



**STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD**

UNITED FACULTY OF THE NORTH  
ORANGE COUNTY COMMUNITY COLLEGE  
DISTRICT, CCA/CTA/NEA,

Charging Party,

v.

NORTH ORANGE COUNTY COMMUNITY  
COLLEGE DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-6708-E

PROPOSED DECISION  
(November 9, 2023)

Appearances: California Teachers Association, by Stephanie J. Joseph, Staff Counsel, for United Faculty of the North Orange County Community College District, CCA/CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo, by Paul Z. McGlocklin and John W. Dietrich, Attorneys, for the North Orange County Community College District.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In this case, an exclusive representative alleges that a public school employer violated the Employer Employee Relations Act<sup>1</sup> (EERA) by retaliating against and/or interfering with employee rights of an employee by one of its agents filing a discrimination complaint, initiating/conducting a workplace investigation, issuing an overbroad noncontact letter; determining that the employee's speech violated the public school employer code of ethics, and threatening to discipline the employee.

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<sup>1</sup> The EERA is codified at Government Code section 3540 et seq. Public Employment Relations Board Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The public school employer denies any violation of EERA.

### PROCEDURAL HISTORY

On April 5, 2022, the United Faculty of the North Orange County Community College District (United Faculty) filed an unfair practice charge (charge) against the North Orange County Community College District (District) with the Public Employment Relations Board (PERB or Board).

On June 28, 2022, the PERB Office of the General Counsel (OGC), issued a complaint which alleged that the District retaliated against Mohammad Abdel Haq (Abdel Haq) and interfered with his protected activities in violation of EERA section 3543.5, subdivisions (a) and (b), by: in November 2021, “acting through its agent Vice Chancellor of Human Resources and Lead Negotiator Jose Ramon Núñez (Núñez)” filing a discrimination complaint against Abdel Haq; on November 30, 2021, the Director for Diversity and Compliance Arturo Ocampo (Ocampo) initiating a workplace investigation against Abdel Haq. In addition, the complaint alleged that on November 30, 2021, the District interfered with employee rights in violation of EERA section 3543.5, subdivisions (a) and (b), by Ocampo issuing Abdel Haq a written directive that he was “not to discuss the matter with students or other employees, except that you may contact your representative regarding the investigation if you so choose.”

On July 18, 2022, the District filed its answer to the complaint where it denied any violation of EERA and asserted multiple affirmative defenses.

On August 4, 2022, the parties attended an informal settlement conference, but the matter was not resolved.

On October 11, 2022, the Administrative Law Judge (ALJ) conducted a prehearing videoconference with the parties.

On October 24, 2022, United Faculty filed a Motion to Amend the Complaint to add additional allegation(s) against the District. Specifically, United Faculty alleged that the District retaliated against Abdel Haq and interfered with his employee rights and therefore violated EERA section 3543.5, subdivisions (a) and (b), around June 2022, when Vice Chancellor of Human Resources Irma Ramos (Ramos) determined that Abdel Haq's protected speech violated the District's code of ethics and threatened to discipline him.

On November 1, 2022, the ALJ conducted a prehearing videoconference where the District stated that it did not object to the proposed amendments of the complaint, but requested additional time to prepare for the hearing.

On November 2, 2022, the ALJ issued an amended complaint and granted the District's request for additional time to prepare for the hearing.

On November 22, 2022, the District filed its answer to the amended complaint denying any violation of EERA and asserting multiple affirmative defenses.

Formal hearing was conducted via videoconference on November 7, and 8, and December 5 and 6, 2022, and January 17, 2023. Post-hearing briefs were filed on March 17, 2023, and the matter was then submitted for proposed decision.

## FINDINGS OF FACT

### Parties, Jurisdiction and Witnesses

United Faculty is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e). For all times pertinent, Christie Diep (Diep) was the

President and Abdel Haq was the Lead Negotiator of United Faculty. Both are employees within the meaning of EERA section 3540.1, subdivision (j).

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). The parties therefore fall within the jurisdiction of PERB.

United Faculty called three witnesses: Abdel Haq, Diep and Aline Gregorio (Gregorio). In addition to being Lead Negotiator for United Faculty, Abdel Haq is also a tenured, full-time faculty member teaching sociology at the District's Fullerton College.<sup>2</sup> Abdel Haq has been the Lead Negotiator since 2019. Diep, in addition to serving as United Faculty President, is also a full-time tenured faculty member of the English department at Cypress College. Gregorio is a full-time, tenured faculty member teaching geography at Fullerton College. For at least the year during and preceding the events at issue, Gregorio represented the Academic Senate on the Fullerton College president's advisory council, and she attended Academic Senate meetings in that capacity.

The District called four witnesses. Julie Kossick (Kossick), Nunez, Ocampo, and Ramos. Kossick is the Associate Vice Chancellor of Human Resources. Kossick reports directly to Ramos. Núñez is the Vice President of Instruction of Fullerton College. Núñez has served on the District's bargaining team for negotiations with United Faculty since 2015, and participated as the only District administrator from Fullerton College during the negotiations at issue here in 2021. Ocampo served as

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<sup>2</sup> In addition to Fullerton College, the District also includes two additional campuses: Cypress College and North Orange County Continuing Education.

Director for Diversity and Compliance for six years until he left the District's employment on September 29, 2022. He reported directly to Ramos during his employment. Ocampo's division was responsible for investigating discrimination complaints, like the one at issue in this case. Ramos is the Vice Chancellor of Human Resources and serves as the District's Lead Negotiator.

#### Abdel Haq's Union Advocacy, Negotiations, and Other Events in 2021

This case centers around a discrimination complaint that was filed in November 2021 by Núñez against Abel Haq, in which Núñez complained chiefly about Abdel Haq's speech during an October 29, 2021 bargaining session, but also included, as examples of Abdel Haq's alleged pervasive discriminatory behavior, comments Abdel Haq had made in May 2021 at two meetings of the Academic Senate, a pre-grievance meeting on October 22, 2021, and at a Town Hall meeting on October 28, 2021. Before discussing Núñez's discrimination complaint and the incidents raised therein, it is useful to discuss the previous relationship between Abdel Haq and District administrators against the backdrop of events occurring in 2021.

##### A. Abdel Haq's Union Advocacy, Professional Background and Negotiations History

Since 2019, when Abdel Haq was selected as United Faculty's Lead Negotiator, negotiations between United Faculty and the District have been tense. The parties have twice reached an impasse in negotiations. In 2020, Abdel Haq initiated a vote of no confidence by United Faculty members against Ramos for her alleged bad faith bargaining. Abdel Haq led negotiations resulting in the bargaining unit receiving full dependent healthcare coverage and a significant pay increase. Abdel Haq is known

for speaking out regarding working conditions during public meetings and for almost always wearing his United Faculty red T-shirt. Diep described him as “the face of the union.” Ocampo testified regarding Abdel Haq that “he has a—a history of being difficult. Of being in your face, as they say.” Ocampo admitted to being aware that Ramos was frustrated with dealing with Abdel Haq during negotiations because she complained to Ocampo that Abdel Haq would “yell at you” and “accuse you of things.”

Abdel Haq is noted on the Fullerton College website as being an expert speaker on the topics of “race and racism”, “toxic masculinity”, and “gentrification.” He has a master’s degree in sociology. Abdel Haq testified without contradiction that the District has encouraged faculty to read a book entitled, “White Fragility”, by Robin DiAngelo. Abdel Haq summarized the definition of the concept of white fragility as the avoidance of discussion about topics of race because they make people uncomfortable. Abdel Haq described “toxic masculinity” as:

“[A] term that we use quite often in sociology, as a matter of fact. One misunderstanding about it is when we hear the term ‘toxic masculinity’, a lot of people mistakenly think, or could think, that masculinity is toxic. That’s, of course, not what it means. What it means is that there are certain sets of traits that sometimes we socialize young men with these traits. And these traits can include things like stubbornness or refusal to change one’s position, even when new evidence is introduced, which is associated with stubbornness. And given that -- the fact that stubbornness is one of the traits associated with the term toxic masculinity, that’s where it stems from. Another point of it, of course, is ignoring the needs of or having blind spots in regards to the needs of women or those that are not men, that don’t identify as men. That’s another component of what we would call toxic masculinity.”

Kossick acknowledged that the District has encouraged conversations about “difficult topics”, including the concepts of “white fragility”, “male ego”, and “toxic masculinity.” Kossick described the term “toxic masculinity as “making decisions and taking actions based upon the male experience to the exclusion of others’ experience.” Similarly, Kossick described “male ego” as “the male vantage point in decision making.” Kossick admitted that there are no District policies prohibiting the use of these phrases.

In the 2021-2022 academic year, United Faculty and the District were negotiating over both a successor collective bargaining agreement (CBA) and a Memorandum of Understanding (MOU) regarding issues related to the COVID-19 pandemic. Abdel Haq, Diep, Ramos, and Núñez participated in these negotiations. As noted previously, Núñez was the only District administrator from Fullerton College at the bargaining table.

B. Viral Video Incident at Cypress College

During the Spring semester of 2021, a video of a Cypress College adjunct professor’s class exercise requiring students to debate the professor on a selected topic went viral on the internet and also received online and television media coverage both domestically and internationally. The student in the leaked video took a pro-police stance and the professor—who, according to Abdel Haq and Diep, identified as queer, and who was a Muslim female—took the opposite, anti-police position in the debate.

After the public spectacle, bargaining unit employees started receiving threatening and/or harassing phone calls and voice and e-mail messages, especially

targeting female faculty and faculty of color. Abdel Haq was the recipient of at least one threatening voice-mail message. The District's Facebook page was also littered with hate speech about women, Muslims, Arabs, and members of the LGBTQ+ community. Cypress College was shut down at one point due to a threat of gun violence on the campus.

C. Foreign Language Department Grievance and the United Faculty's General Concerns over the Return to In-Person Classes

The COVID-19 pandemic was ongoing in the fall of 2021, when Fullerton College administrators announced an intent to return to predominantly in-person classes for the Spring semester. United Faculty was concerned that female faculty would be disproportionately impacted by that decision. Abdel Haq explained why in his testimony:

“[O]ne of the things that has been brought to our attention, including from unit members like Professor Lina Callahan, is basically the disproportionate impact on our colleagues that are women when it comes to the decision to bring faculty back on campus. It is an unfortunate reality -- and as a sociologist, of course, I know that this is true, backed up by academic research, that a lot of household work still falls on our colleagues that are women in terms of childcare, in terms of other responsibilities that are still disproportionately relegated to women. So the impact of a decision to bring faculty back to campus can very reasonably have a disproportionate impact on our colleagues that are women, when you compare that to the impact on our colleagues that are men.”

