State - Revenue, Decision 10415-A (PSRA, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

FAIR WASHINGTON LABOR ASSOCIATION, Complainant, vs. STATE - REVENUE, Respondent.	CASE 22364-U-09-5705 DECISION 10415-A - PSRA CASE 22367-U-09-5706 DECISION 10416-A - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Dennis Redmon, President, for the union.

Attorney General Robert M. McKenna, by *Kari Hanson*, Assistant Attorney General, and *Andrew F. Scott*, Assistant Attorney General, for the employer.

On March 31, 2009, the Fair Washington Labor Association (FWLA) filed two unfair labor practice complaints against the Washington State Department of Revenue (employer). The Commission consolidated the complaints and issued a deficiency notice. On May 7, 2009, the FWLA filed an amended complaint and the Commission, after reviewing the amended complaint, issued a preliminary ruling and order of partial dismissal.[1] The preliminary ruling found a cause of action for: (1) employer discrimination regarding the FWLA's dissemination of decertification information and holding an employee rally, and (2) domination or assistance of a union by showing a preference between unions with respect to the FWLA-sponsored employee rally. The preliminary ruling found no cause of action for the allegations involving employer health insurance proposals or the allegation that the employer refused to release employee names and addresses to the FWLA.[2]

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1 *State – Revenue*, Decision 10415 (PSRA, 2009).

2 Preliminary rulings frame the issues for hearing. *King County*, Decision 9075-A (PECB, 2007). The preliminary ruling in this case specifically rejected a cause of action relating to the allegation that the employer refused to release employee names and addresses to FWLA. As a result, I do not consider the evidence admitted at hearing relating to this issue.

Examiner Sally Carpenter held a hearing on February 9, 10, 22, and 23, 2010. The parties submitted post-hearing briefs on or before April 22, 2010. Carpenter left employment with the Commission at the end of March and the Commission re-assigned the case to Jamie L. Siegel to issue a decision based upon the record.

ISSUES

1. Did the employer discriminate against the FWLA in violation of RCW 41.80.110(1)(c) by limiting the FWLA's dissemination of decertification information and by its actions relating to the FWLA's planned rally?

2. Did the employer dominate or assist a union in violation of RCW 41.80.110(1)(b) by showing a preference between unions in its actions relating to the FWLA's planned rally?

The FWLA failed to establish that the employer engaged in discrimination by limiting the FWLA's dissemination of decertification information or by the employer's actions relating to the FWLA's planned rally. Additionally, the FWLA failed to prove employer domination or assistance of a union.

APPLICABLE LEGAL STANDARDS

Discrimination

RCW 41.80.110(1)(c) provides that 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." The complainant maintains the burden of proof in employer discrimination cases. 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.

Central Washington University, Decision 10118-A (PSRA, 2010). To prove an employer's motivation for an adverse employment action was discriminatory, the complainant must establish that the employer had knowledge of the employee's union activities. *Metropolitan Park District of Tacoma*, Decision 2272, *aff'd*, Decision 2272-A (PECB, 1986). Ordinarily, the complainant may use circumstantial evidence to establish its prima facie case because an employer does not typically announce a discriminatory motive for its actions. *Clark County*, Decision 9127-A (PECB, 2007).

When the complainant establishes a prima facie case, it creates a rebuttable presumption of discrimination. In response to a complainant's prima facie case of discrimination, the employer need only articulate non-discriminatory 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). Instead, the burden remains on the complainant 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 complainant 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.

Interference

An employer commits an unfair labor practice if it interferes with, restrains, or coerces employees in the exercise of rights protected by Chapter 41.80 RCW. RCW 41.80.050 provides employees with the right to:

> [S]elf-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.

Employees maintain the right to decertify their exclusive bargaining representative. WAC 391-25-070(6)(c).

The Commission finds unlawful interference where one or more employees could reasonably perceive an employer's action as a threat of reprisal or force or promise of benefit associated with the exercise of protected rights. The complainant need not show that the employer intended to interfere or that the employees involved actually felt threatened. *Central Washington University*, Decision 10118-A. The Commission does not base a finding of interference on the reaction of the particular employee involved; instead, it bases its determination on whether a typical employee in a similar circumstance could reasonably perceive the actions as attempts to discourage protected activity. Additionally, the complainant bears the burden of establishing that the employer's conduct resulted in harm to protected employee rights. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

The Commission dismisses interference complaints when they are based upon the same set of facts that fail to constitute a discrimination violation. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). The Commission recently declined to overrule this longstanding precedent. *Northshore Utility District*, Decision 10534-A (PECB, 2010).

