State - Corrections, Decision 10998-A (PSRA, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PHYLLIS CHERRY,	
Complainant,	CASE 22847-U-09-5832
vs.	DECISION 10998-A - PSRA
STATE - CORRECTIONS,	
Respondent.	DECISION OF COMMISSION

Spencer Nathan Thal, General Counsel, Teamsters 117, for the complainant.

Rob McKenna, Attorney General, by *Valerie Petrie*, Senior Assistant Attorney General, for the employer.

On November 10, 2009, Phyllis Cherry (Cherry) filed a complaint alleging that the Washington State Department of Corrections (employer) committed an unfair labor practice by discriminatorily suspending her e-mail account and by issuing a letter of reprimand in violation of Chapter 41.80 RCW for sending two e-mails to employees at the Washington Corrections Center for Women (WCCW). Cherry, a guard at WCCW, is represented by Teamsters 117 and has served as a shop steward.[1]

Cherry's complaint alleged that on August 10, 2009, she sent an e-mail to the employer's custody staff informing them the employer had hired an inmate advocate for victims of staff sexual misconduct. Shortly after she sent this e-mail, Cherry was interviewed by the employer regarding that e-mail. On October 15, 2009, Cherry sent a second e-mail concerning the "If Project," a multimedia project in which offenders talked about making positive life choices. On October 19, 2009, the employer suspended Cherry's e-mail account and also precluded her from

[1] Teamsters 117 is not a party to this proceeding.

accessing the internet and intranet. In December 2009, the employer issued a letter of reprimand to Cherry for sending the two e-mails.

Unfair Labor Practice Manager David I. Gedrose reviewed Cherry's complaint and issued a deficiency notice under WAC 391-45-110 stating it was not possible to conclude that her complaint stated a cause of action that could be redressed by Chapter 41.80 RCW. Cherry was given twenty-one days to file an amended complaint to cure the noted defects. On November 22, 2009, Cherry filed an amended complaint, and a preliminary ruling was issued. Examiner Phillip Huang issued a decision finding the employer committed an unfair labor practice.[2] The employer now appeals.

ISSUE PRESENTED

Did the employer discriminatorily retaliate against Cherry in violation of RCW 41.80.110(1)(d) and (a) by suspending her e-mail account and issuing a letter of reprimand for two e-mails that Cherry sent to bargaining unit employees?

For the reasons set forth below, we reverse the Examiner's decision.[3] Although the employer could not have disciplined Cherry for sending out union related e-mails, substantial evidence does not support the Examiner's finding that Cherry made a prima facie case of discrimination. Neither of the e-mail messages that Cherry was disciplined for contains statements that would afford those messages protection under Chapter 41.80 RCW. The complaint is dismissed.

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2 *State – Corrections*, Decision 10998 (PSRA, 2011). Former Examiner Terry Wilson was originally assigned as the Examiner in this matter and was responsible for conducting the hearing. Wilson resigned his employment with the agency before issuing a decision. Executive Director Cathleen Callahan subsequently assigned Examiner Huang to issue a decision based upon the record developed by Wilson.

3 This Commission reviews conclusions and applications of law, as well as interpretations of statutes, *de novo*. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

DISCUSSION

This case calls for the Commission to answer the question of whether the employer discriminatorily denied Cherry the use of the employer's e-mail and disciplined her in violation of Chapter 41.80 RCW for sending two e-mails through employer owned equipment.[4] The first question that must be answered is whether Cherry had the right to use the employer's e-mail system to send out non-work related e-mails. If that question is answered in the negative, then the case should be dismissed without further analysis. If that question is answered in the positive, then it will be necessary to apply the *Educational Service District 114* test to determine if the employer retaliated against Cherry for exercising protected activity.

Applicable Legal Standard - Use of Employer Provided E-mail Systems

In *Central Washington University*, Decision 10118-A (PSRA, 2010), this Commission held that "Washington's labor laws do not give public employees an independent right to use an employer's equipment or facilities for union business, including for union organizing." The Commission went on to explain that if an employer consistently enforces policies that preclude employees from sending messages to groups of employees that are not related to the employer's mission, then an employee may be disciplined for sending e-mail to groups of employees, even if the subject matter of the e-mail is protected. *De minimis* use of an e-mail system to send individual personal messages does not demonstrate that an employer permits or sanctions the sending of mass solicitations through an e-mail system. *Central Washington University*, Decision 10118-A. An employer who consistently applies published rules prohibiting employees from sending non-work related e-mails through its system will not be found to have committed an unfair labor practice if it disciplines an employee for sending out a non-work related e-mail,

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[4] As such, this case is not about whether Cherry's e-mails were permissible or conformed with the limitations set forth in Article 6.1(c) of the parties' collective bargaining agreement. Allegations that the employer has improperly disciplined an employee for exercising a right guaranteed by the collective bargaining agreement is a matter that is resolved through the grievance procedure and arbitration. *See City of Walla Walla*, Decision 104 (PECB, 1976). Those portions of the underlying decision discussing whether Cherry's e-mails were reasonable under the collective bargaining agreement were outside the scope of analysis needed to decide this matter.

