

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DELORES BERNICE FLENOY,

Charging Party,

v.

ALAMEDA COUNTY MEDICAL CENTER,

Respondent.

Case No. SF-CE-78-M

PERB Decision No. 1707-M

November 16, 2004

Appearance: Delores Bernice Flenoy, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Delores Bernice Flenoy (Flenoy) of a Board agent's dismissal (attached) of her unfair practice charge. The unfair practice charge, as amended, alleged that the Alameda County Medical Center violated the Meyers-Milias-Brown Act (MMBA)¹ by retaliating against Flenoy for engaging in protected conduct.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letter and Flenoy's appeal. The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts them as a decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SF-CE-78-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



October 23, 2003

Delores Bernice Flenoy

Re: Delores Bernice Flenoy v. Alameda County Medical Center
Unfair Practice Charge No. SF-CE-78-M; First Amended Charge
DISMISSAL LETTER

Dear Ms. Flenoy:

The above-referenced charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2002. A warning letter was sent to you on January 20, 2003, asking for clarification of your allegations of unlawful conduct on the part of employer, the Alameda County Medical Center (ACMC or employer) in the form of an amended charge. After being given two extensions, you filed an amended charge on February 13, 2003.

On February 13, 2003, I received a first amended charge. The amended charge contains more than 200 pages of documents and provides a daily recitation of your actions for nearly two years. Additionally, after you filed the amended charge, you provided me with another 100 pages of information which were not served on the Respondent. I have summarized the relevant information below.

In January 1999, you were hired by the Alameda County Medical Center (Medical Center) as a Patient Financial Counselor.¹ PFCs are responsible for interviewing patients to obtain necessary demographic and financial information and to determine patients' financial obligations, as needed to maximize revenue to the Medical Center. Additionally, PFCs spend nearly 25% of their time advising and assisting patients in applying for public assistance. The PFC job description requires such employees to be computer literate as financial information is entered into the County's computer system. PFCs are not responsible for investigating discrepancies in this information.

As a PFC, you are exclusively represented by SEIU Local 535. SEIU and the County are parties to a collective bargaining agreement which expired on August 17, 2003. With regard to Union Representatives, the MOU provides as follows:

3.2(C): Job Contacts. Any authorized representative of the Union shall have the right to contact individual employees working within the representation unit represented by his/her

¹ Patient Financial Counselors were previously known as Patient Services Technicians. As such, many of your documents note your former title.

organization in APMC facilities . . . provided prior arrangements have been made for each such contact with the Department Head. The Department Head shall grant permission for such contact, if, in his/her judgment, it will not disrupt the business of the work unit involved.

4(D)(1): Duties and Time Limits. After obtaining supervisory permission, shop stewards employed full time will be permitted to leave their regular work area during on-duty time not to exceed eight (8) hours per pay period in order to assist in the investigation of facts and assist in the presentation of a grievance or disciplinary action.

4(D)(4): Permission to Investigate While on Duty. To obtain permission to investigate a grievance on on-duty time, the steward shall advise the supervisor of the grievant of his/her investigation of the facts and the general nature of the grievance. The shop steward shall report such time to his/her supervisor as shop steward leave for timekeeping purposes.

On September 1, 1999, you were verbally counseled by Supervisor Annette Moresi regarding your excessive tardiness. Ms. Moresi suggested changing your start time to later in the morning, but you stated that you were habitually late and that such a change would not make a difference. On October 29, 1999, and November 1, 1999, you were again verbally counseled regarding your tardiness.

On January 31, 2000, you received a performance evaluation which rated you overall as "Meets Standards." However, the evaluation also noted that with regard to Time and Attendance, you were regularly tardy and thus were rated as "Needs Improvement" in this category. The evaluation stated that your attendance would be reviewed for the next 90 days.

On February 28, 2000, you received a written counseling memo from Ms. Moresi indicating more tardiness problems. The memo stated that if you did not report to work on time, Ms. Moresi would be forced to change your work schedule.

On May 17, 2000, you received another counseling memo from Ms. Moresi. This memo, entitled 90-Day Tardiness Review, notes that over the 90 days you were reviewed, you were tardy 35 times out of 60 work days. The memo further stated:

You are advised that failure to correct this pattern of tardiness may lead to formal disciplinary action up to and including your discharge from employment.

You were advised to contact the Employee Assistance program if you needed assistance.

On December 4, 2000, you were verbally counseled for failing to interview any patients that day. You responded that you believed there were plenty of other people working that day and believed you could take the opportunity to complete other work. You were also informed that further tardiness would be taken from your paycheck as unofficial compensatory time.

