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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C18-K-113

-and-

DONALD THOMAS II,
An Individual-Charging Party.
_____/

APPEARANCES:

Lauri D. Washington, Director of Employee and Labor Relations, for the Public Employer

Donald Thomas II appearing on his own behalf

DECISION AND ORDER

On June 13, 2019, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by any of the parties.

[1] MOAHR Hearing Docket No. 18-021841

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: AUG 05 2019

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULE
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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Docket No. 18-021841-MERC

-and-

DONALD THOMAS II,
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Appearances:

Lauri D. Washington, Director of Employee and Labor Relations, for the Public Employer

Donald Thomas II appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF
ADMINISTRATIVE LAW JUDGE ON
MOTION FOR SUMMARY DISPOSITION

On November 21, 2018, Donald Thomas II (Charging Party), filed the above captioned unfair labor practice charge against his former employer Wayne State University (Respondent or Employer). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party's filing challenges the circumstances surrounding his May 21, 2018, termination. An evidentiary hearing was initially scheduled for January 10, 2019. On January 2, 2019, Respondent filed a motion for summary disposition claiming that Charging Party failed to state a claim under PERA upon which relief could be granted.

Upon agreement of the parties, the January 10, 2019, hearing was adjourned without date and Charging Party was directed to file a response to the Employer's motion; Charging Party's response was timely filed on January 29, 2019.

Based on facts set out in Charging Party's initial charge, Respondent's motion and supporting documents, and Charging Party's response to Respondent's motion as set forth below, I make the following conclusions of law and recommended order.

Background:

The following factual background is derived from the parties' pleadings and not in dispute.

Charging Party, a Groundskeeper, had first been terminated by the Employer on February 29, 2016, for "Failure to Fulfill Mandatory Employment Requirements." Charging Party, through his bargaining representative, AFSCME AFL-CIO Local 1497 (Union), filed a grievance challenging his termination. The grievance was set to proceed to arbitration. The Employer and Union agreed to settle the grievance prior to the arbitration. That settlement, attached to Respondent's motion, provided the following bullet-pointed provisions in the relevant part:

- The Grievant was terminated at the close of business on February 29, 2016 for Failure to Fulfill Mandatory Employment Requirements. Upon the signing of this agreement, the termination will be converted to an authorized unpaid leave of absence and the discipline will be purged from the personnel file.

- The Grievant shall receive one year of back pay in the amount of $32,405.75 minus appropriate deductions and taxes.

- The Grievant shall return to work on Monday, May 7, 2018. He shall report to the Grounds Building at 7:00 a.m.

- The Grievant shall have no break in seniority, his illness bank will be reinstated to the balance at the time of termination and his vacation will begin to accrue at the appropriate rate.

On May 7, 2018, Charging Party returned to work. Partway through his workday, Charging Party was instructed to attend an orientation because he had not worked since February of 2016. Charging Party attended the orientation. There is a factual dispute within the pleadings as to whether Charging Party returned to work following the orientation. The initial charge and response to the motion appear to indicate that Charging Party returned to work after the orientation while the Employer claims he did not report back to work. This factual dispute is immaterial for purposes of considering Respondent's motion.

Regardless of whether Charging Party returned to work following the orientation on May 7, 2018, both parties readily agree that Charging Party did not report to work on May 8, 2018, and instead called in sick. Charging Party continued to call in sick from May 8, 2018, through May 21, 2018.

On May 15, 2018, Human Resources Representative Jennifer Bidlingmaier, attempted to contact Charging Party by telephone to inform him that he would need to attend a "return to work examination" the following day, May 16, 2018, at 2:30 p.m. Charging Party did not answer and Bidlingmaier left a voicemail indicating that a letter directing him to report for the examination was being sent to him. According to the Employer, and unrefuted by the Charging Party, the letter was sent overnight and was delivered in the morning on May 16, 2018. The

letter sent to Charging Party, in addition to providing him the time and place of the examination, also stated in the relevant part:

> As you may already know per AFSCME Local 1497, Article 18(D), a physical examination appointment is required prior to returning to your former Groundskeeper position.
>
> * * *
>
> This is a mandatory appointment and you must satisfactorily complete this physical examination in order to return to work. If you fail to appear for this mandatory physical examination, your employment with Wayne State University will be terminated Effective May 16, 2018.

Respondent's motion claims that the contract contains a clause that requires employees who have "been of work more than twenty (20) days" to submit to the examination. Neither Respondent's motion, nor any other pleading filed by either party, contained a copy of the collective bargaining agreement between the Employer and the Union. The preceding notwithstanding, Charging Party's response to the motion does appear to admit that Article 18 of the contract does cover employees who have been absent either ten (10) or twenty (20) days and that a subsection thereof states, "that an employee [m]ay be required to satisfactorily complete a physical examination."

Charging Party did not attend the examination but did leave a voicemail for Bidlingmaier that same day after the examination's scheduled time. According to the Employer, and again unrefuted by the Charging Party, Charging Party's voicemail message purportedly indicated that Charging Party had received the letter but did not attend the examination because he did not have a ride.

Despite the letter stating that the Employer would terminate Charging Party should he not attend the examination on May 16, 2018, the Employer did not immediately terminate. Instead, on May 17, 2018, Bidlingmaier called Charging Party again to notify him that the examination had been rescheduled to May 21, 2018, at 9:30 a.m., and that a letter indicating the same would be sent to him. The Employer claims, and unrefuted by Charging Party, that the letter, similar to the first letter inclusive of the threat of termination, was sent to Charging Party by overnight mail and delivered on May 18, 2018. Neither Respondent's motion nor Charging Party's response to said motion, indicates whether Bidlingmaier's attempt to reach Charging Party on May 17, 2018, was successful or whether she left the information as a voicemail again. Charging Party did not appear at the examination at the scheduled time on May 21, 2018, and there is no claim that he made any attempt to contact the Employer to inform them he would not be attending.

