

Department of Legal Services

A D V I C E

DISCRIMINATION / REPRISAL INFORMATION WORK SHEET

You or your union ("the local chapter") has requested legal representation from the California Teachers Association's Department of Legal Services ("CTA Legal"). CTA Legal understand that you may have evidence that the District violated the Educational Employment Relation Act (EERA).¹ Specifically, you or your Chapter believes that the Employer may have violated your rights by imposing or threaten to impose reprisals on you, discriminating or threaten to discriminate against you, or otherwise interfering with, restraining, or coercing you because of your exercise of EERA protected rights.

We need your help. To provide the best quality legal representation, CTA Legal must evaluate the claim(s) to determine whether the Public Employment Relations Board ("PERB") will find that your union has stated a "*prima facie* case" of a violation of EERA. Specifically, we request that you help us by providing factual information needed to draft an Unfair Practice Charge which accurately states all the facts necessary to plead a "*prima facie* case." If the blanks provided on the worksheet do not provide enough space for a full and accurate explanation, please use additional pages.

CTA Legal will use the information you provide in evaluating the case and determining how to best provide the legal representation.

Personal History Information

Please provide the directory information about yourself listed below. Your home address, phone numbers and other information will be used only by CTA staff to contact you concerning this matter and only if it is necessary to follow-up with you.

1. Your Name: _____
2. Home Phone: _____ Do not call hours: _____
3. Cell Phone: _____ Email address: _____
4. Home Address: _____

5. School site: _____
6. Number of years at your current school assignment: _____

¹CALIFORNIA GOVERNMENT CODE section 3450, *et seq.*

2. Have you recently held an elected, appointed, or volunteer position with the local chapter or CTA/NEA?

If so, please describe, (and provide dates where possible) the titles of positions that you served in or the nature of the position(s):

3. Have you ever participated in a grievance or arbitration proceeding in the District (as a grievant, site rep, or witness, etc.)? Y ___ N ___

4. As fully and accurately as you can, please describe your activities and provide dates of your participation:

5. In the last two years, have you participated in any local chapter or CTA/NEA organizing activity (e.g., wearing buttons or tee-shirts, attending school board meetings on behalf of the union, distributed union flyers, participating in the support of local chapter bargaining team, picketing, etc.). As fully and accurately as you can, please describe your activities and provide the dates of your participation:

6. In the last two years, have you spoken to District officials or voiced concerns at a staff meeting, raised issues with co-workers, parents, school board members, or other District officials etc. that may have gotten back to the District about issues related to District management practices, employment relations, working conditions, or educational policies in the District? (Think of "working conditions" in the broadest way, as matters related to terms of employment, wages, transfer policies, work assignments, health and safety concerns, parking, performance evaluations, etc.) As fully and accurately as you can, please describe your statements, conversations, or remarks and provide dates of these statements or discussions:

II. District Awareness of Protected Activity

Please provide all the information about how you know (or believe) that the District is aware that you have engaged in "Protected Activities" by answering the questions listed below.

12. To your knowledge, have any District administrators, school board members, or other District officials been aware of any protected activities you described in section I above? And if so, when and how did they become aware of your activities? _____

III. Adverse Employment Actions

Please provide all the information about any actions the District may have taken that you believe are "Adverse" to your employment or professional interests by answering the questions listed below.

13. Within the last six months, have you been subjected to any action by any District administrator, school board member, or other District official which is "adverse" to your professional or employment interests? ("Adverse Actions" include formal or informal discipline, work assignments or transfers that appear to be worse than the previous assignments, addition of undesirable assignments, increased classroom observations, negative performance evaluations, unwelcome criticism at staff meetings, denial of training or promotional opportunities, etc.).

