State - Corrections, Decision 11747 (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117, Complainant, vs. STATE - CORRECTIONS, Respondent.	CASE 24918-U-12-6373 DECISION 11747 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Spencer Nathan Thal, General Counsel for the union.

Attorney General Robert W. Ferguson, by *Susan Danpullo,* Assistant Attorney General, for the employer.

On June 22, 2012, Teamsters Local 117 (union) filed a complaint alleging the Washington State Department of Corrections (employer) discriminated against the union and interfered with employee rights in violation of RCW 41.80.110(a) and (c). On July 2, 2012, a notice of partial deficiency was issued. On July 10, 2012, the union filed an amended complaint. On July 11, 2012, a preliminary ruling issued stating a cause of action. On August 2, 2012, the employer filed its answer. On November 9, 2012, the employer filed an amended answer changing the name "Brian Kelly" to "Darren Kelly.". Examiner Casey King held a hearing on December 6, 2012. Both parties submitted post-hearing briefs.

ISSUES

1. Did the employer discriminate against Darren Kelly by reassigning him out of his bid position in reprisal for union activities?

2. Did the employer interfere with employee rights by reassigning Darren Kelly out of his bid position?

The Examiner rules that Darren Kelly was not engaged in protected activities. Therefore, the employer is not found to have discriminated against or interfered with Kelly's rights for activities protected by Chapter 41.80 RCW.

BACKGROUND

Brian Kelly (Brian) is a former Corrections Officer at the Washington State Department of Corrections. He worked for the Department of Corrections between 1996 and 2012, and was a member of the bargaining unit during this time. On March 11, 2012, a co-worker suspected Brian was intoxicated while at work. After twice registering above a .08 on the breathalyzer, Brian was sent home for the remainder of his scheduled work shift at the Airway Heights Correctional Center. Once home, Brian called his shop steward, and brother, Darren Kelly (Kelly) to discuss the reason he was sent home. After hearing what Brian had to say, Kelly told Brian that he would "make some calls and I'll find out what's going on."

While investigating the incident, Kelly called the Shift Lieutenants office at Airway Heights Correctional Center and talked to Lieutenant Frank Rivera about Brian's dismissal from work. Rivera, believing that it would be inappropriate to discuss an ongoing investigation without proper authorization, informed Kelly that he would not discuss the incident at that time. Once Rivera refused to discuss the situation with Kelly, Kelly became increasingly hostile and abusive while speaking with Rivera. In a single conversation, Kelly used multiple variations of the word "fuck" and described the co-worker who reported Brian Kelly intoxicated as "a fucking bitch" that was out to get Darren Kelly. Kelly continued his verbal ranting to Rivera saying that although Rivera "ain't shit," he is indeed "full of shit" and let Rivera know that in Kelly's estimation, Rivera had "fucked up" on graveyard and third shift. Rivera made several attempts to respectfully end the telephone conversation with Kelly by telling Kelly he was ending the conversation. Kelly ignored Rivera's numerous attempts to end the conversation and continued to use unreasonable language with Rivera. Near the end of the telephone conversation, Kelly commented "you wanna play, lets play." Rivera was concerned that the comment was an attempt to be threatening and asked Kelly if Kelly was threatening him. Kelly denied that he was threatening Rivera. After several more incidents of profane language, the conversation ended with Rivera saying goodbye and hanging up.

Immediately after the conversation, Rivera contacted Superintendent Miller-Stout and informed her of Kelly's elevated emotional state, his excessive use of profanity and personal attacks as well as his threatening "lets play" comment. Miller-Stout determined that Kelly's angry, vulgar, and challenging behavior during his phone call with Rivera raised a concern about his mental state to come to work. Kelly was scheduled to start a shift in less than 12 hours. Because Kelly's conduct concerned Miller-Stout, she directed Rivera to place Kelly on home assignment pending an investigation, as outlined in the current collective bargaining agreement.

