

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SCREEN ACTORS GUILD –  
AMERICAN FEDERATION OF  
TELEVISION AND RADIO ARTISTS,

Complainant,

vs.

UNIVERSITY OF WASHINGTON,

Respondent.

CASE 130727-U-18

DECISION 12988 - PECB

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

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This case involves employees of KUOW (employer), a public radio station owned by the University of Washington. Shortly after its employees organized with the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA or union), KUOW announced and implemented a reorganization to its drive-time shows, ultimately resulting in the layoff of four employees. SAG-AFTRA contends that the reorganization and layoff was unlawful discrimination against the employees: retaliation for organizing a union. Because SAG-AFTRA has not established that KUOW's stated reasons for these actions were pretexts, or that KUOW was substantially motivated by union animus, SAG-AFTRA has not carried its burden of proving unlawful discrimination. The complaint is dismissed.

ISSUE

According to the preliminary ruling issued July 6, 2018, the issue to be decided in this case is whether the employer violated the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, in the following manner:

Employer discrimination in violation of RCW 41.56.140(1) [and if so, derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by laying off employees in reprisal for union activities protected by Chapter 41.56 RCW.

## BACKGROUND

KUOW is a National Public Radio (NPR)-affiliated station owned by the University of Washington (UW). One of the most important parts of KUOW's schedule is its drive-time programming, which airs during the morning and afternoon weekday commutes. Most of the drive-time show content is created by national providers, such as NPR and Public Radio International, but about ten percent of on-air content during the drive-time shows is produced locally by KUOW.

This case centers around a 2018 reorganization of KUOW's drive-time show staffing soon after employees organized with SAG-AFTRA. The reorganization resulted in the elimination of seven positions and the creation of seven new positions. The incumbents in the eliminated positions were invited to apply for the new positions. Ultimately, three of the incumbents remained employed with KUOW's drive-time shows and four were laid off.

### *Pre-reorganization Drive-Time Show Staffing*

Prior to the reorganization, the morning and afternoon drive-time shows were staffed as follows:

- Both shows had hosts who were the "MCs" of the program. They announced the traffic, weather, and upcoming NPR content. The hosts also operated the board.<sup>1</sup> The morning host was Emily Fox, and the afternoon host was Kim Malcolm.

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<sup>1</sup> The record makes numerous references to "the board." This appears to be the mixing console where an operator deals with such technical aspects of the broadcast as making sure the sound levels are right and feeding NPR content, interviews, and other audio sources into the final broadcast.

- Both shows had newscasters, who were responsible for gathering and presenting news content. The morning newscaster was Lisa Craze, and the afternoon newscaster was Jamala Henderson.
- Both shows had producers. The morning drive-time show had two producers, Rob Wood and Stephen Gomes, and the afternoon drive-time show had one producer, Tami Kosch.

*New KUOW Leadership Has Concerns with the Drive-Time Shows*

In June 2017 Jennifer Strachan was hired as KUOW's chief content officer. Right away, Strachan perceived that the drive-time shows were not producing high quality news. Strachan testified to specific observations about their programming: the shows were "produced almost solely by the newscaster," "there was no deep involvement from any producer," and the host was "serving as really kind of an MC of the program, not really contributing to the news product as we saw it." In addition, the local news was "lacking" and "highly repetitive," the drive-time shows were not "well-positioned for any kind of breaking news," and there was no "definitive voice that's KUOW" because both the host and newscaster were talking during the local content. Strachan further stated that the drive-time show teams were "isolated" and not working well together.

Jill Jackson was hired as the KUOW News Director in October 2017. From the beginning, Jackson noticed that the drive-time show teams were not staffed to deliver high quality local content or to respond to breaking news. Jackson's concerns about the drive-time shows were similar to Strachan's: there was not a distinct local voice as both hosts and newscasters were on the air, and the newscasters were "just trying to fill the time"—sometimes taking local content from other stations rather than creating their own. Jackson further observed that the morning producers in particular did not have journalism backgrounds and were not able to set up interviews. She testified that "it was not really a team" and that no one had overall responsibility for the show.

