

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

LARRY CHAPMAN,

Complainant,

vs.

JEFFERSON COUNTY PUBLIC UTILITY
DISTRICT NO. 1,

Respondent.

CASE 26441-U-14

DECISION 12332-A - PECB

DECISION OF COMMISSION

Sean M. Phelan, Attorney at Law, Frank Freed Subit & Thomas LLP, for Larry Chapman.

Tracy M. Miller, Attorney at Law, Karr Tuttle Campbell, for Jefferson County Public Utility District No. 1.

Jefferson County Public Utility District No. 1 (employer) operates an electrical utility in Jefferson County. Complainant Larry Chapman worked for the employer until October 29, 2013. Chapman filed an unfair labor practice complaint alleging that the employer discriminated against him when the employer terminated his employment during his probationary period. Examiner Dianne Ramerman conducted a hearing and issued a decision finding that the employer did not discriminate against Chapman.¹ Chapman appealed.

The issue before the Commission is whether the employer discriminated against Chapman when the employer terminated his employment during his probationary period. We affirm the Examiner. While Chapman established a prima facie case of discrimination, he did not prove that the nondiscriminatory reasons the employer articulated were either pretexts or substantially motivated by union animus.

¹ *Jefferson County Public Utility District No. 1, Decision 12332 (PECB, 2015).*

ANALYSIS

Legal Standards

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing:

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.

City of Vancouver, Decision 10621-B (PECB, 2012), *aff'd in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348-349 (2014); *Educational Service District 114*, Decision 4361-A.

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 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).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver*, 180 Wn. App. 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* If the respondent meets its burden of production, the complainant bears

the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

The Commission reviews conclusions and applications of law, as well as interpretation of statutes, *de novo*. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Application of Legal Standards

The Examiner's decision contains a full discussion of the facts in this case. We recount the facts only to the degree necessary to reach our decision.

The Examiner concluded that Chapman established a *prima facie* case of discrimination. The employer articulated nondiscriminatory reasons for terminating Chapman's employment during his probationary period: his performance was below standard and he had a poor relationship with the foreman. The Examiner concluded Chapman did not prove that the employer's reasons were pretexts or substantially motivated by union animus.

In her analysis, the Examiner considered Chapman's probationary status and concluded Chapman's probationary status made it easier for the employer to terminate the employment relationship. On appeal, Chapman argued that the Examiner applied a heightened burden of proof because Chapman was a probationary employee. Chapman argued that this heightened burden of proof was in error. We agree.

The Examiner wrote, "Since JPUD asserted that Chapman, as a probationary employee, was terminated for performance reasons, the complainant had a higher burden to prove that such claims regarding performance were pretextual or motivated by union animus than it would have had if

Chapman were past his probationary period.” In a discrimination case under Chapter 41.56 RCW, regardless of the employment status of the employee, after a respondent articulates a nondiscriminatory reason for the adverse action, the burden returns to the complainant to establish that the reason was either a pretext or substantially motivated by union animus. That burden of proof is not heightened because of an employee’s status as a probationary employee. The burden of proof in a discrimination case is the same for all employees: establish a prima facie case of discrimination, and if the employer articulates a legitimate, nondiscriminatory reason for its action, prove the stated reason was a pretext or that union animus was a substantial motivating factor in the decision.

In this case, the employer articulated nondiscriminatory reasons for terminating Chapman’s employment. The burden shifted to Chapman to prove those reasons were either pretexts or substantially motivated by union animus.

While we do not find evidence in the record that Chapman received notice that he was in jeopardy of failing his probationary period, that lack of evidence does not prove that the reasons the employer articulated were pretexts or substantially motivated by union animus. Substantial evidence supports the Examiner’s decision that the performance issues predated Chapman’s union activity. Tension existed between Chapman and the foreman. We agree with the Examiner that the foreman did not have union animus that was a substantial factor in the employer’s decision to terminate Chapman’s employment. Substantial evidence also supports the Examiner’s conclusion that the employer’s stated nondiscriminatory reasons were neither pretexts nor substantially motivated by union animus.

CONCLUSION

Chapman established a prima facie case of discrimination. The employer met its burden of production. Chapman did not meet the burden of proof to show that the employer’s reasons were either pretexts or substantially motivated by union animus. The burden of proof in a discrimination case is the same for all employees regardless of their employment status.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Dianne Ramerman are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 23rd day of October, 2015.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


THOMAS W. McLANE, Commissioner

OPINION CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority's statements of legal principals and burden of proof. I respectfully dissent from the majority opinion. Based on the evidence, I would find that union animus was a substantial motivating factor for the employer's decision to terminate Chapman's employment.


MARK E. BRENNAN, Commissioner



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DECISION 12332-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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