STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LISA MARCOE, Charging Party, v. WALNUT VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6041-E PERB Decision No. 2495 June 30, 2016

Appearances: Scott E. Wheeler, Attorney, for Lisa Marcoe; Atkinson, Andelson, Loya, Ruud & Romo, by Anthony P. De Marco and Jacquelyn L. Takeda, Attorneys, for Walnut Valley Unified School District.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal of a dismissal of Lisa Marcoe's (Marcoe) first amended unfair practice charge (UPC) by the Office of the General Counsel (OGC). In that charge, Marcoe alleged that she was dismissed from her position as a music teacher by Walnut Valley Unified School District (District) in retaliation for her complaining about certain curricular issues. Marcoe alleged that this conduct constituted a violation of the Educational Employment Relations Act (EERA)[1] section 3540 et seq.

The OGC dismissed the charge after determining that Marcoe had not sufficiently alleged facts showing that she engaged in protected activity, that the decision-maker knew of

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

her protected activities, or that there was a retaliatory nexus between any protected activities and the adverse action.

The Board has reviewed Marcoe's initial and first amended charges, the District's position statements, the OGC's warning and dismissal letters, Marcoe's appeal of the dismissal, and the District's opposition to the appeal. We affirm the OGC's dismissal of Marcoe's charge, but for reasons discussed below. We conclude that Marcoe's allegations establish that she did engage in protected activity and suffered adverse action, but fail to establish the knowledge element of a retaliation case, as further explained below.

PROCEDURAL HISTORY

Unfair Practice Charge, as Amended

The unfair practice charge, as amended, alleged that the District violated EERA by failing to renew Marcoe's employment contract in retaliation for her making complaints at two meetings, one in October 2014, and the other in January 2015, called by the District for all music teachers within the District.[2] The charge alleged that such complaints constituted protected activity.

Marcoe alleged the following facts. The District called the October 2014 meeting with the music teachers to inform them that a parent had sued the District because the District was requiring students to rent musical equipment, allegedly in violation of the guarantee of a free public education. The music teachers were asked to write a letter to parents informing them they could return their child's rented musical instrument and obtain one from the District at no charge. Marcoe spoke at this meeting, stating that the District had a shortage of instruments and that therefore there were not enough instruments to provide one to each student. She

[2] Although Marcoe did not explicitly allege her employment status with the District, her allegation that she was non-reelected indicates her former probationary status.

further expressed her view that telling parents the District could provide instruments to their children would be a misrepresentation that she was not comfortable making. The other music teachers at the meeting agreed with the concerns that Marcoe verbalized at the meeting, but they did not speak out.

At the January 2015 meeting, District administrators informed the music teachers that they could not grade a student on their instrument knowledge or ask the students to practice. In response, Marcoe raised her concern that it would be difficult for the students to succeed without practice; the schools were expecting concerts at the end of the year, for which the students would not be prepared without practice; and the schools require a letter grade for each student.

Between the October 2014 meeting and the January 2015 meeting, Dr. Sergio Canal (Canal), Director of Pupil Personnel, requested all of Marcoe's grades. During the January 2015 meeting, Jackie Brown (Brown), the District's Director of Educational Projects, asked Marcoe if she was grading the students on instrument testing.

Approximately five days following the January meeting with the music teachers, Marcoe was informed that her employment contract would not be renewed for the 2015-2016 school year.[3]

According to Marcoe, when she spoke against the District's directives, she was acting informally on behalf of the other music teachers who were afraid to make any type of protest and/or complaint. She alleged that her comments regarding the availability of instruments, grading and practicing all related to academic concerns and are therefore protected speech

[3] Marcoe does not allege who informed her of the non-renewal of her contract.

made on behalf of other teachers and herself, and that employee complaints about workplace matters are protected when made in a logical continuation of group activity.