Domination or Assistance of Union

Under RCW 41.80.110(1)(b) it is an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it." The Commission finds unlawful domination or assistance where employers involve themselves in the internal affairs or finances of unions, when employers show preferences between two employee organizations competing for the same bargaining unit, and where employers attempt to create, fund, or control a "company union." To establish domination, the complainant bears the burden of proving the employer intended to assist one union to the detriment of another. *Community College District 13 – Lower Columbia*, Decision 8117-B (PSRA, 2005).

Use of Employer Facilities for Union Organizing

Collective bargaining laws do not provide public employees with an independent right to use employer facilities for union business. *Whatcom County*, Decision 8245-A (PECB, 2004). In *Central Washington University*, Decision 10118-A, the Commission recently held that the employer lawfully prohibited employees from using the employer's e-mail system to send messages about union organizing. In that decision the Commission reiterated: "Public employees do not have an inherent right to use the employer's equipment for union organizing."

Employers have the right to enforce rules designed to maintain discipline and productivity in the work place, including limiting the posting of non-work related materials. *State – Labor and Industries*, Decision 9348. The examiner in *State – Labor and Industries*, Decision 9348 explained:

> Employers generally may restrict employee use of its property for distribution purposes, but may not do so in ways that discriminate against protected communications as opposed to other kinds of non-job-related uses. *Sprint/United Mgmt. Co.*, 326 NLRB 397 (1998). A rule that is presumptively valid may still be unlawful if it is promulgated or enforced in a discriminatory manner.

ANALYSIS

Dennis Redmon serves as president of the Fair Washington Labor Association (FWLA). The FWLA purports to be an employee organization.[3] The Washington Public Employees Association (WPEA) serves as the exclusive bargaining representative for certain employees working for the employer, including Dennis Redmon. The window period in which employees could pursue decertification of the WPEA ended April 1, 2009.[4] Redmon sought to decertify the WPEA during the window period. Redmon filed a decertification petition with the Commission on April 1 which was dismissed for insufficient showing of interest.[5]

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[3] I have no reason to doubt that the FWLA is an employee organization; the record, however, does not include evidence that allows me to specifically find that the FWLA is an employee organization, nor have I found other decisions of which I can take administrative notice.

[4] Unless otherwise noted, all dates refer to 2009.

[5] *State – Revenue*, Decision 10374 (PSRA, 2009).

The complaints in this matter involve three of the FWLA's activities during the course of the window period, including the dissemination of decertification fliers, a planned rally, and messages left on the employer's voice mail system.

Decertification Fliers

On the morning of March 5, Redmon posted the FWLA's decertification fliers on three doors and a stairwell in the lobby area of the 6500 Linderson Way SW building (6500 building), one of the employer's Tumwater office buildings. He posted some of the material adjacent to postings relating to charitable organizations, such as the Combined Fund Drive and the Interagency Committee on State Employed Women (ICSEW). When Dan Contris, the employer's chief financial officer, saw the FWLA postings that morning, he removed them.

Later on March 5 when Redmon saw that the fliers had been removed, he initiated e-mail communication with Marcus Glasper, the employer's Senior Assistant Director for Administrative Services, seeking to understand why the fliers had been removed. Glasper responded by e-mail dated March 5 and explained, in part, as follows:

> In accordance with our policy, please do not use any DOR [Department of Revenue] public resource for the distribution of your campaign literature. To the extent that DOR allows other types of literature on the tables in its lunchrooms, break rooms, or other public reception areas, you may leave your literature in those locations as well.

The following Sunday, Contris removed the FWLA's decertification material, along with an FTE newspaper,[6] from the brick planter in the lobby of the 6500 building where newspapers were occasionally left.

By e-mail dated March 10, Redmon highlighted his concerns with the employer's position on posting fliers and advocated for the employer to view RCW 42.52.560 as authorizing the use of

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[6] The FTE newspaper advertises itself as a "publication for and about state employees." It includes positive stories about state employees and includes advertisements from private businesses.

state resources for decertification purposes.[7] In response, Glasper sent an e-mail dated March 13. In that e-mail, he referenced his prior March 5 e-mail and stated, "As the email stated and consistent with DOR policy 4.1.1 . . . you are allowed to leave your literature on in [sic] lunchrooms, break rooms, or other public reception areas to the extent that DOR allows other types of literature in those locations." Redmon responded by e-mail dated March 13, thanking Glasper for "confirming employee organizations may leave employee communications in lunch rooms, break rooms, and other public reception areas."

