State - Department of Labor and Industries, Decision 9348 (PSRA, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STATE - DEPARTMENT OF LABOR AND INDUSTRIES, Employer.	)	
KIMBERLY JOHNSON, Complainant, vs. WASHINGTON FEDERATION OF STATE EMPLOYEES, Respondent.	)	CASE 19519-U-05-4952 DECISION 9348 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
KIMBERLY JOHNSON, Complainant, vs. STATE - DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	CASE 19520-U-05-4953 DECISION 9349 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Kimberly Johnson, appeared pro se.

Parr Younglove Lyman Coker, by *Edward Earl Younglove III*, Attorney at Law, appeared for the union.

Rob McKenna, Attorney General of Washington, by *MB Newberry*, Assistant Attorney General, appeared for the employer.

On June 2, 2005, Kimberly Johnson (Johnson) filed unfair labor practice complaints against the Washington Federation of State Employees (union/WFSE) and the Washington State Department of Labor

and Industries (employer/L&I), concerning employee efforts to collect sufficient signatures to file a representation petition to hold an election to decertify the union. The union represents approximately 2,000 nonsupervisory employees of the employer. The union and employer had a collective bargaining agreement (CBA) in effect prior to July 1, 2005: the date their first contract under the Personnel System Reform Act was set to go into effect (PSRA).

After review of the complaints, a deficiency notice was issued on June 22, 2005. Johnson filed amended complaints on July 7, 2005. On July 18, 2005, a preliminary ruling was issued finding causes of action to exist against both the union and employer. It summarized the allegations in the amended complaints as follows: union interference with employee rights in violation of RCW 41.80.110(2)(a) and inducement of employer to commit an unfair labor practice in violation of RCW 41.80.110(2)(b); and employer interference with employee rights in violation of RCW 41.80.110(1)(a), domination or assistance of a union in violation of RCW 41.80.110(1)(b), and discrimination in violations of RCW 41.80.110(1)(c). The preliminary ruling is confined to allegations concerning violations of Chapter 41.80 RCW, and the issues before the Examiner are limited to the allegations that were found to state a cause of action in the preliminary ruling.

Prior to the filing of the unfair labor practice complaints against the union and employer, the related representation petition was filed by Bill Ireland on April 1, 2005, seeking decertification of the union as the exclusive bargaining representative of nonsupervisory employees of the employer.[1] A "blocking charge" was issued under WAC 391-25-370 that suspended the representation

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[1] All references to position or status are based on the relevant time period of March, April and July of 2005.

petition until the unfair labor practice cases could be heard. Consequently and in conjunction with a letter from the Commission's Executive Director on June 30, 2005, the employer determined that the new CBA set to go into effect on July 1, 2005, could not be implemented. The representation petition was subsequently dismissed for failure to obtain the required number of signatures, and the blocking charge was thus removed, allowing the new CBA to be implemented and employees to receive raises on July 29, 2005.[2]

Both the union and employer filed motions to dismiss the complaints, or in the alternative, to make the complaints more definite and detailed along with their answers. On August 26, 2005, a ruling denying the motions was issued.

The cases were consolidated for hearing. Examiner Dianne E. Ramerman held a hearing on September 26, 2005, October 4 and 5, 2005, and October 27, 2005. Per stipulation of the parties, the witnesses were sequestered. Post hearing briefs were filed to complete the record.

ISSUES

1. Did the union interfere with employee rights?

2. Did the employer interfere employee rights?

3. Did the employer dominate or assist the union?

4. Did the union induce the employer to discriminate; Did the employer discriminate?

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[2] *State - Labor and Industries*, Decision 9052 (PSRA, 2005).

The union and employer did not interfere with employee rights. The employer did not dominate or assist the union. The union did not induce the employer to discriminate, and the employer did not discriminate. The motions to dismiss or in the alternative to make the complaints more definite and detailed were appropriately denied; however, even if they were not, neither the union nor employer can claim prejudice. All allegations in the two consolidated complaints are dismissed.

I. ISSUE 1: DID THE UNION INTERFERE WITH EMPLOYEE RIGHTS?

A. Applicable Law

1. Union "Interference" with Employee Rights

The PSRA prohibits employee organizations from interfering with, restraining or coercing employees in the exercise of their collective bargaining rights:

> RCW 41.80.050. RIGHTS OF EMPLOYEES. Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining *free from interference, restraint, or coercion*. Employees shall also have the *right to refrain from any or all such activities* except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

(emphasis added). Included among these is the right of employees to decertify their exclusive bargaining representative. WAC 391-25-070(6)(c). That right is protected by the unfair labor practice provisions of the PSRA and by the Commission's delegated authority to determine and remedy unfair labor practices. Under RCW 41.80.050 and RCW 41.80.110(2)(a), it is an unfair labor

practice for an employee organization to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the chapter. However, under RCW 41.80.110(3):

> (3) The expressing of any views, arguments, or opinion, or the dissemination thereof to the public, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under this chapter, if such expression contains no threat of reprisal or force or promise of benefit.

Both unions and employers can commit interference violations. *City of Port Townsend*, Decision 6433-B (PECB, 2000).[3] The legal determination is similar in each type of case and is relatively simple: Interference is based not upon the reaction of the particular employee involved, but rather on whether a typical employee in similar circumstances reasonably could perceive the conduct as a threat of reprisal or force or promise of benefit related to the pursuit of rights protected by the chapter. *Community College District 19 (Columbia Basin)*, Decision 9210 (PSRA, 2006); *King County*, Decision 6994-B (PECB, 2002); *Brinnon School District*, Decision 7210-A (PECB, 2001); *City of Port Townsend*, Decision 6433-A (PECB, 1999) and Decision 6433-B. Intent or motivation is not a factor or defense. *King County*, Decision 6994-B. Nor is it necessary to show that the employees involved were actually interfered with or restrained for an interference charge to prevail. *King County*, Decision 6994-B.

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[3] Although certain differences exist between the PSRA and the Public Employees Collective Bargaining Act (PECBA), cases decided under PECBA are generally applicable to PSRA cases. *Community College District 19 - Columbia Basin*, Decision 9210 (PSRA, 2006) and *State - Department of Natural Resources*, Decision 8458-B (PSRA, 2005).

2. Considerable Free Speech Latitude Allowed During Campaigns

Employees are allowed considerable latitude in seeking the support of other employees for a representation or decertification petition. *Clallam County Public Hospital District 1*, Decision 5445 (PECB, 1996) (decertification petition), *citing Lewis County*, Decisions 4691 and 4691-A (PECB, 1994)(representation petition).[4] Decertification efforts may inevitably arouse some acrimony, hurt feelings, suspicions and anger among the employees involved. *Clallam County Public Hospital District 1*, Decision 5445. In *Clallam County Public Hospital District 1*, where the facts were described as "a garden variety decertification movement at a local level," it was explained that:

> The collective bargaining statute restricts free speech only to a limited degree. Counteracting an opponent, or even of a perceived opponent, during a representation campaign is not automatically unlawful.

Citing North Beach School District, Decision 2487 (PECB, 1986); *North Thurston School District*, Decision 4764 (EDUC, 1994).

Furthermore, in *Lewis County*, Decisions 4691 and 4691-A, it was held that even if one accepted that a union supporter's manner was rude and discourteous in the context of a union organizing campaign, the statute does not prohibit free speech to the degree that raised voices, angry words, sizzling and glaring expressions, and sharp disagreements are universally rendered illegal. In that case, the examiner stated that the employer had "misstated employee's rights as including a 'right to a non-hostile work environment.'" *Lewis County*, Decisions 4691 and 4691-A. There,

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[4] In this regard, decertification campaigns and representation campaigns are appropriately compared.

employees complained of fear and physical symptoms due to the union supporter's manner, but the Commission held that the record did not provide a basis to conclude that the union supporter's words were in themselves threatening or intimidating, or that they indicated physical harm might befall the employees. *Lewis County*, Decisions 4691 and 4691-A.

Parties have the freedom to respond to campaign statements that they believe to be false or misleading, and employees are expected to evaluate campaign information themselves. *North Beach School District*, Decision 2487. Incumbent unions are entitled to mount a campaign in support of retaining its status as the exclusive bargaining representative. *Community College District 23 - Edmonds*, Decision 7815-A (2003).

No one can contend that the history of unions and union organizing in America is a pleasant, artistic, sublime or inspirational journey. *Lewis County*, Decisions 4691 and 4691-A. Rather, such events have often been loud and surly, and their history is replete with violence, angry words and enmities that destroy friendships. One of the purposes of Washington state collective bargaining laws is to create a regulatory process for peaceful determination of questions concerning representation. The statutes have succeeded in eliminating the specter of "recognition strikes" and related violence from the dynamics of labor-management relations. The existence of orderly procedures and impartial administration for representation cases does not, however, altogether eliminate the possibility of hard feelings, angry words and emotions running at a high pitch when a union-organizing effort occurs.

The United States Supreme Court has stated that employees are allowed considerable latitude while campaigning and held that union

"interference" in this regard is limited to tactics involving violence, intimidation and reprisal or threats thereof. *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274 (1960). By providing for a cause of action for union interference Congress sought to ensure that strikes and other organizational activities of the employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or of economic reprisal. *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274. Although the words "interference, restraint and coercion" are indeed nonspecific and vague, Congress did not intend for them to have a broad sweep. *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274.

