STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEVEN J. NELSON, Complainant, vs. STATE – AGRICULTURE, Respondent.	CASE 130656-U-18 DECISION 12886 - PSRA ORDER OF DISMISSAL

On May 25, 2018, Steven J. Nelson filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC) under Chapter 391-45 WAC, naming the Washington State Department of Agriculture (employer) as respondent. The complaint was reviewed under WAC 391-45-110,[1] and a deficiency notice issued on June 11, 2018, indicating that it was not possible to conclude that a cause of action existed at that time. Nelson was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On June 18, 2018, Nelson filed a first amended complaint. On June 19, 2018, Nelson filed a second amended complaint. The Unfair Labor Practice Administrator dismisses the second amended complaint for failure to state a cause of action.

ISSUE

The second amended complaint alleges:

[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.

> Employer discrimination in violation of RCW 41.80.110(1)(c)[2] [and if so derivative interference in violation of RCW 41.80.110(1)(a)] by terminating Steven J. Nelson.

The second amended complaint is untimely and does not describe facts that could constitute violations within the Commission's jurisdiction.

BACKGROUND

The Washington Federation of State Employees (union) represents employees who work for the employer. Nelson was a member of the union and worked for the employer until he was allegedly terminated on August 23, 2017. The union allegedly filed a grievance on Nelson's behalf on or about September 6, 2017. The employer also allegedly prosecuted Nelson through the Employment Security Administrative Hearings Process. Nelson alleges he did not know of his statutory rights under RCW 41.80 until the past 45-50 days.

ANALYSIS

Timeliness

Applicable Legal Standard

The rules for contents of complaint are contained in WAC 391-45-050. WAC 391-45-050(2) requires the complainant to submit "[c]lear and concise statements of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." There is a six-month statute of limitations for unfair labor practice complaints. RCW 41.80.120(1) governs the time for filing complaints:

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That 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. This power shall not be affected or impaired by any means of adjustment, mediation, or conciliation in labor disputes that have been or may hereafter be established by law.

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2 The second amended complaint references Chapter 47.64 RCW. Chapter 47.64 RCW applies to employees of the Washington State Ferry system. The complainant worked for the Washington State Department of Agriculture and Chapter 41.80 RCW applies.

The Commission has ruled multiple times on statute of limitations questions involving unfair labor practice complaints. The six-month statute of limitations begins to run when the complainant knows, or should have known, of the violation. *State – Corrections,* Decision 11025 (PSRA, 2011), *citing City of Bremerton*, Decision 7739-A (PECB, 2003).

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 equitable tolling 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).

The Commission has also ruled that the statute of limitations begins to run when an adverse employment action is communicated to employees and where the employer does not attempt to conceal its actions, even if the exclusive bargaining representative did not have actual notice of the alleged violation. *State – Corrections*, Decision 11025, *citing City of Chehalis,* Decision 5040 (PECB, 1995).

Application of Standard

To determine timeliness, the Commission looks at the dates of events in the complaint or amended complaint in relation to the filing date. The complaint was filed on May 25, 2018. In order to be timely, the complainant would have needed to describe events that took place on or after November 25, 2017. According to the second amended complaint, Nelson was terminated on August 23, 2017. Nelson had actual knowledge of his termination on August 23, 2017. While Nelson alleges in the second amended complaint that he did not know of his statutory rights under

RCW 41.80 until the past 45-50 days, RCW 41.80.110(1)(c) does not allow for the statute of limitations to be extended because an individual or organization did not know about their statutory rights. Nelson should have taken steps to file a complaint no later than close of business on February 23, 2018, in order to keep his rights alive under the unfair labor practice procedure. The facts as alleged occurred more than six months before the complaint was filed with the Commission. Thus the second amended complaint is dismissed.

Discrimination

Applicable Legal Standard

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(c). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 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. *Washington State University*, Decision 11749-A (PSRA, 2013), *citing 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).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory 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. *Id.*

Application of Standard

The second amended complaint lacks facts alleging an employer discrimination violation. A cause of action for discrimination under RCW 41.80.110(1)(c) will be given if the statement of facts indicates that an employer has deprived an employee of ascertainable rights, benefits, or status, in reprisal for the employee's protected union activities. In the present case, the second amended complaint alleges Nelson was terminated on August 23, 2017. The second amended complaint also alleges that Nelson filed a grievance on or about September 6, 2017. The filing of the grievance (alleged protected activity) occurred after the termination. The second amended complaint does not identify how the employer's termination of Nelson was in reprisal for the alleged protected activity. Thus the second amended complaint is dismissed.

ORDER

The second amended complaint charging unfair labor practices in the above captioned matter is DISMISSED for failure to state a cause of action.

ISSUED at Olympia, Washington, this 10th day of July, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Emily K. Whitney

EMILY K. WHITNEY, Unfair Labor Practice Administrator

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.

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

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RECORD OF SERVICE - ISSUED 07/10/2018

DECISION 12886 - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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