*University of Washington,* Decision 11309 (PSRA, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| WASHINGTON FEDERATION OF STATE EMPLOYEES,<br><br>Complainant,<br><br>vs.<br><br>UNIVERSITY OF WASHINGTON,<br><br>Respondent. | CASE 23900-U-11-6103<br><br>DECISION 11309 - PSRA<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

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Attorney General Robert M. McKenna, by *Mark K. Yamashita,* Assistant Attorney General for the employer.

On March 30, 2011, the Washington Federation of State Employees (union) filed a complaint alleging that the University of Washington (employer) discriminated against Nicole Kennedy in violation of RCW 41.80.110(1)(c), when it disciplined Kennedy in reprisal for union activities protected by Chapter 41.80 RCW. The complaint also alleged that the employer derivatively interfered with employee rights in violation of RCW 41.80.110(1)(a). The complaint was reviewed under WAC 391-45-110 and a preliminary ruling was issued on April 11, 2011, finding a cause of action to exist. On April 13, 2011, the Commission assigned the matter to Examiner Claire Nickleberry who presided over a hearing on July 25, 2011. The parties filed post-hearing briefs for consideration.

## ISSUE

Did the employer discriminate and derivatively interfere with Nicole Kennedy's rights when it disciplined her in reprisal for union activities protected by Chapter 41.80 RCW?

After examining the record as a whole, I find that the employer did discriminate against Kennedy for attending a union-management meeting, when the employer disciplined Kennedy with a Final Counseling Memorandum on October 19, 2010.

## 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 Chapter 41.56 RCW. *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also Educational Service District 114.* Decision 4361-A (PECB). 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 does not need to prove that the employer's sole motivation was based on the employee exercising his/her protected right. Instead, the employee must produce evidence that pursuit of a protected right was a cause of the discrimination action. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991). 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. *State - Corrections*, Decision 10998-A (PSRA, 2011).

An independent interference violation cannot be sustained under the same set of facts that failed to constitute a discrimination violation. *Reardan-Edwall School District,* Decision 6205-A (PECB, 1998).

ANALYSIS

Nicole Kennedy has been employed at the University of Washington Medical Center since May 2007. During the relevant time Kennedy was a Health Assistant with the employer's Patient Transport Unit. Kennedy participated in union activities, including negotiations, before becoming a shop steward in March 2010.

In September 2010, the employer requested to meet with staff from multiple unions who represent employees of the employer. The union in this case, informed the employer that it would not participate in the meeting without having its bargaining unit members present at the meeting. Greg Devereux, Executive Director of the union, had several conversations with the employer to arrange for members to attend the October 1, 2010 meeting. Kennedy and one other member were chosen by the union to attend the meeting and release time was approved by the employer. Kennedy was notified of this approval.

On October 1, 2010, the day of the meeting, Kennedy called into the employer's sick line indicating she would be out for the day due to "flu like symptoms." Kennedy made this call at

6:19 A.M. for her shift that was to begin at 7:00 A.M. Department policy dictates that an employee needs to call out ill at least one hour in advance of their shift and if they fail to do so the entire day will be considered leave without pay. Kennedy then rested, felt better and went to the meeting, which began at 2:00 P.M. After the meeting, the union staff and members met to debrief and then attended a joint social hour.

At 2:03 P.M., Peter Denis, Assistant Vice President of Human Resources, sent an e-mail to Dorthea McMahon, Kennedy's manager, with a subject line stating "She's here!!!" and no other text. At 3:15 P.M., McMahon forwarded this email to Kyle Rodrick, Kennedy's direct supervisor who reports to McMahon, and Becky Hammontree, Human Resource Consultant, and stated:

> Nicole called out sick for her 7:00 AM shift at 6:19 AM today claiming flu symptoms and went to the labor meeting this afternoon. Kyle had confirmed with her that release time today would not be an issue, so that excuse, while not even valid, wouldn't be relevant anyway. What are our next steps? This is not acceptable behavior from a steward and I would like to invoke the maximum allowed corrective action.

On October 4, 2010, Kennedy's next work day, Rodrick attempted to contact Kennedy at the end of her shift to inform her of an investigation meeting scheduled for the next day, but he was unable to locate her. On October 5th, Rodrick, Kennedy, Hammontree, and a union representative met for an investigatory interview concerning the incidents on October 1st and 4th. Subsequently, Rodrick issued Kennedy a final counseling memorandum on October 19, 2010. The employer supported this level of discipline based on previous disciplinary actions.

It is clear that Kennedy participated in protected activity when she attended the union-management meeting and that she received a final counseling memo based in part on her attendance of this meeting. The employer offered that three separate instances of misconduct: calling in late, abuse of sick leave, and shift abandonment, in conjunction with Kennedy's previous discipline was the reason for the imposition of Kennedy's final counseling memorandum. Despite the Employer's proffered reasons, I find that substantial union animus was a factor in the decision to impose discipline on Kennedy.

McMahon's Use of "Shop Steward"

In McMahon's e-mail on October 1, 2010, McMahon stated that Kennedy's actions were "not acceptable behavior from a steward." At the hearing McMahon was asked to explain her choice of language:

> Ms. McMahon: ... I think that the relevance of the steward comment was really around the fact that was what she was attending a meeting on behalf of in her role as a steward.

