State - Social and Health Services, Decision 9790 (PSRA, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GAYLE DORMAIER, Complainant,	)	CASE 20601-U-06-5244
vs.	)	DECISION 9790 - PSRA
WASHINGTON STATE - SOCIAL AND HEALTH SERVICES, Respondent.	)	ORDER OF DISMISSAL

Ryan M. Edgley, Attorney at Law, for the complainant.

Attorney General Rob McKenna, by *Patricia A. Thompson*, Assistant Attorney General, for the employer.

On August 17, 2006, Gayle Dormaier (Dormaier) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington State Department of Social and Health Services (employer) as respondent. A preliminary ruling was issued finding that the complaint stated causes of action for employer interference with employee rights in violation of RCW 41.80.110(1)(a) and discrimination in violation of RCW 41.80.110(1)(c), by its written reprimand of Dormaier in reprisal for union activities protected by Chapter 41.80 RCW. Examiner Starr Knutsen held a hearing on January 3 and 4, 2007. The parties submitted post hearing briefs to complete the record.

ISSUES PRESENTED

1. Did the employer discriminate against Dormaier in violation of RCW 41.80.110(1)(c) by issuing her a letter of reprimand in reprisal for protected union activities?

2. Did the employer interfere with Dormaier's rights in violation of RCW 41.80.110(1)(a) by issuing her a letter of reprimand in reprisal for protected union activities?

The Examiner rules that Dormaier was not engaged in any protected activity, a threshold issue for an interference violation and a discrimination violation. Without meeting this threshold requirement, the employer cannot be, and is not, found to have interfered with Dormaier's rights nor to have discriminated against her for activities protected by Chapter 41.80 RCW. Dormaier's complaint is dismissed.

APPLICABLE LEGAL STANDARDS - DISCRIMINATION

The burden of proving any unfair labor practice claim rests with the complaining party, and must be established by a preponderance of the evidence. *Okanogan-Douglas County Hospital*, Decision 5830 (PECB, 1997). WAC 391-45-270(a) provides: "The complainant shall be responsible for the presentation of its case, and shall have the burden of proof."

It is an unfair labor practice for a public 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 . . . . " RCW 41.80.110(1)(c). The Commission decides discrimination allegations under standards drawn from decisions of the Supreme Court of the State of Washington. That formula is: The injured party must make a prima facie case showing retaliation. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;

2. The employee has been deprived of some ascertainable right, benefit, or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. The complainant carries the burden of proof throughout the entire matter, but there is a shifting of the burden of production to the employer. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.

The employee may respond to an employer's defense in one of two ways: (1) by showing that the employer's reason is pretextual; or (2) by showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of the protected right was nevertheless a substantial factor motivating the employer to act in a discriminatory manner. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). *See Educational Service District 114*, Decision 4361-A (PECB, 1994); *Brinnon School District*, Decision 7210-A (PECB, 2001); and *Dieringer School District*, Decision 8956-A (PECB, 2007). Accordingly, the first step necessary to prove a discrimination claim is proof that the complainant was engaged in the exercise of a statutorily protected right, or communicated to the employer an intent to do so.

The "mere assertion that one is engaged in a protected activity does not extend statutory permission to that specific act. Unless the underlying activity is a 'protected activity,' actions arising from the disputed activity cannot be defined as protected activities. . . . " *City of Tacoma*, Decision 6793 (PECB, 1999). Additionally, an employer must be aware of an employee's protected activities in order to form the requisite motivation and intent to react against that conduct. *Seattle Public Health Hospital*,

Decision 1911 (PECB, 1984), *aff'd*, Decision 1911-C (PECB, 1984); *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986), *aff'd*, Decision 2272-A (PECB, 1986).

An employee who asserts, or indicates an intent to assert, a violation of the collective bargaining agreement is exercising a protected union activity. The bare fact that an employee addresses an issue with his or her employer that is coincidentally contained in a collective bargaining agreement, however, is insufficient to bring the conversation into the "protected activities" arena. Almost all personnel matters are covered in any given collective bargaining agreement. This does not mean that all personnel-related matters are automatically transformed into protected activities simply because they are also covered in such an agreement.

The Commission does not enforce protections conferred by statutes outside of the collective bargaining statutes it is authorized to enforce. *City of Lynnwood*, Decision 6986 (PECB, 2000); *King County*, Decision 7139 (PECB, 2000). The duty to bargain notwithstanding, the Commission is not empowered to resolve each and every dispute that may come up between employees and their employers. The Commission does not assert jurisdiction to determine or remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statutes - such matters must be pursued through the courts or through arbitration procedures established by the agreement itself. *City of Walla Walla*, Decision 104 (PECB, 1976).

