King County Public Hospital District 2 (Evergreen Hospital), Decision 9069 (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Complainant,	)	CASE 18910-U-04-4809
vs.	)	DECISION 9069 - PECB
KING COUNTY PUBLIC HOSPITAL DISTRICT 2 (EVERGREEN HOSPITAL) Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Geoff Miller, Staff Counsel, with Douglas Drachler & McKee, by *Martha Barron*, Attorney at Law, for the complainant.

Davis Wright Tremaine LLP, by *Mark A. Hutcheson*, for the respondent.

On October 18, 2004, Service Employees International Union, Local 6 (union), filed the complaint herein, charging unfair labor practices with the Public Employment Relations Commission (Commission) naming King County Public Hospital District 2 (Evergreen Hospital) (employer) as respondent. Marvin L. Schurke, Executive Director of the Commission, issued a preliminary ruling on the complaint on November 12, 2004. The preliminary ruling held that assuming all of the facts alleged to be true and provable a cause of action would be stated for:

Employer discrimination in violation of RCW 41.56.140(1) by its discharge of Justin Smith in connection with a telephone call he placed to Andrea Sheahan in September 2004.

In case 18889-U-04-4799, Mr. Schurke issued a preliminary ruling holding that if the complainant, Andrea Sheahan, established that Justin Smith was a union official and made a threat of "assassination" and/or other threats against Sheahan relating to the filing and processing of a decertification petition, a cause of action would be stated against the union for interference with employer rights in violation of RCW 41.56.140(1). The alleged threats arose in the context of the September 2004 telephone conversation between Smith and Sheahan. In determining this case, the Examiner takes administrative notice of the complaint with exhibits and answers filed in case 18798-U-04-4775 involving these parties.

The two cases were consolidated for hearing on February 15 and 16, 2005, before Examiner Vincent M. Helm. At the hearing it was made clear that although the two cases were bifurcated as to testimony and parties, the Examiner would consider evidence relevant to either case without regard to when received during the hearing process. The parties filed post-hearing briefs on May 3, 2005.

ISSUES PRESENTED

Issue 1: Does the evidence establish that Justin Smith exercised statutorily protected rights and do the totality of the circumstances show a causal connection between Smith's exercise of that right and his termination by the employer?

Issue 2: If the answer to Issue 1 above is in the affirmative, has the employer advanced a legitimate nondiscriminatory reason for its termination of Smith?

Issue 3: If the answer to Issue 2 above is in the affirmative, did the union establish the employer's reason for discharging Smith was pretextual or, alternatively, that while the employer's basis for termination is legitimate, Smith's protected activities were a substantial factor in motivating the employer to terminate him?

APPLICABLE LEGAL CRITERIA

Chapter 41.56 RCW prohibits employers from interfering with or discriminating against a public employee who exercises collective bargaining rights secured by statute:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

Enforcement of those statutory rights is through the unfair labor practice provisions of the statute:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> . . . .

The Commission has jurisdiction to determine and remedy unfair labor practice claims under RCW 41.56.160.

Legal Standards for Interference -

The complaining party has the burden of proof in an allegation of unlawful interference which must be established by a preponderance of the evidence. To prove an "interference" violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with union activity. *City of Seattle*, Decision 3066 (PECB, 1989), *aff'd*, Decision 3066-A (PECB, 1989). See, also, *City of Pasco*, Decision 3804-A (PECB, 1992), and cases cited therein. It is not necessary to prove the employer acted with unlawful intent or motivation. Nor is it necessary to show that the employees were actually interfered with or coerced. *Clallam County v. Public Employment Relation Commission*, 43 Wn.App. 589 (1986).[1]

Legal Standards for Discrimination -

The Commission and Supreme Court require a higher standard of proof to establish a discrimination violation.[2] A discrimination violation occurs when: (1) The employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so; (2) The employer, with knowledge of one (1) above, deprived the employee of some ascertainable right, benefit or status; and (3) There was a causal connection between the exercise of the legal right and the discriminatory action. *See, Educational Service District 114*, Decision 4361-A (PECB, 1994)

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[1] The Commission has found interference where employees could reasonably perceive a lay-off of a union activist as a threat of reprisal associated with union activity (*City of Federal Way*, Decision 5183-A (PECB, 1996)).

[2] *See, Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991), and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996), and *Brinnon School District*, Decision 7211-A (PECB, 2001).