3. Burden of Proof

The Commission has adopted Chapter 391-45 WAC to regulate the processing of unfair labor practice cases. As with any unfair labor practice case, the burden of proof rests with the complaining party and must be established by a preponderance of the evidence. WAC 391-45-270(1)(a). Unlike the National Labor Relations Board (NLRB), the Commission does not investigate facts which are alleged in a complaint to determine if any collective bargaining statute has been violated. *Pierce Transit*, Decision 9074 (PECB, 2005). Thus, allegations are just that; the complainant must present evidence at hearing to prove those allegations. *Community College District 23 - Edmonds*, Decision 7815-A, *citing North Beach School District*, Decision 2487. In the absence of actual proof (through the presentation of evidence) of threats of reprisal or force against the decertification group for the exercise of a protected right, allegations and insult are insufficient to support a finding of an unfair labor practice. *See Community College District 23 - Edmonds*, Decision 7815-A. The Commission staff is not at liberty to take on advocacy responsibilities such as assembling a coherent

presentation, filing in gaps or making leaps of logic. *Pierce Transit*, Decision 9074. Furthermore, statements made as part of questions asked by a party examining a witness (not under oath and not subject to cross examination) are not evidence of any fact admissible at hearing, and thus are given no weight. RCW 34.05.452.

B. The Union Did Not Interfere with Employee Rights

1. Removing Signs Placed Outside of L&I Building[5]

Johnson argues that the union interfered with employee rights when union members removed an eight and one-half by 11 inch piece of paper that stated there was a petition to decertify the union at L&I from a fence outside the L&I building. L&I has a policy that requires employees posting items on agency property, other than in designated areas, to obtain prior approval from L&I. On or about March 16, 2005, Ireland placed the eight and one-half by 11 inch piece of paper on a fence outside the L&I building. He believed the fence was on agency property, but did not obtain prior approval to post the paper. While Lori Butterfield, a union member, and Marcelline Love, a union member, were on a walk, Butterfield removed the paper Ireland had posted from the fence. Other than employee cubicles, Butterfield's and Love's understanding of L&I's policy on posting material on agency property was that union materials were to be posted on union bulletin boards and other materials were to be posted on agency bulletin boards.

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[5] Headers are based on the allegations that were found to state a cause of action in the preliminary ruling. Those incidents or issues raised by the complainant at hearing or in her post-hearing brief, but not in the amended complaint and preliminary ruling, will not be addressed as no cause of action was found to exist at the preliminary ruling stage of the proceedings.

While the right to decertify the incumbent exclusive bargaining representative is protected activity under Chapter 41.80 RCW, there is no right to act in violation of a valid agency policy. Thus, the decertification group was not engaging in protected activity when Ireland placed the paper on the fence without prior approval, and the union cannot be found to have interfered with the exercise of a protected right.[6] Thus, this allegation is dismissed.[7]

2. Removing Flyers from Cafeteria[8]

Johnson argues that the union interfered with employee rights by removing flyers left by the decertification group on tables in the cafeteria. Michael Covey, a bargaining unit employee but not a union member, testified that on a date he could not remember and as he was leaving the cafeteria he saw Joseph Nilsson, a union shop steward and executive board member, go over to a table and pick up some yellow half-sheets of paper. After Covey saw Nilsson, Covey continued walking out of the cafeteria, did not stop to watch, and had no idea what Nilsson did with the papers after he picked them up. Covey could not specifically identify the paper he saw Nilsson

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[6] This situation is distinguished from prior employer approval as a condition for union card solicitations which is unlawful. *King County*, Decision 7819 (PECB, 2002); *State - Department of Corrections*, Decision 7870-A (PSRA, 2003), *citing Opryland Hotel*, 323 NLRB 723 (1997).

[7] In this decision, to the extent testimony conflicts with other testimony or my findings, I found the testimony to be uncredible. Because I have not rejected uncontested testimony, I have not made explicit credibility findings.

[8] The allegation involving the removal of flyers placed in individual work cubicles was dismissed at hearing. In regards to the allegation that the union removed flyers from other "public areas of the workplace," no evidence was presented that "shop stewards followed behind gathering up the material and throwing it in the trash." Thus, that allegation is dismissed as well.

picking up and stated that he really did not pay any attention to what was on the paper.

Johnson did not prove this allegation by a preponderance of the evidence. No evidence was presented as to what Nilsson did with the papers. Covey only testified that he saw Nilsson picking up an unidentified paper on an unidentified day in the cafeteria area. Thus, this allegation is dismissed.

3. Posting Signs Giving False Information

Johnson argues that the union interfered with employee rights by posting a sign giving false information, namely implying that the Evergreen Freedom Foundation (EFF) was behind the efforts of the decertification group at L&I.

a. Facts

During the end of March 2005, the union posted a "Decline to Sign!" sign on its bulletin board warning employees of efforts by the EFF to encourage employees to decertify unions. Uncontradicted testimony was presented that the EFF, the National Right to Work Legal Defense Foundation (NRWLDF), the Building Industry Association of Washington, the Washington Policy Institute, and Fed Up were all encouraging state employees to decertify labor organizations during the relevant time period. Prior to the time the sign was posted at L&I, 9,000 employees at another state agency received a mass mailing about decertification. Subsequent to the time the sign was posted at L&I, L&I employees received at least one similar mailing.

Darrin Adams, a member of the decertification group, testified that the sign regarding the EFF was creating a "hostile work environment" because it sparked some animosity from coworkers. He

testified that it caused a couple of his coworkers to "get in [his] face, saying that they thought that [the decertification supporters] were EFF puppets." As a result, he asked John Geppert, chief union shop steward and local president, to remove the sign from the bulletin board. WFSE director of public affairs Tim Welch testified that the union was anticipating mailings to L&I employees, and the poster was a prophylactic attempt to make sure employees got some information regarding the source of any mailings.

b. Analysis and conclusion

The issue here is whether the posting of a sign is "free speech" or interference. *See City of Seattle*, Decision 3566-A (PECB, 1991). The critical inquiry is whether the main thrust of the communication is informational or substantially factual, or as a whole was persuasive or coercive and reasonably could be perceived by bargaining unit employees as threatening them for the exercise of lawful activity. *See City of Issaquah*, Decision 9255 (PECB, 2006), *citing City of Seattle*, Decision 3566-A.

Looking at the record as a whole, the main thrust of the communication was informational and substantially factual. At the same time the decertification group at L&I was working to decertify the union, other groups were working to decertify the union at least at one other state agency. Thus, the union reasonably suspected that those groups would work to decertify the union at L&I, and legitimately exercised its free speech rights by addressing the activities of these other groups. In the context of a decertification campaigns, it is expected that emotions may run high and that there will undoubtedly be some animosity between coworkers. In the labor law context, there is no "right to a non-hostile work environment." Here, the union had a right to communicate with

bargaining unit employees and defend its incumbent status, and employees were expected to evaluate the information themselves. A typical employee in similar circumstances could not reasonably perceive the sign as a threat of reprisal or force for the exercise of protected rights.[9] This allegation is dismissed.

4. Blocking Access to an Information Table, and Commenting to Supporters of the Decertification Effort[10]

a. Events on March 30, 2005, in the cafeteria eating area[11]

Johnson argues that the union interfered with employee rights by blocking access to an information table and commenting to supporters of the decertification effort in the cafeteria eating area, on the sidewalk, in the hallway to the cafeteria, and in the employee break room.

1) Facts

The decertification group set up a large round table in the cafeteria seating area. Authorization forms that bargaining unit employees could sign to decertify the union were at the table, and hanging in front of the table was the piece of paper Ireland had posted on the fence as previously discussed. Union supporters also set up a similar sized information table catty-cornered to the decertification supporters' table. The union displayed the "Decline to Sign!" sign referenced above. The groups' tables were a few feet apart, located in the middle of a very large room, and

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[9] For any interference allegation in this decision, no evidence was presented that any union member reasonably could make any promises of benefit.

[10] "Comments" can be either verbal or nonverbal.

[11] Although some argument and testimony indicates these events occurred on March 29, 2005, the evidence presented establishes they occurred on March 30, 2005.

surrounded by a mass of other tables and people milling around. A couple civil, casual comments were made between the tables, and union supporters wore union T-shirts, and had piles of literature and cookies to hand out.

Debbie Brookman, union shop steward and policy committee chair, stood to one side of the decertification supporters' table and asked Ireland questions for about 20 to 25 minutes. She used normal speaking tones and obtained a greater understanding of the decertification group's purpose. As they talked, people came up beside them and got material, talked to other decertification supporters at the table, and dropped off several signed authorization forms. Ireland testified that Brookman was trying to block the table because she "hemmed and hawed" when she asked questions. Susan Baker, a decertification group supporter, testified that she felt physically threatened and intimidated by Brookman standing at the decertification supporter's table asking questions, but provided no specifics that reasonably explained why she felt this way. Baker knew Ireland had arranged a safety signal between the decertification group and L&I emergency management personnel, and she observed L&I safety personnel in the area, but did not use the signal.[12]

Baker testified that Geppert sat at a nearby table observing the decertification supporters and that she found his body language threatening and intimidating, but did not provide specific facts that back up her assertion. Geppert testified to sitting at a nearby table and overhearing some conversation that he found interesting.

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[12] The signal was to raise a hand in the air.

Ireland testified that the union supporters "dwarf[ed]" the decertification group, and Baker testified that they were "flanked, surrounded, obstructed." Nevertheless, Kathleen Betzig, a decertification group supporter, testified that there were five to six union people and six decertification supporters. Baker testified that "There were no happy glances, no happy smiles, no friendly gestures toward us."

Furthermore, in the fall of 2004 and the spring of 2005, L&I conducted mandatory agency-wide training on safety and health issues that included workplace violence and the agency's policy on injury/incident reports. In March and April of 2005, 51 incident reports were received by the agency and none had to do with the decertification efforts.[13] L&I emergency management coordinator Valerie Gray testified that she made walkthroughs in the cafeteria during the decertification campaign to look for signs of loud or threatening behavior (*i.e.* body language or facial expressions) or for anyone who looked like a victim of aggression or intimidation. She never saw anything that concerned her.

2) Analysis and conclusion

In the context of a decertification campaign and looking at the record as a whole, a typical employee reasonably could not perceive the described incidents as a threat of reprisal or force related to the pursuit of the right to decertify the incumbent exclusive bargaining representative. Just as the decertification group had a right to work towards decertification of the union, the union had a right to defend its incumbent status by getting its viewpoint out to employees and asking the decertification group questions.