ANALYSIS - DISCRIMINATION

At all relevant times, Dormaier was employed as a support enforcement officer (SEO) 3 with the employer's Division of Child Support. She originally commenced her employment in March 2000 and was

promoted to her current position in 2004. Dormaier was a member of a bargaining unit represented by the Washington Federation of State Employees (union), and served in the capacity of shop steward at all relevant times. The union is not a party to this action.

The underlying facts in this case are largely undisputed. In December 2005, Dormaier raised concerns to management about the process for training new employees. On January 6, 2006, Dormaier responded to a request for help from co-worker Mary Hoffman, an SEO 2. At that time, Dormaier became aware that Hoffman was training a new employee, in conflict with Dormaier's understanding that only SEO 3s were qualified to do that training. Dormaier asked Hoffman "What are you doing?" Dormaier further stated something to the effect that "only 3's are supposed to train." Hoffman testified that she felt like she was "being called to the principal's office."

On January 12, 2006, district manager Sylvia Flores met with Dormaier to discuss the January 6 incident. Flores accused Dormaier of unprofessional conduct, and further stated that her actions caused an unidentified staff member to fear for his/her safety. Dormaier disagreed with Flores' characterization of the incident. On January 13, 2006, Dormaier sent an e-mail to her supervisor, Pat Gaudette, requesting arbitration with the unidentified complaining employee, explaining:

> I believe it would [be] inappropriate for me to speak directly with this staff member. Because everyone is required to work with every other person in this office it is important that this issue be resolved so that a working relationship can be maintained. Therefore, I request that the staff member and I go to arbitration so that I may assure them that neither they nor any other person has any reason whatsoever to be fearful of me and for them to have the opportunity to explain what it was that frightened them.

Gaudette responded, denying the request for arbitration, explaining that arbitration is part of the grievance process. She further invited Dormaier to "compose a letter explaining herself," which could be delivered to the other employee.

On January 18, 2006, Dormaier approached Hoffman and asked her if she feared for her safety during the January 6 incident. Hoffman denied that she had, and confirmed that the exchange with Dormaier at the time was "pleasant." On January 19, 2006, Flores issued a counseling letter to Dormaier for, among other allegations, unprofessional conduct during the January 6 incident. In the letter, Flores stated that "one of the staff members express[ed] fear for their safety."

On January 19, 2006, Dormaier stood close to Hoffman in Hoffman's cubicle for several minutes while Hoffman completed a long telephone call. Dormaier asked Hoffman to read Flores' January 19 letter. Hoffman replied that she did not want to get involved. Dormaier repeated her request for Hoffman to read the document. Hoffman repeated her refusal to get involved. Dormaier asked her, in a "terse" tone, if she would read it in front of a judge.

On January 20, 2006, Human Resources Director Carol Randolph-Nacht met with Dormaier and her union representative to present an oral reprimand for an e-mail Dormaier sent to other CSO 3s on January 12, 2006, regarding the issue of training. In the oral reprimand, Randolph-Nacht accused Dormaier of failing to follow the appropriate chain of command and for failing to treat other employees with respect.

On February 17, 2006, Flores issued a letter of reprimand to Dormaier for speaking to Hoffman in a "terse tone" on January 19, 2006. The letter indicated that this was inappropriate conduct

which "made [Hoffman] feel intimidated, bullied, manipulated and threatened." The letter of reprimand specified that Dormaier violated administrative policy 18.64, which addressed standards of ethical conduct.

These events, for which Dormaier denies any wrongdoing, form the basis of Dormaier's contention that the employer issued the February 17 letter of reprimand in retaliation for engaging in protected union activities. Dormaier did not grieve any of the disciplinary actions taken against her.

As discussed above, a threshold issue for any discrimination claim is that the complainant must prove that he or she was involved in a protected union activity and that the employer was aware of the activity, or that he or she communicated an intent to the employer to do so. After Flores first spoke to Dormaier regarding the January 6 incident, Dormaier requested arbitration. It may be that Dormaier was using the wrong term to request mediation, a process available at any stage of the grievance procedure under the collective bargaining agreement. Under the terms of the agreement, however, the counseling memo Dormaier received was not discipline subject to the grievance procedure.

Simply raising the issue with an employer by asking for arbitration, even where arbitration is addressed in a collective bargaining agreement, is insufficient, in and of itself, to bring that discussion into the "protected activities" arena. In her request for arbitration, Dormaier did not indicate that she was raising any issue in a collective bargaining context. Moreover, Dormaier's request for arbitration appeared to be directed solely toward maintaining a working relationship with an unidentified co-worker. Her request did not address the counseling memo in relationship to the violation of any right under the collective bargaining

agreement. Nor did it address Dormaier's relationship with her employer.