In a discrimination case, the Commission has adopted a three-pronged shifting burden approach. To meet the initial burden, a complainant must establish a prima facie case of discrimination as set forth above. Then the burden shifts to the employer to articulate legitimate, nonretaliatory reasons for its actions by producing evidence sufficient to warrant a finding that its action was taken for a nondiscriminatory reason. Such evidence need not meet the preponderance of evidence standard because the burden of persuasion rests with the complainant. If the employer does not provide this evidence, liability attaches as a matter of law. If such evidence is produced, the presumption of a violation of statute is rebutted. The complainant must then show, by a preponderance of the evidence, that the stated reason for the disputed employer action was pretextual and in fact was in retaliation for the employee's exercise of statutory rights. This may be done by direct or circumstantial evidence showing: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action. If this third factor is not established, the case is dismissed. If it is, the complainant establishes a reasonable inference of discrimination. *Educational Service District 114*, Decision 4361-A; *King County*, Decision 7506-A (PECB, 2003).

As noted in *Educational Service District 114*, an employer usually does not publicize a retaliatory motive and therefore circumstantial, rather than direct evidence, is most often the basis for a finding of a discriminatory motive. In establishing the causal

connection, Washington Supreme Court decisions indicate it is sufficient to show the employee engaged in protected activities, the employee had knowledge of such activities, and under the facts it can reasonably be inferred the employee was discharged or suffered other adverse consequences to his employment status as a result thereof. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46; *Allison v. Seattle Housing Authority*, 118 Wn.2d 79.

A finding of discrimination necessarily includes a finding of interference, because by discriminating against an employee for protected activity, an inference can be made that employees could reasonably perceive a threat to their rights. *Educational Service District 114*.

CONTEXT IN WHICH CASE ARISES

Service Employees International Union (SEIU) adopted an initiative at its national convention in 2000. The jurisdiction of local unions were realigned in an effort to most effectively represent employees in various industrial or service segments of the economy. In furtherance of this policy the SEIU national executive board in November 2002 determined that all health systems/acute care and mental health bargaining units represented by the union would be transferred to SEIU District 1199 NW (1199). A written transfer agreement was entered into by the union and 1199 effective February 5, 2003. At the same time and effective the same date the two entities executed a servicing agreement. This agreement provided that 1199 would assume responsibility, as the agent of the union, for collective bargaining negotiations, labor contract administration, grievance adjustment, arbitration, and representation of bargaining unit members covered by the transfer agreement. A

bargaining unit of clerical and service employees of the employer transferred under the foregoing agreement.

Union stewards did not support this transfer of jurisdiction. On August 5, 2004, three stewards, Andrea Sheahan, Carolyn Lindley, and Phil Cortese filed a petition for Investigation of Question Concerning Representation, case 18749-E-04-2975. An attachment to the petition indicated the purpose of filing was to have the Local 6 certified as the bargaining representative to the exclusion of 1199 and to prevent a change in representation without a vote.

On August 16, 2004, the Commission notified the parties by letter of several deficiencies in the petition. One of the deficiencies noted was if the petition was seeking to decertify the union, a new petition would be required supported by cards or letters indicating that at least 30 percent of the employees no longer wished to be represented by the union. The employer, who had been dealing with staff of 1199 as the servicing agent of its bargaining unit employees, on August 17, 2004, notified the presidents of the union and 1199 by letter that effective that date, no employee of 1199 could be on the employer premises unless a patient or visiting a patient. In its correspondence the employer indicated that its position was premised upon the following factors:

- the failure to allow bargaining unit employees to vote as to whether they wished to be represented by 1199;
- the August 5 petition, which the employer stated it fully supported.

The employer noted that because of the foregoing factors, "[W]e

have decided not to engage in any further dealings with representatives of District 1199 NW."

On August 19, 2004, the employer e-mailed bargaining unit employees and advised them of the filing of the decertification petition with the Commission and of employee complaints about pressure by 1199 representatives. Employees were informed the employer would no longer deal with 1199 and its representatives and 1199 representatives would not be permitted on employer premises.

Thereafter a second petition, case 18802-E-04-2983, was filed by Sheahan and Lindley with the Commission on August 31, 2004, seeking decertification of the union as the bargaining representative. The petition included the cell phone number of Sheahan as the telephone number of the contact person. The space on the form to indicate the name of the contact person was blank.

