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

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

| PHYLLIS CHERRY, Complainant, | CASE 22847-U-09-5832 |
|---|---|
| vs. | DECISION 10998 - PSRA |
| STATE – CORRECTIONS, Respondent. | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

*Spencer Nathan Thal*, Teamsters Local 117 General Counsel, for the employee.

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

On November 10, 2009, Phyllis Cherry filed an unfair labor practice complaint against the Washington State Department of Corrections (employer). Cherry is a member of a bargaining unit represented by Teamsters Local 117, and alleges that the employer interfered with employee rights in violation of RCW 41.80.110(1)(a) and discriminated against her in violation of RCW 41.80.110(1)(c), by denying her use of the employer's internet/intranet system, in reprisal for union activities protected by Chapter 41.80 RCW.

The Commission appointed Examiner Terry Wilson to hear this case. He conducted a hearing on the matter on April 20, 2010. The Commission subsequently re-assigned the case to Examiner Philip Huang to issue a decision based upon the record, after the previously assigned examiner was no longer available. The parties filed post-hearing briefs to complete the record.

ISSUES PRESENTED

1. Did the employer discriminate against Cherry in violation of protected employee rights when it denied her use of the employer's internet/intranet system?

2. Did the employer interfere with protected employee rights when it denied use of the employer's internet/intranet system to Cherry?

The Examiner finds that, for the reasons set forth below, the employer did discriminate in violation of RCW 41.80.110(1)(c) and interfere with employee rights in violation of RCW 41.80.110(1)(a) when it denied use of the employer's internet/intranet system to Cherry.

ISSUE 1: EMPLOYER DISCRIMINATION

Phyllis Cherry is a Corrections and Custody Officer 2 at the Washington Corrections Center for Women (WCCW), a facility operated by the employer, where she has worked since 2002. She has served as a shop steward for the union since 2007. In this role, she has filed grievances on behalf of herself and other employees, served on a statewide Steward Advisory Council, and participated in the most recent contract negotiations with the employer.

Under the parties' collective bargaining agreement, a shop steward is permitted to use the internet/intranet to communicate with the union and/or management to administer the agreement. Cherry viewed her communication responsibilities broadly. The employer cited in her last performance evaluation that Cherry "keeps staff personnel updated on changes with the Collective Bargaining Agreement and ensures staff is aware of the WCCW and Department of Corrections (DOC) policies and procedures," in accordance with the collective bargaining agreement. In addition to policies, the employer also permitted her to send and forward e-mails regarding other departmental news, which she did on a daily basis. Cherry testified that she sent or forwarded over 200 e-mails each day for these purposes.

In 2007, a class action lawsuit was filed against the employer, alleging sexual assault of female offenders in its custody. To settle the claims, the employer pursued changes to the department, including job assignments, policies, and training. The parties discussed these changes and engaged in negotiations on some of them, notably the implementation of a "bona fide

occupational qualification" to create a number of gender-specific posts within WCCW.[1] In August 2009, the employer was still implementing these changes, including a mandatory gender responsiveness training, and the creation of an inmate advocate position outside the bargaining unit.

On August 10, 2009, Cherry sent an e-mail to all WCCW custody staff, which 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.

This e-mail contained a link to a Tacoma-News Tribune blog, which featured a press release from the employer, brief context for the appointment, and the appointee's salary.

On September 24, 2009, she was interviewed by Captain Michael Mullen about the e-mail, pursuant to a fact-finding investigation. They discussed policies and rules of the workplace, in particular those governing the Internet. She acknowledged she was familiar with the rules, but disagreed she had violated any of them. When Cherry asked Mullen to point out which provision of the rules he believed she violated, Mullen declined, only saying it was unprofessional. At the time, Cherry was not disciplined or counseled for the e-mail.

In October 2009, Cherry learned of the "IF Project" from an inmate she supervised. The IF Project is a multimedia project, with offenders helping to educate the public about making positive life choices. On October 12, she e-mailed the project's director expressing her support for the program, and offering her assistance, saying "we had no clue of such a great project."

