

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (DAVIS),

Respondent.

Case No. SA-CE-195-H

PERB Decision No. 1590-H

January 26, 2004

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for American Federation of State, County & Municipal Employees; Barbara Aguirre, Labor Relations Advocate, for Regents of the University of California (Davis).

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of State, County and Municipal Employees (AFSCME) of a Board agent's dismissal of their unfair practice charge. The charge alleged that the Regents of the University of California (Davis) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by retaliating against employees for their protected activities by laying them off. AFSCME alleged that this conduct constituted a violation of HEERA section 3571.

Upon review of the entire record, including the unfair practice charge, amended charge, the Board agent's warning and dismissal letters, AFSCME's appeal, the University's opposition to AFSCME's appeal, and the Board's recent decision in Regents of the University

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

of California (2004) PERB Decision No. 1585-H (Sarka), the Board reverses the Board agent's dismissal and remands the charge to the General Counsel's office for issuance of a complaint.

BACKGROUND

In May 2001, the University of California Davis Medical Center Blood Gas Lab (lab) became short-staffed because two employees had quit. By memo dated May 2, 2001, the lab management offered bonus shifts to employees willing to work beyond their scheduled shifts. Most lab employees pitched in. In July 2001, lab management contacted AFSCME regarding non-payment of several lab employees for extra shifts worked. On August 7, 2001, lab employees sent a letter to management asking why the employees were not receiving bonus shift pay.

On September 7, 2001, AFSCME met with management. Management, including assistant director of nursing Eula Wiley (Wiley), stated that it would only pay for one extra shift. The other extra shifts would not be reimbursed because the bonus had been rescinded by "word of mouth." So far, only one employee received the extra shift pay for one extra shift. At this meeting, employees also expressed concern with the number of extra shifts worked per week. Wiley responded that extra shifts were worked by choice and that employees could refuse extra shifts without repercussions. On September 17, 2001, lab employees wrote to management that they did not wish to work extra shifts until management agreed to pay the extra shift pay pursuant to the May 2 memo and continue such pay until the lab was fully staffed. Lab employees again met with management in February 2002 and on March 8, 2002. During the March 8 meeting, Carol Robinson, director of nursing, promised to respond to the employees' concerns but, to date, has not responded.

On April 5, 2002, management met with AFSCME. At this meeting, AFSCME alleges that management stated that it took the staff's concerns seriously and could see no other

alternative but to allow only licensed personnel to work in the lab. The four employees involved in the meetings were unlicensed technicians and thus would be laid off. At this meeting, management stated that it would consider other options. Wiley and Bill Volz (Volz), the lab manager, also stated that its proposed action was a direct response to the employees' complaints regarding scheduling and management's inability to fill shifts because of the employees' collective action not to work extra shifts. At another meeting on April 12, Wiley informed the employees that its action was due to employees' complaints about schedules and had the employees not filed the grievances, the University would not have been forced to layoff the employees. Within a week, management posted the positions in the local newspaper.² On May 10, the employees met again with management to explore other options. Part of the discussion involved the experience of the employees, and the ability of some of the employees to obtain licenses in the near future. The parties also discussed that management had previously allowed a male co-worker several years to obtain a license without losing his job. However, on June 21, 2002, the four employees received a notice of layoffs effective July 21, 2002.

In July 2002, the night shift of the lab merged with the respiratory therapy unit. According to AFSCME, scheduling problems have worsened, not improved. Many respiratory therapists have not reported to the lab for work. Two employees have worked 18-plus hour shifts to cover scheduling shortages. The respiratory therapists are inexperienced in lab work. Nurses and doctors have complained about lab work errors. On July 31, 2002, AFSCME filed a grievance representing three of the laid-off lab employees. At the meeting, Wiley stated that "if Deena (the AFSCME representative) had done her job she wouldn't have told you to refuse to work extra shifts, then we wouldn't have done this." On October 15, 2002, management

²The advertisement posting job notices for the lab was attached to the charge and is actually dated April 21, 2002.

proposed critical shift pay for respiratory therapists but according to AFSCME, this has not corrected the scheduling problems.

AFSCME thus alleges in its charge that management laid off the four employees in retaliation for protected conduct as a result of the employees' concerted action to not work extra shifts and as evidenced by management comments made on April 5, May 10, and July 31, 2002. AFSCME filed its charge on October 21, 2002, and the amended charge, on December 18, 2002.

BOARD AGENT'S DISMISSAL

The Board agent dismissed the charge on the basis of untimeliness. Citing the test in Gavilan Joint Community College District (1996) PERB Decision No. 1177, the Board agent explained that the limitations period begins when the charging party knows, or should have known, of the conduct underlying the charge. In this case, the Board agent found that AFSCME knew after the April 5 meeting that the lab would only employ licensed technicians so that the four employees in question would be laid off. The employees' knowledge was confirmed by the April 12 meeting and the posting of the positions in the newspaper soon after. The burden is on AFSCME to prove that the charge is timely. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The Board agent found that AFSCME did not meet this burden.