If so, please describe the adverse actions(s) as fully and accurately as you can:

If you have suffered an adverse action, **did you ask the District to explain** why you were receiving the adverse action? Y ___ N ___

requirements; a usual or customary protocol or procedure)? Y ___ N ___

If so, please explain why the process followed by the District was "unusual," as fully and accurately as you can:

16. If you have suffered any adverse action, were you treated differently from the way the District treats other employees in the same situation? Y ___ N ___

If so, please explain both how the District "usually" treats employees in the same situation and how they treated you differently as fully and accurately as you can:

17. If you have suffered an adverse disciplinary action, did the District give you an explanation or offer justification to you **at the time the District took the action** which imposed discipline? Y ___ N ___

If so, please identify the District administrator, school board member, or other District official that gave you the explanation, justification, or reason **at the time the District took the action** which imposed discipline and then state what the official said as fully and accurately as you can:

18. If the District give you an explanation or offered justification to you at the time the District took the action which imposed discipline, has the District subsequently changed the reason(s) for the adverse action? Y ___ N ___

If so, please identify the District administrator, school board member, or other District official that gave you (or someone else) the initial explanation, justification, or reason **at the time the District took the action** which imposed discipline and, as fully and accurately as you can, state what the administrator said. Then identify the District administrator, school board member, or other District official that gave you (or someone else) the new or changed explanation, justification, or reason the action which imposed discipline and, as fully and accurately as you can, and then state what the official said:

7. Number of years employed by the District: _____

8. Number of years teaching outside District: _____

9. Credentials held: _____

Background about the Facts CTA needs to file an Unfair Practice Charge

EERA requires that all unfair practice charges plead “a clear, concise statement of facts and conduct alleged to constitute an unfair practice.”² Alleging these facts is referred to as pleading or making a “*prima facie*.”

The Public Employment Relations Board’s (PERB) Regional Attorneys process unfair practice charges and make determinations on whether to issue complaints on unfair practice charges. A PERB Regional Attorney may only “issue a complaint if the charge or evidence is sufficient to establish a *prima facie* case. . . .”³ To establish a *prima facie* case and secure a complaint, all charges must “state with particularity the conduct which is alleged to constitute an unfair practice.”⁴ In other words, charges must “allege with specificity the ‘*who, what, when, where and how*’ facts and conduct alleged to constitute an unfair practice.”⁵ This requirement means that charges must state the “factual basis” for claims alleged and provide at least “some evidence” of the material facts and conduct alleged to constitute an unfair practice under EERA.⁶ Mere conclusory statements are not sufficient.⁷ Statements like: “The District retaliated against me” or “The District treated me differently than other employees” **do not** provide the concrete, specific factual information (the “who, what, when, where, and how” facts) required to state a *prima facie* case.

To assist you in gathering all the relevant information CTA Legal need to file a charge, we have prepared the following worksheet. Please answer each and every one of the questions and provide any other additional information that you think may be helpful or relevant. If you know of someone else in the District who has been the recent victim of similar acts of discrimination or retaliation because of their union activities, please give us their names, contact information, and describe what you know about their situation.

I. Protected Activities

Please provide all the information about your own “Protected Activities” by answering the questions listed below. (“Protected Activities” relate to public employees’ right to form and join unions and then to participate in the union’s activities. Most commonly, these activities relate to collective bargaining, organizing, the right to union representation, serving as elected or appointed representatives of the union, or grievance processing and other administration or enforcement of the contract).

1. Are you a Member of the local chapter and CTA/NEA? Y ___ N ___. How many years have you been a member _____.

²8 CAL. CODE REGS. § 32615(a)(5).

³8 CAL. CODE REGS. §§ 32620(b)(5), 32620(b)(7), 32640(a).

⁴8 CAL. CODE REGS. § 32640(a).

⁵*United Teachers LA (Ragsdale)* (1992) PERB Dec. N° 944 [16 PERC ¶ 23098] (emphasis added).

⁶*Riverside Unif. Sch. Dist. (Petrich)* (1986) PERB Dec. N° 562a [10 PERC ¶ 17103, pp. 474– 476].

⁷*Petrich, supra*, PERB Dec. N° 562a, at pp. 5, 6, 7, 13-14 [10 PERC ¶ 17103, pp. 474 – 476].

7. In the last two years, have you spoken to District officials or voiced concerns about the District's treatment of other bargaining unit members? As fully and accurately as you can, please describe your statements, conversations, or remarks and provide dates of these statements or discussions:

8. In the last two years, have you engaged in any other kinds of activities that are or might be found to be "Protected Activities"?

