STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STACY JOE WILLOUGHBY, Charging Party, v. MERCED UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2798-E PERB Decision No. 2705 April 15, 2020

Appearances: Brian Crowell, Representative, for Stacy Joe Willoughby; Atkinson, Andelson, Loya, Ruud & Romo by Michael J. Davis and Todd A. Goluba, Attorneys, for Merced Union High School District.

Before Banks, Shiners, and Paulson, Members.

DECISION[1]

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Stacy Joe Willoughby (Willoughby) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the Merced Union High School District (District) violated the Educational Employment

[1] Subdivision (d) of PERB Regulation 32320, as amended effective April 1, 2020, permits a majority of Board members issuing any decision or order to designate all or part of such decision or order as non-precedential. Based on all relevant circumstances, including the criteria set forth in Regulation 32320, subdivision (d), we designate this decision as non-precedential. (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

Relations Act (EERA)[2] by issuing Willoughby a notice of suspension and then suspending him for five days in retaliation for his protected activities. Following a formal hearing, the ALJ dismissed the complaint and underlying unfair practice charge, concluding that Willoughby failed to prove the District engaged in unlawful retaliation.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we find the ALJ's factual findings are supported by the record and her conclusions of law are consistent with applicable law. We therefore affirm the dismissal of the complaint for the reasons stated in the proposed decision, subject to the following discussion of Willoughby's exceptions.

DISCUSSION

As a preliminary matter, the District argues that we should disregard Willoughby's exceptions in their entirety for their failure to comply with PERB Regulation 32300. PERB Regulation 32300 requires a statement of exceptions filed with the Board to identify the page or part of the proposed decision to which the exception is taken, state the grounds for each exception, and designate by page citation or exhibit number the portions of the record, if any, upon which the party relies for each exception. (PERB Reg. 32300, subd. (a).) While Willoughby's exceptions do not consistently identify the specific parts of the decision to which he excepts, they do usually identify the reasons for his exceptions and the evidence that supports his exceptions. Accordingly, we exercise our discretion to address his exceptions despite

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

their technical non-compliance with PERB Regulation 32300. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 6-7; *Los Angeles Unified School District* (2014) PERB Decision No. 2390, pp. 9-10.)

Willoughby's exceptions primarily focus on the ALJ's conclusions that: (1) Willoughby did not prove a causal nexus between his protected activity of having union representation during the District's November 2012 investigation of his computer activity and the adverse action of the five-day suspension for dishonesty with regard to the events of December 14, 2012; and (2) Willoughby failed to prove District management knew of his contacts with his exclusive representative, California School Employees Association Chapter 252 (CSEA) about his workplace anti-bullying proposals and the August 27, 2012 server room incident. We address each issue in turn.[3]

A. District's Unlawful Motive/Causal Nexus

Attempting to show the District acted with unlawful motivation,[4] Willoughby argues the ALJ erred by "misconstruing the facts, testimony and evidence" relating to the District's alleged "willful suppression" of the October 5, 2012 forensic analysis report regarding Willoughby's computer. But Willoughby did not raise the willful suppression issue before the ALJ. Generally, the Board will decline "to review an

[3] The remaining exceptions raise issues that would not affect the outcome of this case if we were to rule in Willoughby's favor on them. Accordingly, we decline to consider them. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

[4] "[E]vidence of unlawful motive is the specific nexus required to establish a prima facie case" of retaliation or discrimination. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2671, p. 6; *Novato Unified School District* (1982) PERB Decision No. 210, p. 6.)

exception raising an issue that was not presented to the ALJ." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 12; *Colusa Unified School District* (1983) PERB Decision No. 296a, p. 7.) Willoughby did not object to admission of the forensic report at the hearing, and he had a full opportunity to make any arguments he wished to make about the report to the ALJ in his closing briefing. In these circumstances, we decline to address the merits of Willoughby's willful suppression argument.

Additionally, Willoughby's exception on this point appears to be an attempt to litigate whether the Letter of Reprimand he received on November 28, 2012, was retaliatory. PERB's Office of the General Counsel dismissed that allegation as untimely, and Willoughby did not appeal the dismissal.[5] Nor has he shown that the Board can consider whether the reprimand was retaliatory under the unalleged violation doctrine.[6] Consequently, Willoughby cannot revive that dismissed allegation in his exceptions.

Furthermore, in order to establish a prima facie case of retaliation, the charging party must prove "that the employee's protected activity was 'a motivating factor' in the

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[5] PERB Regulation 32635, subdivision (a), allows a charging party to appeal a dismissed allegation to the Board itself.

[6] "Under the unalleged violations doctrine, PERB has the discretion to consider allegations not included in the charge or the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. [Citation.]" (*Fresno County Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192-193.)

employer's decision *to take the adverse action complained of*." (*Charter Oak Unified School District* (1984) PERB Decision No. 404, p. 3, quoting *Novato Unified School District*, *supra*, PERB Decision No. 210, p. 4, italics added.) Willoughby's arguments about the forensic report relate not to the adverse action alleged in the complaint, i.e., his five-day suspension, but to the earlier Letter of Reprimand he received for improper computer activity, which he claimed was issued in retaliation for his protected activities of coordinating with CSEA on workplace anti-bullying research and invoking his right to a union representative during the August 27, 2012 server room incident.