On October 15, 2009, she sent this e-mail to all custody staff, providing a link to the project with the following comment:

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[1] Bona fide occupational qualification (BFOQ) is a narrow exception to federal law (Title VII of the Civil Rights Act, 1964), which generally prohibits discrimination based on sex by any employer who employs 15 or more people.

> 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!!!!!

A half hour after sending the e-mail, Cherry was interviewed by the Associate Superintendent. Cherry explained she was comparing the positive message of the program with the "inmates are victims" message she attributed to the gender responsiveness or "sensitivity" training, which employees were taking at the time.[2] By October 19, 2009, her e-mail account had been suspended. Subsequently, Cherry filed a grievance in November. The union and employer agreed to restore the account on December 2, 2009. At the same time, Cole issued a letter of reprimand to Cherry for sending two "unprofessional emails" to custody staff. Her internet/intranet access was not restored until February 2, 2010. Cherry contends that the employer's actions amount to an unfair labor practice.

## DISCRIMINATION – LEGAL STANDARD

Under RCW 41.80.110(1)(c), it is an unfair labor practice for an 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." An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.80 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *State – Transportation*, Decision 8317-B (PSRA, 2005).

The burden of proof rests with the employee in discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

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[2] The superintendent refers to the mandatory class as "gender responsiveness training" and objected to the use of an alternate term. Cherry testified that sergeants at WCCW had called it "gender sensitivity training." I will use the term mandatory training.

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.

*Educational Service District 114*, Decision 4361-A (PECB, 1994); *see Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). An employee may use circumstantial evidence to establish the prima facie case, as parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

In Wilmot, the Washington Supreme Court held that a plaintiff, who was discharged allegedly for claiming workers' compensation benefits, may establish the causal connection by showing "that the worker filed a workers' compensation claim, that the employer had knowledge of the claim, and that the employee was discharged." *Wilmot v. Kaiser Aluminum*, 118 Wn.2d at 69 (1991). The Commission cited this language when it adopted the Wilmot/Allison test. *Educational Service District 114*, Decision 4361-A.

Under the substantial factor test, the employer has the opportunity to articulate legitimate, non-discriminatory reasons for its actions by producing relevant evidence of another motivation. *Educational Service District 114*, Decision 4361-A. 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: 1) the employer's reasons were pretextual, or 2) although some or all of the employer's stated reason may be legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner. *Port of Seattle*, Decision 10097-A (PECB, 2009).

## ANALYSIS

Protected Activity

1. Cherry's union activities generally

Cherry has engaged in a variety of protected union activities, serving as a union steward and contract negotiation team member. She has also filed successful grievances on behalf of herself and her colleagues. She was a steward for her own shift as well as for another shift, leading the union to describe her as a "chief steward." In her role as union steward, she communicated on a daily basis with individual bargaining unit members and the unit as a whole, and e-mail comprised much of that communication. The employer recognized that Cherry was an active and well-known union leader. It granted her general permission to send and forward e-mails to update members about news from the DOC intranet and website, extending her authorized role of providing updates on policies, procedures, and any issues relating to contract administration.

2. Cherry's e-mail communications to bargaining unit members

Protected union activity is not limited to organizing and bargaining. But evidence must include more than a mere allegation of engaging in protected activity, and provide specific instances of that activity. *Dieringer School District*, Decision 8956-A (PECB, 2007). In *Seattle School District*, Decision 5237-B (PECB, 1995), the Commission stated:

> [I]t is recognized that there are many varieties and degrees of protected activity, and that the burden to establish a causal connection increases for activities that are remote from organizing and bargaining. In other words, the evidentiary and proof problems for a union leader and visible organizer are easier than for one who merely claims benefits under an existing contract.

In *Renton Technical College*, Decision 7441-A (CCOL, 2002), the Commission recognized that the scope of protected activity extended to "actions and activities undertaken by academic employees . . . to assist employee organizations," beyond those which directly involve union officials or traditional collective bargaining activities. In that case, even though the employee contacted a legislator about school equity money and was not a union official, his actions were held to be "an effort to 'assist' the union in collective bargaining on a 'wages' issue that was

clearly within the mandatory subjects of collective bargaining." The employer also argued that since the equity money issue had been resolved before its adverse actions occurred, no protection was triggered, but the Commission viewed things differently. It stressed that "hostility against an employee who engages in protected activities (and is perceived as challenging the authority of the employer) does not end just because the particular issue involved is resolved or becomes moot."