On April 11, 2001, you received another performance evaluation. Again, your overall rating was "Meets Standards." However, the evaluation noted your excessive tardiness and rated you as "Needs Improvement" in this area. More specifically, the evaluation noted that you were tardy more than 44 times and had been verbally counseled in this area. Additionally, during this month, you were trained in Medical Center policies and procedures and signed a form indicating you understood your responsibilities to all patients.

On September 7, 2001, you refused to interview a Spanish-speaking patient, stating that Spanish-speaking PFCs should be responsible for such interviews. The Medical Center provides Bilingual Translation services, and has a policy regarding the use of such services. The policy states in relevant part:

1. Departments in need of interpreter services must first utilize bilingual-designated personnel from within their department.
2. If departments are unable to provide the language coverage through their bilingual-designated staff, departmental staff can contact the dispatch desk at Interpreter-Translation Services.

The policy makes clear that employees are to contact bilingual-designated employees in the area and are provided with a directory of such employees.

You were informed by your supervisor Cathy Barroero that bilingual-designated employees were available in your area and that you could not skip over Spanish speaking patients who were next in line. Despite this admonition, on October 2, and October 25, 2001, you again refused to interview a Spanish-speaking patient, again indicating your belief that they should be interviewed by Spanish-speaking PFCs. You were again verbally counseled to contact a bilingual translator when a Spanish-speaking patient is in need of your service.

In October 2001, you became a SEIU Local 535 Shop Steward. On October 31, 2001, you again refused to interview several Spanish-speaking patients, one of whom filed a complaint against you with the Medical Center, claiming discrimination. This patient reported that she was next in line to be helped, but when she informed you that she did not speak English, you stated you would have to help someone else and she would have to wait until a Spanish-speaking PFC was available. Later that day, Supervisor Lynda Fisher informed you of the complaint and again admonished you to use the translation services available.

On November 7, 2001, the Medical Center received another complaint about your conduct from a Spanish-speaking patient. This patient stated that you refused to interview him and refused to allow one of your Spanish-speaking coworkers to translate for him. The

complainant further stated that you told him he would have to wait until a Spanish-speaking PFC was available.

On November 21, 2001, Ms. Fisher received another complaint about your services from a Spanish-speaking patient. This patient alleged that while she was in the waiting room, you questioned the legality of her status in this country and told her that you had already called the Social Security Administration to check on her status. The patient then followed you into your cubicle where she informed you that she did not appreciate your comments. You stated that you "didn't do anything wrong" and that she did not qualify for assistance. Ms. Fisher requested the patient return for another financial screening, during which it was determined that the patient was qualified for assistance.

After receiving the verbal counseling from Ms. Fisher on November 21, 2001, you filed a grievance alleging violation of the "Mutual Respect" clause of the MOU. More specifically, you alleged Ms. Fisher forced you to interview Spanish-speaking patients in violation of the contract. You did not, however, cite any contractual clause in support of your contention.

On December 10, 2001, the Medical Center responded to your grievance by stating that Medical Center and State guidelines require translation services be available and utilized by employees, and that your failure to do so opened up the Medical Center to discrimination complaints. As such, the grievance was denied.

On December 28, 2001, another patient complained about your treatment of her during the financial interview. This patient complained that you questioned her status in this country and made comments about trying to "beat the system." Ms. Barroero issued you a written reprimand regarding this incident, and instructed you to treat all patients with dignity and respect. On that same date, Ms. Barroero sent you a Notice of Intent to Suspend, for (1) Discourteous Treatment of Patients; (2) Breach of Patient Confidentiality; (3) Violation of Patient Rights; (4) Neglect of Duty; and (5) Insubordination. The Notice reiterated the incidents of September 7, October 2, October 25, October 31, November 21, and December 28, 2001, and noted the seriousness of those complaints. Additionally, the Notice included copies of all relevant documents, including the complaints from patients, copies of the Medical Center procedures signed by you, and witness statements from fellow employees. The Notice further indicated that you had the right to respond by January 7, 2002.

On January 8, 2002, Ms. Barroero sent you a follow-up memo, reiterating that your reprimand did not concern your technical knowledge of eligibility, but only the manner in which you treat patients.

On January 11, 2002, you withdrew your November 21, 2001, grievance without prejudice.

On January 25, 2002, you and your union representative Fred Beal, attended a Skelly hearing regarding your suspension. At the meeting, you denied all of the charges and blamed the discourteous treatment of patients on the department's policies and procedures.

On January 31, 2002, you filed another grievance alleging the Medical Center was discriminating against you because of your steward status. The grievance, however, did not present any evidence supporting this allegation, and as such, was denied at Step 1. On February 5, 2002, you elevated the grievance to Step 1, but did not provide any additional facts.

On February 15, 2002, the Medical Center's Skelly Officer upheld your suspension, finding that you refused to follow Medical Center policies in contacting bilingual translators. The Officer also found that you were responsible for the way you treated these patients, and that your discourteous treatment could not be blamed on the department. You were suspended without pay for 30 days, effective February 21, 2002. Although you appealed this decision, the suspension was upheld by the Medical Center's CEO on April 15, 2002.