On May 21, 2018, Charging Party was sent a letter terminating his employment with Respondent. That letter stated in the relevant portion the following:

> On Wednesday, May 16, 2018 a letter was delivered to you stating that you were required to report to a mandatory physical examination appointment at the

> University Health Center. After failing to report to the mandatory appointment you stated that due to the short notice you did not have transportation to attend the appointment. The appointment was rescheduled and on Friday May 18, 2018 another letter was delivered to you stating you were required to report to the University Health Center on Monday, May 21, 2018 at 9:30 a.m. for a mandatory physical examination appointment.
>
> In addition to the letters that were delivered, multiple attempts were made to reach you by phone; including several voicemail messages regarding the mandatory appointments.
>
> As a result of failing to report to the mandatory physical examination appointments that were scheduled for Wednesday, May 16, 2018 and rescheduled for Monday, May 21, 2018, your employment with Wayne State University is terminated effective May 21, 2018 due to job abandonment.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically, Rule 151(2)(c), of the Commission's General Rules, 2002 AACS; 2014 MR 24, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged therein, and the sections of LMA or PERA alleged to have been violated.

Rule 165 of the Commission's General Rules, states that the Commission or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge does not state a claim upon which relief can be granted under PERA. See, *Oakland County and Sheriff*, 20 MPER 63 (2007); aff'd *282* Mich App 266 (2009); aff'd 483 Mich 1133 (2009); *MAPE v MERC*, 153 Mich App 536, 549 (1986), lv den 428 Mich 856 (1987),

Section 10(1)(a) of PERA prohibits public employers from engaging in "unfair" actions that seek to interfere with an employee's free exercise of the specific rights contained in Section 9 of the Act. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Section 10(1)(c) of the Act makes it unlawful for a public employer to discriminate against a public employee in retaliation for engaging in protected activity. The preceding notwithstanding, PERA does not prohibit all types of discrimination or unfair treatment. *Detroit Pub Sch*, 22 MPER 16 (2009). Absent a valid claim under PERA, the Commission lacks jurisdiction to address the fairness of an employer's actions. *Id.*

In order to establish a prima facie case of discrimination under the Act, a charging party must show, in addition to an adverse employment action: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Interurban Transit Partnership*, 31 MPER 10 (2017). The aforementioned analysis was first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line*, Inc, 251 NLRB 1083 (1980), enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp*, 462 US 393 (1983). Under the *Wright Line* test, later adopted under PERA in *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983), it is only after a prima facie case has been established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74.

Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor*, 28 MPER 42 (2014). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Moreover, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation).

In the present matter, Charging Party's initial pleading claims that the Respondent's "decision to terminate him was a form of reprisal against him for his successful grievance." Charging Party also identifies two individuals that he claims were not required to undergo an examination despite both also being absent from work for quite some time.[1] According to the unfair labor practice charge, Charging Party argues that, as of May 16, 2018, he had only missed five (5) days of work and that "five days of absence for illness is so far outside the realm of possibility to warrant the [U]niversity's decision to instruct [Charging Party] to attend an [examination] appointment." In the response to Respondent's motion, Charging Party, in summarizing his position, wrote:

> [Respondent] grew tired annoyed when they learned that the Charging who had been just been reinstated on May 7, 2018 was absent from work on May 8, 2018.

[1] With respect to these other individuals, Charging Party intimates that race also played a role in the University's decision to refer him to the examination. However, allegations of racial discrimination, similar to discrimination based on sex, gender, age, etc., are not actionable under PERA and instead must proceed under other state and federal statutes. Moreover, there is no allegation that either individual identified by Charging Party had been returned to work pursuant to a grievance settlement.

> Instead of affording the Charging Party the right to progress through the progressive discipline process as per the Collective Bargaining [Agreement], they harassed him by setting an unreasonable Fitness for Duty medical exam **after** he performed his job on May 7, 2018. [emphasis in original].

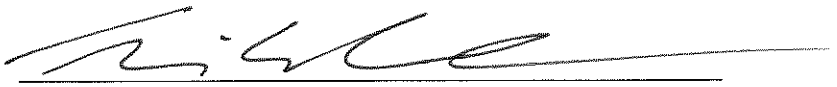
Charging Party's belief as it relates to contract clause purportedly relied upon by Respondent to justify its actions is clearly misplaced and is grounded, incorrectly, on the idea that the absence referenced by the Respondent in sending him to the examination were the absences he was accruing after being reinstated. Respondent's pleadings and letters sent to Charging Party notifying him of their requirement that he appear for the examination, in the opinion of the undersigned, clearly indicate that the examination requirement is predicated on the fact that he had been away from work for more than two years while his grievance remained pending. Moreover, Charging Party's claim that the Employer's action was a result of his "successful grievance" is only supported by the close proximity of time between his return to work and the actions that led to his termination. However, as stated above temporal proximity alone is not sufficient to establish a Section 10(1)(c) violation. Additionally, consideration of the circumstances surrounding Charging Party's return to work in light of his later termination lessens any significance one could place on the temporal relationship. Accepting Charging Party's position would require the undersigned to conclude that the impetus for the termination lies within an agreement that the Employer had just struck with the Union to return Charging Party to work – an agreement that the Employer had voluntarily entered into that would pay Charging Party a large sum of money. Such a premise is illogical and, absent some other fact showing animus or other unlawful motive, one that cannot be reconciled with what occurred.

Charging Party's filings fail to plead with any specificity facts that, if proven true, could establish a claim under PERA for which relief could be granted. As such I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules \

Dated: June 13, 2019