Additional correspondence was transmitted by the employer to Local 6 on September 9, 2004, and to 1199 on September 28, 2004, reiterating the employer's position that 1199 representatives could not be on employer property for the purpose of representing bargaining unit employees. From August 17 onward, the employer's security escorted 1199 staff from the employer's premises and the employer called local police in connection with 1199 representatives' attempts to be on the employer's premises for representation purposes.

The Examiner finds the employer violated RCW 41.56.140(1) by discharging Justin Smith in retaliation for his exercise of rights protected under the statute. By this conduct, the employer has also interfered with, restrained or coerced employees in violation of the statute.

ANALYSIS

Issue 1: Does the evidence establish that Justin Smith exercised statutorily protected rights and do the totality of the circumstances show a causal connection between Smith's actions and his termination by the employer?

Justin Smith was hired as a janitor in the employer's environmental services department on November 19, 2001. At the time of his hire, he had disclosed he was a union steward for the postal workers union. He worked for the United States Postal Service full time throughout his period of employment with the employer. While employed by the employer he worked 8:30 P.M. to 12:30 A.M. Monday through Friday in the Evergreen Professional Building, one of several employer facilities.

The evidence of Justin Smith's protected activity consists of a grievance filing and associated information request in the summer of 2004, appointment as a union steward and union negotiating team member on September 2, 2004, and a phone call to Sheahan on September 11, 2004, wherein he expressed his support of the union and opposition to its decertification as a bargaining representative.[3] It has been found he was not functioning in his steward role in making this call. *See King County Public Hospital District 2 (Evergreen Hospital)*, Decision 9056 (PECB, 2005).

On September 2, 2004, 1199 staff representatives met with certain

[3] The grievance filing and information request arose out of a reprimand received by Smith in the summer of 2004 for insubordination. The employer states this alleged misconduct was not considered in connection with the decision to terminate Smith.

bargaining unit employees of the employer, who had indicated an interest in serving as members of the union bargaining team. Justin Smith attended the meeting. During the meeting, Johnathan Rosenblum, the head of internal organizing and the individual appointed to lead 1199 negotiations with the employer, advised the employees that union stewards had filed a decertification petition and would have to be replaced. He further said that the employees in attendance at this meeting would be designated as stewards. On September 3, 2004, the president of the union in a letter to Smith confirmed his appointment as union steward copying, by certified mail, three employee relations officials of the employer.

Smith testified he never functioned as a steward of the union, advised fellow employees that he was not a steward, and verbally advised 1199 representatives on September 2 and 11, 2004, that he would not function as a steward. Sometime following his September 11 phone call to Sheahan and prior to September 23, 2004, he wrote the union that he could no longer function as a steward. Smith's picture was prominently displayed on a September 20, 2004, bulletin published by the union listing him as a union bargaining team member. Moreover, by letter dated September 14, 2004, the union notified the employer that Smith was a member of its negotiating committee. The employer, at the time it terminated Smith, believed he was a union steward.

The six employees who were leading the decertification effort sent a letter to the homes of all bargaining unit employees, bearing the names of the six employees and detailing the reasons for filing the petition. The letter urged employees with questions to respond to an e-mail address. Smith read this letter on the afternoon of September 11, 2004, and, rather than using e-mail, obtained the contact telephone number listed on the petition through use of the

Commission website. Smith then proceeded to call that number to ascertain how the leaders of the decertification effort obtained his home address and to obtain answers to questions produced in his mind by the contents of the letter.

While Smith contends he identified himself to Sheahan as Justin Smith, I do not credit this contention. On two different occasions, within hours of the telephone call, Sheahan told a police officer and an employer security guard that the caller had identified himself as Keith. The Examiner finds no motivation for her to fabricate. For his part, Smith at times testified he was unsure of the identity of the person he talked to and at times admitted he was aware he was talking to Sheahan. While elements of the conversation between Smith and the grievant are sharply disputed, it is fair to state the conversation at times was heated and that in essence Smith manifested strong opposition to the decertification effort. Sheahan for her part attempted to read excerpts of the letter to Smith to support her position.