In *Clallam County*, Decision 4011 (PECB, 1992), an examiner found the scope of protected activity applied to union member's expressive speech. In that case, two union officers reacted to a personnel move benefitting administrators within the sheriff's department, saying "the department was a feudal empire, and that internal dissent was being suppressed." The examiner found these statements to be protected, because they "were clearly related to the interests of bargaining unit employees, [and] employer officials made public statements relating them to the bargaining impasse which existed at that time." The statements were expressive speech conveying how the employees felt, rather than communications directly about bargaining and organizing. But the employer's knowledge of the statements, as well as the employer's perception of them, establishes the causal connection.

Making statements as an individual bargaining unit member does not remove one from the ambit of protected activity. But not every type of employee commentary on work-related issues is protected. In *Seattle School District*, Decision 9355-C (EDUC, 2010), the employee's individual activity of testifying before the School Board about a principal's absences was not considered protected activity. The Commission held that the testimony was unprotected because it involved subject matter (a principal's extracurricular involvement with the NCAA) not governed by the collective bargaining statute. In other words, the principal's activities at issue did not affect the complainant's employee rights or interests, or that of his fellow bargaining unit employees. No potential bargaining would have been useful, because there was nothing for the employer to do. These particular facts distinguish it from the other decisions.

Together, these cases provide a roadmap for determining whether statements by employees and union agents are protected, even if not made in an "official" capacity or during a bargaining-like

setting. Did the employee make it on behalf of bargaining unit employees' interests, as opposed to their own private interests? Does the statement relate to a current or recent labor issue? Could it lead in the future to potential bargaining or other union activity? How did the employer perceive the statements?

Do Cherry's comments in the two e-mails meet the criteria? First, her comments were clearly made on in the interests of bargaining unit employees, and not in her individual interest. The first e-mail addressed the hiring and salary of an advocate for victims of alleged staff misconduct. The second e-mail addressed the mandatory training. Both the new personnel's role and salary, and the mandatory training are work-related issues. Also, the appointment of a victim's advocate and implementation of mandatory training arguably affect working conditions, such as new rules of employee conduct. Finally, both issues affect the bargaining unit as a whole, not just the petitioner.

While not directly about bargaining, the e-mails also addressed recent labor relations topics. As in *City of Renton* and *Clallam County*, activity is protected even after issues appear "resolved" and policies are being implemented, when hostility to visible union members or their activities may still linger. Here, the employer is still implementing its programmatic responses to the 2007 lawsuit. The changes have met a mixed reception, which has not pleased the employer. The employer admits that the climate around implementing changes has been "very challenging." In testifying that some employees tried to "rename" the gender responsiveness training by using alternate terminology, the employer apparently views slight or non-criticism as a challenge to its authority.

Conversely, union activity may begin with a member's preliminary statements or discussions, as they are essential to the right to organize and bargain collectively. Unlike the subject matter in *Seattle School District*, here the issues do implicate employee rights and interests. Because they may affect working conditions, they offer possibilities for organizing and bargaining. Nothing in the record directly indicates these topics would be at the next bargaining table. Given Cherry's role as an active union steward, though, the employer likely perceived her opinions as potentially

influential on other members. In fact, its testimony confirms that it feared Cherry had stirred feelings among members, causing some to consider refusing to attend mandatory training.

The employer argues that Cherry's statement saying her e-mails were not "union business" shows it was not protected activity. This statement was actually a response to an investigatory interview question about her compliance with the collective bargaining agreement, which disallowed the union steward from using e-mail for conducting "internal union business." The employee's intent is not necessarily relevant. *Port of Seattle*, Decision 10097-A (PECB, 2009). What is relevant is the employer's perception of the remarks. Here, the employer perceived them to be labor-related.