*KUOW Decides to Change Drive-Time Show Staffing*

During the fall of 2017, Strachan, Jackson, and other content directors talked about issues they noticed with the quality of the drive-time shows. Strachan discussed these concerns, and the possibility of a reorganization, with Caryn Mathes, the president and general manager of KUOW.<sup>2</sup>

Strachan organized a meeting with the content directors on November 27, 2017, to discuss how their concerns with the drive-time shows could be addressed with different staffing and to “come to some conclusions.” At the meeting, the content directors agreed that the newscaster and host roles should be combined so that there would be a single voice of KUOW during the local content. The group agreed that the drive-time shows needed producers with journalism experience who would be able to effectively provide content for the newscast. The group also decided to have stand-alone board operator positions so the hosts could focus on their own roles rather than running the board.

After the meeting, Strachan had Arvid Hokanson, the director of audience, survey other public radio stations to see how they staffed their drive-time shows. Hokanson found that stations staffed them in different ways and that what KUOW was considering was not unusual.

Strachan decided that the new positions should be filled through a competitive process rather than automatically transferring the incumbent drive-time show employees into them. Although this could result in layoffs, Strachan did not feel KUOW could move employees from the existing positions to the new ones because the new positions were significantly different from the old ones. The new ones required more skill and experience, and she was not certain that the current employees would be the best candidates for the new positions. Also, Strachan had heard that prior reorganizations in which people were involuntarily moved to different jobs led to resentment and people being put into positions for which they were not well qualified.

At the time, KUOW was the number one rated radio station and had the number one morning show in Seattle. However, Strachan testified that the ratings system was not specific enough to show that the local content of KUOW’s drive-time shows was highly rated (as opposed to the nationally

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<sup>2</sup> Mathes was hired by KUOW in 2014 and also noticed issues with the quality of the drive-time shows beginning when she was a candidate for the position.

produced content). Despite the number one rating, Strachan felt that KUOW was in a competitive market and there were concerns about the drive-time show staffing that needed to be addressed.

#### *KUOW Staff Organize with SAG-AFTRA*

The rank-and-file KUOW employees began organizing with SAG-AFTRA in spring 2017. Shellea Allen was the Pacific Northwest executive director of SAG-AFTRA when the KUOW employees contacted the union. Allen testified that a main concern was that “there were a lot of reorganizations happening and [the employees] had no say and no input; however, when these reorganizations would happen they would be reclassified or moved around to different titles.” Pay and transparency were also issues.

Allen testified that the organizing was “very quiet” and the employees had committee meetings that were not public. In November 2017 the employees began “signing a petition more openly at work with the intent to deliver it to management.” Reporter Ann Dornfeld testified that the organizing was kept secret, but editors and possibly others in lower management knew about the unionization effort by this time.

On December 3, 2017, a delegation of employees submitted its petition to Mathes. The petition was addressed to KUOW management and requested recognition of SAG-AFTRA as the employees’ union. The petition was signed by 46 employees in the bargaining unit,<sup>3</sup> including drive-time show hosts Fox and Malcolm, newscasters Craze and Henderson, and afternoon producer Kosch. Morning producers Gomes and Wood did not sign the petition.

The delivery of the petition on December 3, 2017, was the first time Mathes and Strachan knew that the employees were organizing. Both were surprised by the petition but, at the same time, not surprised that the employees would unionize at some point. Everywhere Strachan had previously worked had a SAG-AFTRA union. Mathes had worked at unionized radio stations before.

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<sup>3</sup> On the representation petition filed with the Public Employment Relations Commission (PERC), SAG-AFTRA said there were 55 employees in the unit. However, the tally of cross-check that was appended to the interim certification stated there were 51 eligible employees. *University of Washington*, Decision 12835 (PECB, 2018).

Jackson had heard that the employees might be organizing. Before she went in for her interview for the news director position on September 11, 2017, Jackson had coffee with Ross Reynolds, who was her boss when she previously worked for KUOW.<sup>4</sup> Reynolds told her that the employees were possibly unionizing. Jackson was nervous about her upcoming interview and did not give much thought to Reynolds' comment. Jackson was a former SAG-AFTRA member and most of the places she previously worked had unions. Jackson did not tell anyone what Reynolds said and did not think about the potential unionization at KUOW again until she heard about the petition being delivered to Mathes on December 3, 2017. Jackson was not surprised by the petition and testified to her reaction:

[I]t meant a lot to a lot of them, and I'm right in the middle of the newsroom, these are my people, so I felt – I was proud for them. I think that they felt like they'd accomplished something . . . . It was a lot of work to get to that point; so, it was actually kind of a day of celebration in the newsroom.”

