

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )  
 )  
 T [REDACTED] D [REDACTED] )  
 )  
 From discrimination in the position of )  
 Correctional Officer with Centinela State )  
 Prison, Department of Corrections at )  
 Imperial )  
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SPB Case No. 98-2020

**BOARD DECISION**  
(Precedential)

**NO.: 00-03**

February 9, 2000

**APPEARANCES:** William F. Macklin, attorney, on behalf of appellant, T [REDACTED] D [REDACTED];<sup>1</sup> Nathan Schmidt and Laura D. Baumann, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

**BEFORE:** Ron Alvarado, Vice President; Richard Carpenter, and William Elkins, Members.

**DECISION**

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) denying appellant's request for a continuance and dismissing appellant's appeal from discrimination. In a prior, separate proceeding, the Board revoked an adverse action taken by the Department against a correctional sergeant based upon appellant's allegations that the sergeant engaged in sexual harassment against her.

In this decision, the Board finds that appellant demonstrated good cause for a continuance due to the serious illness of appellant's counsel's mother. Further, the Board concludes that, because appellant was not a party, nor in privity with a party, to

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<sup>1</sup> As discussed in this Decision, appellant appeared *in pro per* at the hearing before the administrative law judge and also filed a written argument with the Board after the Board rejected the Proposed Decision of the administrative law judge. Attorney Macklin also filed written argument with the Board and presented oral argument on behalf of appellant.

the prior adverse action proceeding, but merely testified as a witness on behalf of the Department, appellant is not precluded from litigating her discrimination claims against the Department in this proceeding.

## BACKGROUND

### Factual Summary

Appellant is a Correctional Officer with the Department. On or about September 25, 1997, appellant filed a formal discrimination complaint with the Department in which she alleged that Correctional Sergeant J [REDACTED] D [REDACTED] engaged in the following acts of sexual and/or verbal harassment:

1. On June 27, 1997, Sergeant D [REDACTED] put his hand on appellant's right upper leg and ran his hand the length of her thigh, making her feel very uncomfortable.<sup>2</sup>
2. On September 11, 1997, Sergeant D [REDACTED] grabbed appellant's calf and squeezed it.
3. On September 16, 1997, Sergeant D [REDACTED] verbally harassed appellant on several occasions by yelling at her and using profanity toward her on the phone and in front of other officers, ordering her to disregard her post orders in order to isolate her from the rest of the officers, and docking her pay for being 40 minutes late to work the day before due to car trouble.<sup>3</sup>

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<sup>2</sup> In its written arguments before the ALJ, the Department stated that appellant also alleged that, on June 27, 1997, Sergeant D [REDACTED] referred to appellant as the "TJ (Tijuana) Madonna." In a February 18, 1998 investigative report, the Department determined that this allegation had been substantiated.

<sup>3</sup> In its arguments before the ALJ and in its investigative report, the Department stated that this allegation included the allegation that another officer who carpooled with appellant and was also late was not docked.

The Department investigated these allegations and found them to be partially substantiated. On October 6, 1998, the Department served Sergeant D [REDACTED] with a notice of adverse action suspending him for five days effective October 15, 1998. The notice of adverse action alleged that D [REDACTED] engaged in the two instances of physical touching alleged above, and also that D [REDACTED] was less than honest during an Equal Employment Opportunity investigatory interview concerning appellant's allegations of verbal abuse and harassment. As legal cause for discipline, the notice charged D [REDACTED] with inexcusable neglect of duty (Government Code section 19572(d)), dishonesty (Government Code section 19572(f)), and discourteous treatment of the public or other employees (Government Code section 19572(m)). The notice did not allege unlawful discrimination, including harassment, pursuant to Government Code section 19572(w).

At the subsequent hearing before the Board on D [REDACTED] adverse action appeal, appellant testified about the two incidents of alleged physical harassment.<sup>4</sup> On February 17, 1999, the Board adopted the ALJ's proposed decision revoking the adverse action taken against D [REDACTED]. In his proposed decision, the ALJ found that the Department did not prove its allegations, and credited D [REDACTED] testimony over that of appellant.<sup>5</sup>

On or about June 26, 1998, in response to a request for additional information by the Board's Appeals Division, appellant submitted a letter in which she alleged that various staff members at Centinela State Prison had retaliated against her because of her prior formal discrimination complaint against Sergeant D [REDACTED]. Appellant's

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<sup>4</sup> SPB Case No. 98-4283.