According to Marcoe, the District's board possessed at least imputed knowledge of Marcoe's complaints. Marcoe alleged that Brown, who conducted the October 2014 meeting, reports to the Assistant Superintendent of Educational Services, Matthew Witmer (Witmer),[4] and directly to District Superintendent Robert P. Taylor (Taylor), who reports directly to the District board. The decision to release Marcoe was made by Assistant Superintendent of Human Resources Michelle Harold (Harold). Taylor is Harold's supervisor.

Marcoe also alleged that sufficient nexus exists because of close temporal proximity between her protected activity and her non-reelection, and because the District did not give Marcoe a reason for her non-election other than it was not related to her job performance. According to Marcoe, she was never written up or disciplined during her employment with the District, and the District provided her with inconsistent and/or ambiguous reasons for her non-reelection.[5]

Warning and Dismissal Letters

The OGC issued a warning letter on December 22, 2015, and dismissed the charge on February 22, 2016, concluding that Marcoe failed to state a prima facie case because she did

[4] Besides alleging that Brown reports both to Witmer and Taylor, Marcoe did not allege that Witmer had any knowledge of her protected activity or played any role in her non-reelection.

[5] The District filed position statements in response to both the initial unfair practice charge and to the first amended charge. Neither was verified, and we therefore do not consider them. PERB Regulation 32620, subdivision (c) states in relevant part: "The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries. Any response must be in writing, and signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief." (See, e.g., *National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371, p. 9, fn. 8. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

not demonstrate that she exercised protected rights, that the relevant District representative had knowledge of this conduct, or that such activities motivated the District to retaliate against her.

According to the OGC, the charge did not indicate that Marcoe raised her concerns while acting as a formal or informal representative of fellow unit members, or as an extension of group activity, or that Marcoe was perceived by the District to be acting on behalf of other unit members when she voiced her concerns about the music program. Also according to the OGC, the charge failed to allege that Marcoe previously knew about her colleagues' reticence about voicing their concerns or that she conferred with them about raising these complaints. The charge failed to provide any other facts demonstrating that those at the meeting could otherwise reasonably infer that she was lodging complaints on other certificated employees' behalf, according to the OGC. Rather, according to the OGC, Marcoe's protests stemmed solely from her own misgivings about the District's new directives. The OGC did not consider whether Marcoe's activity could be considered an exercise of her right to represent herself individually in her employment relations with the public school employer pursuant to EERA section 3543, subdivision (a).

Even if it were assumed that Marcoe's protests were protected, the OGC concluded that the charge failed to allege that the relevant District representatives who made the decision not to rehire Marcoe had knowledge of these activities. According to the OGC, the amended charge appeared to assert that because Brown attended the meetings with the music teachers, her knowledge of Marcoe's complaints would be imputed to Harold, the decision-maker, due to these two officials sharing a supervisor, Superintendent Taylor. According to the OGC, the amended charge did not provide any facts showing that Brown ever actually informed Taylor about Marcoe's comments or typically provided this sort of information to Taylor.

Additionally, the amended charge did not attempt to explain how any relevant information Brown brought to Taylor's attention would then subsequently filter down to Harold before she decided not to renew Marcoe's employment.

The OGC also concluded that the charge failed to show a retaliatory nexus between any protected activities and the adverse action. Although the OGC found a sufficiently close temporal proximity between Marcoe's statements at the October 2014 and January 2015 meetings and the District's decision not to rehire Marcoe, the OGC concluded that the charge does not allege the existence of any other necessary nexus factors. Specifically, according to the OGC, the District's failure to provide Marcoe with a reason for not renewing her employment is not evidence of a retaliatory motive, since the District was not required to give Marcoe a reason. The OGC also concluded that the District did not waver or take inconsistent positions because the amended charge shows that the District offered at most a single explanation for Marcoe's non-reelection by asserting that it was not related to job performance.

The OGC also concluded that the amended charge did not show that the District departed from any standard procedures by failing to rehire a certificated employee without any disciplinary infractions.