On December 8, 2017, the union filed a representation petition with the Commission.

#### *KUOW Moves Forward with Reorganization*

Even though the employees' union organizing was now public, KUOW management decided to move forward with the planned reorganization. Strachan and Jackson felt that the staffing changes were important for the success of the drive-time shows and that delaying the reorganization would be detrimental to the station and its audience.

Around December 11, 2017, Strachan created a document outlining the new positions that would be created for the drive-time shows: news host, news producer, board operator, and reporter<sup>5</sup>; and the positions that would be eliminated: producer, host, and newscaster. On December 15, 2017,

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<sup>4</sup> Reynolds does not appear in any of the organization charts and his position is not clear from the record. Nor is it clear whether he is a member of management or a rank-and-file employee. Although Jackson referred to Reynolds as her former boss, he signed the SAG-AFTRA petition.

<sup>5</sup> In conversations after the November 27 meeting, Strachan and the content directors developed a plan for a full-time reporter for the morning drive-time show team. The KUOW newsroom was available to support the afternoon drive-time show, but the morning drive-time show began before the newsroom staff arrived for work. The group felt that the morning drive-time show team needed extra support from a reporter to develop news content.

Strachan held a meeting with the content directors to discuss her document, and the group agreed that it accurately captured their discussion on November 27. The group also discussed the union's petition. Strachan testified that the group had questions about how long the representation process would take.

After confirming the details of the reorganization plan with the content directors, Strachan and KUOW management worked with the UW on the specifics of implementation, such as writing new job descriptions, getting compensation ranges accepted, and coming up with a communication plan. This process took several months.

#### *SAG-AFTRA Is Certified and Begins Bargaining Activities*

The Commission conducted a cross-check of the union's petition on February 13, 2018; an interim certification was issued on February 22, 2018; and a final certification was issued on July 31, 2018. After the interim certification, the union began working with its members and KUOW to prepare for negotiations.

On March 5, 2018, the union sent the employer a letter requesting information about, among other things, "[a]ny anticipated changes to compensation structure or employment arrangements for any member of the existing bargaining unit." On March 21, 2018, the employer's Labor Relations office provided a partial response to SAG-AFTRA, answering, "None at this time." Peter Denis, the employer's assistant vice president for Labor Relations, testified that this was consistent with his understanding that "the decisions were still in flux at that point and the definitive changes had not been agreed to because [they had] not come to the end of the process for making the reorganization."

#### *The Reorganization Is Announced*

By early April 2018 the UW and KUOW had substantially completed the bureaucratic tasks related to the reorganization and were ready to implement it.

On the morning of April 4, 2018, Denis e-mailed Allen and gave SAG-AFTRA notice of the imminent drive-time show reorganization. Fifteen minutes later, Strachan met with the drive-time show staff and announced the reorganization. At the same time, an e-mail was sent from Strachan

to all KUOW staff explaining the reorganization. The e-mail described management's reasons for the staffing changes and stated that the new positions would be open for recruitment the following day.

Craze testified that at the meeting she asked Strachan if the reorganization was in response to the union organizing and that Strachan "kind of stiffened up and then denied it and said, no, that's not the case at all. She seemed tense." Craze testified that other questions were asked, including the reasons for the reorganization, and that Strachan responded that the drive-time shows were the "tent poles" that held up KUOW. Strachan did not recall any questions at the meeting about whether the reorganization was because of the union. Jackson testified that she was at the meeting and did not hear anyone say that the reorganization was because of unionization.

#### *Employees Are Interviewed for the New Positions*

On April 27, 2018, the UW and SAG-AFTRA executed a memorandum of understanding relating to the drive-time show reorganization. The memo outlined the schedule and process for interviews, and stated that any of the affected employees who applied and met the minimum qualifications would be interviewed before any other candidates. The parties also agreed that if an affected employee was hired for a board operator position, that employee's current rate of pay would carry over.

