

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



SEIU LOCAL 1021,

Charging Party,

v.

CALAVERAS COUNTY WATER DISTRICT,

Respondent.

Case No. SA-CE-510-M

PERB Decision No. 2039-M

June 19, 2009

Appearances: Weinberg, Roger & Rosenfeld, by Matthew J. Gauger, Attorney, for SEIU Local 1021; Downey Brand, by Jennifer R. Madden, Attorney, for Calaveras County Water District.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by SEIU Local 1021 (SEIU) of a Board agent's partial dismissal of its unfair practice charge. The charge alleged that the Calaveras County Water District (District) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> by: (1) interfering with the protected rights of bargaining unit members; (2) engaging in acts of retaliation/discrimination against certain union activists; (3) terminating the employment of a probationary employee because she engaged in protected activity; (4) failing to provide requested information; and (5) contracting out bargaining unit work.<sup>2</sup>

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<sup>1</sup> MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>2</sup> A complaint issued on allegations of interference, retaliation against bargaining unit employee Rick Griffin, and failure to provide requested information. The remaining allegations were dismissed.

The Board has reviewed the entire record in this case, including but not limited to the original and amended unfair practice charge, the Board agent's warning and dismissal letters, SEIU's appeal and the District's response. Based on this review, the Board affirms the dismissal of the allegation at issue for the reasons discussed below.<sup>3</sup>

### BACKGROUND

The District operates five water treatment plants and twelve wastewater treatment plants. SEIU has been the exclusive representative of the District's clerical, technical, professional and blue-collar employees since 1997.

The memorandum of understanding between the parties expired on June 30, 2007.<sup>4</sup> The parties initiated negotiations for a successor agreement in April. Negotiations were at times acrimonious before the parties reached agreement in October. During the course of negotiations, bargaining unit employees engaged in several concerted activities, including mass picketing, "unity breaks," union meetings and wearing union insignia, including purple SEIU shirts, at work.

Nicole Randall (Randall), a probationary employee, was employed by the District as an administrative clerk. Prior to August, Randall participated in informational picketing activities, signed pro-union petitions and wore union insignia at work.

Randall's immediate supervisor was Pat Emerson (Emerson), Director of Administrative Services. On August 3, Emerson learned that Randall was dating the SEIU chapter president. She called Randall into her office "to give her advice about life and dating and how Randall should not date [the chapter president]."

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<sup>3</sup> SEIU appealed only the dismissal of the allegation regarding termination of the probationary employee's employment. Only those facts essential to the resolution of this allegation are summarized herein. The remaining allegations in the partial dismissal were not considered by the Board and are dismissed.

<sup>4</sup> Unless otherwise noted, all dates hereafter refer to 2007.

Randall and Emerson at times had a difficult working relationship. At some point prior to September 17, Randall and Emerson engaged in a verbal and physical altercation during which Emerson touched Randall on the elbow to move her out of her office. During the encounter, Randall told Emerson she wanted to have union representation at a future meeting with Emerson for the purpose of working out their differences. Emerson told Randall she was not allowed to have union representation.

On September 17, Emerson met with Randall and SEIU representative Tony Atnip to discuss the prior incident. Emerson apologized for the way she had acted. Emerson told Randall that she had no problems with her and that her work was good.

On October 10, District Board Member Ed Rich was talking to Randall and said words to the effect that workers would be fired if they go on strike.

On October 11, Randall joined other employees in forming a “human chain” in the District’s parking lot, forcing drivers, including Emerson, to drive between the employee “chains” on their way out of the parking lot. The employees all wore purple union t-shirts and shouted “Settle the contract!”

On November 1, Emerson called Randall to a meeting to go over her performance review. After arriving at the meeting, Randall requested union representation. She was told that she could have a union representative.<sup>5</sup>

On November 9, a petition to remove Emerson from her duties was circulated by SEIU. Randall signed her name to the petition.<sup>6</sup>

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<sup>5</sup> Although not clear from the charge, it appears the performance review meeting was rescheduled to November 19.

<sup>6</sup> There are no facts alleged that the petition was actually submitted to the District or that anyone in management was aware of the petition.

Randall received her performance review in a meeting held on November 19. The evaluation was described in the unfair practice charge as “a very bad review.”

On January 31, 2008, while still a probationary employee, the District terminated Randall’s employment.

