Port of Seattle, Decision 7603-A (PECB, 2003)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM GLOVER, Complainant, vs. PORT OF SEATTLE, Respondent.	CASE 16079-U-01-4104 DECISION 7603-A - PECB ORDER DENYING MOTION FOR SUMMARY JUDGMENT

William Glover appeared *pro se*.

Craig R. Watson, Attorney at Law, for the employer.

William Glover filed a complaint charging unfair labor practices with the Commission on October 29, 2001, under Chapter 391-45 WAC, naming the Port of Seattle (employer) as respondent. A deficiency notice was issued under WAC 391-45-110, and Glover filed an amended complaint on January 7, 2002. An order for further proceedings on this case was issued on January 17, 2002,[1] finding a cause of action to exist on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.56.140(1), and discrimination for filing an unfair labor practice charge in violation of RCW 41.56.140(3), by terminating William Glover in reprisal for his union activities protected by Chapter 41.56 RCW.

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[1] Glover had filed a companion complaint naming International Brotherhood of Electrical Workers, Local 46, as respondent. The complaint against the union was dismissed. *Port of Seattle*, Decision 7604 (PECB, 2002).

The employer filed its answer and a hearing was set for May 22, 2002, but Glover requested a continuance. The employer filed a motion for summary judgment motion on September 10, 2002, and Glover filed a written response to that motion.

Upon review of the pleadings and the documents on file, the Examiner finds there is an issue of material fact sufficient to warrant a hearing. The motion for summary judgment is DENIED.

BACKGROUND

Glover was employed by the Port of Seattle, as an electrician. While so employed, he was within a bargaining unit represented by International Brotherhood of Electrical Workers, Local 46 (union). Glover's employment was terminated, after he failed or refused to pay union dues under the union security obligations set forth in a collective bargaining agreement between the employer and union.

While reviewing and dismissing several allegations, the order for further proceedings included:

> In relation to allegations concerning the employer, the amended complaint alleged that Glover had been "singled out, harassed, and finally terminated" by the employer "since my complaint against my employer to PERC." Commission docket records confirm that Glover filed unfair labor practice complaints against the employer (Case 15654-U-01-3968) and the union (Case 15655-U-01-3969) on February 20, 2001. Both of those complaints were dismissed by the Commission on May 16, 2001. *Port of Seattle*, Decision 7405 (PECB, 2001). The amended complaint in Case 16079-U-01-4104 does contain factual allegations of employer misconduct for the filing of an unfair labor practice complaint under Chapter 41.56 RCW . . .

Those allegations were thus forwarded to the undersigned Examiner for further proceedings under Chapter 391-45 WAC.

DISCUSSION

In adjudicative proceedings under the Administrative Procedure Act, Chapter 34.05 RCW, including this unfair labor practice case under Chapter 391-45 WAC, the Commission considers summary judgment motions under a model rule adopted by the Chief Administrative Law Judge of the State of Washington. That rule states:

> WAC 10-08-135 SUMMARY JUDGMENT. A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Statutory Authority: RCW 34.05.020, 34.05.250, 34.12.030 and 34.12.080. 99-20-115, § 10-08-135, filed 10/6/99, effective 11/6/99.]

A motion for summary judgment calls upon the Examiner to make final determinations on a number of critical issues without the benefit of a full evidentiary hearing and record. The granting of such a motion cannot be taken lightly. *Port of Seattle,* Decision 7000 (PECB, 2000).

WAC 10-08-135 does not give respondents a "second bite at the apple" or an opportunity to re-litigate the preliminary rulings issued in unfair labor practice cases by the Executive Director or designee under WAC 391-45-110. In responding to a motion for summary judgment, an Examiner must operate within the context of a preliminary ruling that has been issued by higher authority, and is confined to ruling on admissions or defects which have become evident since the issuance of the preliminary ruling.

In this case, the employer's motion for summary judgment asserts that Glover has not made out a prima facie case of discrimination, and/or that the employer has advanced a non-discriminatory reason for terminating his employment (i.e., that Glover ceased paying union dues, that the union requested termination under provisions of the collective bargaining agreement, and that the employer had no other choice than to comply and terminate the employee) even if Glover made out a prima facie case. The employer's arguments are premature.

The Commission decides "discrimination" allegations under standards drawn from the decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). In this case, Glover would need to make out a prima face case as follows:

> [T]he first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliat[ion]. To do this, a complainant must show:
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> 1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
>
> 2. That he or she was discriminated against;
>
> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.
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> If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. . . . While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. 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:
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> 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 protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Educational Service District 114, Decision 4631-A (PECB, 1994). That standard has been followed in numerous subsequent decisions. *See City of Mill Creek*, Decision 5699 (PECB, 1996); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *Pasco Housing Authority*, Decisions 6248, 6248-A (PECB, 1998).

Rather than holding that Glover has made out a prima facie case, the order for further proceedings issued in this case merely gave Glover the opportunity to make a prima facie case at a hearing.[2] If Glover fails to provide evidence in support of his claim that the employer singled him out following his earlier filing, that

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[2] In his amended complaint, Glover stated:

> [In] my 9 years working at the Port of Seattle, I have known no one to be fired while on workers compensation injury and FMLA, not to mention not paying union dues. I am the only one that I know of that has been singled out since my complaint to PERC.

In his response to the summary judgment motion, he states:

> In early 2001, I filed a complaint with PERC against my employer, the Port of Seattle . . . Since this early complaint to PERC, I was placed under a microscope and was harassed by every means possible. The Port of Seattle was trying to get me terminated by disciplinary actions for any little thing I did but since I received no response for the grievances [sic]. After many calls, I stopped paying union dues and this was the reason the Port of Seattle used as a cause to terminate me. In this way, the blame was on the union not the Port of Seattle.

will be soon enough for the employer to move for dismissal of the complaint. At this time, the motion for dismissal is premature.

The employer offers substantial evidence to support its defense, but it will not be called upon to present such evidence until such time (if ever) as Glover has made out a prima facie case. Again, the employer's argument is premature.

The employer's motion for summary judgment does not point out any admission-against-interest or procedural defect discovered since the issuance of the order for further proceedings in this matter. Even then, the only basis for depriving Glover of his right to a hearing under Chapter 34.05 RCW would be a defect or defense so conclusive that no hearing would be needed. *Renton School District,* Decision 3121 (PECB, 1989). A summary judgment is only appropriate where the party responding to the motion cannot or does not deny any material fact alleged by the party making the motion. *Monroe School District,* Decision 5283 (PECB, 1985); *City of Vancouver*, Decision 7013 (PECB, 2000); *Whitman County*, Decision 7735 (PECB, 2002). The fact that Glover admits he stopped paying union dues may not be conclusive, if he can sustain his allegation that the employer treated him differently than others when it terminated his employment.

NOW, THEREFORE, it is

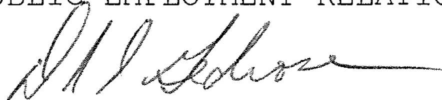
ORDERED

1. The motion for summary judgment filed by the Port of Seattle in the above-captioned matter is DENIED.

2. Within 14 days following the date of this order, the parties are directed to file and serve their available dates for a two-day hearing between March 10 and 21, 2003.

Issued at Olympia, Washington, this 13th day of January, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DAVID I. GEDROSE, Examiner