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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GAR A. RICHMAN, Plaintiff and Appellant, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Defendant and Respondent.	B235128 (Los Angeles County Super. Ct. No. KC059865)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce Minto, Judge. Affirmed.

Michael Lee Gilmore for Plaintiff and Appellant.

Michael R. Clancy and Sonja J. Woodward for Defendant and Respondent.

Appellant Gar A. Richman appeals from the judgment of dismissal entered upon the trial court's order sustaining the respondent California School Employees Association's (CSEA) demurrer without leave to amend to appellant's complaint. Before this court, appellant asserts that the lower court erred in dismissing his claims based on the view that the Public Employment Relations Board (PERB) had exclusive jurisdiction over appellant's claims against CSEA. Appellant's causes of action all center on the claim that CSEA failed to perform in its duty to represent him in various respects including that CSEA failed to file a grievance of his layoff from the Arcadia Unified School District (the "District"). As we shall explain, appellant's claims fall within the jurisdiction of the PERB, rather than the superior court. As a result, the lower court properly sustained the demurrer. Furthermore, it does not appear that affording appellant an opportunity to amend could cure the defects in his causes of action against CSEA. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant worked for the District as a Senior Warehouseman from 1989 until September 2009. He was also a member of CSEA during that time period.

In September 2009, appellant's position at the District was eliminated and as a result he was scheduled to be laid off and consequently, appellant elected to take early retirement. According to his complaint, after appellant left his employment, he learned that the District hired a part-time employee to perform some of appellant's former duties.

After learning of the District's actions, appellant claims he contacted CSEA to seek their assistance to: (1) file a grievance of his layoff; (2) exercise his right to be eligible for reemployment; and (3) notify the Public Employees Retirement System (PERS) that his retirement was due to a layoff. Appellant claims that he met with CSEA's representatives in February of 2010 to discuss his requests. He alleges that at that time, CSEA indicated that the District had offered appellant reemployment. Nonetheless, according to appellant, he never received any notice of a job offer and that CSEA did not respond to his written request that it provide him notice of an offer of

reemployment. In addition, appellant alleged that CSEA never responded to any of his requests for assistance or representation.

In October 2010, appellant filed a complaint in the superior court against CSEA alleging five causes of action: (1) "Violation of Public Policy," (2)"Violation of the Duty of Fair Representation," (3) "Unfair Business Practices," (4) "Civil Conspiracy," and (5) "Intentional Interference with Contract." With respect to the first cause of action labeled "Violation of Public Policy," appellant specifically alleged that CSEA's "refusal to represent him when he was laid off was wrongful because it was in violation of public policy of the United States and the State of California, and that such refusal to represent him was in violation of the Fair Representation principles developed under the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) and other federal and California codes and regulations." Under the second cause of action titled "Violation of the Duty of Fair Representation," appellant alleged that the "cause of action is brought pursuant to the common law standards that permit an employee to challenge the quality of their representation by the Union" and that the CSEA "prevented plaintiff from obtaining the benefit of the Union contract with Arcadia Unified School District by failing to grieve his layoff, failing to notify him of reemployment positions and notifying PERS his retirement was a result of lay off," which constituted "an unlawful employment practice in violation of the Union's duty of fair representation of its members." In the "Unfair Business Practices" claim, appellant alleged that CSEA's "refusal to grieve plaintiff's lay off enabled [CSEA] to deny its duty of fair representation and to protect individual members is an unlawful and unfair business practice." Pursuant to his fourth cause of action for "Civil Conspiracy" appellant alleged that CSEA conspired with the District to force appellant to retire so that he would not have "a basis to grieve the lay off because plaintiff voluntarily elected to retire . . . ." In appellant's cause of action for "Intentional Interference with Contract" he asserted he was a beneficiary of the contract (governing employment conditions, layoff and reemployment rights) between the CSEA and the District and that CSEA breached that agreement by

"failing to grieve plaintiff's lay off and provide him with job offers during the reemployment period."

In May 2011, CSEA filed a demurrer to all of the causes of action alleged in appellant's complaint. CSEA argued that all of the facts and allegations in appellant's complaint centered on the claim that CSEA failed in its obligation to fairly represent him, and that such assertions constituted an alleged violation of the Educational Employment Relations Act (the EERA) (Gov. Code, § 3540 et seq.). CSEA pointed out that PERB had exclusive jurisdiction over claims under the EERA, and therefore appellant could not bring his claims in the superior court because he had failed to exhaust his remedies before the PERB.

