STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KENNON B. RAINES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5482-E PERB Decision No. 2244 February 29, 2012

Appearance: Kennon B. Raines, on her own behalf.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Kennon B. Raines (Raines) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Los Angeles Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by retaliating against Raines for engaging in protected activity.

The charge, as amended, alleged that Raines engaged in protected activity by: (1) filing an unfair practice charge with PERB against the District (PERB Case No. LA-CE-4740-E), which was resolved by a settlement in her favor in July 2004; (2) filing grievances against the District on April 23, 2007 and February 6, 2008, which were resolved in her favor on August 20 and 24, 2009; (3) filing a PERB unfair practice charge against United Teachers of Los Angeles (UTLA) in October 22, 2009 (PERB Case No. LA-CO-1395-E); (4) appearing at an October 2009 meeting of the UTLA and voicing her support of a resolution to rescind a

[1] EERA is codified at Government Code section 3540 et seq.

side-letter negotiated between UTLA and the District; and (5) meeting with District Administrators Ira Berman (Berman) and Helen Tablack (Tablack) in January 2010 concerning the implementation of the settlement of her prior grievances. The charge alleged that the District retaliated against Raines for having engaged in these protected activities by: (1) on February 26, 2010, barring Raines from working as a substitute teacher at Ramona Elementary School (Ramona School); (2) reducing her work assignments pursuant to an audit in May 2010.[2]

The Board agent found that Raines failed to establish a prima facie case that the District retaliated against her because of her protected activity and dismissed the charge.

We have reviewed the entire record in this matter and affirm the Board agent's determination that the charge failed to state a prima facie case with respect to the alleged reduction in work assignments. We find, however, that the charge, as amended, alleges sufficient facts to establish a prima facie case of retaliation with respect to the allegation that the District removed Raines from working at Ramona School in retaliation for her protected activities. Accordingly, we reverse the dismissal of the charge and remand for issuance of a complaint with respect to this allegation only.

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[2] To the extent Raines alleges that the District took other adverse actions against her, we agree with the Board agent that the charge fails to allege sufficient facts to establish any other adverse actions taken within the six months prior to the filing of the charge. EERA section 3541.5(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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

FACTUAL ALLEGATIONS[3]

Raines began her employment as a substitute teacher with the District in 1997. Except for a brief span in 2003-2004, Raines' employment has been continuous.[4]

UTLA represents the District's teachers. The bargaining unit includes at least two distinct groups of employees, full-time teachers and substitute teachers. The District and UTLA are parties to a collective bargaining agreement (CBA). Under the CBA, a substitute teacher's seniority is based on uninterrupted years of service.

The CBA establishes a calling order that the District follows when offering assignments to substitute teachers. Seniority is the primary factor in determining the calling order. Individual schools may establish a "preferred" list for substitutes. Those with sufficient seniority who are on such a list are accorded priority for assignments at that school. If a school administrator is dissatisfied with a substitute teacher's performance, the administrator may issue a "no call" notice[5] regarding a particular substitute, which prevents the substitute teacher from being assigned to that school in the future. Accumulation of multiple "no call" notices leads to termination. Substitutes may challenge such notices by filing a grievance. If the challenge is successful, the "no call" notice may be rescinded and removed from the teacher's file.

In June 2009, the District laid off 1,800 full-time teachers. In July 2009, UTLA and the District negotiated a side-letter agreement granting the laid-off full-time teachers a preference

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[3] At this state of the proceedings, we must assume that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB* Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) (*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

[4] The brief break in service is discussed below.

[5] "No call" notices are also referred to by the District as "Inadequate Service Reports" or ISRs.

over the substitute teachers for substitute work assignments. The preference became effective in September 2009. In November 2009, UTLA and the District agreed to rescind the side-letter agreement.

Raines' Alleged Protected Activity

During the 2003-2004 school year, the District terminated Raines' employment. Raines alleged that the termination was due to her protected activities and filed an unfair practice charge with PERB in April 2004 (Case No. LA-CE-4740-E). The parties settled the case and Raines was reinstated to her employment with the District.

On April 19, 2007, Raines was issued a "no call" notice by the principal of Union Elementary School (Union School). Raines filed a grievance seeking removal of the notice from her file.

On October 18, 2007, Raines met with Maureen Diekmann (Diekmann), District 4 elementary director, regarding the Union School grievance. Raines had not previously met with Diekmann. According to Raines, the meeting was contentious in that Diekmann repeatedly asked questions and cut Raines off, and accused her of having had problems before, even though her record had been cleared.

In February 2008, Raines received another "no call" notice. Raines again filed a grievance over this notice.

