

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DON DURKEE, Complainant, vs. CITY OF UNION GAP, Respondent.	CASE 128838-U-17 DECISION 12728 - PECB ORDER OF DISMISSAL
DON DURKEE, Complainant, vs. WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Respondent.	CASE 128839-U-17 DECISION 12729 - PECB ORDER OF DISMISSAL

On March 13, 2017, Don Durkee (complainant) filed complaints charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Union Gap (employer) and Washington State Council of County and City Employees (union) as respondents. The complaints were reviewed under WAC 391-45-110,¹ and a deficiency notice was issued on April 17, 2017, indicating that it was not possible to conclude that a cause of action existed at that time. The complainant was given a period of 21 days in which to file and serve amended complaints, or face dismissal of the cases.

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.

On May 17, 2017, the complainant filed amended complaints. The Unfair Labor Practice Manager has reviewed the allegations of the complaints and amended complaints and dismisses these cases for failure to state a cause of action.

ISSUES

The amended complaints allege:

1. In August through December 2015 the employer created a hostile work environment towards Don Durkee.
2. Union breach of duty of fair representation in August through December 2015 by failing to investigate or launch a formal complaint alleging the employer created a hostile work environment towards Durkee.
3. December 2015 employer interference with Durkee's ability to vote on ratification of the 2016-2018 collective bargaining agreement (CBA), by placing Durkee on administrative leave during the time the new CBA was negotiated.
4. Employer violation of Durkee's Loudermill rights by placing Durkee on administrative leave in December 2015.
5. Employer violation of CBA by directing a grievance settlement offer to employee's private legal counsel, rather than to the union representative.
6. On February 27, 2017, the employer and union had a mediation meeting and failed to advise Durkee of the meeting.
7. Wrongful termination of Durkee's employment in violation of ADA and FMLA laws.
8. On an unspecified date, unspecified co-workers expressing fear of termination if they were found to be in communication with Durkee.
9. Union breach of duty of fair representation by advising Durkee that the union was filing for arbitration on his behalf, when no such filing has been made.

ANALYSIS

Statute of Limitations

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).

Events Before September 13, 2016, are Untimely

To determine timeliness the Commission looks at the dates of events in the complaints in relation to the filing date of the complaints. The Commission only has the power and authority to evaluate and remedy an unfair labor practice if the complaints are filed within six months of the occurrence. The complaints were filed on March 13, 2017. In order to be timely, the complainant needs to describe triggering events that took place on or after September 13, 2016.

The first four allegations of the complaint took place in 2015. The allegations that the employer created a hostile work environment towards Don Durkee, that the union failed to investigate or launch a formal complaint alleging the employer created a hostile work environment towards Durkee, interference with Durkee’s ability to vote on ratification of the 2016-2018 collective bargaining agreement (CBA), and violation of Loudermill rights by placing Durkee on administrative leave in December 2015 are dismissed for being untimely filed.

Harassment/Intimidation Allegation Lacks Dates and Details

Paragraph 7 of the amended complaint alleges that on an unspecified date, unspecified co-workers expressed fear of termination if they were found to be in communication with Durkee. The complaint alleges that the union has not been willing to take action regarding this situation. It is not clear when these conversations took place. There is also no action described that is

attributable to the employer. Dates of occurrence are necessary to allow the charged parties to respond to the allegations. Dates of occurrence are also necessary to determine whether these allegations fall within the six-month statute of limitations period. This allegation is being dismissed because it lacks information required for further case processing.

PERC does not Enforce Whistleblower Laws

The complaints also allege violations of RCW 42.40.035. The Public Employment Relations Commission does not have the authority to address alleged violations of the State Employee Whistleblower Protection laws. The Washington State Auditor's Office (SAO) enforces the whistleblower aspects of RCW 42.40. These laws address whistleblowing by state employees. To file a state employee whistleblower complaint, you can contact the Whistle Blower Program administered by State Auditor's Office. The Washington State Human Rights Commission also has jurisdiction over whistleblower workplace reprisal or retaliatory action.

Alleged Violation of Collective Bargaining Agreement

The complaint alleges the employer violated the CBA by directing a grievance settlement offer to Durkee's private legal counsel, rather than to the union representative. The Commission has consistently refused to resolve "violation of contract" allegations or attempts to enforce a provision of a collective bargaining agreement through the unfair labor practice provisions it administers. *Anacortes School District*, Decision 2464-A (EDUC, 1986), citing *City of Walla Walla*, Decision 104 (PECB, 1976). The Commission has consistently held that any remedy for a contract violation will have to come through the grievance and arbitration machinery of that contract, or through the superior courts. *South Whidbey School District*, Decision 11134-A (EDUC, 2011) citing *Tacoma School District*, Decision 5722-E (EDUC, 1997).