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[13] If the agency received notice of an incident without an incident report, a report would thereafter be requested by the agency as follow-up to the initial report.

Neither Brookman nor Geppert interfered with employee rights by blocking access to the decertification group's table or by commenting to decertification group supporters. The decertification group set up an information table in the middle of a very large room, surrounded by tables and people milling around, where employees could approach from all directions: Employees approached, obtained information and dropped off authorization cards while Brookman and Ireland talked off to one side of the table. No employee testified that their access to the information table was blocked. It could not reasonably be perceived as a threat of reprisal or force for Brookman to ask decertification group members questions about their efforts; rather, in the context of a decertification campaign, it would be usual for the incumbent union to want to obtain such information. Brookman talked to Ireland for a reasonable period of time given the context, and without more "hemming and hawing" does not amount to interference, as intent is not a factor or defense. Ireland did not testify that he felt threatened or intimidated by Brookman. Baker made bare assertions that Brookman and Geppert engaged in intimidation or threats, but did not present specific facts that reasonably backed up those assertions. Also impacting the credibility of the Baker's assertions, she did not use the safety signal or report Brookman or Geppert to the employer. Gray did not observe anything that concerned her. No incident report was filed with the agency.

It was not interference for the union to have bigger signs, more supporters in the area, union T-shirts, piles of literature or cookies to hand out. It was not interference for the union not to have happy glances or smiles for the decertification group. The decertification group seems upset that the union may not have been "nice" to them; however, "niceness" is not the test for an interference violation, rather violence, intimidation and reprisal

are the measure. Thus, the complainant did not establish by a preponderance of evidence that the union interfered with, retrained or coerced employees in the exercise of their right to decertify the incumbent union by blocking or commenting. This allegation is dismissed.

b. Events on March 31, 2005, on the sidewalk

1) Facts

Betzig was sitting outside the L&I building at the decertification group's information table collecting signatures for the decertification effort when Geppert came outside with the "Decline to Sign!" sign mentioned above and stood on the other side of the sidewalk. Geppert and Betzig engaged in casual conversation. Geppert had been outside for about 40 minutes when Adams came out on a walk. Adams was upset by the sign as he had previously complained about its posting on the union bulletin board. Geppert and Adams exchanged words, but other than Geppert telling Adams to "have a nice day" possibly in a sarcastic tone no other specific evidence of what Geppert said was presented. When Adams walked away, Geppert stated "I've made my point," or something to that effect, and by stating that, he meant that he felt he had a right to hold up the sign, regardless of what Adams thought.

2) Analysis and conclusion

In the context of a decertification campaign and looking at the record as a whole, under an objective standard the incident on the sidewalk reasonably could not be perceived as a threat of reprisal or force related to the pursuit of the right to decertify. Geppert did what the statute allows by peaceably using persuasion and propaganda to express his free speech rights by holding up a sign in an area where those interested in decertification could see him. Geppert's comment that "I've made my point" is reasonable under the circumstances, and the complainant did not prove by a preponderance

of the evidence that other comments were made that interfered with employee rights. No incident report was filed. Thus, this allegation is dismissed.

c. Events on April 1, 2005, in the hallway to the cafeteria

1) Facts

The decertification group and union set up information tables in the relatively narrow hallway near the entrance to the cafeteria. The tables were located to the side of the hallway and back near a railing. The union was seated at the small two-person, "cocktail" tables that are normally in the area. The decertification group had two small tables and one banquet style table they had taken from a different location and that was impinging into the hallway. The group complained that the union's presence was intimidating, but gathered quite a few signatures that day.

Brookman stood in front of the decertification information table reading a new version of the group's authorization form she had not previously had a chance to read. While she was in the hallway, Brookman had a brief conversation with Baker, talked to Samuel Harvey, a decertification group member, former union activist, and longtime acquaintance, whom she was surprised to see supporting decertification, and caught up on a personal issue with Wendy Palms, a union shop steward, for a few minutes a few feet away from the decertification table. Uncontradicted testimony was given that Exhibit 17 was an accurate reflection of Brookman standing in front of the table. In the photo, Brookman is standing at the decertification table reading a petition, and she is not blocking employee access to sign the petition, to get information, or to have discussions with other decertification supporters.[14]

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[14] Harvey testified that he took other photos that day, but Exhibit 17 was the only photo offered into evidence.

After Brookman had been at the table for about five minutes, the decertification group asked Brookman to leave two times, but she did not as she felt she had a right to be there. Washington State Patrol (WSP) Officer Tony Doughty testified that Ireland asked him to go with him to the cafeteria because Ireland claimed that Brookman was harassing the decertification group. However, Doughty testified that he did not see Brookman engaging in any harassing behavior. He verbally suggested that Brookman might want to walk away as others had complained, and she did leave. Brookman testified that she went and asked labor relations manager Glen Christopherson if she could go to the decertification table, and he said that she could. Within about five minutes, she went back to the table and resumed reading the petition. When she returned she loudly declared that she had the right to be there. Baker testified that Brookman's loud proclamation was physically intimidating, but that although she saw a WSP trooper in the area, she did not tell the trooper that she felt physically threatened or that her safety was in danger.

2) Analysis and conclusion

Looking at the record as a whole, a typical employee could not reasonably perceive the union's conduct as a threat of reprisal or force related to employees' right to decertify the union. In the context of a decertification campaign, the union has a right to defend its status as the exclusive bargaining representative, and it was therefore reasonable for the union to set up a table next to the decertification table in the cafeteria hallway so that it could provide its materials as well. Objective evidence in the form of a photograph and testimony established that Brookman was not blocking employee access to the information table as she stood in front of it reading the new flyer. As mentioned above, it was not inherently unlawful for Brookman to ask the decertification

supporters questions, and she had reasonable reasons (*i.e.* catching up with acquaintances) for standing in the area as well. Brookman's comments regarding her right to be in the cafeteria hallway and at the decertification table were factual. No employees testified that their access to the decertification group's material was interfered with, or that they were intimidated from obtaining information or from signing the decertification petition because of any union supporters' presence or behavior. The complainant did not establish by a preponderance of the evidence that the union interfered with, retrained or coerced employees) in the exercise of their rights by blocking or commenting. This allegation is dismissed.

d. Events on April 1, 2005, in the break room

Johnson argues that the union interfered with employee rights by blocking access to an information table (*i.e.* by "grabbing" a table away from Baker, encroaching on the decertification supporter's space, and setting up in the break room as well) and commenting to supporters of the decertification effort (*i.e.* using inappropriate language and verbally intimidating employees to keep them from receiving information).

After setting up in the hallway to the cafeteria, both groups moved into the employee break room and continued their campaign activities. Gray spent about a half an hour in the break room sitting at a table and observing, and nothing gave her cause for concern.

1) The table in the break room

a) Facts

Ireland testified that when the group moved into the break room he told decertification group members to move fast and grab the best tables. As the decertification group grabbed for tables, so did

the union. Baker testified that she acquired two tables before Nilsson arrived, and that she sat down at one of the tables. She testified that when Nilsson arrived he pulled the table she was sitting at away from her, and that she felt that when he pulled the table away he was trying to get at her to assault her. However, other than moving towards her to get the table and then pulling the table away, Baker was not able to identify anything else that made her feel this way. Baker did not report Nilsson to the employer. Nilsson testified that when he went into the break room he also tried to secure a table that appeared to be unoccupied as no one was sitting at it. As he started to move the table to put a little separation between the two groups, Harvey belly-flopped onto the table and said "No, sir, you're not taking this table." Nilsson then threw up his hands, let Harvey take the table, and then stepped away.

As people would pass by or leave the decertification information table, union supporters would ask if they had questions. People were constantly going in and out of the room as they went into the cafeteria to get food and then brought it back into the break room to eat. Stephen Simpkins, a union shop steward, testified that union supporters were sitting to the side of the decertification supporters and that to block access to the table they would have had to stand up and move into the path leading through the room.

b) Analysis and conclusion

In the context of a decertification campaign and looking at the record as a whole, a reasonable employee could not perceive the union's actions as a threat of reprisal or force related to the pursuit of the decertification group's right to choose no representation. Both the union and decertification group wanted to get their viewpoints out to employees. Here, Johnson did not prove by

a preponderance of the evidence that Nilsson did anything other than move a table. Both wanted to use the same table, and each chose to exert some effort to obtain it. Rather than pursue a disagreement that could have escalated, Nilsson chose to walk away from the situation. Baker did not file an incident report. People were constantly going in and out of the break room. No one testified that they had been blocked or intimidated from going to the decertification information table or as they left the decertification information table. Gray did not observe anything that concerned her. No one else filed an incident report. Thus, Johnson did not establish by a preponderance of the evidence that the union interfered with, restrained or coerced employees. This allegation is dismissed.

2) Inappropriate language

Johnson did not prove by a preponderance of the evidence that any union supporter used "verbally assult[ing]" or "intimidat[ing]" language or interfered, restrained or coerced employees under the statute. Thorton Alberg, a union member, and Allen Whitehead, a union senior field representative, testified that Alberg did not curse, only that he sarcastically and loudly complained when he was kicked out of the break room. Whitehead, Nilsson, Simpkins, Kelvin Hoang, a union member, and Maria Hanson, a member of the bargaining unit but not a member of the union or decertification group, all testified that they did not hear union supporters swear or see them verbally intimidating decertification group members or other employees. Baker could not substantiate her testimony by identifying who she heard swearing or even recall what they said. Harvey's testimony was contradictory. And, Ireland testified that Harvey and a union supporter were "yelling at each other." Furthermore, even had Alberg cursed, that would not necessarily have been cause to find an interference violation: The critical inquiry would have

been whether such statements were violent, intimidating or threatening such that they interfered with the pursuit of rights protected by the statute. Again, "niceness" is not the test where decertification campaigns are concerned. Here, no one testified that they were kept away from the decertification table because of verbal threats or force. Gray did not observe anything that concerned her. No incident report was filed. This allegation is dismissed.