<sup>5</sup> The allegations concerning D [REDACTED] dishonesty were stricken at the hearing.

June 26, 1998 letter alleges numerous retaliatory acts during the period from September 27, 1997 through March 1998. Appellant also provided a list of remedial actions she wished to have taken with respect to both her original complaint and the new allegations of retaliation.

### Procedural Summary

This matter was scheduled for hearing before the ALJ on June 15, 1999.<sup>6</sup> Appellant appeared at the hearing and moved for a continuance because her attorney had informed her that he was called away at the last minute due to the ill health of his mother. The Department confirmed that it had received a letter from appellant's counsel earlier that day by facsimile transmission. That letter, addressed to the Employment Relations Officer at Centinela State Prison, stated:

I have been called away at the last minute do [sic] to the health of my Mother. I will not be able to attend the hearing today. I am faxing this to you as I leave my office. I apologize for this development.

I do not have a way to contact the A.L.J. assigned in this matter. My client will show up at the scheduled time and request a short continuance. Also, I would appreciate it if you would give Attorney Schmidt a heads-up.

I am sorry that this is short and at the eleventh hour.

The Department objected to the continuance, and the ALJ denied appellant's request.

Previously, by letter dated March 1, 1999, the Department had moved to either dismiss the discrimination complaint in its entirety or to limit the hearing to issues that

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<sup>6</sup> The record indicates that this matter was originally scheduled for hearing on March 9, 1999, but was continued at appellant's request due to the recent death of a member of appellant's household and because appellant's counsel was attending his gravely ill mother. The Department did not oppose that continuance.

were not previously litigated before the Board in Sergeant D [REDACTED] adverse action appeal. At the hearing, the ALJ granted the motion to dismiss as to the allegations contained in the original discrimination complaint, on the ground that appellant was collaterally estopped from relitigating those allegations, but denied the motion with respect to the retaliation claims asserted in appellant's June 26, 1998 letter that had not been litigated previously. The ALJ gave appellant the opportunity to present evidence in support of the remaining allegations set forth in her June 26, 1998 letter. Because of the absence of her counsel, appellant was not prepared to present such evidence. Therefore, in his Proposed Decision, the ALJ concluded that appellant had failed to proceed with the production of any evidence to support the allegations contained in her June 26, 1998 complaint, and that the appeal was thereby deemed withdrawn and dismissed by operation of law pursuant to Government Code section 19579.

The Board rejected the ALJ's Proposed Decision at its meeting on August 3, 1999 and invited the parties to brief the issues concerning the ALJ's denial of appellant's request for continuance and the collateral estoppel effect of the Board's decision in Sergeant D [REDACTED] adverse action appeal.

### **ISSUES**

1. Was appellant entitled to a continuance of the June 15, 1999 hearing?
2. Is appellant collaterally estopped from relitigating issues that were addressed by the Board in its decision in J [REDACTED] v. D [REDACTED] (1999) SPB Case No. 98-4283?

## DISCUSSION

### Appellant's Request for Continuance

The Board is guided by Rule 52.5,<sup>7</sup> which provides that continuances shall be granted only upon a showing of good cause or mutual agreement between the parties. Ordinarily, the Board would view a request for a continuance made on the day of hearing with great disfavor, given the expenditure of resources incurred by both the parties and the Board's representative in preparing for and making themselves available at the hearing.

After reviewing the record in this case, however, the Board concludes that good cause exists to warrant granting a continuance to enable appellant to proceed to hearing with representation. Appellant's counsel had previously advised both the Board and the Department's counsel that his mother was gravely ill. At the hearing, appellant informed the ALJ that her attorney had told her that his mother was in a coma and that he had to leave to go to San Diego immediately.<sup>8</sup> Together with the facsimile letter sent by appellant's counsel as he was leaving the office, appellant provided sufficient information to apprise the parties and the ALJ of the urgent nature of the facts supporting appellant's request for a continuance.<sup>9</sup> Therefore, the Board exercises its discretion to grant a final continuance to enable appellant to put on her case. Appellant

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<sup>7</sup> Cal. Code Regs., tit. 2, § 52.5.

