

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COALITION OF UNIVERSITY EMPLOYEES,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (LOS ANGELES),

Respondent.

Case No. SF-CE-753-H

PERB Decision No. 1995-H

December 19, 2008

Appearances: Leonard Carder by Shawn C. Groff, Attorney, for Coalition of University Employees; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Regents of the University of California (Los Angeles).

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

RYSTROM, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the Coalition of University Employees (CUE) of the dismissal of its unfair practice charge against the Regents of the University of California (Los Angeles) (UCLA) by an administrative law judge (ALJ).

The charge alleged that UCLA violated the Higher Education Employer-Employee Relations Act (HEERA)¹ section 3571(a)² when it laid off an employee, Bert Thomas (Thomas), in retaliation for his union activities.

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²HEERA section 3571(a) makes it unlawful for a higher education employer to “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.”

We have reviewed the entire record, including but not limited to the charge, the complaint, the parties' post-hearing briefs, the ALJ's proposed decision, CUE's exceptions to the proposed decision and UCLA's response thereto. Based on our review, we affirm the ALJ's dismissal of the charge for the reasons stated below.

ALJ'S DECISION

The ALJ found that Thomas was not laid off in retaliation for his union activities in violation of HEERA. Although she found that there was evidence of union animus on the part of Thomas' lower-level supervisors Kevin Clark (Clark) and Ann Marie Lebsack (Lebsack),³ the ALJ found that Carma Lizza (Lizza), who alone made the layoff decision, did not have a part in or knowledge of their animus. Lizza was manager of the Transfusion Medicine Division. Concluding that Lizza's testimony was credible, the ALJ found that Lizza harbored no animus toward Thomas' union activities and that those activities did not motivate her decision to lay off Thomas.

Even though the ALJ failed to find a nexus between Thomas' union activity and his selection for layoff, she analyzed whether the layoff decision was made for legitimate business reasons notwithstanding Thomas' protected activities.⁴ The ALJ determined that there was a legitimate business reason for the layoff decision.

³The ALJ found that union animus on the part of Clark and Lebsack was evidenced by Clark's comments in Thomas' August 2001 evaluation; Lebsack's transfer of Thomas to the Center for Health Sciences (CHS) building; Lebsack's February 2003 memo, which referenced his work rules grievance; Lebsack's comments in Thomas' 2003 through 2004 evaluation, which referenced his union activities; and Lebsack's denial of Thomas' request to attend bargaining training in June 2004.

⁴Only if a prima facie case of retaliation is established does the burden then shift to the employer to prove that its action would have been the same in the absence of the protected activities. (California State University (San Francisco) (1986) PERB Decision No. 559-H; Sacramento City Unified School District (1985) PERB Decision No. 492 (Sacramento USD).) Because we find CUE has failed to demonstrate a prima facie case of retaliation, we do not

The ALJ's proposed decision dismissed the complaint and its underlying unfair practice charge.

CUE'S EXCEPTIONS TO THE PROPOSED DECISION

CUE excepted to the following findings in the ALJ's proposed decision:

(1) The conclusion that Lizza possessed only minimal awareness of Thomas' protected union activities.

(2) The finding that Lizza harbored no animus toward Thomas' union activities and that such animus did not motivate her decision to lay Thomas off. CUE argues that unlawful animus on the part of Clark and Lebsack should have been imputed to Lizza.

(3) The finding that the Blood and Platelet Center (BP Center) increased its revenue after Thomas' layoff due to the mobile units. CUE contends that given the decision to lay Thomas off was wholly without basis from a purely economic standpoint, it must have been unlawfully motivated.

UCLA'S RESPONSE TO CUE'S EXCEPTIONS

UCLA urges the Board to uphold the ALJ's findings as supported by the weight of the evidence and makes the following arguments in opposition to CUE's exceptions:

(1) Lizza's knowledge that Thomas was actively involved in and held various leadership positions with CUE is too vague and general to establish the element of knowledge required in retaliation cases.

(2) An imputation of union animus is unwarranted in this case because Lizza never conferred with Clark or Lebsack as to her decision to eliminate Thomas' position, and because Lizza was never aware of any animus toward Thomas.

address whether UCLA has proved that it would have taken the same adverse action even if Thomas had not engaged in protected activity.

(3) The conclusion that revenues increased after Thomas was laid off from his position as a recruiter is relevant. By retaining employees more versatile than Thomas, whose classifications permitted them to work on the mobile unit, the division was able to further the objective of focusing on the more efficient and productive mobile units.