The employer argues that both e-mails fall outside the protection of our statutes. There is sufficient evidence that at least one of the e-mails is protected activity. It is unnecessary to show in a prima facie case that all of the claimed actions are protected, because both the record and employer's statements reveal that Cherry has engaged a variety of undisputed protected activity. *See City of Vancouver*, Decision 10621-A (PECB, 2010); *Dieringer School District*, Decision 8956-A (PECB, 2007).

<u>Deprivation of right, benefit or status</u>

On October 19, 2009, the employer removed Cherry's internet/intranet access at work for a period of three and a half months. She also received a letter of reprimand. Cherry testified that this treatment adversely affected her ability to be an effective employee and effective steward, resulting in harm to her protected employee rights.

<u>Causal connection</u>

There are two lines of causal connection to consider. One stems from Cherry's union steward role generally. The other derives from the contents of her two e-mails specifically.

Regarding her steward role, evidence of known protected activity followed by subsequent harm may be sufficient to make a prima facie case. *See Wilmot v. Kaiser Aluminum*, 118 Wn.2d at 69 (1991); *Northshore Utility District,* Decision 10534 (PECB, 2009)*, aff'd Northshore Utility*

*District,* Decision 10534-A (PECB, 2010). However, such a presumption should not be "mechanical" any time action is taken against a union activist. *Aberdeen School District*, Decision 6434 (PECB, 1998). The steward in *Aberdeen* ceased being a union activist at least six years before the adverse action. Cherry's union steward role is very current.

Here we also consider Cherry's recognized role as a steward in sending informative e-mails. The first e-mail, informing the staff of a new staff member, was similar to the e-mails she had sent in the past, which the employer had permitted, in her role as shop steward. The second e-mail is less similar to the typical updates of departmental news, policies, procedures and contract administration. While the second and more opinionated e-mail seems more attenuated from her steward responsibilities, we need not resolve that issue here. The employer based its actions on both e-mails. We may infer the causal connection.

Regarding the contents of the two e-mails themselves, they are activities more "remote" from organizing and bargaining, and require a greater showing of causal connection. *See Seattle School District*, Decision 5237-B (PECB, 1995). The nexus between the two e-mails and the employer's response is not in dispute. The employer has testified that the e-mails are the direct cause for the denial of internet/intranet access. The employer confronted Cherry regarding the second e-mail, and cut off internet access before her next day at work.

Based on the evidence presented, the Examiner concludes that a causal connection has been established between her protected activities and the employer's denial of internet access and reprimand. The complainant has established a prima facie case for unlawful discrimination.

The Employer's Burden of Production

The burden of production now shifts to the employer to articulate legitimate, non-discriminatory reasons for its actions. The employer argues it had legitimate reasons to deny internet/intranet access to Cherry in response to the two e-mails she sent to all custody staff. The employer states that Cherry violated internal policies governing non-official use of the internet/intranet system. First, the employer argues that she violated the policies against promoting personal political beliefs. Second, it argues that she failed to follow the policy that e-mail communications should

be “brief, infrequent, and non-disruptive.” Third, the employer also alleges that her e-mails threatened the security and integrity of state property. Finally, the employer also states Cherry did not have specific prior approval to send the two e-mails.

The first three reasons are legitimate departmental or state-wide policies, and each policy as articulated by the employer appears to be non-discriminatory. They warrant further analysis under the substantial factor test.

The last reason given fails to meet the “lawful reasons” requirement at all. Requiring an employee to secure a supervisor’s permission before speaking to co-workers about a protected topic, or distributing protected material, constitutes prior restraint and violates employee rights. *See King County*, Decision 7819 (PECB, 2002); *King County*, Decision 8630 (PECB, 2004). Yet the employer claims it required specific supervisory approval before each and every e-mail, rather than merely requiring specific approval of non work-related e-mails. The employer’s vague and overbroad interpretation of this policy is also troubling. Cole testified that the “prior approval” policy is invoked especially with e-mails that “border issues of personal opinion and political beliefs or conjectures.” Furthermore, the employer has not shown that it actually informed Cherry such a requirement existed. It had an opportunity to explain this policy during Cherry’s interview with Captain Mullen. In fact, the employer already granted general permission to Cherry to forward informative, work-related e-mails.