The incumbent drive-time show employees were provided 90 days between the reorganization announcement and the effective date of the layoffs. They were invited to apply for the newly created positions and all but one did.<sup>6</sup>

The applicants for the new drive-time show positions, including the six incumbent employees who applied, were interviewed in May 2018.<sup>7</sup> Jackson was the lead on the hiring panels for the new

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<sup>6</sup> The record indicates that Jamala Henderson did not apply for a new drive-time show position.

<sup>7</sup> In its brief, the union asserts that "laid-off union supporters were denied even the opportunity to interview." The union references Craze's testimony about her application for a KUOW web editor job. The record is sparse relating to this position but it does not appear the web editor job was part of the drive-time show or the reorganization.



positions. The hiring panels (except the panel for the reporter position)<sup>8</sup> were composed of union and non-union personnel. The application process had two parts. The first part of the hiring process was an interview, where every candidate was asked the same questions and each member of the panel ranked the candidate. All of the drive-time show employees who applied, as well as the top candidates from the interviews, made it to the second stage of the application process—the performance assignment. In the performance assignment, the employees were asked to perform tasks related to the positions. For example, candidates for the news host position had to do a newscast and an interview.

At the end of the hiring process, the seven newly created positions were filled. Three of the incumbent drive-time show employees were hired into new positions: Kim Malcolm as the afternoon news host, and Stephen Gomes and Tami Kosch as board operators. Two individuals hired into new positions came from other positions at KUOW (and had signed the SAG-AFTRA petition), Casey Martin and Andy Hurst. The two other new employees came from outside of KUOW.

Drive-time show incumbents Emily Fox, Lisa Craze, Jamala Henderson, and Rob Wood were not hired into new positions and were laid off.

Jackson testified that the candidates who were ultimately chosen by the panel had the skill, energy, and enthusiasm that KUOW was seeking. Except for the board operator positions, the new positions were paid higher than the comparable eliminated positions.<sup>9</sup>

After the reorganization, Strachan and Jackson thought the sound of the drive-time shows was of higher quality, with more local content and interviews. At the time of the hearing, however,

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<sup>8</sup> It is not clear from the record how the hiring panels for the reporter position were constituted.

<sup>9</sup> The new board operators, Gomes and Kosch, were previously drive-time show producers and, per the memorandum of understanding with SAG-AFTRA, kept their prior rate of pay. The University of Washington thought this was higher than the market rate for board operators but honored the memorandum of understanding.

KUOW was the number two ranked radio station in Seattle. Jackson explained that “it’s pretty normal after the holiday season or after a pledge drive . . . The numbers go up month to month.”

The union filed its complaint on June 29, 2018. A preliminary ruling was issued on July 6, 2018, finding the complaint stated a cause of action for discrimination and derivative interference. An evidentiary hearing was conducted on January 10, 2019. Briefs were filed to complete the record on March 1, 2019.

## ANALYSIS

### Applicable Legal Standards

The sole issue in this case is whether KUOW committed unlawful discrimination in violation of RCW 41.56.140(1) by laying off employees in reprisal for union activities. If, and only if, unlawful discrimination is found, derivative interference will also be found. *See City of Snohomish*, Decision 9569 (PECB, 2007).<sup>10</sup>

An employer unlawfully discriminates against employees when it takes action in reprisal for the employees’ exercise of statutorily protected rights. RCW 41.56.140(1); *Educational Service*

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<sup>10</sup> Once an examiner has been assigned, the analysis of the case must be confined to the issues framed by the preliminary ruling. *King County*, Decision 9075-A (PECB, 2007). The sole issue in this case is whether the employer committed unlawful discrimination by laying off employees in reprisal for union activities, and no other issue may be considered. *Id.*; *City of Orting*, Decision 7959-A (PECB, 2003).

The union expressed concern about the employer’s arguably disingenuous response to its March 5, 2018, information request, but the union does not explain how this relates to the discrimination issue in this case. “Failure to provide information” and other “refusal to bargain” claims are distinct from “discrimination” claims. *King County*, Decision 9075-A. A claim of failure to provide information is beyond the scope of the preliminary ruling and cannot be considered.