Additionally, this case is not about whether Cherry's e-mails were reasonable under the employer's use policy. This Commission is only empowered to administer this state's collective bargaining laws. Our purview in cases such as this is limited to determining whether the employee engaged in protected activity and whether the employer retaliated against the employee for that activity in violation of the law.

even if that e-mail concerns activity or information that is protected by Chapter 41.80 RCW because no discrimination occurred.

However, an employer may not prohibit union related e-mails or discriminate against employees who send them when it allows other non-work related materials, such as personal items for sale, non-work related services that are being offered or requested, or announcements about outside clubs or events, to be sent through employer-owned e-mail. *See Central Washington University*, Decision 10118-A, *citing King County*, Decision 8630-A (PECB, 2005). An employer who disparately applies its rules to prohibit union related materials while allowing its systems and equipment to be used to distribute other non-work related materials commits an unfair labor practice. *Central Washington University*, Decision 10118-A.[5]

Applying these standards to the case before us, this record supports a finding that even though the employer had policies governing the use of its e-mail system, the employer still allowed non-work related e-mails to be sent through its system. Cherry introduced three different e-mails which demonstrated the types of e-mails that the employer allowed through its system: a July 21, 2009 e-mail advertising a "Back to School Carnival" to support WCCW's school for the children of inmates[6] and a September 28, 2009 e-mail to all staff advertising them of the "1st Annual Gig Harbor Celebration & Blessing of Law Enforcement, Firefighters, EMTs and their Families."[7] The second and third e-mails entered into evidence demonstrate that this employer allowed non-work related e-mails to be distributed on its system.

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[5] We specifically reject the application of *The Guard Publishing Company d/b/a The Register Guard*, 351 NLRB 1110 (2007), as being persuasive precedent for cases decided under Washington's labor laws. Unlike the National Labor Relations Board, this Commission sees no legitimate policy justification for making distinctions between an employer's e-mail system and other forms of employer owned communication methods, such as bulletin boards or telephones. All employer-owned communication devices, whether they are electronic or manual in nature, shall continue to be analyzed under the same use standards. *See Central Washington University*, Decision 10118-A; *see also The Guard Publishing Company d/b/a The Register Guard*, 351 NLRB 1110 (Members Liebman and Walsh, dissenting in part).

[6] Exhibit 21.

[7] Exhibits 23 and 24. Cherry submitted into evidence a third e-mail, Exhibit 20, which was sent on March 2, 2010, and advertised a "Remodeling Expo" for which the employer was offering employees free tickets to attend. Because this e-mail was sent after the filing of Cherry's complaint, it was not timely to the complaint. *See Central Washington University*, Decision 10118-A.

The "1st Annual Gig Harbor Celebration & Blessing of Law Enforcement, Firefighters, EMTs and their Families" e-mail was sent by Sylvia Dewitt, an Emergency Management Specialist at WCCW. This community event was sponsored by private entities and not the employer. It is clear from the subject matter the e-mail did not relate to the employer's operation.

With respect to the "Remodeling Expo" e-mail, this event was a private exposition held at the Tacoma Convention Center where recent trends in remodeling and landscaping were demonstrated. The employer provided free tickets to employees to enter the show. The fact that the employer provided a benefit to the employees (free tickets) did not change the overall character of the e-mail, i.e., the subject matter of the e-mail concerned an event that did not relate to the employer's operation. With respect to the e-mail advertising the "Back to School Carnival," it appears that this event is an employer sponsored event to collect donations of school supplies for the children of offenders housed at WCCW. There is not enough evidence in this record to determine whether the school is an employer run program or if the donations are to help children who attend school outside of the employer's facility.