<sup>8</sup> The fact that appellant's counsel apparently informed the Department's counsel the day prior to the hearing that he intended to appear for the hearing indicates that the subsequent emergency was unanticipated.

<sup>9</sup> In fact, in his written submission and during oral argument, appellant's counsel informed the board that his mother died five days after the hearing.

and her counsel are admonished, however, that the Board will not entertain any further requests for continuances in this matter.<sup>10</sup>

### Collateral Estoppel

The Department argues that the Board's determination that the Department failed to prove its case in the adverse action appeal of Sergeant D [REDACTED] should preclude appellant from relitigating the same issues in her discrimination complaint appeal. Collateral estoppel may be applied to decisions of administrative agencies "[w]hen an administrative agency is *acting in a judicial capacity and resolves disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate*. . . ."<sup>11</sup> Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding if: (1) the issue necessarily decided in the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.<sup>12</sup> The Board will consider these principles in determining whether to give collateral estoppel effect in this case.

Because we deem it dispositive in this case, we address the issue of privity first. Clearly, the party against whom collateral estoppel is asserted—appellant—was not a party to Sergeant D [REDACTED] appeal from the adverse action taken against him by the

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<sup>10</sup> The Board notes that, unlike in an adverse action proceeding, this appeal does not implicate due process concerns. (See Kristen M. Coddington-Gordon (1996) SPB Case No. 34637.)

<sup>11</sup> People v. Sims (1982) 32 Cal.3d 468, 479, quoting United States v. Utah Constr. Co. (1966) 384 U.S. 394, 422 [16 L.Ed.2d 642, 661, 86 S.Ct. 1545] (emphasis added by Sims court).

<sup>12</sup> People v. Sims, 32 Cal.3d at p. 484, quoting People v. Taylor (1974) 12 Cal.3d 686, 691 (quotation marks omitted).

Department. Therefore, the question is whether there is sufficient privity between the Department and appellant to conclude that the Board's findings in that case are binding on appellant in this proceeding.

The concept of "privity" refers to a relationship between the party to be estopped and the unsuccessful party in the prior litigation that is "sufficiently close" so as to justify application of the doctrine of collateral estoppel.<sup>13</sup> To comply with due process requirements, the nonparty must have had an identity or community of interest with, *and adequate representation by*, the losing party in the first action, and the circumstances must have been such that the nonparty should reasonably have expected to be bound by the prior adjudication.<sup>14</sup> Such an expectation may be present where the nonparty had a proprietary interest in and financial control of the prior action, or where the unsuccessful party in the first action acted in a representative capacity for a nonparty.<sup>15</sup> An individual who appears as a witness in a proceeding, however, but has no power to control any aspect of the case, cannot reasonably have expected to be bound by the prior adjudication and is not deemed to be in privity with a party to that case.<sup>16</sup>

Applying these principles, an appellate court has ruled that a discrimination complainant was not barred from pursuing a separate state law action against her employer after the federal Equal Employment Opportunity Commission (EEOC) entered

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<sup>13</sup> People v. Sims, *supra*, 32 Cal.3d at pp. 486-487, quoting Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 875 (quotation marks omitted).

<sup>14</sup> Lynch v. Glass (1975) 44 Cal.App.3d 943, 948 (emphasis added).

<sup>15</sup> Id., at p. 949.

<sup>16</sup> Id. (although the plaintiffs in the second action were identified in interest with the plaintiffs in the first action and were fully aware of the prior litigation, they had no control over the case and did not stand in any relationship with the prior plaintiffs that would put them on reasonable notice of the binding effect of the litigation).



into a consent judgment resolving her federal age discrimination claims arising out of the same set of factual circumstances.<sup>17</sup> Finding that the EEOC prosecuted its case “at least as much, and perhaps more, in the general, public interest” than in the plaintiff’s interest, the court concluded that the EEOC did not act as the plaintiff’s representative when it settled the case without her knowledge or consent and without affording her any individual relief.<sup>18</sup>

Here, although appellant’s discrimination complaint led to the Department’s decision to initiate adverse action proceedings against Sergeant D [REDACTED], appellant was not a party to those proceedings, but merely testified as a witness when called by the Department to do so at the hearing. Like the plaintiffs in Lynch, supra, appellant had no power to control the conduct of the adverse action proceedings between the Department and Sergeant D [REDACTED]. Appellant had no control over the contents of the notice of adverse action or the presentation of the Department’s case, and had no right to present her own witnesses or evidence, or to cross-examine Sergeant D [REDACTED] or his witnesses. Thus, she did not stand in any relationship with the Department that would cause her to expect to be bound by the factual findings in that case.

