Mukilteo School District, Decision 5899 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLARD L. ROBERTS,	)	
	)	
Complainant,	)	CASE 12336-U-96-2919
	)	
vs.	)	DECISION 5899 - PECB
	)	
MUKILTEO SCHOOL DISTRICT,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

James S. Sable, Attorney at Law, appeared on behalf of the complainant.

Montgomery, Purdue, Blankinship & Austin, by Christopher L. Hirst, Attorney at Law, appeared on behalf of the respondent.

On February 20, 1996, Willard L. Roberts filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Mukilteo School District interfered with employee rights and discriminated against Roberts in violation of RCW 41.56.140(1) and (3), by contacting potential employers to dissuade them from hiring him. A hearing was held before Examiner Mark S. Downing at Kirkland, Washington on October 25, 1996. Both parties filed briefs.

BACKGROUND

Willard Roberts was hired by the Mukilteo School District (employer) in September of 1991, as a substitute school bus driver.

He worked in that capacity during the 1991-1992 and 1992-1993 school years. In a telephone conversation on September 2, 1993, the employer's Supervisor of Transportation, Tom Hingson, informed Roberts that his employment was terminated.

Roberts protested his termination in a September 6, 1993, letter to Hingson. Roberts sent a copy of that letter to Public School Employees of Washington (union), which is the exclusive bargaining representative of a bargaining unit of the employer's classified employees performing food service, secretarial/ bookkeeping, transportation, custodial, maintenance, professional/ technical, data processing, warehouse, and security functions. The employer and union were then parties to a collective bargaining agreement covering the period from September 1, 1992 through August 31, 1995.

On September 9, 1993, Hingson wrote a letter to Roberts, confirming the information discussed in their telephone conversation on September 2nd. Hingson wrote that Roberts had "not consistently demonstrated the qualities and skills expected of a Mukilteo School Bus Driver."

On September 29, 1993, Roberts filed a grievance protesting his "wrongful firing". He alleged that, as a member of the union, he was entitled to the protections of sections 11.1 and 11.2 of the collective bargaining agreement, relating to "justifiable cause" and "notice".

In an October 5, 1993 letter answering the grievance, Deputy Superintendent John W. Keiter took the position that as a substitute employee, Roberts did not have a right to utilize the grievance procedure of the collective bargaining agreement. The employer cited section 1.6 of the agreement, which provided:

> Substitute employees who have worked for the District for thirty (30) days in the current or immediately preceding school year will be paid at step one (Schedule A) for each hour of required work. The above solely states the coverage of this agreement in reference to substitute employees, except that any dispute arising from the application of Schedule A shall be subject to Article XV, the grievance procedure.

Under the employer's interpretation of that language, the sole right available to Roberts under the collective bargaining agreement was to be paid for any hours worked at the rate for step one of the salary schedule, and that was the sole provision of the contract that he could grieve.

On October 22, 1993, Roberts filed a complaint charging unfair labor practices with the Commission,[1] challenging the employer's differentiation between part-time and full-time employees and alleging that the employer had violated the "just cause" provisions of the collective bargaining agreement.

At an unspecified time, Roberts obtained work with Journey Lines, a charter bus company that was performing work for the Mukilteo School District. He also contacted Chinook Charters to find out if that firm was hiring. Roberts filed an amendatory letter with the Commission on October 29, 1993, alleging that the Mukilteo School District had contacted Journey Lines, and told Journey Lines that Roberts could not drive charters involving the Mukilteo School District, because he had a lawsuit pending against the employer. Roberts asserted that the employer was referring to the unfair labor practice complaint he had filed with the Commission. Roberts

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[1] The complaint was docketed by the Commission as Case 10736-U-93-2497.

also alleged that the employer had contacted Chinook Charters, and told them that Roberts would not be allowed to drive a school bus transporting children in the district.

A preliminary ruling was issued by Executive Director Marvin L. Schurke on April 1, 1994. While no cause of action was found on the original allegations, the allegations filed on October 29, 1993 did state a cause of action under RCW 41.56.140(3), for alleged discrimination related to Roberts' filing of the discharge grievance and/or the unfair labor practice complaint.[2] The Executive Director issued a "Preliminary Ruling and Partial Order of Dismissal" on September 30, 1994, to guide further proceedings in that case. Mukilteo School District, Decision 4861 (PECB, 1994). Again, a cause of action was found to exist on the allegation that the employer engaged in discrimination and retaliation against Roberts, by its efforts to "blacklist" him with his current and prospective employers because he had filed a grievance and/or an unfair labor practice complaint.

