Community College District 5 (Everett), Decision 8850-A (PSRA, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BOYD GRIFFIN, Complainant, vs. COMMUNITY COLLEGE DISTRICT 5 (EVERETT), Respondent.	)	CASE 19008-U-04-04842 DECISION 8850-A - PSRA ORDER OF DISMISSAL

Peter Cogan, Attorney at Law, for the complainant.

Rob McKenna, Attorney General of Washington, by *David LaRaus*, Assistant Attorney General, for the respondent.

On November 23, 2004, Boyd Griffin (Griffin) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Community College District 5 (Everett) (employer) as respondent. A preliminary ruling was issued on January 24, 2005, which found 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 termination of Griffin in reprisal for union activities protected by Chapter 41.80 RCW. Griffin is a member of a bargaining unit represented by the Washington Federation of State Employees. Examiner Guy Otilio Coss held a hearing on June 23, 2005, September 16, 2005, and October 18, 2005. The parties submitted post hearing briefs on December 20, 2005.

The Examiner rules that Griffin was not engaged in protected activities, a threshold issue for an interference violation under RCW 41.80.110(1)(a) and a discrimination violation under RCW 41.80.110(1)(c). Without meeting this threshold requirement, the employer cannot be, and is not, found to have interfered with Griffin's rights nor to have discriminated against him for activities protected by Chapter 41.80 RCW. Griffin's complaint is therefore dismissed.

Issues Presented:

1. Did the employer discriminate against Griffin in violation of RCW 41.80.110(1)(c) by terminating him in reprisal for protected union activities?

2. Did the employer interfere with Griffin's rights in violation of RCW 41.80.110(1)(a) by terminating him in reprisal for protected union activities?

Issue 1 - Applicable Legal Standards:

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

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 Commission does not assert jurisdiction to remedy violations of collective bargaining

agreements through statutory unfair labor practice provisions. *City of Walla Walla*, Decision 104 (PECB, 1976). Such claims must be processed through the grievance and arbitration machinery of the collective bargaining agreement, or through the courts.

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 as follows:

> 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 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). 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 had "communicat[ed] to the employer an intent to do so." *Wilmot* and *Allison*.

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); *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986).

Issue 1 - Application of the Standards:

Griffin was an employee of Everett Community College. He originally commenced his employment in March 2000 and was terminated on October 23, 2002. He appealed that termination to the Personnel Appeals Board (PAB) and after a hearing the termination was reduced to a one year suspension. Griffin was reinstated effective March 15, 2004, and was assigned to work in the employer's Human Resources office. Boyd Griffin was a member of a bargaining unit that was represented by the Washington Federation of State Employees.

After being reinstated on March 15, 2004, Griffin was again terminated on May 12, 2004, effective May 28, 2004, for alleged "insubordination and abuse of fellow workers" during an event occurring on April 23, 2004. This event, termed a discussion by Griffin and an argument by the employer, forms the basis of Griffins contention that he was terminated for engaging in protected union activities.

Griffin claims that the "evidence shows that it was the events of April 23, 2004 that were the basis" for his termination. He claims that it is his "contention that he was terminated for engaging in protected activity, specifically the presentation of a grievance to his supervisor." Griffin claims that during the April 23, 2004, discussion/argument he was engaged in the presentation of the following grievances:

1. Discrimination for a medical disability and a request for reasonable accommodation.

2. Denial of a leave request.

3. A request to contact the Health Care Authority during work hours instead of on his breaks and/or own time.

As discussed above, a threshold issue to any discrimination claim is that the complainant must prove that he or she was involved in a protected union activity.

1. <u>Issues surrounding Griffin's medical disability and reasonable accommodation request</u>:

Griffin claims that the employer discriminated against him, and failed to provide him reasonable accommodation, for a medical disability covered under Article I of the collective bargaining agreement (CBA). That section states that conditions of employment

shall be consistent with applicable state and federal laws concerning non-discrimination. However, the duty to bargain notwithstanding, the Public Employment Relations 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 contract itself. *City of Walla Walla*, Decision 104 (PECB, 1976). Likewise, the Commission does not have jurisdiction over claims that arise either under the state law against discrimination, Chapter 49.60 RCW, or the federal "American's with Disabilities Act", 42 U.S.C., Section 12101 or other such discrimination statutes. *See King County*, Decision 6767 (PECB, 1999).