On March 25, Redmon posted FWLA fliers on the glass door, walls, and staircase in the lobby of the 6500 building. Dolly Garcia, the employer's Labor Relations Manager, saw the fliers and removed them. She saw Redmon on the staircase after removing the fliers and they briefly discussed the issue. On March 26, Garcia and Nicole Ross, Assistant Director of the employer's compliance division, met with Redmon, providing him with a letter reiterating the employer's expectations regarding postings. During the meeting, Redmon shared his perception that Glasper's elimination of the word "table" from his March 13 e-mail represented what he understood to be the employer's acknowledgement that he could post decertification fliers in the lobby of the 6500 building.

Understanding the possible confusion and giving Redmon the benefit of the doubt, the employer issued a revised letter dated March 31. In the letter, the employer reiterated that the FWLA could not post its materials on any of the employer's doors, walls, or staircases but that it could place materials on tables in lunch rooms, break rooms, and public reception areas where other non-work related materials are allowed. The March 26 and March 31 letters also indicated that the FWLA could continue to place materials on the brick planter in the lobby of the 6500 building. The March 31 letter clarified:

> You may have also mistakenly concluded that you could place your documents next to the Interagency Committee on State Employed Women's (ICSEW) flyers sponsoring a clothing drive since they were posted on walls and doors. The ICSEW is a state entity created pursuant to an executive order issued by the

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[7] During the course of the hearing and in its post-hearing brief, the FWLA raises issues relating to RCW 42.52.560. The Commission does not have jurisdiction over alleged violations of Chapter 42.52 RCW. *Community College District 3 - Olympic (Washington Public Employees Association)*, Decision 8900 (PSRA, 2005).

> Governor. The activities of the ICSEW are officially sanctioned by the State and in this case, the charitable drive at DOR had the explicit approval of DOR's Director, Cindi Holmstrom. . . .
>
> As you know, in accordance with the provisions of RCW 41.80 and DOR Policy 4.1.1 (Attachment 3), DOR management cannot appear to support or not support, the activities of any employee organization's effort to organize or decertify an existing bargaining unit. To allow your documents to be taped to the doors, walls, and staircase, may have the appearance of supporting your effort because it allows you to use state resources, specifically DOR's facilities, for your organization's potential benefit or gain.

Planned Rally

In his March 13 e-mail to Glasper, Redmon stated that in the next two weeks the FWLA planned a rally by the picnic table between the 6300 and 6500 buildings. Glasper responded by e-mail dated March 16 stating the importance of not interrupting service to the public. He wrote, in part: "Please contact Dolly Garcia, Labor Relations Manager, to work out the details of your rally." The evidence does not show that Redmon contacted Garcia concerning the rally until the morning of March 26, the day of the planned rally.

On March 26 when Garcia and Ross met with Redmon between 9:00 and 9:30 A.M. to deliver the above-referenced letter relating to the posting of decertification fliers, Redmon shared his plan to use the picnic table on the lawn adjacent to the front parking lot for the FWLA rally at noon that same day. Redmon believed that the property was leased, that the employer did not control the property, and that he could use the space. Redmon, Garcia, and Ross discussed the issue of the rally location and left the meeting with the expectation that Garcia would research the issue and get back to Redmon. At hearing, Garcia denied Redmon's allegation that she told Redmon during the meeting that he was putting her in a bad position with the WPEA and management. She acknowledged: "I believe I might have said words it would be very difficult for us to do that today." Garcia also admitted to telling Redmon that she was under a great deal of pressure to make sure that she did things correctly.

After the meeting, Garcia and Redmon exchanged e-mails. Garcia sent Redmon an e-mail on March 26 at 11:23 A.M. that delineated the employer's expectations for the noon rally. One of the expectations included that people not stand "in or adjacent to the parking lot as this may pose

a hazard from passing traffic." Redmon responded by e-mail at 11:42 A.M., expressing concern that the e-mail did not address sitting at the picnic table or standing on the grass; he had been expecting clarification on that point.

From the employer's perspective, Garcia made significant efforts to get management approval for the rally on short notice. In approximately two hours, Garcia connected with the individuals she needed to in order to gain approval for the rally and provide Redmon with guidelines. Garcia and other employer representatives believed that the rally occurred as planned on March 26.

From Redmon's perspective, the employer effectively blocked him from holding the rally. He believes that Garcia failed to answer his question on the rally location and, because he felt that he could not get clear direction, he called off the rally. He testified that during the time slated for the rally he and the FWLA's attorney sat at the table and talked with several employees.