<u>Substantial factor analysis</u>

The “personal political opinions” policy, while legitimate, does not apply to the facts here. The employer argues that Cherry violated the policy in the first e-mail, stressing “Political Buzz” title of the News-Tribune website, and the anonymous comments following the DOC article. That the news site addresses local politics fails to address the material question: whether Cherry’s apparent opinion reaches outside of union-related matters. Comments in that e-mail were not made in her private interest, but on behalf of the collective interest. Construing “personal political opinion” to limit speech made in the interests of fellow bargaining unit members brings the rule into conflict with the purposes of Chapter 41.80 RCW. While anonymous opinions

posted on the website are undoubtedly personal political opinions, those opinions are not Cherry's any more than they belong to the News-Tribune. Finally, the reference to salary was a small part of an e-mail about a protected subject. *See Samsonite Corp.*, 206 NLRB 343 (1973) ("that some of the articles in the newsletter contained gratuitous remarks or 'social comment' matters does not detract from the conclusion" that the activity is protected). The comment in first e-mail was brief and gratuitous, but the second e-mail commentary is decidedly less so. The line between her personal interest and the collective interest is less clear there. But the employer's actions were predicated on the belief that both e-mails were unprotected. It must make some showing of evidence that both violated this policy, and fails to do so.

Does Cherry's alleged failure to meet the "brief, infrequent, and not disruptive" criteria remove her statements from protection? Her e-mails were written eight weeks apart, and neither text is long. The issue of whether they were disruptive remains. The only aspect of the first e-mail at issue is the reference to the victim advocate's salary. Cole asserted during the hearing that with this reference Cherry "had not respected the dignity" of the advocate, but the employer provides no specific examples of disruption. As to the second e-mail, the employer initially believed that Cherry was criticizing aspects of the mandatory training and the IF Project itself. However, the employer investigated Cherry and read her supportive e-mail to IF Project's director. It knew that any criticism was directed solely at the content of the mandatory training. To determine if opinions expressed in either e-mail exceed the bounds of protected activity, we apply the reasonableness test.

Both PERC and the Washington state courts have applied the reasonableness test to govern union activity. *Vancouver School District v. SEIU, Local 92*, 79 Wn. App 905 (1995); *State v. Fox*, 82 Wn.2d 289 (1973) ("a union organizer has a right to go where necessary to meet with workers, as long as his exercise of that right is reasonable"). Employee activity including speech loses its protection when it is "unlawful, violent, in breach of contract, or 'indefensibly' disloyal." Id., citing *Washington Aluminum Co.*, 370 U.S. 9, 17 (1973). Cherry's statement, while impolitic, does not rise to this level of unreasonableness.

The union has argued that both e-mails involved sharing information on workplace issues and were therefore protected activity. The first e-mail informed staff about the hiring of a former state senator in the position of victim advocate when WCCW was facing a severe budget shortfall. The second e-mail informed staff about a little-known program involving offenders taking the message of responsibility for their actions to a wider audience. Cherry sent out this e-mail for informational and security purposes, and to show support for its message of personal responsibility. In it, she also expressed the view that one concept of the gender responsiveness training, casting offenders as victims, was "extremely inconsistent" with the IF Project.

The employer expressed concern at what it called "antagonistic" opinions at the workplace. It points out employee discontent over the mandatory training, and attributes it to Cherry's statement. There are two problems with this perspective. One, many union members were already unhappy with the mandatory training. As union representative Analtha Moroffko testified, "[A]ll the female officers were calling it sensitivity training. And they were all complaining that why did they have to go to the gender sensitivity training when they were females and they already knew how to respond to women." Employee discontent over this issue existed before the October 2009 e-mail, belying the claim that Cherry was "creating animosity."