Marcoe's Appeal

In her March 14, 2016 appeal of the OGC's dismissal of her charge, Marcoe argues that she engaged in protected activity, citing to *Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H, *Regents of the University of California* (1984) PERB Decision No. 449-H, *Rancho Santiago Community College District* (1986) PERB Decision

No. 602 (*Rancho Santiago*) and *Berkeley Unified School District* (2015) PERB Decision No. 2411 (*Berkeley*).[6]

Marcoe also objects to the OGC's rejection of her assertion of the "subordinate bias liability" and "cat's paw" doctrines, and urges the Board to conclude that the decision-maker, Harold, was improperly influenced by Brown.

With regard to nexus, Marcoe argues that the District's statement that its non-reelection of Marcoe was "not related to her job performance" is vague and/or ambiguous as to why Marcoe was not reelected, and the District never provided Marcoe with a justification as to her non-reelection. According to Marcoe, the vague and ambiguous reason for Marcoe's non-reelection and the close temporal proximity of her non-reelection establishes the District's unlawful intent.

District's Opposition to Appeal

In its opposition to Marcoe's appeal, the District urges the Board to disregard Marcoe's allegations on appeal that (1) her complaints regarding her concerns about the musical program were made within her right to participate in the activities of an employee organization for the purpose of representation on matters within the scope of representation, and that (2) her complaints regarding the music program constituted protected speech related to educational policy because PERB Regulation 32635, subdivision (b) prohibits a party from submitting a new allegation or new evidence on appeal, absent a showing of good cause.

[6] Marcoe makes a new factual allegation that Canal's request for all of Marcoe's grades was intended to silence Marcoe, keep her in line, and intimidate her. Marcoe also argues: "Certainly, in order for the music teachers to express their fear, there was some discussion between Charging Party and the other District music teachers present at the two meetings." As these are new factual allegations that do not appear in the initial charge or first amended charge, we disregard them. (See PERB Reg. 32635, subd. (b) ["Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence"].)

The District also argues that Marcoe's alleged complaints were unprotected because they were not a logical continuation of group activity, and that the official who made the decision regarding adverse action did not have knowledge of the alleged protected activity, nor did she have a subordinate or agent influencing her decision. Even if Marcoe had alleged facts showing protected activity and decision-maker knowledge, the District argues as an affirmative defense that its decision to non-reelect Marcoe was lawfully motivated and consistent with established procedure.

DISCUSSION

When reviewing an appeal of a dismissal of an unfair practice charge, we assume that the facts alleged in the unfair practice charge as amended are true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *Eastside Union School District* (1982) PERB Decision No. 466.) Therefore, we must assume that teachers who were present at the October 2014 meeting agreed with Marcoe but did not speak out. We must also assume the truth of the allegation that when Marcoe spoke at the January 2015 meeting she was "acting informally on behalf of the other music teachers who were afraid to make any type of protest and/or complaint," as alleged in the amended charge.

Employee Rights Under EERA

Historically, when PERB has determined that an employee's complaints related to employment matters are protected under EERA, the Board has found the source of the employee's right in one or both sentences in the following language of EERA section 3543, subdivision (a), which provides in relevant part:

> Public school employees shall have 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. Public school employees shall

> have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, an employee in that unit shall not meet and negotiate with the public school employer.

(Emphasis added.)