After the conversation ended Sheahan, believing that one statement by Smith constituted a threat of physical harm to her, perhaps her family members, and the other individuals who had initiated the decertification effort, contacted on September 11, 2004, among others, an employee working in security for the employer. Sheahan said a person who identified himself as an employee named Keith, working in Environmental Services, had just called and told her that she, Carolyn Lindley, and others might be assassinated. Sheahan provided the caller's phone number from her caller I.D. Thereafter, the employer, on September 14, 2004, through a security consultant retained the proceeding day determined the call was made from Smith's wife's cell phone. The number had also been listed by Smith as his home phone number on his employment application.
On September 20, 2004, Sheahan prepared a written account of her

telephone conversation with Smith and presented it to the employer's manager of safety, security, and transportation services. Highlights of this document include:

- The caller asked if the person answering phone was Andrea Sheahan.
- Response was in the affirmative.
- Caller identified himself as dues paying union member named Keith working in environmental services in the employer's EPC facility.
- Caller asked why decertification petition filed.
- Caller said stewards were confused as to what they were trying to accomplish.
- Caller interrupted Sheahan's reading of the letter to employees.
- Caller said Sheahan had personal vendetta against 1199 and did not consider other members of the union.
- Sheahan explained the position of the petitioners with respect to not having a vote on representation by 1199 and not being supported with respect to grievance processing-and an increase in cost of union dues.
- Caller responded that Sheahan did not understand that working a year without a labor agreement will permit the employer to exercise total control over the bargaining unit with no increase in wages or benefits.
- Sheahan responded she was aware of the process following decertification, noted the excellent relationship with the employer, and her familiarity with the existing contract

because she negotiated it.

- Sheahan notes that the caller's response was agitated in beginning to describe the perceived inadequacies of the existing labor agreement.
- Sheahan noted at that point she believed she was not talking to an employee and made a note of the caller's phone number as displayed on her phone.
- Caller stated it appeared Sheahan and the employer have been working together.
- Sheahan responded they had through a conference committee.
- Caller said it appeared the decertification effort was self motivated by the stewards who did not have sufficient support of employees.
- Sheahan responded that the decertification had majority support.
- Caller noted that since Sheahan and Lindley were no longer stewards and conference committee members, their credibility with the bargaining unit would decrease.
- Sheahan noted these last comments convinced her that she was not talking to an employee because her loss of steward status was not public information.
- The caller after some further conversation asked Sheahan if she knew what would happen if she followed through with the decertification petition.
- Sheahan responded affirmatively.
- Caller then said, "Let me tell you what will happen to you and

Carolyn," and inquired if she was the other signer of the petition.

- Sheahan said she was.
- Caller then said, "You both will be assassinated, fired from your jobs by management and administration, all six of you."
- Sheahan responded that the phone call was becoming harassing and threatening, she no longer wanted to talk to the caller, and directed that he not call her again.
- Sheahan hung up the phone.

In addition, she signed an acknowledgment that the security guard's report of her conversation with him on September 11, 2004, was accurate. Phone records indicate the phone call lasted approximately 25 minutes.

On September 27, 2004, the employer decided to place Smith on administrative leave pending review with him of the matter. This decision was not implemented until September 29 because Smith was absent from work on the 27th and 28th. Chuck Thorell, the employer's manager of environmental services, told Smith he was being placed on paid administrative leave pending investigation of a serious complaint against him by an employee. He refused to divulge the nature of the complaint. Thorell told Smith to contact Gary Brenner, the employer's director of labor, employee relations, and employment, to arrange a time for an investigatory interview.

The interview was conducted on October 4, 2004. After extensive discussion, Denise Baeza, a staff representative of 1199, was permitted to attend as Smith's legal representative. At the

meeting, Smith gave his account of his telephone conversation with Sheahan.

Other than the matter of how Smith identified himself and whether he knew he was talking to Sheahan, which have been previously referenced, Smith's account varies from that furnished the employer by Sheahan only in the following significant areas:

- Smith told Sheahan if the decertification committee assassinated the union the employer would fire them.
- Sheahan told Smith that if Smith called her again she would consider it harassment.
- Both parties concluded the conversation by wishing the other a nice day.

The employer at the conclusion of the meeting advised Smith he was terminated for violation of the employer's written policy with respect to violence in the workplace.

The evidence clearly establishes Justin Smith engaged in the following activities protected by the act:

- filed a grievance and written information request with the employer in the summer of 2004.
- was appointed a union steward in September 2004.
- was appointed a member of the union negotiating committee in September 2004.
- on September 11, 2004, as an individual member of the bargaining unit telephoned a leader of the committee seeking to decertify the union and voiced his opposition to this effort and support of the union.

The evidence establishes that the employer, with full knowledge of

Smith's protected activity, terminated Smith's employment. With respect to Issue 1, the union has shown Smith engaged in protected activity and under the circumstances noted above has established a causal connection between this activity and the employer's termination of his employment.

