

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY, ROBERT LEE KING COUNTY SECURITY GUILD	Employer. Complainant, vs. Respondent.	CASE 130434-U-18 DECISION 12907 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
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Desmond D. Kolke, Attorney at Law, Law Offices of Desmond Kolke, for Robert Lee.

Spencer Nathan Thal, Attorney at Law, Vanguard Law, LLC, for the King County Security Guild.

The main allegations in this case are that the union interfered with an employee's rights and breached its duty of fair representation when the union failed to file a grievance before the end of its contractual timeline. The King County Security Guild (union) filed a motion for summary judgment requesting dismissal of this case.

ISSUES

This case raises two issues:

1. Is there no genuine issue of any material fact in dispute where the union would then be entitled to judgment as a matter of law?

2. Did the union breach its duty of fair representation to Robert Lee by favoring one employee over another based on gender?

First, I grant the union's motion. There are no material facts in dispute. Second, the complainant did not meet his burden to prove that the union interfered with employee rights by breaching its duty of fair representation. The case is dismissed.

BACKGROUND

Robert Lee works in the Facilities Management Division-Security at the Maleng Regional Justice Center in Kent, Washington. On February 9, 2018, Lee filed an amended unfair labor practice complaint against the union alleging that the union breached its duty of fair representation by favoring a female employee, Lynn Lester, over Lee based on his gender when the union failed to file his grievance in a timely manner.¹ The complaint was given a preliminary ruling on February 14, 2018. The union filed a motion for summary judgment on May 7, 2018.

This case concerns Lee's belief that the failure of the union to file his grievance in a timely manner is a direct result of the union president, Ted Griffin, favoring a female bargaining unit member over himself. To support his assertion, Lee submitted a disciplinary investigation from October 2015 in which Lester and the union president were found in a dark room watching a video on Griffin's phone. The employer gave Lester a written reprimand for that incident. In April 2016 the employer terminated Lester for falling asleep at work. After a successful arbitration, the employer reinstated Lester to her position.

Lester's departure created an opening in the work schedule and a shift that Lee wanted to fill. Lee bid for and received Lester's shift schedule. Upon reinstatement, Lester returned to her shift. Lester believed that Lee's losing the shift upset him and that he retaliated against her by refusing

¹ On October 30, 2017, Lee filed an unfair labor practice complaint against the union. The unfair labor practice manager found the complaint deficient. The complaint did not state a cause of action for a duty of fair representation claim within the Commission's jurisdiction. For a duty of fair representation complaint alleging discrimination to fall within the Commission's jurisdiction, the complaint needed to include information showing that the "union took some action aligning itself against bargaining unit employees on an improper or invidious basis, such as union membership, race, sex, national origin, etc."

to work with her, intimidating her, and avoiding her during work hours. Lester filed a complaint with the employer, who conducted an investigation. In the investigation report written on August 3, 2017, many of the claims were found to be unsubstantiated. Prior to issuing the report, however, the employer (wanting to avoid any further animosity) removed Lee from an overtime shift on June 20, 2017, where he was scheduled to work with Lester.

Lee stated in his complaint that on June 20, 2017, he served a notice of intent to grieve to shop steward Collin Sanders for the loss of this overtime shift. Sanders worked with union vice president Deryl King in processing the grievance. In an e-mail from the employer to the union, human resources manager Denise Gregory Wyatt acknowledged that Sanders wrote and signed the grievance in preparation for delivery on August 11, 2017. However, Sanders left for vacation and the grievance was not delivered to the employer before the 14-day grievance deadline.

While the employer did not accept the untimely grievance, the union did pursue negotiations with the employer at Step 1 of the grievance process and secured two settlement options. The employer offered Lee the opportunity to work an equivalent eight-hour overtime shift on another day or be paid two hours of overtime without having to work. Lee accepted neither. In a declaration of support filed by the union, King stated that the union decided not to advance the grievance to Step 2. He did not believe it would be successful since the employer gave Lee more than three hours of advance notice of cancellation pursuant to the Collective Bargaining Agreement.

ANALYSIS

Issue 1: Summary Judgment Is Appropriate

Applicable Legal Standards

An examiner may grant a motion for summary judgment “if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” WAC 10-08-135. The courts and the Commission define a material fact as one upon which the outcome of the litigation depends. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243 (1993); *State – General Administration*, Decision 8087-B (PSRA, 2004). The

Commission applies the same standards in ruling on motions for summary judgment as do Washington courts. *State – General Administration*, Decision 8087-B.

When the moving party shows that there are no genuine issues as to any material fact, the nonmoving party bears a responsibility to present evidence demonstrating that there are material facts in dispute. *City of Seattle (Seattle Police Management Association)*, Decision 12091 (PECB, 2014). Consistent with Civil Rule 56, if the nonmoving party fails to do so, summary judgment may then be appropriate. *Id.*; *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506 (1990). Civil Rule 56(e) specifically states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Commission does not grant summary judgment motions lightly since doing so involves making a final determination without the benefit of a hearing. *City of Orting*, Decision 7959-A (PECB, 2003). In ruling on a motion for summary judgment, the Commission must consider the material evidence and all reasonable inferences most favorably to the nonmoving party and deny the motion if reasonable people might reach different conclusions as to the facts. *Paul D. Wood v. City of Seattle*, 57 Wn.2d 469 (1960).

