STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WENJIU LIU, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (EAST BAY), Respondent.	Case No. SF-CE-995-H PERB Order No. IR–56–H June 7, 2013

Appearances: Wenjiu Liu, on his own behalf; Dawn S. Theodora, University Counsel, for Trustees of the California State University (East Bay).

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on the fifth request for injunctive relief filed by Wenjiu Liu (Liu) against the Trustees of the California State University (East Bay) (CSUEB). The unfair practice charge filed by Liu alleges that CSUEB retaliated against him by denying him tenure and promotion, by suspending him without pay, by banning him from campus pursuant to Penal Code section 626.4,[1] and by terminating his employment. PERB issued a complaint based on these allegations, and has conducted several days of formal hearing on these charges, the last day of which was April 5, 2013.

Liu has filed four prior requests for injunctive relief with the Board. All have been denied. We deny this request as well, for reasons discussed below.

[1] Penal Code section 626.4 permits the chief administrative officer of a California State University campus (or his/her designee) to withdraw consent for any person to remain on campus when there is reasonable cause to believe that person "has willfully disrupted the orderly operation of such campus or facility."

STANDARDS FOR INJUNCTIVE RELIEF

Higher Education Employer-Employee Relations Act (HEERA) section 3563(i)[2] empowers the Board, "[u]pon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order."

The appropriate test used to determine when PERB will seek injunctive relief requires that two elements be established: (1) reasonable cause must exist to believe an unfair practice has been committed; and (2) injunctive relief must be "just and proper." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 896 (*Modesto*); *County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M (*San Joaquin).*) Traditional equitable considerations "come into play" in determining whether injunctive relief is just and proper. (*Modesto,* at p. 896; *Antioch Unified School District, et al* (1985) PERB Order No. IR-47, at pp. 21-22: "If the damage is easily ascertain able [sic] and a money judgment will afford adequate relief, an injunction should be denied.")

Because PERB issued a complaint on Liu's unfair practice charge, we assume for the sake of this decision that the first prong of the *Modesto* test has been satisfied. Showing that reasonable cause to believe an unfair practice has been committed is not a high burden. The party seeking the injunction does not need to establish that an unfair practice has in fact been committed, but only that the theory supporting the claim is not insubstantial or frivolous. (*San Joaquin*, at p. 7; *Modesto,* at p. 896.) We leave to the administrative adjudication process the question of whether unfair practices have in fact been committed.[3]

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[2] HEERA is codified at Government Code section 3560 et seq.

[3] In Case No. SF-CE-995-H, the administrative law judge (ALJ) has issued a decision dismissing Liu's unfair practice charge. As of this date, the time for filing exceptions to that decision has not expired.

It is the second prong of *Modesto*—whether injunctive relief is "just and proper"—that is at issue here. Injunctive relief will be deemed just and proper under circumstances in which the unfair practice, if committed, would render any final order of the Board meaningless or "so devoid of force that the remedial purposes of the Act will be frustrated." (*Modesto*, at pp. 902-903.) However, if the unfair practice can be remedied by back pay or some other type of make whole remedy without compromising the remedial authority of the Board, an injunction will generally not be found to be "just and proper," unless the purposes of the labor relations statutes within our jurisdiction will be frustrated in the absence of injunctive relief.

Thus, PERB has granted a union's request for injunctive relief on behalf of an employee who was suspended in the middle of the union's organizing campaign. The individual was the union's only organizer. (*San Joaquin.*) In that case, PERB recognized that even if the organizer was ultimately reinstated after an administrative hearing, "the Board would be unable to remedy the 'serious impact' of the suspension of the primary union supporter during the election balloting if injunctive relief is not sought. . . . . If injunctive relief is not sought, [employee's] removal from the workplace would have a severe chilling effect on any organization efforts." (*San Joaquin*, at p. 13.)

While each request for injunctive relief is assessed on its individual merit, the Board has generally looked to traditional equitable principles in cases where individual employees allege retaliation or discrimination by the employer. In the absence of a union organizing campaign or where there is no allegation or credible evidence that the alleged unfair practice will chill the rights of other employees, PERB has typically denied the request for injunctive relief. In such cases, it is assumed that the remedies available pursuant to PERB

Regulation 32325,[4] such as reinstatement and back pay, will make the aggrieved party whole within the limits of PERB's jurisdiction at the conclusion of the administrative proceedings.[5]