The union also expressed concern about the employer’s decision to notify the union of the reorganization only 15 minutes before announcing it to the drive-time show staff and all other employees. The union does not explain how this bears on the discrimination claim. A claim that the employer violated its bargaining obligations by giving insufficient notice to the union is beyond the scope of the preliminary ruling and cannot be considered.

Similarly, the union argued in its brief and in its opening statement that the employer decided to announce the reorganization to the KUOW staff via e-mail because of union activity. As the union points out, Strachan’s e-mail to the KUOW staff stated that the changes were announced by e-mail “[b]ecause SAG-AFTRA now represents the newly formed bargaining unit.” The union does not explain how this relates to the sole issue in this case—*layoff* because of union activity. A claim that the employer *communicated to employees in a certain manner* because of union activity is not sufficiently germane to the “*layoff* because of union activity” issue and cannot be considered.

*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 a 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 employees' exercise of protected activity and the employer's action.

*City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A. Ordinarily, the complainant may use circumstantial evidence to establish a prima facie case of discrimination because parties do not typically announce a discriminatory motive for their actions. *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69 (1991); *Clark County*, Decision 9127-A (PECB, 2007).

If the complaining party establishes a prima facie case, the burden of production shifts to the employer. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The employer 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 employer 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

#### *Prima Facie Case*

The union establishes a prima facie case of discrimination.

Protected activity. Five of the seven affected drive-time show employees signed the SAG-AFTRA petition. Signing a petition for initial union recognition is protected activity.

Gomes and Wood did not sign the petition, but they were part of a group layoff with five others who did sign the petition. General retaliation by an employer against the workforce can discourage the exercise of protected rights just as effectively as adverse action taken against only known union supporters. See *City of Federal Way*, Decision 4088-A (PECB, 1993), *aff'd*, Decision 4088-B (PECB, 1994) (stating that although there was little evidence of employees' union sympathies, discharges "could have been designed to scare off the remaining union sympathizers, just as the organizing campaign approached its climax"); *Davis Supermarkets v. National Labor Relations Board*, 2 F.3d 1162, 1168–69 (D.C. Cir. 1993). The theory that the *unit's* organizing activity was protected and was the motivation for a mass layoff designed to discriminate against the *unit*, is plausible enough to establish this element of the prima facie case.

Deprivation. The union satisfies the "deprivation" element of the prima facie case. The seven incumbent employees' existing jobs were eliminated, and they were made to go through the competitive process of applying for different jobs if they wanted to stay employed at KUOW. Four of the employees did not get new positions at KUOW and were laid off. Even those employees who ultimately found new (even higher-paying) jobs were adversely impacted because they were removed from the stability of their prior positions and required to go through a competitive process to continue employment at KUOW.

Causal connection. The union satisfies the "causal connection" element of the prima facie case. Employees may establish a causal connection by showing that adverse action followed the employees' known exercise of a protected right. *City of Winlock*, Decision 4784-A (PECB, 1995). "[T]he burden to establish a causal connection increases for activities that are remote from organizing and bargaining." *Seattle School District*, Decision 5237-B (EDUC, 1996). Here, where the adverse actions immediately surrounded the initial organization of the union, the union's burden to establish a causal connection is relatively low.

SAG-AFTRA began organizing in spring 2017. Although the employees were "very quiet" and had committee meetings that were "not public," Ross Reynolds knew about possible union activity

by September 11, 2017, when he told Jackson that “people [were] talking about possibly unionizing.” In November 2017 employees “started signing a petition more openly at work.” Editors, who were considered lower level management, knew about the effort to unionize before the petition was delivered. Strachan and Meyers testified credibly that they were not aware of the organizing until the petition was delivered on December 3, and Jackson credibly testified that she did not tell anyone about Reynold’s comment and did not think about it. Nonetheless, Jackson’s knowledge of potential unionization, the “more open” circulation of the petition in November, the editors’ knowledge, and the small size of the workforce make it appropriate to infer, for purposes of the prima facie case, that the employer knew of organizing activity when it decided to reorganize the drive-time show staffing and lay off employees. *See City of Winlock*, Decision 4784-A.

The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse actions. *City of Winlock*, Decision 4784-A; *Mansfield School District*, Decision 5238-A (EDUC, 1996). KUOW’s decisions occurred in the time frame immediately surrounding the union’s initial organizing campaign. Management’s November 27 planning meeting, when they decided on staffing changes, occurred when the organizing had come to the point of circulating a petition to formally present to management. The subsequent steps in planning and implementation of the layoffs occurred virtually simultaneously with the union’s steps through PERC’s certification procedure.