The charge also alleges Randall was subject to sexual harassment, although it does not indicate when the conduct occurred. The charge states:

The employer tolerates sexual harassment of workers who associate with Union activists. [Manager “A”], an Office Manager constantly leers at Nicole Randall, inappropriately complimenting her clothing (which is similar to the clothing the other similarly situated workers wear), referring to her to [sic] “Nordstrom”, comes into her work area and speaks to her in a flirtatious manner.

#### BOARD AGENT’S DISMISSAL

The Board agent concluded that SEIU’s charge alleged sufficient facts to demonstrate that Randall engaged in protected activity, the District had knowledge of some of that protected activity, and the termination of her employment constituted adverse action. However, the Board agent determined the charge did not establish a connection, or nexus, between Randall’s protected activity and the adverse action.

#### SEIU’S APPEAL

As noted above, SEIU appeals only the portion of the partial dismissal pertaining to the termination of Randall’s employment. In doing so, SEIU challenges the determination that this allegation does not demonstrate nexus. SEIU contends that nexus is established by the following conduct.

1. SEIU contends the District allowed the sexual harassment of Randall to continue because of her protected activity, including Emerson’s comment on August 3 that she should not date the chapter president.

2. Randall asked for a future meeting with Emerson, including union representation, to discuss the altercation that occurred in September. Emerson told Randall she was not permitted to have a union representative. SEIU contends that, because a discussion regarding the incident could give rise to discipline, Emerson improperly denied Randall the right to union representation.

3. SEIU asserts that the board member's comment to Randall on October 10, that employees would be fired if they go on strike, demonstrates union animus.

4. The appeal states that Randall "received positive evaluations" and there was "no evidence of performance problems except picayune and hypersensitive interpretations of work rules." The charge alleges Emerson told Randall her work was good during the September 17 meeting. In contrast, the District terminated Randall's probationary employment for performance and attitude issues. SEIU contends this demonstrates shifting justifications.

5. SEIU states the District is under no obligation to explain why it decides to discharge a probationary employee. Because the District provided the justification for Randall's termination, SEIU argues this demonstrates disparate treatment.

6. Finally, SEIU contends that because several of the allegations in the charge stated a prima facie case, this demonstrates the District "was steeped in anti-Union animus."

In response to the appeal, the District asserts SEIU's appeal contains new evidence not included in the charge. The District also contends the Board agent properly concluded the charge failed to demonstrate the necessary nexus element.

#### DISCUSSION

At issue is whether the charge alleges sufficient facts to establish a prima facie case that the District dismissed Randall, a probationary employee, because she engaged in activity protected by the MMBA. The Board agent concluded that the initial elements of a prima facie

case, protected activity, employer knowledge and adverse action, were present. The Board concurs in these findings, which are briefly summarized below. SEIU's appeal, and the focus of the Board's analysis, address only the Board agent's determination that the facts alleged in the charge do not demonstrate the nexus element necessary to establish a prima facie case.

To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a),<sup>7</sup> a charging party must show that: (1) the employee exercised rights under MMBA; (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 (*Novato USD*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*City of Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*City of San Leandro*.)

#### Protected Activity

The charge alleges facts that demonstrate that Randall engaged in protected activity by: (1) prior to August, she participated in informational picketing, signed pro-union petitions and dressed in union insignia at work; (2) on September 17, accompanied by a union representative, Randall met with her supervisor to discuss a prior altercation; (3) on October 11, Randall participated in a "human chain" in support of a new contract, which required drivers to drive through the parking lot between the employee "chains"; and (4) on November 9, Randall signed a petition circulated by SEIU to remove her supervisor from her duties.

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<sup>7</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

### Knowledge of Protected Activity

Unlawful discrimination cannot be established unless the employer is aware of the employee's participation in protected activity. (*Sacramento City Unified School District* (1985) PERB Decision No. 492 (*Sacramento City USD*)). The charge does not allege facts to establish that District representatives were aware that prior to August, Randall participated in picketing, signed petitions and wore union insignia. In addition, the charge does not demonstrate the District knew of the petition targeting Randall's supervisor and that Randall had signed the petition. The charge establishes only that the District had knowledge of the September 17 meeting with union representation, and that Randall's participation in the October 11 parking lot protest was observed by her supervisor.