Dormaier further claims that her attempt to talk to Hoffman on January 19, 2006, was an effort to gather information for a potential grievance. Dormaier did not advise the employer that she intended to file, nor did she file, a grievance over any of the events discussed above. While that may have been Dormaier's intention, she did not convey her motives to the employer. The evidence shows that during the discussion resulting in the February 17 letter of reprimand, Dormaier failed to indicate to the employer that she was raising an issue in relation to her collective bargaining rights. Dormaier received the letter of reprimand for her intimidating behavior toward a co-worker, not for having contact with her. In fact, the record is undisputed that Dormaier talked to Hoffman concerning the January 6 incident on January 18, 2006. Although the employer became aware of that conversation, it did not react to it in any way.

Dormaier's request for arbitration and subsequent effort to talk to Hoffman were insufficient to put the employer on notice that she was raising an issue during her meeting with Hoffman on January 19, 2006, under any protected union activity rights. Because the Examiner finds that Dormaier was not involved in a protected activity, the employer can not be found to have discriminated against her for exercising a protected union activity.

APPLICABLE LEGAL STANDARDS - INTERFERENCE

It is an unfair labor practice under RCW 41.80.110(1)(a) for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by" Chapter 41.80 RCW. Interference claims involve a less complex analysis than discrimi-

nation charges. The Commission's test for an interference violation is whether one or more employees could reasonably perceive employer actions as a threat of reprisal or force, or promise of benefit, associated with the pursuit of protected activity. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened. *City of Omak*, Decision 5579-B (PECB, 1998); *City of Tacoma*, Decision 8031-B (PECB, 2004).

Discrimination and interference claims are interrelated in that both require evidence of protected activities. *Dieringer School District*, Decision 8956-A. If a discrimination claim and an interference claim are based on the same set of facts, and a discrimination claim is dismissed for failing to meet the test of protected activities, the Commission will not find an independent interference claim. *Seattle School District*, Decision 5237-B (EDUC, 1996); *Brinnon School District*, Decision 7210-A.

ANALYSIS - INTERFERENCE

The Examiner has found that Dormaier was not involved in any protected activities under the analysis of her discrimination claim. The exercise of a protected activity is a required element for a finding of interference under RCW 41.80.110(1)(a). Because Dormaier was not involved in any protected activities, the claim of interference is dismissed.

FINDINGS OF FACT

1. The Washington State Department of Social and Health Services is an employer within the meaning of RCW 41.80.005(8).

2. Gayle Dormaier is an employee of the Washington State Department of Social and Health Services, Division of Child Support. She is an employee within the meaning of RCW 41.80.005(6).

3. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7) and was, at all times relevant to this case, the exclusive bargaining representative for the bargaining unit of which Dormaier was a member.

4. Dormaier received a written reprimand on February 17, 2006, based on allegations that she engaged in improper workplace behavior, by making a co-worker feel intimidated, bullied, manipulated, and threatened.

5. Dormaier was not involved in the exercise of any protected activities under Chapter 41.80 RCW during the discussion with a co-worker that formed the basis of the February 17, 2006 reprimand.

CONCLUSIONS OF LAW

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

2. The Washington State Department of Social and Health Services did not discriminate against Dormaier in violation of RCW 41.80.110(1)(c) by issuing her a letter of reprimand in reprisal for protected union activities.

3. The Washington State Department of Social and Health Services did not interfere with Dormaier's rights in violation of RCW

41.80.110(1)(a) by issuing her a letter of reprimand in reprisal for protected union activities.

NOW THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 29th day of June, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Starr Knutson by MMN

STARR KNUTSON, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE
P. O. BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	20601-U-06-05244	FILED:	08/17/2006	FILED BY:	PARTY 2
DISPUTE:	ER INTERFERENCE				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	Yakima Support				
COMMENTS:					

EMPLOYER: STATE - DSHS
ATTN: STEVE MCLAIN
210 11TH AVE SW STE 331
PO BOX 43113
OLYMPIA, WA 98504-3113
Ph1: 360-725-5154 Ph2: 360-725-5166

REP BY: PATRICIA A THOMPSON
OFFICE OF THE ATTORNEY GENERAL
1116 W RIVERSIDE AVE
SPOKANE, WA 99201-1194
Ph1: 509-458-3514 Ph2: 509-456-6190

PARTY 2: GAYLE DORMAIER
ATTN:
C/O RYAN EDGLEY
251 HIDEAWAY RD
YAKIMA, WA 98908
Ph1: 509-248-1740

REP BY: RYAN M EDGLEY
ATTORNEY AT LAW
251 HIDEAWAY RD
YAKIMA, WA 98908
Ph1: 509-575-6611 Ph2: 509-248-1740