The coincidence in timing here is conspicuous enough to satisfy the final element of the union’s prima facie case and shift the burden to KUOW. *See Kennewick School District*, Decision 5632-A (PECB, 1996). The fact that this reorganization deviated from the prior occasions where employees were automatically reassigned rather than laid off further supports a finding of a causal connection for the prima facie case.

#### *KUOW’s Nondiscriminatory Reasons*

The union has established a prima facie case, and so the burden of production shifts to KUOW to produce legitimate, nondiscriminatory reasons for its actions.

The initial reorganization decision. First, KUOW produced legitimate nondiscriminatory reasons for reorganizing the drive-time show staffing. Mathes, Strachan, and Jackson all observed issues

with the quality of drive-time show programming. In November 2017 Strachan and Jackson met with other content directors who shared these concerns and recommended specific changes to staffing to address them. These concerns had nothing to do with the union. The changes proposed by management were germane to the concerns. Management felt that drive-time shows were KUOW's most important program and that the content should be improved when possible.

Layoffs rather than reassignment. KUOW produced legitimate nondiscriminatory reasons for the decision to competitively fill the new positions instead of automatically reassigning the employees from the old positions to the new ones. Strachan and Jackson had concerns about the drive-time show and wanted the best candidates for the most important parts of KUOW's broadcast program. They explained that the new positions were different from the old positions in that they required different skills and experience, and that most would be paid at a higher rate. Both Strachan and Allen testified that there was resentment from people being involuntarily transferred to different jobs in prior reorganizations. Strachan also testified that in prior reorganizations the station had "assigned people work that they did not have the skills for."

Failure to hire all incumbents. KUOW produced legitimate nondiscriminatory reasons for not hiring all seven of the affected employees into the new positions. Jackson explained that hiring panels, which included union members, used job-related criteria to rank and evaluate the candidates. KUOW introduced into the record examples of the questions and performance tasks used to evaluate the candidates. Jackson said that the candidates they hired had the skills to interview, "to tell the news," and they had "great news judgment."

#### *Pretext and Union Animus*

Because KUOW produced legitimate nondiscriminatory reasons for its actions, the union must satisfy the ultimate burden of persuasion by showing that the reasons articulated by KUOW were a mere pretext for what, in fact, was a discriminatory purpose, or that protected activity was nevertheless a substantial motivating factor behind the discriminatory action. *King County, Decision 6994-B (PECB, 2002)*. The union does not meet its ultimate burden of persuasion.

An articulated reason is a pretext when it is not the real reason for the adverse action and there is no legitimate business justification for the action, or when the employer's proffered explanation is unworthy of credence. *Educational Service District 114*, Decision 4361-A.

The initial reorganization decision. The union does not present sufficient evidence to dispute the legitimacy of KUOW's specific concerns about the quality of the drive-time shows, nor does the union present any evidence to show that these concerns were not KUOW's true motivations.

The union argues that KUOW's decision to reorganize the drive-time shows was unnecessary, pointing out that KUOW was rated number one before the reorganization. The union also points out that according to the employer's own study, other public radio stations have separate hosts and newscasters, and so it was unnecessary for KUOW to change its drive-time show staffing. The union also argues that there were ways the employer's concerns could have been addressed without layoffs. In response, the employer's witnesses explained that they could not rest on their laurels, there were real concerns about the quality of the drive-time shows, and the best way to address the concerns was by reorganizing and restaffing the positions.

It is not the Commission's role to second guess KUOW's decisions on how to run the programs and the station. The question here is not whether KUOW's decisions were wise or unwise. The sole issue at this point is whether the reasons for KUOW's actions were pretextual or whether KUOW was motivated by union animus. See *East Wenatchee Water District*, Decision 1392 (PECB, 1982) (quoting *National Labor Relations Board v. McGahey*, 233 F.2d 406 (5th Cir. 1956); *City of Vancouver*, Decision 10621-B (PECB, 2012), *aff'd in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333 (2014). Although the union argues that these changes were not necessary or appropriate, the union has not proven that the employer's stated reasons for reorganizing the drive-time show staffing were pretextual.