3) Table of employees of Vietnamese descent

In the context of a decertification campaign and looking at the record as a whole, a reasonable employee could not perceive the unions actions as a threat of reprisal or force that interfered with employee rights. Simpkins and Love individually went over to the table of Vietnamese employees who were eating their lunch in the break room while the decertification group and the union were campaigning. They knew people at the table, English was the groups' second language, and they wanted to be sure the employees knew what they were signing; both left after the relatively short period of time it took to convey the union's position. Whitehead, Nilsson and Hanson testified that Simpkins and Love did not engage in any intimidating or threatening behavior. Hanson testified that it did not appear that a woman at the table did not want to talk to Simpkins or Love, but noted that Love was moving her hands around as she spoke.[15] Hoang testified that he was one of the Vietnamese employees and that he knew Love. He testified that Love came over and just wanted to make sure the employees knew what they were signing. Hoang did not think there was anything intimidating about her behavior, although he expressed certain opinions about his

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[15] Hanson also testified that when Love was speaking to the group Harvey was taking pictures of Love.

culture others might misinterpret. No Vietnamese employees in the break room testified that the union interfered with their rights. Gray did not observe anything that concerned her and no incident report was filed. Johnson did not establish by a preponderance of the evidence that the union interfered with, restrained or coerced employees. Thus, this allegation is dismissed.

5. Distributing Materials with Misleading Information

Johnson argues that the union interfered with employee rights by distributed multiple pieces of propaganda with misleading information in an attempt to discourage employees from signing the decertification petition. During approximately March and April of 2005, Betzig received a flyer titled "Think before you sign!" and another flyer titled "Questions and Answers on Union Dues and Fees," and union newsletters and various other documents were admitted into evidence. However, no testimony was given or evidence presented that proved by a preponderance of the evidence that the union distributed misleading materials that interfered with employees' rights. Not all documents admitted into evidence were identified as being prepared by and/or distributed by the union. No testimony was given as to how the material was misleading. No employees testified that they failed to sign authorization forms due to any misleading material. Organizational activities are to be conducted peaceably by persuasion and propaganda, and employees are responsible for determining the accuracy of the information upon which they rely. Thus, this allegation is dismissed.

6. Distributing Flyers Naming Employees as the Reason for the CBA Not Being Implemented

Johnson argues that the union interfered with employee rights by naming employees as the reason for the CBA not being implemented.

a. Facts

The union distributed a flyer on July 1, 2005, to bargaining unit employees.[16] Ireland and Johnson were both identified in the flyer as the individuals who filed the decertification petition and unfair labor practice complaints. The flyer stated that these legal matters prevented L&I from implementing the new CBA and thereby prevented employees from receiving raises. The flyer also explained that there were "many thorny legal issues involved," and encouraged employees to "[p]lease keep a cool head and don't say or do anything that might further complicate the process."

Johnson testified that the flyer and its consequences caused her to worry for her safety, lose one friendship, and be sick to her stomach about the thought of coming into work from July 1 until the contract was implemented on July 29. However, she also testified that no one actually threatened her. Previously, on March 8, 2005, Johnson e-mailed Brookman, Geppert, and Jim Hughes, a union shop steward, asking that she stop receiving union flyers in her cubicle and asserting that "it has become public knowledge that I am against the union securities clause in the contract." Prior to July 1, 2005, Johnson wrote a letter to the editor of *The Olympian*, a local news paper that was published for anyone in the public, including her coworkers, to see on May 25, 2005. After the flyer was distributed on July 1, Johnson talked to a reporter for *The Olympian* to "get my side of the story out," and was quoted in the paper on July 2 and 7, 2005.

On April 1, 2005, Ireland did an interview with a reporter for *The Olympian* stating that he was one of the individuals responsible for

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[16] At hearing, the amended complaints were amended to change the date of the flyer from June 1, 2005, to July 1, 2005.

filing the petition, and his comments were published in at least two articles. He talked to the local press around April 25, 2005, about falling short of the number of signatures required for the Commission to hold a decertification election, and those comments also appeared in *The Olympian*. He was again quoted in *The Olympian* on July 8 and 22, 2005.

After the flyer was distributed, Gray followed-up with both Johnson and Ireland to ask that they advise the employer if they needed anything related to their safety. Neither reported any safety problems as a result of the union flyer. During July and August of 2005, the agency did not receive any incident reports related to Johnson or Ireland's names appearing in the July 1 flyer.

Welch testified that the flyer was intended to be a communication with employees in the bargaining unit who were confused regarding contract implementation. He testified that he, the WFSE's director of PERC affairs Gladys Burbank, and the union's legal counsel were all responsible for drafting the flyer: the three discussed the need to be as accurate as possible because of confusion over the contract. Welch testified that in his opinion the flyer was accurate; he testified that "It was simply restating in a very summarized form the public record as we knew it at that time and to not be mysterious and have people draw conclusions that they didn't need to draw."

b. Analysis and conclusion

In the context of a decertification campaign and looking at the record as a whole, a typical employee reasonably could not perceive the union's conduct as a threat of reprisal or force related to the decertification group's right to choose no representation. Fear

and physical symptoms are not enough to establish an interference violation; rather the words used must be threatening and intimidating. Johnson and Ireland had been public in their efforts to decertify the union. The flyer was accurate with respect to the fact that Ireland had filed a decertification petition with the Commission and Johnson had filed an unfair labor practice with the Commission. Neither reported any safety problems. No evidence was presented that the flyer was inaccurate, and the union took care in its drafting to be accurate. The union has a responsibility to communicate with its members, not necessarily to defer to any prior communication from the employer, and it exercised its free speech rights to inform its members. The union's flyer encouraged members to act appropriately. Thus, Johnson did not prove by a preponderance of the evidence that the union's words were threatening and intimidating or that it interfered with employee rights. This allegation is dismissed.

II. ISSUE 2: DID THE EMPLOYER INTERFERE WITH EMPLOYEE RIGHTS?

A. Applicable Law

1. Employer "Interference" with Employee Rights

RCW 41.80.110(1)(a) states that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the statute. As discussed above under union interference, the determination is based on whether a typical employee in similar circumstances reasonably could perceive the employer's actions as a threat of reprisal or force related to the pursuit of his or her right to decertify the incumbent exclusive bargaining representative. *King County*, Decision 7819 (PECB, 2002).

2. Valid Distribution Policies

Valid distribution policies balance the rights of employers, the rights of unions, and the rights of employees. *King County*, Decision 7819. Employers have the right to maintain discipline and productivity in their work place. Unions have the right to self-organization and to fend off decertification campaigns. Employees have the right to not self-organize or to seek decertification of the incumbent exclusive bargaining representative.

Precedents developed under the National Relations Act are persuasive in the interpretation of similar provisions found in Chapter 41.80 RCW. *See Nucleonics Alliance, et al v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984). The National Labor Relations Board (NLRB) has generally allowed employers to forbid distribution of literature by employees both during working time and in working areas, as distribution poses special issues such as littering and involves a message of a permanent nature that is designed to be retained by the recipient for reading or rereading at his convenience. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).[17] However, employers may not prohibit distribution in nonwork areas or in mixed areas during nonworking time. *United Parcel Service*, 327 NLRB 317 (1998). Employers generally may restrict employee use of its property for distribution purposes, but may not do so in ways that discriminate against protected communications as opposed to other kinds of non-job-related uses. *Sprint/United Mgmt. Co.*, 326 NLRB 397 (1998). A rule that is presumptively valid may still be unlawful if it is promulgated or enforced in a discriminatory manner.

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[17] Different rules apply to solicitation that are oral or predominantly oral communications. Here, the amended complaint and petition reference distribution and not solicitation.

B. Employer Did Not Interfere with Employee Rights[18]

1. Refusing to Allow Employees to Distribute Information in Work Buildings, and Denying Employees Permission to Hand out Flyers or Place Flyers in Individual Work Cubicles

Johnson argues that the employer interfered with employee rights by refusing to allow employees to distribute campaign flyers in work areas of the building, including cubicles.

a. Facts

L&I's distribution policy was that neither the union nor decertification group could distribute decertification campaign information into employee work areas or cubicles, but that the union could distribute general information, including information about the new contract into employee work areas or cubicles. Neither type of information could be distributed in a way that disturbed employees during their work day. The union and the decertification group were allowed to distribute campaign flyers while not on work time, in public areas of the building. The agency took the same position regarding non-work related flyers.

The CBA contained an article titled "Union Communication." It allowed the union to communicate with employees though material posted on union bulletin boards and electronic communications. Additionally, the employer had an established practice of allowing the union to distribute general information, including information about the contract in work areas of the building.

On March 1, 2005, Johnson e-mailed Christopherson complaining that the union had placed "union propaganda" in her cubicle the previous

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[18] The allegation involving inadequate posting of a Commission notice concerning the decertification petition was dismissed at hearing.

night. On the same day, Christopherson responded via e-mail that it was an acceptable practice for the union to communicate with employees in this manner when they had general information to share, and stated that "The limitations that management has placed on their communications is that it occurs before or after work hours, or when both parties are on break or lunch." Regarding another flyer, Johnson e-mailed back that "I did happened to still be in my cubicle yesterday when documents were delivered." On March 1, Christopherson called Johnson and told her that it was his understanding that the flyers she received explained the new contract and that management was allowing flyers to be distributed with that content because the new contract was going to be confusing to employees. On cross-examination, Johnson testified that the flyers that were the subject of her March 1 e-mails had nothing to do with decertification, and that she was simply objecting to the union distributing the material when she was working.

On March 7, 2005, Johnson received the "Decline to Sign!" flyer referencing the EFF while she was working in her cubicle. Consequently, Johnson sent Christopherson an e-mail asking if the union is "allowed to distribute this stuff at work, are the people working to decertify the union allowed to distribute their information into cubicles on their own time too?" That same day Christopherson responded to Johnson's question asking about distribution of campaign materials in cubicles, stating: "Individuals that are engaged in decertifying the union are not allowed to distribute information within any state building." Johnson replied again on March 7 asking "Is there a specific policy or WAC with the prohibition? I'm just curious."