Issue 2: If the answer to Issue 1 above is in the affirmative, has the employer advanced a legitimate nondiscriminatory reason for its termination of Smith?

RCW 49.19 sets forth a legislative concern for violence in health care settings and mandates the establishment by each covered health care facility of a plan to protect employees at the workplace; training of employees in violence prevention; and maintenance of appropriate records. The statute defines violence as including a verbal threat of physical assault. In addition, RCW 9A.50 provides that it is a gross misdemeanor for an individual to threaten to inflict injury on an employee of a health care facility.

In furtherance of its statutory obligation under RCW 49.19, the employer adopted a Violence in the Workplace Plan. This policy defines workplace violence as including any verbal assault of an intentional nature occurring or arising in the workplace. The policy defines a verbal assault as any actual or attempted physical/emotional abuse of any person. The policy provides for education and training of employees in safety and security and states the employer's "zero tolerance" attitude toward violence in the workplace. The policy notes that appropriate disciplinary action, including immediate termination, will be instituted where employees make verbal threats of violence. The evidence shows that

Smith received training with respect to the policy. Brenner testified that the employer had terminated 10 employees for incidents of violence, threats, or harassment.

In the October 4, 2004, meeting, Brenner listened to Smith deny threatening to assassinate Sheahan or the other sponsors of the decertification petition. Brenner did not accept Smith's statement that he had in reality told Sheahan if she and her associates were successful in eliminating the union, i.e. "assassinating the union", they would be terminated thereafter by the employer. Smith contended this statement was predicated upon his knowledge of a relative's experience after a decertification involving another employer and that his comment was inspired by a segment of a "Star Trek" movie.

Brenner also did not accept Smith's assertion that he had clearly identified himself as Justin Smith at the outset of his conversation with Sheahan. Brenner also viewed the date of the phone call as indicating an intent on the part of Smith to impart a particularly sinister import to his comments to Sheahan as it transpired on the anniversary of the destruction of the Twin Towers in New York City by terrorists. Lastly, Brenner testified that he believed Smith's words to Sheahan constituted a literal threat to kill a coworker. Further, Brenner believed Smith, by falsely identifying himself in the telephone conversation, had thereby wrongfully implicated another employee. On October 5, 2004, the employer terminated Smith for, "[S]erious direct and indirect threats of violence and falsely implicating another employee in threat of violence."

Based upon the foregoing, the employer has articulated a legitimate, nondiscriminatory reason for terminating Smith. The complaint, accordingly, must be dismissed absent a showing by the

union that the asserted reason is a pretext or Smith's protected activities were a substantial factor motivating the employer to act.

Issue 3: If the answer to Issue 2 above is in the affirmative, did the union establish the employer's reason for discharging Smith was pretextual or, alternatively, that while the employer's basis for termination is legitimate, Smith's protected activities were a substantial factor in motivating the employer to terminate him?

In analyzing the employer's motivation in discharging Smith the Examiner is taking into account the surrounding circumstances, the nature of the employer's response to Smith's perceived threat, evidence of Smith's protected activity, the plausibility of the employer's conclusions as to the nature of Smith's comments to Sheahan, and the employer's prior discipline of employees found to have violated its policy against violence in the workplace.

The employer has not maintained a neutral position with respect to the representation question involving employees represented by Local 6. The evidence shows that until the initial decertification petition was filed by employees Sheahan, Lindley, and Cortese, the employer had willingly dealt with staff representatives of 1199 who, pursuant to the agreements between 1199 and the union, were representing union bargaining unit employees. Less than two weeks subsequent to this filing, the employer for the first time stated it refused to deal with 1199, indicated its support of the petition, and issued its mandate against employees of 1199 being on employer premises to conduct union business. Within a matter of days, the employer followed with an e-mail to all employees confirming this position.

There followed two further letters in September 2004, one to the union and one to 1199 reaffirming the employer's position respecting access to employer premises. Throughout this period in August and September, the employer enforced its bar on 1199 representatives either through resort to its own security officers or the police. The foregoing provides ample evidence of the employer's general anti-union animus.

Smith, since September 2, 2004, had been appointed by the union as a steward and union negotiating team member. The employer had received written notice of these appointments in September 2004. At the time of terminating Smith, the employer did not know of any other protected activity except as revealed by its investigation of Smith's September 11, 2004, conversation with Sheahan and the earlier grievance filing and information request.