United Faculty's leadership was also concerned that the District was not consulting with them over the schedule of in-person classes as required under the parties' CBA. Bargaining unit members in the foreign languages department came to



the United Faculty with their concerns, and the United Faculty then filed two grievances over the District's plan to return to in-person classes.

### Núñez's Discrimination Complaint

As noted previously, on or about November 17, 2021, Núñez filed a letter with Ocampo that was treated by the District as a formal discrimination complaint against Abdel Haq.<sup>3</sup> Through the discrimination complaint, Núñez asked the District to “[s]top Mr. Mohammed Abdel Haq from using discriminatory, hostile, offensive, unprofessional, untrue, and uncivil language towards me.” Núñez testified that he filed the discrimination complaint because the bargaining session on October 29, 2021, was the first time that Abdel Haq had addressed comments “[o]nly to me, and I thought okay, this is enough . . . I’m not going to permit this anymore, and I want the District to stop it.” Núñez testified that he pursued the discrimination complaint “with the hope that Professor Abdel Haq would not continue discriminating against anybody else in the District using these types of expressions.”

Although Núñez's discrimination complaint primarily focused on Abdel Haq's speech during a bargaining session on October 29, 2021, he also recounted several other incidents occurring in 2021 as evidence of Abdel Haq's alleged “repetitive and pervasive” behavior towards Núñez. Each of the incidents discussed in the discrimination complaint are described individually below, including Núñez's statements about them in the discrimination complaint itself, followed by relevant testimony and other evidence.

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<sup>3</sup> The District's policies and procedures for investigating discrimination complaints are discussed *post*, in the next section of the proposed decision.

A. May 6, 2021 Academic Senate Meeting

Academic Senate meetings are public meetings that provide a time and place for faculty to meet with District administration. Abdel Haq is the United Faculty representative on the Fullerton College Academic Senate. The May 6, 2021 meeting of that body was held online and video recorded and the recording was received in evidence. Abdel Haq spoke during the public comment portion of the meeting regarding the District's response to the viral video incident at Cypress College. Núñez and Gregorio were also in attendance.

Núñez alleged in the discrimination complaint about the Academic Senate meeting on May 6 that:

“[P]rofessor Abdel Haq stated that the silence from the Fullerton College Administration regarding a Cypress College case was because the [Fullerton College] Executive Team, in which I serve as Vice President, were all males, and therefore did not care about a queer, female, Muslim professor.”

Núñez confirmed in his testimony that he believed Abel Haq's comments were discriminatory against him and other male members of the executive team because they had been accused of remaining silent, and through that silence having disregarded the wellbeing of a female faculty member, because they were male. Núñez testified that Abdel Haq was speaking that day with a raised voice.

Abdel Haq testified about the nature of his comments on May 6 as follows:

“I spoke about concerns relevant to faculty safety. I spoke about the disproportionate impact of the viral video on minoritized faculty, mainly faculty that are women and faculty of color. I spoke about the inaction of administration and that they've just been silent about this at Fullerton College and trying to distance themselves from this issue,

as opposed to making public statements that are meant to protect and support faculty and support and protect their safety.”

Gregorio testified that Abdel Haq’s comments were “in line with the nature of the comments that everyone delivered that day.” The official minutes of the meeting also reflect comments by various faculty, including a written statement on behalf of the Academic Senate, criticizing the inaction of the administration and failure to protect faculty from vitriolic attacks.

The video recording of the meeting confirms that Abdel Haq criticized that District administration had not responded to the United Faculty’s reports of faculty being harassed, especially persons with names that suggested Middle Eastern ethnicity, and criticized the fact that the District had hired a media consultant who had advised the District to ignore the situation. Abdel Haq criticized then-President of Fullerton College, Dr. Schultz, for failing to speak up and defend “the most vulnerable faculty,” including adjunct faculty and faculty of color. Abdel Haq stated, “[a]nd even Dr. Schultz, who is very well liked and who is well known for being a nice guy, needs to be called out on his failure, along with the three VPIs [Vice Presidents of Instruction] men that failed to speak up.”

B. May 20, 2021 Academic Senate Meeting

Abdel Haq, Diep, Gregorio, and Núñez attended the Fullerton College Academic Senate meeting on May 20, 2021. No recording of this meeting was introduced into evidence. Núñez alleged the following about this meeting in the discrimination complaint:

“[M]r. Abdel Haq repeated the same statement that the Fullerton College Executive Administration stayed silent on

the case of dismissive male behavior against a queer, female, Muslim professor from Cypress because they were male.”

Gregorio testified that Abdel Haq’s comments on May 20 were “in the same thread” of his comments on May 6, and that she did not view them as offensive or as a personal attack on anyone. Abdel Haq reviewed the minutes of the meeting during his testimony and confirmed that the comment attributed to him was accurate. The minutes stated that Abdel Haq, “expressed his frustration with Dr. Schulz remaining silent regarding recent events at Cypress College.”

C. October 22, 2021 Meeting over Scheduling in the Foreign Languages Department

A meeting was held on October 22, 2021, to discuss concerns of United Faculty and of employees in the foreign languages department over Fullerton College’s planned return to predominantly in-person classes for the upcoming Spring semester. United Faculty filed a grievance over this issue that same day. Núñez attended the meeting at the request of Dan Willoughby (Willoughby), the Dean of the Foreign Languages Department. Willoughby, Núñez, and Abdel Haq attended the meeting, along with Lina Callahan, a faculty unit member in the foreign languages department who took notes of the meeting. Abdel Haq confirmed the accuracy of his statements captured in the notes.

Núñez alleged in the discrimination complaint regarding this meeting that Abdel Haq made the following statement regarding Willoughby:

“[T]he refusal [of Willoughby] to adjust [his] decision [to require certain foreign language department faculty to return for two in-person classes] might be rooted in toxic masculinity, rather than data and evidence.”

Núñez testified that he included this incident involving Abdel Haq’s comment about Willoughby in the discrimination complaint to show the pervasiveness of Abdel Haq’s discriminatory speech, because he believed that showing the conduct to be pervasive was one of the requirements to prove a “clear case” of discrimination.

Abdel Haq explained that in this meeting, United Faculty was discussing with Fullerton College administrators the results of a student survey indicating that most students preferred to remain in remote learning, and trying to understand why the administrators were then pushing for a return to predominantly in-person classes. Abdel Haq stated in the meeting that the administrators were making decisions without supporting those decisions with data. Abdel Haq explained that when he used the term “toxic masculinity,” he was not referring to any particular individual, but to the collective action of the administrators who are predominately male. In explaining what his goal was in using the phrase “toxic masculinity”, Abdel Haq stated:

“Because the terms ‘toxic masculinity’ are academic terms. They are literally not just in published research, so you can find them in the titles of articles of published academic research. And working in an academic institution, it seems very appropriate to use academic terms to describe what is happening.”

D. October 28, 2021 Town Hall Meeting

The District convened a Town Hall meeting on October 28, 2021, to discuss a vaccine mandate for employees. The meeting was held online and video recorded. Abdel Haq, Gregorio, Kossick, and Núñez attended.

In the discrimination complaint, Núñez alleged regarding this meeting that Abdel Haq’s behavior had become “repetitive and pervasive” toward Núñez. Núñez

stated that during the Town Hall meeting, Abdel Haq “[a]ccused Interim President [Gil] Contreras, Interim Chancellor [Fred] Williams, and the Executive Administration team of Fullerton College, on which I serve as Vice President, of making the Spring 2022 scheduling decisions based on our toxic masculinity.” Núñez testified that Abdel Haq’s demeanor was “[a]gitated, loud, speaking fast, quickly.”

Kossick described Abdel Haq’s comments as “discriminatory” and stated:

“He made a claim that the administrators were unconcerned with women of color and faculty of unrepresented groups and the decisions they made were based on their toxic masculinity and male egos.”

Kossick described Abdel Haq’s demeanor as “[a]ccusatory, aggressive, loud, and hostile.”

The video recording of the Town Hall meeting confirms that, regarding the planned return to in-person instruction, Abdel Haq criticized the decision-making by managers that Abdel Haq alleged are “[d]isproportionally men” and that are enforced on a faculty population that is “majority women”, who are largely “[s]till sadly responsible for household work . . . and chores and childcare, and they are being told they need to be back on campus during a global pandemic.” As an example of why the faculty should not trust the District’s leadership and their decision-making process, Abdel Haq noted that in November 2020, before vaccines were available, that “[y]ou yourself Dr. Contreras, and the Chancellor, Chancellor Williams . . . and VP Garcia were golfing at a country club without masks, without social distancing.” Abdel Haq questioned whether leadership was taking the pandemic seriously by taking such actions. While Abdel Haq used the phrase “male ego” to describe management’s decision-making, the video recording does not confirm his use of the phrase “toxic

masculinity.” The video recording also does not confirm any reference to the Fullerton College Executive Administration team.

E. October 29, 2021 Bargaining Session

The bargaining session on October 29, 2021, was held virtually. Abdel Haq attended in his capacity as United Faculty Lead Negotiator, accompanied by Diep and other members of the United Faculty’s bargaining team. Ramos was present as Lead Negotiator for the District, accompanied by Núñez and Kossick as members of the District’s bargaining team. Kossick took notes of the session. Abdel Haq confirmed that while the notes may not have captured every word, the statements attributed to him were mostly accurate except for a statement about racism.<sup>4</sup>

Núñez alleged in the discrimination complaint regarding the bargaining session as follows:

“During the meeting, Professor Mohammed Abdel Haq became visibly agitated and used a loud and accusatory voice and claimed that I used what he considered to be my sex, sexual orientation, and gender identification to publicly discredit my work related to the development of the Fullerton College Spring 2022 Schedule of Classes. He said that I made scheduling decisions because of my ‘male tendencies’ which, according to him, disregarded the needs of female faculty in general, and those who are mothers of small children in particular.

“I immediately objected to this comment. I stated that he did not have the right to talk about what he considered to be my sex, sexual orientation, or gender identification because they were protected categories against

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<sup>4</sup> The notes state that Abdel Haq said “now you call me a racist!” As discussed below, Abdel Haq and Diep assert instead that Abdel Haq said words to the effect of: if he brought up “white fragility,” would you accuse me of racism?

discrimination and harassment. He responded that he was entitled to make those comments due to the fact that he was a trained sociologist and that my objection to his statement only showed my 'white fragility.' He then added, "Are you going to now accuse me of racism?"

Núñez testified that Abdel Haq's comments were "[d]irected against me, not against the executive team of the college. I was the only person in that meeting [from Fullerton College] in the negotiations[.]" Núñez described Abdel Haq's demeanor as "[a]gitated, loud, speaking fast."