The FWLA alleged in its complaint that both Garcia and Ross roamed the worker areas overlooking the rally and took notes; it asserts that this behavior intimidated employees. The testimony at hearing revealed that on the afternoon of the scheduled rally, Garcia went to the second floor lobby area and looked out the windows twice. She wanted to make sure that nothing was disruptive to the employer's business. She said that she had a notepad with her, but did not take any notes. She did not exit the building. Ross testified that she looked out the windows in front of the reception counter once, did not recall having a notepad with her, and did not recall taking any notes. The FWLA offered no evidence to contradict Garcia's and Ross' testimony regarding their alleged intimidating behavior; the FWLA offered no evidence in support of its allegation.

Voice Mail Messages

On March 27 some employees received a 15 to 20 second message on their work voice mail. Garcia testified that the messages, left on behalf of FWLA, indicated that there were just a couple days left to sign decertification cards. Garcia testified that the voice on the message sounded like a specific retired employee. She was specifically aware of 15 to 20 employees who received the message; some employees complained to her about the message. She testified that

the messages caused disruption in the workplace. According to Garcia, a WPEA representative complained because Garcia had been clear with the WPEA that the union could not use the voice mail system.

As a result of the messages, the employer launched an investigation. As part of the investigation, the employer interviewed Redmon on March 27. The outcome of the investigation was inconclusive and the employer took no disciplinary action against Redmon or anyone associated with the FWLA.

Employer Policies

The parties introduced two of the employer's written policies into evidence, Administrative Policy 4.1.1: Use of State Equipment and Facilities, and Administrative Policy 5.9.1: Electronic Media. Policy 4.1.1 states that employees "must not use state resources, including . . . facilities for private benefit or gain of the employee or any other person . . . ." Policy 4.1.1 also includes, in part, the following:

> **Written Communication Unrelated to Department of Revenue (DOR) Official Business**
> Written communications unrelated to DOR work concerning participation in non-DOR work activities, and solicitations for approved charitable events, are limited to conference rooms, lunch rooms, common areas, and break areas. Refer to the Solicitations Policy 4.1.5 for information on approved charitable or non-profit solicitations.
>
> All documents must be non-partisan in nature and must not offer any promise of benefit or threat of reprisal for participating or not participating in the activity. Department of Revenue management may remove any document of an offensive or inappropriate nature. Examples of inappropriate materials are pamphlets or other sales/product information that may result in personal gain. Examples of acceptable items are non-profit organizational fund raising items.
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> **Bulletin Boards**
> Bulletin Boards are for Agency purposes as approved by Department of Revenue management unless the bulletin board, or a part of the bulletin board, has been designated for use by the certified exclusive representative in accordance with CBA Article 35.5.

The 2007-2009 collective bargaining agreement between the employer and the WPEA includes a section requiring the employer to maintain bulletin board space for union communication. That section of the contract includes the following restriction: "Union communications may not be posted in any other location in the agency."

Policy 5.9.1 applies to electronic media, including voice mail systems. The policy includes as a "prohibited use" the following: "Supporting promoting or soliciting for an outside organization or group unless provided for by law or authorized by the Director."

Neither party introduced into evidence the Solicitations Policy 4.1.5 referenced in Policy 4.1.1. The testimony revealed that the employer allows information on state-sanctioned or sponsored activities, including charitable events such as the Combined Fund Drive and the Interagency Committee on State Employed Women's clothing drive, to be posted on doors and walls, as can events that promote organizational effectiveness approved through the director's office. The employer allows employees wishing to advertise other types of charitable events or fundraisers to leave such non-work related information on tables in lunchrooms, break rooms, and other public reception areas where other non-work related materials are allowed.

ISSUE 1: DISCRIMINATION

The FWLA argues that the employer discriminated against Redmon and/or other employees by restricting their ability to post decertification fliers in the 6500 building and by investigating the FWLA messages left for employees on the employer's voice mail system. The FWLA also argues that the employer's actions with respect to the planned rally amounted to unlawful discrimination.

To establish a prima facie case of discrimination, the FWLA must establish that Redmon or other employees participated in an activity protected by the collective bargaining laws, that the employer deprived Redmon or other employees of some ascertainable right, benefit, or status, and that a causal connection exists between the exercise of a protected activity and the employer's action. Redmon engaged in protected activities during March 2009. For example, the evidence demonstrated that Redmon held meetings with employees concerning the possible

decertification of the WPEA.[8] The FWLA cannot show, however, that the employer deprived Redmon or any other employee of some ascertainable right, benefit, or status. As a result, the FWLA failed to establish that the employer engaged in unlawful discrimination.