Two, the material issue is not whether statements are "antagonistic," but whether they are reasonable in the context of labor relations. As Justice Marshall stated in a case involving federal workers who had published a "List of Scabs," a law governing public employees might "regulate the location or form of employee speech to a somewhat greater extent than under the NLRA, we do not perceive any intention to curtail in any way the content of union speech." *Letter Carriers v. Austin*, 418 U.S. 264, 278 (1974).[3] State courts have applied a similar standard. Courts applying the reasonableness test held it did not to protect an internal union discussion where members were alleged to have conspired to harass a fellow officer. *PERC v. City of Vancouver*, 107 Wn. App. 694 (2001). But they have held it was reasonable to allow a

[3] Like 41.80 RCW, the Executive Order governing federal employees in *Letter Carriers* does not grant the Section 7 right of private sector employees, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

union representative and grievant to briefly interview children ages 12 and up unsupervised. *Vancouver School District v. SEIU, Local 92,* 79 Wn. App 905 (1995).

Under these precedents, Cherry's remarks about "sensitivity" training do not appear to cross the line of reasonableness. On the other hand, Superintendent Cole's focus on the e-mail's content and his professed fears of viewpoints "antagonistic" to management policies, suggest the employer's desire to forestall further organizational possibilities around mandatory training and other issues that arose from implementing the employer's settlement of the 2007 lawsuit. The word "disruptive" is viewpoint-neutral, but "antagonistic" indicates the expression of opposition. That opposing viewpoint was a substantial factor in the employer's response. That the employer's actions were highly motivated to settle the lawsuit does not lessen the need to honor rights inherent in the collective bargaining relationship.

Finally, Cherry's e-mails did not threaten the security and integrity of state property. The following exchange between the union's attorney and the superintendent underscores this:

> Q: Do you have any evidence that Officer Cherry in sending out these two e-mails in August or October, somehow compromised the security or integrity of state property, information, or software?
>
> A: It compromised the integrity of information in that it tainted the true representation that the department had regarding the appointment of advocates and the IF Project.

A rule governing the physical security and integrity of state property is not intended to regulate the expression of personal views and opinions. The union also points out that neither e-mail obviously fits the employer's criteria for immediate suspension of internet/intranet access due to such threats.[4] The employer's interpretation seems strained at best.

<u>Disparate treatment</u>

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[4] The employer's main criterion for removing an employee's access to network resources is whether "the suspected abuser poses an immediate threat to the Department." The guidelines list examples such as accessing pornography, offender compromise, contraband data, rogue equipment, backdoor access to a network, and unauthorized access to data. While not limited to those criteria, it is difficult to argue that the opinionated e-mails here belong in this class.

In addition, the union argues Cherry suffered disparate treatment from the employer. Washington's labor laws do not give public employees an independent right to use an employer's equipment or facilities for union activities. *Central Washington University,* Decision 10118-A (PSRA, 2010). However, an employer who allows non-work related materials to be posted, but denies the right to post materials protected under Chapter 41.56 RCW has committed an unfair labor practice. *King County*, Decision 9692 (PECB, 2007).

In *Central Washington University*, a case involving both intranet and e-mail, the Commission elaborated further:

> An employer may adopt a rule that prohibits *all* non-work related materials from being posted on its bulletin board and not be in violation of Chapter 41.80 RCW. However, an employer may not prohibit union related notices or discriminate against employees who post them when it allows 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 posted by employees on employer-owned bulletin boards.

The union argues it is discrimination when the employer does not permit certain communications about employer-related issues from a union steward on the employer's e-mail and intranet, but allows communications about non-employer related topics. The union introduced evidence of four non-work e-mails sent to all custody staff: two donation requests for a back to school carnival, and invitations to a "Remodeling Expo" show in Tacoma and an "appreciation/blessing event" at a Gig Harbor church. While there was testimony that the employer helped run the back to school event, and that it benefitted the children of offenders, neither of the other events were claimed to be WCCW events. There was also general testimony about employees receiving non-work related chain letters through the e-mail system.

The employer has failed to demonstrate that it uniformly applies its policies. The employer's labor relations consultant testified that its appointing authorities frequently suspend the accounts of its employees, noting that 105 staff had their internet/intranet access suspended over the previous year. But the employer provided no information about specific violations of policy that led to those suspensions, and did not explain if access was suspended for sending e-mails as opposed to other violations of Internet use. The record shows only Cherry's e-mail resulted in suspended access, and employee discipline. It also shows that the disciplinary letter referred to

her role as union steward. Without producing some evidence of similar treatment of comparable conduct, the employer cannot rebut the evidence of disparate treatment.