The employer filed its answer to that complaint on October 11, 1994. While denying any discrimination or retaliation against Roberts for filing a grievance or unfair labor practice complaint, the employer admitted that it had informed certain charter bus operators that it did not want Roberts driving charter runs for the Mukilteo School District. A notice was issued setting a hearing in that matter for December 7, 1994.

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[2] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

On the day of the scheduled hearing, the employer and Roberts reached an agreement resolving that complaint. Their agreement called for issuance of an "Agreed Order to Cease and Desist", which was to be signed by the Examiner and was to read as follows:

> It is hereby ordered that:
> 1. Respondent shall cease and desist from contacting past, present or future employers of complainant; and
> 2. Respondent shall provide copies of this order to John Keiter, Tom Hingson, Dianne Bailey, Journey Lines and Chinook Charter Service.

The Agreed Order was signed by Examiner William A. Lang on February 21, 1995.

The agreement for settlement of the unfair labor practice complaint also called for the issuance of letters by employer officials. Two letters bearing the date of January 17, 1995, were attached to the Order. The first read as follows:

> To Whom It May Concern:
>
> The Mukilteo School District does not now have nor never has had reasons or knowledge to believe that Willard Roberts poses a threat to harm children under his supervision. Tom Hingson apologizes for any contrary or different impression he may have given to charter companies in prior conversations he had with Chinook and Journey Lines. Mr. Roberts' employment with the District involved personality differences between Mr. Roberts and Tom Hingson and between Mr. Roberts and Dianne Bailey.

That letter was signed by Keiter and Hingson. The second letter contained the following information:

> To Whom It May Concern:
>
> Willard Roberts was employed by Mukilteo School District during the 1991-92 and 1992-93 school years as a substitute bus driver. During his work for the District, Mr. Roberts demonstrated reliability in regularly appearing for work as a substitute bus driver, and he demonstrated technical competence as a bus driver.

That letter was signed by Hingson. Roberts' unfair labor practice case was closed on March 21, 1995, by entry of an "Order Closing Case" signed by Examiner Lang. See, Mukilteo School District, Decision 4861-A (PECB, 1995).

The unfair labor practice complaint now before the Examiner was filed by Roberts on February 20, 1996. Roberts alleged that Keiter and Hingson contacted potential employers to dissuade them from hiring him, and that they thereby committed three statutory violations: (1) interference under RCW 41.56.140(1), for breaching the Agreed Order; (2) interference under the same statute, by contacting potential employers and dissuading them from hiring Roberts; and (3) discrimination under RCW 41.56.140(3), by dissuading employers from hiring Roberts because he filed an unfair labor practice complaint with the Commission.

In a letter issued on March 27, 1996, the Executive Director noted that the complaint failed to contain a clear and concise statement of facts, as required by WAC 391-45-050(2), and gave Roberts 14 days to amend the complaint. In an amended complaint filed on April 10, 1996, Roberts alleged that Hingson made a telephone call, during March of 1996, to 3A/EDJ Transit Company, where Roberts had applied for employment. Roberts indicated that Hingson told a 3A/EDJ employee that Roberts was not eligible for rehire by the Mukilteo School District.

On April 23, 1996, the employer filed a motion for a more definite and certain complaint, noting that the amended complaint continued to allege contacts with unspecified potential employers. In a preliminary ruling issued by the Executive Director on May 9, 1996, further proceedings were confined to the one incident alleged to have occurred in March of 1996.

POSITIONS OF THE PARTIES

Roberts claims the Agreed Order prohibits the employer from having any communication with his potential employers, and that a willful and deliberate violation of the Agreed Order should be held to be a statutory interference violation. He rejects the employer's contention that the word "contact" in the Agreed Order refers only to contacts initiated by this employer. Roberts argues that the Agreed Order was drafted by counsel for the employer, and that any ambiguity in the document must be construed against the drafter. Roberts objects to the employer's interpretation of the term "future employers" in the Agreed Order as somehow excluding potential employers of Roberts, contending that would render the term meaningless in the context of the Agreed Order. Roberts contends that Hingson had to know his remark about ineligibility for rehire would influence 3A/EDJ's decision on whether to hire Roberts, that Hingson was aware that Roberts had participated in protected activities by filing his unfair labor practice complaint in 1993, and that Hingson was aware he was not to have any contact with Roberts' future employers. Roberts maintains that the employer's willful and deliberate statutory violations have forced him to pursue this second litigation on the same issues, and that the employer's defenses to this complaint are frivolous, so that he is entitled to an award of reasonable attorney's fees.

