

9 PERC ¶ 16239

UNIVERSITY OF CALIFORNIA (BERKELEY)

California Public Employment Relations Board

California State Employees' Association, Chapter 41, and Michael Bogan, Charging Parties, v. Regents of the University of California (Berkeley), Respondent.

Docket No. SF-CE-46-H

Order No. 534-H

November 4, 1985

Before Public Employment Relations Board

Discrimination -- Discharge -- Intimidation Of Fellow Workers -- 72.311, 72.314, 72.323, 72.355 ALJ properly dismissed union's charge, alleging that university unlawfully discharged library employee in retaliation for his filing of grievances, where evidence showed that employee behaved in rude and vulgar manner toward other library employees, that university warned employee concerning such behavior, and that discharge was motivated by employee's continued ill-mannered behavior [see 7 PERC 14129 (1983)]. In addition, university, by subsequently banning employee entirely from library area, did not interfere with employee's organizational rights where evidence showed that employee, following his discharge, returned to library and engaged in "staring" at his former coworkers.

APPEARANCES:

Kevin McCurdy and Michael R. Bogan, Representatives for California State Employees' Association, Chapter 41 and Michael Bogan; Susan M. Thomas, Attorney for the Regents of the University of California (Berkeley).

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Parties, California State Employees' Association, Chapter 41 and Michael Bogan, and by Respondent, the Regents of the University of California at Berkeley (University). Charging Parties except to the attached proposed decision of an administrative law judge (ALJ), [see 7 PERC 14129 (1983)], dismissing their complaint that the University discharged Michael Bogan and then banned him from certain library premises in retaliation for protected activities. The University excepts to the ALJ's determination not to give collateral estoppel effect to an arbitrator's findings dealing with the same factual situation as the instant case.

After carefully reviewing the entire record, the Board finds the ALJ's findings of fact and conclusions of law free of prejudicial error and adopts the proposed decision as that of the Board itself.

The University's exception to the determination of the collateral estoppel issue and Charging Parties' procedural exception to the substitution of ALJs merit some brief additional comment, however.

Charging Parties except to the substitution of ALJ Ronald Blubaugh, who authored the proposed decision, for ALJ Gerald Becker, who conducted the hearing in this case. They argue that there were significant conflicts in testimony and that the decision required credibility determinations which only Becker, who saw and heard the witnesses, could make.

PERB has long since determined that such ALJ substitutions are proper and permitted by the statute, especially where the Board itself has rendered a final decision after a de novo review of the record. *Fremont Unified School District* (1978) PERB Order No. Ad-28. This is true even where credibility of witnesses is an issue. *Regents of the University of California (UCLA)* (1983) PERB Decision No. 267a-H. However, the Board finds that the decision in this case does *not* require credibility determinations. We conclude from our review of the extensive record that Charging Parties simply failed to establish the requisite prima facie case of discriminatory treatment by a preponderance of the evidence, and we agree with the ALJ that, even if a prima facie case were established, the University successfully rebutted it.

With regard to the University's exception on the collateral estoppel issue, the Board affirms the ALJ's reasoning and determination. The University's reliance on *People v. Sims* (1982) 32 Cal.3d 468 is misplaced as that case refers to the deference given an administrative agency's findings and not an arbitrator's award.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this matter, the Public Employment Relations Board ORDERS that the unfair practice charge in Case No. SF-CE-46-H is DISMISSED.