Kossick remembered Abdel Haq using the phrase "toxic masculinity", when asked to whom that phrase was directed, she testified:

"He was directing the comment at -- it would have to be Jose Ramone [*sic*] because down further in my notes, there's a note that says FC[.] So he was referring to the decisions made at Fullerton College[.]

"Q I believe you testified earlier that the only administrator present at Fullerton College at that session was Dr. Núñez, correct?

"A Yes."

Kossick described Abdel Haq's demeanor as "[v]ery upset" because of "[t]he tone of his voice when he responded and the tenseness of his face when he responded. He was visibly upset." Kossick said she was "shocked and disappointed" by Abdel Haq's "discriminatory" statements about Núñez.

Ramos answered "Yes" when asked during her testimony whether, at some point in the negotiation session, Abdel Haq began speaking directly to Núñez. She did not explain what gave her that impression, however. Ramos testified that Abdel Haq was "[r]aising his voice" during his comments.



Abdel Haq testified that his comments about management decisions based on male ego and/or toxic masculinity were “[r]eferencing the culture and decision-making process, rather than Núñez himself, directly . . . it was the culture at large, and him being part of that culture that makes decisions, that ignores data, that ignores the needs and the disproportionate impact on your unit members that are women.”

When asked to describe Núñez’s reaction at the bargaining table to his comments, Abdel Haq testified:

“Dr. Núñez responded. He got very angry, and he started yelling at me. And I was honestly taken aback by his reaction because he was yelling at me, and he said, I am not going to stand by someone questioning my sexuality. And I was very confused by that, because I didn't say anything about his sexuality. And my response to him was, I'm confused, why would you, you know, think I said anything about your sexuality; I didn't say anything about your sexuality. I said, I was just referencing a culture of toxic masculinity.

“And then I continued -- and I said, if I spoke about white privilege or white fragility, would you accuse me of being racist, but -- and I'm assuming that's what the remainder of the notes are stating, which is, now you call me racist, which is not really what I said, it's -- what I said was, if I spoke about white privilege or white fragility, would you accuse me of being racist, to basically highlight that just because I spoke about toxic masculinity, the culture of toxic masculinity, this is not an attack on you. This is not about you; this is not about Jose Ramone [sic] Núñez. This is about the concerns that have been raised about the issues we've been dealing with for a long time now at Fullerton College.”

Diep testified that Abdel Haq was speaking passionately during the bargaining session, but was not shouting, cursing, or threatening anyone. Diep’s testimony about

Núñez's reaction to Abdel Haq's comments was consistent with Abdel Haq's account.

Diep stated:

“Jose Ramone [*sic*] Núñez said that -- he said I will not stand for you questioning my sexuality, and Mohammad said and I said you're not -- your sexuality is not being questioned. He -- he said I'm not questioning your sexuality, and he said, I won't stand for this. And then Mohammad said, well, if I say white privilege or white fragility, would you think I'm a racist?”

Diep further testified that after this exchange during bargaining between Abdel Haq and Núñez, she stated, echoing Abdel Haq's comments, that United Faculty had received safety concerns from female faculty at Fullerton College about male administrators at Fullerton College not collaborating in their decision making about the return to in-person instruction. Kossick then acknowledged that administrators had received a similar complaint.

#### The District's Policies and Procedures for Investigating Discrimination Complaints

The District's Administrative Procedure (AP) 3410 mandates the process for the District's investigation of complaints of unlawful discrimination and sexual harassment under legal requirements contained in California Code of Regulations, Title 5, section 59300 et seq. (Title 5).

AP 3410, Section 3.1, designates Ramos, as the Vice Chancellor of Human Resources, to be the District officer ultimately responsible for investigating discrimination claims. Sections 3.2 and 9.3 allow for the use of outside investigators. Section 6.0 provides procedures for informal resolution of complaints. Under section 6.4, once a formal, written complaint is filed, informal resolution efforts may continue, but the filing of a written complaint triggers a compulsory investigation under

Title 5. That investigation “must be completed” unless the matter is informally resolved and the complainant dismisses the complaint or the complainant files with the Department of Fair Employment and Housing and the State Chancellor elects not to require further investigation pursuant to Title 5, section 59328(f)(2). Section 7.1.1 requires formal complaints to be filed on a form prescribed by the State Chancellor, but section 7.1.2 provides that if a written complaint is presented by letter, the District may request that the complainant execute the form or the District may “[a]ttach the letter to the form and open a formal investigation.” Even without the use of a form, the merits of a procedurally defective complaint “[m]ay still be valid and must be addressed.”

AP 3410, sections 7.2 and 7.2.1, describe the threshold requirements prior to investigation of a formal, written complaint. An investigation of alleged unlawful discrimination “[w]ill be initiated” by filing a complaint “[b]y one who alleges that he or she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity as a faculty member or administrator.” Section 7.3.2 requires that any complaint alleging discrimination in employment shall be filed within 180 days of the date the alleged unlawful discrimination occurred, with an exception to extend that period by no more than 90 days if the complainant first learned of the facts of the alleged violation after the expiration of the 180 days.

AP 3410, section 9.1 requires the District to conduct an impartial fact-finding investigation upon receipt of a complaint filed within the parameters of Title 5, section 59328 and to notify the State Chancellor that it is doing so. The results of the

investigation must be in writing and include: a description of the circumstances giving rise to the complaint; a summary of the testimony of each witness, including the complainant and any viable witness identified by the complainant in the complaint; an analysis of relevant data or other evidence collected during the investigation; a specific finding whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and any other information deemed appropriate by the District. Section 9.2 states that “involved persons (including complainant(s), accused person(s), witness(es) shall be interviewed, and relevant documents collected and reviewed, as applicable.” Section 11.2 requires the District to complete its investigation within 90 days of receiving a formal complaint and section 14.0 outlines processes for the District to follow to request extensions of time to complete its investigation with the State Chancellor’s office. The complainant is entitled to object to the State Chancellor to such extension requests. Section 11.3 requires that if the District has completed an investigation of formal complaint against an employee of the District, a written notice of the District’s administrative determination regarding the complaint be provided to the employee.

All District witnesses confirmed that, in order to comply with Title 5, the District does not have discretion whether to conduct an investigation when it receives a formal discrimination complaint. An investigation is compulsory. Ocampo confirmed that the investigator should talk to corroborating witnesses and witnesses who may have seen or heard what occurred, and should review all relevant documents, communications, and videos of the alleged conduct. Ocampo described the investigation process and substantiating the allegations in a complaint:

“[Y]ou’re looking first . . . to corroborate facts. And once you’re done with that, then someone has to do a legal analysis and say do these facts constitute a violation of the policy . . . [u]ltimately, it’s up to the vice chancellor of HR to decide whether or not something violated a policy. But I do—in my analysis, I do provide my thoughts on it.”

Ramos testified that when she receives an investigative report from outside investigators, she reviews it for completeness and to ascertain whether relevant witnesses were interviewed.

None of the District witnesses claimed to have any experience with a discrimination complaint that involved protected union speech, but all acknowledged that whether speech is protected should be considered in an investigation. Ramos testified that she did not remember ever reviewing a discrimination complaint involving protected union speech. Kossick testified that she had not been an investigator where someone claimed protected speech. Ocampo responded as follows to a question of whether in a discrimination investigation he would analyze whether certain speech might be protected union speech:

“I haven’t, in the six years I’d been there, had to deal with that particular issue. But obviously -- oh, yeah, and that was the other issue raised in this -- in this investigation -- was the -- the speech, whether it was protected activity or not. So if that, you know, was -- in this case, if it’s raised, then you have to look at it. But again, you have to conduct an investigation to know what the facts are and what the context is.”

#### The District’s Investigation of Núñez’s Discrimination Complaint

Ocampo, in his capacity as Director for Diversity and Compliance, received Núñez’s letter claiming unlawful discrimination by Abdel Haq on or around

November 17, 2021. Ocampo reviewed the letter and determined that it stated a prima facie case of discrimination and thus required an investigation. Ramos testified that she reviewed the discrimination complaint with Ocampo and determined the timeliness of the allegations and that it alleged discrimination. Because of his workload, Ocampo requested that the investigation be “farmed out” to an outside investigator and Núñez approved this request. Patricia Weaver (Weaver) of the law firm Currier and Hudson was selected as the investigator. The only information provided by the District to Weaver was Núñez’s letter.

On or about November 30, 2021, the District sent letters to Núñez and Abdel Haq notifying them of the receipt of the discrimination complaint and that Weaver had been assigned to investigate. Abdel Haq’s letter from the District stated:

“This investigation is being conducted confidentially, in order to protect the rights of all concerned, and in the interests of a sound investigation process. You are therefore directed to maintain the confidentiality of the investigation, and not to discuss the matter with students or other employees, except that you may contact your representative regarding the investigation if you so choose. You are allowed to have representation during the investigatory interview.”

The District’s winter recess lasted from December 13, 2021 until January 19, 2022. Ocampo testified that anytime a discrimination complaint came in around the Thanksgiving holiday, as in this case, the likelihood of completing it within 90 days was very low because of upcoming final exams and grading periods followed by the winter break. On January 14, 2022, the District notified Abdel Haq and Núñez

that it would be invoking an extension of time to complete the investigation.<sup>5</sup> The notice stated that the extension of time was necessary “[d]ue to a need to interview a party or witness who has been unavailable.” Ocampo testified that the person who had been unavailable was Abdel Haq, and that his office had been unsuccessfully trying to schedule an interview appointment with Abdel Haq. The new deadline to complete the investigation was March 30, 2022.

On February 10, 2022, counsel representing United Faculty sent a letter to Ocampo objecting that the confidentiality directive issued to Abdel Haq in the District’s letter of November 30, 2021, interfered with Abdel Haq’s protected activity and requesting that it be rescinded. Ramos referred the United Faculty’s letter to the District’s counsel.

On February 18, 2022, counsel for the District wrote via e-mail to United Faculty’s counsel stating that the District was reviewing the points raised by United Faculty and would respond by the following week and put off scheduling Abdel Haq’s interview until then. On February 28, 2022, District counsel sent a letter to United Faculty counsel acknowledging that the original confidentiality directive issued to Abdel Haq could have been construed more broadly than the District intended. The letter stated, “[t]he District will provide the following, more tailored, directive that is intended to mitigate the specific manner or type of communication that will interfere with the investigative process:”

“While Mr. [Abdel] Haq is not precluded from speaking with other employees about this matter in the context of

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<sup>5</sup> The District was allowed to grant itself one extension of time. More than one extension of time required the approval of the State Chancellor’s office.

protected activity, he is directed not to interfere with the investigative process by engaging in harassing or intimidating conduct or by attempting to influence the substance of what witnesses share with the investigator (e.g., through the use of leading questions, debate about the facts, or similar strategies that have the purpose or effect of coaching or influencing witnesses as to what they should say).”<sup>[6]</sup>

On March 9, 2022, the District sought another extension of time by notifying the State Chancellor’s office that it needed more time to complete the investigation due to the unavailability of a party or witness. Ocampo again testified that it was Abdel Haq’s interview that still had not been able to be scheduled. On March 22, 2022, the State Chancellor granted the extension until May 13, 2022.