On April 15, 2002, Ms. Barroero issued you another written counseling memo regarding your excessive tardiness. The memo noted that over a three month time period, you were late 31 out of 35 work days. When Ms. Barroero indicated that your punctuality was important to the work flow, you disagreed stating it did not matter when you reported to work. Ms. Barroero further noted that your continued tardiness could result in further disciplinary action.

On May 1, 2002, you filed another grievance. This grievance alleged that the Finance Department had altered the job description for PFCs by requiring PFCs to assist in processing registration and admission records. The grievance did not provide any information supporting this accusation. On May 21, 2002, the grievance was denied at Step 2. In denying the grievance, the Medical Center noted that all changes to job descriptions must be negotiated and that no such change had taken place. Additionally, the Medical Center noted that some PFCs have volunteered to assist in registration in an effort to speed up the registration lines.

On May 8, 2002, Ms. Barroero issued you a written memo regarding your failure to use an available bilingual translator because her name did not appear in the Bilingual Directory. Ms. Barroero informed you that this employee had recently passed the bilingual examination and was immediately available to assist you. You refused to contact this employee, and instead insisted upon waiting for another bilingual translator who was not readily available.

On May 29, 2002, you filed another grievance, this time alleging the Medical Center had violated the MOU by failing to establish a Work Force Planning Committee. Article 9.4 of the MOU states that the Medical Center shall establish such a committee to make recommendations regarding ways in which the work force can be maintained without layoffs. Article 9.4 does not provide a time frame for such implementation. The grievance also contends that Article 9.4 pertains to reassignments and transfers. However, such actions are properly administered under Article 5.

On June 4, 2002, Ms. Barroero sent you a memo regarding your work performance. Ms. Barroero noted that, during January and February 2002, you conducted 47% fewer interviews than your coworkers, in April 2002, you conducted 53% fewer and in June 2002, you conducted 42% fewer interviews. You asserted that your low productivity is due to the

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fact that you perform a more in-depth financial screening than your coworkers and that "errors seem to find you."

On June 6, 2002, the Medical Center responded to your May 29, 2002, grievance, by stating that SEIU should forward the names of individuals interested in serving on the Work Force Planning Committee, and any other committee, and that such committees would be established at that time.

On June 11, and June 18, 2002, you filed two additional grievances. However, you did not discuss these grievances with the appropriate administrators prior to filing the grievances, and thus they were rejected at Stepl for failure to follow the MOU procedures.

On June 18, 2002, you were issued another written reprimand for excessive tardiness. The reprimand noted the six previous reprimands and noted that from April 16 to June 18, 2002, you were tardy 17 times. Additionally, on most of those occasions you failed to contact the Medical Center as previously instructed. The reprimand further indicated that your attendance would be reviewed in 30 and 60 days, and that continued tardiness could lead to termination.

On July 19, 2002, you informed Ms. Barroero that you were leaving your work area and traveling to Highland Hospital to conduct union business. You also informed Ms. Barroero that you would be meeting with Ms. Fisher and Mr. McCardell. When you arrived at Highland, Ms. Fisher and Mr. McCardell "assumed" you were there to conduct union business. You stated to Ms. Fisher and Mr. McCardell that you were there to "train" another employee. However, your time sheet indicates that you claimed union time while you were at Highland.

On July 26, 2002, Ms. Fisher issued you a written reprimand regarding your use of union time. Ms. Fisher reminded you that prior to engaging in union business during work hours, you are required to seek approval from your supervisor and the supervisor of the employee to whom you wish to speak. Ms. Fisher noted that you failed to seek such approval from the employee's supervisors and merely "showed up" at the work site.

Shortly after receiving this reprimand, you filed a grievance alleging the Medical Center discriminated against you by assuming you were at Highland to conduct union business. On August 12, 2002, this grievance was rejected by the Medical Center, noting that you, yourself, indicated that you would be there conducting union business and that you failed to seek such approval prior to entering the work site.

On August 14, 2002, you were issued another Notice of Intent to Suspend based on your excessive tardiness. The letter of intent notes that during the time period from June 19 through August 13, 2002, you were tardy 11 times in 23 days of work, or nearly 50% of the time. The letter recommends a ten (10) day suspension and indicates your right to a Skelly hearing on the matter if requested by August 26, 2002.

