STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEPHANIE SWAZER, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 130655-U-18 DECISION 12891 - PSRA ORDER OF DISMISSAL

On May 22, 2018, Stephanie Swazer filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the University of Washington (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. Swazer was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case. No further information has been filed by Swazer.

The allegations of the complaint concern:

(1) Employer general contract violations.

(2) Employer interference with employee rights in violation of RCW 41.80.110(1)(a), within six months of the date of the filing of the complaint, by informing Stephanie Swazer that she did not need a union representative (*Weingarten* right) present during a May 2018 meeting.

(3) Employer discrimination in violation of RCW 41.80.110(1)(c), [and if so, derivative interference in violation of 41.80.110(1)(a)],within six months of

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.

> the date of the filing of the complaint, by retaliating against the complainant for attempting to enforce the job class provisions of the parties' collective bargaining agreement.

The complaint is dismissed for failure to state causes of action that could constitute violations within the Commission's jurisdiction.[2] This Commission lacks jurisdiction to address Swazer's allegations that the employer violated the collective bargaining agreement. Swazer's complaint also fails to allege facts demonstrating that the employer interfered with her *Weingarten* rights or discriminated against her for exercising protected activity.

BACKGROUND

The employer and the Washington Federation of State Employees (union) are parties to a collective bargaining agreement that contains provisions for Corrective Action/Dismissal (Article 36), Classification and Reclassification (Article 44), Compensation, Wages and Other Pay Provisions (Article 45), and Staffing Concerns (Article 48). Swazer allegedly works as a medical assistant at the University of Washington in the Sleep Medicine Clinic and is represented by the union.

On April 24, 2018, Swazer allegedly submitted paperwork under Article 45 of the agreement requesting lead medical assistant pay under the Career Enhancement/Growth Program provisions of the collective bargaining agreement. The employer's compensation officer allegedly returned the paperwork to Swazer on April 26, 2018, because her supervisor had neither approved nor denied the request. Swazer allegedly forwarded the information to Brett Thomazin to sign. Thomazin allegedly declined to forward the request for further processing because Swazer had not "developed skills, increased productivity, or assumed higher level duties" that warranted a pay increase. On May 4, 2018, Swazer allegedly received an e-mail informing her that her Career Enhancement/Growth Program request was denied.

On May 7, 2018, Swazer allegedly informed the clinic by e-mail that she would no longer perform certain duties that Swazer believed were outside of her medical assistant job duties. On that same day, it appears that Thomazin directed Swazer, by e-mail, to perform all of her current duties,

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2 Swazer's complaint also failed to request a specific remedy as required by WAC 391-45-050(3).

because he believed that all of her current job duties were part of the medical assistant role. Swazer responded that she looked forward to a meeting with Thomazin, at which her union representative would be present.

On May 8, 2018, Thomazin sent an e-mail to Swazer that, once again, directed her to perform her current duties and informed her that a failure or refusal to do so would result in corrective action up to and including dismissal. In another e-mail that same day, Thomazin directed Swazer to attend a May 9, 2018, meeting with a human resources representative. Thomazin allegedly informed Swazer that she did not need a union representative at the meeting because no corrective action would be taking place.

ANALYSIS

Contract Violations

Applicable Legal Standard

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 interprets and administers collective bargaining statutes but does not act in the role of arbitrator to interpret or enforce collective bargaining agreements. *State – Corrections (Teamsters Local 313)*, Decision 8581 (PSRA, 2004), *citing Clallam County*, Decision 607-A (PECB, 1979); *City of Seattle*, Decision 3470-A (PECB, 1990); *Bremerton School District*, Decision 5722-A (PECB, 1997).

Application of Standard

The Commission does not have jurisdiction to address alleged violations of the parties' collective bargaining agreement. Swazer's allegations that the employer violated provisions of the collective bargaining agreement is dismissed.

Interference

Applicable Legal Standards

Generally, the burden of proving unlawful interference with the exercise of rights protected by Chapter 41.80 RCW rests with the complaining party or individual. An interference violation exists when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). The complainant is not required to demonstrate the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *See City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Employees have the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Seattle School District*, Decision 10732-A (PECB, 2012); *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975). In *Okanogan County*, Decision 2252-A (PECB, 1986), the Commission held that the rights announced in *Weingarten* are applicable to employees who exercise collective bargaining rights under Chapter 41.80 RCW. *See also Methow Valley School District*, Decision 8400-A (PECB, 2004).

As examiners explained in *Washington State Patrol*, Decision 4040 (PECB, 1992) and *Seattle School District*, Decision 10066-B (PECB, 2010), four elements are necessary for *Weingarten* rights to apply:

1. The right to representation attaches only where the employer compels the employee to attend an investigatory meeting.

2. A significant purpose of the interview must be (or becomes) obtaining facts related to a disciplinary action.

3. The employee must reasonably believe potential discipline might result from the information obtained during the interview. *Mason County*,

Decision 7048 (PECB, 2000).

4. The employee must request the presence of a union representative.

An employee has a right to union representation at an "investigatory" interview that the employee reasonably believes could result in discipline. *City of Bellevue*, Decision 4324-A (PECB, 1994), *citing National Labor Relations Board v. Weingarten*, 420 U.S. 251; *Okanogan County*, Decision 2252-A. It is the nature of an "investigatory" interview that the employer is seeking information from the employee. A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. *City of Bellevue*, Decision 4324-A. Discipline often can and does result from "investigatory" meetings, and the Commission has found interviews to be "investigatory" where they were part of an investigation concerning improper conduct. *Snohomish County*, Decision 4995-B (PECB, 1996). If the interview is not investigatory in nature, *Weingarten* rights do not apply.

Application of Standards

Swazer's complaint lacks facts alleging employer interfered with her *Weingarten* rights. The complainant alleges that the employer requested a meeting with Swazer on May 9, 2018. Although Swazer alleges that she reasonably believed that discipline could result from that meeting, the complaint lacks facts as to whether the meeting actually occurred. The complaint also lacks facts as to what occurred during the meeting and whether the meeting was investigatory in nature. Finally, the complaint alleges Swazer requested that a union representative be present at any future meeting between her and Thomazin but lacks facts as to whether Swazer specifically requested a union representative at the May 9 meeting or whether Thomazin denied that request. The complaint does not state a cause of action for employer interference with *Weingarten* rights and is therefore 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

41.80 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 that:

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 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 pretext or that union animus was a substantial motivating factor behind the employer's actions. *Id.*

Application of Standard

Swazer's complaint fails to allege specific facts demonstrating that she was engaged in protected activity. The complaint also lacks facts alleging the employer retaliated against her for exercising protected activity. While the complaint does allege that Thomazin denied Swazer's Career Enhancement/Growth Program request, the complaint does not allege that the denial was causally

connected to Swazer's exercise of protected activity. The complaint does not state a cause of action for employer discrimination and is therefore dismissed.

ORDER

The 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 13th day of July, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, 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
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RECORD OF SERVICE - ISSUED 07/13/2018

DECISION 12891 - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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