STATEMENT OF FACTS

UCLA hired Thomas as a “casual employee” (20 hours per week) for a senior clerk position in April 1996, and made him a full-time employee in April 1998. At the time of his layoff on May 2, 2005, Thomas was employed as a senior clerk in the BP Center, where he served as a recruitment officer responsible for blood donor recruitment.

Thomas’ Union Activities

Thomas was active in CUE since 1998, and held various offices within the union. From 2000 to 2002, he served on its statewide executive board. From 2002 to 2003, he was the local president. Thomas was a steward from 2003 to 2004, and served as a member of CUE’s statewide bargaining team from June 2004 through June 2006.

In these various capacities, Thomas’ activities included talking about CUE with his fellow employees in order to increase its membership, participating in on-campus rallies, speaking in opposition to UCLA at board meetings, and confronting management on various CUE issues.

In July 2001, Thomas filed grievances which alleged that new rules governing tardiness, dress code, eating and drinking on campus as well as other such workplace rules were implemented by UCLA unilaterally and in violation of the parties’ collective bargaining agreement. He distributed CUE flyers, which solicited employee complaints about the new rules and testified at the arbitration hearing on the grievance.

Thomas' Job Duties and History at the BP Center

As a senior clerk, Thomas' job duties consisted of soliciting and scheduling blood donors at the BP Center. This was done by making "cold calls" from donor reference lists. Thomas was the most successful recruiter and scheduled approximately 100 units of blood donations per week and approximately five platelet donors per day. There was differing testimony regarding the dollar value of blood and platelet donations. Thomas set the blood at \$400 per unit and a platelet donor at \$900, while Lizza set a unit of blood at \$300 and a platelet donor at \$450.

Thomas' 2002 Transfer

In early 2002, when UCLA began renovating the CHS building to relieve overcrowding at the BP Center, Lebsack moved two senior recruiters, Thomas and Carsteliious Ervin, from the BP Center to a room in the basement of CHS. In a memo to the recruiters dated February 28, 2002, Lebsack explained that the temporary move would last from six to twelve months. As of his layoff on May 2, 2005, Thomas had not been relocated from the CHS building to the new facility.

Thomas' Training

Lebsack's June 2003 through June 2004 evaluation of Thomas stated that due to staffing shortages, Thomas would be trained in the Fall to cover either the center front desk duties or operations center duties regarding the mobile units and that the assignment would be his choice. Thomas received some training for the mobile unit, but he was never assigned to a mobile unit. As to the reason why, Lebsack testified that "we just didn't get to it."

The 2005 Staff Reductions

As of December 2004, the three hospitals of the UCLA Medical Center (UCLA hospitals) lost \$11.6 million through the first six months of the fiscal year. The UCLA

hospitals budgeted to lose \$5.3 million during this period. Thus, with the \$11.6 million loss, the UCLA hospitals faced an additional \$6.3 million shortfall. These losses mainly resulted from expenses exceeding revenue.

At this time, as a result of seeing the numbers on the expense side, the UCLA hospitals tried to correct the situation by evaluating and reducing expenses as well as increasing revenue. On the revenue side, the UCLA hospitals tried to maximize patient revenue reimbursement. On the expense side, they initiated programs which looked at staffing and supply expenses.

The situation improved on the revenue side and by the close of the fiscal year in June 2005, the hospitals had a net income of \$9.2 million. But, this was \$10.8 million less than the \$20 million the UCLA hospitals had projected for net income. The \$10.8 million shortfall was mainly due to expenses being over budget by about \$26.8 million. Staffing salaries and benefits were \$2.8 million over budget in December 2004 and \$7.8 million over budget in June 2005. The staffing salaries and benefits usually accounted for about one half of the UCLA hospitals' expenses and were, therefore, a major concern at that time.

In February 2005, David Bruckner (Bruckner), director of clinical labs, and Lizza's immediate supervisor, told all of the managers, including Lizza, that: the UCLA hospitals had serious financial problems, it had been decided that the organization would reduce salary costs by cutting staff, and they each had to reduce their staff by eight percent while maintaining the same level of service.

Thomas' Layoff

When Lizza received the direction to reduce her staff by eight percent, she believed she had to eliminate about eight positions given she had approximately 40 employees in transfusion services and 50 in the BP Center. Lizza initially decided to try and eliminate four

positions without laying off any employees, although she knew that she might be asked to reduce more positions later.