On April 15, 2022, the District informed the State Chancellor’s office that it had failed to notify Abdel Haq of his right to file an objection to the recent extension request due to the District failing to update its local policies to match recently amended State regulations requiring such notice. On April 20, 2022, Abdel Haq sent a letter objecting to the extension alleging that the District failed to notify him of his right to object in bad faith. On May 5, 2022, the State Chancellor’s office notified Abdel Haq and the District that it had considered Abdel Haq’s objection, but upheld its grant of the extension, finding good cause existed as Abdel Haq had not been interviewed. On May 11, 2022, Abdel Haq was interviewed by Weaver. That same

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<sup>6</sup> On March 29, 2022, the District sent a revised notice of complaint and updated confidentiality directive to Abdel Haq, which was identical in substance to the above-quoted language in the District’s February 28, 2022 letter.



day, the District requested and was ultimately granted a final extension until June 11, 2022.

Charging Party's Exhibit 20 lists the witnesses who were interviewed, and the dates of those interviews, as follows: Núñez (December 14, 2021); Willoughby (January 12, 2022); Kossick (February 11, 2022); Fred Williams (February 25, 2022); Gil Contreras (March 1, 2022); Professor Hornell, Chair of the Foreign Languages Department (March 2, 2022); Jodi Balma Faculty Member, Political Science (March 8, 2022); Kim Orlijan (April 6, 2022); Rod Garcia (April 7, 2022); and Abel Haq (May 11, 2022).

When Ramos was confronted during cross-examination to explain why her name did not appear on the list of witnesses, Ramos at first testified that she was not interviewed. Shortly thereafter, she vacillated over whether she had, in fact, been interviewed, but stated that she could not remember because the District deals with "so many complaints."<sup>7</sup> Later, Ramos was shown the investigative findings and statements regarding her that were allegedly made by Abdel Haq, namely, that Abdel Haq had accused Ramos of white fragility and/or sexism in the past. When asked if she did not tell the investigator about that, who did, she answered, that she "would have" discussed the incident during bargaining on October 29, 2021, with the investigator. When pressed by the ALJ to only testify to what she remembered saying, not what she "would have" said, Ramos admitted to telling the investigator that Abdel Haq had accused her of white fragility.

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<sup>7</sup> Ocampo testified that there was an average of 30 discrimination complaints per year.

## Findings of the Investigation

On June 10, 2022, The District issued a document entitled “Notice of Investigative Findings and Administrative Determination” (Findings and Determination) to Abdel Haq. It was signed by Ramos. In addition to having interviewed the witnesses identified in the previous section, the Findings and Determination noted that the investigator had “reviewed relevant documents.” Findings of fact were made about each of five incidents previously discussed. Regarding the meeting of the Academic Senate on May 6, 2021, it was noted that “[n]o one recalls exactly what Abdel Haq said,” implying that the video recording of that meeting was not reviewed by the investigator.

In section C, the “Legal Analysis of the Complainant’s Allegations”, the ultimate conclusion was that Abdel Haq’s statements at issue did not rise to the level unlawful discrimination because they were not shown to be pervasive toward Núñez (noting that only one comment was actually directed at Núñez), nor were they shown to be because of Núñez’s gender or perceived race. Nonetheless, it was concluded that Abdel Haq “created a negative work environment” for Núñez and other employees:

“Núñez and other administrators reasonably found Abdel Haq’s comments to be highly offensive and unprofessional. His comments were a personal attack on Núñez’s and other administrators’ character and were serious in nature. The evidence demonstrated a pattern on Abdel Haq’s part of indiscriminately making allegations against Núñez and other administrators in an attempt to undermine their credibility in public settings. The majority of witnesses also described Abdel Haq’s attitude as hostile and his behavior aggressive and unprofessional. The evidence also shows that on some occasions Abdel Haq made

accusations based on false facts in order to support his position.”<sup>[8]</sup>

It was also concluded that “[t]he Investigator was not presented with any objective evidence to suggest that the investigation was initiated to retaliate against Abdel Haq for engaging in a protected activity (if any) or to restrict Abdel Haq’s academic freedom, free speech and advocacy rights.” It is noted that the Findings and Determination does not address or analyze whether Abdel Haq was engaged in protected union activity during any or all of the incidents alleged in the discrimination complaint.

The section of the document entitled, “Administrative Determination,” includes this statement:

“[T]he Investigator’s findings support a determination that Abdel Haq’s pattern of accusations as to the (perceived) causes or sources of decision about which he disagrees are inconsistent with Administrative Procedure 3050 Institutional Code of Ethics, which states at Section 5.2, ‘Employees of the District are expected to treat other members of the District and members of the public with courtesy, honesty, professionalism, and civility.’ Accordingly, this matter is under review for appropriate corrective action.”

Ramos testified that it was the investigator, not her, who determined that Abdel Haq’s speech violated AP 3050. Ramos reviewed the investigator’s report and did not find any deficiencies in the investigation. When asked whether she made any

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<sup>8</sup> The Findings and Determination alleged that Abdel Haq frequently misstated the ratio between male and female faculty and male and female administrators, asserting that the “data shows” exactly 12 male and 12 female administrators at Fullerton College, and roughly equal numbers of male and female full-time faculty.

effort to determine whether Núñez's complaint had been based on union animus, she said no. When asked why not, she answered, "Because it's not." Ramos confirmed that if corrective action is taken against Abdel Haq, it will be her decision to do so. When asked why her decision on taking action had yet to be made, she said one of the reasons was summer break, and another was a concern about interfering with union activity. Later, she testified that she was waiting to make a decision over whether to take corrective action against Abdel Haq, not necessarily based the outcome of the unfair practice hearing, but because of the timing of it. Ramos would not confirm that the conclusions in the Findings and Determination would not be used against Abdel Haq in the future.

#### Credibility Determination

There are material factual disputes surrounding Abdel Haq's speech and conduct during the events alleged in the discrimination complaint that must be resolved.

In evaluating the credibility of the testimony of witnesses, the ALJ may rely on observational factors, such as, demeanor, manner, and attitude, and non-observational factors, including those specified in Evidence Code section 780.

*(Palo Verde Unified School District (2013) PERB Decision No. 2337, p. 28*

*(Palo Verde).*) Non-observational credibility factors in Evidence Code section 780

include: the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testifies; the existence or non-existence of any fact testified to by the witness; the existence or nonexistence of the witness's bias, interest, or other motive; and a statement made by the witness that is

inconsistent with any part of the witness's testimony at the hearing.

In general, Núñez's, Kossick's, and Ramos's accounts of Abdel Haq's speech and behavior during the events at issue were not as credible as Abdel Haq's own accounts, which were confirmed by Gregorio and/or Ramos (depending on attendance at the event), and which were further bolstered by review of the video recordings of the May 6, 2021 Academic Senate meeting and the October 28, 2021 Town Hall meeting. For example, Nunez stated that on May 6, 2021, Abdel Haq's comments were discriminatory against him and other members of the executive team because Abdel Haq accused them of not speaking out to defend the female adjunct professor involved in the viral video *because* they are men. Núñez also testified that Abdel Haq was speaking loudly. None of this was confirmed by review of the recording. Abdel Haq was not speaking more loudly than other speakers. And while he criticized Dr. Schultz for remaining silent on the issue and noted that the "three VPIs [Vice Presidents of Instruction] men . . . failed to speak up", he did not make any further statement that they did not speak up specifically because they are men. This shows that Núñez exaggerated this allegation.

Similarly, regarding the October 28, 2021 Town Hall meeting, Núñez alleged in the discrimination complaint that Abdel Haq stated that Contreras, Williams, and the "Executive Administration team" of Fullerton College made scheduling decisions for Spring 2022 based on "toxic masculinity," and these comments by Abdel Haq showed "repetitive and pervasive" discriminatory conduct towards Núñez. Núñez's testimony affirmed these contentions. Kossick testified that Abdel Haq stated that administrators were "unconcerned" about female faculty and that administrators' decisions were

based on “toxic masculinity” and “male ego.” She described these comments as “discriminatory.” She described Abdel Haq’s demeanor as “accusatory, aggressive, loud, and hostile.” Review of the video recording again did not confirm these assertions.

First, Abdel Haq did not refer to the Fullerton College executive team, nor did he say anything about “toxic masculinity.” Thus, Núñez’s claims regarding Abdel Haq’s statements were exaggerated. It is difficult to discern how these comments could be interpreted as repetitive and pervasive toward Núñez as he alleged. Abdel Haq also did not assert that administrators were unconcerned about female faculty, as asserted by Kossick, but complained that managers who are “disproportionally men” were making decisions that were enforced on a faculty population that was “majority women,” and who were largely “[s]till sadly responsible for household work . . . and chores and childcare.” And while Abdel Haq did mention “male ego” as a driver of administrators’ decisions, Kossick, like Núñez, incorrectly attributed comments about “toxic masculinity” to Abdel Haq. Kossick describing Abdel Haq’s comments as “discriminatory” is also at odds with the District’s Findings and Determination. Kossick’s description of Abdel Haq’s demeanor was also exaggerated. While he may have been talking a bit more loudly than he did on May 6, 2021, and some of the content of his speech was uncomplimentary to Contreras and Williams, Abdel Haq’s demeanor cannot be objectively described as aggressive or hostile.

Ramos provided inconsistent testimony about her being interviewed as a witness in the investigation. This, coupled with Ocampo’s testimony about her being

frustrated by Abdel Haq by her interactions with him in negotiations may possibly demonstrate bias against Abdel Haq.

Since there was exaggeration by the District's witnesses over two of the five events alleged in the discrimination complaint and potential bias, this calls into question the rest of their testimony about the events at issue. For these reasons, the testimony of United Faculty's witnesses is credited over the District's witnesses where there are material factual disputes regarding his speech and conduct at issue.