On July 22, 2009, Raines attended a "step 2" meeting on her grievances.[6]

In August 2009, Raines and the District entered into a settlement of both grievances. In exchange for Raines' agreement to withdraw both grievances, the District agreed to remove the Union School notice provided Raines did not receive another Inadequate Substitute Teacher

[6] According to Raines, both the October 18, 2007 meeting with Diekmann and the July 22, 2009 meeting were "step 2" meetings on her grievances.

Service Report before December 30, 2009, and also agreed not to accept or seek assignments to Union School.[7] The written settlement agreement indicates that it was copied to Diekmann.

In October 2009, Raines, along with other substitutes, attended an UTLA meeting. At the meeting, Raines and other substitute teacher protested against a side-letter agreement entered into between UTLA and the District under which laid-off full-time teachers were given a preference in substitute employment. Those present at the meeting voted overwhelmingly to rescind the side-letter. On October 22, 2009, Raines, on behalf of herself and other substitute teachers, filed a PERB unfair practice charge against UTLA (PERB Case No. LA-CO-1395-E), alleging that UTLA breached its duty of fair representation by agreeing with the District to divert substitute teacher work to laid-off full-time teachers. In November 2009, the District and UTLA agreed to rescind the side-letter agreement.[8]

On January 10, 2010, Raines met with Berman and Tablack over her concerns that the "no call notices" had not been removed from her file, as provided by the October 2009 settlement agreement, and that she was being denied work assignments as a result. Tablack told Raines she would research the issue and get back to her. On January 14, 2010, Tablack told Raines she was correct and that she would immediately remove the "no call" documents from her file.

Alleged Retaliation

Later in January 2010, Raines took an assignment at Ramona School. She had worked there frequently and was on the school's preferred substitute list. While working there, Raines

[7] The settlement agreement does not expressly refer to removal of the February 2008 "no call notice." However, Raines appears to allege that both documents were to be removed from her file.

[8] Case No. LA-CO-1395-E remains pending before PERB.

saw Diekmann walking with Principal James Hum (Hum). As they passed, Raines alleges that Diekmann looked at her, whispered at Hum, and they both "snickered."

On February 26, 2010, while working again at Ramona School, Assistant Principal Sylvia Hernandez (Hernandez) called Raines into the office and accused her of being inattentive and filing her nails during a student program. Hernandez informed Raines that she would be sent home without pay and not allowed to return to work at Ramona School. Raines admitted that she had been filing her nails, but denied that she had been inattentive. Raines then went to Hum, who informed her that a parent had complained that her students were teasing her child using ethnic slurs. Raines denied that her students were misbehaving, and stated that the penalty was excessive for such a minor incident. Hum informed Raines that he had to promise the parent that he would have an assembly on cultural and sensitivity issues "in order to keep her from going to Diekmann." When Raines asked whether Diekmann was behind the decision to remove her from Ramona School, Hum responded, "Why? Have you had problems with her before?"

In March 2010, the District performed an audit of its "SubFinder" computer program.[9] According to the amended charge, the audit "drastically reduced" Raines' work assignments in May 2010; the amended charge also appears to allege that the audit also reduced her assignments in April 2010. However, the amended charge shows Raines worked an average of 9.3 days a month between September 2009 and June 2010. It also shows that she worked 12 days in May 2010 and 11 days in April 2010.

On June 13, 2010, Raines attended a Ramona School staff retirement party. Hum also attended, and the two spoke briefly. Raines said, "No one believed that fingernail story!"

[9] It appears that the SubFinder program is a program for assigning substitute teachers to work in the District.

Hum replied, "Well of course that wasn't it." After Raines described her years of devotion to Ramona School, Hum responded, "But you have to prepared to hear and accept what will be said. You should consider, think about the problems you've been having with other principals." After Raines denied she had had any problems with other principals, Hum stated, "Ah, but you have in the past and you mustn't take it out on me because of what others dictate." Hum agreed to have his office manager set up an appointment for them to speak further, but no such appointment ever was made. Raines asserts that Hum's statements confirmed that "others" in authority over Hum—namely Diekmann—made the decision to deny Raines work at Ramona School and that the decision was not grounded in the nail-filing incident.

DISCUSSION

To state a prima facie case that an employer retaliated against an employee in violation of EERA section 3543.5(a), the charging party must allege that: (1) the employee exercised rights under EERA; (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.)