The next morning, March 12, 2012, Kelly arrived for work at 5:30 A.M. When he arrived, Kelly was verbally informed that he was being placed on home assignment. Miller-Stout directed Captain Haynes to conduct an investigation and obtain a written statement from Kelly regarding the incident with Rivera. Miller-Stout expected Haynes to evaluate Kelly and determine if Kelly was in the proper frame of mind and could demonstrate the proper amount of self-control necessary to return to his bid position and perform his job safely. Kelly was scheduled to meet with Haynes on March 12 but Kelly rescheduled the meeting to March 13, 2012, due to a medical appointment.

The following day, March 13, 2012, Kelly met with Captain Haynes to give his written statement about his telephone conversation with Rivera. Present during the meeting was the union's Business Representative, Joseph Kuhn and Lieutenant Mayfield. Haynes had Mayfield attend the meeting to be a witness to Kelly's conduct during the meeting. During the meeting, Kelly asked Haynes if he could prepare his statement at home and have Kuhn review it before giving it to Haynes. Haynes agreed to Kelly preparing his statement and having it reviewed by Kuhn at a later time. Instead of ending the meeting at this point, Kelly then provoked Haynes and asked him when he was going to stop protecting Lieutenant Rivera. Although framed as a question, Kelly began another tirade of profane language and personal attacks. Expanding on the colorful vocabulary used with Rivera, Kelly used words like "douchebag," "fuck-stick," and "cock sucker" to describe his co-workers. Haynes asked Kelly if he was sure he wanted to continue speaking in such a manner. Kelly continued to use profane language until Haynes told Kelly he was done listening to him. As Kelly and Kuhn were leaving the meeting, Haynes asked Kelly to return his ID and badge, pending the conclusion of the investigation into Kelly's conduct. Kelly responded to the Captain's request with "come to my house and get it." Haynes then directed

Kelly to give his ID to Kuhn so that Kuhn could return the ID and badge for Kelly. Kelly responded to the request by once again challenging Captain Haynes to "come and get it." Kelly and Kuhn left the meeting and Kelly returned his ID and badge the following day.

After the meeting, Haynes met with Miller-Stout to discuss how to handle the current situation with Kelly. Kelly's conduct during his meeting with Haynes only increased Miller-Stout's concerns about Kelly's mental state. Miller-Stout determined that Kelly would be taken off home assignment but he would not be placed back into his bid position until the concerns about his mental state and lack of self-control could be abated. On March 14, 2012, Miller-Stout gave Kelly notice that he would be removed from home assignment but before Kelly could return to work, he would need to provide a medical release defining any restriction he might have in his ability to return to his work. The letter also informed Kelly that upon his return to work, he would be on a temporary assignment until the completion of the current investigation. Kelly was returned to his bid position in September or October 2012.

Issue 1: Did the employer discriminate against Darren Kelly by reassigning him out of his bid position in reprisal for union activities?

APPLICABLE LEGAL STANDARD

Discrimination

Under RCW 41.80.110(1)(a) it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter." Unlawful discrimination occurs when an employer takes action in reprisal for an employee's exercise of rights protected by Chapter 41.80 RCW. *University of Washington,* Decision 11091-A (PSRA, 2012), *Educational Service District 114*, Decision 4361-A (PECB, 1994).

In discrimination cases, the complainant maintains the burden of proof. To prove discrimination, the complainant 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 a prima facie case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). While the complainant carries the burden of proof, there is a shifting of the burden of production. Once the complainant establishes a prima facie case, the employer need only articulate legitimate, non-retaliatory reasons for its actions. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The complainant may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or

2. By showing that, although some or all of the employer's stated reason is 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).

Protected Activity

RCW 41.80.050 protects employee rights as follows:

> Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organization, 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.