Application of Standards

The threshold issue in this case is whether summary judgment is appropriate. Summary judgment is appropriate because there is no genuine dispute as to any material fact; the parties only disagree on the conclusions drawn from the facts. The crux of this case is whether the union's representative, Sanders, failed to mail Lee's grievance in a timely manner based on Lee's gender. There is no dispute that the grievance concerned Lee losing an overtime shift. Lee lost the June 20th overtime shift because the employer did not want him working with Lester. In support of his response to this motion for summary judgment, Lee provided the investigative report for Lester's claim that Lee retaliated against her for taking his regular shift. The contents of the

report provide an explanation why the employer did not want the two employees working together. Both parties agree that Lee made a timely request to process the grievance and that Sanders was responsible for sending the employer the grievance but failed to do so in a timely manner. Additionally, there is no dispute that the employer rejected the grievance as untimely or that the employer and union ultimately negotiated multiple settlement options. Neither party disputes that Lee rejected the settlement options.

Lee stated in his response to the motion for summary judgement that there is no dispute that the union breached its duty of fair representation, that the discriminatory treatment arose from an incident involving Lester and the union president, and that the union's failure to timely process his grievance endorsed Lester's and the employer's actions against Lee. These statements are not facts but, rather, they are subjective speculations. Summary judgement only requires that there be no dispute over material facts. Therefore, Lee's assertions do not pertain to the test to determine whether summary judgment is appropriate.

Even though Lee presented more than one hundred pages of evidence to highlight Lester's past disciplinary record as evidence of discrimination against Lee, I do not believe that this evidence is enough to elevate Lee's argument to carry his burden of proof. In his motion, Lee made no connection between Lester's past disciplinary issues and evidence that would be relevant in supporting a duty of fair representation claim. The facts relevant to this case are not in dispute.

Issue 2: No Breach in Duty of Fair Representation

Applicable Legal Standards

A union commits an unfair labor practice if it interferes with, restrains, or coerces public employees in the exercise of their rights. RCW 41.56.150(1). One way unions can violate RCW 41.56.150(1) is by breaching their duty of fair representation. A union breaches its duty of fair representation under RCW 41.56.150(1) when its conduct toward one of its members is arbitrary, discriminatory, or in bad faith. *City of Redmond (Redmond Employees Association)*, 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 and must demonstrate

that the union's actions or inactions were arbitrary, discriminatory, or in bad faith. *City of Renton (Washington State Council of County and City Employees)*, Decision 1825 (PECB, 1984).

The Commission asserts jurisdiction in duty of fair representation cases when an employee alleges its union aligned itself in interest against employees it represents based on invidious discrimination. *City of Seattle (Seattle Police Officers' Guild)*, Decision 11291-A (PECB, 2012). In such cases, the employee bears the burden of establishing that the union took some action aligning itself against bargaining unit employees on an improper or invidious basis, such as union membership, race, sex, national origin, etc. *Id.*

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).

Application of Standards

Lee did not meet his burden of proof to show that the union's failure to file his grievance in a timely manner resulted from a breach of its duty of fair representation that can be adjudicated under the Commission's jurisdiction. Lee does not present any evidence demonstrating that Sander's failure to send out his grievance before he went on vacation, or the union's decision not to pursue the grievance, stems from discrimination against him based on gender. Nor does Lee show that the union acted in an arbitrary manner or in bad faith. The union did not pursue the grievance because the employer did not violate any provisions of the contract when it cancelled Lee's overtime shift, and the union did not believe the case would be successful in arbitration.

First, Lee did not provide any evidence showing that the union acted in an arbitrary manner when it did not send out his grievance on time. In *Air Line Pilots Association v. O'Neill*, 499 U.S. 65 (1991), the court found that for a union to act in an arbitrary manner, its behavior must be "so far outside a wide range of reasonableness as to be irrational." Lee did not provide any evidence that the union, through Sanders, acted so irrationally that there could be no explanation as to why his grievance was not filed on time. Lee was unable to meet his burden of proof demonstrating that the union acted arbitrarily in delaying the filing of his grievance.

Second, Lee did not provide any evidence showing that the union interfered and breached its duty of fair representation based on his gender. Lee asserts that Lester's previous history with the union president, the union's successful arbitration, and Lester's subsequent reinstatement show that the union favored Lester over Lee. This assertion alone is not enough to establish a claim of invidious discrimination. Lee shows no evidence of any disparaging comments or documents that relate to gender discrimination nor does he bring forward any evidence demonstrating that other similarly situated employees were treated differently based on their gender. Additionally, no other evidence was brought forward that the union discriminated against Lee based on other forms of discrimination, such as union membership, race, national origin, etc. No reasonable person would make the connection that Griffin or Sanders favored Lester over Lee based on gender and that this presumed discrimination was the reason why Lee's grievance was not timely filed.