Lizza reviewed her staff list and found three positions to recommend for elimination. First, she suggested “absorbing” a vacant unlicensed lab technician position in the transfusion service section by spreading the position’s duties among a “fair number” of unlicensed technical people. Next, she recommended discontinuing the employment of a licensed technologist in the transfusion service section who was a per diem at-will employee. Lizza suggested eliminating the third position by restructuring and reassigning the work of the highest administrative supervisor position in the BP Center, which became vacant in February 2005, when its incumbent retired. At this point, Lizza determined that she could not avoid a layoff.

Lizza next looked at classifications that would have the least impact on operations if eliminated. She determined that a reduction could be made to the clerical staff without negatively impacting the needs of the department. She mistakenly thought there were three individuals in administrative assistant I clerical positions and determined that Thomas had the least seniority among the three. She selected him for layoff on that basis.⁵

Bruckner approved each of Lizza’s staff reduction recommendations. Lizza gave Thomas a layoff notice on March 1, 2005, which was effective May 2, 2005. Thomas was offered a choice of being placed on a preferential rehiring list or receiving severance pay. He chose the severance pay.

⁵After making her decision regarding Thomas’ layoff, Lizza discovered when looking at the roster that Thomas was actually classified as a senior clerk. This classification was a lower clerical classification than the administrative assistant I position Lizza had thought Thomas had. As a senior clerk, Thomas’ position was less cross trained and did not handle blood. The discovery of this new information about Thomas’ classification did not change Lizza’s layoff recommendation.

Approximately 30 employees were laid off in this staff reduction, including supervisors and managers. Approximately 65 other employees resigned, retired, or were dismissed.

Since Thomas' layoff, the BP Center has collected more blood and platelet donations due to its use of the mobile units. The operation changed significantly to scheduling mobiles out in the field from tele-recruitment of blood donors.

DISCUSSION

In considering an appeal, PERB reviews the entire record de novo. It may reverse legal determinations of an ALJ and from the factual record, may draw opposite inferences from those drawn by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a (Woodland); Santa Clara Unified School District (1979) PERB Decision No. 104.)

In this case we must decide whether CUE demonstrated that UCLA's decision to lay off Thomas was made in retaliation for his having engaged in protected union activities.

To establish a prima facie case of retaliation in 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 employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)⁶

The charging party has the initial burden of showing the elements of a prima facie case of retaliation. (Novato.) The issues in this case are whether CUE has demonstrated both that Lizza had sufficient knowledge of Thomas' union activities and that Lizza selected Thomas for layoff because of those activities.

⁶Under HEERA, the Board has adopted the test in Novato for discrimination and retaliation. (California State University (Sacramento) (1982) PERB Decision No. 211-H; Trustees of the California State University (1990) PERB Decision No. 805-H.)

Knowledge

There can be no retaliation if an employer is unaware of a charging party's protected activity. (Sacramento USD.)

CUE argues that there is ample evidence in the record to show that Lizza was aware of Thomas' union activity. For example, Lizza testified that "Mr. Thomas was very active and everybody was aware that he was involved with the Union within the Department." CUE also points out that Lizza testified she knew Thomas served as both a president and a steward of CUE and that she assumed Thomas was directly involved in the work rules grievance and arbitration.

We find in this case that while Lizza was not aware of all of Thomas' union activities, CUE demonstrated that Lizza possessed awareness of them so as to satisfy the employer knowledge requirement.

In addition to the evidence cited by CUE above, Lizza testified when asked about Thomas' union activities in relation to her layoff decision that she "regarded his participation in Union activities not to be a reason to target him or to exclude him." Regarding the work rules grievances, although Lizza was not at the arbitration hearing and did not know that Thomas testified at the hearing, she assumed that he was involved. Lizza also recalled seeing a CUE flyer written in opposition to the work rules and assumed that Thomas had been involved in authoring it.

Unlawful Motivation

When direct evidence of unlawful motive is not available, such motive can be established through circumstantial evidence and inferred by the record as a whole. (Novato.) Although relevant, the timing of the adverse action, standing alone, cannot establish the action was taken because of the protected activities. (Moreland Elementary School District (1982))

PERB Decision No. 227.) Evidence 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; State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S (Parks and Recreation)); (2) the employer's departure from established procedures and standards when dealing with the employee (Los Angeles Unified School District (2001) PERB Decision No. 1469; Alisal Union Elementary School District (2000) PERB Decision No. 1412); (3) the employer's inconsistent, contradictory, or vague justifications for its actions (Parks and Recreation); (4) the employer's cursory investigation of the employee's misconduct (Novato); (5) employer animosity toward union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (6) any other facts which might demonstrate the employer's unlawful motive (Novato).