These rights are not absolute and an employee is not immune from disciplinary actions just because he or she has engaged in union activity. *University of Washington*, Decision 11199-A (PSRA, 2013). When determining whether an activity is protected, the Commission will first look at whether the activity was taken on behalf of the union. *See* RCW 41.80.050; *City of*

Seattle, Decision 10803-B (PECB, 2012) (a letter written by the union president to the employer was protected because the union was working on behalf of one of its members); *Renton Technical College*, Decision 7441-A (CCOL, 2002) (contacting a state legislator to inquire about use of particular funding for employee salaries was protected activity); *Atlantic Steel Co.*, 245 NLRB 814 (1979) (complaint made on plant floor, rather than in company office or across table at formally convened and structured grievance meeting was protected activity). Should it be determined that the activity was taken on behalf of the union, the next step is to evaluate the reasonableness of that activity.

Protected activity will lose its protection when the activity becomes unreasonable. "[R]reasonableness is gauged by what a reasonable person would do in the midst of industrial strife, and not by what a reasonable person would do in the more ordinary affairs of life." *Vancouver School District v. PERC,* 79 Wn. App. at 922; *see also Vancouver School District,* Decision 3779 (PECB, 1991), *rev'd, Vancouver School District,* PECB 3779-A (PECB, 1992). Even in the midst of industrial strife, "Conduct may fall outside of the protections of labor statutes if the conduct is irresponsible and abusive." *City of Vancouver*, 107 Wn. App. at 711.

In order to determine whether a particular activity warrants protection, the activity must be analyzed within the proper context. Depending on the context and delivery, confrontational statements may or may not be protected activity. Telling a supervisor that "this could be settled out in back of the warehouse" was unreasonable and unprotected. C*ity of Pasco*, Decision 3804 (PECB, 1991), *aff'd*, Decision 3804-A (PECB, 1992). On the other hand, the use of defiant language in a written letter is inherently less confrontational than in face-to-face interactions and is not necessarily unreasonable. *Lewis County*, Decision 4691-A (PECB, 1994). It is not strictly unreasonable to question a supervisor's veracity or even make unsubstantiated allegations, as long as these are relevant to union activity. *Atlantic Steel Co.*, 245 NLRB 814 (holding that union activity is unprotected when statements are so opprobrious as to make an employee unfit for further service).

The culture of the work environment is also relevant. For example, the use of profanity may be unreasonable if it is not normally acceptable in the work place and if it is used confrontationally. *Pierce County Fire District No. 9*, Decision 3334 (PECB, 1989). If profanity and disrespectful

language are regularly used at the work place, then such language does not become unreasonable when used during union activities. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Crown Central Petroleum Co. v. NLRB*, 430 F.2d 724 (1970).

These cases do not cover the full spectrum of what is reasonable and unreasonable, they are instructive. First, motive matters. If activity appears, on its face, to be union activity, then it is likely protected. If it is proven that there was an improper intent to harass or intimidate, then the activity is likely unprotected. Second, while it can be expected that some actions will be confrontational, activity that is so confrontational that it could reasonably be expected to lead to a physical altercation is likely unprotected. In this regard, it could be argued that confrontational language in a written communication may be reasonable when those same words said in person would be unreasonable. Finally, the particular dispute matters. The same type of activity may be unprotected when it is not related to union issues.

Ultimately, what conduct qualifies as unreasonable will differ in every case. If the complaint fails to establish that the conduct is protected union activity, a finding of discrimination cannot be awarded and continued analysis becomes unnecessary. *Dieringer School District*, Decision 8956-A (PECB, 2007).

ANALYSIS

The first step in the discrimination analysis is to determine whether the union established its prima facie case. To establish a prima facia case,the union must first prove that Kelly's conduct during the March 11, 2012 telephone conversation and/or the March 13, 2012 meeting was protected activity.