Appellant opposed the demurrer arguing that the PERB did not have jurisdiction over his claims because his "central allegation is a violation of the Education Code," specifically that the "District failed to follow the Education Code's mandatory reemployment procedure and requirements" under Education Code sections 45308 and 45298. Appellant asserted that he should be permitted to amend the complaint to specify the Education Code sections at issue.

The court sustained the demurrer without leave to amend and entered an order dismissing appellant's complaint.[1]

Appellant timely filed this appeal.

DISCUSSION

I. The Court Properly Sustained the Demurrer to Appellant's Causes of Action.

The apparent basis for the lower court's ruling in sustaining the demurrer was that the PERB had exclusive jurisdiction over appellant's claims against CSEA. Before this court, appellant asserts the superior erred in reaching that conclusion. As we shall explain, in our view the lower court reached the correct result.

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[1] Although the demurrer hearing was transcribed, the transcript is unavailable because apparently it was archived and stored in an "unreadable format."

A. Standard of Review

A demurrer tests the sufficiency of the plaintiff's claims as a matter of law. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.) We review de novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We do not, however, assume the truth of the legal contentions, deductions or conclusions; questions of law, such as the interpretation of a statute, are reviewed de novo." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373.) In addition, if a complaint on its face alleges facts amounting to an affirmative defense of absolute privilege, a demurrer to it is properly sustained. (*Halvorsen v. Aramark Uniform Services, Inc*. (1998) 65 Cal.App.4th 1383, 1393, 1396.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. If no liability exists as a matter of law, we must affirm the judgment. (*Traders Sports, Inc. v. City of San Leandro, supra,* 93 Cal.App.4th at pp. 43-44.) Appellant bears the burden of proving the trial court erred in sustaining the demurrer. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

B. PERB Jurisdiction

The EERA (Gov. Code, § 3540 et seq.) states that its purpose is "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the

exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy." (Gov. Code, § 3540.)

PERB was created as part of the EERA. (Gov. Code, § 3541; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 603-604; *California Teachers' Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503, 1510.) As an administrative agency, PERB was established to adjudicate unfair labor practice charges under the EERA, and its jurisdiction was set forth in Government Code section 3541.5. That statute provides, in part: "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." Government Code section 3541.3 specifies PERB's powers and duties, including "[t]o determine in disputed cases, or otherwise approve, appropriate units" (Gov. Code, § 3541.3, subd. (a)) and "[t]o investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter." (Gov. Code, § 3541.3, subd. (i).)

PERB's exclusive jurisdiction is not limited to cases in which it is clear that an EERA violation is involved. Rather, "[i]n applying section 3541.5 to situations dealing with employment disputes, courts have permitted [PERB] to retain exclusive jurisdiction in order to resolve disputes which *arguably* could give rise to an unfair practice claim." (*Los Angeles Council of School Nurses v. Los Angeles Unified School Dist.* (1980) 113 Cal.App.3d 666, 670, italics added; see also *Amador Valley Secondary Educators Assn. v. Newlin* (1979) 88 Cal.App.3d 254, 257.) In determining whether conduct in a given case could give rise to an unfair practice claim, a court "must construe the activity broadly." (*California Teachers' Assn. v. Livingston Union School Dist.*, *supra*, 219 Cal.App.3d at pp. 1510-1511].)

The aim of the rule giving PERB exclusive jurisdiction over "unfair practices" is to "help bring expertise and uniformity to the delicate task of stabilizing labor relations." (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12.) Thus, the courts

"'seek to avoid conflicting adjudications which may interfere with [a labor] board's ability to carry out its statutory role, yet to permit court action when the board cannot provide a full and effective remedy.'" (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 960-961 quoting *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75.)