That said, an employee who asserts, or indicates an intent to assert, a violation of the collective bargaining agreement, is exercising a protected union activity. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). The act, or indication of intent to act, under statutory or contractual collective bargaining rights, is a protected activity, even if the Commission has no jurisdiction over the underlying issue. It is the assertion of the collective bargaining right that is the protected activity, not the underlying issue. This would include an employee's assertion that the employer had violated a contract containing a prohibition on disability discrimination. However, the employee must actually put the employer on notice that the employee considers the issue to concern collective bargaining rights and/or that they would be seeking union assistance on the issue. Alternatively, the context of the meeting may suffice to put the employer on notice that the

employee's assertion is that there has been a violation of the collective bargaining agreement - for example, if the assertion is made at a union-management meeting.

The bare fact that an employee addresses an issue with his or her employer, which is coincidentally contained in a collective bargaining agreement, is insufficient to bring the conversation into the "protected activities" arena. 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); *Metropolitan Park District of Tacoma*, Decision 2272 (PECB, 1986). Almost all personnel matters are covered in any given collective bargaining agreement. This does not mean that all personal related matters are automatically transformed into protected activities simply because they are also covered in such an agreement.

The evidence shows that, concerning the discussion on April 23, 2004, with his supervisor over his medical disability and reasonable accommodation request, Griffin did not indicate to the employer that he was raising the issue in relation to his collective bargaining rights. Furthermore, Griffin did not advise the employer that he intended to file, nor did he file, a grievance over the issue. Griffin claims that the verbal discussion with his supervisor was sufficient to invoke the grievance procedure under the parties contract. Griffin cites to *Clallam County v. Washington State Public Employment Relations Commission*, 43 Wn.App 589 (1986), for the proposition that verbally raising an issue with an employer is sufficient to invoke a contractual grievance procedure. However, Griffin's reliance on this case is mistaken. In *Clallam County*, the court found that the contract:

> [S]*pecifically states that a grievance may be presented verbally* to the employee's immediate supervisor. We conclude, therefore, that both Baker's request for vacation pay and his promotion request constituted the raising of "grievance[s]" pursuant to the terms of the collective bargaining agreement.

(Emphasis added).

In the present case, the collective bargaining agreement did not provide for grievances to be verbally presented. In fact, the contract requires all grievances to be submitted in writing. Griffin did not file a grievance over his medical disability or related reasonable accommodation request. Simply raising these issue with an employer, even where such is addressed in a collective bargaining agreement, is insufficient, in and of itself, to bring that discussion into the "protected activities" arena. During the conversation at issue, Griffin did not indicate that he was raising the issue in a collective bargaining context.

The discussion Griffin had with his supervisor was insufficient to put the employer on notice that he was raising an issue under any protected union activity rights. Because the Examiner finds that Griffin was not involved in a protected activity in discussing his medical disability and/or reasonable accommodation request, the employer can not be found to have discriminated against him for exercising a protected union activity.

2. Denial of vacation leave request:

Griffin alleges that during the April 23, 2004, discussion/argument with his supervisor he discussed a vacation leave request that had been previously denied by the employer. The employer contends that this issue was not even raised during the discussion/argument. The

Examiner need not rule whether this issue was, or was not, raised because even if it had it would not have risen to the level of a protected activity. Again, if Griffin is alleging that the employer violated the collective bargaining agreement between the parties on this issue, the matter must be pursued through the courts or through arbitration procedures established by the contract itself. *City of Walla Walla*, Decision 104 (PECB, 1976).

The evidence shows that, even if this alleged discussion concerning a vacation leave denial did occur, Griffin did not indicate to the employer that he was raising the issue in relation to his collective bargaining rights. Furthermore, Griffin did not advise the employer that he intended to file, nor did he file, a grievance over the vacation leave denial issue. As discussed above, the collective bargaining agreement required all grievances to be submitted in writing.