In contrast, the employer in *Central Washington University* showed it made an effort to achieve uniform treatment of union-related and (other) non-work related e-mails. When the union provided examples of outside business postings from the intranet, the employer witness was able to characterize the postings for a bank and a charity as permissible, because the bank was located on campus and had an agreement with the employer, and the charity was affiliated with a student group. That employer also provided examples of postings found to be inappropriate, and were therefore not posted or removed after posting. The record in our case indicates other employees sent occasional mass e-mails through the employer's system that apparently violated e-mail use policies, but it fails to establish other employees were disciplined or were denied access for sending those e-mails.

Finally, negative inferences can be drawn when an employer resorts to an overly severe disciplinary response. *See City of Winlock*, Decision 4784-A (PECB, 1995). The record indicates that Cherry's workplace conduct had not been questioned before this incident, and that she never received any prior discipline. Yet a brief comment on salary triggered the scrutiny of a two-month investigation, indicating employer hostility to an apparent viewpoint on a protected topic. Though no discipline or warning was issued in the two months between the first and second e-mail, the letter of reprimand cited both e-mails as the basis for discipline.

Even if the initial suspension of her internet/intranet access was justified due to the impolitic comments of the second e-mail alone, or even as a preventative measure prior to investigation, there was no legitimate reason for the long delay in restoring access. After the union and employer already agreed to restore Cherry's internet/intranet access, it took an additional two months for Cherry to regain access. The employer failed to explain why it did not take prompt action to restore Cherry's rights. By its choice of punishment and slack pace of resolution, the employer's conduct appears inherently destructive of employee interests. *See City of Omak*, Decision 5579-B (PECB, 1998). The letter of reprimand and delay in restoring the e-mail access

of a union steward lends credence that its asserted justifications are unfounded, pretextual, or that protected activity was a substantial motivating factor in the employer's response.

ISSUE 2: EMPLOYER INTERFERENCE

INTERFERENCE – LEGAL STANDARD

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party or individual. 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). It is not necessary to show that the employee involved was actually coerced by the employer. *See City of Tacoma*, Decision 6793-A (PECB, 2000).

Interference and discrimination claims are separate causes of action with different elements of proof. *Port of Everett*, Decision 10777 (PECB, 2010). Each claim requires proof of an additional fact, or set of facts, which the other does not. An independent interference violation cannot be found on the same set of facts that failed to constitute a discrimination violation. *Northshore Utility District*, Decision 10534-A (PECB, 2010), citing *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). The complainant must show that a typical employee in the same circumstances could reasonably see the employer's actions as discouraging his or her union activities. *City of Pasco*, Decision 4860-A (PECB, 1995) Unlike in a discrimination claim, the complainant is not required to show the employer intended or was motivated to interfere with employees' collective bargaining rights.[5] *City of Tacoma*, Decision 6793-A.

The Commission routinely finds an interference violation whenever a discrimination charge is sustained. *City of Wenatchee*, Decision 6517-A (PECB, 1999). A typical employee could

[5] An independent interference claim does not require a showing that the employer acted in reprisal of protected activity. *See Kennewick School District*, Decision 5632-A ("Such extensive evidence concerning [employee's] union activities would have been unnecessary if the parties were only litigating an interference violation.")

reasonably perceive an employer's discrimination for protected activities as discouraging his or her union activities. *Educational Service District 114*, Decision 4361-A. In this case, employees reasonably perceived that the employer's adverse actions toward Cherry were the result of her union activities as a steward.

There is also independent evidence to support the claim of interference. Two other employees testified that denying their union steward e-mail access also harmed the ability of employees other than Cherry to pursue their collective bargaining rights. The employees testified that their concerns about specific workplace safety and childcare issues were harder to address, because they worked different shifts than their most effective steward, and yet had to seek her out personally to get the answers or advice they needed. The length of time between the initial suspension and restoration of full access was unreasonable and also supports such an inference.