CUE argues that unlawful intent in this case was demonstrated by: (1) imputing the union animus of Clark and Lebsack to Lizza; and (2) the fact that Thomas had been the top revenue-producing telephone recruiter which indicates an unlawful motivation because there is no economic justification for his layoff.

(1) Imputing Animus

The ALJ found that CUE failed to show that Lizza's decision was motivated by union animus. On appeal CUE argues that the ALJ erred in failing to impute to Lizza the union animus she found on the part of Clark and Lebsack.⁷

“Unlawful animus may be imputed to high management officials where, even innocently, they rely on inaccurate and biased information of lower level officials.” (State of

⁷The ALJ's findings of animus on the part of Clark and Lebsack are listed at footnote 3.

California (Department of Corrections) (2001) PERB Decision No. 1435-S (emphasis added); see e.g., Parks and Recreation.)

We find no basis to impute any union animus on the part of Clark or Lebsack to Lizza.⁸ Lizza testified that before making her layoff decision, she spoke to no one, including Clark or Lebsack about what she was doing.⁹ She further testified that she did not have conversations with any supervisor or official at the UCLA campus about concerns they had regarding Thomas or his participation in union activities, and she did not review his personnel file during her decision-making process.

We defer to the ALJ's following credibility findings as to Lizza's testimony in accordance with Woodland, and incorporate these findings into our decision:

Lizza did not participate in any prior decisions regarding Thomas, including his work assignments, and did not consult with his supervisors or review his evaluations before making her decision.

Thus, unless I discredit Lizza's testimony, I cannot find that she harbored any animus toward Thomas' union activities or that those activities motivated her decision. An adverse credibility finding may be made against a witness whose testimony is evasive, exaggerated, confused, inconsistent, inherently unbelievable, or whose demeanor suggests she is not telling the truth. (Regents of the University of California (CSEA) (1984) PERB Decision No. 449-H; Santa Clara Unified School District (1985) PERB Decision No. 500.) Here, Lizza's testimony was straightforward and consistent, her recollection was intact, and she did not exhibit any suspicious demeanor. Accordingly I find no reason to discredit her testimony. [¶] . . . there is no solid basis upon which to conclude that her decision was unlawfully motivated.

⁸We do not address whether CUE proved that Clark or Lebsack had union animus because we find that any such animus on their part would not be properly imputed to Lizza.

⁹Lizza testified that if an action were going to be taken on one of her staffing recommendations she would then consult with her boss (Bruckner) and human resources on the appropriate method of taking that action.

CUE urges us to find that the ALJ's failure to impute the union animus she found on the part of Thomas' lower level supervisors to Lizza was erroneous because National Labor Relations Board (NLRB) case law holds that a supervisor's unlawful motivation is imputable to the employer even if the official who takes the adverse action is unaware of the supervisor's animus.

In support of its argument that animus should be imputed, CUE cites Goldens Foundry & Machine Co. (2003) 340 NLRB 1176 [173 LRRM 1585] (Goldens Foundry) for the proposition that a supervisor's unlawful motivation is imputable to the employer even if the official who actually makes the adverse determination is unaware of the supervisor's animus.

In Goldens Foundry, a manager discharged an employee as a direct result of a meeting with the employee's immediate supervisor in which the supervisor presented a false report that the employee had walked off the job without giving notification or receiving authorization. The NLRB found that "Toland's [the supervisor's] unlawful motivation must be imputed to Giddings [the manager] because were it not for the fact that Toland brought Jones' [the employee] purported misconduct on February 12 to Giddings's attention, Jones would not have been discharged." (Goldens Foundry, at p. 1177.)

CUE also cites Tracer Protection Services, Inc. (1999) 328 NLRB 734 [162 LRRM 1079] (Tracer), as authority for imputing Clark and Lebsack's animus to Lizza. In Tracer, the critical fact in the NLRB's decision to impute the unlawful motivation of officials from one company, who had recommended an employee's discharge to the supervisor of another company who thereafter discharged the employee, was that it was proved that the supervisor who discharged the employee knew about the unlawful motivation on the part of the officials who sought the employee's removal. However, in deciding this case, the NLRB acknowledged "that an unlawful motive on the part of Ormet [respondent] cannot simply be attributed to

Tracer [respondent] without any evidence from which Tracer's own knowledge and motive can be inferred." (Tracer, at p. 734.)

