STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAKLAND UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C15 I-115
-and- Hearing Docket No. 15-050939

KEANDRES S. DYSON,
An Individual Charging Party.
_____/

APPEARANCES:

Ogletree, Deakins, Nash, Smoak & Stewart, PLLC, by Thomas A. Cattel, for Respondent

Law Office of Frank W. Jackson, III, PLLC, by Frank W. Jackson, III for Charging Party

DECISION AND ORDER

On March 2, 2016, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order 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 charge 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 either of the parties.

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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 12, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

OAKLAND UNIVERSITY,
Respondent-Public Employer,

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Docket No. 15-050939-MERC

-and-

KEANDRES S. DYSON,
Individual Charging Party.
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APPEARANCES:

Ogletree, Deakins, Nash, Smoak & Stewart, PLLC, by Thomas A. Cattel, for the Respondent-Public Employer

Law Office of Frank W. Jackson, III, PLLC, by Frank W. Jackson, III for the Charging Party

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

On September 1, 2015, Keandres S. Dyson ("Charging Party") filed the present unfair labor practice charge against her former employer, Oakland University ("Employer" or "Respondent"). 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 Travis Calderwood, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

The Unfair Labor Practice Charge and Procedural History:

Charging Party's September 1, 2015, charge against the Employer alleges that she was continuously harassed by her supervisor because of her race and was terminated in retaliation for her filing of a grievance in which she complained of the harassment. On October 7, 2015, Respondent filed its answer responding to the charge.

An evidentiary hearing was held in Detroit on February 5, 2016. At the onset of the hearing, the Employer argued that the charge as filed did not state a claim under PERA upon which relief could be granted, because Charging Party had not alleged any facts that could show she was engaged in protected or concerted activity. The Employer further indicated that at the conclusion of the Charging Party's offer of proof, it intended on moving for summary dismissal.

Following several hours of testimony, in which Charging Party called numerous witnesses, including both Charging Party's direct supervisor as well as the University's Labor and Employee Relations Manager, Charging Party rested. Respondent immediately moved for dismissal on the grounds that Charging Party had failed to establish a prima facie case of unlawful discrimination under PERA and, even if such a case had been made, evidence had been provided during Charging Party's proffer or proof that the Employer had sufficient and legitimate, non-discriminatory reasons for terminating Charging Party. After considering the extensive arguments made by the representatives for each party on the record regarding Respondent's motion, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165(1). See also *Detroit Pub Sch*, 22 MPER 19 (2009) and *Oakland Co and Oakland Co Sheriff v Oakland Co Deputy Sheriffs Ass' n*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party failed to state a claim under PERA for which relief could be granted against the Respondent. I informed the parties that following the receipt of the transcript, I would issue a written decision and recommended order. That decision and recommended order is as follows.

Findings of Fact:

On April 1, 2015, Charging Party began working for the Respondent in the position of Office Assistant II with the School of Health Sciences. In that position Dyson was a probationary employee and a member of the bargaining unit represented by the Oakland University Professional Support Association ("Union").

The Respondent and Union are parties to an agreement effective from July 1, 2014, through June 30, 2017. Article IX, Paragraph 58 of that agreement, entitled Probationary Employees, states:

> The University may discharge probationary employees for such cause an in such manner as it, in its sole and absolute discretion, deems appropriate and in the best interest of the University. Such discharge shall not be subject to the grievance procedures of this Agreement.

Article VIII, entitled Grievance Procedure defines the term "grievance" as:

> [A] complaint by an employee, by a group of employees or by the Association on its own behalf about the application, interpretation or violation of the provisions of this Agreement. No grievance may be presented more than thirty (30) working days following the date of the occurrence, or the date when the employee is notified of the occurrence on which the grievance is based.

Paragraph 39 of that Article requires that all "formal grievances" be submitted on a grievance form provided as an appendices to the contract.

Charging Party's direct supervisor was Michelle Southward, the University's Director of Academic Advising for the School of Health Sciences. Approximately two months into Charging Party's employment, Southward completed a performance evaluation for Charging Party. That evaluation lists three separate performance areas, Interpersonal Skills, Job Effectiveness and Dependability. On that evaluation, Southward rated Charging Party as "Successful" for Interpersonal Skills and as "Needs Improvement" for the other two areas. Both Southward and Dyson acknowledged at the hearing that there were attendance issues during the beginning of Charging Party's employment.

On or around July 2, 2015, Southward met with Kay Armstrong, the University's Labor and Employee Relations Manager regarding concerns the former had over Charging Party's job performance. Southward testified that during that meeting she indicated to Armstrong that Charging Party was not performing satisfactorily and that she wished to terminate her employment. After being advised by Armstrong to give Charging Party more time in which to improve, Southward testified that she spoke with Charging Party, prior to the July 4th holiday weekend, and told her that she might not make it through her probationary period but that she, Southward, would work with her to improve her chances. While Southward testified confidently and with conviction to these facts, Charging Party either denied or did not recall any such conversation with Southward.