Form, Join, and Participate Language

Contrary to the OGC's conclusion in the dismissal letter, we find that Marcoe's complaints are protected under the "form, join, and participate" language of EERA section 3543, subdivision (a). The context of Marcoe's statements made during two management-convened meetings, addressed to management in protest of management directives regarding matters of professional concerns to certificated employees and in front of her fellow employees, indicate the protected nature of her actions. Marcoe's criticism of management directives represent an attempt to enlist the support of her fellow employees for mutual aid and protection and/or to protect the employment interests of the entire group. Simply because she was the only speaker does not mean that she was not engaged in the protected right to "form, join, and participate" in the activities of an employee organization. (*Barstow Unified School District* (1996) PERB Decision No. 1164, proposed dec., p. 23 [complaint of an individual teacher about site council election process was protected because its purpose was to protect the rights of all teachers, not merely her own]; *State of California, Department of Transportation* (1982) PERB Decision No. 257-S [criticism of supervisor's performance is protected when its purpose is to advance employees' interest in working conditions]; *Regents of the University of California (Einheber)*, *supra*, PERB Decision No. 949, p. 6.) PERB has also held that an employee who complained to a school principal

concerning class size, acting on her own, and an employee seeking redress about a classroom assignment, were both engaged in protected activity. (*Livingston Union School District* (1992) PERB Decision No. 965, proposed dec., p. 27.)

Private sector cases are in accord in concluding that individual employee protesting working conditions may be considered protected concerted activity, depending on the factual context. Section 7 of the National Labor Relations Act (NLRA)[7] states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

(29 U.S.C. § 157)

PERB held in *Modesto City Schools* (1983) PERB Decision No. 291:

> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process.

(*Id.* at p. 62.)

In *Timekeeping Systems, Inc.* (1997) 323 NLRB 244 (*Timekeeping*), the National Labor Relations Board (NLRB) held that an individual employee's e-mail to co-workers criticizing management's newly-announced vacation policy was protected concerted activity because he was attempting to induce co-workers to help him preserve a former vacation policy. Despite

[7] When interpreting EERA, it is appropriate for PERB to derive guidance from court and administrative decisions interpreting the NLRA (29 U.S.C., § 151 et seq.) and parallel provisions of California labor relations statutes. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

the lack of evidence that the employee had prior communication with his co-workers regarding the vacation policy change, or that he otherwise had any prior knowledge of his co-worker's position on the subject, in concluding the conduct protected, the NLRB noted:

> [T]he object of inducing group action need not be express. For instance, it is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal.

(*Id.* at p. 247, citations, internal quotations and internal brackets omitted.)

Whittaker Corporation (1988) 289 NLRB 933 (*Whittaker*) is also instructive. In that case, the employer conducted a series of meetings in his office with the employees to inform them that they would not be receiving their regular annual wage increases. At each meeting, he invited questions, and several employees asked questions about his announcement. At the last of these meetings, employee Johnston expressed his disagreement with the employer's decision and criticized the employer for expecting the employees to bear the brunt of a temporary downturn. No other employee commented at the meeting on the wage policy, although several employees expressed agreement with Johnston's comments afterwards. The employer discharged Johnson the next day for his comments, which the employer claimed amounted to insubordination.

Finding that the employer had unlawfully fired Johnson for engaging in protected activity, the NLRB observed: "[p]articularly in a group-meeting context, a concerted objective may be inferred from the circumstances." (*Whittaker*, *supra*, 289 NLRB 933, 934.) Because Johnston, in the presence of other employees, immediately protested a change in an employment term affecting all employees just announced by the employer at that meeting, the NLRB concluded his actions to be "clearly the initiation of group action." (*Id.* at p. 934.)

Under the above PERB and private sector authority, Marcoe has alleged sufficient facts to establish that she was exercising her right under EERA section 3543 to "form, join, and participate" in the activity of an employee organization. Under the circumstances alleged, she need not have additionally alleged whether or how she knew the concerns of other teachers, or that she was attempting to enlist fellow employees in her cause. In this case, it was sufficient that she alleged she was speaking to management at a meeting called by management and protesting management directives regarding a matter of obvious collective concern—educational policy and curriculum issues, as explained below.

Substance of Marcoe's Complaints

In concluding that certain employee speech constitutes protected activity, PERB has held that writings about "educational policy and academic freedom" are "related to matters of legitimate concern to employees as employees." (*Rancho Santiago*, *supra*, PERB Decision No. 602, p. 13.)

