STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CAROLE A. JORDAN, Complainant, vs. COMMUNITY COLLEGE DISTRICT 13 (LOWER COLUMBIA), Respondent.	)	CASE 18740-U-04-4764 DECISION 9171-A - PSRA DECISION OF COMMISSION

Law Offices of Judith A. Lonnquist, P.S., by *Judith A. Lonnquist,* Attorney at law, for the complainant.

Rob McKenna, Attorney General of Washington, by *Rachelle L. Wills,* Assistant Attorney General, for the employer.

This case comes before the Commission on a timely appeal filed by Carole A. Jordan (employee) seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner David I. Gedrose dismissing Jordan's complaint.[1] Community College District 13 (employer) supports the Examiner's decision.

ISSUES PRESENTED

1. Did the Examiner correctly dismiss the claim of unlawful discrimination?

2. Did the Examiner properly exclude the claim of unlawful interference from consideration?

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[1] *Community College District 13*, Decision 9171-A (PSRA, 2005).

For the reasons set forth below, we affirm the Examiner's decision dismissing Jordan's claim that the employer discriminated against Jordan in violation of RCW 41.56.140(3), and affirm the Examiner's decision to exclude the independent claim of interference under RCW 41.56.140(1).

STANDARD OF REVIEW

This Commission does not conduct a de novo review of examiner decisions in unfair labor practice proceedings under Chapter 391-45 WAC. Rather, we review findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and the order. *Cowlitz County,* Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains competent, relevant, and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services,* 104 Wn.2d 323 (1985). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *City of Edmonds,* Decision 8799-A (PECB, 2005). This deference, while not slavishly observed on every appeal, is even more appropriate in fact-oriented appeals. *Cowlitz County,* Decision 7007-A.

ISSUE 1 - DISCRIMINATION

Applicable Legal Standard

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114,* Decision 4361-A (PECB, 1994), where the Commission

embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;
2. The employee is discriminatorily deprived of some ascertainable right, benefit, or status; and
3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate nondiscriminatory reasons for its actions. It 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 disputed action was in retaliation for the 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 4626-A.

Application of Standard

Jordan's complaint alleged the employer committed unfair labor practices by discriminating against her on 33 occasions, including instances where she was given no work, or given work with an incomplete work assignment form, or given work without any assignment form. Other allegations were that Jordan was given work with short deadlines, that work was transferred from her to another

employee, that she was blamed for mistakes, and that her work was micro-managed. In addition, Jordan alleged she was excluded from decisionmaking and meetings, and that meetings she was called to were cancelled. However, Jordan was not disciplined or terminated, nor did she fail to complete any of the work involved.

The Examiner dismissed the complaint, finding that the employee had not sustained her burden of proof on the allegations. Jordan argues that the Examiner erred in dismissing her case, claiming that the totality of the circumstances demonstrates a pattern of discrimination by the employer. We disagree, and find that substantial evidence exists within this record supporting the Examiner's findings and conclusions that the employer did not discriminate against Jordan for exercising her statutory rights.

The Examiner found that Jordan established that she exercised her statutorily protected rights by filing an earlier unfair labor practice complaint, which is the first prong of the three part test for discrimination.

The record reveals that Jordan has not been deprived of any ascertainable right, benefit or status and she failed to demonstrate that she had been terminated, disciplined or suffered any loss of any benefit from her filing of an unfair labor practice complaint.[2] Furthermore, Jordan testified that she was able to complete all her work assignments on time. Jordan asserts that the employer is trying to create a hostile job atmosphere to force her to quit her job. She has not been forced to quit and she has not left the job. No deprivation has occurred. The argument that she

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[2] Case 16499-U-02-4259. *See Community College District 13 (Lower Columbia)*, Decision 8386 (PSRA, 2004) for a summary of the employer's violation and remedial order.

is being deprived of a right, benefit or status is, at best, premature.

Although the Examiner's analysis could have ended there, he went on to examine the second prong of the test: whether, in each instance of alleged retaliatory conduct, the employer had articulated legitimate, nonretaliatory reasons for its actions. He found that in each instance the employer had nondiscriminatory reasons for the actions taken. Our examination of the record, without repeating the analysis of each and every instance, reveals substantial evidence supporting the Examiner's findings on each instance of alleged retaliation.

Jordan's appeal basically re-argues already determined facts and urges a different result, asserts that the totality of the circumstances must be considered, and that the employer was engaging in a pattern of retaliatory conduct. This argument goes to the third prong of the three part test, and requires Jordan to demonstrate that the employer's reasons were pretextual or that union animus was a motivating factor.