On July 6, 2015, Charging Party sent Southward an email informing the supervisor that she would be attending a Union luncheon on July 16, 2015. The luncheon was scheduled to last one hour. According to both Southward and Dyson, Southward had directed Dyson to keep the supervisor informed of such luncheons. Both agreed that Southward gave this directive shortly after Dyson began working for the University and after she had returned from a Union luncheon early on in her employment. Southward claimed the impetus for the directive was because when Charging Party had attended that first luncheon she had not requested additional time off to allow for travel to and from the meeting. No allegation was made that Southward either denied Dyson travel time for the July 16, 2015, luncheon or had questioned Dyson as to what was discussed there.

According to Dyson, on July 9, 2015, she complained of harassment by Southward to her Union representative, Linda Hubarth.[1] Hubarth testified that she gave advice to Dyson that included keeping close communication with her supervisor, doing everything that needed to be done, following up by e-mail, and making sure she arrived to work on time. Hubarth claims that Dyson approached her a second time regarding the alleged harassment on July 15, 2015. After that second meeting Hubarth communicated Dyson's complaint and harassment concerns to the Union President, Geoff Johnson. Hubarth asked Johnson to bring the harassment complaint to the attention of the University's Human Resources Department.

On July 15, 2015, Johnson, along with the Union's Vice President, met with Armstrong to discuss any number of routine issues of concern between the University and the Union. Both Armstrong and Johnson agreed that it was Armstrong who first steered their discussion to the topic of Dyson. Armstrong informed Johnson that the University was considering terminating Dyson's employment.

[1] Hubarth testified that Charging Party first approached her regarding the alleged harassment on July 6, 2015.

Johnson testified that following this, he communicated Dyson's complaints against Southward to Armstrong. Johnson could not, however, recall what he said regarding Dyson's complaint, other than it was discussed. Armstrong did not recall that Johnson had made any mention of Dyson's complaints against Southward at any time during the July 15, 2015, meeting. Southward testified that she was never made aware of Dyson's complaints against her until after Dyson had been terminated.

On July 17, 2015, Dyson once again approached Hubarth alleging harassment. Both Dyson and Hubarth used the term "filing a grievance" when describing this meeting, however no written grievance was prepared on behalf of Dyson until sometime after her termination.

At the end of July, 2015, Southward completed a second performance evaluation for Dyson in which Charging Party was rated as "Needs Improvement" in the three separate performance areas, Interpersonal Skills, Job Effectiveness and Dependability. Southward met with Dyson to discuss the evaluation and also inform her that she was being terminated effective August 2, 2015.

Discussion and Conclusions of Law:

The Commission administers and enforces PERA. Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. "Lawful concerted activities for mutual aid and protection" includes complaining with other employees about working conditions and taking other kinds of actions with other employees to protest or change working conditions. Section 10(1) of PERA prohibits a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against its employees because they have engaged in, or refused to engage in, union activities or other concerted protected activities.

In order to establish a prima facie case of unlawful discrimination under PERA resulting in an adverse employment action, a charging party must allege: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006). If the charging party has alleged that the employer's unlawful discrimination is motivated by anti-union animus, that party bears the burden of demonstrating that protected conduct was a motivating or substantial factor in the employer' s decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). Only after a charging party establishes a prima facie case of unlawful discrimination does the burden shift to the respondent to demonstrate with credible evidence that the same action would have taken place even in the absence of the protected conduct. *Michigan Educational Support Personnel Ass'n v. Evart Public Schools*, 125 Mich. App. 71, 74 (1983).

Despite being provided ample opportunity throughout the hearing in which to do so, Charging Party has failed to allege any facts that, if proven true, could state a claim under PERA against Respondent. Most notably, other than attending Union luncheons, Charging Party has not established that she was engaged in protected or concerted activity of which her employer was aware.[2] Despite Dyson's claims that she made several complaints regarding the alleged harassment to her Union, it is my finding that the testimony of Southward and Armstrong establishes that at no point in the time leading up to Dyson's termination had either been made aware of said complaints. Additionally, while Dyson originally alleged in her charge that she was terminated for filing a grievance in which she complained of Southward's harassment of her because of race, the record is devoid of any such grievance being filed until after she was terminated.

Ignoring the above noted failure, Charging Party's allegations of anti-union animus are, at best, merely conclusory statements of a PERA violation, not supported by factual allegations. Such statements, absent something more, cannot sustain an unfair labor practice charge. See *Detroit Pub Sch*, 25 MPER 83 (2012). With respect to the Union luncheon, it is the opinion of the undersigned that Southward's request that she be notified of when Dyson would attend a Union luncheon, when considered in light of the record established, is not evidence of anti-union animus.

Accordingly, for the reasons set forth above, it is the conclusion of the undersigned that Charging Party failed to establish a prima facie case that her termination was a result of unlawful discrimination. As such, I recommend that the Commission issue the order as set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by Keandres S. Dyson against Oakland University is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 2, 2016

[2] Charging Party did testify at the hearing that Southward had disapproved of Dyson's friendly relationship with a co-worker, however she did not allege any facts that could establish that the two co-workers' relationship was the sort of concerted activity protected under Section 9 of PERA.