

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

ROBIN GIOVANNI MONTGOMERY,

 Charging Party,

 v.

CITY & COUNTY OF SAN FRANCISCO,

 Respondent.

Case No. SF-CE-166-M

PERB Decision No. 1643-M

June 15, 2004

Appearance: Robin Giovanni Montgomery, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's dismissal (attached) of Robin Giovanni Montgomery's (Montgomery) unfair practice charge. The charge alleged that the City and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)¹ by terminating her employment.

The Board has reviewed the entire record in this case, including the unfair practice charge, the appeal and other correspondence from Montgomery, and the Board agent's warning and dismissal letters. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

¹The MMBA is codified at Government Code section 3500, et seq.

DISCUSSION

The charge filed by Montgomery was originally filed August 23, 2001, and dismissed as lacking merit on August 6, 2002. This re-filing of the same charge is untimely under the statute of limitations of the MMBA. As the regional attorney states, the charges are being dismissed because they are not timely filed.

In addition to being untimely, there is another problem with these charges. Re-filing charges identical to those already dismissed can be an abuse of process. While we agree with the Board agent's dismissal of this action, we believe Montgomery should also have been warned that continuing to file charges after they have been dismissed may lead to sanctions.

After thoroughly reviewing the charges, attachments and correspondence from Montgomery, the Board agrees that Montgomery has failed to state a prima facie case. The charges must therefore be dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-166-M is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

February 26, 2004

Robin Montgomery
5750 E. Shields Avenue, #124
Fresno, CA 93727

Re: Robin Giovanni Montgomery v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-166-M
DISMISSAL LETTER

Dear Ms. Montgomery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 13, 2004. Robin Giovanni Montgomery alleges that the City & County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)¹ by terminating her employment.

I indicated to you in my attached letter dated February 18, 2004, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 25, 2004, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 18, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

SF-CE-166-M
February 26, 2004
Page 3

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Phillip Ginsburg

Warning Letter

February 18, 2004

Robin Montgomery
5750 E. Shields Avenue, #124
Fresno, CA 93727

Re: Robin Giovanni Montgomery v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-166-M
WARNING LETTER

Dear Ms. Montgomery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 13, 2004. Robin Giovanni Montgomery alleges that the City & County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)¹ by terminating her employment.

Investigation of the charge revealed the following. You were employed by the City and County of San Francisco as a Public Safety and Communications Dispatcher, assigned to the Emergency Communications Division (ECD). As such, you were exclusively represented by the SEIU Local 790. The City terminated your employment on November 16, 2000, asserting that you failed to report to work when assigned.²

On March 27, 2000, you informed your supervisor that you would not report to work effective March 30, 2000, because of health and safety concerns relating to asbestos abatement. On April 5, 2000, the ECD sent you a letter indicating the air quality in your workplace had been tested and that the air was found to be free of asbestos. As such, you were instructed to report to work on April 6, 2000.

On April 6, 2000, you reported for work ninety (90) minutes late. As such, Wayne Propolis, Police Communications Supervisor, issued you a written reprimand and placed that reprimand in your personnel file. You contend this action violated the MOU. On April 14, 2000, you again informed the ECD that you would not report to work due to asbestos abatement. You further requested the City pay you for the time you refused to report to work.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² On August 23, 2001, you filed an unfair practice charge with PERB regarding the identical issues presented herein (SF-CE-12-M). On August 6, 2002, that charge was dismissed as lacking merit. As the facts in both charges are substantially similar, I will provide only an outline of the relevant facts herein.

On April 17, 2000, Communications Director Rex Martin provided you with a report from CAL/OSHA which indicates the air in your workplace is asbestos-free. You were again instructed to report to work for your next scheduled assignment. You refused to report to work, citing California law.

On May 15, 2000, the City informed you that it would not pay you for your time off and further informed you that you were considered absent without leave (AWOL). You allege the City refused to pay you because you filed a safety grievance. However, contract language between the City and SEIU indicates you will be paid only if you execute an agreement indicating you will repay the City if the complaint was invalid. You did not execute such an agreement.

On June 19, 2000, Director of Emergency Communications, Thera Bradshaw, sent a letter indicating the following: (1) you had been AWOL since April 14, 2000; (2) your workplace safety concerns had been addressed; and (3) you had failed to respond to repeated requests to return to work. Ms. Bradshaw ordered you to report to work on June 22, 2000.

On June 22, 2000, you informed the City you were taking Family Medical Leave, although it appears you failed to file the proper paperwork for such leave. On September 15, 2000, Ms. Bradshaw again instructed you to report to work. Again, you refused to return to work alleging health and safety concerns.

On October 30, 2000, Ms. Bradshaw sent you a letter indicating the City's intent to terminate your employment due to your AWOL status. On November 2, 2000, you received notice of your termination hearing. On November 8, 2000, the City conducted a Skelly hearing regarding your termination. You failed to attend this hearing, and your termination became effective November 9, 2000.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the MMBA, for the reasons provided below.

Code of Civil Procedure section 338 prohibits PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than three years prior to the filing of the charge. A recent Court of Appeal decision in Coachella Valley Mosquito Abatement Dist. v. PERB shortened the statute of limitations period under the MMBA to six months. However, this case is currently on appeal to the Supreme Court, and thus the three year statute of limitations will be applied to your 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.)³ The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party 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.) As you were aware of the City's conduct in November 2000, your charge, filed February 13, 2004, is untimely filed and must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 25, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR

³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)