The Examiner reviewed the timing of the actions and testimony of the employee's witnesses in finding that no discrimination occurred. He noted that the complained-of actions decreased over time and after she met with college officials. The Examiner also found that the witnesses called by the employee did not add any evidence of discriminatory conduct. Important to our analysis of the record is the fact that Jordan did not introduce any evidence of how she was singled out for retaliatory treatment. No evidence was presented that she received disparate treatment from other employees nor was there any evidence of union animus. While Jordan argues that the timing of the acts in question is suspect, the

timing reveals no correlation to the union activity. Jordan did not sustain her burden of proof on this third point.

ISSUE 2 - INTERFERENCE

Applicable Legal Standard

Chapter 41.56 RCW prohibits employer interference with, or discrimination against, the exercise of collective bargaining rights. RCW 41.56.040 provides in part:

> [N]o public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.140(1) enforces those statutory rights by establishing that an employer who interferes with, restrains, or coerces public employees in the exercise of their collective bargaining rights commits an unfair labor practice.

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The employee is not required to show an intention or motivation to interfere on the part of the employer to demonstrate an interference with collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee was actually coerced or that

the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Chapter 391-45 WAC governs proceedings before the Commission on complaints charging unfair labor practices. WAC 391-45-070(2) provides that a complaint may be amended:

- After the appointment of an Examiner but prior to the opening of an evidentiary hearing, amendment may be allowed upon motion to the examiner and subject to due process requirements. WAC 391-45-070(2)(b); or

- After the opening of an evidentiary hearing, amendment may be made only to conform the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing. WAC 391-45-070(2)(c).

In *City of Seattle,* Decision 8313-B (PECB, 2004), the Commission upheld an Examiner's decision to exclude four instances raised at the hearing as a basis for financial remedy in that the union never moved to amend its complaint under WAC 391-45-070 although it had ample time to do so.

Application of Standards

Following the hearing, a new cause of action was alleged by the employee in the post-hearing brief, arguing that the employer committed an independent interference violation. The employer moved to strike the new cause of action. The Examiner refused to consider the new cause of action. On appeal, Jordan argues that the cause of action should have been considered, that the Examiner should have advised the employee to amend her complaint, that the employee was pro se when she filed her complaint, and that the

evidence introduced in the hearing could reasonably have been shown to state a claim of interference.

The Examiner stated that the Commission does not consider evidence or argument once the preliminary ruling is issued. *See King County,* Decision 6994-B (PECB, 2002). He also noted that prior to the hearing, an amended complaint may be filed under WAC 391-45-070, and that once the hearing begins, amendments are only allowed upon a motion to amend the pleadings pursuant to WAC 391-45-070(2). Finally, the Examiner noted that a claim of interference must be independently asserted aside from a claim of discrimination.[3] *Yakima School District*, Decision 8612 (EDUC, 2004).

The decision of the Examiner on this point must be affirmed. The Examiner is not in the position of "guessing" what cause of action the facts may allege and advising the parties accordingly. While this Commission permits complainants appearing pro se some leniency with regards to the presentation of their case, the rights of the other parties to the proceeding must also be considered, and pro se complainants still have the ultimate burden of proving their complaint. *See King County*, Decision 5595-A (PECB, 1996). In processing unfair labor practice complaints, the role of the Commission is to provide "uniform and impartial" adjustment of complaints. RCW 41.58.005. Unlike the staff members for the NLRB, who perform investigatory and prosecutorial functions, the examiner does not engage in advocacy for any party.

Jordan retained counsel for purposes of representation shortly after the preliminary ruling was issued, and a motion to amend the

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[3] Additionally, the derivative interference violation found in this preliminary ruling cannot be converted into an independent interference violation because the discrimination violation was dismissed.

pleadings could have been made without objection any time following the filing of the complaint up to the commencement of the hearing. No motions were submitted, and Jordan has not demonstrated that she was prohibited from doing so. Instead, Jordan's allegations of an independent interference claim appeared for the first time in the post-hearing brief. An independent cause of action for interference with protected rights was not properly alleged in the original complaint, and was correctly excluded by the Examiner.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner David I. Gedrose dismissing the above-captioned case are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 11th day of July, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

CASE NUMBER:	18740-U-04-04764	FILED:	08/04/2004	FILED BY:	PARTY 2
DISPUTE:	ER DISCRIMINATE				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	-				
COMMENTS:					

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