Moreover, the relationship between appellant and the Department is not sufficiently close so as to justify application of the doctrine of collateral estoppel. As an employee, appellant is interested in protecting her personal right to be free from unlawful discrimination and harassment in the workplace. The Department shares this interest, but, as an employer, is also interested in minimizing its own liability for

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<sup>17</sup> Victa v. Merle Norman Cosmetics (1993) 19 Cal.App.4th 454, *review denied*.

<sup>18</sup> Id. at p. 468.

workplace discrimination. One way of doing so is for the Department to take prompt and effective action to remedy discrimination that has already occurred, such as by disciplining an employee who engages in conduct that could constitute sexual harassment. Even if the Board later overturns that discipline, the Department can still assert that it attempted to remedy the alleged discrimination. The fact that the Department fails to prove its case in an adverse action proceeding against an alleged harasser does not necessarily relieve it from liability in a discrimination action brought directly by the complaining party.

The absence of privity between appellant and the Department in the D [REDACTED] adverse action proceeding precludes application of the doctrine of collateral estoppel to appellant's claims in this proceeding. Therefore, the Board's factual and legal determinations in the D [REDACTED] case do not bar appellant from proceeding to litigate her discrimination claims in this case. In light of our determination of no privity between appellant and the Department, we need not address the other factors necessary to apply collateral estoppel: identity of issues and final judgment on the merits.

#### The Retaliation Allegations

The ALJ ruled that the allegations of retaliation contained in appellant's letter of June 26, 1998 were not litigated in the D [REDACTED] adverse action and, therefore, were not barred by principles of collateral estoppel. The ALJ further ruled, however, that appellant's failure to proceed with the production of evidence pertaining to these allegations, which failure appellant asserted was due to the absence of her attorney, constituted a withdrawal of the appeal under Government Code section 19589. In light of the Board's decision above that appellant established good cause for a continuance,

the Board finds that appellant did not withdraw her appeal and she will be entitled to present evidence in support of her allegations at the hearing ordered by this Decision.<sup>19</sup>

### **CONCLUSION**

The Board recognizes that unanticipated, extenuating circumstances, such as the serious illness or injury of a party, attorney, or close family member of either, may arise and constitute good cause for a continuance. The Board finds such circumstances to exist in this case, and grants appellant's request for a continuance. The Board further finds that the absence of privity between appellant and the Department precludes application of the doctrine of collateral estoppel to bar relitigation by appellant of the factual issues litigated by the Department in the prior adverse action. Finally, the Board finds that, under the circumstances of this case, appellant's failure to present evidence in support of her retaliation allegations did not constitute a failure to proceed or withdrawal of any portion of her appeal.

### **ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. Good cause appearing, the request of T [REDACTED] D [REDACTED] for a continuance of the administrative hearing in Case No. 98-2020 is hereby granted.

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<sup>19</sup> The ALJ will retain full authority, however, to make any evidentiary or jurisdictional rulings with regard to such evidence, consistent with this Decision.

2. The matter of the appeal by T [REDACTED] D [REDACTED] from discrimination in the position of Correctional Officer with Centinela State Prison, Department of Corrections is hereby referred to the Chief Administrative Law Judge and shall be set before an administrative law judge for hearing on the merits.
3. This decision is certified for publication as a Precedential Decision.  
(Government Code § 19582.5).

**STATE PERSONNEL BOARD<sup>20</sup>**

Ron Alvarado, Vice President  
Richard Carpenter, Member  
William Elkins, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 9, 2000.

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Walter Vaughn  
Executive Officer  
State Personnel Board

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<sup>20</sup> President Florence Bos and Member Sean Harrigan did not participate in this decision.