The seriousness with which the employer viewed Smith's "threat" in his conversation with Sheahan is illustrated by its actions upon being informed of the matter on September 11, 2004. Initially, the employer's response reflected a genuine concern. On the day it received Sheahan's verbal report, the employer, through its security department, advised Sheahan and Lindley to contact the security department for escort to and from work. Cortese was verbally advised of the threat by Sheahan.

The employer, through the telephone number supplied by Sheahan, ascertained on September 14, 2004, that the call originated from the telephone of Smith's wife. Faced with this knowledge, it did nothing for two weeks to take action to eliminate the threat it contends Smith's employment created. It did not inform Cortese, who worked as a janitor for many of the same hours worked by Smith and who had contact with him on the job, that it had discovered

that Smith was the caller. It waited over one week before attempting to obtain any detailed information from Sheahan as to the content of the call and never advised Sheahan of her caller's identity until October 6, 2004.

These actions are not consistent with that of an employer concerned with a threat of serious harm to employees. The delay speaks more to an internal risk-benefit analysis in deciding whether to avail itself of an opportunity to convey a clear message to its employees that being a union supporter was not a prescription for continued employment.

Brenner is an intelligent, experienced labor relations professional. In the meeting with Smith, he quite correctly concluded that Smith was not truthful when he said he identified himself to Sheahan and that he had not told Sheahan she and others would be assassinated. It does strain credibility to believe that Brenner honestly believed that Smith's comment was a literal threat of death. Brenner's efforts to attach significance to the date of the phone call also appeared to be a forced reaction to justify the employer's discharge of Smith. Clearly, had Smith meant Sheahan and the other sponsors were going to die, he would not have immediately followed the assassination comment with the prediction that they would be fired by the employer. In that context, "assassinated" would clearly not be referencing literal death, but conveying a secondary meaning of being injured in the form of losing their employment. This conclusion is supported by the lack of a continuing and aggressive response by the employer once it became aware of the situation.

Even assuming Brenner was so obtuse as to attach a literal meaning to the use of the word by Smith, nonetheless, the Examiner

concludes that protected activity was nonetheless a substantial motivating factor in the employer's decision to terminate Smith.

In part the Examiner reaches this conclusion by viewing the context in which the conversation between Smith and Sheahan occurred. It arose in the midst of a heated representation campaign with Smith calling as a union adherent to voice his opposition to the decertification effort and Sheahan, a leader of the decertification effort, defending her position. Sheahan in her testimony conceded the obvious. She admitted she expected employees to oppose her efforts, and to voice their opposition to her position. Indeed the letter to employees from her and the other leaders of the decertification effort invited a response from employees. Smith's conversation thus must be viewed as protected activity. Assuming the employer's decision to regard Smith's comments as a literal death threat was made in good faith, the question still remains as to whether Smith's protected activity was nonetheless a substantial motivating factor in the employer's decision.

In this regard, the union introduced evidence of the employer's response to other instances of alleged violations of the employer's policy against violence in the workplace. Three instances occurring in 2003 and 2004 are particularly instructive:

- An employee during a telephone conversation with a claims examiner processing her workers compensation claim, upon being informed her claim was being denied, uttered angry words ending with, "I'm going to shoot your ass." Upon investigation, the employee denied making the threat and failed to show any remorse. The discipline imposed was a one-day suspension.
- Employee at workplace instigated altercations with a fellow employee which included physically restraining employee in a

stairwell while holding on to employee's purse and pushing her against a wall and persisting in this conduct over protests of the employee and in spite of a second employee asking her to stop. Disciple imposed included a verbal warning, written apology, employee review of employer's Workplace Violence Prevention Program, completion of examination thereon, and discussion with supervisor.

- Employee, frustrated with another employee who recently suffered a hearing loss, overheard by another employee to say, "If (name of employee) does not get out of my ______ face, I am going to take a stick and knock out her good ear!" Discipline included a written final warning and a request for employer to prepare an action plan regarding professional assistance to cope with employee issues and methodology to resolve conflict with fellow employee.

Interestingly, the employer introduced no evidence as to the circumstances wherein it had terminated other employees for violation of its Violence in the Workplace policy. The Examiner finds Mr. Brenner's response to a question from employer counsel to be particularly useful in assessing the employer's motivation in this case.

> Q: Are there differences in your mind between a threat made to an employee of a third party like a claims examiner and a coworker?
>
> A: No.