Kennedy's role as a steward, rather than as an employee, has no place in the determination of appropriate discipline. McMahon's reference to this title in her comment is highly suggestive that Kennedy's role as a union steward factored into her decision to seek discipline. Additionally, McMahon's comment would not make sense if she used the word "employee" instead. It would not be improper for an employee to call in sick for the day, feel better by the afternoon, and therefore attend an important work meeting. Kennedy's attendance at this work related meeting was important to the employer and sanctioned by the employer, through its grant of release time. Deveraux had informed the employer that the union would not participate in the meeting without members in attendance. Kennedy was well aware of the importance of her attendance.

Alleged Abuse of Sick Leave

At the time of McMahon's October 1, 2010 e-mail quoted above, McMahon was only aware that Kennedy had called in sick late, for which the normal discipline is a day of leave without pay, and that she had attended the union-management meeting. The employer concluded that Kennedy was not sick when she called in and thus misused sick leave. The employer failed to prove this for two reasons.

First, Kennedy stated that she felt ill in the morning with flu like symptoms, rested, and then felt better. Deveraux testified that Kennedy had informed him at the meeting that she had felt ill earlier in the day. The employer offered no evidence to show that Kennedy had not felt ill earlier and I have no reason to doubt her testimony.

Second, at the time of the meeting Kennedy was not using sick leave. When an employee calls in late when sick, the shift is unpaid, a policy Kennedy was aware of. Therefore, at the time of

the meeting Kennedy was on unpaid time. Alternatively, Kennedy was granted release time for the meeting and thus was on leave for release time during the meeting rather than sick leave. In both scenarios Kennedy was not at the meeting while being compensated for sick leave and thus she could not have been misusing sick leave.

McMahon's Decision to Issue Corrective Action

At the hearing McMahon testified that Rodrick, in consultation with Human Resources, was solely responsible for determining the extent of discipline imposed. Thus the employer suggests that any union animus held by McMahon did not impact the decision to issue Kennedy a final counseling memorandum because Rodrick had the decision making authority. However McMahon stated in the e-mail above that she "would like to *invoke* the maximum allowed corrective action" (emphasis added). This language is instructive rather than suggestive. Also, in Rodrick's Formal Counseling Memo to Kennedy on September 21, 2010, he wrote that if the areas of concern arose again he "may *recommend* further correction action" (emphasis added) rather than a declaration that he would impose further corrective action. Based on these statements, I find that Rodrick did not have the sole authority to issue discipline and McMahon influenced the decision to discipline Kennedy.

In summary, when an employee engages in statutorily protected activity, the employer is not prevented from taking actions that the employer finds necessary to its operations as long as those actions are not pretextual or substantially motivated by union animus. To be substantial does not mean that union animus must be the primary or majority reason for the action taken by the employer. While there may have been legitimate reasons for the employer to issue Kennedy a final counseling memorandum, the decision to discipline Kennedy was made prior to any investigation or knowledge of subsequent incidents based on her involvement in union activity.

## FINDINGS OF FACT

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

2. The Washington Federation of State Employees (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. Nicole Kennedy has been employed by the employer since 2007 and has participated as a shop steward since March 2010.

4. On October 1, 2010, Kennedy called in sick after the required call-in time; therefore Kennedy was not in pay status for the day.

5. On October 1, 2010, Kennedy attended a union-management meeting in the afternoon.

6. At the start of the meeting, the Assistant Vice President of Human Resources, e-mailed his Administrative Assistant, and Kennedy's manager, Dorthea McMahon, with a subject line stating "She's here!!!" and no other text in the e-mail.

7. An hour later, McMahon forwarded the e-mail to her subordinate and Kennedy's supervisor, Kyle Rodrick, as well as to the Human Resource Consultant adding:

> Nicole called out sick for her 7:00 AM shift at 6:19 AM today claiming flu symptoms and went to the labor meeting this afternoon. Kyle had confirmed with her that release time today would not be an issue, so that excuse, while not even valid, wouldn't be relevant anyway. What are our next steps? This is not acceptable behavior from a steward and I would like to invoke the maximum allowed corrective action.

8. On October 4, 2010, Rodrick attempted to contact Kennedy while she was on duty to inform her of a disciplinary interview scheduled for the next day but was unable to find her.

9. On October 5, 2010, Rodrick conducted an investigatory interview concerning the incidents on October 1 and 4, 2010.

10. On October 19, 2010, Rodrick issued Kennedy a final counseling memorandum and a final action plan based on McMahon's October 1, 2010 e-mail.

## CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.

2. The employer's actions, as described in Findings of Fact 10, violated RCW 41.80.110(1)(d).

## ORDER

The University of Washington, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating against Nicole Kennedy for participation in protected activity or in any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under 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. Rescind the Final Counseling Memorandum, Final Counseling Scheduling Memorandum, Final Action Plan, and any other related documents issued to Nicole Kennedy and remove any record of these documents from Kennedy's 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 2nd day of March, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Claire Nickleberry

CLAIRE NICKLEBERRY, 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.

CASE 23900-U-11-6103
DECISION 11309 - PSRA


**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

# NOTICE

**STATE LAW GIVES YOU THE RIGHT TO:**

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

**THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT *UNIVERSITY OF WASHINGTON* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:**

WE UNLAWFULLY discriminated against Nicole Kennedy for participating in protected activities.

**TO REMEDY OUR UNFAIR LABOR PRACTICES:**

WE WILL rescind the Final Counseling Memorandum, Final Counseling Scheduling Memorandum, Final Action Plan, and any other related documents issued to Nicole Kennedy and remove any record of these documents from Kennedy's 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.

# PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

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| CASE NUMBER: | 23900-U-11-06103 | FILED: | 03/30/2011 | FILED BY: | PARTY 2 |
| DISPUTE: | ER DISCRIMINATE | | | | |
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