Layoffs rather than reassignment. The union does not present sufficient evidence to show that KUOW's explanations for deciding to use layoffs instead of automatic reassignment in this reorganization were pretextual. Management explained that the new positions involved skills and experience different from the prior positions, so the incumbent employees may not have been the most qualified. The union suggests that the positions were not so different, and KUOW *could*

*have* decided to reassign the employees to the new positions instead of using layoffs and a new hiring process.<sup>11</sup> Again, the issue here is not whether KUOW made the best business decision but whether the reasons for the decision it did make were pretextual. The union has not rebutted KUOW's evidence that the positions are at least somewhat different. Nor has it shown that KUOW's stated reasons for choosing to use layoffs instead of reassignment were pretextual.

The layoffs involved in this reorganization were a departure from the way prior reorganizations were handled, but management explained that a factor in its decision to use layoffs was employee resentment from prior involuntary reassignments. Allen testified that this, indeed, was a significant concern of employees when they organized with SAG-AFTRA. Strachan also explained that prior transfers had resulted in people being placed in positions that did not match their skills. The union has not shown that these explanations were pretextual. "Deviations in personnel policies and changes in personnel practices have been a basis for finding unfair labor practices in the past, *where an employer provides unclear or inconsistent explanations for its actions.*" *City of Kalama*, Decision 7448 (PECB, 2001) (emphasis added). *See also Pasco Housing Authority*, Decision 6248-A (PECB, 1998) (determining that evidence discredited employer's explanations for deviation from prior practice). Here, KUOW provided an explanation for why they chose to deviate from the prior reorganizations and use layoffs in this case. The union has not rebutted KUOW's explanations and so the deviation from the past practice here does not establish pretext.

Failure to hire all incumbents. The union does not present sufficient evidence to show that the employer's failure to hire all of the drive-time show employees into the newly created positions was pretextual. The employer presented evidence that the hiring process was based on merit and even gave the incumbent employees an edge (they were automatically given interviews and advanced to the second step of the process). Jackson testified that the successful candidates were the most qualified and did the best in the hiring process in the judgment of the hiring panels, which included union members. There is no evidence that the hiring process was unfair. There is no evidence that hiring decisions were made for any reasons other than the panels' judgment of the

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<sup>11</sup> For example, Craze thought that the new news host position did not differ "greatly" from her prior host position, suggesting that she could have been reassigned to the new position.



candidates' merit. There is no evidence that the incumbents were more qualified than those applicants who were hired.<sup>12</sup>

The union does not present evidence to counter KUOW's testimony that the content of the drive-time shows has improved as a result of its actions, except for the fact that KUOW was rated number two in January 2019. Jackson explained that ratings often see a decline after the holidays and a pledge drive. SAG-AFTRA did not counter Jackson's explanation. Moreover, evidence that the employer made a bad decision does not equate to evidence that its decision was pretextual.

Union animus. Even without showing pretext, a complainant can prove discrimination by showing the employer's actions were motivated by union animus. *Educational Service District 114*, Decision 4361-A. The record here does not show that union animus constituted any part of KUOW's motivation in the reorganization and layoff of employees. There was no evidence of any statements or behavior that indicated union animus, nor of any hostile response to SAG-AFTRA's organizing and union activity. Management witnesses testified they were indifferent if not supportive of SAG-AFTRA, and there was no evidence that this testimony was insincere. *Cf. Pierce County*, Decision 7258 (PECB, 2001) (finding supervisors' claimed neutrality toward union was undermined by evidence of anti-union statements).

Despite the assertion in the complaint that "[a]t least one member of management indicated to SAG-AFTRA represented employees that this reorganization was a result of the union organizing campaign and election," there was no such evidence in the record. Union and employer witnesses alike denied that any member of management said that union activity motivated management's actions.

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<sup>12</sup> The union argues that Craze was well qualified for the news host position. Jackson testified without rebuttal that "[i]n the interview process she did not do as well as the other candidates." Although Craze may have been well qualified, in the judgment of the hiring panel she was not the *most* qualified candidate, and there is no evidence suggesting that Craze was actually better qualified than the successful candidate. *Cf. Educational Service District 114*, Decision 4361-A. It is not the role of the Examiner to determine the most qualified candidate in this matter; rather, the Examiner's role is to determine whether discrimination occurred. *City of Vancouver*, 10621-B; *City of Centralia*, Decision 2904 (PECB, 1988).