On March 8, 2005, Adams e-mailed Christopherson asking "What are the parameters management would place on those seeking a decertification election with regards to distributing information to individuals desks?". Adams testified that on March 8, 2005, he told Christopherson that the union had left "flyers on everyone's chairs" that were political, had nothing to do with legitimate union organizing, were not just informational, and were targeted against decertification. However, the flyer was not offered into evidence, and Adams did not testify as to what specifically the flyer stated. Christopherson left voice mails for Adams between March 8 and 22, and talked to Adams twice in late March, telling him that he could distribute information to employees before work, after work, and at lunch or on breaks in public areas of the building.[19] Christopherson e-mailed Adams on March 22, 2005, that:

> Those seeking a decertification elections are not recognized as the exclusive representative, and would not be permitted to use the agreed language in the CBA to distribute information, nor to use state resources for such action.

In this e-mail, Christopherson testified that he was answering questions Adams had about information shared on bulletin boards and on desk tops.

During March 2005, both the union and the decertification group distributed campaign materials in work areas, and Christopherson protested either to the distributor if they were identified or to the union or decertification group. Both sides were given the same

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[19] No evidence was presented that Adams pursued other avenues to obtain answers to his question after he received an "Out of Office" notification in response to e-mails he sent to Christopherson.

information: Christopherson spoke with Geppert, Brookman, Ireland, Betzig and Lindsay Schuster, a decertification group member, about the agency's policy.

Due to past disagreements, Geppert and Christopherson had an ongoing discussion about what could be distributed into work areas. Geppert testified that the union had distributed flyers in employee work areas many times, but that "we were very careful not to distribute campaign information or political information. Generally, they're related to union business or union business related to the agency." Distributions "would have to have a business need or, you know, be part of the contract, one way or another."

b. Analysis and conclusion

Looking at the record as a whole, a similarly situated employee reasonably could not perceive the employer's conduct as a threat of reprisal or force related to employees' right to pursue decertification. The employer did not allow the union or the decertification group to distribute campaign materials into work areas of the building and denied both permission to hand out or place campaign materials in work cubicles. Under established practice, the exclusive bargaining representative could distribute general information related to the contract (or new CBA) into work cubicles, but the decertification group could not. In addition to agency policy, the union's communication with its members was part of the union's CBA and established practice. Johnson and Adams asked the employer unclear questions, and the complainant argues that the answers they received amounted to unfair labor practices. Such is not the case. While the employer has a duty to unambiguously convey its distribution policies to employees, under an objective reasonableness test and looking at the record as a whole, the employee also bears some burden.

On March 7, Johnson asked generally about distributing campaign materials into work cubicles, and Christopherson's response needs to be read in that context, *i.e.* he addressed the question as it related to cubicles and work areas within the L&I building. In conjunction with her March 1 e-mail, Johnson was again complaining, and her question was an aside. Johnson's e-mails gave the appearance that she was not associated with the decertification effort. Christopherson knew from her e-mails that Johnson was opposed to the new CBA and was curious about rules related to distribution of material by the union and decertification group, but he did not know that Johnson was associated with the decertification effort or was asking permission to distribute campaign flyers in L&I's building. It is reasonable to assume that because Johnson did not appear to be asking for permission, Christopherson did not elaborate on what was allowed regarding distribution of campaign materials in public areas (as opposed to the work areas she had asked about) as he did with Betzig and Schuster as discussed below, or even as with Adams as discussed below. Healthy labor relations is about open and honest communication between the parties. Johnson cannot reasonably expect to obtain the answers she was seeking by being unclear.

Adams' March 8, 2005, e-mail was also unclear in the sense that it would be reasonable to assume he wanted to know about the distribution of both general information and campaign information to bulletin boards and desks. Christopherson's answers must be viewed in the context of their e-mail and phone exchanges. Christopherson knew Adams was involved in the decertification effort, called him, and verbally told him when and where the group could distribute campaign flyers. Although Adams may have been confused by the content of the e-mail he received, Christopherson's phone calls and e-mail on March 22 answered the specific question Adams asked in

his e-mail regarding the parameters the employer would place on the distribution of decertification materials. Here, the complainant did not establish by a preponderance of the evidence that the employer interfered with, retrained or coerced employee in the exercise of their rights. This allegation is dismissed.

2. Failing to Answer Questions about the Number of Employees Covered by the CBA

Johnson argues that the employer interfered with employee rights by failing to answer her question about the number of employees covered by the CBA. Under state collective bargaining laws, the statutory duty to bargain in good faith obligates an employer to provide the exclusive bargaining representative of its employees (not individual employees) with requested information reasonably necessary for the union to perform its representation functions. *Tacoma Police Union*, Decision 5439 (PECB, 1996); *City of Seattle*, Decision 3429 (PECB, 1990); *City of Bellevue*, Decision 3085-A (PECB, 1989). Although Johnson may have been annoyed by the employer's failure to respond to her phone call, there is no statutory obligation under the Commission's jurisdiction that required the employer to respond, and thus, the employer did not commit an interference unfair labor practice violation by its inaction. To obtain such information Johnson could have made a public disclosure request.[20] This allegation is dismissed.

3. Refusing to Stop Harassment of Supporters of the Decertification Effort by Union Members

In the amended complaint, Johnson alleges that the employer interfered with her rights by not addressing and refusing to stop

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[20] Johnson already had the information she desired, as she had previously made a successful public disclosure request to obtain the e-mail addresses of all employees covered by the new contract.

union harassment of decertification supporters on March 31 in the cafeteria and on April 1 in an incident with a WSP officer. However, Johnson did not provide any evidence that any incident of harassment occurred on March 31 in the cafeteria. Furthermore, the interference allegation above (that included allegations of harassment) involving Brookman and a WSP officer on April 1 was dismissed. Here, the employer cannot be found to have committed an interference unfair labor practice by failing to address or stop harassment that the complaint did not provide any evidence on, or that was not proven by a preponderance of the evidence. This allegation is dismissed.

4. Refusing to Take Action Against Distribution of Flyers by the Union Naming Employees as the Reason for a CBA Not Being Implemented

Johnson argues that the employer interfered with employee rights by refusing to take action against the distribution of the July 1, 2005, flyer. However, the employer cannot be found to have committed an interference violation for refusing to take action against the distribution of the flyer naming employees as the reason for the CBA not being implemented when the union did not commit an interference violation for distributing the flyer in the first place. This allegation is dismissed.

III. ISSUE 3: DID THE EMPLOYER DOMINATE OR ASSIST A UNION?

A. "Domination or Assistance" of Union

RCW 41.80.110(1)(b) states that it shall be an unfair labor practice for an employer:

> To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules adopted by the commission, an employer shall not

> be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay.

A finding of "domination" or "assistance" under RCW 41.56.140(2) can be found where the employer has involved itself in the internal affairs or finances of the union, has shown a preference between two unions or groups competing for the same group of employees, or has attempted to create, fund, or control a "company union." *City of Walla Walla*, Decision 8444 (PECB, 2004); *Grays Harbor County*, Decision 7239 (PECB, 2000); *City of Anacortes*, Decision 6863 (PECB, 1999); *Spokane Transit Authority*, Decision 5743 (PECB, 1996).

Such a violation has a high standard of proof in that it requires proof of employer intent to dominate or assist. *Community College District 13 - Lower Columbia College*, Decision 8637-A (PSRA, 2005), *citing King County*, Decision 2553-A (PECB, 1987); *Tacoma School District*, Decision 5466-D (EDUC, 1997). In *Community College District 13 - Lower Columbia College*, Decision 8637-A, the incumbent union showed that another union's sympathizers used employer facilities to communicate with bargaining unit members regarding that union's representation petition, but that evidence did not support a conclusion that the employer intended to assist the other union.[21]

B. Employer Did Not Dominate or Assist Union

Johnson failed to prove by a preponderance of evidence that the employer involved itself in the internal affairs or finances of the

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[21] In that case, it was found that even by an "interference" standard, there was no evidence that any of the e-mail messages could reasonably have been interpreted by bargaining unit employees as indicating employer support for either of the competing unions.

union, showed a preference for the union over the decertification group, or attempted to create, fund, or control a "company union." Johnson provided no proof of employer intent to dominate or assist. Specifically, Johnson provided no proof that the employer intended to assist the union in its distribution of campaign related materials to employees or that the employer allowed union supporters to distribute campaign material without protesting to union officials or the individuals involved. Furthermore, no proof of assistance was presented regarding the creation or distribution of the July 1, 2005, flyer: The employer's knowledge of the union's flyer and intent to assist are different. Thus, this allegation is dismissed.

IV. ISSUE 4: DID THE UNION INDUCE THE EMPLOYER TO DISCRIMINATE; DID THE EMPLOYER DISCRIMINATE?

A. Applicable Law

1. Union "Inducement" of Employer

Under Chapter 41.80 RCW the test for inducement is relatively narrow, as is the test for discrimination.[22] RCW 41.80.110(2)(b) reads in relevant part that it shall be an unfair labor practice for an employee organization: "To cause or attempt to cause an employer to *discriminate* against an employee in violation of subsection (1)(c) of this section." (emphasis added). RCW 41.80.110(1)(c) reads in relevant part that it shall be an unfair labor practice for an employer: "To encourage or discourage membership in any employee organization by discrimination *in regard*

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[22] An inducement violation under RCW 41.80.110(2)(b) is substantially narrower than under RCW 41.56.150(2), where an employee organization may commit an unfair labor practice by inducing an employer to commit *any* unfair labor practice, not just discrimination.

to hire, tenure of employment, or any term or condition of employment." (emphasis added).

