STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LAWANDA BAILEY, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4355-E PERB Decision No. 1552 October 21, 2003

Appearance: William D. Evans, Attorney, for Lawanda Bailey.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lawanda Bailey (Bailey) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by discriminating against her for engaging in protected conduct. Bailey alleged that this conduct constituted a violation of EERA section 3543.5(a).[2] Bailey also alleged violations of EERA

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

[2]EERA section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For

section 3543.5(c) and (e), Government Code section 12940 (discrimination on the basis of membership in a protected class), and Cal. Const. Art. I, section 7 (due process and equal protection provisions). These allegations will not be addressed since there were no facts stated to support the EERA violations, the other alleged statutory violations are not within PERB's purview, and these allegations were not raised in Bailey's appeal.

Upon review of the entire record, including Bailey's charge, the warning and dismissal letters, and Bailey's appeal, the Board affirms the Board agent's dismissal consistent with the discussion below.

BACKGROUND

Bailey's unfair practice charge may be summarized as follows. Bailey alleges that in December 2000, she and her coworkers noted the substandard performance of Phyllis Drake (Drake), an employee under Bailey's supervision. Bailey alleges that her supervisor, Robert Smitheal (Smitheal), gave preferential treatment to that employee and that Smitheal blamed Bailey for Drake's mistakes. On March 14, 2001, Smitheal asked Bailey to change a performance evaluation she prepared on Drake from "below standards" to "meets standards." Smitheal also did not respond to memos from Bailey regarding the deficiencies in Drake's work. Bailey objected and complained to District Facilities Director, Al Bowen (Bowen), who on March 14, 2001, met with Smitheal, Bailey and her union representative. At the meeting, Bowen told Smitheal to not be personally involved with the day-to-day functions of staff and instructed Bailey to hold Drake accountable for her work. Bailey also complained about Smitheal to other District officials.

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purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

On September 21, 2001, Smitheal issued a memo to clerical staff which stated, "Do not make or accept any phone calls from La Wanda Bailey during working hours." There was also another vague allegation of misconduct in the charge. On October 12, 2001, during a union hearing, the union informed her that it could not help with her complaints.

Bailey further alleges that the work environment created by Smitheal and Drake became hostile prompting her to request a lateral transfer. Apparently no comparable jobs were available and so beginning October 15, 2001, Bailey accepted a demotion to a part-time, lower-paying position.

In the charge, Bailey also alleges that she was not paid for eight hours worked on June 29, 2001 and her payment for overtime and mileage from the April 2001 pay period was delayed. She attributes the payment discrepancies to Drake and Smitheal. Bailey accuses the District and the union of not investigating these pay errors.

BOARD AGENT'S DISMISSAL

The Board agent found that the original charge failed to provide evidence of nexus between Bailey's complaints to her supervisors and grievances,[3] and the September 21 memo, the denial of the lateral transfer requests and non-payment for time worked on June 29, 2001. The Board agent, in accordance with standard Board practice, also advised Bailey that an amended charge must be filed by April 1, 2002, or her charge would be dismissed.

In the dismissal, the Board agent noted that on April 5, 2002, Bailey faxed a five-page amended charge to the Board and separately faxed a proof of service. The proof of service did not indicate that the District was served with the amended charge. On April 8, 2002, the Board received hard copies of the faxed documents by mail, the first page of a completed unfair

[3]The charge only contained a vague allusion to "the grievances filed" but offered no further information about alleged grievances.

practice charge form labeled First Amended Charge, and five memos or letters regarding various disputes Bailey had with the District. The mailed proof of service also did not indicate service on the District; yet, the Board agent evaluated the information in the mailed packet as part of her determination that the charge should be dismissed.