Restrictions on Posting Decertification Fliers

As stated above, public employees have no independent right to use their employer's facilities for union organizing. In *Central Washington University*, a case involving electronic bulletin boards and e-mail, the Commission explained:

> 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 employer allows the following in building 6500:

WPEA bulletin board. Consistent with the collective bargaining agreement between the WPEA and the employer, the WPEA posts material on an employer-provided bulletin board that is located in employee lunchrooms. The law affords an exclusive bargaining representative the right to negotiate with an employer for the exclusive use of such bulletin boards. *King County*, Decision 9692 (PECB, 2007).[9]

The record contains no evidence that the employer allows the WPEA, or any other employee organization, to post items outside of its designated WPEA bulletin boards. Garcia testified that

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[8] To the extent Redmon posted fliers in locations that violated the employer's policies, the activity was not protected. In *State – Labor and Industries*, Decision 9348, the examiner explained: "While the right to decertify the incumbent exclusive bargaining representative is protected activity under Chapter 41.80 RCW, there is no right to act in violation of a valid agency policy." As a result, in that case, the examiner found the decertification group was not engaged in protected activity when it posted material without prior approval as required by the employer's policy.

[9] Once an employee organization files a valid petition concerning representation, the employer's obligation of neutrality is triggered and the incumbent union can no longer have exclusive access to the employer's facilities. *Whatcom County*, Decision 8245-A. Because no employee organization filed a valid petition in this case, the obligation of neutrality restricting the incumbent's exclusive use of the bulletin board was not triggered.

she has approved the removal of WPEA communications any time it has come to her attention that the WPEA put something up outside of the bulletin board.

Employer's bulletin boards. The testimony and exhibits focused on the 6500 building. Although there was some limited testimony about other work sites, the parties focused on the 6500 building so that is the focus of this decision. The 6500 building does not have bulletin boards designed for general employee use. The employer provides no bulletin boards or other space where employees can post notices of items for sale. Redmon described that the second floor lunchroom includes a safety bulletin board, a WPEA bulletin board, and a workplace rights bulletin board. He said that everything on the safety board is approved by management. "It's a pretty neat work area, all of the Department of Revenue offices are, you know. There's no – well, I guess there's no tolerance for just sort of miscellaneous, nonapproved materials to be posted."

Transit information. The employer allows Intercity Transit, a governmental entity, to display information near the elevators of the 6500 building.

Charities. As discussed earlier in this decision, information on state-sanctioned or sponsored activities, including charitable events such as the Combined Fund Drive and the ICSEW clothing drive, may be posted on doors and walls, as can events that promote organizational effectiveness approved through the director's office.

Non-work related material. The employer authorizes non-work related materials in the 6500 building to be placed on tables in lunch rooms, break rooms, and public reception areas where other non-work items such as newspapers may be left. In this case, the employer treated the FWLA's decertification material in the same way as other non-work related materials, including advertisements from private businesses and charities that are not state-sanctioned or sponsored activities.[10]

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[10] The FWLA argues that decertification material is work-related as it relates to changing terms and conditions of employment. Although I agree that decertification activities are statutorily protected just as union activities are statutorily protected, neither can be correctly described as "work-related." The election process may lead to changes in representation. Such changes could ultimately lead to changes in terms and conditions of employment. That does not, however, make the election process work-related.

Amore Espresso. The employer contracts with Amore Espresso which runs a coffee and food stand in the 6500 building. The FWLA introduced copies of photographs into evidence that show a sandwich board that appears to highlight Amore's daily specials.[11] One of the photographs includes a small sign posted near the sandwich board that advertises Amore's "coffee and doughnut catering." The record does not establish when that photograph was taken and whether the small sign was posted prior to or after the FWLA filed the complaint or the amended complaint in this matter; as a result, I do not consider the small sign in my analysis.[12]

As the above-described listing demonstrates, with one limited exception, the employer has consistently prohibited the posting of non-work-related materials on building 6500's walls, doors, and non-WPEA bulletin boards. The record demonstrates that the employer implements this policy in a consistent manner. Employees are not allowed to post items relating to personal matters; private businesses are not allowed to post advertisements. The one narrow exception is the coffee and food stand. Typically when public employers allow coffee and/or food stands to operate on their property, they do so for the benefit of employees and the employer's customers. Signs describing menu options are often viewed as a necessary part of the service.