Accordingly, it is found that during the Academic Senate meetings on May 6 and 21, 2021, Abdel Haq did not say that administrators were remaining silent because they are male. On October 22, 2021, at the pre-grievance meeting, Abdel Haq did not direct his comment about toxic masculinity toward Willoughby in particular, but was referring to the collective action of administrators. On October 28, 2021, Abdel Haq's comments at the Town Hall meeting did not involve Núñez or the Fullerton College executive administration team. During the bargaining session on October 29, 2021, Abdel Haq did not direct his comments toward Núñez in particular, rather his criticisms were directed toward administrators' collective decision-making. Abdel Haq did not use the term "male tendencies", mention sexual orientation, or accuse Núñez of showing "white fragility."

## ISSUES

- 1) Did the District, acting through Núñez,<sup>9</sup> retaliate against Abdel Haq because of his protected activity and interfere with protected rights by filing a discrimination complaint against Abdel Haq?
- 2) Did the District retaliate against Abdel Haq because of his protected activity and interfere with protected rights by initiating and conducting a workplace investigation over the discrimination complaint?
- 3) Did the District, acting through Ramos, retaliate against Abdel Haq for his protected activity and interfere with protected rights by concluding that Abdel Haq's protected speech and activity violated the District's code of ethics and by threatening to discipline Abdel Haq?
- 4) Did the District interfere with protected rights by issuing Abdel Haq a written directive not to discuss the workplace investigation with other employees except his representative?

## CONCLUSIONS OF LAW

### Retaliation/Discrimination and Derivative Interference Claims

Except for cases involving alleged facial discrimination, PERB considers a charging party's discrimination or retaliation claim under the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and its

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<sup>9</sup> The original and amended complaint incorrectly identify Nunez as the Vice Chancellor of Human Resources rather than the Vice President of Instruction of Fullerton College. A Board agent may "disregard any error or defect in the complaint that does not substantially affect the rights of the parties." (*City of Montebello* (2016) PERB Decision No. 2491-M.) This typographical error does not substantially affect the rights of the District and is therefore disregarded.



progeny. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 12, fn. 6.) Under the *Novato* framework, the charging party’s prima facie case requires each of the following four elements: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action “because of” the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 26; *City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.)

If a prima facie case is established, and the evidence also reveals a non-discriminatory reason for the employer’s decision, the respondent may prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*City and County of San Francisco, supra*, PERB Decision No. 2712-M, p. 15.) In such “mixed motive” or “dual motive” cases, the question becomes whether the adverse action would not have occurred “but for” the protected activity. (*Id.* at p. 16.)

A. Prima Facie Case

1. Abdel Haq’s Protected Activity

The PERB complaint alleges that Abdel Haq engaged in EERA-protected activity by holding the offices of Lead Negotiator and Union Representative for the Fullerton College Academic Senate, and from May 2021 through October 2021, raising concerns to management regarding: (a) workplace safety for female faculty

and faculty belonging to racial and ethnic minorities; (b) the disproportionately negative impact on the female-majority faculty if the District decided to return to in-person learning; (c) the workplace gender distribution reflecting a majority male management and a majority female faculty; and that “male ego” may be driving the District’s decision to return to in-person learning. The District does not dispute that Abdel Haq’s leadership role in United Faculty is protected activity. The District argues that Abdel Haq’s speech during the events at issue lost the protection of the statute because it was offensive enough to cause Núñez to file a “facially valid” discrimination complaint.

EERA section 3543, subdivision (a), protects employees’ right to form, join, and participate in employee organization activities on matters concerning employer-employee relations. Holding union office is protected activity (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 27-29), as is serving as a member of the union’s bargaining team. (*Healdsburg Union High School District* (1997) PERB Decision No. 1185-E, p. 47.)

EERA protects employee speech if it is “related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations.” (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586-E, p. 15 (*Chula Vista*), quoting *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12 (*Rancho Santiago*)). An individual employee’s criticism of management or working conditions is protected activity when its purpose is to advance other employees’ interests or when it is a

logical extension of group activity. (*Chula Vista, supra*, at p. 15, citing *Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 16.)

Abdel Haq's speech in this case was closely related to matters of legitimate concern to employees, including the topics of employee safety, equity, and the return to in-person work during the COVID-19 pandemic. Because Abdel Haq's speech addressed "matters of legitimate concern to the employees as employees" (*Rancho Santiago, supra*, PERB Decision No. 602, p. 12), its content generally falls under the protection of EERA section 3543, subdivision (a).

There is a high bar for otherwise protected speech to lose its statutory shield due to its content or the manner in which it was delivered. The Board recently summarized the circumstances under which otherwise protected activity retains or loses its statutory protection:

"Because labor and employment disputes tend to engender ill feelings and strong responses, the parties are afforded wide latitude to engage in 'uninhibited, robust, and wide-open debate' during those disputes. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 23.) Public employees' right to engage in concerted activities therefore permits them some leeway for 'impulsive' and 'intemperate' behavior, including moments of 'animal exuberance.' (*Ibid.*) Thus, employee conduct and speech related to a labor and employment dispute is protected unless it is so 'opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice' as to substantially disrupt or materially interfere with employer operations. (*Rancho Santiago* [,*supra*,] PERB Decision No. 602, p. 13[.]

"The *Rancho Santiago* standard encompasses two different tests. (*Chula Vista* [,*supra*,] PERB Decision No. 2586, p. 19, fn. 9.) The first test, which applies when an employer or union claims that an employee has leveled a false criticism, is largely content-based: the speech only loses

protection if it was maliciously false.<sup>[10]</sup> (*Ibid.*) The second test is conduct-based and analyzes whether the employee engaged in face-to-face communications with a manager or supervisor in a manner that substantially disrupts operations. (*Ibid.*) This fact-intensive inquiry generally considers, at least: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. (*Mount San Jacinto Community College District* (2018) PERB Decision No. 2605, p. 11 (*San Jacinto*).)"

(*Carpinteria Unified School District* (2021) PERB Decision No. 2797, pp. 13-14 (*Carpinteria*).)

*Rancho Santiago* provides a salient example of uncomplimentary and exaggerated speech retaining the protection of EERA. In that case, a faculty member wrote a series of scurrilous newsletters touching on common employment concerns including the status of negotiations. In describing actions of management regarding what she perceived as attempts at stifling academic freedom and free speech, as well as contract violations, she compared management to "Nazis"; accused management in being involved in the attempted murder of a teacher; called male management "vindictive sadists" and "male supremacists"; and accused management of having "student spies" reporting on teachers' conduct. (*Rancho Santiago, supra*, PERB

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<sup>10</sup> *Chula Vista* described the maliciously false standard as: "speech related to matters of legitimate concern to employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations is protected unless the speech (1) is demonstrably false and (2) the employee knew the speech was false or acted with reckless disregard for whether it was false." (*Chula Vista, supra*, PERB Decision No. 2586-E, pp. 18-19.)

Decision No. 602-E, pp. 6-7, 10.) The Board found that, in spite of the complaints by her fellow faculty regarding the derogatory nature of the newsletters, the employee's writings were related to matters of legitimate concern to employees as employees, and thus retained statutory protection, stating,

“[T]he underlying events were widely known at the college and are explained in graphic detail in the articles, enabling the reader to make his/her own judgment. Indeed, the sophisticated audience of college instructors and administrators is quite capable of drawing its own judgments about both the articles and events.”

(*Id.* at pp. 13-14.)

In contrast, in *Pittsburg Unified School District* (1978) PERB Decision No. 47, an employee's written communication that, among other accusations, stated that a union representative witnessed a deputy superintendent “engaged in intercourse with more than one woman concurrently” was found to be unprotected because the communicator knew this allegation to be false, as shown by his attempted defense that the word “intercourse” could also mean conversation. (*Id.* at pp. 7-8.) More recently, the Board found an employee's e-mail to a television news organization in which he called his former supervisor a “sexual predator” to be unprotected because it “was made with reckless disregard for the truth.” (*Anaheim Union High School District* (2015) PERB Decision No. 2434, adopting proposed decision, p. 81.)

Here, Abdel Haq's speech retains statutory protection under both the content-based and conduct-based tests from *Rancho Santiago* and its progeny.

a. Content-Based Test

It cannot be shown that Abdel Haq's speech was demonstrably false or that he acted with reckless disregard for whether it was false. As an initial point, Abdel Haq's various comments regarding "toxic masculinity" and "male ego" were his opinions rather than factual statements that are capable of being proven or disproven. The statements were not announced as fact, but offered as supposition in light of his contention about student survey results not aligning with administrators' goal to return to a certain level of in-person instruction.

Moreover, like the circumstances in *Rancho Santiago*, Abdel Haq spoke about widely known events to a sophisticated audience of college faculty and administrators, who were more than capable of drawing their own conclusions to agree or disagree with Abel Haq about a culture of "toxic masculinity" and/or "male ego" driving the decision-making processes at Fullerton College in particular or the District in general. For example, Diep provided unrefuted testimony that the Kossick admitted during the bargaining session on October 29, 2021, that the District had received a safety concern from female faculty that male administrators were not collaborating about the planned return to in-person instruction. This highlights that Abdel Haq was not speaking in a vacuum, and that his audience was free to draw its own conclusions about the content of his speech.

To the extent that Abdel Haq's comments over "toxic masculinity" and "male ego" were viewed or can be viewed subjectively as purely derogatory, rather than through the sociological lens intended by Abdel Haq, even derogatory and uncomplimentary speech that is not maliciously false retains its protection, as long it is

related to legitimate concerns of employees. (*Rancho Santiago, supra*, PERB Decision No. 602, pp. 13-14; *Carpinteria, supra*, PERB Decision No. 2797, pp. 15-17.) Not only are the topics of employee safety, equity, and the return to in-person instruction logically related to matters of legitimate concern to employees, records of the official meetings of the Academic Senate, video recordings entered in evidence, and witness testimony show that employees were concerned over these issues at the time Abdel Haq was speaking on behalf of United Faculty. Since Abdel Haq's speech cannot be shown to be maliciously false, and it was entirely related to legitimate concerns of employees, it retains protection under the content-based test.

b. Conduct-Based Test

Because each of the meetings at issue were live events, conducted through web-based conferencing platforms, they all were the functional equivalent of in-person meetings. It is therefore appropriate to consider whether the place, subject, or manner of Abdel Haq's speech substantially disrupted District operations in order to lose statutory protection. (*Chula Vista, supra*, PERB Decision No. 2586, p. 19, fn. 9.) With respect to the Academic Senate meetings, Abdel Haq appropriately used the public comment portions to express his and the United Faculty's concerns over the perceived silence of District administrators over the viral video incident and their inaction over safety threats to faculty by members of the public. While Abdel Haq's speech was uncomplimentary, especially to the Fullerton College president, it mirrored the sentiment expressed in a written statement entered into the minutes of the meeting by the faculty senate. The video recording of the May 6, 2021 meeting did not demonstrate that Abdel Haq's delivery of his message was loud or otherwise

disruptive of the proceedings. The meeting continued after he spoke. All witnesses confirmed that his statements at the May 21, 2021 meeting were substantially similar to the ones on May 6.