According to the Board agent, much of the amended charge was reiterative. The Board agent summarized the amended charge as follows: In the amended charge, Bailey alleged that the September 21 memo was pretextual and was issued because of Bailey's conversation with a new employee. Bailey further alleges that Drake did not inform Smitheal of a June 18, 2001 written notice that Bailey planned to return to work after an extended leave of absence. Upon return to work on July 2, 2001, Bailey's desk duties were changed, she was moved out of her office, her phone was disconnected, and she was notified of her responsibility for clearing the backlog created during her absence. Bailey again attributed this situation to her refusal to change Drake's evaluation. Bailey also repeated allegations regarding denial of a lateral transfer and the District's failure to pay overtime due her.[4]

Evaluating the amended charge, the Board agent again did not find that Bailey established nexus to state a prima facie case of retaliation. The Board agent found that the September 21 memo did not establish nexus because Bailey was on workers' compensation leave at the time that the memo was issued[5] and it is reasonable for employees to be instructed

[4]The alleged unpaid overtime includes eight hours for June 29, 2001 and eighteen hours claimed for work performed at home between October 1, 2000 and November 7, 2000. The latter is identified for the first time in attachments to the amended charge.

[5]The attachment to the amended charge dated September 9, 2001, identifies Bailey's extended leave from February 5 through June 29, 2001 to consist partly of workers' compensation leave and partly of family medical leave. This is the only place in either the charge or amended charge where the nature of her leaves of absence are identified. However, in her appeal, Bailey acknowledges that she was absent from February 5 through February 26,

not to contact her at home.[6] The Board agent also determined, citing Board precedent for constructive discharge,[7] that Bailey did not demonstrate that her protected activity led to a working environment that was so unpleasant that she was forced to transfer to a lower paying job, or that her working conditions were changed because of her union activities. Although she was denied transfers to certain jobs, she was granted a transfer to a job for which she presumably applied. In addition, the Board agent found that some of the complaints involving non-payment of overtime were resolved in her favor, taking notice of unfair practice Case No. LA-CO-1085-E, dismissed on March 7, 2002.[8]

BAILEY'S APPEAL

Bailey reiterates most of the same allegations on appeal regarding Drake's performance evaluation, the September 21, 2001 memo, the hostile working environment that existed upon her return to work from leave on July 2, 2001,[9] leading Bailey to transfer to a less desirable part-time job in October 2001. She states that during 2001, her attendance was "sporadic"

2001, March 27 through June 29, 2001, and from August 23 through October 12, 2001 due to two car accidents and a work-related injury.

[6]Note that the September 21, 2001 memo also allegedly directed that staff was not to take calls from Bailey.

[7]See State of California (Secretary of State) (1990) PERB Decision No. 812-S (For constructive discharge based on protected activity, the charging party must show: (1) the burden imposed must cause and be intended to cause a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) the burden was imposed because of the employee's union activities.) (See also, Hacienda La Puente Unified School District (1988) PERB Decision No. 685; Marin Community College District (1980) PERB Decision No. 145.)

[8]A copy of the Board agent's dismissal in Case No. LA-CO-1085-E was not provided as part of the record in this matter.

[9]This information is contained only in the amended charge.

because of two car accidents and a work-related injury.[10] Bailey further alleges that she filed three grievances with the union regarding payroll issues during June, July, and September of 2001. Bailey argues that the history of Smitheal's hostility toward her demonstrates a pattern of adverse action by Smitheal. Bailey alleges that she was engaged in protected activities through her grievances with the union and that the District was clearly aware of those grievances. For the first time in her appeal, Bailey also mentions complaints against Smitheal lodged between November 2000 and October 2001, which she states were resolved at least partially in her favor. Bailey further alleges that the August 28, 2001 letter identified in the amended charge, in which he counsels Bailey about her work performance, is evidence of Smitheal's illegal motive.

DISCUSSION

The Board finds that Bailey failed to state a prima facie violation of EERA section 3543.5(a) for the reasons discussed below.

Procedural Defects in the Amended Charge

The Board finds that the amended charge contains procedural defects that preclude the Board from consideration of that document: a defective proof of service and untimely filing. PERB Regulation 32140 provides,[11] in pertinent part:

> (a) All documents referred to in these regulations requiring 'service' or required to be accompanied by 'proof of service,' except subpoenas, shall be considered 'served' by the Board or a party when personally delivered or deposited in the first-class mail properly addressed. All documents required to be served shall include a 'proof of service' affidavit or declaration signed under penalty of perjury which meets the requirements of Section

[10]See footnote 5, supra.