The FWLA has no inherent right to post decertification material. The sandwich board associated with the espresso and food stand does not render the employer's policies invalid or discriminatory. The FWLA did not establish that the employer's policies discriminate against protected communication or that the employer enforces its policies in a discriminatory manner. No employee was deprived of an ascertainable right, benefit, or status when the employer removed fliers that Redmon posted in the 6500 building. The FWLA failed to establish that the employer discriminated in regard to hire, tenure of employment, or any term or condition of employment.

Investigation of Voice Mail Messages

The employer received employee complaints about the FWLA's messages left on the employer's voice mail system. The employer found the messages disruptive to the work environment. As

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11 The record is not clear with respect to the proximity of the sandwich board to the espresso and food stand.

12 It is clear that the photograph was not taken on the same day as any of the other photographs showing the face of the sandwich board.

part of its investigation, it interviewed Redmon. The employer took no disciplinary action. As a result, the FWLA failed to establish a prima facie case of discrimination because it provided no evidence that the employer deprived Redmon or anyone else of an ascertainable right, benefit or status. The FWLA failed to establish that the employer discriminated in regard to hire, tenure of employment, or any term or condition of employment.

Planned Rally

The FWLA alleges that the employer's actions with respect to the planned rally amounted to unlawful discrimination. Although the employer's communication with Redmon concerning the rally may have lacked the clarity that Redmon sought, the FWLA did not meet its burden of establishing discrimination.

When Redmon shared that the FWLA would hold a rally, the employer expressed concern that any rally held near its buildings not interfere with public access. The testimony revealed that in 2006 the employer had similar concerns when it learned of a planned WPEA rally. In that situation, the employer went through the same process with the WPEA to confirm that the location of the rally would not disrupt public access to the buildings. According to the testimony at hearing, when the employer told the WPEA it could not rally on the walkway in between the two buildings, the WPEA decided to hold the rally on the street.

According to the undisputed testimony, the employer treated the FWLA's March 2009 rally no differently from the 2006 WPEA rally. Although the previous WPEA rally related to the negotiation of a collective bargaining agreement and the FWLA rally at issue in this case involved the decertification of the WPEA, both groups sought to engage in protected activities and the evidence demonstrates that both employee organizations were treated in a similar manner.

Additionally, the evidence demonstrates that neither Redmon nor any other employee was deprived of any ascertainable right, benefit or status. The employer did not prohibit the FWLA's rally. Although Redmon did not receive the clarity of information he was seeking, the evidence reveals that the employer acted quickly in an effort to be responsive and to gain approval for the

rally. Furthermore, the FWLA presented no evidence to suggest that Garcia and Ross engaged in any type of inappropriate or unlawful behavior during the course of the rally.

Interference

The FWLA asserts the same set of facts to support its interference complaint as it does to support its discrimination complaint. Because I find that the FWLA did not establish that the employer unlawfully discriminated against Redmon or the FWLA and dismiss the discrimination complaint, I must also dismiss the interference complaint. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).

ISSUE 2: DOMINATION

The preliminary ruling, which frames the issues for hearing, found a cause of action for "domination or assistance of a union in violation of RCW 41.80.110(1)(b), by showing a preference between unions in an organization campaign regarding an employee rally sponsored by the Fair Washington Labor Association." To establish unlawful domination, the FWLA bears the burden of proof, including establishing that the employer intended to assist one employee organization to the detriment of another. The FWLA did not meet this burden.

From Redmon's perspective, his efforts to communicate with employees and inform them of their rights concerning decertification have been blocked at every turn by an employer he perceives as inextricably linked with the WPEA. Much of Redmon's frustration appears to have initially stemmed from the WPEA negotiating a union security provision to the collective bargaining agreement in 2004 without affording non-members the opportunity to vote on the agreement. *See State – Revenue (Washington Public Employees Association)*, Decision 8972-B (PSRA, 2008). Although I understand the frustration, the FWLA's domination cause of action is limited to the planned rally in March 2009. With respect to that cause of action, the FWLA failed to establish that the employer intended to assist the WPEA to the detriment of the FWLA.

As stated earlier in this decision, although the employer's communications with Redmon about the planned rally may have lacked the clarity he sought, the evidence is insufficient to conclude that the employer engaged in unlawful domination or assistance. The record demonstrates that

the employer acted quickly to try to get management approval for the FWLA rally. Furthermore, the FWLA presented no evidence to suggest that Garcia and Ross engaged in any type of inappropriate behavior during the course of the rally.