The Board is not bound by NLRB precedent or analysis. (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667; Carlsbad Unified School District (1979) PERB Decision No. 89; Los Angeles Unified School District (1976) EERB¹⁰ Decision No. 5.) Indeed, the Board has not adopted the standards regarding imputation of knowledge set forth in either Goldens Foundry or Tracer. To the contrary, as discussed below, the Board has taken a different approach. Therefore, we find CUE's reliance on Goldens Foundry and Tracer is misplaced.

In San Bernardino City Unified School District (2004) PERB Decision No. 1602 (San Bernardino), a director of classified personnel removed a substitute teacher from a phone calling system's bank of substitute teachers based on the recommendation of an assistant affirmative action officer, whose investigation revealed that the teacher used physical force on a student. The ALJ's proposed decision in San Bernardino would have imputed the director's knowledge of the substitute teacher's union activities to the affirmative action officer in the absence of any evidence that the officer was aware of the teacher's protected activity. The Board did not affirm that portion of the proposed decision and specifically found that the imputation of knowledge under those circumstances was not warranted. (San Bernardino, at p. 25, fn. 22.) Therefore, under PERB precedent, one individual's experience will not be imputed to another unless it is warranted under the circumstances.

In this case, Lizza was unaware of any unlawful motivation towards Thomas on the part of Clark or Lebsack and never consulted with them regarding her layoff decision. Under these

¹⁰Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

facts, the evidence does not justify imputing any animus on the part of Clark and Lebsack to Lizza.

Lack of Economic Justification for Layoff as Alleged Indicia of Unlawful Motivation

CUE argues that because Thomas's donor recruitment generated many times more money for UCLA than he received in salary, any decision to lay him off cannot be justified from an economic standpoint and therefore must have been a product of unlawful motivation. In support of this argument, CUE alleges that the ALJ's conclusion that UCLA increased donor productivity due to the mobile units after Thomas was laid off was erroneous. We find there is no factual basis for this argument and reject it for that reason alone.

While it is true that Thomas' efforts brought substantial revenue to UCLA, it does not automatically follow that UCLA lost revenue when it laid him off. The fact that the revenue generated by the mobile units exceeded that generated by telephone recruiting is confirmed by the evidence in the record. Lebsack gave the following testimony as to the increased efficiency of the mobile blood units compared to telephonic recruiting:

But really, our focus is the mobile operation. Just because for the time involved, if we go to a mobile, we can draw out a hundred units in one day, whereas, if we have someone that's tele-recruiting and they're at the top of their game, they'll be pulling in 20 units max, 20 appointments for a day. Well, that's five days of somebody sitting eight hours at a telephone to get us a hundred units for the week. Or I can send out one mobile crew, one day, and bring in more than a hundred units

The evidence establishes that not only did donations increase after Thomas' layoff, but UCLA's decision to select the lowest clerical position for layoff was also consistent with its shift from telephonic donor recruiting to mobile unit recruiting as discussed above.¹¹

¹¹Even Thomas admitted that the mobile units were "very successful."

THE WITNESS [Lizza]: There has not been -- There has been an increase in donors to the Center since he has been laid off so it has been effective. There has not been a drop in donors.

[ALJ]: There's been an overall increase in donors?

THE WITNESS: Absolutely. And a lot of that has to do with the fact that we're booking larger mobiles. I told you about the other direction we're going into.

[ALJ]: Well, if he had stayed, isn't it possible that he would [have] made an even larger increase?

THE WITNESS: We had to layoff somebody and I don't -- and we were able to absorb it and to also do his function with other people to the same amount of time. So, I had to choose, and again, it was based on cross functioning and keeping those donors coming in and operate in getting them processed all through the whole system. He was very focused on one little part of the piece in order to get that blood available.

[ALJ]: Okay.

Accordingly, we conclude that the ALJ's finding that UCLA's mobile blood units resulted in the collection of more blood donations as compared with its prior telephone recruiting process was supported by the evidence and is not erroneous.

The Board finds that CUE failed to prove that UCLA retaliated against Thomas by selecting him for layoff because of his union activity, and affirms the ALJ's dismissal of the charge.

We agree with CUE that it demonstrated Lizza possessed sufficient knowledge of Thomas' union activities.

However, we find that CUE's contentions that nexus is established by imputing Clark and Lebsack's union animus to Lizza and that the decision to lay off Thomas was so economically indefensible that it must have been the product of unlawful motivation, are without merit.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-753-H are hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member McKeag joined in this Decision.