The Examiner agrees with Mr. Brenner's assessment. With this being the case, the question arises as to why in one instance a threat merits a one-day suspension, and in Smith's case, termination. The only discernable differences are the following:

- Smith, at the time in question, was being held out to the employer and bargaining unit employees as a steward and leader by virtue of serving on the union's negotiating committee.
- Smith's comments were made in the course of a heated conversation with a leader of the union decertification effort wherein each was strongly advocating contrary views concerning representation by the union.
- The employer was strongly supportive of the decertification effort.

Based on the foregoing, the Examiner finds that the protected activity of Smith was a substantial motivating factor in the employer's decision to terminate Smith. By this action the employer was reinforcing its anti-union message to the employees by demonstrating the unhappy result for an employee aligned with the union and reinforcing its support of those leading the effort to decertify the union. The lack of any action by Smith in his role as union steward or limited involvement as a union negotiating team member does not serve to counteract this conclusion. While the employer had ample reason to conclude that Smith attempted to hide his identity during his conversation with Sheahan and, in fact, identified himself as another employee, for the reasons advanced herein the Examiner concludes that, absent protected activity in the context of the larger decertification effort, the employer would not have discharged Smith.

FINDINGS OF FACT

1. King County Public Hospital District 2 (Evergreen Hospital) is a "public employer" within the meaning of RCW 41.45.030(1).

2. Service Employees International Union, Local 6, is a "bargaining representative" within the meaning of RCW 41.56.030(2).

3. Justin Smith is a "public employee" within the meaning of RCW 41.56.030(2).

4. At all times relevant herein the union was the bargaining representative for a unit of certain employees of the employer.

5. On August 5, 2004, Andrea Sheahan, Carole Lindley, and Phil Cortese filed a petition with the Commission, case 18749-E-04-2975. An attachment indicated the purpose in filing was to have the union certified as the exclusive bargaining representative to the exclusion of 1199 and to prevent a change in representation without a vote.

6. Upon being notified that the petition as filed was defective, Sheahan and Lindley filed a second petition with the Commission on August 31, 2004, seeking to decertify the union as the bargaining representative for the unit described in four above, case 18802-E-04-2983.

7. At the time of the filings referenced in five and six above, Sheahan, Lindley, and Cortese were union stewards and conference committee members.

8. On September 2, 2004, the union designated Justin Smith, a part time janitorial employee of the employer and a bargaining unit member, to be a union steward and a member of its negotiating committee. Throughout the period of time relevant

here, the union held Smith out to be a steward. Smith, at no time relevant herein, took effective action to rescind this status. Smith did not function as a steward or hold himself out as such to employees. At all relevant times herein, the employer believed Smith was a union steward and negotiating team member having received written notification from the union of these assignments in letters dated September 3 and 14 respectively.

9. On September 3, 2004, the union removed Sheahan and the other stewards who supported the decertification from their positions because of their support of the decertification.

10. The decertification petitions were prompted principally by agreements in February 2003, between the union and Service Employees International Union, District 1199 NW adopted in response to an initiative by Service Employees International Union whereby representation of bargaining unit employees of the employer and union memberships of such employees was transferred from the union to 1199 effective February 5, 2003, without any provision being made for bargaining unit employees to vote on the matter.

11. On August 17, 2004, the employer advised the union and 1199 that because of the filing of the petition it would not deal with employees of 1199 in connection with representation of the union's bargaining unit and would not permit employees of 1199 to be on employer premises except as a patient or to visit a patient. The employer thereafter reiterated its position vis a vis 1199 in letters to the union on September 9, 2004 and to 1199 on September 28, 2004.

12. On August 19, 2004, the employer by e-mail notified all bargaining unit employees of the filing of the August 5, 2004, petitions and its support thereof. It alluded to reports of pressure by 1199 representatives upon employees. As a consequence of the petition and the conduct of the 1199 representatives, employees were advised that the employer would no longer deal with 1199, and its representatives would not be permitted on employer premises except as patients or to visit patients.

13. Until August 17, 2004, the employer had dealt with 1199 employees on matters dealing with the union's bargaining unit. Thereafter, it aggressively pursued its policy as noted in 12 above. This included employer security repeatedly escorting 1199 representatives off employer premises and requesting intervention of local police to accomplish this objective.

14. On the afternoon of September 11, 2004, Smith met with a staff representative of 1199 to be informed of what transpired at a meeting of the union negotiating committee which he had been unable to attend. In the course of this conversation he was advised to look for a letter to employees from leaders of the decertification effort.