9. In the last two years, has any District administrator, school board member, or other District official asked you whether you were a union member or whether you supported the local chapter's bargaining positions, organizing activities, or union officers, etc.?

10. In the last two years, has any District administrator, school board member, or other District official warned you about your union membership or cautioned you about your support for the local chapter's bargaining positions, organizing activities, or union officers, etc.?

11. In the last two years, has any District administrator, school board member, or other District official promised you that it would somehow be in your interest to drop your union membership or abandon your support for the local chapter's bargaining positions, organizing activities, or union officers, etc.?

If you have suffered an adverse action, did the District explain to you why you were receiving the adverse action? Y ___ N ___

If you have suffered an adverse action, has the District's explanation about why you were receiving the adverse action remained the same? Y ___ N ___

If someone explained, please state who explained and the reasons they gave, as fully and accurately as you can:

Did the District refuse to explain about why you were receiving the adverse action? Y ___ N ___

If the District refused to explain why you were subjected to the adverse action, please state who refused to explain why the District would not or could not give you a reason, as fully and accurately as you can:

IV. Motivation for Adverse Employment Actions

Please provide all the information you can about the motivation of the District or District officials taking what you believe are "Adverse Actions" against your employment or professional interests by answering the questions listed below. The best evidence of motivation is a direct statement or remark by a District administrator, school board member, or other District official that: deprecated to your local chapter, the chapter's officials or the chapter's activities; expressed or evidenced dislike, disdain, hostility or other disapproval of your local chapter or of unions in general. Other evidence can be "circumstantial." The questions below will help CTA glean such circumstantial evidence, from which the PERB Regional Attorney can infer motive.

14. If you have suffered an adverse employment action as described in section IV, do you know or suspect that you received the adverse action "**Because Of**" your activities in support of your co-workers' or your local chapter? Y ___ N ___

If so, please describe and explain all facts or circumstances that caused you to have such knowledge or suspicion as fully and accurately as you can:

15. If you have suffered any adverse action, was there anything you found "unusual" concerning the circumstances or process followed by the District (for example, did the District deviate from: Board Rules; contract

19. If you have suffered an adverse disciplinary action, did the District conduct only a cursory investigation of alleged misconduct prior to the imposition of discipline? Y ___ N ___

If so, please explain both how the District's investigation was cursory and why it did not constitute a full and complete investigation of alleged misconduct as fully and accurately as you can:

20. Have you heard or read anything from a District administrator, school board member, or other District official that: deprecated to your local chapter, the chapter's officials or the chapter's activities; expressed or evidenced dislike, disdain, hostility or other disapproval of your local chapter or to unions in general?

If so, please describe the "anti-union" statement or remark and explain all facts or circumstances related to it:

21. Are there any other reasons why you know or suspect that you were subjected to the adverse action? (For example, your principal belongs to rival church or an administrator dislikes: your appearance; ethnic heritage; easy-going manner; practice of questioning authority, political party affiliation(s); NRA or ACLU membership; sexual orientation; lack of sexual preference; etc.)

If yes, please explain:

ELEMENTS OF PROOF: DISCRIMINATION/REPRISAL VIOLATIONS

In section 3543.5,¹⁶¹ EERA expressly prohibits public school employers from discriminating or retaliating against public school employees for exercising their rights to union representation or participation in the protected activities of their union.

In order to establish a *prima facie* case for a section 3543.5 Discrimination/Retaliation violation, charging parties must establish that:

1. The employee participated in a protected activity.
2. The employer had knowledge of the employee's participation in the protected activity.
3. The employer took action adverse to the employee's professional or employment interests.¹⁶²
4. The employer took the adverse action because of an unlawful motive, *i.e.*, **to interfere with, discriminate against, or in reprisal for** the employee's participation in the protected activity or **because of** or anti-union animus.

Charging parties may evidence the unlawful motive required by Element 4 (the motivational nexus between the protected activity and the adverse action) through:

- ▶ Direct evidence (*e.g.*, employer admissions and incriminating statements), or
- ▶ Indirect, circumstantial evidence (which permits PERB to infer the motivation for the employer's adverse action).

Indirect, circumstantial evidence must be proven using the "nexus test," described below.