More recently, in *Berkeley*, *supra*, PERB Decision No. 2411, PERB held that a teacher's filing of a complaint regarding the 9th grade curriculum is protected activity under EERA. The Board noted that the Legislature specifically recognized in EERA section 3540 that one of the purposes of EERA was to secure the right of public school employees to be represented by employee organizations of their own choice in both their professional and employment relationships with public school employers. (*Id.* at p. 16.) Consistent with this broader protection, EERA specifically protects the right of certificated employees to be afforded "a voice in the formulation of educational policy." (*Id.* at p. 17.) The Board noted that in furtherance of this right, the statutory provision defining the "scope of representation" under EERA states that "the exclusive representative of certificated personnel has the right to

consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law." (§ 3543.2, subd. (a)(3); *Berkeley*, *supra*, p. 17.)

Citing explicitly to the "form, join, and participate" language in EERA section 3543, the Board then framed the question as "whether [Charging Party's] filing of the 9th grade curriculum complaint is of legitimate concern to employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on all matters of employer-employee relations." (*Berkeley*, *supra*, PERB Decision No. 2411, p. 17.) The Board concluded that "EERA protects certificated teachers' right to be represented in their professional and employment relationship with their public school employer including their right to have a voice in the formulation of educational policy." (*Id.* at p. 19.) Therefore, the charging party's complaint about the curriculum was protected activity.

Since employees have a right to be represented in their professional relationship, they also have a right to represent themselves or engage in group activity concerning the same interests, and they should be free from retaliation when they represent themselves or engage in group activity on a matter related to their professional and/or employment relationship. Grading and homework policies are such matters. (See also *Rio School District* (2015) PERB Decision No. 2449, p. 2 [speech related to the quality of a school district's education program is protected].)

We therefore conclude that Marcoe's activity as alleged in her unfair practice charge is protected because she complained about grading and homework policy, both of which are

matters related to curriculum and the definition of educational objectives, similar to the teacher's complaint about the 9th grade curriculum in *Berkeley*, *supra*, PERB Decision No. 2411. As in *Berkeley*, Marcoe's complaint is also protected because EERA's purpose is "to afford certificated employees a voice in the formulation of educational policy." (§ 3540.) Marcoe's complaints are protected because they relate to educational policy, academic freedom, and the quality of the District's education program. Whether students have the necessary tools (in this case, musical instruments) to gain an education relates to educational policy and quality. Whether music teachers may grade a student on their instrument knowledge or ask the students to practice relates to all three areas.

The Right of Self-Representation[8]

Although we conclude that that Marcoe has alleged sufficient facts to show that she was engaged in protected activity based on the "form, join, and participate" language of EERA section 3543, subdivision (a), we take this opportunity to clarify that when facts allege conduct by an individual employee acting alone the OGC should consider whether the charging party was representing herself in employment relations with the public school employer. (See *Los Banos Unified School District* (2007) PERB Decision No. 1935; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 46; *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 54.)

Under EERA section 3543, subdivision (a)'s self-representation language, PERB has held that individual employees retain the "right to represent themselves individually in their

[8] The right of self-representation is included in four other statutes that PERB administers. (See Meyers-Milias Brown Act section 3502; Higher Education Employer-Employee Relations Act section 3581.1 (granting the right to supervisory employees); Ralph C. Dills Act section 3515, Trial Court Employment Protection and Governance Act section 71631; Trial Court Interpreter Employment and Labor Relations Act section 71813.)

employment relations with the public school employer," even after employees have selected an exclusive representative, so long as the individual does not "meet and negotiate with the public school employer." (§ 3543, subd. (a); see, e.g., *Pleasant Valley School District* (1988) PERB Decision No. 708 (*Pleasant Valley*), p. 15, fn. 5: "We would note that in presenting his concerns to his supervisors, [the employee] was not attempting to meet and negotiate with his employer, but was simply communicating in a manner consistent with the day-to-day activities involving employer/employee relations.")