The employer contends Roberts failed to carry his burden of proof to show either a violation of the Agreed Order or a violation of the statutory prohibitions against interference and discrimination. It denies that a violation of the Agreed Order is necessarily a statutory violation, and maintains that Roberts must meet the requirements set forth in Commission precedent to establish a violation of RCW 41.56.140(1) or (3). The employer urges that the Agreed Order should be viewed in the context in which it was negotiated, where Hingson was accused of *initiating* contact with other employers. As the telephone conversation at issue in this case was initiated by an employee of the 3A/EDJ firm, the employer maintains that Hingson did not violate the Agreed Order. The employer also claims that 3A/EDJ is not a "future employer" within the meaning of the Agreed Order, as Roberts never actually became an employee of that firm. The employer maintains that Roberts failed to show he was engaged in any union activity, or that there was anti-union animus by the employer. In the employer's view, Hingson merely returned a telephone call, and there was no proof that Hingson did so as a result of any discriminatory intent towards Roberts. The employer urges that Hingson's conduct could not have been reasonably perceived by employees as a threat of reprisal or force, or a promise of benefit, deterring them from the pursuit of lawful union activity.

DISCUSSION

Interpretation of the Agreed Order

The parties resolved Roberts' first unfair labor practice complaint without presenting any documentary evidence or sworn testimony. As the Agreed Order was prepared by the parties before the time of the

scheduled hearing, and without involvement by the Commission, it can only be interpreted at this time through the pleadings that had been filed with the Commission in that case.

The Examiner finds the employer's arguments to be the more persuasive on the "initiate" issue. Roberts' complaint in 1993 focused on telephone calls allegedly made by employer officials to his current and prospective employers. The employer's answer to that complaint admitted that it had informed certain charter bus operators that it did not want Roberts to drive charter runs involving the Mukilteo School District. In one of the letters accompanying the Order, Hingson made reference to prior conversations that he had with Chinook and Journey Lines. Copies of the Order were also provided to these charter companies. From the context of the Agreed Order, it is clear that the conduct complained about by Roberts involved telephone calls initiated by the employer to the charter companies.

The Examiner does not find support for the employer's interpretation of the "future employers" terminology found in the Agreed Order. The employer claims that language did not prohibit Hingson's contact with 3A/EDJ, because Roberts never actually became an employee of that firm. That interpretation of "future employers" would, however, even allow the Mukilteo School District to initiate contact with potential employers to dissuade them from hiring Roberts. Under such a scenario, the employer would never violate the Agreed Order so long as it was successful in its efforts to blacklist Roberts. The employer's contention is without merit. It is clear from its context that the Agreed Order was designed to prevent this employer from contacting employers where Roberts had applied for, or might apply for, a position.

The Disputed Contact

The 3A/EDJ firm is a small company that employs about 20 drivers to provide transportation for special education students of the Seattle School District. Roberts applied for employment with 3A/EDJ on March 5, 1996, by presenting his application to Operations Manager / Driver Trainer Helene McDonald. Roberts' application materials contained several references to his previous employment with the Mukilteo School District, including his training records and a copy of the letter signed by Hingson under the Agreed Order.

McDonald placed a telephone call to the Mukilteo School District on the same day that Roberts filed his application with 3A/EDJ. She talked to a secretary, who informed her that the person she needed to speak with (Hingson) was not available. Several days later, Hingson returned McDonald's call. McDonald testified that their conversation went as follows:

> I said this is Helene. He said I'm returning your call from Mukilteo School District. So I said is there anything that you can tell me about Willard Roberts. He said anything like what. And I said is this person rehireable and he said no. And I hung up the phone. That was it.
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> [Transcript, page 24.]

Hingson's version of his conversation with McDonald was similar:

> As I recall she wanted to confirm that Mr. Roberts had worked at Mukilteo School District as a substitute bus driver and I confirmed that. She asked if he was eligible for rehire and I said he was not.
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> [Transcript, pages 53-54.]