Protected Activity

Raines engaged in protected activity when she filed grievances in April 2007 and February 2008 challenging "no call" notices she received, as well as when she met with District administrators concerning the implementation of the settlement of those grievances. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270.) Raines also engaged in protected activity when she filed unfair practice charges with PERB in 2004 and October 2009. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H;

Riverside Unified School District (1987) PERB Decision No. 639.) Like the Board agent, we assume for the sake of discussion that Raines also engaged in protected activity when she attended an UTLA meeting and voiced her support of a resolution to rescind a side-letter between UTLA and the District. (But see *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106 [employee's internal union activities are not protected unless they have a substantial impact on the employee's relationship with the employer]; *California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S [employee does not have a protected right to campaign against the ratification against the ratification of a tentative agreement].)

Knowledge

An employer's knowledge of protected activity may be inferred from circumstantial evidence. (*Los Angeles Community College District* (2004) PERB Decision No. 1668.) The Board agent found that the amended charge identified two District representatives—Berman and Tablack—who knew about Raines's protected activity in pursuing her grievances when she met with them on January 10, 2010. In addition, the amended charge alleges that Raines spoke to Diekmann in July 2009 about her grievances and that Diekmann was copied with the August 2009 agreement settling those grievances. Accordingly, we conclude that Raines has alleged sufficient facts to establish a prima facie case that Diekmann had knowledge of Raines's protected activities.

Adverse Action

In determining whether the employer's action is adverse to the employee, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) "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 (*Newark*).)

The decisions to bar Raines from working at Ramona School and to remove her from the preferred substitute list are adverse actions. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento*) [decision to remove an individual's name from an active substitute list is an adverse action].) The charge fails to set forth sufficient facts, however, to establish that the District manipulated the audit to reduce her work assignments in April and May 2010. As indicated above, the information provided with the charge indicates that Raines worked more than her average number of days during April and May 2010. Accordingly, we do not find that the charge establishes an adverse action with respect to the audit.[10]

Nexus

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 (*Moreland*).) 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*

[10] On appeal, Raines appears to assert that the District's delay in removing the "no call notices" from her file until she spoke with Tablack in January 2010 also constitutes an adverse action. The charge fails to establish, however, that the District had a duty to remove the notices prior to that time, given the language of the settlement agreement that the notices would be removed provided Raines did not receive another report before December 30, 2009. Accordingly, we do not find the alleged delay in removing the notices from Raines' file to constitute an additional adverse action.

Transportation) (1984) PERB Decision No. 459-S; *Campbell Municipal Employees Assn. v. City of Campbell* 131 Cal.App.3d 416); (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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (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*; *Novato*.)

Typically, the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself. (*Moreland*; *Regents of the University of California* (1998) PERB Decision No. 1263-H.) PERB has found a lapse of less than three months between the protected activity sufficient to establish the timing factor. (See, e.g., *Calaveras County Water District* (2009) PERB Decision No. 2039-M [negative evaluation within one to two months of protected activity and termination within 3-1/2 months]. However, the Board has held that a time lapse of five or six months between alleged protected activity and adverse action does not establish temporal proximity sufficient to support indicia of unlawful motivation. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.)

The Board agent found that the charge failed to establish that Hernandez and Hum, the Ramona School principal and vice principal responsible for making the decision to bar Raines from substitute teaching at Ramona School, knew about any of her protected activities. Thus, the Board agent concluded, the charge failed to establish a prima facie case of retaliation.

While we find the allegations of the charge to be sparse, we nonetheless find them sufficient to warrant issuance of a complaint. Although many of Raines' protected activities occurred years before the February 2010 adverse action, her protected activity in seeking resolution of her grievances in January 2010 occurred only one month before the adverse action. Thus, timing is established.

The charge also contains allegations of additional "nexus" factors indicative of unlawful motivation. Thus, the allegation that, during a retirement party on June 13, 2010, Hum told Raines that the fingernail incident was not the true reason for her removal from Ramona School could support a finding of inconsistent or contradictory justifications or the offering of vague and ambiguous reasons. (*Newark*; *Sacramento*.) In addition, the allegation that Hum stated to Raines that she had "had problems with other principals in the past and mustn't take it out on him because of what others dictate" could support a finding that the decision was made by someone else, such as Diekmann. Given Diekmann's involvement with Raines' grievances in July and August 2009, particularly when considered with the other indicia of unlawful motivation, we find the allegations of the charge sufficient to support a prima facie case and thus issuance of a complaint.[11]

[11] In finding the allegations set forth in the charge sufficient to establish a prima facie case, we do not rely on the allegation that Diekmann "snickered" when passing Raines in the hall at Ramona School.

ORDER

The Public Employment Relations Board hereby REVERSES the dismissal of the unfair practice charge in Case No. LA-CE-5482 and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Dowdin Calvillo and Huguenin joined in this Decision.