### Adverse Action

The District took adverse action against Randall on November 19, when it issued her a negative performance evaluation, and on January 31, 2008, when it terminated her employment.

### Nexus

When direct proof of unlawful motivation is not present, the record as a whole is reviewed to determine if the inference of unlawful motive is established. 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 SD*)), it does not, without more, demonstrate the necessary connection 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; *City of Campbell*); (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; *City of San Leandro*); (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; *City of San Leandro*); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's offering of exaggerated, vague, or ambiguous reasons to justify its conduct (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento SD; Novato USD.*)

The charge demonstrates the timing factor is present. The District issued the negative evaluation on November 19, within one to two months of her protected activity on September 17 (attending a meeting with union representation) and October 11 (parking lot protest). The employment termination occurred approximately three and one-half months after Randall's participation in the October 11 protest. (*San Mateo County Community College District* (2008) PERB Decision No. 1980 [four and one-half months arguably too long].) The charge does not, however, allege facts that demonstrate other nexus factors.

SEIU contends the District allowed the sexual harassment of Randall to continue because of her protected activity. The charge does not state when the alleged sexual harassment by Manager "A" occurred in relation to Randall's protected activity. Further, there



is no evidence that Randall reported the alleged improper conduct by either manager. Without knowledge of the alleged harassment, the District could not have addressed the matter.

SEIU asserts nexus is established because Emerson told Randall she was not entitled to union representation when Randall asked for a meeting to discuss their altercation. SEIU argues Randall had a right to union representation because discipline could arise from a discussion of the incident.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (*Rio Hondo Community College District (1982) PERB Decision No. 260.*)

In the present case, it was Randall who requested a meeting with Emerson to discuss the incident. There are no facts suggesting that an investigatory meeting would be held or that Randall could reasonably believe discipline might result from the meeting she requested. As the charge does not establish Randall had a right to union representation when she asked Emerson for a meeting, Emerson's denial of representation before a meeting was scheduled does not demonstrate nexus.

SEIU also contends that the District board member's comment to Randall, that employees would be fired if they went on strike, establishes the required connection. However, there are no facts alleged that the board member was aware of Randall's participation in protected activity. Furthermore, there is no evidence the board member had any role in the preparation of Randall's evaluation or the decision to terminate her employment. (*Sacramento City USD [animus cannot automatically be imputed to decision maker].*) Rather, the charge alleges that Randall's supervisor conducted the performance

review. Therefore, this conduct also fails to establish a connection between Randall's protected activity and her termination.<sup>8</sup>

The appeal states that Randall "received positive evaluations" and only minor performance problems were documented. The charge alleges that during the September 17 meeting Randall's supervisor said her work was good. In contrast, the District terminated Randall's employment for performance and attitude issues. SEIU contends this demonstrates shifting justifications.

There are no facts alleged or copies of evaluations included in the charge, or facts stated in the warning letter, that Randall had "received positive evaluations" or had only minor performance problems, prior to receiving the negative evaluation on November 19. Pursuant to PERB Regulation 32635(b), "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." As there is no explanation why this information could not have been included in the charge, the Board does not find good cause and declines to consider the new evidence.

The charge does allege that Randall's supervisor told her she was doing a good job. However, the evidence does not demonstrate that Randall had a consistent, documented history of excellent work prior to receiving the negative evaluation and the reasons for her termination. (*San Joaquin Delta Community College District* (1982) PERB Decision No. 261 [six year unblemished record].) Absent these facts, the charge does not demonstrate shifting justifications.

SEIU also contends that because the District provided the reason for Randall's termination when it did not have to, this demonstrates disparate treatment. The appeal cites no authority for this proposition. Further, the charge does not allege facts that any other similarly

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<sup>8</sup> An interference allegation concerning this statement was included in the complaint.

situated employee was treated in a different manner or that the District deviated from existing policies.

Finally, SEIU argues that because several of the other charge allegations did state a prima facie case, this is sufficient to establish nexus for the present allegation. However, it is a charging party's obligation to allege facts that demonstrate the elements of a discrimination claim under *Novato USD. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.*) SEIU has not met its burden to establish the elements of a prima facie case of discrimination.

#### ORDER

The partial dismissal of the unfair practice charge in Case No. SA-CE-510-M is hereby AFFIRMED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.