15. Upon returning home, Smith opened and read the letter referenced above. He then went to the Commission website and located the decertification petitions. He thereafter placed a call to the contact number listed on the petition which was Sheahan's cell phone.

16. Smith and Sheahan engaged in a 25 minute telephone discussion on September 11, 2004, wherein Smith misrepresented his identity, indicating he was an employee named Keith.

17. In the telephone conversation Smith vigorously opposed the decertification effort and late in the conversation told Sheahan, in effect, that if the decertification effort was successful, she and Lindley would be assassinated, fired from their jobs by management and administration, all six of them. The latter reference covering the six individuals who had signed the letter to employees.

18. Sheahan reported the conversation on September 11, 2004, to an employer security guard who made a written report which was sent to various employer representatives and included the phone number of the caller as provided by Sheahan.

19. On September 13, 2004, the employer sought assistance of an outside security consultant to ascertain the identity of the person having that phone number. On September 14, 2004, responsible employer representatives were informed that the number was for a phone listed in the name of Smith's wife.

20. On September 27, 2004, the employer decided to place Smith on administrative leave pending a review with him of the September 11, 2004, telephone conversation with Sheahan.

21. At all times material herein, the employer had in effect a policy dealing with violence in the workplace adopted by virtue of RCW 49.19 which provides that health care facilities must establish plans to protect employees at the workplace.

22. The Violence in the Workplace Plan adopted by the employer defines workplace violence as including a verbal assault of an intentional nature occurring or arising in the workplace and provides for appropriate discipline including termination for a violation of the policy.

23. On October 4, 2004, employer representatives met with Smith and his representative to review the circumstances involved in Smith's phone call with Sheahan on September 11, 2004.

24. The employer elected to construe Smith's comment to Sheahan as a literal death threat rather than concluding that, in context, it was a prediction that if the decertification succeeded, the employer would then terminate the leaders of the effort, thus equating loss of employment with their figurative assassination, and thereupon terminated Smith for violation of the policy referenced in 22 above, and for wrongfully implicating another employee by identifying himself as that employee.

25. The evidence shows that three employees in 2003 and 2004 received discipline of a verbal warning, a written final warning, and a suspension of one day respectively for threats to do serious bodily injury to a fellow employee or a third party or for physically and repeatedly assaulting a fellow employee at the workplace.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and chapter 391-45 WAC.

2. The evidence as described in paragraphs 3, 5, 6, 8, 11-13, 16-20, 22, 24, and 25 of the foregoing findings of fact shows that Justin Smith exercised rights protected by RCW 41.56.040 and that his exercise of these rights was a substantial motivating factor in the employer's decision to terminate him and accordingly the employer's action constitutes an unfair labor practice under RCW 41.56.140(1).

ORDER

KING COUNTY PUBLIC HOSPITAL DISTRICT 2 (EVERGREEN HOSPITAL), its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering with or discriminating against Justin Smith for his exercise of his collective bargaining rights under Chapter 41.56 RCW.

   b. In any other matter interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Offer Justin Smith immediate and full reinstatement to his former position or a substantially equivalent position. Make Smith whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful layoff to the effective date of the unconditional offer of reinstatement made pursuant to this order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

   b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Notice". Such notices shall be duly signed by an authorized representa-

tive of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular public meeting of the Board of Commissioners for Evergreen Hospital and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

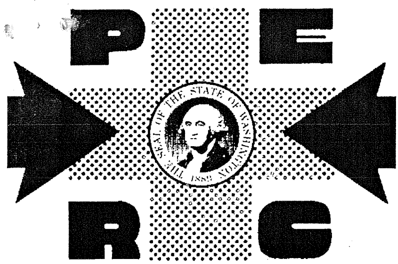
e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 26th day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

VINCENT HELM, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with and discriminated against Justin Smith by terminating him for exercising his collective bargaining rights under the laws of the state of Washington.

WE UNLAWFULLY interfered with our employees in the exercise of their collective bargaining rights under state law.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL offer Justin Smith immediate and full reinstatement to his former position or a substantially equivalent position and make Smith whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful layoff to the effective date of the unconditional offer of reinstatement made pursuant to this order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

WE WILL NOT interfere with or discriminate against Justin Smith in the exercise of his collective bargaining rights under the laws of the State of Washington.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: ____________________ EVERGREEN HOSPITAL

BY: ____________________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 112 Henry Street N.E. PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website: www.perc.wa.gov.