AFSCME cited NLRB v. Rapid Bindery, Inc. (2nd Cir. 1961) 293 F. 2d 170 [38 LRRM 2658] (Rapid Bindery) and State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S (Developmental Services) to support its argument that the statute of limitations does not begin until employees received their layoff notices. The Board agent disagreed and distinguished Rapid Bindery from the instant case. In Rapid Bindery, there was

rumor that the employer was moving to a new location. However, unlike this case, the court found that the employer did not give the union actual notice.

The Board agent also distinguished Developmental Services. Developmental Services involved an employee opposing deferral of his case to arbitration because of futility. The State argued against futility because the facts at issue occurred more than six months before the charge was filed. The Board found that the State's argument was based upon a misunderstanding of the statute of limitations. Only the event constituting the unfair practice must occur within the six-month period, not facts supporting or opposing deferral to arbitration. The Board agent found that Developmental Services also does not support AFSCME's argument since the event triggering the unfair practice, the notice of layoff to AFSCME and to the affected employees, occurred more than six months before the filing of the charge; and therefore, the charge was untimely.

DISCUSSION

HEERA section 3563.2(a) 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.) The statute of limitations is an affirmative defense which has been raised by the University in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, AFSCME now bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

On appeal, AFSCME argues that the statute should have begun when the University issued the written notice of layoff to the four unlicensed employees on June 21, or alternatively, on April 22, the day after the job announcements for licensed employees was posted in the local newspaper for lab employees. In either event, the October 21 charge would be timely filed. On the other hand, the University argues that the charge was untimely because the affected employees were provided with firm notice of layoffs at the April 5 meeting, or alternatively, no later than the April 12 meeting with the lab employees, and that, as of those dates, the University had not wavered in its intent to use only licensed employees in the lab.

Recently, in Sarka, the Board adopted a new rule regarding the commencement of the statute of limitations in discrimination cases. That rule is based upon the California Supreme Court's decision in Romano v. Rockwell International, Inc. (1996) 14 Cal. 4th 479 [59 Cal. Rptr. 2d 20] (Romano) and holds that the date of actual termination, not the notice of termination, triggers the statute of limitations under the Fair Employment and Housing Act (Gov. Code sec. 12900 et seq.). In Sarka, the Board explained that this rule provides a simpler way of determining the onset of the limitations period over trying to determine when the employer has decisively shown its intent to take the action. The Board in Sarka concluded that the Romano rule better suits allegations of discrimination or retaliation.³

In this case, the unlicensed employees' layoff date was July 21, 2002, less than six months before the charge was filed on October 21. Consequently, we find AFSCME's charge to be timely filed.

We next address whether AFSCME has stated a prima facie violation of discrimination under HEERA and find that AFSCME has done so. To demonstrate a violation of HEERA

³The Board in Sarka distinguished between adverse action and the threat to take adverse action because of the charging party's protected activity. The Board noted that both the action itself and the threat to take the action are the basis for separate violations of HEERA. Under Board precedent, the latter violation is still triggered by the threat itself. (Sarka, at pp. 7-8.)

section 3571(a), AFSCME must show that: (1) the employees exercised rights under HEERA; (2) the University had knowledge of the exercise of those rights; and (3) the University 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; Carlsbad Unified School District (1979) PERB Decision No. 89.)

The charge alleged protected conduct. In the charge, AFSCME alleged that because of staffing shortages, the University posted a memo requesting that lab employees work extra shifts for premium pay. The four unlicensed employees worked multiple additional shifts but only one employee received additional pay for only one extra shift. As a result, on September 17, 2001, the lab employees wrote a letter to management stating that they no longer wished to work extra shifts unless they received the promised additional pay. The employees and their union representative met with management on several occasions to discuss this issue. The September 17 letter and the employees' and AFSCME representative's meetings with management are clearly protected under HEERA; management obviously had knowledge of the employees' and AFSCME's conduct. (See Los Angeles Unified School District (1999) PERB Decision No. 1338, ALJ's proposed dec. at pp. 6-7.) Management took adverse action by laying off the affected employees on July 21, 2002.

According to AFSCME, Wiley and Volz stated at the April 5, 12 and July 31, 2002 meetings that because of the employees' complaints, management saw no other option but to lay off the unlicensed employees and utilize only licensed staff in the lab. Management's alleged statements constitute direct evidence of unlawful intent, that the University would not have laid off the unlicensed lab employees but for their protected conduct. Where there is direct evidence of unlawful intent, it is unnecessary for the Board to determine the existence, or

lack thereof, of circumstantial evidence. (See Berkeley Unified School District (2003) PERB Decision No. 1538, p. 4, citing, San Marcos Unified School District (2003) PERB Decision No. 1508, p. 45, fn. 26.)

In light of the above allegations, we conclude that AFSCME has stated a prima facie case of discrimination. The Board therefore reverses the Board agent's dismissal and remands the unfair practice charge to the General Counsel's office for issuance of a complaint.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. SA-CE-195-H and REMANDS the case to General Counsel's office for issuance of a complaint.

Members Baker and Neima joined in this Decision.