003 and your calling the CHP in January 2004. These assertions are insufficient to support a prima facie finding of a violation for the following reasons.

First, case law does not support finding that a request for a transfer constitutes protected conduct any more than, for example, would a request by an employee for a vacation day, or an employee's application for a promotion, or a request to work overtime.

Second, the incident with the CHP is not described in sufficient detail to support finding that you were engaged in the exercise of any right guaranteed by the Dills Act. Further, even assuming this incident constituted protected activity, it would stand as the only such evidence, and the charge still fails to establish that the subsequent termination was motivated by the incident. (Novato Unified School District (1982) PERB Decision No. 210; North Sacramento School District (1982) PERB Decision No. 264.)

Therefore, I am dismissing the charge based on the facts and reasons set forth above, as well as those contained in my July 8, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

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

By _____
Les Chisholm
Regional Director

Attachment

cc: Nalda Keller

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377



July 8, 2004

Kevin J. Reddington

Re: Kevin J. Reddington v. State of California (Department of Forestry & Fire Protection)
Unfair Practice Charge No. SA-CE-1435-S
WARNING LETTER

Dear Mr. Reddington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 21, 2004. You allege that the State of California (Department of Forestry & Fire Protection) violated the Ralph C. Dills Act (Dills Act)¹ by dismissing you from your employment without cause, taking other false adverse actions against you, and creating a hostile work environment.

Your charge includes the following information and allegations. You have been employed by the California Department of Forestry & Fire Protection (State or Department) as an office technician since March 26, 2000. You allege that certain named managers in the Department created a hostile work environment; made false adverse actions against you on January 9, 2002, August 22, 2002, and September 8, 2003; abused their power to the detriment of your well being; and used their power to "fraudulently and wrongfully" dismissing you from employment.

You also reference the denial of your request for voluntary transfer on March 20, 2003, and an incident on January 13, 2004, where you contacted the California Highway Patrol and were yelled at "for no justified reason" by two of the managers. In February 2004, you were first placed on administrative leave and then dismissed on February 22 based on "contrived and false allegations" contained in a memo written on January 14, 2004.

Finally, you indicate it is your belief that there was a "premeditated conspiracy" by the named managers to give you bad reports, create a hostile work environment, set you up for failure, and dismiss you from employment.

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Discussion

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Your charge does not allege evidence of protected conduct that preceded any of the adverse actions, nor evidence of employer knowledge of such conduct, nor evidence that would demonstrate the necessary connection or "nexus" between any of the adverse actions and the protected conduct. Thus, while the charge does allege evidence of adverse action, the charge fails to allege a prima facie case of discrimination in violation of the Dills Act.

In addition, Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which may be raised by the respondent. (Long Beach Community College District (2003) PERB Decision No. 1564.) If raised as an affirmative defense, charging party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) In this case, the alleged adverse actions taken

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July 8, 2004

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in January and August 2002, and March and September 2003, would be subject to dismissal as untimely.

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before July 16, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director