As with the disability issue above, simply raising an issue with an employer, even where such is addressed in a collective bargaining agreement, is insufficient, in and of itself, to bring that discussion into the "protected activities" arena. During the conversation at issue, Griffin did not indicate that he was raising any issue in a collective bargaining context. The discussion Griffin had with his supervisor was insufficient to put the employer on notice that he was raising an issue under his protected union activity rights.

The Examiner finds that Griffin, even had the vacation leave denial issue been discussed, would not have been involved in a protected activity. Therefore, the employer can not be found to have discriminated against him for exercising a protected union activity.

3. Griffin's request to contact the Health Care Authority during work hours:

On April 23, 2004, Griffin was advised by his supervisor of health care deductions that were due to the Washington State Health Care Authority (HCA) and that would be deducted from his paycheck. Griffin had questions concerning these deductions and felt that he needed to contact the HCA to discuss them. He was told by his supervisor that he was required to contact the HCA during his breaks rather than during the workday. During the discussion with his supervisor that followed, Griffin requested that he be allowed to contact the HCA during the workday because he needed his full breaks due to a medical condition. Griffin claims that this request was a protected activity because health care coverage was an employee benefit and because he needed his breaks for medical reasons of which the employer was aware of.

However, at the time of the events in this case, employee medical coverage was not subject to bargaining and the parties collective bargaining agreement contained no provision concerning employee medical coverage. Further, the parties collective bargaining agreement contained no mention of the HCA nor an employee's right to contact them during work hours or otherwise. Griffin did not advise his supervisor, nor did the context of the conversation indicate, that he considered this a union and/or collective bargaining issue. Finally, Griffin did not express an intent to file, nor did he file, a grievance concerning this issue. Griffin's conversation with his supervisor concerning contacting the HCA during working hours was simply that - a discussion with his supervisor. It was not a protected activity under Chapter 41.80 RCW. Further, Griffin's statement to his supervisor that he needed his full breaks because of his medical condition was, at best, a request for a reasonable accommodation due to a medical

disability. As discussed above, this is an issue for which the Commission lacks jurisdiction.

The discussion Griffin had with his supervisor was insufficient to put the employer on notice that he was raising an issue under any protected union activity rights. The Examiner finds that Griffin was not involved in a protected activity in discussing his need to contact the HCA and to do so during his work hours due to a medical disability. Therefore, the employer can not be found to have discriminated against him for exercising a protected union activity.

Issue 2 - Applicable Legal Standards:

It is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by" the Personnel System Reform Act (PSRA), Chapter 41.80 RCW. RCW 41.80.110(1)(a). Interference claims involve a less complex analysis than discrimination 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 rights under Chapter 41.56 RCW. 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, 1997); *City of Tacoma*, Decision 8031-A (PECB, 2004).

Discrimination and interference claims are interrelated in that both require evidence of protected activities. *Dieringer School District*, Decision 8956 (PECB, 2005). 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, an independent interference claim will not be found. *Seattle School District*, Decision 5237-B (EDUC, 1996); *Brinnon School District*, Decision 7210-A (PECB, 2001).

Issue 2 - Application of the Standards:

The Examiner finds that Griffin was not involved in any protected activities under the analyses of his 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 Griffin was not involved in any protected activities, the claim of interference must be, and therefore is, dismissed.

FINDINGS OF FACT

1. Community College District 5 (Everett) is an institution of higher education within the meaning of RCW 41.80.005(10).

2. Boyd Griffin is an employee of Community College District 5 (Everett) 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 Boyd Griffin was a member.

4. Boyd Griffin was terminated on May 12, 2004, effective May 28, 2004, based on Community College District 5 (Everett) allegations that he was insubordinate and abusive of fellow workers during a discussion with his supervisor on April 23, 2004.

5. Boyd Griffin was not involved in the exercise of any protected activities during the discussion with his supervisor on April 23, 2004.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW.

2. Community College District 5 (Everett) did not discriminate against Griffin in violation of RCW 41.80.110(1)(c) by terminating him in reprisal for protected union activities.

3. Community College District 5 (Everett) did not discriminate against Griffin in violation of RCW 41.80.110(1)(a) by terminating him in reprisal for protected union activities.

ORDER

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

ISSUED at Olympia, Washington, this 10th day of April, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Guy Otilio Coss, 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.