STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GENE KAPLAN, Charging Party,	)	Case No. SF-CE-119-S
v.	)	PERB Decision No. 1066-S
STATE OF CALIFORNIA (DEPARTMENT OF CONSUMER AFFAIRS), Respondent.	)	November 8, 1994

Appearance; Gene Kaplan, on his own behalf.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (Board) on an appeal filed by Gene Kaplan (Kaplan) of a Board agent's dismissal (attached hereto) of his unfair practice charge. In his charge, Kaplan alleged that the State of California (Department of Consumer Affairs) engaged in reprisals against him because he filed grievances and raised other complaints about working conditions in violation of section 3519 of the Ralph C. Dills Act (Dills Act).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

The Board has reviewed the warning and dismissal letters, the unfair practice charge and Kaplan's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CE-119-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Carlyle joined in this Decision.

Member Garcia's concurrence begins on page 3.

GARCIA, Member, concurring: At page 6 of the warning letter, the Public Employment Relations Board (PERB or Board) agent concluded that Gene Kaplan (Kaplan) had failed to allege violations occurring within 6 months of the date he filed his unfair practice charge. Thus, the Board agent concluded that, "For these reasons the charge, as presently written, does not state a prima facie case."[1]

I concur separately to remind Board agents not to mix apples with oranges. The Board does not have jurisdiction over this case because it was not timely filed. Once that finding is established there is no need to inquire into whether a prima facie case was established. Our agents should distinguish between the Board's obligation to investigate whether a charging party has established a prima facie case pursuant to PERB Regulation 32640[2] and the Board's duty under the Educational

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[1]The Board agent did not address the merits of Kaplan's charge, since he planned to dismiss it as untimely.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32640 provides, in pertinent part:

> (a) The Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case. The complaint shall contain a statement of the specific facts upon which Board jurisdiction is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question. The Board

Employment Relations Act (EERA) to determine PERB jurisdiction. The issue of timeliness is separate and distinguishable from the issue of whether the elements of a prima facie case exist.

EERA requires us to dismiss a charge for lack of Board jurisdiction if a party has filed an untimely charge or fails to make a prima facie case for the charge filed. Timeliness for the purpose of establishing PERB jurisdiction should be inquired into by the Board agent. If found, the Board agent would then inquire into the existence of a prima facie case. In this case, the Board lacks jurisdiction because Kaplan's charge was untimely filed.

Case Law on "Continuing Violation" Theory

PERB has followed the National Labor Relations Board approach of strongly disfavoring stale claims. The cases cited by the Board agent demonstrate that Kaplan failed to provide evidence or allege facts that established a violation that occurred subsequent to an alleged prior violation. In UCLA Labor Relations Division (1989) PERB Decision No. 735-H, the Board held that a continuing violation will only be found where active conduct or grievances occur within the limitations period that independently constitute an unfair practice. The burden is clearly on the charging party to provide the facts which show a violation within 6 months of filing a charge. Reliance on a

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may disregard any error or defect in the complaint that does not substantially affect the rights of the parties. [Emphasis added.]

vague theory of continuing violation will not suffice and the concept is, for good reasons, losing its vitality.[3]

[3]See Chambersburg County Market (1989) 293 NLRB 654 [131 LRRM 1057] and A & L Underground (1991) 302 NLRB 467 [137 LRRM 1033] for an explanation of the rationale.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350

January 31, 1994

Gene Kaplan

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Gene Kaplan v. State of California (Department of Consumer Affairs)
Unfair Practice Charge No. SF-CE-119-S

Dear Mr. Kaplan:

The above-referenced unfair practice charge, filed on November 12, 1993, alleges that the State of California (Department of Consumer Affairs) (Department) has engaged in reprisals against Gene Kaplan because he filed grievances and raised other complaints about working conditions. This conduct is alleged to violate Government Code sections 3519(a) and (d) of the Ralph C. Dills Act (Dills Act).

I indicated to you, in my attached letter dated January 20, 1994, 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 January 28, 1994, 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 January 20, 1994 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph,

certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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.