Duty of Fair Representation

Applicable Legal Standard

The Commission is vested with authority to ensure that exclusive bargaining representatives safeguard employee rights. The Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute and

does not assert jurisdiction over breach of duty of fair representation claims arising exclusively out of the processing of contractual grievances. *Bremerton School District*, Decision 5722-A (PECB, 1997). While the Commission does not assert jurisdiction over “breach of duty of fair representation” claims arising exclusively out of the processing of contractual grievances, the Commission does process other types of “breach of duty of fair representation” complaints against unions. *City of Port Townsend (Teamsters Local 589)*, Decision 6433-B (PECB, 2000). A union breaches its duty of fair representation when its conduct is more than merely negligent; it must be arbitrary, discriminatory, or in bad faith; or be based on considerations that are irrelevant, invidious, or unfair. *City of Redmond*, Decision 886 (PECB, 1980); *Vaca v. Sipes*, 386 U.S. 171 (1967). The employee claiming a breach of the duty of fair representation has the burden of proof. *City of Renton*, Decision 1825 (PECB, 1984).

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Washington State Supreme Court adopted three standards to measure whether a union has breached its duty of fair representation:

1. The union must treat all factions and segments of its membership without hostility or discrimination.
2. The broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty.
3. The union must avoid arbitrary conduct.

Each of these requirements represents a distinct and separate obligation.

Application of Standard

The complaints and amended complaints allege that the union interfered with Durkee's right to participate in a grievance mediation meeting. Durkee alleges that on an unspecified date the union unfairly prevented him from attending mediation to discuss a grievance that he filed. Durkee alleges that the union did not give him enough advance notice about the meeting date. Durkee was frustrated that the union would not reschedule the grievance mediation meeting to a later date that would allow him to participate. The complaints express frustration with the union's

scheduling communications. However, the complaints do not describe a breach of duty of fair representation.

The allegation of union breach of duty of fair representation by advising Durkee that the union was filing for arbitration on his behalf, when no such filing has been made, is specific to grievance processing. As the case law explained above, “the Commission does not assert jurisdiction over ‘breach of duty of fair representation’ claims arising exclusively out of the processing of contractual grievances. . . .” *City of Port Townsend (Teamsters Local 589)*, Decision 6433-B.

While an exclusive bargaining representative has the obligation to provide fair representation, the courts have recognized a wide range of flexibility in the standard to allow for union discretion in settling disputes. *Allen*, 100 Wn.2d at 375. There is no statutory requirement that a union must accomplish the goals of each bargaining unit member, and complete satisfaction of all represented employees is not expected. A union member’s dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the member can prove the union violated rights guaranteed in statutes administered by the Commission. *Dayton School District (Dayton Education Association)*, Decision 8042-A (EDUC, 2004).

Wrongful Termination under ADA

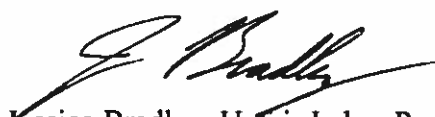
The complaint alleges that the employer’s decision to terminate Durkee’s employment was based in part on medical conditions that are protected by the ADA and FMLA. The Public Employment Relations Commission does not have jurisdiction to enforce the Americans with Disabilities Act (ADA) or the Family Medical Leave Act (FMLA). The only type of discrimination that the Commission can address is discrimination for engaging in (or refraining from) protected union activity. The complaint does not allege that Durkee was discriminated against for engaging in protected union activity. The complainant can file complaints of discrimination for an ADA protected status with the Equal Employment Opportunity Commission (EEOC) or the Washington State Human Rights Commission.

ORDER

The complaints and amended complaints charging unfair labor practices in the above-captioned matters are DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 15th day of June, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'J. Bradley', is written over the printed name.

Jessica Bradley, Unfair Labor Practice Manager

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

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

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 06/15/2017

DECISION 12728 – PECB and DECISION 12729 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: DEBBIE BATES

CASE NUMBERS: 128838-U-17 and 128839-U-17

EMPLOYER: CITY OF UNION GAP
ATTN: ROGER WENTZ
102 W AHTANUM RD
PO BOX 3008
UNION GAP, WA 98903-0008
ugmayor@cityofuniongap.com
(509) 575-3799

PARTY 2:
ATTN: DON DURKEE
509 SUNRISE PLACE
SELAH, WA 98942
(509) 833-1969

PARTY 3:
ATTN: WSCCCE
CHRIS DUGOVICH
PO BOX 750
EVERETT, WA 98206-0750
c2everett@council2.com
(425) 303-8818