It is apparent from the record that Redmon believes the employer intended to frustrate the FWLA's efforts to hold its rally. That belief, however, absent relevant evidence, is insufficient to meet its burden of proof. The fact that Ross previously served in a leadership role with the WPEA when she was a bargaining unit member, or that Garcia has, since the hearing in this matter, gone to work for the WPEA, may support Redmon's belief about events; in and of itself, however, those facts do not constitute evidence of unlawful domination or assistance.

The record lacks evidence that the employer involved itself in the internal affairs or finances of the FWLA or the WPEA, that the employer attempted to create, fund, or control a "company union," or that it showed preferences between the FWLA and the WPEA. Furthermore, the record lacks evidence that the employer intended to assist the WPEA to the detriment of the FWLA.

FINDINGS OF FACT

1. The State of Washington Department of Revenue is a public employer within the meaning of RCW 41.80.005(8).

2. The Fair Washington Labor Association (FWLA) purports to be an employee organization within the meaning of RCW 41.80.005(7).

3. Dennis Redmon, a public employee within the meaning of RCW 41.80.005(6), is employed by the Department of Revenue; he serves as president of the FWLA.

4. The Washington Public Employees Association (WPEA) is an employee organization within the meaning of RCW 41.80.005(7) and is the exclusive bargaining representative of employees at the Department of Revenue, including Dennis Redmon.

5. Redmon sought to decertify the WPEA during the window period that ended April 1, 2009. Redmon engaged in protected activities during the window period.

6. Redmon filed a decertification petition with the Commission on April 1, 2009 which was dismissed for insufficient showing of interest.

7. On March 5, 2009, the employer removed decertification materials Redmon had posted on doors and a stairwell in the lobby area of the 6500 Linderson Way SW building (6500 building), one of the employer's Tumwater office buildings.

8. Later on March 5 when Redmon saw that the fliers had been removed, he initiated e-mail communication with Marcus Glasper, the employer's Senior Assistant Director for Administrative Services, seeking to understand why the fliers had been removed.

9. Glasper responded by e-mail dated March 5 asking that Redmon, in accordance with policy, not use the employer's public resources for distribution of campaign literature. He also advised Redmon that he could leave his literature on the tables in lunch rooms, break rooms, and other public reception areas to the extent that other types of literature were allowed in those locations.

10. The following Sunday, the employer removed the FWLA's decertification material, along with an FTE newspaper, from the brick planter in the lobby of the 6500 building where newspapers were occasionally left; the employer later clarified that the decertification material and FTE newspaper could be placed on the planter.

11. By e-mail dated March 10, Redmon highlighted his concerns with the employer's position on posting fliers and advocated for the employer to view RCW 42.52.560 as authorizing the use of state resources for decertification purposes.

12. In response, Glasper sent an e-mail dated March 13. In that e-mail, he referenced his prior March 5 e-mail and stated, "As the email stated and consistent with DOR policy

4.1.1 . . . you are allowed to leave your literature on in [sic] lunchrooms, break rooms, or other public reception areas to the extent that DOR allows other types of literature in those locations."

13. Redmon responded by e-mail dated March 13, thanking Glasper for "confirming employee organizations may leave employee communications in lunch rooms, break rooms, and other public reception areas."

14. On March 25, Redmon posted the FWLA's fliers on the door, walls, and staircase in the lobby of the 6500 building.

15. On March 25, Dolly Garcia, the employer's Labor Relations Manager, saw the FWLA's fliers and removed them.

16. On March 26, Garcia and Nicole Ross, Assistant Director of the employer's compliance division, met with Redmon, providing him with a letter reiterating and clarifying the employer's expectations regarding postings. After Redmon shared his perception that Glasper's elimination of the word "table" from his March 13 letter represented what he understood to be the employer's acknowledgement that he could post decertification fliers in the lobby, Garcia and Ross agreed to issue a revised letter.

17. In the revised letter dated March 31, the employer reiterated that the FWLA could not post its materials on any of the employer's doors, walls, or staircases but that it could place materials on tables in lunch rooms, break rooms, and public receptions areas where other non-work related material is allowed.

18. The employer maintains a policy that prohibits employees from using the employer's equipment and facilities for private benefit or gain. The employer also maintains a policy applicable to electronic media, including voice mail systems, that identifies the following as a prohibited use: "Supporting promoting or soliciting for an outside organization or group unless provided for by law or authorized by the Director."