¹⁶¹ Specifically, CALIFORNIA GOVERNMENT CODE section 3543.5 provides in relevant part:

It is unlawful for a public school employer 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

¹⁶² *Palo Verde Unif. Sch. Dist.* (1985) PERB Dec. N° 689 [12 PERC ¶ 19121] adopting an objective test for adverse action; *Woodland Unif. Sch. Dist.* (1990) PERB Dec. N° 808 [14 PERC ¶ 12101, at P 396] *see also California State Univ. v. PERB* (1992) 6 Cal.App.4th 1107 [1123 Cal.Rptr.2d 60].

Using the "Nexus Test" to prove unlawful motive:

PERB apply a standard governing the use of indirect, circumstantial evidence to prove unlawful motive, "Nexus Test."¹⁶³ The test infers unlawful motive from the totality of circumstances surrounding the situation, by requiring proof of:

- A relatively close timing between the employee's protected activity and the employer's action adverse in response,

And evidence of at least one of the following:

- a. The employer treated the employee disparately compared to other employees.
- b. The employer departed from established procedures and standards.
- c. The employer conducted only a cursory investigation of alleged misconduct prior to the imposition of discipline.
- d. The employer failed to offer justification to the employee at the time it took action.
- e. The employer offered inconsistent or shifting justification for its actions.
- f. The employer offered exaggerated, vague or ambiguous reasons for its actions.
- g. The employer engaged in a pattern of obstructionist conduct.

When the charging party has made a *prima facie* showing sufficient to support the inference that the exercise of employee rights was a motivating factor, the burden shifts to the employer to prove its actions would have been the same despite the protected activity.

¹⁶³*Novato, supra*, PERB Dec. N° 210 [6 PERC ¶ 13114]; *see also California State Univ., supra*, 6 Cal.App.4th 1107 [1123 Cal.Rptr.2d 60]; *California State Univ.* (1986) PERB Dec. N° 559-H p. 450 [10 PERC 17043, at p. 190]; *California State Univ.* (1982) PERB Dec. N° 211-H [6 PERC 13115 at p. 450].

ELEMENTS OF PROOF: INTERFERENCE VIOLATIONS

In section 3543.5,¹⁵⁹ EERA expressly prohibits public school employers from interfering with union activity.¹⁶⁰ Most interference violations involve from the rights of the union, the bargaining unit as a whole, or groups of employees. Frequently, interference arises when employers attempt to unions from exercising their section 3543.1 access rights. Common examples of Interference violations include:

- Threats or promises of benefits (but EERA implies a right of "Employer Free Speech").
- Banning employees from wearing union buttons, arm bands, or other union insignia.
- Polling or interrogation employees regarding organizing campaigns, planned concerted activities, or their support for the union.

In order to establish a *prima facie* case for a section 3543.5 Interference violation, charging parties must establish that:

1. An agent of the Employer harmed (or acted in a manner which tends to harm or interfere with) an employee's rights:
 - a. [Proof of:] The specific harm to the employee's rights;
 - b. [Proof of:] The nature or magnitude of the harm to employee's rights.
2. The nature or magnitude of the harm and the employer's defense or justification determines whether a violation will be found:
 - a. Where the harm to employee rights is slight and the Employer offers justification based on operational necessity, the competing interests are balanced.
 - b. Where the harm is inherently destructive of employee rights, the Employer's conduct will be excused only if occasioned by circumstances beyond the employer's control and no alternative course of action was available.

NOTE: Unlike discrimination cases, charging parties do not have to prove anti-union animus or discriminatory motive to demonstrate interference violation: Unlawful intent is not a required element in the *prima facie* case.

¹⁵⁹ Specifically, CALIFORNIA GOVERNMENT CODE section 3543.5 provides in relevant part:

It is unlawful for a public school employer 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

¹⁶⁰ *Carlsbad Unified Sch. Dist.* (1979) PERB Dec. No. 89 [3 PERC ¶ 1003]; *Novato Unified Sch. Dist.* (1982) PERB Dec. No. 210 [6 PERC ¶ 13114]; *Coast Community College Dist.* (1982) PERB Dec. No. 251 [6 PERC ¶ 13237],