

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JESSICA TORRES,

Complainant,

vs.

GRAYS HARBOR COUNTY,

Respondent.

CASE 128790-U-17

DECISION 12691 - PECB

PRELIMINARY RULING AND
ORDER OF PARTIAL DISMISSAL

On February 15, 2017, Jessica Torres (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming Grays Harbor County (employer) as respondent. The complaint alleged:

Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] by:

1. In December 2012, discouraging Torres from applying for a job position and providing misinformation in reprisal for union activities protected by Chapter 41.56 RCW.
2. In September 2014, denying Torres' request for position reclassification in reprisal for union activities protected by Chapter 41.56 RCW.
3. In March 2016, denying Torres' request for position reclassification in reprisal for union activities protected by Chapter 41.56 RCW.

The complaint was reviewed under WAC 391-45-110,¹ and a partial deficiency notice issued on March 17, 2017, indicated that it was not possible to conclude the December 2012 and September

¹ At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

2014 allegations qualified for further case processing. The deficiency notice explained the allegations of employer discrimination in 2012 and 2014 appear to be untimely filed. In contrast, the March 2016 employer discrimination allegation raises a deception or concealment argument. Deception or concealment of an unfair labor practice can alter the trigger date and is a question of fact to be resolved by an examiner. The 2016 employer discrimination allegation states a cause of action and qualifies for further case processing.

The complainant also provided many documents along with her case filing. The deficiency notice informed the complainant that she should not rely on the content of attached documents or exhibits at the preliminary review stage of the proceedings. If a fact is relevant it needs to be described in the text of the complaint itself.

The complainant was given a period of 21 days in which to file and serve an amended complaint, or face dismissal of the defective allegations of the complaint. The complainant filed an amended complaint document on April 4, 2017. I reviewed the amended complaint and determined that the additional information provided did not cure the timeliness defects described in the partial deficiency notice.

The December 2012 and September 2014 allegations against the employer are being dismissed because they are untimely filed. The complaint and amended complaint state a cause of action for employer discrimination in March 2016. The employer must file and serve their answers to the complaint and amended complaint within 21 days following the date of this Decision.

BACKGROUND

According to the facts alleged in the complaints, Torres is employed by Grays Harbor County as a Community Health Worker I. Torres' job position is in a bargaining unit that is represented by WSCCCE.

Torres alleges that in December 2012 the employer discouraged her from applying for a job position and provided her with misinformation about the required qualifications for the position.

On two occasions, in 2014 and March of 2016, Torres requested that the employer reclassify her job position to a Community Health Worker II. On both occasions the employer denied Torres' reclassification request. Torres argues that her combination of work experience and education qualified her for the Community Health Worker II position.

In the summer of 2016, Torres made a public records request. On August 17, 2016, the employer provided Torres with a DVD of the records she requested. Torres alleges that she could not initially open the files, but after going to a computer store 7 to 10 days after receiving the DVD she was able to open the files. Upon reviewing the emails Torres discovered that the employer appeared to be displeased with her involvement in encouraging co-workers to file grievances. The emails lead Torres to believe that the employer's decision to deny her reclassification was in retaliation for her union activity. Torres had been active in the union and previously served as a shop steward and chapter chair. Torres had also helped a co-worker file a grievance in October 2015.

Timeliness- Six Month Statute of Limitations Period

Legal Standard

There is a six-month statute of limitations for unfair labor practice complaints. "[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), citing *City of Bremerton*, Decision 7739-A (PECB, 2003). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice of" the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

The only exception to the strict enforcement of the six-month statute of limitations is when the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Renton*, Decision 12563-A (PECB, 2016) citing *City of Pasco*, Decision 4197-A (PECB, 1994). Under the "discovery rule," the statute of limitations does not begin to run until

the complainant, using reasonable diligence, would have discovered the cause of action. *U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wn.2d 85, 92 (1981). The doctrine of equitable tolling requires the exercise of reasonable diligence on the part of the complainant. *Adult Residential Care, Inc.*, 344 NLRB 826 (2005). The party asserting that the equitable tolling doctrine should apply bears the burden of proof. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 (2009). To prove that the statute should be tolled, the complainant would need to show deception or concealment of the facts forming the basis of the unfair labor practice complaint and the exercise of diligence by the complainant. *City of Renton*, Decision 12563-A citing *Millay v. Cam*, 135 Wn.2d 193, 206 (1998).

Analysis

To determine timeliness, the Commission looks at the dates of events in the complaint in relation to the filing date. The complaint was filed on February 15, 2017. In order to be timely, the complainant needs to describe triggering events that took place on or after August 15, 2016.

The allegations against the employer in 2012 and 2014 appear to have taken place well outside of the statute of limitations period. The complaints do not describe concealment of these actions. The complaint and amended complaint do not describe any reason why the complainant could not have made a public records request in December 2012 when she was discouraged from applying for a job position or in September 2014, when her request for position reclassification was denied. I am dismissing these allegations because they are untimely filed.

The March 2016 employer discrimination allegation has an interrelated deception or concealment argument, which is related to information obtained from a records request in August 2016. While the timeliness of this allegation is not entirely clear, the complaint raises material issues of fact regarding when the complainant knew or reasonably should have known of the alleged discrimination. These types of factual issues regarding concealment and the appropriate triggering date are factual issues that should be decided by an examiner.

ORDER

1. Assuming all of the facts alleged to be true and provable, the complaint and amended complaint state a cause of action, summarized as follows:

Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] in March 2016, by denying Torres' request for position reclassification in reprisal for union activities protected by Chapter 41.56 RCW.

This allegation of the complaint and amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

2. The employer shall:
 - File and serve their answers to the allegations listed in paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

- a. Specifically admit, deny, or explain each fact alleged in the complaint and amended complaint, as set forth in paragraph 1 of this Order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial.
- b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the complaint and amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a

fact alleged in the complaint and amended complaint, will be deemed to be an admission that the fact is true as alleged in the complaint and amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

3. The allegations of the complaint and amended complaint in Case 128790-U-17 concerning Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] in December 2012, by discouraging Torres' from applying for a job position and providing misinformation and in September 2014, denying Torres' request for position reclassification, and other unfair labor practices, are DISMISSED for failure to state a timely cause of action.

ISSUED at Olympia, Washington, this 12th day of May, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA J. BRADLEY, Unfair Labor Practice Manager

Paragraph 3 of this order will be the final order of the agency on any defective allegations, unless a notice of appeal is filed with the Commission under WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 05/12/2017

DECISION 12691 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBER: 128790-U-17

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