Third, Lee provided no evidence that the union acted in bad faith. Rather, through King's declaration, King said the union pursued the grievance even after concluding that Lee did not have a valid grievance for cancelled overtime hours because there was no breach of contract. Still, King negotiated with the employer, who then offered Lee two different settlement options, which Lee ultimately did not take. The union decided not to continue past the Step 1 grievance process because it did not believe winning at arbitration would be a likely outcome. The union did not act in bad faith when it pursued this grievance through Step 1 and worked with the employer to achieve a settlement agreement but ultimately decided not to continue the grievance process.

Last, even though the union failed to mail out the grievance in a timely fashion, this mistake alone does not rise to the level of violating the duty of fair representation. In *Steamfitters Local 342*, 336 NLRB 549 (2001), a case involving hiring hall practices, the National Labor Relations Board ruled that inadvertent mistakes arising from mere negligence in the operation of an exclusive hiring hall does not violate the union's duty of fair representation. This rule can be applied to other circumstances in which union representatives fail to perform adequately but still do not breach a union's duty of fair representation. In the present case, Sanders did not follow through on mailing out, or making sure someone else mailed out, Lee's grievance before the timeline expired. Lee presented no evidence showing that the late filing was due to Lee's gender. Rather, it appears that the late filing occurred because of Sanders' forgetfulness or carelessness.

CONCLUSION

There is no dispute over any genuine issue of material fact nor are any of the supporting documents in contradiction to this claim. The union did not interfere with Lee's rights under RCW 41.56.150(1), and Lee was unable to carry his burden of proof to show that the union acted arbitrarily, discriminatorily, or in bad faith when a union representative filed his grievance after the contractual timeline. As a result, I grant the union's motion for summary judgment and dismiss the complaint.

FINDINGS OF FACT

1. Robert Lee works in the Facilities Management Division-Security at the Maleng Regional Justice Center in Kent, Washington.
2. On February 9, 2018, Lee filed an amended unfair labor practice complaint against the union alleging that the union breached its duty of fair representation by favoring a female employee, Lynn Lester, over Lee based on his gender when the union failed to file his grievance in a timely manner.
3. The complaint was given a preliminary ruling on February 14, 2018.
4. The union filed a motion for summary judgment on May 7, 2018.
5. Lee submitted a disciplinary investigation from October 2015 in which Lester and the union president, Ted Griffin, were found in a dark room watching a video on Griffin's phone.
6. In April 2016 the employer terminated Lester for falling asleep at work.
7. After a successful arbitration, the employer reinstated Lester to her position.

8. Lee bid for and received Lester's shift schedule in her absence. Upon reinstatement, Lester returned to her shift. Lester believed that Lee's losing the shift upset him and that he retaliated against her by refusing to work with her, intimidating her, and avoiding her during work hours.
9. The employer removed Lee from an overtime shift on June 20, 2017, where he was scheduled to work with Lester.
10. Lee stated in his complaint that on June 20, 2017, he served a notice of intent to grieve to shop steward Collin Sanders for the loss of this overtime shift.
11. Sanders left for vacation and the grievance was not delivered to the employer before the 14-day grievance deadline.
12. The union pursued negotiations with the employer at Step 1 of the grievance process and secured two settlement options.
13. Lee accepted neither of the settlement options bargained by the union and employer.
14. The union decided not to advance the grievance to Step 2.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.
2. According to findings of fact 3 through 14, no genuine issue of material fact exists under WAC 10-08-135 and the King County Security Guild is entitled to judgment as a matter of law.


3. Lee did not meet his burden of proof to show that the union's failure to file his grievance in a timely manner resulted from a breach of its duty of fair representation that can be adjudicated under the Commission's jurisdiction.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 22nd day of August, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



ELIZABETH SNYDER, Examiner

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

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DECISION 12907 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:



BY: AMY RIGGS

CASE NUMBER: 130434-U-18

EMPLOYER: KING COUNTY

REP BY: KRISTI D. KNIEPS
KING COUNTY
OFFICE OF LABOR RELATIONS
500 4TH AVE RM 450
SEATTLE, WA 98104
kristi.knieps@kingcounty.gov
(206) 477-1896

PARTY 2: ROBERT LEE

REP BY: ROBERT LEE

15707 4TH AVE S. #31
BURIEN, WA 98148
mcq1974@comcast.net
(206) 371-4821

DESMOND D. KOLKE
LAW OFFICES OF DESMOND D. KOLKE
1201 PACIFIC AVE S #600
TACOMA, WA 98402

888.631.6957

PARTY 3: KING COUNTY SECURITY GUILD

REP BY: TED GRIFFIN
KING COUNTY SECURITY GUILD
PO BOX 4491
SEATTLE, WA 98104
damon103@yahoo.com
(206) 296-0522

SPENCER NATHAN THAL
VANGUARD LAW
PO BOX 939
POULSBO, WA 98370
spencer@vanguardlawfirm.com
(206) 488-8344