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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: Linda A. Mayhew

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350

January 20, 1994

Gene Kaplan

Re: WARNING LETTER
Gene Kaplan v. State of California (Department of Consumer Affairs)
Unfair Practice Charge No. SF-CE-119-S

Dear Mr. Kaplan:

The above-referenced unfair practice charge, filed on November 12, 1993, alleges that the State of California (Department of Consumer Affairs) (Department) has engaged in reprisals against Gene Kaplan because he filed grievances and raised other complaints about working conditions. This conduct is alleged to violate Government Code sections 3519(a) and (d) of the Ralph C. Dills Act (Dills Act).

Investigation of the charge revealed the following. The charge consists of 105 single-spaced, typewritten pages and attached documentation. The following contains a summary of the allegations contained therein. Gene Kaplan is a Senior Investigator, Division of Investigation for the Department. He is assigned to the San Mateo Field Office and is a member of a bargaining unit exclusively represented by the California Union of Safety Employees (CAUSE). In December 1987, Kaplan attempted to file a grievance concerning his failure to be promoted to Senior Investigator. Kaplan confided in Laura Campos, a Senior Investigator, who represented that she was CAUSE steward. Warren Wolfe was the Deputy Chief of the Division at that time. In April 1988, Kaplan complained about harassment and a work speed-up. Wolfe refused to meet with him in person. In June 1988, CAUSE agreed to represent Kaplan regarding his denial of promotion and harassment. In September 1988, co-worker Linda Rudkin was promoted to Field Office Supervisor. Sometime thereafter, Rudkin sent a memorandum to Wolfe warning him that Kaplan intended to file a grievance and described activities of employees attempting to dominate those in CAUSE. In early 1989, Wolfe was promoted to Chief of the Division. In April 1989, Wolfe advised Kaplan of his promotion to Senior Investigator. In early 1990, John Lancara became Deputy Chief.

In January 1990, Rudkin's behavior toward Kaplan changed abruptly and she threatened to have him removed if he did not meet her

production expectations. Several incidents of sexual harassment by Rudkin toward Kaplan occurred which were of a physical and verbal nature. In March 1990, Rudkin threatened to prevent Kaplan from returning to work without a medical clearance after he had taken a brief sick leave. On May 17, 1990, Kaplan participated in an informal grievance discussion with Lancara. On May 23, 1990, Kaplan was one of four investigators who complained to CAUSE about Rudkin's physical and verbal abuse of men in the office. On May 25, 1990, Rudkin demanded that Kaplan retract the statements he made to CAUSE. On July 25, 1990, Rudkin pushed Kaplan. On July 30, 1990, Kaplan filed a grievance against Rudkin's pushing, threats, and unwanted physical contact. On August 2, 1990, Lancara rejected Kaplan's grievance and ordered Rudkin's immediate supervisor not to discuss the grievance. Around this time, Lancara and Wolfe began assembling a "reprisal" file against Kaplan. In August 1990, Lancara and Wolfe met with the Consumer Affairs Legal Office and, using the "reprisal" file, attempted to have formal disciplinary action taken against Kaplan. Lancara and Wolfe drafted adverse action documents. The Legal Office declined to approve the request for disciplinary action.

On September 28, 1990, Kaplan was ordered to submit to a psychological examination by Dr. Kenneth Hood. The "reprisal" file was given to Hood for his examination. In April 1993, Kaplan learned that Wolfe failed to verify the accusatory information contained in the file. In February 1991, some months after the examination, Kaplan obtained a copy of Hood's October 8, 1990 evaluation report and determined that it was based on the "reprisal" file. The evaluation has been the basis for preventing Kaplan from returning to work at the present time. Hood's report apparently concluded that Kaplan suffered from depression and anxiety, and relied, in part, on Kaplan's call to the police department following a physical assault by Rudkin in August 1990 during a time in which CAUSE had advised Kaplan to contact the police if Rudkin assaulted him again.

On October 25, 1990, Wolfe notified Kaplan that he was to be removed from duty without pay due to a medical condition. Kaplan then wrote to request a copy of Hood's report, which was at first denied. He was not able to view the report until February 1991.