Hingson testified that nothing else was said in his conversation with McDonald.

No Violation of Agreed Order

Roberts has failed to prove that Hingson's telephone conversation with McDonald violated the Agreed Order, as interpreted above. The contact was initiated by McDonald, and Hingson merely returned the telephone call. McDonald asked Hingson two questions about Roberts. When asked an open-ended question, Hingson asked for more specificity. When asked whether Roberts was eligible for rehire, Hingson gave a simple answer to that question and did not volunteer any additional information.

Interference and Discrimination Claims

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, grants public employees the right to organize and designate representatives of their own choosing, in the following manner:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No 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.

[Emphasis by **bold** supplied.]

Enforcement of those rights is through the unfair labor practice provisions of the statute:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) **To discriminate against a public employee who has filed an unfair labor practice charge;**
>
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

The Public Employment Relations Commission has jurisdiction to determine and remedy unfair labor practice claims. RCW 41.56.160.

The Interference Standard -

In City of Seattle, Decision 3066 (PECB, 1988), the following standard was adopted to determine whether an employer's conduct violates RCW 41.56.140(1):

> An interference violation can be found if complainant shows that the employer's conduct could reasonably be perceived by employees as a threat of reprisal or force, or a promise of benefit, deterring them from the pursuit of lawful union activity.

A complainant need not show that the employer intended to interfere with employees' rights. Nor is it necessary to show that the employees concerned were actually interfered with or coerced. See, City of Pasco, Decision 3804-A (PECB, 1992), and Kennewick School District, Decision 5632-A (PECB, 1996). The question before the Examiner in this proceeding is whether Hingson's telephone conversation with McDonald could reasonably be perceived by

employees as a threat of reprisal or force associated with Roberts' exercise of rights under Chapter 41.56 RCW.

The burden of proving an allegation of unlawful interference rests with the complaining party. In this case, the record only shows that Hingson answered two questions that were posed by McDonald:

The first question was whether Roberts had worked as a substitute bus driver for the Mukilteo School District. The answer to this question is public information, available to anyone who makes a similar inquiry.

The second question was whether Roberts was eligible for rehire by the Mukilteo School District. It was phrased in a general fashion by McDonald, and Hingson's simple negative answer did not explain any of the reasons that led to the termination of Roberts' employment. McDonald did not ask any follow-up questions, and Hingson did not volunteer any additional information.

Based on this brief conversation, the Examiner cannot conclude that employees could reasonably perceive this exchange as a threat of reprisal or force associated with union activities. Roberts has failed to establish by a preponderance of the evidence that the district interfered with his exercise of rights protected by Chapter 41.56 RCW.

The Discrimination Standard -

Precedent established by the Commission and by the Supreme Court of the State of Washington require a higher standard of proof to establish a discrimination violation.[3] A discrimination violation occurs when: (1) The employee exercises a right protected by the

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[3] See, Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991), and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), first applied by the Commission in Educational Service District 114, Decision 4361-A (PECB, 1994).

collective bargaining statute, or communicates to the employer an intent to do so; (2) The employee was discriminatorily deprived of some ascertainable right, benefit or status; and (3) The exercise of the legal right was a substantial motivating factor in the discriminatory action. See, also, Seattle School District, Decision 5237-B (EDUC, 1996); Mansfield School District, Decisions 5238-A and 5239-A (EDUC, 1996); and Kennewick School District, supra. In a discrimination case, a complainant has the burden to establish a prima facie case of discrimination, after which the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer action was in retaliation for the employee's exercise of statutory rights, which may be done by: (1) showing the reasons given by the employer were pretextual; or (2) showing that union animus was nevertheless a substantial motivating factor behind the employer's action. Educational Service District 114, supra.

To prevail in this case, Roberts must first show that he exercised rights protected by Chapter 41.56 RCW. Actions and activities undertaken by public employees in furtherance of their rights under Chapter 41.56 RCW are known as protected activities. Examples include the filing and processing of a grievance through a contractual grievance procedure,[4] and filing unfair labor practice charges.[5] In September of 1993, Roberts filed a grievance protesting the termination of his employment by the employer. A month later, he filed an unfair labor practice complaint with the Commission. Roberts has made a sufficient showing that he

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[4] Valley General Hospital, Decision 1195-A (PECB, 1981).