PERB's injunctive relief authority, when invoked by employees or employee organizations, serves two purposes: to protect the integrity of the collective bargaining process, including the right of employees to choose their representative organizations and the right of employee organizations to organize in the workplace; and to preserve the effectiveness of PERB's remedial power while the merits of the case are being decided by an ALJ. (*Frankl v. HTH Corp.* (2011) 650 F.3d 1334, 1355; *San Joaquin.*) Like the authority vested in the National Labor Relations Board in section 10(j), PERB's injunctive relief authority seeks to vindicate the public interest, rather than purely private rights. (*Miller v. California Pacific Medical Center* (1994) 19 F.3d 449, 455, [overruled on other grounds, *Winter v. National Resources Defense Council* (2008) 555 U.S. 7].) In this way, the injunctive relief available through collective bargaining statutes differs from traditional injunctive relief available through the civil judicial system.

Included in the assessment of whether injunctive relief is "just and proper" is whether the alleged unfair practice will cause irreparable harm to the requesting party. If the wrong can be remedied by the Board's order to make the injured party whole, including the restoration of

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[4] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[5] PERB does not have the authority to award punitive damages or compensatory damages for emotional pain and suffering. (*Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548 (*Mark Twain*); *State of California (Secretary of State)* (1990) PERB Decision No. 812-S (*Secretary of State*).) However, PERB may have concurrent jurisdiction with the courts in claims that implicate both unfair practices and claims for breach of contract or libel. (*Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259; *Rim of the World Unified School District* (1986) PERB Order Ad-161.) Whether parties in such cases of concurrent jurisdiction could seek injunctive relief from the courts where PERB is unable to provide a full and effective remedy is a question that must be considered on a case-by-case basis.

back pay and benefits and reinstatement, and if there is no other probable harm to the public interest, to the collective right to organize, or to negotiate in good faith, or to PERB's ability to fashion an effective remedy at the conclusion of administrative proceedings, we have generally concluded that there is no irreparable harm.

LIU'S REQUEST FOR INJUNCTIVE RELIEF

In this case, PERB has issued a complaint on Liu's behalf alleging that CSU violated HEERA section 3571(a) by denying him tenure and promotion, restricting him from campus grounds, suspending him and ultimately terminating him from employment in retaliation for filing numerous grievances, participating in a grievance meeting and filing an unfair practice charge. As stated earlier, because PERB has issued a complaint on his unfair practice charge, we assume for purposes of this discussion, that Liu has established reasonable cause to believe an unfair practice has occurred. The remaining question is whether injunctive relief is "just and proper." We conclude that injunctive relief would not be just and proper in this case.

Liu requests injunctive relief and an order from PERB directing CSUEB to immediately reinstate him to his position as assistant professor with full rights and benefits of that position, and to refrain from imposing "further police actions" against him. He claims that without this relief he has and will continue to suffer irreparable damage to his family life, and that an ultimate back pay award could not compensate him for the pain and suffering in his personal life, which includes depression and potentially deteriorating health. Liu has alleged he suffered additional irreparable harm to his reputation because he is prevented from accessing "necessary resources for research," which prevents him from publishing academic articles, which in turn, harms his career as an academic. At this stage in the lengthy proceedings, according to Liu, he has exhausted his savings and "cannot survive financial hardship."

Much of what Liu describes as a basis for his claim of irreparable harm is in the nature of emotional pain and suffering and harm to reputational interests. Because PERB does not have the authority to grant such relief, either prospectively or at the conclusion of its administrative proceedings, injunctive relief seeking such a remedy would not be "just and proper." (*Regents of the University of California* (2010) PERB Decision No. 2094-H [no authority to award punitive damages or damages for emotional pain and suffering]; *Mark Twain*; *Secretary of State*.)

The other types of injury Liu alleges—lost wages and loss of health benefits—are the type of economic harm that can be remedied at the conclusion of the administrative proceedings in the event Liu's unfair practice complaint is successful. Although Liu stated a prima facie case for retaliation for engaging in the protected activity of filing grievances and an unfair practice charge, there is no allegation that his protected activity was critical to some other collective action such as a union organizing drive during a representation election. Nor is there any allegation or evidence that CSUEB's alleged retaliation against Liu was likely to chill the rights of other employees to engage in protected activity.

For these reasons, injunctive relief is not necessary to preserve a status quo or to assure that an ultimate remedy will be effective. We recognize that dismissal from employment is likely to create financial hardship, but that alone is not a criterion for seeking injunctive relief.

ORDER

Wenjiu Liu's fifth request for injunctive relief in Case No. SF-CE-995-H is DENIED WITH PREJUDICE.

PER CURIAM