19. The employer allows the following to be posted on doors and walls in the 6500 building: information on state-sanctioned or sponsored activities, including charitable events such as the Combined Fund Drive and the Interagency Committee on State Employed Women's clothing drive, as well as events that promote organizational effectiveness approved through the director's office.

20. Consistent with the 2007-09 collective bargaining agreement between the WPEA and the employer, the WPEA posts material on an employer-provided bulletin board that is located in employee lunchrooms. The record contains no evidence that the employer allows the WPEA to post items outside of its designated bulletin boards.

21. The 6500 building does not have bulletin boards designed for general employee use. The employer provides no bulletin boards or other space where employees can post notices of items for sale.

22. The employer authorizes non-work related materials in the 6500 building to be placed on tables in lunch rooms, break rooms, and public reception areas where other non-work related items such as newspapers may be left. The employer treated the FWLA's decertification material in the same way as other non-work related materials.

23. The employer contracts with Amore Espresso which runs a coffee and food stand in the 6500 building. The coffee and food stand maintains a sandwich board that highlights menu items.

24. Except for the coffee and food stand, the employer consistently prohibits the posting of non-work-related materials on building 6500's walls, doors, staircases and non-WPEA bulletin boards. The sandwich board does not render the employer's policies invalid or discriminatory.

25. The FWLA did not establish that the employer's policies discriminate against protected communication or that the employer enforces its policies in a discriminatory manner.

26. The employer did not deprive Redmon or any other employee of an ascertainable right, benefit, or status when it prohibited the posting of decertification fliers consistent with its policies.

27. Redmon planned a rally in support of the FWLA's decertification efforts at noon on March 26, 2009.

28. On March 26 when Garcia and Ross met with Redmon between 9:00 and 9:30 A.M. concerning the posting of decertification fliers, they discussed the FWLA's plan to use the picnic table on the lawn adjacent to the front parking lot for the FWLA rally at noon that same day.

29. After the meeting, Garcia and Redmon exchanged e-mails. Garcia sent Redmon an e-mail at 11:23 A.M. that delineated the employer's expectations for the noon rally.

30. Redmon responded by e-mail at 11:42 A.M., expressing concern that the e-mail did not address sitting at the picnic table or standing on the grass; he had been expecting clarification on that point.

31. Although Redmon did not receive the clarity of information he was seeking, the employer acted quickly in an effort to be responsive and to gain approval for the rally.

32. The employer did not prohibit the FWLA from holding a rally and the record does not demonstrate that the employer intended to frustrate the FWLA's efforts to hold its rally.

33. The FWLA presented no evidence to suggest that Garcia and Ross engaged in any type of inappropriate or unlawful behavior during the course of the rally.

34. The evidence demonstrates that the employer treated the FWLA's March 2009 rally no differently from a 2006 WPEA rally.

35. The evidence does not establish that the employer intended to assist the WPEA to the detriment of the FWLA with respect to the planned rally.

36. Neither Redmon nor any other employees were deprived of any ascertainable right, benefit or status with respect to the planned rally.

37. On March 27, 15 to 20 employees received a 15 to 20 second message on their work voice mail in support of the FWLA's decertification efforts.

38. Some employees complained to the employer about the message. A WPEA representative complained because the employer had been clear with the WPEA that the union could not use the voice mail system.

39. The employer found that the messages caused disruption in the workplace and launched an investigation into the messages. As part of the investigation, the employer interviewed Redmon on March 27.

40. The outcome of the investigation was inconclusive and the employer took no disciplinary action against Redmon or anyone associated with the FWLA. The employer did not deprive Redmon or any other employee of an ascertainable right, benefit or status.

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. As described in Findings of Fact 7 through 40, the FWLA failed to sustain its burden of proof to establish that the State – Revenue discriminated against Redmon or any other employee in violation of RCW 41.80.110.(1)(c), or interfered with employee rights in violation of RCW 41.80.110(1)(a).

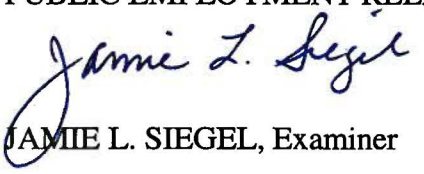
3. By the actions described in Findings of Fact 27 through 35, the State – Revenue, did not dominate or assist a union in violation of RCW 41.80.110(1)(b), or interfere with employee rights in violation of RCW 41.80.110(1)(a).

ORDER

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

ISSUED at Olympia, Washington, this 30th day of June, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JAMIE L. SIEGEL, 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.