In August 1991, Rudkin was placed on administrative leave for physically assaulting four different employees on eight different occasions and was subsequently demoted for these acts. Despite Rudkin's demotion, the Department refuses to retract adverse documents in the "reprisal" file. These documents include (1) a July 30, 1990 memorandum by Laura Campos, (2) Wolfe's draft adverse action based on the Campos memorandum, (3) a July 31,

1990 memorandum by Rudkin, (4) a second draft adverse action by Wolfe dated July 31, 990, (5) an August 8, 1990 Wolfe memorandum, (6) an August 23, 1990 Rudkin memorandum, (7) an August 23, 1990 incident report by Rudkin, (8) an August 27, 1990 Lancara memorandum, (9) a third draft disciplinary document in the form of a "letter of warning" written by Wolfe, and (10) Hood's October 8, 1990 evaluation. Kaplan contends that he was denied his rights to inspect the documents prior to their placement in his "reprisal" file and to include written rebuttals in the file. Kaplan asserts that these failures by the Department violate Chapter 7 of the Division's Administrative Policy Manual as well as the Government Code.

In September 1991, Kaplan wrote to Jim Conran, Director of the Department, to complain about the "reprisal" file. In December 1991, after discussions with the Department's Legal Office, the Department continued to reject Kaplan's complaints about the file and the Department's refusal to return him to work.

In mid-1993, Lancara told Kaplan that he placed him on leave because Kaplan had disagreed with him during the May 17, 1990 informal grievance discussion, reported Rudkin's assault to the police, and because of another incident where a security guard was disrespectful to Kaplan at a building where he was to interview a witness. Kaplan alleges that Lancara knew that Kaplan had been advised by CAUSE to contact the police if Rudkin assaulted him again.

Kaplan alleges: "On May 18 through May 19, 1993 I was compelled to deal with the fact that management's reprisal file branding me as a problem employee because of union activity was still their 'de facto' job description for me." Kaplan indicated to the undersigned that he suffered physical symptoms of his emotional distress (thus a legally cognizable injury under tort law principles) after learning that he was required to appear for a periodic Worker's Compensation medical review. Kaplan contends that it is the Department's goal to prove through a medical examination, based on the "reprisal" file, that he suffers a permanent and stationary disability. Such a finding, he contends, will make him unemployable for life in his customary occupation. Kaplan indicated to the undersigned that on May 20, 1993 he was required to submit to the periodic psychological examination. Kaplan acknowledges that he has a right to request from the Department medical clearance to return to work but asserts that such a right is a nullity so long as the "reprisal" file is maintained by Department.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the Dills Act for the

reasons that follow.

Government Code section 3514.5(a)(1) of the Dills Act states that the Public Employment Relations Board (PERB) shall not "issue a complaint in respect of any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge." PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) The charge was filed on November 12, 1993. For a violation to be timely Kaplan must have known or should have known of the conduct giving rise to the unfair practice on or after May 12, 1993.

The only events alluded to in the charge which occurred on or after May 12, 1992 concern (1) the Department's continuing maintenance of the "reprisal" file, which contains an illegal "de facto job description," (2) the Department's order that Kaplan submit to another psychological evaluation on or about May 20, 1993, and (3) the emotional distress injury he suffered in the days preceding the May 20 examination, which were precipitated by having to consider how to respond to the adverse material in the "reprisal" file.

The claim that the Department continues to maintain the "reprisal" file attempts to invoke the notion of a continuing violation. This claim would appear to be clearly controlled by PERB's decision in Pasadena Unified School District (1977) PERB Dec. No. 16. In that case, PERB held that the public school employer's refusal to remove certain letters from employee personnel files, which criticized employees for protected activity and made threats concerning future protected activity, did not constitute grounds for applying the theory of a continuing violation. PERB cited a National Labor Relations Board case, N.L.R.B. v. Pennwoven (3rd Cir. 1952) 194 F.2d 521 [29 LRRM 2307], involving the discriminatory refusal to rehire striking employees, noting that the violation was held to occur "only at the time of discharge and not to continue thereafter during the employee's term of unemployment or at the time of the employee's request for reinstatement." (Pasadena Unified School District, supra. PERB Dec. No. 16, at. p. 4.)