Although the District cited the reprimand as prior progressive discipline to support the five-day suspension, there is no evidence that the forensic report provided a basis for the suspension beyond the role it played in leading to the earlier reprimand. The tenuous relationship between the forensic report and the suspension thus does not establish unlawful motive with respect to the suspension.[7]

For all the foregoing reasons, we dismiss this exception in its entirety.

B. District's Knowledge of Willoughby's Protected Activity

Willoughby next argues that the ALJ erred by finding Anthony Thomas (Thomas), Assistant Information Technology Manager and Willoughby's immediate supervisor, had no knowledge of (1) whether Willoughby contacted CSEA about the

[7] Willoughby also claims the District violated Education Code section 44031 by not giving him the opportunity to respond to the forensic report. PERB lacks jurisdiction to enforce the Education Code, and thus may not remedy independent violations of the Education Code. (*Berkeley Unified School District* (2017) PERB Decision No. 2529, p. 2.) We therefore express no opinion as to Willoughby's Education Code claim.

August 27, 2012 server room incident, and (2) Willoughby's anti-bullying research in coordination with CSEA. A charging party may prove employer knowledge of an employee's protected activity by "direct or persuasive circumstantial evidence." (*Moreland Elementary School District* (1982) PERB Decision No. 227, p. 13, citing *Amyx Industries, Inc. v. NLRB* (8th Cir. 1972) 457 F.2d 904, 906.)

We find no basis in the record to overturn the ALJ's finding that Thomas did not know whether Willoughby sought CSEA's assistance regarding the August 27, 2012 server room incident. The August 27, 2012 e-mails between Willoughby, CSEA President Gloria Coulombe, CSEA Labor Relations Representative Laurie Mitchell (Mitchell), and CSEA Vice President William Wohltman were strictly internal to CSEA, and Willoughby provided no evidence that any of the e-mails were forwarded to Thomas or otherwise made known to him. Nor did Willoughby prove that Thomas knew of Willoughby's August 30, 2012 meeting with Mitchell and Chief Job Steward Mary Mercado (Mercado), or that Willoughby or anyone from CSEA contacted Thomas to arrange a meeting following the server room incident. Willoughby instead argues that we should "infer Thomas knew or should have known there was a very high likelihood Willoughby was going to contact his union." However, it is the charging party's burden to prove the employer's knowledge of protected activity, rather than the employer's burden to affirmatively deny knowledge of an employee's protected activity. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 15.) Willoughby did not establish that Thomas, or anyone else from District management, knew of his request for assistance to CSEA on August 27, 2012 or his meeting with Mitchell and Mercado on August 30, 2012.

Similarly, there is no evidence in the record that Thomas had any knowledge of Willoughby's anti-bullying research and communications with CSEA about it. Willoughby asks us to assume that Thomas knew of Willoughby's anti-bullying research because Thomas had full administrative rights to the District's e-mail server. However, Willoughby offered no evidence that Thomas actually accessed or searched Willoughby's e-mails. All employers have access to their employees' e-mail accounts, yet that fact alone is not sufficient to establish actual knowledge of the content of employee e-mails.

Based on the foregoing, we find no grounds to disturb the ALJ's finding that Thomas had no knowledge of Willoughby's anti-bullying research and his request for CSEA assistance after the August 27, 2012 server room incident. But even if Thomas knew of Willoughby's request for CSEA assistance and anti-bullying proposals, our review of the record shows that Willoughby failed to prove the District was unlawfully motivated by those protected activities when it issued him the Statement of Charges and Notice of Five-Day Suspension and subsequently suspended him. We therefore dismiss this exception.

C. Submission of New Evidence

Willoughby submitted with his exceptions a request for judicial notice and a number of new exhibits.[8] When considering a request to reopen the record to admit

[8] The request for judicial notice asks PERB to apply the analytical framework for unlawful discrimination or retaliation set forth in *Novato Unified School District*, *supra*, PERB Decision No. 210, as well as the rule for delayed discovery articulated in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797. A party need not request judicial notice to bring legal authorities to the Board's attention; simply citing those authorities in the party's exceptions is sufficient.

new evidence, the Board applies the standard for a request for reconsideration based on newly discovered evidence. (*County of Riverside* (2010) PERB Decision No. 2132-M, p. 6, citing PERB Reg. 32410, subd. (a).) The applicable regulation provides: "A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case." (PERB Reg. 32410, subd. (a).)

Willoughby's newly submitted evidence does not meet these criteria. As a threshold matter, Willoughby did not include a declaration under penalty of perjury establishing that the evidence was not previously available and could not have been discovered prior to the hearing with the exercise of reasonable diligence. Even if Willoughby had submitted the requisite declaration, he would not have been able to satisfy the standard, since all but one of the documents—a December 2, 2018 e-mail from Willoughby's hearing representative to the ALJ regarding an alleged inaccuracy in the hearing transcript—were available to Willoughby prior to the formal hearing. In any event, none of the documents would alter the outcome of the proposed decision, as they are offered as a means for Willoughby to litigate his November 28, 2012 Letter of Reprimand. As discussed *ante*, the issue of whether the Letter of Reprimand was retaliatory is not properly before the Board. Therefore, we have not considered the new evidence Willoughby submitted with his exceptions.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-2798-E are DISMISSED.

Members Banks and Paulson joined in this Decision.