To induce an employer to commit an unfair labor practice, a union must be requesting that the employer do something unlawful. *Municipality of Metropolitan Seattle*, Decision 2746-A (PECB, 1989). A union will commit a violation of RCW 41.80.110(2)(b) by merely asking the employer do something unlawful, "even if the employer has the good sense to refuse the request." *See Shoreline School District*, Decision 5560 (PECB, 1996). The classic scenario occurs when a union induces the employer to discriminate against an employee based upon union membership. *State - Department of Natural Resources*, Decision 8458-B.

2. Employer Discrimination

A discrimination violation occurs when an employer takes action that is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.80 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994). To prove discrimination the complainant must show: the exercise of a right protected by the collective bargaining statute, or the communication of an intent to do so to the employer; the deprivation of some ascertainable right, benefit, or status; *and* the causal connection between the exercise of the legal right and the discriminatory action. Where a complainant proves all three of these elements, he or she establishes a prima facie case of discrimination - a rebuttal presumption in favor of the complainant. *City of Tacoma*, Decision 8031-A (PECB, 2004). Then, the employer need only articulate non-discriminatory reasons for its actions. *City of Tacoma*, Decision 8031-A. The employer does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the action was taken in

retaliation for an employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4624-A.

B. Union Did Not Induce Employer to Discriminate

Johnson argues that the union induced the employer to discriminate by requesting that disciplinary action be taken against employees. In late March of 2005, Betzig and Schuster distributed campaign material while on break to employees who were working. Thereafter, Nilsson and Simpkins sent e-mails to the employer to complain about the distributions. The e-mails show nothing of the union asking that the two decertification supporters be disciplined. Rather one e-mail informs the employer that the union member believes something inappropriate is occurring, and the other asks that the distributed documents be "immediately picked up." Pointing out that decertification supporters were doing something the employer had asked union members to not to do is not requesting discipline. Asking that distributed documents be picked up is not requesting discipline. Thus, the union did not cause or attempt to cause the employer to encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment, or any term or condition of employment. The inducement allegation is dismissed.

C. Employer Did Not Discriminate

On March 29, 2005, Christopherson called Betzig and Schuster to his office to have an informal meeting to warn them not to distribute campaign flyers to employees who were working again and to educate them. No personnel action was taken. Christopherson told them that the union had distributed campaign flyers on work side of the building too and that he was going to convey to the union the same

information he was conveying to them; anytime he was able to identify the individual who was violating the distribution policy, he took some sort of action to make sure it did not happen again. Betzig asked if the decertification group could distribute campaign materials in the public areas of the building, and in response Christopherson said that L&I had no problem with that. Betzig specifically asked if they could locate in the cafeteria and Christopherson said yes, so long as they did not create any safety issues.

Johnson failed to establish a prima facie case. Betzig and Schuster were not engaging in protected activity when, in violation of L&I's distribution policy, they distributed campaign material to employees who were working. Furthermore, Johnson provided no evidence that the employer deprived anyone of some ascertainable right, benefit or status: No evidence was provided that anyone was discriminated against in regard to hire, tenure of employment, or any term or condition of employment. No personnel action was taken against Betzig or Schuster. Therefore, the allegation of employer discrimination is dismissed.

FINDINGS OF FACT

1. Washington State Department of Labor and Industries (L&I) is a public employer within the meaning of RCW 41.80.005(8).

2. Washington Federation of State Employees (WFSE), a bargaining representative within the meaning of RCW 41.80.005(7), is the exclusive bargaining representative of approximately 2,000 nonsupervisory employees at L&I.

3. L&I and WFSE were parties to a collective bargaining agreement (CBA) prior to July 1, 2005, and had their first contract

under the Personnel System Reform Act be implemented on July 1, 2005.

4. Kimberly Johnson is a bargaining unit employee in the bargaining unit described in paragraph 2 of these findings of fact.

5. In March and April 2005, Johnson, along with other bargaining unit employees in the bargaining unit described in paragraph 2 of these findings of fact, were members of a decertification group that attempted to obtain sufficient signatures so that all bargaining unit employees could vote on whether they wanted "no representation."

6. On April 1, 2005, Bill Ireland filed a representation petition related to the decertification group's signature gathering efforts described in paragraph 5 of these findings of fact.

7. On June 2, 2005, Johnson filed one unfair labor practice complaint against L&I and one unfair labor practice complaint against the WFSE alleging certain violations relating to the decertification group's signature gathering efforts described in paragraph 5 of these findings of fact. A "blocking charge" was issued under WAC 391-25-370 that suspended the representation petition until the unfair labor practice cases could be heard. Consequently and in conjunction with a letter from the Commission's Executive Director on June 30, 2005, the employer determined that the new CBA set to go into effect on July 1, 2005, could not be implemented. The representation petition was subsequently dismissed for failure to obtain the required number of signatures, and the blocking charge was thus removed, allowing the new CBA to be implemented and employees to receive raises on July 29, 2005.

8. L&I has a policy that requires employees posting items on agency property, other than in designated areas, to obtain prior approval from L&I.

9. On or about March 16, 2005, Ireland placed an eight and one-half by 11 inch piece of paper that stated there was a petition to decertify the union at L&I on a fence outside the L&I building. He believed the fence was on agency property, but did not obtain prior approval to post the paper as required in paragraph 8 of these findings of fact. While Lori Butterfield, a union member, and Marcelline Love, a union member, were on a walk on L&I property, Butterfield removed the paper Ireland had posted from the fence. While the right to decertify the incumbent exclusive bargaining representative is protected activity under Chapter 41.80 RCW, there is no right to act in violation of a valid agency policy. Thus, the decertification group was not engaging in protected activity when Ireland placed the paper on the fence without prior approval, and the union cannot be found to have interfered with the exercise of a protected right.

10. On an unidentified date, Michael Covey, a bargaining unit employee but not a union member, testified that as he was leaving the cafeteria he saw Joseph Nilsson, a union shop steward and executive board member, go over to a table and pick up some yellow half-sheets of paper. After Covey saw Nilsson, Covey continued walking out of the cafeteria, did not stop to watch, and had no idea what Nilsson did with the papers after he picked them up. Covey could not specifically identify the paper he saw Nilsson picking up and stated that he really did not pay any attention to what was on the paper. Johnson did not prove by a preponderance of the evidence that

the union interfered with employee rights by removing flyers from the cafeteria.

11. During the end of March 2005, the union posted a "Decline to Sign!" sign on its bulletin board warning employees of efforts by the Evergreen Freedom Foundation (EFF) to encourage employees to decertify unions. Several organizations were all encouraging state employees to decertify labor organizations during the relevant time period. Prior to the time the sign was posted at L&I, 9,000 employees at another state agency received a mass mailing about decertification. Subsequent to the time the sign was posted at L&I, L&I employees received at least one similar mailing. WFSE director of public affairs Tim Welch testified that the union was anticipating mailings to L&I employees, and the poster was a prophylactic attempt to make sure employees got some information regarding the source of any mailings.

12. Darrin Adams, a member of the decertification group, testified that the sign regarding the EFF referenced in paragraph 11 of these finding of fact was creating a "hostile work environment" because it sparked some animosity from coworkers who thought that decertification supporters were EFF puppets. However, looking at the record as a whole, the main thrust of the communication was informational and substantially factual. The union reasonably suspected that other organizations would work to decertify the union at L&I, and legitimately exercised its free speech rights by addressing the activities of these other groups. In the context of a decertification campaign, it is expected that emotions may run high and that there will undoubtedly be some animosity between coworkers. In the labor law context, there is no "right to a non-hostile work environ-

ment." Here, the union had a right to communicate with bargaining unit employees and defend its incumbent status, and employees were expected to evaluate the information themselves. A typical employee in similar circumstances could not reasonably perceive the sign as a threat of reprisal or force for the exercise of protected rights.

13. In the fall of 2004 and the spring of 2005, L&I conducted mandatory agency-wide training on safety and health issues that included workplace violence and the agency's policy on injury/incident reports. In March and April of 2005, 51 incident reports were received by the agency and none had to do with the decertification efforts. L&I emergency management coordinator Valerie Gray testified that she made walkthroughs in the cafeteria during the decertification campaign to look for signs of loud or threatening behavior or for anyone who looked like a victim of aggression or intimidation. She never saw anything that concerned her.

14. On March 30, 2005, the decertification group set up a large round table in the cafeteria seating area of the L&I building. Authorization forms that bargaining unit employees could sign to decertify the union were at the table, and hanging in front of the table was the piece of paper Ireland had posted on the fence as discussed in paragraph 9 of these findings of fact. Union supporters also set up a similar sized information table catty-cornered to the decertification supporters' table. The union displayed the "Decline to Sign!" sign referenced in paragraph 11 of these findings of fact. The groups' tables were a few feet apart, located in the middle of a very large room, and surrounded by a mass of other tables and people milling around.

15. During the scene described in paragraph 14 of these findings of fact, Debbie Brookman, union shop steward and policy committee chair, stood to one side of the decertification supporters' table and asked Ireland questions for about 20 to 25 minutes. She used normal speaking tones and obtained a greater understanding of the decertification group's purpose. As they talked, people came up beside them and got material, talked to other decertification supporters at the table, and dropped off several signed authorization forms. Ireland testified that Brookman was trying to block the table because she "hemmed and hawed" when she asked questions. Susan Baker, a decertification group supporter, testified that she felt physically threatened and intimidated by Brookman standing at the decertification supporter's table asking questions, but provided no specifics that reasonably explained why she felt this way. Baker knew a safety signal between the decertification group and L&I emergency management personnel had been arranged, and she observed L&I safety personnel in the area, but did not use the signal.

16. During the scene described in paragraph 14 of these findings of fact, Baker testified that John Geppert, chief union shop steward and local president, sat at a nearby table observing the decertification supporters and that she found his body language threatening and intimidating, but did not provide specific facts that back up her assertion. Geppert testified to sitting at a nearby table and overhearing some conversation that he found interesting.