With respect to the pre-grievance meeting on October 22, 2021, regarding scheduling in the foreign languages department, there was no evidence that Abdel Haq was loud, disrespectful, or that he otherwise disrupted the meeting. His comments also may have been in part motivated by the District allegedly failing to follow the parties' contract regarding scheduling.

Regarding the Town Hall meeting on October 28, 2021, Abdel Haq again appropriately utilized the public comment portion of the meeting to criticize administrators' actions with respect to returning to in-person instruction. While his speech was uncomplimentary to Contreras and Williams, all administrators had the opportunity and did respond to Abdel Haq's statements. Abdel Haq also apologized for interrupting their comments and they were able to continue responding. While Abdel Haq was speaking firmly and with conviction, he was not inappropriately loud or disruptive. The meeting continued after his comments.

Regarding the bargaining session on October 29, 2021, the bargaining table is necessarily a forum for robust debate and possibly tense interactions. As discussed above in the section addressing witness credibility, there is no credible evidence that Abdel Haq's comments were delivered in a manner that was different from his manner in earlier events. Although Núñez was personally and subjectively offended, there is no objective evidence that Abdel Haq was targeting Núñez personally, but rather he was criticizing the culture of management as a whole. The fact that Núñez suspended



the bargaining session after his exchange with Abdel Haq does not, under these circumstances, demonstrate that Abdel Haq's behavior was substantially disruptive.

After considering all of the evidence, Abdel Haq's conduct did not substantially disrupt District operations. Thus, Abdel Haq's speech did not lose protection under the conduct-based test.

The District's argument that Abdel Haq's speech should lose the protection of EERA because it caused Núñez to file a facially valid discrimination complaint is rejected as inconsistent with the authorities discussed herein. Abdel Haq's speech in each of the instances alleged in Núñez's discrimination complaint was protected by EERA.

## 2. Decision-maker's Knowledge

Charging party's prima facie burden includes showing that the employer, specifically, the decision-maker taking adverse action against the employee, had knowledge of the protected activity. (*City and County of San Francisco* (2011) PERB Decision No. 2206-M, adopting dismissal letter, p. 4.) Here, Ramos was the ultimate decision-maker in two of the alleged adverse actions, i.e., the initiation of the investigation and the threat of corrective action for violating the District's code of ethics, and Núñez was the decision-maker over the alleged adverse action of filing the

discrimination complaint.<sup>11</sup> It is clear that both Ramos and Núñez were aware of Abdel Haq's advocacy for United Faculty and his protected speech.<sup>12</sup>

### 3. Adverse Actions

PERB uses an objective test to determine whether an employer's action is adverse. (*City of San Diego, supra*, PERB Decision No. 2747-M, p. 27.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Ibid*; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

#### a. Filing the Discrimination Complaint

Pursuing a written complaint against an employee has been found to be an adverse action by the Board. (*California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, p. 12 (*CAUSE-Coelho*)). In that case, a union's attorney

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<sup>11</sup> Nunez credibly testified that he did not consult with any other managers over his decision to file the discrimination complaint, implying that it should be considered a personal employment decision which is divorced from his management role as an agent of the District. However, an employer's high-ranking officials, particularly those whose duties include employee or labor relations or collective bargaining matters, are generally presumed to speak and act on behalf of the employer such that their words and conduct may be imputed to the employer in unfair practice cases. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 23, *affirmed*, 5 Cal.5th 898 (2018).) Since Nunez belongs to the Fullerton College executive administration team and is a member of the District's bargain team, his words and conduct may be imputed to the District.

<sup>12</sup> Although Ramos was not present at some of the events where Abdel Haq made protected comments, she was nevertheless aware of those comments because she testified to reviewing and discussing Nunez's letter with Ocampo before the investigation was initiated.

filed a written complaint against a safety officer employed by the state's department of fish and game because of a heated verbal altercation that occurred between the employee and the union's attorney over a private lawsuit. The union alleged that the employee potentially represented a threat to the safety of the union's staff members. The employer's investigation consisted of formal interviews and a lengthy written report, but the charges were not sustained against the employee. The Board found that such action by the union was adverse to the employee, because:

“[A] reasonable person [would] be concerned about the potential adverse effect of the complaint and ensuing investigation on his employment relationship. The fact that the complaint and investigation did not result in action being taken against Coelho by his employer does not eliminate the adverse nature of CAUSE's conduct.”

*(Ibid.)*

Likewise, here, a reasonable person in Abdel Haq's position would be rightfully concerned about the potential adverse effect the discrimination complaint and investigation could have on continued employment, as he was informed that he had to submit to a formal interview and that he was entitled to have representation in the process. A reasonable conclusion from these facts would be that disciplinary action was possible or even likely. The adverse nature of Núñez having pursued the discrimination complaint is not eliminated by the fact that the District did not find unlawful discrimination by Abdel Haq. The District concluded that Abdel Haq had violated District policies and created a hostile working environment. This would not have occurred but for Núñez's pursuit of a formal complaint against Abdel Haq.

Therefore, the adverse action element of the *Novato* test is satisfied as to the filing of the discrimination complaint.

b. Initiating and Conducting the Investigation

An employer's investigation into alleged employee misconduct may be considered an adverse action against the investigated employee, regardless of whether disciplinary action actually results. (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 16-17 (*Torrance*); *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, p. 32 (*Dept. of Youth Authority*); *CAUSE-Coelho, supra*, PERB Decision No. 1032-S, p. 12.)

The determination of whether an employer's investigation rises to the level of an adverse action is made on a case-by-case basis on the facts presented. (*Chula Vista, supra*, PERB Decision No. 2586-E, p. 26; *Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9 (*SEIU-Gutierrez*)). In *SEIU-Gutierrez*, the union's request to management to investigate an employee's alleged on-duty, anti-union activities did not result in a finding of adverse action, because the investigation consisted entirely of one phone call by management to the investigated employee, after which the matter was completely dropped on the same day. (*Id.* at p. 7.) The Board concluded that no employee would reasonably fear disciplinary action based on the very limited response of the employer to the union's allegations against him. (*Id.* at pp. 7-9.)

In contrast, in *Torrance*, the investigation was found to be adverse because the employee was threatened that sustained allegations could lead to discipline. (*Torrance, supra*, PERB Decision No. 1971-M, p. 16.) Similarly, in *Dept. of Youth*

*Authority*, the investigation that was found to be adverse consisted of formal witness interviews over a long period and the allegations involved misconduct against students. (*Dept. of Youth Authority, supra*, PERB Decision No. 1403-S, p. 37.)

In this case, the investigation was formal and prolonged, unlike the trivial one found not to be adverse in *SEIU-Gutierrez*, and Abdel Haq faced serious allegations of discrimination under state and federal laws. Any reasonable employee in Abdel Haq's position would consider this kind of investigation to be adverse. Therefore, the District's initiation and conduct of the investigation satisfies the adverse action element of the *Novato* discrimination standard.

c. Concluding that Abdel Haq's Protected Speech violated the District's Code of Ethics and threatening Corrective Action

PERB has held that a threatened adverse action is a separate potential unfair practice from the completed action. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 35.) While "a threat may constitute an adverse action even if the employer never follows through with the threatened action," for a threat to be actionable it must give the employee unequivocal notice that the employer has made a firm decision to take the threatened action. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H, p.12, overruled on other grounds.) *County of Merced* (2008) PERB Decision No. 1975-M, at page 3, described "unequivocal notice" as initiation of formal disciplinary procedures, such as a notice of intent to suspend or a notice of intent to dismiss a certificated employee pursuant to Education Code requirements. In contrast, a supervisor's isolated comment that she would be "seeking adverse action against" the employee, without specifics either orally or in

writing, did not constitute unequivocal notice of an adverse action. (*Ibid*, citing *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.)

Here, despite the District's vacillation about not having reached a firm decision over whether to take corrective action against Abdel Haq, a reasonable employee standing in Abdel Haq's position would find the District's action adverse to his employment. This is so because the District found through its investigation that Abdel Haq had acted unprofessionally and created a negative work environment, not just for Núñez, but for "other" employees as well, and concluded that he violated the District's Code of Ethics.<sup>13</sup> When pressed, Ramos would not confirm that these findings would not be used against Abdel Haq in the future, even if no official record of the investigation is placed in his personnel file. A reasonable employee would fear that such findings by the employer are detrimental to his continued employment.

#### 4. Unlawful Motivation/Nexus

Showing nexus—i.e., that the employer's action was at least substantially motivated by the employee's protected activities—can be done with either direct or circumstantial evidence. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 21; see *Novato, supra*, PERB Decision No. 210, p. 6.) "Where the employer's words or actions reveal that the adverse action was taken in response to the employee's protected activity, such conduct serves as direct evidence of

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<sup>13</sup> It is not entirely clear who the other employees are, but the Findings and Determination identified "Greg Schultz, Dan Willoughby, Kim Orlijan, Lauren Mata, Julie Kossick, and Irma Ramos" as witnesses who provided accounts of their own personal experiences when Abdel Haq made accusations against them similar to what was under investigation.

unlawful motive.” (*Chula Vista, supra*, PERB Decision No. 2586, p. 26-27, citing *Omnitrans* (2010) PERB Decision No. 2121-M, p. 10 (*Omnitrans*); *Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H, pp. 7-8 (*UC Davis*); *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.) In cases involving direct evidence of unlawful motive, it is unnecessary to resort to an analysis of the so-called “nexus factors” outlined in *Novato* and its lineage to evaluate circumstantial evidence of unlawful motive. (*Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, p. 77 (*Berkeley*), citing *UC Davis, supra*, p. 7-8; *Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 29, other citations omitted.) Here, there is both direct and circumstantial evidence of nexus between Abdel Haq’s protected activity and the adverse actions taken against him.

a. Direct Evidence

The Board found direct evidence of unlawful motivation when an employer issued a letter of instruction to an employee exclusively because of conduct the employee undertook as a union representative. The Board said in that circumstance “We need look no further.” (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S (*CDCR*).