This rule has been applied to various California cases involving labor disputes in public education. The decisions considering PERB preemption of superior court jurisdiction are divided into three types. First are cases in which the plaintiff alleges *only* a violation of the Education Code, and no arguable EERA violation is evident. In these cases, the courts find no preemption. (See, e.g., *Dixon v. Board of Trustees* (1989) 216 Cal.App.3d 1269, 1277; *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319, 323; *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal.App.3d 632, 638.)[2]

The second variety is cases in which the plaintiff alleges *only* conduct amounting to an unfair practice or other violation of the EERA. In these cases, the courts find

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[2] In *Dixon* the court found no preemption where the complaint alleged violation of Education Code section 44931, requiring placement of permanent certificated employee re-employed within 39 months of last day of service as a permanent employee, and Education Code section 45028, requiring uniform treatment of certificated teachers on salary schedule. (*Dixon v. Board of Trustees*, *supra*, 216 Cal.App.3d at p. 1277.) In *Wygant* the court concluded that "PERB does not have exclusive initial jurisdiction where a plaintiff's allegations are confined solely to a unilateral violation of Education Code section 45028 [requiring uniformity in salary schedules for certificated employees] by a school district." (*Wygant v. Victor Valley Joint Union High School Dist.*, *supra*, 168 Cal.App.3d at p. 323.) Cases which have found PERB lacked initial jurisdiction, such as *California School Employees Association v. Travis Unified School District* (1984) 156 Cal.App.3d 242, 250, and *California School Employees Assn. v. Azusa Unified School Dist.* (1984) 152 Cal.App.3d 580, 592-593, alleged violations of the Education Code which did not implicate the EERA: in *Travis*, reimbursement of bus drivers' expenses governed by the Education Code; in *Azusa*, compensation for certain days when students were not present, again governed by the Education Code. In these cases, the alleged violation of the Education Code involved an issue completely separate from those with which the EERA is concerned.

preemption. (See e.g., *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 14 [strike that district sought to enjoin judicially may have been preceded by teachers' unfair practices]; *Amador Valley Secondary Educators Assn. v. Newlin*, *supra*, 88 Cal.App.3d 254, 257 [school district salary freeze because of lack of salary agreement at start of school year].)[3]

Finally is the third type of case in which the plaintiff alleges both a violation of the Education Code and an unfair practice or other violation of the EERA. In these cases, the courts again find preemption. (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 886; *Los Angeles Council of School Nurses v. Los Angeles Unified School Dist.*, *supra*, 113 Cal.App.3d at pp. 669, 672 [provision of collective bargaining agreement alleged to be contrary to Education Code, breach of duty of fair representation by union].) PERB has jurisdiction to interpret the Education Code "in order to carry out its statutory duty to administer the EERA." (*CSEA and its San Bernardino Chapter No. 183 v. San Bernardino City Unified School District* (1983) 13 PERC 20060.) With respect to the third type of case the PERB considers only the alleged EERA violations, not the alleged violations of the Education Code. (*Gorcey v. Oxnard Educators Assn.* (May 5, 1988) PERB Dec. No. 664 at pp. 7-8.) With these principles in mind, we turn to appellant's individual causes of action.

Although appellant alleged five separate causes of action variously labeled: "Violation of Public Policy," "Violation of the Duty of Fair Representation," "Unfair Business Practices," "Civil Conspiracy," and "Intentional Interference with Contract," the underlying factual basis for all of these claims is the same. (See, *Saunders v. Cariss*

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[3] In the following cases the conduct complained of was *arguably* prohibited by the EERA and it was held that PERB had exclusive initial jurisdiction to determine whether the conduct was an unfair practice: *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 [suit for damages arising out of strike]; *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259 ["nominally tort" causes of action based on potential unfair practices arising out of strike].)

(1990) 224 Cal.App.3d 905, 908 ["When considering the legal effect of those facts, we disregard any erroneous or confusing labels employed by the plaintiff"].) His claims all center on the allegations that CSEA failed or refused to file grievances in response to his layoff, failed to notify him of reemployment positions and failed to notify PERS that his retirement was the result of layoff. Appellant asserted that CSEA's conduct amounted to a breach of the duty of fair representation.

The EERA imposes upon employee organizations, such as CSEA a duty of fair representation. As the court observed in "[u]nder sections 3544.9 and 3543.6 of the California Government Code,[4] the exclusive organization representing public employees has a duty to fairly represent each employee and not to discriminate against such employee." (*Los Angeles Council of School Nurses v. Los Angeles Unified School Dist., supra*, 113 Cal.App.3d at p. 672; see also *King v. Fremont Unified District Teachers Association* (August 4, 1978) PERB Dec. No. 125 at pp. 17-18, 24-25 [violation of the duty of fair representation is an unlawful practice under Government Code section 3543.6, subd. (b), and recognizing that Government Code section 3544.9 imposes a

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4 Government Code section 3544.9 provides: "The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."

