DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RAGNI LARSEN-ORTA, Charging Party, v. CITY OF BERKELEY, Respondent.	Case No. SF-CE-426-M PERB Decision No. 2281-M August 17, 2012

Appearance: Ragni Larsen-Orta, on her own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Ragni Larsen-Orta (Larsen-Orta) of the Office of the General Counsel's dismissal of her unfair practice charge. The charge, as amended, alleged that the City of Berkeley (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by terminating her from her employment because of her protected activity. The Office of the General Counsel dismissed the charge, concluding that certain of the allegations were untimely and the remaining allegations failed to state a prima facie case.

We have reviewed the entire record in this matter and given full consideration to the issues raised on appeal. Based on this review, the Board affirms the dismissal for the reasons below.

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

DISCUSSION

Pursuant to PERB Regulation 32635, subdivision (a),[2] an appeal from dismissal of an unfair practice charge shall:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635, subdivision (a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.) An appeal that does not comply with the requirements of PERB Regulation 32635, subdivision (a), is subject to dismissal. (*City of Brea* (2009) PERB Decision No. 2083-M.)

In response to the dismissal, Larsen-Orta filed a document with the Board dated March 12, 2012, entitled "Request for Extension of Time for Appeal of Dismissal and Request

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

for Reconsideration" (Request for Extension). By letter dated March 13, 2012, the Board's Appeals Assistant informed the parties that "the new date for filing an appeal . . . will be Monday, April 9, 2012." On April 4, 2012, Larsen-Orta filed a document with the Board entitled "Request for Tolling of Statute of Limitations for Appeal of Dismissal and Request for Reconsideration." We construe this document to be Larsen-Orta's appeal from the dismissal of her unfair practice charge under PERB Regulation 32635[3] and refer to it herein as the "appeal."

Attached to the appeal is a copy of a discrimination charge filed by Larsen-Orta with the California Department of Fair Employment & Housing (DFEH) on March 15, 2012. In the appeal, Larsen-Orta refers to this DFEH charge in stating that she "further reactivate[s] requests filed with PERB on March 13, 2012 due to subsequent availability of the federal discrimination charge." The March 13, 2012, request to which Larsen-Orta refers is that contained in the March 12, 2012 request for extension, i.e., "that the Board extend the time for me to appeal dismissal of the charge until outcome of the federal discrimination charge." As stated above, in response to the request for extension, Larsen-Orta's deadline for filing an appeal was extended to April 9, 2012.

Larsen-Orta contends that the deadline for filing an appeal of the dismissal should be "tolled" during the pendency of her Equal Employment Opportunity Commission (EEOC) proceedings. Larsen-Orta received one extension of the deadline for filing an appeal to date. To the extent Larsen-Orta intends by the filing of the appeal to request a further extension of the deadline for filing an appeal until such time as the EEOC charge proceedings are concluded, such request is hereby denied.

[3] Requests for reconsideration are governed by PERB Regulation 32410, which allows a party to a decision of the Board itself to file a request for reconsideration based on extraordinary circumstances. Here, Larsen-Orta is challenging the dismissal of her charge. She is not challenging a decision of the Board itself. Therefore, her appeal falls under PERB Regulation 32635 governing review of dismissals rather than PERB Regulation 32410 governing requests for reconsideration.

By the appeal, Larsen-Orta also seeks "corrections/clarifications" of factual statements contained in the dismissal letter. Because we are not adopting the warning and dismissal letters as the decision of the Board itself, we need not address Larsen-Orta's contentions on appeal that certain factual statements contained in the dismissal letter require correction or clarification. Instead, we review the unfair practice charge, as amended, to determine whether it states a prima facie case.

In the initial charge, Larsen-Orta alleged that the City retaliated against her because of her protected activities; that her union, SEIU Local 535, grieved her termination through arbitration; and the City, by its conduct at the arbitration, engaged in unfair practices. In the amended charge, Larsen-Orta alleged that the arbitrator's award is repugnant. In dismissing the charge, the Office of the General Counsel concluded that certain of Larsen-Orta's allegations were untimely filed and the others failed to state a prima facie case of repugnancy.

A repugnancy claim[4] is analyzed under the post-arbitration deferral standard set forth in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a. PERB will exercise its discretion to defer to an arbitrator's award if (1) the matters raised in the unfair practice charge were presented to, and considered by, the arbitrator, (2) the arbitral proceedings were fair and regular, (3) all parties to the arbitration proceedings agreed to be bound by the arbitral award, and (4) the award is not repugnant to the purposes of the labor relations statutory scheme. "An arbitration award [that] has failed to observe any of the foregoing criteria would be inherently repugnant to the purposes of [the statutory scheme]." (*Ibid.*) The purpose of deferral is to encourage the voluntary settlement of disputes, and that purpose would not be served if PERB "were to give effect to an . . . award [that] does not consider the underlying unfair practice, or in which a party was denied due process." (*Ibid.*)

[4] See PERB Regulation 32661.

The problem with this case, however, is that even if Larsen-Orta were to prevail on her repugnancy claim in establishing that PERB should not exercise its discretion to defer to the arbitrator's award,[5] the underlying allegations in Larsen-Orta's unfair practice charge relevant to the discrimination/retaliation violation are nonetheless untimely.

PERB is prohibited 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. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) 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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*State of California (Department of Insurance* (1997) PERB Decision No. 1197-S.) In cases involving allegations that an employee was terminated from employment in retaliation for having engaged in protected activities, the statute of limitations begins to run on the date of actual termination, rather than the date of notification of the intent to terminate. (*Regents of the University of California* (2004) PERB Decision No. 1585-H.)

On October 12, 2005, Larsen-Orta's termination became effective. At most, Larsen-Orta had until April 12, 2006, six months from the date of termination, by which to file her unfair practice charge. Larsen-Orta filed her unfair practice charge on February 23, 2007.

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[5] Larsen-Orta alleges that the City "ratified prior unfair practices" at the arbitration of August 23, 2006, by "entering testimony and documents into evidence falsely stating insubordination, poor work performance, and disciplinary action against me for non-existent misconduct." Larsen-Orta further alleges that "these documents were created discriminatorily, misrepresentationally, and illegally under state law." While Larsen-Orta's allegations are vague, to the extent she is alleging that the City's conduct at the arbitration proceedings constitutes an independent violation of the MMBA, we conclude that, although these allegations were timely filed, Larsen-Orta has failed to establish the elements of an interference or discrimination/retaliation case. (See *Novato Unified School District* (1982) PERB Decision No. 210; *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

Accordingly, we agree with the Office of General Counsel that Larsen-Orta's allegations of discrimination/retaliation occurring during her employment with the City are untimely.[6]

ORDER

The unfair practice charge in Case No. SF-CE-426-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

[6] The issue of whether the statute of limitations was equitably tolled during the pendency of the grievance proceedings is arguably presented by the factual allegations of the charge. The doctrine of equitable tolling applies to cases under the MMBA. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.) Under the doctrine of equitable tolling, the statute of limitations is tolled if the following elements are met: (1) the dispute resolution procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitations period by causing surprise or prejudice to the respondent. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) It is charging party's burden to establish that the statute of limitations has been equitably tolled. Here, Larsen-Orta did not provide PERB with a copy of the grievance procedure or grievances, nor allege in what manner her allegations of retaliation for having engaged in protected activity involve the "same dispute" as the issue before the arbitrator, i.e., whether the City was entitled to terminate her employment upon failure to return from an approved leave of absence. Accordingly, we conclude that the six-month limitations period was not subject to equitable tolling.