STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY REGIONAL AFIS GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 127743-U-15 DECISION 12582-D - PECB DECISION OF COMMISSION

James M. Cline, Attorney at Law, Cline & Associates, for the King County Regional AFIS Guild.

Susan N. Slonecker, Senior Deputy Prosecuting Attorney, and *Lynne J. Kalina*, Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney Daniel T. Satterberg, for King County.

The King County Regional AFIS Guild (union) filed an unfair labor practice (ULP) complaint and amended complaints alleging unilateral change, discrimination, and interference against King County (employer). Examiner Stephen W. Irvin conducted a hearing and issued a decision. *King County*, Decision 12582-A (PECB, 2017). The union appealed the Examiner's decision to the Commission. In *King County*, Decision 12582-B (PECB, 2018),[1] we concluded that Marquel Allen engaged in protected activity by questioning management during a Jail Identification (Jail ID) Unit meeting on November 16, 2015. We remanded the case to the Examiner to determine whether the employer discriminated against Allen when it issued a performance evaluation and changed the evaluation after Allen appealed the evaluation.

On remand, the Examiner concluded that the employer did not discriminate against Marquel Allen when the employer provided Allen an evaluation and after Allen appealed the evaluation made

[1] The employer appealed Decision 12582-B to King County Superior Court. King County 18-2-06869-0.

changes to the evaluation. *King County*, Decision 12582-C (PECB, 2018). The union appealed Decision 12582-C.

The issues before the Commission are whether the employer discriminated against Allen when supervisor Lisa Wray issued an evaluation on March 16, 2016, and whether the employer discriminated against Allen when manager Carol Gillespie changed the evaluation during the appeal process. We reverse the Examiner's conclusion that Wray's evaluation of Allen was not discriminatory. Allen's protected activity was a significant factor in the evaluation; therefore, the evaluation was substantially motivated by Allen's union activity at the November 16, 2015, Jail ID Unit meeting. We affirm the Examiner's conclusion that the union did not establish a prima facie case of discrimination because the evaluation was not final when Gillespie made changes.

BACKGROUND

Allen worked in the King County (employer) Jail ID Unit as an identification technician. Allen was a lead employee in the Jail ID Unit until November 19, 2015. The employer revoked Allen's lead status after she engaged in protected activity by challenging and questioning management and advocating for employees at a Jail ID Unit meeting on November 16, 2015. *King County*, Decision 12582-B (PECB, 2018).

On March 16, 2016, unit supervisor Lisa Wray evaluated Allen. The evaluation had seven categories: leadership, professionalism, service, teamwork, communications, seeks to improve performance, and policies and procedures. The categories had three ratings: needs improvement, meets standards, and exceeds standards. The areas of Allen's evaluation that are relevant to this appeal are leadership, professionalism, teamwork, and communications.

In leadership, Wray rated Allen as meets standards. In professionalism, Wray rated Allen as meets standards. In teamwork, Wray rated Allen as meets standards. In communications, Wray rated Allen as meets standards. Allen did not feel the evaluation was a fair assessment of her work

performance.[2] For comparison, for the February 1, 2014, through January 31, 2015, review period, Wray rated Allen as exceeds standards in leadership, exceeds standards in professionalism, exceeds standards in service, exceeds standards in teamwork, and exceeds standards in communications.[3]

Allen signed the evaluation, indicating that she had received the evaluation. Under the collective bargaining agreement, an employee could challenge the fairness or accuracy of his or her annual performance evaluation.[4] If the supervisor and the employee were unable to reach an agreement, then the employee could appeal to the section commander/manager of the unit.[5]

Allen appealed the evaluation. On March 30, 2016, Wray e-mailed Allen a copy of her appeal, with comments added by Wray. In comment 11, Wray wrote, "I began to lose confidence in November, especially after the unit meeting. I have not been able to counsel you due to the pending investigation and ULP."[6] Allen responded to Wray's comments and asked for changes to the goals section.

On April 7, 2016, Wray responded to Allen. Wray was willing to strike some of the language and work with Allen to revise some language. On April 8, 2016, Allen asked to move the appeal to the next level.

On April 21, 2016, Wray responded to Allen.[7] Wray explained the changes she was willing to make. For the rating in the leadership section, Wray included six specific examples supporting her rating including the Jail ID Unit meeting on November 16, 2015, and the lead meeting on

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2 Transcript Vol. II, at 250:1-6.

3 Union Ex. 75.

4 Union Ex. 4, Article 21, at 31.

5 *Id.*

6 Employer Ex. 13.

7 Employer Ex. 16.

November 17, 2015, during which Wray debriefed the events of November 13, 2015, with Allen and the other lead. For her rating in communications, Wray listed four specific examples including the Jail ID Unit meeting on November 16, 2015.

