University of Washington, Decision 11199-A (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 23649-U-10-6033 DECISION 11199-A - PSRA DECISION OF COMMISSION

Younglove & Coker, by *Christopher J. Coker*, Attorney at Law, for the union.

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

On November 22, 2010, the Washington Federation of State Employees (union) filed an unfair labor practices complaint against the University of Washington (employer). The union alleged that the employer interfered with employee rights by threats of reprisal or force or promises of benefit made to Michael Lynne (Lynne) and discriminated against Lynne by its final counseling of him in reprisal for union activities. Examiner Joel Greene conducted a hearing and found that the employer did not commit unfair labor practices. The union now appeals that decision.

ISSUES

1. Did the Examiner apply the correct legal standard to the facts of this case?

2. If not, should the Commission remand to the Examiner to make sufficient findings, including credibility determinations, if any, and to apply the correct legal standard?

The Examiner did not properly analyze whether Lynne engaged in protected activity and, therefore, did not apply all aspects of the legal standard for discrimination. The Examiner made insufficient findings of fact to determine whether Lynne engaged in protected activity and whether the employer discriminated against Lynne. We remand the case with instructions to make sufficient findings, including credibility determinations, if any, and to apply the correct legal standard to those findings.

FACTUAL BACKGROUND

Lynne has been a campus security officer at the employer's Harborview Medical Center in the department of parking and security since 2001. At the time of the hearing, Lynne had been a shop steward for approximately eight years. Director Bill Gaber (Gaber) and Associate Director of Operations R.J. Angeles (Angeles) were the heads of the department. Sergeant Duane Pederson was Lynne's immediate supervisor when the incidents relevant to this case occurred.

Bargaining unit member Malik Corbin (Corbin) contacted Lynne about a list of employees who had not paid citations for parking in restricted areas; Corbin was on the list. Corbin thought he was being treated unfairly because supervisors had been parking in the same lot without repercussion. On April 25, 2010,[1] Lynne sent the following e-mail titled "Illegal Parking" to Sergeant Ruben Bonilla (Bonilla):

> Ruben,
>
> It has come to my attention that our department is cracking down on an officer who received a parking ticket for being parked in the engineering lot, and demanding that he pay a $35 fine.
>
> I recall shortly after your job title changed from Lieutenant to Sergeant, I saw you with your vehicle parked in that lot just prior to your shift. I recall I took a photo of your vehicle with my cell phone and you made a comment about having to move or something like that. I deleted the photo, but you did not move your vehicle. I have seen your vehicle, and those of other supervisors parked in that lot on many other occasions.

[1] All dates are 2010 unless otherwise stated.

> As a supervisor, you lead by example. If an officer sees you and other supervisors park your personal vehicles in that lot, the officer would naturally assume that it is ok to park there also. One has done so, and now faces a $35 fine.
>
> Simply because you did not "get caught", that is, receive a parking citation, does not mean that it was alright [sic] for you or other supervisors to park there.
>
> As a supervisor, it is your duty to notify your supervisor that you have illegally parked your personal vehicle in the engineering lot in the past, and offer to pay the $35 fine for each instance you can recall illegally parking there, so that everyone is treated equally. As a supervisor, you should also report to your supervisor if you have observed other supervisors also illegally parking there and request that he take appropriate action.
>
> I assume that you will take the appropriate action within the next few days.
>
> Thank you,
> Michael Lynne
> Shop Steward
> WFSE Local 1488

On April 29, Angeles sent Lynne a memorandum scheduling an investigatory meeting "to discuss in detail, allegations [Lynne] has made regarding security supervisor parking illegally as well as the appropriateness of the [April 25] e-mail." The meeting ultimately occurred on May 26.

On August 2, Gaber issued a final counseling letter to Lynne. The letter listed the April 25 e-mail and several other incidents that occurred after April 25 as the "current situation" supporting Lynne's discipline. Gaber concluded that "[b]ased on my investigation, I find that your continued disruptive, angry, and insubordinate behaviors are inconsistent with a professional security officer in a healthcare setting."

COMMISSION REVIEW

Most appeals to the Commission present mixed questions of law and fact. *Central Washington University*, Decision 10967-A (PECB, 2012). The Commission reviews an examiner's interpretation of the law de novo and, therefore, does not defer to the examiner's conclusions of law. *Central Washington University*, Decision 10967-A, *citing Clover Park Technical College*,

Decision 8534-A (PECB, 2004). If the examiner has applied the correct legal standard, the Commission generally will look to see if there is substantial evidence in the record to support those findings, and to determine whether those findings in turn support the conclusions of law. *Central Washington University*, Decision 10967-A, *citing C-Tran*, Decision 7087-B and 7088-B (PECB, 2002).

In determining whether the findings support the conclusions, the Commission will examine whether the examiner addressed all necessary elements of a cause of action. If an examiner concludes that the complainant has not met its burden, it is unnecessary for the examiner to continue the analysis. Examiners must make sufficient findings of fact to support their conclusions of law. Dismissal without sufficient findings of fact to support the conclusions of law may result in a decision being remanded to the Examiner.