The fact that Douglas Coyle, the Superintendant for WCCW, approved all three e-mails prior to their being sent does not impact the conclusion in this case. In discrimination cases such as this, the only question is whether the employer has consistently precluded non-work related e-mails from being sent through its system. Once the employer allowed non-work related e-mails to be distributed through its system, whether approved by the Superintendant or not, the employer was then precluded from prohibiting employees from sending union related e-mails.[8]

Having determined that the employer could not lawfully discipline Cherry for the mere act of sending out union related e-mail, we must now determine whether the employer discriminated against Cherry for engaging in protected activity.

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[8] However, an employer does not "open" its communication systems up for non-work uses when the employer conveys use to represented employees through the provisions of a collective bargaining agreement. *See Central Washington University*, Decision 10118-A.

Applicable Legal Standard – Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Personnel System Reform Act of 2002, Chapter 41.80 RCW. *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also Educational Service District 114*, Decision 4361-A (PECB, 1994). The employee maintains the burden of proof in employer discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

In response to an employee's prima facie case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an

inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which according to the common experience gives rise to a reasonable inference of the truth of the fact sought to be proved.

Applicable Legal Standard - Interference

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party or individual. An interference violation exists when employees could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of the disciplined employee. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Application of Standard

In order to determine whether Cherry set forth a prima facie case of discrimination, we must first determine whether she engaged in protected activity. RCW 41.80.050 guarantees employees covered by Chapter 41.80 RCW for the purposes of collective bargaining shall have the right to:

> self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

Thus, the question is whether the complained-of action is the kind of action that is protected by the statute.

Cherry's E-mails

Cherry's complaint does not allege that the employer's sanctions against her were in retaliation for exercising specific protected rights, such as representing or advocating for an employee in her role as a shop steward. Rather, Cherry's complaint only alleges that the employer took retaliatory action against her for sending the two e-mails.

The Examiner's conclusion that Cherry engaged in "a variety of undisputed protected activity" for purposes of supporting a prima facie case of discrimination overstates the evidence as it relates to the complaint.

The August 10, 2009 e-mail concerned the hiring of a new employee at WCCW, and stated:

> For your information:
>
> WCCW will be getting new staff by the name of Jeralita Costa . . . former State Senator to be the inmate advocate for victims of staff sexual misconduct. And of course, look at her salary to be an advocate for inmates.

(ellipsis in original). The e-mail also contained a link to a website that explained Costa's role at WCCW and her annual salary. The October 15, 2009 e-mail concerned the "If Project," and stated:

> Check this out!!! Now tell me why we are being sensitive when they have projects like this going on. Inmates telling their stories as to how they made bad choices and ways to change their lives. Inmates are trying to help others by telling that if they had whatever. . . . things could've been different.
>
> However, we are to be sensitive to their needs . . . with that sensitivity class!!!!!
>
> This was filmed inside WCCW with several of the current inmates . . . even a person sentenced to life!!!!!

(ellipsis in original). The Examiner held that both e-mails constituted protected activity. In reaching these conclusions, the Examiner found that the e-mails related to the employee at WCCW and that employee's salary, mandatory training, and work-related issues. The Examiner also found that Cherry's statements were made in the interest of bargaining unit employees, and

not her individual interest, and therefore implicated bargaining unit employees' rights and interest. To support his analysis, the Examiner cited *Renton Technical College*, Decision 7441-A (CCOL, 2002) and *Clallam County*, Decision 4011 (PECB, 1996) as holding that statements made by employees in response to "resolved" issues and policies that are implemented still fall within scope of protected activity. We disagree with the Examiner's analysis.

The Examiner's reliance upon *Renton Technical College* is misplaced. In *Renton Technical College*, a union and an employee contacted a state legislator to inquire about the use of a particular funding source for employee salaries. When the legislator made inquiries to the college about the possible misuse of the funding source in question, the employee who made the initial inquiry to the legislator came under increased scrutiny from the college. Because the employee's contact with the legislator was made in a manner that was intended to "assist" the union in its negotiations, the employee's communication was protected.

The Examiner's reliance upon *Clallam County* is also misplaced. In *Clallam County*, the facts demonstrated that the employee's comments regarding the employer's workplace being run like a "feudal empire" were in response to a county resolution which the union had publicly opposed. In the union's view, the resolution would "entrench the bureaucracy responsible for problems plaguing the department." The facts also demonstrated that the parties were in a contentious state of negotiations. Because the employee's statement was made in relation to the union's position on the county resolution and the contentious state of negotiations, the statements were made in a context that "assisted" the union.