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

> 1013(a) of the Code of Civil Procedure or which contains the following information . . . .
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> (b) Whenever 'service' is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

The Board will accept documents with a defective service or proof of service if the opposing parties received actual notice of the filing and if there was no showing of prejudice to the opposing party. (Fontana Unified School District (2003) PERB Order No. Ad-324.) In this case, Bailey first faxed amendments to the charge[12] and mailed a hard copy with additional documents, which were received by the Board three days later. Both the fax and the hard copies included a proof of service with no indication that the District had been served.[13] There was also no indication in the dismissal letter that the District had received the amended charge. As the District did not respond to either the charge or amended charge, the proof of service did not show service to the District, and the Board agent's dismissal did not indicate service of the amended charge to the District, the Board must assume that the District did not receive the amended charge. Since the amended charge contained additional allegations and attached documents, the Board may assume that the District was prejudiced by not receiving the amended charge.[14]

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[12]The faxed documents are not included in the file but are identified in the dismissal letter.

[13]PERB Regulation 32631 requires that an amended charge must meet all the requirements contained in PERB Regulation 32615 for a charge, including the requirement in PERB Regulation 32615(c) that "[s]ervice and proof of service on the respondent pursuant to Section 32140 are required."

[14]We respectfully disagree with Member Neima's interpretation of Evidence Code section 641 and the holding in Glasser v. Glasser (1998) 64 Cal. App. 4th 1004, 1010-11 [75 Cal. Rptr. 2d 621] (Glasser) in his concurrence. The application of Evidence Code section 641 presumes that: "[a] letter correctly addressed and properly mailed . . . (is) received in the ordinary course of mail." (Emphasis added.) In Glasser, this principle was confirmed for

In addition, Bailey did not timely file the amended charge. The Board did not receive the faxed version of the amended charge until four days after the due date and a hard copy version, seven days after the due date. The Board agent had advised Bailey of the due date for filing an amended charge in the warning letter; and, Bailey neither sought an extension of time (PERB Reg. 32132) nor requested that the Board excuse the late-filed document (PERB Reg. 32136). Therefore, the Board declines to consider Bailey's amended charge in reaching a decision in this matter and declines to adopt the Board agent's discussion of the amended charge in the dismissal.

Retaliation

To demonstrate a violation of EERA section 3543.5(a), Bailey must show that: (1) she exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Bailey's complaints to Smitheal regarding Drake's poor performance do not rise to the level of protected activity. In Oakdale Union Elementary School District (1998) PERB Decision No. 1246, at pages 18-19, footnote 8, the Board cited with approval, National Labor Relations Board precedent holding that employee complaints to employers are protected when

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service by mail of a notice of entry of judgment, stating that from findings in the lower court's ruling, the court inferred that the contents of the proof of service substantially complied with the requirements of Code of Civil Procedure section 1013a. (Id., at p. 1011.) In this case, the evidence is clear that the proof of service was neither correctly addressed nor properly mailed to the District and thus did not substantially comply with PERB Regulation 32140. Thus, the presumption of receipt of service, if applicable to an administrative proceeding, would not apply in this case.

those complaints "are a logical continuation of group activity." However, where an employee's complaint was undertaken alone and for her sole benefit, that individual's conduct was not protected. (Id., citing Meyers Industries (1984) 268 NLRB 493, 497 [115 LRRM 1025].) Here, Bailey supervises Drake, thus her 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. Bailey acted on her own behalf and, without further information in the charge, ostensibly for her sole benefit. Bailey'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.[15] Therefore, for this reason, the conduct in this matter is not protected.

In the charge, Bailey also did not provide specifics to support her alleged generalized complaints to Smitheal about Drake's performance. Under PERB Regulation 32615(a)(5), the charging party must provide "a clear and concise statement of the facts alleged to constitute an unfair practice." The charge contains no information regarding the timing of Bailey's complaints or the specific nature of the complaints.