On March 11, 2012, Kelly engaged in his union duties as a shop steward and contacted Rivera on behalf of a bargaining unit member. Under most circumstances, a shop steward contacting an employer to inquire about an ongoing employee investigation would be considered protected union activity. However, Kelly's conduct during his phone conversation with Rivera became too abusive and unreasonable to retain protection under Chapter 41.80 RCW. I credit the employer's testimony that Kelly became increasingly hostile as the conversation progressed. I find Rivera's incident report to be the most credible evidence of what was said during Kelly's phone

conversation given that Rivera's report was completed moments after his conversation with Kelly.

While acting on behalf of a bargaining unit member, Kelly was not required to be subordinate or a passive observer but he also was not entitled to dismiss all standards of professionalism and become abusive as he clearly did here. In a correctional facility, the use of profanity may not be uncommon or unreasonable but Kelly's excessive use of profanity was clearly both. Kelly's "let's play" comment, although not seriously taken as a physical threat is seen as an intent to intimidate the employer. Union activity is given protection in order to provide employees a shield while defending union rights, not to give them a sword in their confrontations with management. Independent of each other, the excessive use of profanity, the personal attacks, the ignored request to end the conversation, and the threatening "lets play" comment may not be considered unreasonable. Nevertheless, here it was the combined effect of all these actions within a single conversation that clearly places Kelly's conduct over the line of reasonableness. Therefore, I find that Kelly's actions on March 11, 2012 were not protected activity.

On March 13, 2012, Kelly's conduct also became unreasonable and was not protected activity. Kelly's use of profanity and personal attacks during the in-person meeting was as prevalent and emotional as it had been during the telephone conversation. I again credit the employer's testimony because both Haynes and Mayfield's testimony were consistent and expressed the same unreasonable nature of Kelly's conduct.

Kelly's tirade of unreasonable conduct during his meeting with Haynes was unwarranted and unprovoked. Kelly's conduct was so outlandish that it compelled Haynes to advise Kelly to reconsider his behavior. The fact that Kelly's confrontational comments to Haynes were also said in a face-to-face meeting is significant. Side by side, Kelly's conduct on the telephone and in the meeting is relatively similar in terms of vulgarity and duration, but as expressed by the Commission in *Lewis County*, Decision 4691-A threats and defiant language become more confrontational when said in person versus in writing. Since Kelly's conduct during the phone conversation was found to be unreasonable, clearly similar conduct during a meeting with Haynes, given the confrontational amplifying effect of face-to-face communications, is even more unreasonable.

Kelly's conduct was far more confrontational than the employee written letter in *Lewis County*, and is more closely comparable to the employee from *City of Pasco*, Decision 3804-A telling his supervisor that their disagreement could be settled out behind the warehouse. An important distinction to *City of Pasco* is that Kelly's "come and get it" statements were never seriously considered as an actual incitement to a physical altercation. Had there been any testimony on the record that suggested Kelly's comments were reasonably interpreted as a threat of violence, that action alone would likely be enough to destroy any claim of protected activity.

Kelly's "come and get it" comments may have not been enough to destroy the possibility of protected activity independently but the comments do weigh heavily in favor for the employer. Again, as with Kelly's conduct during his telephone conversation with Rivera, it is the culminating effect of Kelly's unreasonable and abusive conduct in his face-to-face meeting with Haynes that caused Kelly's activity to lose its protection.

The union has failed to meet the first step in establishing a prima facie case of discrimination. Kelly's conduct during his telephone conversation with Rivera on March 11, 2012, and meeting with Haynes on March 13, 2012, was not protected activity. The culminating effect of excessive profanity, personal attacks, ignored requests to stop, and multiple confrontational statements destroys any attempt to consider Kelly's conduct reasonable. Because the Examiner finds Kelly's activity was not protected, the claim of discrimination must be dismissed.

Issue 2: Did the employer interfere with employee rights by discrediting and undermining the union through its actions regarding Darren Kelly?