In *Pleasant Valley*, an employee told his supervisor he would not drive a particular riding mower on public streets because it was a safety hazard, and he was subsequently reassigned. The ALJ determined his safety complaint was protected because he was asserting a right to a safe work environment secured in the collective bargaining agreement (CBA). The Board agreed that the individual's complaint was protected, but explicitly based its conclusion on the right to represent himself in his employment relations.[9] Because safety matters are clearly an implicit part of any employment relationship, and the employee's personal concern was reasonable as evidenced by the subsequent OSHA citation and the District's determination that repairs were necessary, the Board concluded that his complaint was related to his employment, and therefore protected. (See also *Los Angeles Unified School District* (1999) PERB Decision No. 1338 (*Los Angeles I*) [teacher's individual complaint to principal about not being reimbursed for purchase of school supplies was protected activity]; *Madera County*

[9] Although the Board noted in *Pleasant Valley* that "the express terms of the CBA obligated the District to endeavor to provide safe working conditions and to comply with all applicable OSHA provisions, and employees were to report unsafe conditions" (*Pleasant Valley*, *supra*, PERB Decision No. 708, p. 15), in the Board's view, the employee's protection did not rest on whether safety was addressed in the CBA. More recently, PERB has held that "seeking individually to enforce provisions of a collectively-bargained agreement is a 'logical continuation of group activity' and protected under EERA." (*Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 12.)

Office of Education (1999) PERB Decision No. 1334, proposed dec., pp. 19-20 [employee's protest of mandatory work assignment—insulin training—deemed protected self-representation].)

Under these cases an employee who raises a concern with the employer about a matter that is clearly an implicit part of any employment relationship is engaged in protected activity. The employee need not demonstrate that he or she is also engaging in activity that is a logical continuation of group activity because his or her individual employment-related complaint is protected by the right of self-representation. Beginning with *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 (*Oakdale*), PERB's decisions began to incorporate the "logical continuation of group activity" standard into its analysis of protected activity. In *Oakdale*, PERB held that a school district engaged in unlawful discrimination where the principal issued reprimands to a secretary, a union activist, because she informed an insurance inspector about building safety hazards. In a footnote, PERB stated:

> We note that this result is consistent with National Labor Relations Board (NLRB) precedent protecting employee complaints to employers, as well as to third parties, when those complaints are a logical continuation of group activity.

(*Id.* at p. 18, fn. 8, citations omitted, emphasis added.)

Oakdale, *supra*, PERB Decision No. 1246 issued before the Legislature temporarily removed the "self-representation" language from EERA section 3543.[10] Although it refers to

[10] In 2000, the Legislature deleted the portion of EERA section 3543 that guaranteed employees the right to represent themselves in their employment relations. Subsequent PERB cases reflected that change. (*Woodland Joint Unified School District*, *supra*, PERB Decision No. 1722 [teacher's complaint about lack of classroom supplies and about her principal's hostile response to the complaint deemed unprotected self-representation]; *Fairfield-Suisun Unified School District* (2005) PERB Decision No. 1734 [individual's request for reclassification not protected because self-representation no longer a right under EERA].) In 2008, the Legislature restored the right of self-representation to EERA section 3543.

the NLRB's "logical continuation of group activity" standard for finding speech to be protected as consistent with its own decision, PERB did not explicitly require a showing of a "logical continuation of group activity" as a prerequisite for a prima facie case of retaliation in that case.

In 2003 (after the Legislature had temporarily removed the "self-representation" language from EERA), PERB explicitly incorporated the NLRB's "logical continuation of group activity" standard when analyzing allegations of retaliation for protected speech or conduct. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552 (*Los Angeles II*), pp. 8-9). In that case, the charging party alleged that her complaint to her supervisor about the charging party's subordinate was protected activity. The Board rejected that claim, explaining,

> where an employee's complaint was undertaken alone and for her sole benefit, that individual's conduct was not protected. [Citation.] Here . . . [charging party's] complaints to a supervisor about a subordinate would fall within her responsibilities as a supervisor, rather than representing herself in her employment relationship with the employer. . . . [Charging Party's] conduct may be distinguished from cases in which the Board found that an employee's complaint concerned an issue impacting employees generally and thus, was protected.