Because there is insufficient detail in the charge, we disagree with the Board agent that the March 14, 2001 complaint to Bowen constituted protected conduct. Complaints regarding

[15]In reaching this conclusion, the Board does not alter its holdings in the following cases: Pleasant Valley School District (1988) PERB Decision No. 708, pp. 13-15, employee presenting safety concerns to supervisor regarding his job assignment is protected conduct; Madera County Office of Education (1999) PERB Decision No. 1334, proposed decision, pp. 19-20, employee protesting his participation in training offered by another employee is protected conduct; Los Angeles Unified School District (1999) PERB Decision No. 1338, employee complaint about school's reimbursement policy is protected conduct; Regents of the University of California (Einheber) (1992) PERB Decision No. 949, proposed decision, p. 6, employee's criticism of management plus efforts to organize other employees to provide similar criticism combined constitute protected activity.

a supervisor's performance are protected if the performance impacts collective working conditions. (State of California, Department of Transportation (1982) PERB Decision No. 257-S (Transportation).) However, the allegations must still be stated with sufficient specificity. (PERB Reg. 32615(a)(5).) Although the complaint was coupled with a subsequent meeting with Bowen, Smitheal and her union representative, we are unable to determine whether the purpose of Bailey's complaint was to advance the collective interest of employees or was really the result of a personal grudge. (Transportation.)

With regard to Bailey's complaints about Smitheal's preferential treatment of Drake to other District officials, Bailey's allegations on this issue again lack sufficient detail as required by PERB Regulation 32615(a)(5) to find her conduct protected. She did not provide the dates of these complaints nor facts evidencing alleged preferential treatment by Smitheal, other than Smitheal's request to change Drake's performance evaluation. The charge also fails to specify how Smitheal's conduct involves treating Drake differently from other employees.

Therefore, the Board finds that there is insufficient information in the charge to determine whether Bailey engaged in protected conduct. Accordingly, Bailey did not meet the first prong of the Novato test and thus has failed to state a prima facie violation of EERA section 3543.5(a).

New Allegations on Appeal

PERB Regulation 32635(b) provides:

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

The Board agent evaluated the allegations in Bailey's amended charge in the dismissal although it had not been served on the District. To this date, there is no evidence that the amended charge was ever served on or received by the District. Nor was the amended charge

timely filed. Bailey does not provide any support for raising these new allegations or for considering the allegations in her amended charge.[16] Because the amended charge should not have been accepted by the Board, as a matter of due process, it is inappropriate to allow Bailey to make these claims through the back door on appeal. Therefore, the Board finds that Bailey has not shown good cause to present what are essentially new allegations on appeal.

In addition, for the first time on appeal, Bailey mentioned unspecified complaints made against Smitheal from November 2000 through October 2001, which were adjusted at least partially in her favor. Bailey did not describe the nature of these complaints, nor justify why they were raised for the first time on appeal. Accordingly, we find that Bailey has not shown good cause under PERB Regulation 32635(b) to present these allegations in her appeal.

ORDER

The unfair practice charge in Case No. LA-CE-4355-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Baker joined in this Decision.

Member Neima's concurrence begins on page 12.

[16]The Board acknowledges that, since the Board agent considered allegations in the amended charge in rendering the dismissal, Bailey may not have realized that these allegations were improperly considered. However, the prejudice to the opposing party in not receiving the amended charge outweighs such considerations for Bailey.

NEIMA, Member, concurring: I agree that dismissal of this case should be affirmed. However, I respectfully submit that it is unnecessary for the Public Employment Relations Board (PERB or Board) to address the issue of whether there was a failure of proof of service. I do not believe the Board must or should "assume the Los Angeles Unified School District (District) did not receive the amended charge" or "assume that the District was prejudiced by not receiving the amended charge." Absent argument or affirmative evidence that the District was not served or was prejudiced, I believe the Board should simply affirm the dismissal as written. A proof of service establishes a rebuttable presumption that service occurred. (Evidence Code sec. 641; City of Sacramento (2003) PERB Decision No. 1541-M (Neima, concurring); Glasser v. Glasser (1998) 64 Cal.App.4th 1004 [75 Cal.Rptr.2d 621].) I am aware of no authority for the converse proposition: that the absence of a proof of service creates a presumption that proper service was lacking. The Board should not, in my opinion, create such a presumption or raise and address this issue sua sponte on the facts of this case.

Based on the foregoing, I do not take issue with the Board agent's consideration of the amended charge. Nevertheless, I find that nothing in Lawanda Bailey's appeal, including the contents of the amended charge, warrants reversal of the dismissal.

Subject to the above reservation, I concur in the disposition of this case.