## CONCLUSION

The union established a prima facie case of discrimination, and the employer articulated non-discriminatory reasons for its actions. The union met its burden of proof by showing that the reasons given were unfounded or pretextual, and that Cherry's union activity was a substantial motivating factor for the employer's actions. The employer discriminated against Cherry for exercising her rights under Chapter 41.80 RCW. The employer also interfered with the ability of Cherry and other employees to exercise their collective bargaining rights, by denying e-mail access between union members and their steward.

## FINDINGS OF FACT

1. The State of Washington is a "public employer" within the meaning of RCW 41.80.005(8). The State Department of Corrections is an agency of the State of Washington as defined by RCW 41.80.005(1) and one of its facilities is the Washington Corrections Center for Women (WCCW).

2. Teamsters Local 117 is an "exclusive bargaining representative" within the meaning of RCW 41.80.005(9) and represents non-supervisory employees employed at the WCCW.

3. Phyllis Cherry is a corrections officer at WCCW and a shop steward for Teamsters Local 117.

4. The employer and the union are parties to a collective bargaining agreement, under which a shop steward is permitted to use state equipment, including the internet/intranet, to communicate with union employees and management to administer the agreement. Under this agreement, shop steward Cherry was authorized to send informative e-mails updating employees on policies and procedures to bargaining unit members on a regular basis. Up to October 2009, the employer also permitted shop steward Cherry to send informative e-mails to the bargaining unit regarding other departmental news.

5. In response to a 2007 lawsuit alleging sexual assault, the employer has pursued changes to job assignments, including the creation of female-only posts within Washington Corrections Center for Women, requiring employees to take gender “sensitivity” training, and implementing a new position, inmate advocate, outside of the bargaining unit.

6. On August 10, 2009, Cherry e-mailed custody staff regarding the appointment of a staff inmate advocate, and referenced the appointee’s salary.

7. As a result of the August 10, 2009 e-mail, Cherry was interviewed by the employer on September 24, 2009, but no discipline or counseling resulted at that time.

8. On October 15, 2009, Cherry sent an e-mail to the custody staff regarding a multimedia program featuring inmate participation and inmate testimony on positive life choices. The e-mail also included criticism of the gender “sensitivity” training.

9. The employer suspended Cherry’s internet/intranet access on October 19, 2009, for sending the e-mails mentioned in Findings of Fact 6 and 8 above. After Cherry filed a

grievance, the union and employer agreed to restore her internet/intranet access on December 2, 2009.

10. In December 2009, the employer issued a letter of reprimand, based on both e-mails in Findings of Fact 6 and 8.

11. Between October 2009 and February 2010, employees did not have internet/intranet access to contact their union steward, until Cherry's internet/intranet access was restored on February 2, 2010.

## CONCLUSIONS OF LAW

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

2. The evidence, as described in paragraphs 3 through 11 of the foregoing findings of facts, establishes that union activity was a motivating factor in the removal of internet/intranet access and disciplinary letter of Phyllis Cherry and that the employer committed discrimination in violation of RCW 41.80.110(c).

3. The evidence, as described in paragraph 3 through 11 of the foregoing findings of fact, sufficiently establishes that the employer interfered with employee rights in violation of RCW 41.80.110(1)(a).

## ORDER

*Washington State Department of Corrections*, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Discriminating against or interfering with employee rights by denying internet/intranet access to Phyllis Cherry for her exercise of activities that are protected under Chapter 41.80 RCW.

b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

a. Remove the letter of reprimand dated December 2, 2009, from her personnel file.

b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

d. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 8th day of February, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PHILIP HUANG, 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.

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**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

# NOTICE

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *STATE - CORRECTIONS* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY discriminated against and interfered with employee rights by denying internet/intranet access to Phyllis Cherry for her exercise of activities that are protected under Chapter 41.80 RCW.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL remove the letter of reprimand dated December 2, 2009, from her personnel file.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

## DO NOT POST OR PUBLICLY READ THIS NOTICE.

## AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC’s website, www.perc.wa.gov.