In the case before us, the evidence and testimony demonstrates that Cherry was simply informing employees of a new hire and the salary of that new hire, and of the "If Program." No evidence exists within this record demonstrating that either of the e-mails related to matters that the union had discussed with the employer or was anticipating discussing. Neither of Cherry's e-mails concern the administration of a provision of the collective bargaining agreement, and no evidence was presented demonstrating that the e-mails were related to negotiations or preparation for negotiations between Teamsters 117 and the employer. Therefore, Cherry failed to prove that either e-mail was protected by the statute.

Furthermore, other evidence demonstrates that the e-mails were not protected activity. When Cherry was first investigated by the employer, the employer asked her several questions about whether she was familiar with the collective bargaining provisions allowing the union to distribute e-mails. Cherry stated that the e-mails were not "union business" and that she "didn't mention the union, nor the Teamsters, nor did I sign [the e-mails] as Shop Steward Phyllis Cherry, it is not union related."[9] Cherry also stated that she thought she was being informative by distributing the information. Exhibit 30; see also Transcript, pg. 41, line 19 through pg. 42, line 23.

The Examiner rejected the employer's argument that these statements demonstrate that the e-mails were not protected activity stating that "an employee's intent is not necessarily relevant" to determining whether activity is protected. *State – Corrections*, Decision 10998, *citing Port of Seattle*, Decision 10097-A (PECB, 2009). The Examiner also found that Cherry's statement was in response to a question about her compliance with the collective bargaining agreement and therefore gave the exhibit little or no weight.

While we agree with the Examiner that an employee's intent is not necessarily determinative of whether a communication is protected, an employee's statement about his or her intent is the type of probative evidence that assists in making such a determination. Examining the context in which the questions were asked and answered, we find Cherry's statements reinforce our conclusion that the e-mails were not protected. Finally, the fact that Superintendant Coyle displayed a certain level of animus towards e-mails that espoused an opinion that differed from management while at the same time allowing other non-work related e-mails does not change the outcome of this case.

Conclusion

Because Cherry's e-mails were not protected activity, Cherry has failed to establish a prima facie case of discrimination. Therefore, it is unnecessary to undertake the rest of the discrimination test and it is also unnecessary to determine if the employer's acts interfered with Cherry's protected rights. An independent interference violation cannot be found under the same set of

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[9] Exhibit 30.

facts that fail to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

NOW, THEREFORE, it is

ORDERED

I. The Findings of Fact, Conclusions of Law, and Order issued by Examiner Phillip Huang are VACATED.

II. The Commission makes the following Findings of Fact:

1. The Washington State Department of Corrections is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Correctional Center for Women (WCCW) is a facility operated by the Washington State Department of Corrections (employer).

3. Phyllis Cherry (Cherry) is a corrections officer at WCCW and is an employee within the meaning of RCW 41.80.005(6).

4. Cherry is represented for purposes of collective bargaining by Teamsters Local 117. Cherry serves as a shop steward for the Teamsters.

5. The collective bargaining agreement between the employer and Teamsters Local 117 permitted shop stewards to communicate with the union and/or management through the employer's e-mail system for purposes of administering the collective bargaining agreement.

6. Cherry regularly communicated with bargaining unit employees using the employer's e-mail system.

7. Prior to August 10, 2009, the employer allowed non-work related e-mails to be sent to all employees through its e-mail system.

8. On August 10, 2009, Cherry sent an e-mail to custody staff informing them that the employer had hired an "inmate advocate for victims of staff sexual assault." Cherry's e-mail directed the recipients of the e-mail to look at the salary of the new staff person. Shortly after Cherry sent this e-mail the employer interviewed her about sending the e-mail.

9. On October 15, 2009, Cherry sent an e-mail to custody staff informing them of the "If Program," which is a multimedia project in which offenders talked about making positive life choices.

10. On October 19, 2009, the employer suspended Cherry's use of her e-mail account and also suspended her use the internet and intranet.

11. In December 2009, the employer issued Cherry a letter of reprimand for sending the two e-mails.

III. The Commission makes the following 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. Cherry's actions described in Findings of Fact 8 and 9 were not actions protected by Chapter 41.80 RCW.

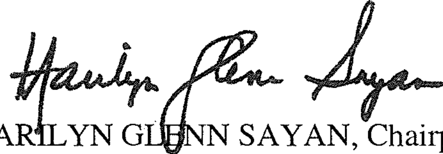
3. By its actions in suspending Cherry's e-mail account and internet and intranet access as described in Findings of Fact 10 and 11, the employer did not discriminate against Cherry or otherwise violate of RCW 41.80.110(1)(a).

IV. The Commission issues the following Order:

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

ISSUED at Olympia, Washington, this 15th day of June, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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