17. During the scene described in paragraphs 14 through 16 of these findings of fact, neither Brookman nor Geppert blocked access to the decertification group's table or unlawfully

commented to decertification group supporters. It could not reasonably be perceived as a threat of reprisal or force for Brookman to ask decertification group members questions about their efforts; rather, in the context of a decertification campaign, it would be usual for the incumbent union to want to obtain such information. Brookman talked to Ireland for a reasonable period of time given the context, and without more "hemming and hawing" does not amount to interference, as intent is not a factor or defense. Ireland did not testify that he felt threatened or intimidated by Brookman. No employee testified that their access to the information table was blocked. Baker made bare assertions that Brookman and Geppert engaged in intimidation or threats, but did not present specific facts that reasonably backed up those assertions. Also impacting the credibility of the Baker's assertions, she did not use the safety signal or report Brookman or Geppert to the employer. Gray did not observe anything that concerned her.

18. During the scene described in paragraph 14 of these findings of fact, Ireland testified that the union supporters "dwarf[ed]" the decertification group, and Baker testified that they were "flanked, surrounded, obstructed." However, Kathleen Betzig, a decertification group supporter, testified that there were five to six union people and six decertification supporters. Baker testified that "There were no happy glances, no happy smiles, no friendly gestures toward us." The decertification group seems upset that the union may not have been "nice" to them; however, "niceness" is not the test for an interference violation, rather violence, intimidation and reprisal are the measure.

19. On March 31, 2005, Betzig was sitting outside the L&I building at the decertification group's information table when Geppert came outside with the "Decline to Sign!" sign referenced in paragraph 11 of these finding of fact. Geppert and Betzig engaged in casual conversation. Geppert had been outside for about 40 minutes when Adams came out on a walk. Adams was upset by the sign and he had previously complained about its posting on the union bulletin board. Geppert and Adams exchanged words, but other than Geppert telling Adams to "have a nice day" possibly in a sarcastic tone no other specific evidence of what Geppert said was presented. When Adams walked away, Geppert stated "I've made my point," and by stating that meant he felt he had a right to hold up the sign, regardless of what Adams thought. Geppert did what the statute allows by peaceably using persuasion and propaganda to express his free speech rights. Geppert's comment that "I've made my point" is reasonable under the circumstances, and the complainant did not prove by a preponderance of the evidence that other comments were made that interfered with employee rights.

20. On April 1, 2005, the decertification group and union set up information tables in the relatively narrow hallway near the entrance to the cafeteria. The tables were located to the side of the hallway and back near a railing. The union was seated at the small two-person, "cocktail" tables that are normally in the area. The decertification group had two small tables and one banquet style table they had taken from a different location and that was impinging into the hallway. The group complained that the union's presence was intimidating, but gathered quite a few signatures that day. No employees testified that their access to the decertification

group's material was interfered with, or that they were intimidated from obtaining information or from signing the decertification petition because of any union supporters' presence or behavior.

21. During the scene described in paragraph 20 of these findings of fact, Brookman stood in front of the decertification information table reading a new version of the group's authorization form she had not previously had a chance to read. It was not inherently unlawful for Brookman to ask Baker questions, and she had reasonable reasons for having brief conversations with two acquaintances in front of the decertification table. Uncontradicted testimony was given that Exhibit 17 was an accurate reflection of Brookman standing in front of the table. In the photo, Brookman is standing at the decertification table reading a petition, and she is not blocking employee access to sign the petition, to get information, or to have discussions with other decertification supporters.

22. During the scene described in paragraphs 20 and 21 of these findings of fact and after Brookman had been at the table for about five minutes, the decertification group asked Brookman to leave two times, but she did not. Washington State Patrol (WSP) Officer Tony Doughty testified that Ireland asked him to go with him to the cafeteria because Ireland claimed that Brookman was harassing the decertification group. Doughty testified that he did not see Brookman engaging in any harassing behavior but verbally suggested that Brookman might want to walk away as others had complained. Brookman left and went to ask labor relations manager Glen Christopherson if she could go to the decertification table, and he said that she

could. Within about five minutes, she went back to the table and resumed reading the petition. When she returned she loudly declared that she had the right to be there. Baker testified that Brookman's loud proclamation was physically intimidating, but that although she saw a WSP trooper in the area, she did not tell the trooper that she felt physically threatened or that her safety was in danger. Brookman's comments regarding her right to be in the cafeteria hallway and at the decertification table were factual.

23. On April 1, 2005, after setting up in the hallway to the cafeteria, both groups moved into the employee break room and continued their campaign activities. Gray spent about a half an hour in the break room sitting at a table and observing, but nothing gave her cause for concern.

24. On April 1, 2005, as both groups were moving from the cafeteria hallway to the break room, Ireland told decertification group members to move fast and grab the best tables. As the decertification group grabbed for tables, so did the union. Baker testified that she acquired two tables before Nilsson arrived, and that she sat down at one of the tables. She testified that when Nilsson arrived he pulled the table she was sitting at away from her, and that she felt that when he pulled the table away he was trying to get at her to assault her. However, other than moving towards her to get the table and then pulling the table away, Baker was not able to identify anything else that made her feel this way. Nilsson testified that when he went into the break room he also tried to secure a table that appeared to be unoccupied as no one was sitting at it. As he started to move the table, Harvey belly-flopped onto the table and said "No, sir, you're not taking

this table." Nilsson then threw up his hands, let Harvey take the table, and then stepped away. Here, Johnson did not prove by a preponderance of the evidence that Nilsson did anything other than move a table. Both groups wanted to use the same table, and each chose to exert some effort to obtain it. Rather than pursue a disagreement that could have escalated, Nilsson chose to walk away from the situation.

25. On April 1, 2005, in the break room, as people would pass by or leave the decertification information table, union supporters would ask if they had questions. People were constantly going in and out of the room. Stephen Simpkins, a union shop steward, testified that union supporters were sitting to the side of the decertification supporters and that to block access to the table they would have had to stand up and move into the path leading through the room. No one testified that they had been blocked or intimidated from going to the decertification information table or as they left the decertification information table.

26. On April 1, 2005, in the break room, Thorton Alberg, a union member, sarcastically and loudly complained when he was kicked out. Johnson did not prove by a preponderance of the evidence that Alberg or any other union supporter cursed or verbally intimidated decertification group members or other employees. No one testified that they were kept away from the decertification table because of verbal threats or force.

27. On April 1, 2005, in the break room, Simpkins and Love individually went over to a table of Vietnamese employees while the decertification group and the union were campaigning. They knew people at the table, English was the groups' second language, and they wanted to be sure the employees knew

what they were signing; both left after the relatively short period of time it took to convey the union's position. Allen Whitehead, a union senior field representative, Maria Hanson, a member of the bargaining unit but not a member of the union or decertification group, and Nilsson testified that Simpkins and Love did not engage in any intimidating or threatening behavior. Hanson testified that it did not appear that a woman at the table did not want to talk to Simpkins or Love, but noted that Love was moving her hands around as she spoke. Kelvin Hoang, a union member, testified that he was one of the Vietnamese employees and that he knew Love. He testified that Love came over and just wanted to make sure the employees knew what they were signing. Hoang did not think there was anything intimidating about her behavior, although he expressed certain opinions about his culture others might misinterpret. No Vietnamese employees in the break room testified that the union interfered with their rights.

28. Looking at paragraphs 14 through 27 in these findings of fact, in the context of a decertification campaign and looking at the record as a whole, a typical employee reasonably could not perceive the described incidents as a threat of reprisal or force related to the pursuit of the right to decertify the incumbent exclusive bargaining representative. Just as the decertification group had a right to work towards decertification of the union, the union had a right to defend its incumbent status by getting its viewpoint out to employees and asking the decertification group questions.

29. During approximately March and April of 2005, Betzig received a flyer titled "Think before you sign!" and another flyer titled "Questions and Answers on Union Dues and Fees," and

union newsletters and various other documents were admitted into evidence. However, no testimony was given or evidence presented that proved by a preponderance of the evidence that the union distributed misleading materials that interfered with employees' rights. Not all documents admitted into evidence were identified as being prepared by and/or distributed by the union. No testimony was given as to how the material was misleading. No employees testified that they failed to sign authorization forms due to any misleading material. Organizational activities are to be conducted peaceably by persuasion and propaganda, and employees are responsible for determining the accuracy of the information on which they rely.

30. On July 1, 2005, the union distributed a flyer to bargaining unit employees. Ireland and Johnson were both identified in the flyer as the individuals who filed the decertification petition and unfair labor practice complaints. The flyer stated that these legal matters prevented L&I from implementing the new CBA and thereby prevented employees from receiving raises. The flyer also explained that there were "many thorny legal issues involved," and encouraged employees to "[p]lease keep a cool head and don't say or do anything that might further complicate the process."

31. The flyer described in paragraph 30 of these findings of fact and its consequences caused Johnson to worry for her safety, lose one friendship, and be sick to her stomach about the thought of coming into work. No one actually threatened Johnson. Previously, on March 8, 2005, Johnson e-mailed Brookman, Geppert, and Jim Hughes, a union shop steward, asking that she stop receiving union flyers in her cubicle and

asserting that it was then public knowledge that she was against the union securities clause in the contract. Prior to July 1, 2005, Johnson wrote a letter to the editor of *The Olympian*, a local news paper that was published for anyone in the public, including her coworkers, to see on May 25, 2005. After the flyer was distributed on July 1, Johnson talked to a reporter for *The Olympian* to "get my side of the story out," and was quoted in the paper on July 2 and 7, 2005.

32. Ireland's name had also been connected publicly to the decertification effort prior to the flyer described in paragraph 30 of these findings of fact. On April 1, 2005, Ireland did an interview with a reporter for *The Olympian* stating that he was one of the individuals responsible for filing the petition, and his comments were published in at least two articles. He talked to the local press around April 25, 2005, about falling short of the number of signatures required for the Commission to hold a decertification election, and those comments also appeared in *The Olympian*. He was again quoted in *The Olympian* on July 8 and 22, 2005.