Kaplan alleges that he discovered the existence of the "reprisal" file in February 1991 when he read Hood's evaluation for the first time. At that time, he knew or should have known that the Department had violated its own policies and the Government Code by not permitting him prior inspection of the documents or a right to rebuttal. The charge alleges that he protested the contents of the file in September 1991 and continuing through

December 1991, and that the Department refused to provide him relief as late as December 1991. There is no evidence that Kaplan was deprived of evidence necessary for him to conclude that his rights under the Dills Act in this regard had been violated prior to May 12, 1993. Thus, the charge establishes that Kaplan was aware prior to the six months period of the contents of the "reprisal" file and the Department's retaliation against him for filing grievances and complaining about his working conditions as evidenced by those documents.

In contrast to the claim regarding the maintenance of the "reprisal" file, the claim that the Department has caused Kaplan to undergo another psychological examination that involved yet another review of the "reprisal" file and that the notice of the examination caused him to suffer an emotional distress injury both rely on the notion of an independent violation as opposed to a continuing violation. But this argument is rejected for two reasons.

First, in El Dorado Union High School District (1984) PERB Dec. No. 382, PERB, in discussing the continuing violation theory, held that a timely violation would not be found where the employer's conduct during the limitations period constitutes an unfair practice based on a necessary relation to the original offense. In cases where there is a relation back to previous conduct, some new conduct which is sufficiently independent of the original offense is required that will "revive the viability of the unfair practice." In the context of a unilateral change case, PERB held, the first implementation of the policy commences the six month period and subsequent occasions when employees are required to adhere to the policy, so long as it does not change, do not revive the violation.

In the instant case, the use of the "reprisal" file in the Worker's Compensation case is not sufficiently independent of the original offense. In February 1991, Kaplan read Hood's report and discovered that it was based on the "reprisal" file. Kaplan acknowledges that the May 20 evaluation was part of a periodic medical review within the Worker's Compensation process. The Department's position in this litigation that Kaplan is unfit for duty is consistent with its reasons for placing him on leave in October 1990. Although Kaplan also asserts that the Department continually updates the file with new information, there is insufficient evidence to establish that they differ sufficiently in kind so as to constitute independently offending conduct.

Similarly, the claim that Kaplan suffered emotional distress prior to the May 20 evaluation is not sufficiently distinct from his experiences dealing with other prior psychological

evaluations. Furthermore, the emotional distress is a personal manifestation of a reaction to the Department's conduct of maintaining a "reprisal" file, as distinguished from the Department's conduct of creating the file which objectively constitutes the adverse action. While the notion of an independent violation might be sustained were the emotional distress claim to be analyzed under the law of torts, that analysis is not appropriate in the instant case where the labor law authorities noted above must be applied.

Second, construing the new injuries as timely would adopt a rule allowing charging parties to manipulate events so as to circumvent the statute of limitations rule. In this case, the impetus giving rise to the alleged new injuries was the result of conduct on Kaplan's part rather that the Department's. The psychological examination is a requirement of the prosecution of Kaplan's Worker's Compensation claim against the Department. The act of filing and prosecuting such a claim is a volitional act on his part. It is similar to the employee request for reinstatement subsequent to a discriminatory firing to which Pasadena Unified School District, supra. PERB Dec. No. 16 alludes, i.e., an attempt to obtain a legal entitlement from the employer. Although Kaplan contends that he was "forced" to file for disability benefits because the Department refuses to return him to work, this argument is unpersuasive. The statute of limitations has been applied so as to prevent the charging party from engaging in a volitional act which would create facts that might establish a new or independent violation within the six months period. For example, in N.L.R.B. v. Pennwoven. supra. 194 F.2d 521, the NLRB rejected the notion that letters written after the initial refusal to hire, which demanded reemployment under threat of a unfair labor practice charge, were sufficient to commence a new statute of limitations period. Finding that the new injuries are timely is rejected as it would undermine the policies embodied in the rule, which seek to prevent unfairness to the respondent as a result of having to litigate stale claims.

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 which 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 be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **January 28. 1994. I**

shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZZA
Regional Attorney