Regarding the filing of the discrimination complaint, all of Abdel Haq’s speech alleged to be discriminatory by Núñez was EERA-protected, and in each instance over which Núñez complained, Abdel Haq was acting in his capacity as a representative of United Faculty. Thus, this provides direct evidence of nexus.

b. Circumstantial Evidence

The Board considers the following factors when evaluating circumstantial indicators of unlawful motive: (1) timing of the employer's adverse action in close temporal proximity to the employee's protected conduct; (2) disparate treatment of the employee; (3) departure from established procedures and standards when dealing with the employee; (4) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, or ambiguous justifications for the employer's actions; (5) a cursory or inadequate investigation of the employee's alleged misconduct; (6) a punishment that is disproportionate based on the relevant circumstances; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (See *City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 42; *County of Santa Clara* (2019) PERB Decision No. 2629-M, pp. 9-10; *County of Yolo* (2009) PERB Decision No. 2020-M, pp. 12-13; *Novato, supra*, PERB Decision No. 210, pp. 6-7.)

Here, close timing between protected activity and the adverse actions are demonstrated because each of the incidents alleged in the discrimination complaint were incidents of protected activity. Additionally, other nexus factors are shown.

i. Departure From Established Procedures/Cursory Investigation

Several departures from the District's procedures are shown. For example, Ramos testified that she reviewed the discrimination complaint for timeliness and concluded that the allegations were timely because they all occurred within a year of the filing. This does not align with AP 3410, Section 7.3.2, requiring complaints of discrimination in employment to be filed within 180 days. The Findings and



Determination also does not address that some allegations were older than 180 days before the discrimination complaint was filed.

Ocampo testified that Ramos, as the Vice Chancellor of Human Resources, has the responsibility to determine whether there is a violation of District policies after receiving the report of investigative findings by the investigator. This is also consistent with AP 3410, Section 3.1. However, Ramos testified that the outside investigator, Weaver, was the person who made that determination, not her.

Ocampo testified that all relevant documents and video evidence, if available, should be reviewed as part of an investigation. There is no indication that the outside investigator reviewed available video evidence, indicating both a departure from investigative procedure and a cursory investigation. This was highlighted by the statement in the Findings and Determination that “[n]o one recalls exactly what Abdel Haq said,” regarding the meeting of the Academic Senate on May 6, 2021. There was a video recording of the entire proceeding, as well as a recording of the Town Hall event, which should have been reviewed for direct evidence of Abdel Haq’s statements and demeanor.

None of the District’s witnesses claimed any familiarity with investigations involving protected union speech despite acknowledging that investigations should consider if the conduct involved protected speech. Ocampo first said he had not dealt with that situation in his six-and-a-half years with the District before remembering that the present investigation dealt with such a scenario. The Findings and Determination also did not weigh the protected nature of Abdel Haq’s statements and the fact that he

was acting as a United Faculty representative in its analysis of the discrimination complaint.

Finally, the investigator did not seek to interview Diep or other members of the United Faculty's bargaining team who were present at the October 29, 2021 bargaining session that formed the primary basis of Núñez's discrimination complaint. Instead, the witnesses seemed to be people who individually had issues with Abdel Haq. This shows that the investigation tended to be cursory and one-sided.

ii. Exaggerated Justifications

Ocampo repeatedly blamed Abdel Haq's unavailability for an interview, starting in January 2022, as the reason that the District had to ask for several extensions of time to complete the investigation. However, the record showed that as of the time that the District sought its first extension, only Núñez and Willoughby had been interviewed, and that other witnesses continued to be interviewed through April 2022, while the District was seeking additional extensions of time. The exclusive focus on Abdel Haq as being the dilatory party is therefore exaggerated. This exaggeration regarding the investigation process calls into question the District's veracity about the investigation process.

The District's witnesses, especially Kossick, continued to refer to Abdel Haq's speech as "discriminatory," and the District argued such in its opening statement, despite the Findings and Determination concluding that Abdel Haq's speech was *not* discriminatory on the basis of gender or race. The fact that the District continued to make this claim during the hearing tends to indicate exaggerated justifications for its actions.

iii. Animus/Bias

Ocampo testified in an unfiltered manner about Ramos having shared with him her frustration over having to deal with Abdel Haq in negotiations. This coupled with her testimony about being a witness in the investigation for which she was also the ultimate decision maker tends to show animus or bias towards Abdel Haq's advocacy.

For all of these reasons, the fourth and final element of nexus between Abdel Haq's protected activity and the adverse actions has been demonstrated. The burden now shifts to the District to prove an affirmative defense.

B. Employer's Affirmative Defense

Because United Faculty sufficiently demonstrated a prima facie case of retaliation/discrimination, the burden shifts to the District to establish that it would have taken adverse action even if Abdel Haq had not engaged in protected activity. (*State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, pp. 21, 26-27.) When the evidence suggests the adverse action was motivated by both lawful and unlawful reasons, commonly referred to by PERB as a "mixed motive" case, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 16 (*Claremont*), citing *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730.)

This defense is most typically available when, even though a charging party has established protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a nondiscriminatory motivation for the same decision. (*Carpinteria, supra*, PERB Decision No. 2797, p. 18; see *City of San Diego*,

*supra*, PERB Decision No. 2747-M, p. 26 [if charging party establishes a prima facie case, but evidence also reveals a nondiscriminatory reason for employer’s decision, respondent has the burden to prove it would have taken the “exact same action” even absent protected activity].) To establish its affirmative defense, the respondent must therefore prove “(1) that it had an alternative nondiscriminatory reason for the challenged action; and (2) that it acted because of this alternative nondiscriminatory reason and not because of the employee’s protected activity.” (*Palo Verde Unified School District, supra*, PERB Decision No. 2337, p. 31.)

Accordingly, the “but for” test is an affirmative defense which the employer must establish by a preponderance of the evidence. (*Claremont, supra*, PERB Decision No. 2654, p. 16.) Once the parties have met their respective burdens to either establish a prima facie case or affirmative defense, PERB weighs the evidence supporting the employer’s alternative, nondiscriminatory justification for the adverse action against the evidence of its unlawful motive; thus, the outcome of the case is ultimately determined by the weight of the evidence supporting each party’s position. (*Id.* at pp. 16-17.)

In assessing the evidence, PERB’s task is to determine whether the respondent’s “true motivation for taking the adverse action was the employee’s protected activity.” (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted (*Regents*); see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB “weighs the respondent’s justifications for the adverse action against the evidence of the respondent’s retaliatory motive.” (*Baker Valley Unified School District* (2008) PERB

Decision No. 1993, p. 14.) If PERB determines that a respondent's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

Even where there is direct evidence of unlawful motivation, a respondent may prove that the employee's protected activity was not the true motivation for its action, which is sufficient to defeat the prima facie case. (*Regents, supra*, PERB Decision No. 2302-H, p. 4.) In that case, although the employer specifically referenced the employee's protected conduct as part of its written grounds for termination, there was sufficient evidence of performance concerns that showed the employer would have taken the same course of action, regardless of the protected conduct. (*Id.*, adopting proposed decision, p. 33.)

A different result was reached in *CDCR, supra*, PERB Decision No. 2282-S. There, a union steward was disciplined in direct response to so-called unacceptable conduct during a representational meeting, which the Board found protected. There was no other basis offered by the employer for the discipline. Thus, the Board found that the employer could not meet its burden to defeat the prima facie case where the "discipline is seen to arise from, and only from, [the employee's] protected conduct." (*Id.* at p. 14.)

1. Filing the Discrimination Complaint

Regarding the first adverse action, Núñez's pursuit of the discrimination complaint, as in *CDCR*, there was no other basis offered for taking this action other than Núñez's expressed desire to restrict Abdel Haq's speech that has been found

entirely protected by EERA. Thus, the District cannot defeat the prima facie case for this cause of action.

2. Initiating and Conducting the Investigation and Threat of Discipline over Code of Ethics Violation

In *Chula Vista*, the Board noted that under National Labor Relations Board (NLRB) precedent, an employer does not commit an unfair labor practice by investigating an employee based on a facially valid complaint of misconduct, even if the alleged misconduct occurred during an employee's exercise of protected rights. (*Chula Vista, supra*, PERB Decision No. 2586-E, p. 30, citing *Bridgestone Firestone South Carolina* (2007) 350 NLRB 526, 528-529.) The Board found that such a rule "is necessary to protect the employer's legitimate interest in investigating and preventing employee misconduct, especially where the employer has an affirmative duty under federal or state civil rights statutes to investigate alleged discrimination or harassment[,]" while "also adequately protect[ing] employee rights by preventing employers from using baseless investigations to punish or discourage protected activity." (*Chula Vista, supra*, PERB Decision No. 2586-E, p. 30; citations omitted.)

Adopting the NLRB rule, the Board held:

"[A]n employer does not interfere with employee rights when it conducts an initial investigation of arguably protected activity based on a facially valid complaint, provided that (i) the nature of the complaint legitimately calls into question whether the employee conduct was protected, and (ii) if the employer acquires information indicating that the alleged conduct was protected, the employer immediately ceases the investigation and notifies all affected employees regarding its outcome."

(*Ibid.*)

Here, the District had an obligation under Title 5, and its adopted administrative procedures interpreting the legal requirements of Title 5, to initiate the investigation because of Núñez's allegations that Abdel Haq had discriminated on the basis of gender and perceived race. It was obvious on the face of those allegations that Abdel Haq was acting in his United Faculty representative capacity during the instances alleged to be discriminatory. But, considering the nature of Núñez's complaint, it would have been appropriate for the District to reserve judgement until after interviewing percipient witnesses and reviewing other evidence to conclude whether Abdel Haq's speech retained or lost its statutory protection based on a totality of circumstances. However, as the record shows, the District did not appear to even consider that Abdel Haq had engaged in protected activity during the course of its investigation, let alone immediately stop its investigation once it was determined that the speech was protected. For this reason, the District's investigation ran contrary to the standard in *Chula Vista*, and therefore it cannot defeat the prima facie case and show that it acted for a non-discriminatory reason during its investigative process.

Regarding the final adverse action, the District has not offered any other reason, than Abdel Haq's protected speech and union advocacy, that it concluded that he "[c]reated a negative work environment" through his "[h]ighly offensive and unprofessional comments" that were a "[p]ersonal attack on Núñez's and other administrators' character[,]" and thereby violated AP 3050. Thus, because these findings and the threat of corrective action arose only from protected activity, the District cannot defeat the prima facie case. (*CDCR, supra*, PERB Decision No. 2282-S, p. 14.)

The District has not met its burden of proving an affirmative defense to these charges of retaliation. Accordingly, the District violated EERA when it took the adverse actions alleged in the PERB complaint. By this same conduct, the District also interfered with protected employee rights and deprived United Faculty of its right to represent its members and officials.