If the appealing party fails to assign error to a specific finding of fact, that unchallenged finding is considered to be true on appeal. *Central Washington University*, Decision 10967-A, *citing C-Tran*, Decision 7087-B and 7088-B.

LEGAL PRECEDENT

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. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a *prima facie* case 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 respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to the common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

In response to a complainant's *prima facie* case of discrimination, the respondent need only articulate its non-discriminatory reasons for acting in such a manner. The respondent 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 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.

The opinion below properly laid out the test for discrimination, but failed to adequately analyze the alleged protected activity.

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.

Enforcement of these rights is through the unfair labor practice provisions of RCW 41.80.110. These rights are not absolute, however, and an employee is not immune from disciplinary actions just because he or she has engaged in union activity. *PERC v. City of Vancouver*, 107 Wn. App. 694 (Div. 2, 2001); *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905 (Ct. App. Div. II, 1995), *review denied*, 129 Wn.2d 1019 (1996).[2]

When determining whether activity is protected, we first look at whether, on its face, 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 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).

If the activity appears to be union activity on its face, Washington courts have adopted a "reasonableness" standard. *Vancouver School District v. SEIU Local 92*, 79 Wn. App. 905; *PERC v. City of Vancouver*, 107 Wn. App. 694 (Ct. App. Div II 2001). "Employee protected activity loses its protection when it is unreasonable – but 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; s*ee also Vancouver School District,* Decision 3779 (PECB, 1991), *rev'd, Vancouver School District,* PECB 3779-A (PECB, 1992). "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 (even when it was claimed the actions were taken as part of union duties, actions that amounted to a conspiracy to retaliate against a fellow employee were unprotected).

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

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[2] Cases regarding protected activity status that are applicable to Chapter 41.56 RCW are also applicable to Chapter 41.80 RCW.

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).

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. *City 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 interaction 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).

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. What will qualify as protected activity depends upon the facts of the case.

ANALYSIS

The opinion below found that the April 25 e-mail was not protected because it did not qualify as a formal grievance and the tone and content of the e-mail was not protected activity. While not a

formal grievance, the e-mail purports to have been sent in Lynne's role as a shop steward to resolve a bargaining unit member's dispute at the lowest level. As the law demonstrates, activity does not need to be part of the formal grievance process to be protected. If the e-mail fits into the *res gestae* of union activity, Lynne engaged in protected activity.

Written statements may qualify as protected activity when the same statement made in-person would not. To the extent that the e-mail was confrontational, it was not a face-to-face discussion; thus, there was no risk of the "confrontation" escalating. Any "attack" by Lynne on Bonilla's behavior and credibility may be related to the issue raised by the bargaining unit member. The questions are whether the accusations were relevant to the union issue at-hand and whether they were made to further that purpose.

The Examiner's reasoning for finding that Lynne did not engage in protected activity did not analyze the alleged protected activity in light of the existing precedent. On remand, whether Lynne engaged in protected activity should be examined in light of the existing precedent cited above. The Examiner should enter findings of fact, including credibility determinations, to support the conclusions of law he reaches.

Additionally, the Examiner wrote: "Lynne's e-mail to Bonilla *led to* Lynne's discipline." (emphasis added). If the Examiner determines that the union established a *prima facie* case of discrimination, the Examiner should further explain this conclusion. The Examiner's role is not to determine whether the employer established just cause to discipline Lynne. *See City of Pullman*, Decision 11148 (PECB, 2011), *aff'd*, Decision 11148-A (PECB, 2012).

CONCLUSION

Although the Examiner cited the proper legal standard for discrimination, he did not properly analyze protected activity. The Examiner did not make sufficient factual and credibility findings for us to rule on appeal. The case is remanded to the Examiner to make sufficient findings, including credibility determinations, if any, and to apply the correct legal standard to those findings consistent with this opinion.

NOW, THEREFORE, it is

ORDERED

We REMAND the case to the Examiner with instructions that he make sufficient findings, including credibility determinations, and to apply the correct legal standard to those findings.

ISSUED at Olympia, Washington, this 4th day of February, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

/S/ ROBBIE DUFFIELD

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DETAILS:	See 23720-S-11-0201 Campus Security Officers				
COMMENTS:					

EMPLOYER: UNIVERSITY OF WASHINGTON
ATTN: PETER DENIS
1100 NE CAMPUS PARKWAY
BOX 354555
SEATTLE, WA 98105-6207
Ph1: 206-616-3564 Ph2: 206-841-2872

REP BY: MARK YAMASHITA
OFFICE OF THE ATTORNEY GENERAL
UNIVERSITY OF WASHINGTON
BOX 359475
SEATTLE, WA 98195-9475
Ph1: 206-543-4150 Ph2: 206-616-7935

PARTY 2: WA FED OF STATE EMPLOYEES
ATTN: GLADYS BURBANK
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501-2332
Ph1: 800-562-6002 Ph2: 360-352-7603

REP BY: CHRISTOPHER COKER
YOUNGLOVE COKER
PO BOX 7846
OLYMPIA, WA 98507-7846
Ph1: 360-357-7791