33. After the flyer described in paragraph 30 of these findings of fact was distributed, Gray followed-up with both Johnson and Ireland to ask that they advise the employer if they needed anything related to their safety. Neither reported any safety problems as a result of the union flyer. During July and August of 2005, the agency did not receive any incident reports related to Johnson or Ireland's names appearing in the July 1 flyer.

34. Welch testified that the flyer described in paragraph 30 of these findings of fact was intended to be a communication with employees who were confused regarding contract implementation.

He, the WFSE's director of PERC affairs, and the union's legal counsel were all responsible for drafting the flyer: the three discussed the need to be as accurate as possible because of confusion over the contract. In Welch's opinion, the flyer was accurate; he testified that "It was simply restating in a very summarized form the public record as we knew it at that time and to not be mysterious and have people draw conclusions that they didn't need to draw."

35. Looking at paragraphs 30 through 34 in these findings of fact in the context of a decertification campaign and looking at the record as a whole, a typical employee reasonably could not perceive the union's conduct as a threat of reprisal or force related to the decertification group's right to choose no representation. Fear and physical symptoms are not enough to establish an interference violation; rather the words used must be threatening and intimidating. Johnson and Ireland had been public in their efforts to decertify the union. The flyer was accurate with respect to the fact that Ireland had filed a decertification petition with the Commission and Johnson had filed an unfair labor practice with the Commission. Neither reported any safety problems. No evidence was presented that the flyer was inaccurate, and the union took care in its drafting to be accurate. The union has a responsibility to communicate with its members, not necessarily to defer to any prior communication from the employer, and it exercised its free speech rights to inform its members. The union's flyer encouraged members to act appropriately. Johnson did not prove by a preponderance of the evidence that the union's words were threatening and intimidating or that it interfered with employee rights.

36. During March and April of 2005, L&I's distribution policy was that neither the union nor decertification group could distribute decertification campaign information into employee work areas or cubicles, but that the union could distribute general information, including information about the new contract, into employee work areas or cubicles. Neither type of information could be distributed in a way that disturbed employees during their work day. The union and the decertification group were allowed to distribute campaign flyers while not on work time, in public areas of the building. The agency took the same position regarding non-work related flyers.

37. The CBA in effect during the relevant time period referenced in paragraph 3 of these findings of fact contained an article titled "Union Communication." It allowed the union to communicate with employees though material posted on union bulletin boards and electronic communications. Additionally, the employer had an established practice of allowing the union to distribute general information, including information about the contract in work areas of the building.

38. During March 2005, both the union and the decertification group distributed campaign materials in work areas, and Christopherson protested either to the distributor if they were identified or to the union or decertification group. Both sides were given the same information: Christopherson spoke with Geppert, Brookman, Ireland, Betzig and Lindsay Schuster, a decertification group member, about the agency's policy.

39. During March 2005, Geppert and Christopherson had an ongoing discussion about what could be distributed into work areas. Geppert testified that the union had distributed flyers in

employee work areas many times, but that "we were very careful not to distribute campaign information or political information. Generally, they're related to union business or union business related to the agency." Distributions "would have to have a business need or, you know, be part of the contract, one way or another."

40. On March 7, 2005, Johnson asked generally about distributing campaign materials into work cubicles, and Christopherson's response needs to be read in that context, *i.e.* he addressed the question as it related to cubicles and work areas within the L&I building. In conjunction with her March 1, 2005, e-mail, Johnson was again complaining, and her question was an aside. Johnson's e-mails gave the appearance that she was not associated with the decertification effort. Christopherson knew from her e-mails that Johnson was opposed to the new CBA and was curious about rules related to distribution of material by the union and decertification group, but he did not know that Johnson was associated with the decertification effort or was asking permission to distribute campaign flyers in L&I's building. It is reasonable to assume that because Johnson did not appear to be asking for permission, Christopherson did not elaborate on what was allowed regarding distribution of campaign materials in public areas (as opposed to the work areas she had asked about) as he did with Betzig and Schuster as discussed in paragraph 48 of these findings of fact, or even as with Adams as discussed in paragraph 41 of these findings of fact. Healthy labor relations is about open and honest communication between the parties. Johnson cannot reasonably expect to obtain the answers she was seeking by being unclear.

41. On March 8, 2005, Adams sent Christopherson an e-mail that was unclear, and Christopherson's answers must be viewed in the context of their e-mail and phone exchanges. Christopherson knew Adams was involved in the decertification effort, called him, and verbally told him when and where the group could distribute campaign flyers. Although Adams may have been confused by the content of the e-mail he received, Christopherson's phone calls and e-mail on March 22 answered the specific question Adams asked in his March 8 e-mail regarding the parameters the employer would place on the distribution of decertification materials.

42. Looking at paragraphs 36 through 41 in these findings of fact and the record as a whole, a similarly situated employee reasonably could not perceive the employer's conduct as a threat of reprisal or force related to employees' right to pursue decertification. The employer did not allow the union or the decertification group to distribute campaign materials into work areas of the building and denied both permission to hand out or place campaign materials in work cubicles. Under established practice, the exclusive bargaining representative could distribute general information related to the contract (or new CBA) into work cubicles, but the decertification group could not. In addition to agency policy, the union's communication with its members was part of the union's CBA and established practice. Johnson and Adams asked the employer unclear questions, and the complainant argues that the answers they received amounted to unfair labor practices. Such is not the case. While the employer has a duty to unambiguously convey its distribution policies to employees, under an objective reasonableness test and looking at the record as a whole, the employee also bears some burden.

43. Johnson called the employer's office of human resources and requested the number of employees covered by the CBA. However, there is no statutory obligation under the Commission's jurisdiction that required the employer to respond, and thus, the employer did not commit an interference unfair labor practice violation by its inaction.

44. Johnson provided no evidence of any incident of harassment that occurred on March 31 in the cafeteria. The interference allegation above in paragraph 22 of these findings of fact (that included allegations of harassment) involving Brookman and a WSP officer on April 1 was dismissed. The employer cannot be found to have committed an interference unfair labor practice by failing to address or stop harassment that the complaint did not provide any evidence on, or that was not proven by a preponderance of the evidence.

45. The employer cannot be found to have committed an interference violation for refusing to take action against the distribution of the July 1, 2005, flyer when the union did not commit an interference violation for distributing the flyer.

46. Johnson failed to prove by a preponderance of evidence that the employer involved itself in the internal affairs or finances of the union, showed a preference for the union over the decertification group, or attempted to create, fund, or control a "company union." Johnson provided no proof of employer intent to dominate or assist. Specifically, Johnson provided no proof that the employer intended to assist the union in its distribution of campaign related materials to employees or that the employer allowed union supporters to distribute campaign material without protesting to union officials or the individuals involved. Furthermore, no proof

of assistance was presented regarding the creation or distribution of the July 1, 2005, flyer.

47. In late March of 2005, Betzig and Schuster distributed campaign material while on break to employees who were working. Thereafter, Nilsson and Simpkins sent e-mails to the employer to complain about the distributions. The e-mails show nothing of the union asking that the two decertification supporters be disciplined. Rather one e-mail informs the employer that the union member believes something inappropriate is occurring, and the other asks that the distributed documents be "immediately picked up." Pointing out that decertification members were doing something the employer had asked union members not to do is not requesting discipline. Asking that distributed documents be picked up is not requesting discipline. The union did not cause or attempt to cause the employer to encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment, or any term or condition of employment.

48. On March 29, 2005, after the events described in paragraph 47 of these findings of fact, Christopherson called Betzig and Schuster to his office to have an informal meeting with them to warn them not to distribute campaign flyers to employees who were working again and to educate them. No personnel action was taken. Christopherson told them that the union had distributed campaign flyers on the work side of the building too and that he was going to convey to the union the same information he was conveying to them; anytime he was able to identify the individual who was violating the distribution policy, he took some sort of action to make sure it did not happen again. Betzig asked if the decertification group could distribute campaign materials in the public areas of the

building, and in response Christopherson said that L&I had no problem with that. Betzig specifically asked if they could locate in the cafeteria and Christopherson said yes, so long as they did not create any safety issues.

49. In regard to the events described in paragraph 48 of these findings of fact, Johnson failed to establish a prima facie case. Betzig and Schuster were not engaging in protected activity when they distributed campaign material to employees who were working and in violation of L&I's distribution policy. Furthermore, Johnson provided no evidence that the employer deprived anyone of some ascertainable right, benefit or status: No evidence was provided that anyone was discriminated against in regard to hire, tenure of employment, or any term or condition of employment. No personnel action whatsoever was taken against Betzig or Schuster.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 and Chapter 391-45 WAC.

2. By its actions described in paragraphs 8 through 35 in the above findings of fact, the union did not interfere with, restrain or coerce employees in the exercise of their right to pursue no representation under Chapter 41.80 and WAC 391-25-070(6)(c), and therefore has not committed an unfair labor practice in violation of RCW 41.80.050 and RCW 41.80.110(2)(a).

3. By its actions described in paragraphs 36 through 45 in the above findings of fact, the employer did not interfere with, restrain or coerce employees in the exercise of their right to

pursue no representation under Chapter 41.80 and WAC 391-25-070(6)(c), and therefore has not committed an unfair labor practice in violation of RCW 41.80.110(1)(a).

4. By its actions described in paragraphs 46 in the above findings of fact, the employer did not dominate or assist the union, and therefore commit an unfair labor practice in violation of RCW 41.80.110(1)(b).

5. By its actions described in paragraphs 47 in the above findings of fact, the union did not induce the employer to discriminate against employees, and therefore commit an unfair labor practice in violation of RCW 41.80.110(2)(b).

6. By its actions described in paragraphs 48 and 49 in the above findings of fact, the employer did not discriminate against employees, and therefore commit an unfair labor practice in violation of RCW 41.80.110(1)(c).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are DISMISSED.

ISSUED at Olympia, Washington, this 13th day of June, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Dianne Ramerman

Dianne E. Ramerman, 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.