#### Interference by an Overbroad Directive

To establish a prima facie case of interference with employee rights, the charging party must demonstrate that the employer's conduct tends to or does result in harm to employee rights under EERA. (*San Diego, supra*, PERB Decision No. 2634, p. 17 (*San Diego*)). A finding of interference does not require showing that the employer intended to interfere with protected rights or otherwise harbored an unlawful motive or purpose. (*County of Sacramento* (2014) PERB Decision No. 2393-M, p. 33; *Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10.) Nor does it require that any employee felt subjectively threatened or intimidated or was in fact discouraged from participating in protected activity. (*City of Commerce* (2018) PERB Decision No. 2602-M, pp. 4-5; *Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15 (*Clovis*)).

The PERB complaint alleges that the District interfered with EERA-protected employee rights when it instructed Abdel Haq in the November 2021 directive that he was not to discuss the investigation with employees other than his representative. "In general, PERB does not look favorably upon broad, vague, directives that might chill lawful speech or other protected conduct." (*Los Angeles Community College District* (2014) PERB Decision No. 2404 (*Los Angeles CCD*)). In that case, a letter



placing an employee on paid administrative leave pending a fitness-for-duty examination to be conducted “in collaboration with AFT,” the employee’s union, also informed him: “You are hereby directed not to contact any members of the faculty, staff or students.” (*Los Angeles CCD, supra*, PERB Decision No. 2404, adopting proposed decision at pp. 6-7.) The Board held:

“[N]othing in the letter affirms Perez's protected right to contact employee members of AFT or communicate with other employees on protected subjects. The reference to AFT in the letter, at best, creates ambiguity as to the limits on Perez's right to contact others. Such ambiguity, without clarification, causes at least ‘slight harm’ to [and thus interferes with] Perez's exercise of protected rights. In addition, even if one assumed that he or she could still contact AFT, the directive would still inhibit other protected activities not directly involving AFT.”

(*Los Angeles CCD, supra*, PERB Decision No. 2404, adopting proposed decision at p. 14.)

Similarly, in *County of Santa Clara* (2018) PERB Decision No. 2613-M (*Santa Clara*), a union president was the subject of an investigation of alleged violations of workplace communications policies by him. (*Id.* at p. 2.) A letter by which he was placed on paid administrative leave directed him: “You are hereby ordered not to discuss this matter with any witnesses, potential witnesses, the complainant, or any other employee of the Sheriff’s Office other than your official representative.” (*Id.* at p. 3.) The Board held:

“On its face, the directive . . . prohibited [the union president] from communicating with his co-workers about the matter for which he was being investigated. He thus was prevented from contacting potential witnesses, or from making other inquiries that could help him prepare for his investigatory interview. This, in turn, prevented him from

giving effective assistance to [his union] in its representation of him in the investigation. . . . Thus, the directive . . . tended to result in some harm to [his] right to discuss working conditions with fellow employees.”

(*Santa Clara, supra*, PERB Decision No. 2613-M, p. 9.)

The District’s original directive here was similarly overbroad as the ones found to interfere with protected rights in *Los Angeles CCD* and *Santa Clara* because it directed Abdel Haq not to discuss the investigation with employees, which interfered with his ability to discuss working conditions and inhibited his ability to aid in his own defense to the discrimination complaint. Although the District issued a tailored directive several months later that appropriately clarified that Abdel Haq was not restricted from speaking with employees about the substance of investigation, just from harassing witnesses or trying to influence statements made by witnesses to the investigator, that did not cure the earlier interference with Abdel Haq’s protected activity. Thus a prima facie case of interference is established.

If the prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*San Diego, supra*, PERB Decision No. 2634, p. 17.) Where the harm is slight, PERB will entertain a defense of operational necessity and then balance the competing interests. (*Ibid.*) Where the harm is inherently destructive of protected rights, the employer must show that the interference was caused by circumstances beyond its control and that no reasonable alternative course of action was available. (*Ibid.*)

The District had not offered a compelling defense under either standard. It defends its action on the premise that it retracted the overbroad directive before it showed any actual chilling effect on Abdel Haq’s protected activity. This misstates the

standard. Actual harm need not be shown to sustain an interference claim, only that the conduct would tend to interfere with the exercise of protected rights. (*City of Commerce, supra*, PERB Decision No. 2602-M, pp. 4-5; *Clovis, supra*, PERB Decision No. 389, pp. 14-15.) Thus, the District has not met its burden of defeating the prima facie case. The original directive interfered with Abdel Haq’s EERA-protected rights.

### REMEDY

The Legislature has delegated to PERB broad powers to remedy unfair practices or other violations of EERA and to take any action PERB deems necessary to effectuate the Act’s purposes. (EERA section 3541.5, subdivision (c); *City of San Diego, supra*, PERB Decision No. 2464-M, p. 42, affirmed *sub nom. Boling v. PERB* (2018) 5 Cal.5th 898, 920, *reh’g denied* (Oct. 10, 2018); *Mount San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.)

A “properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice.” (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should compensate affected employees and other injured parties, and should withhold from the wrongdoer the fruits of its violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13; *Mead Corp. v. NLRB* (11th Cir. 1983) 697 F.2d 1013, 1023, enforcing *The Mead Corp.* (1981) 256 NLRB 686; *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 673-674.) In addition to these restorative and compensatory functions, a PERB-ordered remedy should also serve as a deterrent to future misconduct, so long as the order is not a patent attempt to

achieve ends other than those which can fairly be said to effectuate the policies of the MMBA. (*City of San Diego, supra*, pp. 40-42; *City of Pasadena, supra*, pp. 12-13.)

It is also a customary remedy in all unfair practice cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the Board's order. Such an order is granted to provide employees with notice, signed by an authorized agent, that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, the District will be ordered to post a notice incorporating the terms of the order below at its buildings, offices, and other facilities where notices to its employees are customarily posted. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 45-46.) Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. Posting of such notice effectuates the policies of EERA that employees be informed of the resolution of this matter and the District's readiness to comply with the ordered remedy.

(*Placerville Union School District* (1978) PERB Decision No. 69, p. 12; see also *Gonzales Union High School District* (1985) PERB Decision No. 480, pp. 62-63.)

Here, it is appropriate to order the District to rescind and expunge from all files it maintains regarding Abdel Haq the Findings and Determination document, and to similarly rescind and expunge the original November 30, 2021 letter containing the confidentiality directive that interfered with Abdel Haq's protected rights. It is also

appropriate under the circumstances, since the District's own agent initiated the discrimination complaint in this matter, to order the District to inform United Faculty and Abdel Haq in writing that it deems the discrimination complaint filed by Núñez to have been formally withdrawn. (See *CAUSE-Coelho, supra*, PERB Decision No. 1032-S, pp. 18-19 [union ordered to withdraw its complaint with employer against employee and notify employee of such in writing].) It is also appropriate to order the District to post notice as described above.

### PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a) and (b), by (1) its agent filing and pursuing a formal discrimination complaint against Mohammed Abdel Haq; (2) failing to immediately stop its investigation of the discrimination complaint after acquiring information that it was based on Abdel Haq's protected activity; and (3) by concluding that Abdel Haq's protected speech violated the District's code of ethics and threatening corrective action. The District also violated the above sections of EERA by issuing Abdel Haq a directive not to discuss the investigation with employees except his representative.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

- A. CEASE AND DESIST FROM:
  - 1. Retaliating against employees for exercising rights under EERA.

2. Interfering with or harming rights guaranteed to employees under EERA.

3. Interfering with United Faculty of the North Orange County Community College District's (United Faculty's) right to represent bargaining unit employees.

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:**

1. Rescind and expunge from all files it maintains regarding Abdel Haq the June 10, 2022 Notice of Investigative Findings and Administrative Determination and the letter of November 30, 2021 containing a confidentiality directive.

2. Inform United Faculty and Abdel Haq in writing that it deems the discrimination complaint filed by its agent on or about November 17, 2021 to have been formally withdrawn.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the faculty bargaining unit are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by United Faculty to communicate

with faculty employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.<sup>14</sup>

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on United Faculty.

#### RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the

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<sup>14</sup> Either party may ask PERB's OGC to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice. (*City and County of San Francisco* (2023) PERB Decision No. 2858-M, p. 19, fn. 10; see also, *City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13 [amended instructions may be justified when a majority of employees at one or more work locations are not physically reporting to their work location at the time physical posting would otherwise commence].)

statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website:

[www.perb.ca.gov/laws-and-regulations/](http://www.perb.ca.gov/laws-and-regulations/).

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: <https://eperb-portal.ecourt.com/public-portal/>. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)



The Board's mailing address and contact information is as follows:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street, Suite 200  
Sacramento, CA 95811-4124  
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: [www.perb.ca.gov/about/forms/](http://www.perb.ca.gov/about/forms/). Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)



**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**

After a hearing in Unfair Practice Case No. LA-CE-6708-E, *United Faculty of the North Orange County Community College District, CCA/CTA/NEA v. North Orange County Community College District*, in which all parties had the right to participate, it has been found that the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by (1) its agent filing and pursuing a formal discrimination complaint against an employee who serves as Lead Negotiator for the United Faculty of the North Orange Community College District (United Faculty); (2) failing to immediately stop its investigation of the discrimination complaint after acquiring information that it was based on the employee’s protected activity; and (3) by concluding that the employee’s protected speech violated the District’s code of ethics and threatening corrective action. The District also violated the above sections of EERA by issuing the employee a directive not to discuss the investigation with employees except his representative.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for exercising rights under EERA.
2. Interfering with or harming rights guaranteed to employees under EERA.
3. Interfering with United Faculty’s right to represent bargaining unit employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind and expunge from all files it maintains regarding the employee the June 10, 2022 Notice of Investigative Findings and Administrative Determination and the letter of November 30, 2021 containing a confidentiality directive.
2. Inform United Faculty and the employee in writing that it deems the discrimination complaint filed by its agent on or about November 17, 2021 to have been formally withdrawn.

Dated: \_\_\_\_\_

North Orange County Community College District

By: \_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

## PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On November 9, 2023, I served the Cover Letter and Proposed Decision regarding *United Faculty of the North Orange County Community College District, CCA/CTA/NEA v. North Orange County Community College District*, Case No. LA-CE-6708-E on the parties listed below by

I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.

Personal delivery.

Electronic service (e-mail).

Stephanie J. Joseph, Staff Counsel  
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Paul Z. McGlocklin, Attorney  
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John W. Dietrich, Attorney  
Atkinson, Andelson, Loya, Ruud & Romo  
3880 Lemon Street, Suite 350  
Riverside, CA 92501  
Email: jdietrich@aalrr.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 9, 2023, at Sacramento, California.

Michelle L Bacigalupi  
\_\_\_\_\_  
(Type or print name)



\_\_\_\_\_  
(Signature)