On August 26, 2002, you attended an investigatory meeting with your union representative. This meeting was called because, during the course of investigating a grievance, the Medical

Center came upon information that you may have falsified your husband's financial records in an effort to secure him public assistance. During this meeting, the Medical Center presented facts demonstrating that on March 14, 2000 and July 14, 2002, you processed financial information for your husband. However, when completing his information, you failed to note any of your income or property as required by State law, a fact of which you were aware. Additionally, you noted on your husband's financial information that you lived with him, but then informed the Medical Center that you did not, in fact, live with him, but did support him financially. Omission of this information qualified your husband for public assistance he would not have been qualified for had you accurately completed the paperwork.

On September 6, 2002, you were granted release time to attend in a meet and confer session beginning at 9:00 a.m. The meet and confer session ended at 12:40 p.m., but rather than returning to work, you instead went home. When you did not return to work, Ms. Barroero telephoned you at home, where you answered the phone. When Ms. Barroero asked what you were doing at home, you replied that you were on a break. Ms. Barroero indicated that she considered you AWOL. You did not provide any other explanation regarding why you failed to return to work.

From the period of August 14 through September 16, 2002, you were tardy 21 out of 22 work days, totaling more than five (5) hours of time.

On October 28, 2002, the Medical Center issued you a Notice of Intent to Terminate your employment. The Notice of Termination cited your repeated tardiness, including more than 7 warnings, your previous suspensions of 30 and 10 days, as well as your falsification of records as factors in terminating your employment. You were advised that any appeal must be filed by November 4, 2002, and that you would be placed on administrative leave pending the outcome of any Skelly hearing.

On November 20, 2002, having failed to request a Skelly hearing, you were terminated from your employment. On some unspecified date, Local 535 filed a grievance over your termination. On April 30, 2003, the Step 3 Disciplinary Hearing was held.

On May 13, 2003, the Medical Center rejected your grievance, finding that your statements regarding the falsification of records lacked credibility, and also finding that your excessive tardiness and AWOL status justified the termination.

On August 26, 2003, SEIU considered your request for arbitration and rejected the request, finding that the information you provided would be insufficient to sway an arbitrator to overturn your dismissal. SEIU further indicated that you had the right to appeal this determination to the Financial Review Committee.

On September 5, 2003, you appealed the denial of arbitration to the Financial Review Committee. It is unclear what SEIU's response was.

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.

To establish a prima facie case of discrimination in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those rights. (Campbell Municipal Employees Association v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Association v. City of San Leandro (1976) 55 Cal.App.3d 553.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors should be present: (1) the employer's disparate treatment of the employee (Campbell, supra); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro Police Officers Association, supra); (3) the employer's inconsistent or contradictory justifications for its actions (San Leandro Police Officers Association, supra); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) employer animosity towards union activists (San Leandro Police Officers Association, supra; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683.).

While it is clear you engaged in protected activity and that the Medical Center was aware of this protected activity, facts provided fail to demonstrate the requisite nexus. Although the timing of some of the disciplinary actions are in close temporal proximity to your protected activity, facts provided demonstrate that you were consistently reprimanded for your tardiness well before you engaged in any protected activity. The Medical Center's continuation of such discipline does not demonstrate disparate treatment. Moreover, you provided facts regarding employee Roger Glancy who was also habitually late. Mr. Glancy was reprimanded and suspended in nearly the exact fashion you were, and Mr. Glancy did not engage in any protected activity. As such, the charge fails to demonstrate disparate treatment.

Additionally, the charge demonstrates the Medical Center followed its progressive discipline policies and procedures in issuing you more than 10 warnings about your tardiness, and further demonstrates the Medical Center offered consistent justification for your discipline. Finally, you fail to provide any facts supporting the contention that the Medical Center was not justified in terminating you based on your falsification of records, your AWOL status and your failure to report to work on time. As the charge is devoid of any other facts demonstrating nexus, the charge must be dismissed for the reasons discussed above.

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.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than 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).)

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

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.

Sincerely,

ROBERT THOMPSON
General Counsel

By

Jerilyn Gelt
Labor Relations Specialist

Attachment

cc: Rosemary Murphy

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



January 30, 2003

Delores Bernice Flenoy

Re: Delores Bernice Flenoy v. Alameda County Medical Center
Unfair Practice Charge No. SF-CE-78-M
WARNING LETTER

Dear Ms. Flenoy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2002. The charge alleges that the Alameda County Medical Center (ACMC or Respondent) violated the Meyers-Milias-Brown Act (MMBA).¹ However, the charge is unclear not only as to what specific sections of MMBA have been violated, but also as to the necessary facts constituting allegations of unlawful conduct on the part of ACMC.

PERB Regulation 32615(a) requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus your burden, as the charging party, includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 171-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) As the charge includes none of these facts in a clear and concise manner, the charge fails to state a prima facie case.

I spoke to you on January 27, 2003, and explained the necessary elements which are missing from your charge. You indicated that you have additional information with which to amend. 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 7, 2003, I shall dismiss your charge.

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.

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If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist

JAG