On April 29, 2016, Allen e-mailed manager Carol Gillespie an appeal letter. On May 13, 2016, Gillespie responded to Allen's appeal.[8] Gillespie added comments to Allen's evaluation. In the leadership category, Gillespie explicitly referenced Allen's conduct at the November 16, 2015, Jail ID Unit meeting. Gillespie explained that exceeds standards was to be used "for truly exceptional work."[9]

On May 16, 2016, Allen appealed the evaluation to the next step. Allen identified her areas of disagreement.

On June 1, 2016, Gillespie responded to Allen. Gillespie was willing to rate Allen as exceeds standards in teamwork. However, to increase the teamwork rating, Gillespie changed Allen's rating in leadership from meets standards to needs improvement.

On June 4, 2016, Allen responded that she was unwilling to accept needs improvement in any category. Allen accepted some of the other changes Gillespie proposed.

On June 6, 2016, Allen asked that the parties agree to suspend the ULP appeal time frame because the evaluation was part of the complaint. Both parties agreed. Allen's appeal of her performance evaluation had not reached finality at the time of the hearing.

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8 Union Ex. 64.

9 Union Ex. 64, at 000696.

ANALYSIS

Applicable Legal Standards

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that

1. the employee participated in protected activity 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 protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 348–349 (2014); *Educational Service District 114*, Decision 4361-A.

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

Application of Standards

The March 16, 2016, evaluation was substantially motivated by union animus.

The union established a prima facie case of discrimination. Allen engaged in protected activity on November 16, 2015. *See King County*, Decision 12582-B. On March 16, 2016, Wray provided

Allen a performance evaluation. That evaluation was a deprivation of an ascertainable right, benefit, or status. A performance evaluation documents employee performance, remains part of the employee file, and can be used by the employer in making future decisions. An evaluation that is less favorable because of protected activity is a deprivation. In Allen's March 16, 2016, performance evaluation, Wray explicitly referenced Allen's conduct in the November 16, 2015, Jail ID Unit meeting. A causal connection exists between Allen's protected activity and the March 16, 2016, performance evaluation.

The employer met its burden of production and articulated nondiscriminatory reasons for the evaluation. As the Examiner detailed in his decision, Wray coached Allen in lead meetings, Wray observed Allen's communication style, and Wray addressed concerns with Allen.

After the employer articulated a legitimate nondiscriminatory reason for its action, the union had the burden to prove by a preponderance of the evidence that the employer's articulated reason was a pretext or substantially motivated by union animus. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 73 (1991). To satisfy its burden to prove the articulated reason was substantially motivated by union animus, the union must prove that the protected activity was a "significant factor" in the employer's decision. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d at 75; *Allison v. The Housing Authority of the City of Seattle*, 118 Wn.2d 79 (1991). A factor is "substantial" if it is "important" or "significant." *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d at 71, 74–75; *University of Washington*, Decision 11199-B (PSRA, 2013). The Examiner concluded that the union did not "[meet] its burden of persuasion to show that the employer's stated reason for the ratings and comments in Allen's initial appraisal was either a pretext or substantially motivated by union animus."[10]

Wray credibly testified that Allen's behavior during the November 16, 2015, Jail ID Unit meeting was only part of the basis for the evaluation,[11] but the evidence shows that Allen's behavior was a significant part of the equation. Allen's behavior influenced how the employer rated her, therefore,

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[10] *King County*, Decision 12582-C, at 14.

[11] *King County*, Decision 12582-C, at 11.

Allen's union activity was a substantial factor in the evaluation. Accordingly, we find that substantial evidence does not support the Examiner's conclusion that Allen's protected activity was not a substantial factor in the March 16, 2016, evaluation.

Wray prepared an outline before writing Allen's evaluation.[12] Wray included Allen's achievements and Wray's concerns about Allen's communication and professionalism. Wray's concerns were not related to Allen's technical ability to perform the job. Rather, Wray's concerns were with Allen's communication and professionalism.[13]

Wray's outline included eight incidents. Most significantly detailed were the November 16, 2015, Jail ID Unit meeting and the November 17, 2015, lead meeting during which Wray debriefed the unit meeting with the leads. Wray's notes focus on what and how Allen communicated during the unit meeting, which related to her protected activity. As explained in *King County*, Decision 12582-B, during the unit meeting Allen confronted the employer in what some perceived as an abrasive and confrontational manner.