(*Id.* at p. 9, emphasis added.)

After the Legislature restored the self-representation language to EERA in 2008, PERB continued to invoke the "logical continuation of group activity" standard in an EERA "self-representation" case in *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091 (*San Joaquin*), p. 3, where the Board acknowledged the right of self-representation, but nevertheless imposed a requirement of a "logical continuation of group activity." In *San Joaquin*, a part-time adjunct psychology instructor for a community college district alleged

that the district discriminated against him after he complained about a reduction in his class load. The Board held:

> EERA section 3543 gives public employees the right to "represent themselves individually in their employment relations with the public school employer." PERB has held that individual complaints related to employment matters made by an employee to his superior are protected. (See, e.g., *Pleasant Valley School District* (1988) PERB Decision No. 708 [individual complaint about employee safety is protected activity].) This right of self representation, however, is not unlimited. Thus, the Board has held that employee complaints to employers are protected when those complaints "are a logical continuation of group activity." (*County of Riverside* (2009) PERB Decision No. 2090-M (Riverside); *Los Angeles Unified School District* (2003) PERB Decision No. 1552 (Los Angeles).) Where, however, an employee's complaint is undertaken alone and for his/her sole benefit, that individual's conduct is not protected. (*Riverside*; *Los Angeles*; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.)

(*Id.* at p. 3.)

In requiring a link between the employee complaint and a "logical continuation of group activity," the *San Joaquin* Board cited to two cases: *Los Angeles II*, *supra*, PERB Decision No. 2091 and *County of Riverside* (2009) PERB Decision No. 2090-M (*Riverside*). As noted above, *Los Angeles II* was decided when EERA lacked any self-representation language. *Riverside* itself cites to *Los Angeles II* as its only source for this standard.

Requiring a charging party who engaged in alleged self-representation to demonstrate that he or she was engaged in a "logical continuation of group activity" or was acting on behalf of others, or was asserting a collectively-bargained benefit, ignores EERA section 3543 subdivision (a)'s "self-representation" language. We believe it is an error to require a charging party to allege facts demonstrating that her speech or actions are a "logical continuation of group activity" when she alleges acts that can be reasonably characterized as representing

oneself in employment relations. To the extent that *San Joaquin*, *supra*, PERB Decision No. 2091, *Riverside*, *supra*, PERB Decision No. 2090-M, or other cases imply to the contrary, we disavow those portions of such cases.

While a charging party's communication with other employees about the subject matter of the speech in question or knowledge of other employees' position on the subject matter are probative of whether an employee's complaint is "a logical continuation of group activity" under the "form, join, and participate" language of EERA section 3543, subdivision (a), those facts are not required for the complaint to be protected under the "self-representation" language. Therefore, in future cases where PERB must determine whether speech or conduct by an individual is protected under EERA, it must consider both the "form, join, and participate" language and the "self-representation" language in EERA section 3543, subdivision (a), and their respective standards, as two separate but equally valid sources of protection. There is no reason to require an *individual* to act on behalf of others or to vindicate collective rights if the relevant EERA-guaranteed right is to represent one's self. On the other hand, when the alleged protected conduct is rooted in the right to "form, join, and participate" in the activities of an employee organization, the need to connect an individual's acts to the group interest is obvious. (See, e.g., *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 33; *Jurupa*, *supra*, PERB Decision No. 2283, p. 16.)