[5] RCW 41.56.140(3).

participated in protected activities during or related to his employment with the Mukilteo School District.

The second requirement for a prima facie case is to show that the employee was deprived of some ascertainable right or benefit. Roberts has proven that 3A/EDJ refused to hire him, but the actions of that private employer are not before the Examiner in this case. Rather, it is Hingson's answers to McDonald's questions which are the focus of this case. Inasmuch as Roberts' previous employment with the Mukilteo School District was a matter of public record, he had no legal right to have that fact concealed by Hingson. Since the settlement reached by the parties in 1994 apparently left him ineligible for rehire by the Mukilteo School District, Roberts had no legal right to expect a different answer by Hingson in response to McDonald's simple and straightforward question.

The third requirement for a prima facie case is to show some casual connection between the exercise of protected rights and the disputed action. Roberts has failed to show any connection whatsoever in this case. There is no evidence that McDonald knew of Roberts' grievance or unfair labor practice complaint. Likewise, there is no evidence that Hingson's negative answer to McDonald's "rehire" question was related in any way to Roberts having filed a grievance or an unfair labor practice complaint.[6]

Roberts failed to establish a prima facie case of discrimination. Under these circumstances, there is no occasion to pursue analysis in this case of the employer's articulated reasons for its actions, or of pretext or motivation considerations.

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[6] If one accepts McDonald's version of her conversation with Hingson, an inference is available that Hingson was, if anything, attempting to minimize his responses to her questions.

FINDINGS OF FACT

1. Mukilteo School District is a public employer within the meaning of RCW 41.56.030(1).

2. Willard L. Roberts was hired by the Mukilteo School District in September, 1991, as a substitute bus driver. Roberts' employment was terminated by the employer on September 2, 1993. Roberts filed a grievance with the employer on September 29, 1993.

3. On October 22, 1993, Roberts filed an unfair labor practice complaint with the Commission. A preliminary ruling found a cause of action to exist under RCW 41.56.140(3), for alleged employer actions to "blacklist" Roberts with his current employer and prospective employers, because he had filed a grievance and/or an unfair labor practice complaint.

4. The employer's answer to the complaint filed in 1993 admitted that its agent had informed certain charter bus operators that the employer did not want Roberts driving charter runs involving the Mukilteo School District.

5. Roberts and the employer resolved the complaint filed in 1993 without a hearing, by signing an "Agreed Order to Cease and Desist", which stated that the employer "shall cease and desist from contacting past, present, or future employers of complainant". That Order was signed by Examiner William A. Lang on February 21, 1995, and that proceeding was closed.

6. On March 5, 1996, Roberts presented an application for employment to Helene McDonald of 3A/EDJ Transit Company, a

company providing transportation services for special education students of the Seattle School District. Roberts' application contained references to his previous employment with the Mukilteo School District.

7. On March 5, 1996, McDonald, who serves as Operations Manager/Driver Trainer for 3A/EDJ, called the Mukilteo School District. Tom Hingson, Supervisor of Transportation, was not available to respond to her call.

8. Several days later, Hingson returned McDonald's call, providing minimal responses to her questions. Two subjects were discussed in their phone conversation. First, Hingson confirmed that Roberts had worked at the Mukilteo School District as a substitute bus driver. Second, McDonald asked if Roberts was eligible for rehire by the district. Hingson said: "No." Nothing else was said in the conversation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Roberts engaged in protected activities under Chapter 41.56 RCW when he filed a grievance with the employer in September 1993, and when he filed an unfair labor practice complaint with the Commission in October 1993.

3. Roberts failed to make a prima facie showing that there was a casual connection between the exercise of his protected rights

and the decision by 3A/EDJ Transit Company not to hire him as a bus driver. Roberts did not sustain his burden of proof showing any violation of RCW 41.56.140(1) or (3) by the employer.

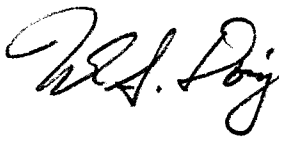
NOW THEREFORE, IT IS

ORDERED

The complaint charging unfair labor practice filed in this matter is hereby dismissed.

ISSUED AT Olympia, Washington, this 11th day of April, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK S. DOWNING, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.