APPLICABLE LEGAL STANDARD

Interference

Under RCW 41.80.110(1)(a) it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter." An employer commits an interference violation if its actions or the statements of its officials are reasonably perceived by employees as a threat of reprisal or force, or promise of benefit,

associated with the exercise of rights protected by Chapter 41.80 RCW. *Skagit County*, Decision 6348 (PECB, 1998), *aff'd*, Decision 6348-A (PECB, 1998); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd,* 98 Wn. App. 809 (2000); *King County*, Decision 4893-A (PECB, 1995). The burden of proving unlawful interference rests with the complaining party or individual. *Grays Harbor College*, Decision 9946-A (PSRA, 2009).

Discrimination and interference claims are interrelated in that both require evidence of protected activities. If a discrimination claim and an interference claim are based on the same set of facts, and a discrimination claim is dismissed for failing to meet the test of protected activity, an independent interference claim will not be found. *Seattle School District*, Decision 5237-B (EDUC, 1996); *Brinnon School District*, Decision 7210-A (PECB, 2001).

ANALYSIS

The exercise of a protected activity is a required element for a finding of interference under RCW 41.80.110(1)(a). For reasons explained in the discrimination allegation analysis, the Examiner finds that Kelly was not involved in protected union activity. Because Kelly was not involved in protected union activity, the claim of interference must be dismissed.

FINDINGS OF FACT

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

2. Teamsters Local 117 (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9)

3. On March 11, 2012 Darren Kelly (Kelly) contacted Lieutenant Frank Rivera via telephone to discuss bargaining unit member, Brian Kelly, being sent home during his scheduled work shift.

4. During the telephone conversation discussed in Finding of Fact 3 above, Kelly used excessive profanity. Kelly used multiple variations of the word "fuck" several times,

described a fellow co-worker as "a fucking bitch," and told Lieutenant Rivera that he "ain't shit," that he is "full of shit" and that he had "fucked up" several times.

5. Rivera made several attempts to respectfully end his March 11, 2012 telephone conversation with Kelly. Kelly ignored Rivera's numerous attempts to end the conversation and continued to use unreasonable language with Rivera.

6. Near the end of the March 11, 2012 telephone conversation discussed in Finding of Fact 3, Kelly commented "you wanna play, lets play." Rivera asked Kelly if his comment was a threat. Kelly denied it was a threat.

7. On March 12, 2013, Darren Kelly was placed on temporary home assignment while the employer investigated Kelly's conduct described in Finding of Fact 4 through 6 above.

8. On March 13, 2013, Darren Kelly met with Captain Ronald Haynes to provide his statement about the telephone conversation with Rivera on March 11, 2012. Also present during that meeting was Business Representative Joseph Kuhn and Lieutenant Leonard Mayfield.

9. During Darren Kelly's meeting on March 13, 2012, Kelly used excessive profanity. Kelly used the terms "douchebag", "fuck-stick", and "cock sucker" to describe co-workers. He also made similar personal and disparaging remarks about Rivera as described in Findings of Fact 4. Haynes provided Kelly an opportunity to end his ranting and end the conversation, but Kelly continued his aggressive demeanor and use of inappropriate language.

10. During the March 13, 2012 meeting, Kelly responded to Captain Haynes's request to turn in his ID and badge by stating "you want my ID, come to my house and get it" and when asked again for his ID and badge, Kelly responded a second time with "if you want it, come and get it."

11. On March 14, 2012, Darren Kelly was reassigned from his original bid assignment due to his conduct during his March 11, 2012 phone conversation with Rivera described in Findings of Fact 4through 6 and his March 13, 2012 meeting with Haynes as described in Findings of Fact 8 through 10 above.

12. Darren Kelly was returned to his bid position in September or October of 2012.

CONCLUSION 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. By its actions in Findings of Fact 7 and 11 above, the employer did not discriminate against Darren Kelly in violation of RCW 41.80.110(1)(c) and (a).

3. By its actions in Findings of Fact 7 and 11 above, the employer did not interfere with employee rights in violation of RCW 41.80.110(1)(a).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are now dismissed.

ISSUED at Olympia, Washington, this 7th day of May, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Casey King

CASEY KING, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

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