We caution that the right to represent oneself under EERA section 3543, subdivision (a) is not unlimited. By the terms of the statute, the right is to represent "individually in their employment relations with the public school employer." Thus, an individual self-representation must be tethered to "employment relations," which means those matters which

are within the scope of negotiations pursuant to EERA section 3543.2 or which are related to the formulation of educational policy, in the case of certificated employees. (§ 3540.)

We do not intend to expand rights of individual employees to bargain directly with their employer or establish an absolute right to have grievances heard or adjusted without the exclusive representative. The plain language of EERA section 3543 makes clear that once an exclusive representative is chosen, an employee in a represented unit may not meet and negotiate with the employer. (See also *Relyea v. Ventura County Fire Protection District*, *supra*, 2 Cal.App.4th 875.) Nor do we intend that the right to represent oneself in employment relations encroaches on our decision in *Chaffey Joint Union High School District* (1982) PERB Decision No. 202, which interpreted EERA section 3543, subdivision (b),[11] a distinct but somewhat related right. PERB held in *Chaffey* that this subdivision does not vest in employees an absolute right to present grievances individually, but instead provides the employer with a defense to a by-passing charge if it chooses to hear and adjust individual grievances without the intervention of the exclusive representative.

[11] EERA section 3543, subdivision (b) provides in pertinent part:

> An employee may at any time present grievances to his or her employer, and have those grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration . . . and the adjustment is not inconsistent with the terms of a written agreement . . . provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Knowledge of Decision-Maker

Despite Marcoe's successful allegation of protected activity, her charge has failed to allege facts supporting the necessary prima facie element of decision-maker knowledge of the protected activity.

Marcoe alleged that the doctrines of "subordinate bias liability" and "cat's paw" support a finding of knowledge of the relevant decision-maker who decided to not reelect Marcoe. Under the "cat's paw" theory, employers are responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus. (*Reeves v. Safeway Stores*, *Inc.* (2004) 121 Cal.App.4th 95, 116.)

Thus, under the subordinate bias liability theory, a supervisor's unlawful motive may be imputed to the decision-maker when: (1) the supervisor's recommendation, evaluation, or report was motivated by the employee's protected activity; (2) the supervisor intended for his or her conduct to result in an adverse action; and (3) the supervisor's conduct caused the decision-maker to take adverse action against the employee. (*County of Riverside* (2011) PERB Decision No. 2184-M, p. 15 and citations included therein.)

According to Marcoe, because the decision-maker, Harold, and the administrator to whom Marcoe addressed her complaints, Brown, both reported to the District's Superintendent Taylor, Brown's alleged animus may be imputed to Harold through Taylor.

We decline to recognize a doctrine of reverse subordinate bias liability. PERB held in *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M:

> The basic rationale for imputing the unlawful motive of the supervisor or lower-level official to an ignorant and otherwise

> innocent decision maker is that, by providing inaccurate, biased or incomplete information about the charging party, the supervisor or lower-level manager has effectively tainted the decision-making process for the employer as a whole.

(*Id.* at p. 33.)

Marcoe has not alleged any facts showing that Brown recommended Marcoe's non-reelection or provided inaccurate, biased or incomplete information about Marcoe to Taylor in a manner that would taint the decision-making process for the employer as a whole. Nor has Marcoe alleged any facts showing that Taylor provided inaccurate, biased or incomplete information about Marcoe to his direct report Harold in a manner that would taint Harold's decision-making process for the employer as a whole.

We therefore dismiss Marcoe's charge for failure to sufficiently allege decision-maker knowledge of her protected activity.[12]

CONCLUSION

The unfair practice charge in Case No. LA-CE-6041-E, filed by Lisa Marcoe against the Walnut Valley Unified School District, is hereby DISMISSED WITH PREJUDICE.

Chair Martinez and Member Gregersen joined in this Decision.

[12] In light of Marcoe's failure to allege the necessary prima facie element of decision-maker knowledge, we need not address the OGC's conclusion that Marcoe failed to allege facts showing a retaliatory nexus between any protected activities and the adverse action.