Wray testified that she had concerns with Allen's performance before the November 16, 2015, meeting but her "concerns became significant" following the November 16 and 17, 2015, meetings.[14] In preparing the evaluation, Wray testified that she considered Allen's conduct at the meeting but did not specifically reference it because of the ongoing internal investigation.[15] Wray admitted Allen's conduct during the November 16, 2015, Jail ID Unit meeting influenced her writing the evaluation.[16] In this case, Allen's protected activity at the November 16, 2015, Jail ID Unit meeting was a significant factor in Wray's evaluation of Allen.

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12 Employer Ex. 11.

13 Transcript Vol. V, at 911:25–912:3.

14 Transcript Vol. V, at 909:5–23, and at 911:8–20.

15 Transcript Vol. V, at 972.

16 Transcript Vol. V, at 976:1-21.

The language Wray used in the evaluation contributes to our finding that Allen's protected activity was a substantial factor in the evaluation. The opening paragraph in the leadership category points out that Wray rated Allen as meets standards because she is self-motivated, requires little supervision, and maintains high standards. Wray rated Allen this way "even though [Allen] sometimes struggled to channel [her] passion in a positive way." Based on Wray's testimony and notes, we infer that this criticism included Allen's protected activity.

While Allen's conduct at the November 16, 2015, Jail ID Unit meeting was one of many factors in Wray's evaluation, it was a significant factor. The union met its burden of persuasion to prove that the employer's stated nondiscriminatory reasons were substantially motivated by Allen's union activity.

The employer did not discriminate against Allen when Gillespie changed the evaluation.

We affirm the Examiner's conclusion that the union did not establish a prima facie case of discrimination for Gillespie changing Allen's evaluation during the appeal.

In this case, Allen disagreed with Wray's March 16, 2016, evaluation and appealed. The March 16, 2016, evaluation was final and completed. Wray and Allen were unable to reach an agreement on the appeal. The March 16, 2016, evaluation of Allen was final. In contrast, the evaluation provided by Gillespie was not final.

Allen appealed the March 16, 2016, evaluation to Gillespie. Gillespie proposed additional changes, which Allen did not agree with. Allen appealed Gillespie's evaluation to the next step. The parties agreed to place the appeal on hold while the Agency processed the unfair labor practice complaint. Thus, there has been no resolution to Allen's appeal of her evaluation. Gillespie's evaluation cannot constitute a deprivation of right because it is not a final evaluation.

Remedy

The March 16, 2016, evaluation was substantially motivated by Allen's union activity. Accordingly, we must provide a remedy that places Allen in a position had the employer not considered her protected activity in the evaluation. To do so, we order the employer to remove the

March 16, 2016, evaluation from all files and evaluate Allen without considering or referencing her protected activity.

CONCLUSION

Allen's protected activity was a significant factor in the March 16, 2016, evaluation. The employer discriminated against Allen when it issued the March 16, 2016, evaluation that considered Allen's protected activity. We order the employer to withdraw the March 16, 2016, evaluation and conduct a new evaluation free from discrimination.

We affirm the Examiner's conclusion that the union did not establish a prima facie case of discrimination for Gillespie's evaluation of Allen. The appeal process was not complete at the time of the hearing in this matter.

ORDER

The Findings of Fact issued by Examiner Stephen W. Irvin are AFFIRMED and adopted as the Findings of Fact of the Commission.

Conclusions of law 1 and 3 are AFFIRMED and adopted as the Conclusions of Law of the Commission. Conclusion of law 2 is VACATED. We substitute the following conclusion of law:

2. By its actions described in findings of fact 6 and 7, the employer discriminated against Marquel Allen because of her protected activities and interfered with employee rights in violation of RCW 41.56.140(1).

The order issued by Examiner Stephen W. Irvin is VACATED and the following order is substituted:

ORDER

KING COUNTY, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating and interfering with employee rights by considering Marquel Allen's protected activity at the November 16, 2015, Jail ID Unit meeting when evaluating Allen for the February 1, 2015 through January 31, 2016, evaluation period.

   b. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Withdraw the written evaluation issued to Marquel Allen for the February 1, 2015, through January 1, 2016, review period and eliminate any reference to the evaluation in Allen's personnel files and employer files. Conduct a new evaluation for the February 1, 2015, through January 1, 2016, review period that is not based on Allen's protected activity.

   b. Contact the Compliance Officer at the Public Employment Relations Commission to receive official copies of the required notice posting. Post copies of the notice provided by the Compliance Officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The

respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the County Commissioners of King County and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide the complainant with a signed copy of the notice provided by the Compliance Officer.

e. Notify the Compliance Officer, in writing, within 20 days following the date of this order as to what steps have been taken to comply with this order and, at the same time, provide her with a signed copy of the notice she provides.

ISSUED at Olympia, Washington, this 7th day of September, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

MARK BUSTO, Commissioner

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DECISION 12582-D - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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