Government Code section 3543.6 provides: "It shall be unlawful for an employee organization to:

"(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

"(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

"(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

"(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548)."

separate duty of fair representation].) This duty of fair representation extends to and includes the manner in which employee organizations handle employee grievances. (*Anderson v. California Faculty Assn.* (1994) 25 Cal.App.4th 207, 214; *King v. Fremont Unified District Teachers Association* (August 4, 1978) PERB Dec. No. 125; *Tsai v. California Teachers Association* (February 4, 2010) PERB Dec. No. 2096 at pp. 6-7 [refusal of union to submit a grievance to arbitration alleged to breach duty of fair representation guaranteed by Government Code section 3544.9 and thus violating Government Code section 3543.6, subd. (b)].)

Thus, even though appellant did not expressly plead a violation of EERA, the sum and substance of his claims alleged arguable unfair practices prohibited by the Government Code provisions governing the conduct of educational employee organizations such as CSEA. Violation of CSEA's duties under EERA may constitute unfair practices in which PERB would have the exclusive jurisdiction.

Anderson v. California Faculty Assn., supra, 25 Cal.App.4th 207 is illustrative. In *Anderson* the Supreme Court upheld the trial court's order sustaining, on the ground that PERB had exclusive initial jurisdiction over the plaintiffs' claims, the union defendants' demurrer to a breach of contract suit that had alleged that the defendants had breached a collective bargaining agreement by failing to prosecute the plaintiff professors' grievances. *Anderson* involved the Higher Education Employer Employee Act (HEERA) (§ 3560 et seq.),[5] administered by PERB. The court, citing the availability of a PERB remedy for representation claims, the comprehensive scheme under HEERA for resolution of public employee labor disputes, PERB's expertise in public sector labor relations, and the absence of any indication that the Legislature intended to grant jurisdiction to state courts as well as PERB on such claims, found that the superior court did not have jurisdiction over the plaintiffs' claims. (*Anderson v. California Faculty*

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[5] The HEERA was modeled on EERA. (*Anderson v. California Faculty Association*, *supra*, 25 Cal.App.4th at p. 214.)

Association, supra, 25 Cal.App.4th at pp. 216-219.) We similarly conclude that the superior court was without jurisdiction over appellant's claims against CSEA.

In reaching this conclusion we reject appellant's claim that the facts he has alleged support a claim under the Education Code, rather than EERA, and that as such the lower court had jurisdiction over these alleged Education Code violations. Specifically, appellant asserts that he plead facts showing a violation of Education Code sections 45308 and 45298 relating to layoff procedures and reemployment rights.[6] This argument does not assist appellant here. Whether or not the facts pled might also support causes of action under Education Code sections 45308 and 45298, these statutes impose duties *on the District*, not the CSEA. Appellant has cited to no authority, nor have we found any, to demonstrate that Education Code sections 45308 and 45298 give rise to statutory obligations owed by employee organizations, such as the CSEA. Thus, any claim based on these statutes is properly asserted against the appellant's employer, who is not a defendant in this case.

In view of the foregoing, we conclude the court properly sustained the demurrer because PERB had exclusive jurisdiction over this matter.

II. Court did no abuse its discretion in failing to grant appellant an opportunity to amend his complaint.

"'When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without

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[6] Education Code section 45308 provides: "(a) Classified employees shall be subject to layoff for lack of work or lack of funds. If a classified employee is laid off, the order of layoff within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first. Reemployment shall be in order of seniority."

Education Code section 45298: "Persons laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants. In addition, such persons laid off have the right to participate in promotional examinations within the district during the period of 39 months."

leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, quoting *Blank v. Kirwan*, *supra*, 39 Cal.3d 311, 318.)

Appellant has not suggested on appeal how he might amend the complaint to state a valid cause of action against CSEA. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint"].) Below, however, appellant requested the opportunity to amend to allege causes of action under Education Code sections 45308 and 45298. Nonetheless, as discussed above, appellant has not demonstrated that either of these Education Code sections imposes obligations upon CSEA. Consequently, because appellant has not identified any other possible factual scenario or plausible legal theory to revive his claims against CSEA, we conclude the failings in appellant's claims cannot be cured by amendment and thus the court did not abuse its discretion when it did not give appellant another opportunity to amend his complaint.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**