Similarly, management wanted a senior producer with a journalism background, and there is no evidence that Wood (the only incumbent to apply for the position) had a journalism background. Again, the union does not show that management's explanation of its hiring decisions is unworthy of credence.

The union calls attention to a segment of Craze's testimony when she asked Strachan whether the reorganization was a response to union organizing. Craze said that Strachan "kind of stiffened up and then denied it and said, no, that's not the case at all. She seemed tense." I am not persuaded that Strachan's discomfort is evidence of union animus or a guilty conscience of anti-union motive for the reorganization, as the union suggests.

The pattern of who was hired and who was laid off does not reflect anti-union motivation:

- Malcolm and Kosch, who signed SAG-AFTRA's petition, were hired into new positions while Wood, who did not sign the petition, was laid off.
- Wood was the only incumbent to apply for the senior producer position, but Andy Hurst was selected for the position instead. Hurst was previously in another position at KUOW, and signed the SAG-AFTRA petition, while Wood did not sign it.
- Fox, who signed the petition, was the only incumbent to apply for the reporter position, but Casey Martin got the job. Like Hurst, Martin also previously worked at KUOW and signed the SAG-AFTRA petition.
- The only employee identified in the record as involved in union activity beyond signing the petition was Ann Dornfeld,<sup>13</sup> who was not affected by this reorganization and remains employed at KUOW.

This evidence, particularly the fact that Wood (who did not sign the petition) was passed over in favor of Hurst (who did sign the petition), undermines the argument that union activity was a factor in the hiring decisions.

The union argues that employees reasonably perceived KUOW's actions to be retaliatory. Given the timing of events, it is not surprising that some employees believed the layoffs were related to

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<sup>13</sup> The record indicates that Dornfeld was involved in collecting signatures for the petition and presenting the petition to KUOW management.

the union organizing efforts. The union argues that if a typical employee would reasonably perceive KUOW's action to be retaliatory, it is evidence of a violation of Chapter 41.56 RCW, citing *Wenatchee School District*, Decision 8206-A (EDUC, 2005). This analysis may be relevant to independent interference cases such as *Wenatchee School District*, but is not used in discrimination cases.<sup>14</sup> "[M]ore than a belief is required" in discrimination cases. *King County*, Decision 11221-A (PECB, 2011).

In summary, the union has failed to carry its ultimate burden of persuasion to show that the employer's legitimate nondiscriminatory reasons for its actions were pretextual or that union animus was a substantial motivating factor in its decisions.

### CONCLUSION

Based on the strong correlation in timing between SAG-AFTRA's organizing and the reorganization and layoffs (as well as other circumstances), the union established a prima facie case of discrimination. KUOW met its burden of production to show that its decisions were motivated by legitimate nondiscriminatory reasons. The union did not meet its burden of persuasion to show that KUOW's reasons were either pretexts or substantially motivated by union animus. The complaint is dismissed.

### FINDINGS OF FACT

1. The University of Washington is a public employer within the meaning of RCW 41.56.030(12).
2. The Screen Actors Guild – American Federation of Radio and Television Artists is a bargaining representative within the meaning of RCW 41.56.030(2).

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<sup>14</sup> Because discrimination was the sole issue identified in the preliminary ruling, an independent interference claim cannot be considered. *See supra* note 9.

3. KUOW is a National Public Radio-affiliated station owned by the University of Washington. One part of KUOW's schedule is its drive-time programming, which airs during the morning and afternoon weekday commutes.
4. Jennifer Strachan is the KUOW Chief Content Officer.
5. Jill Jackson is the KUOW News Director.
6. Caryn Mathes is KUOW's president and general manager.
7. Peter Denis is the University of Washington's assistant vice president for Labor Relations.
8. Prior to April 2018, the drive-time shows were staffed by Emily Fox (a host), Kim Malcolm (a host), Lisa Craze (a newscaster), Jamala Henderson (a newscaster), Rob Wood (a producer), Stephen Gomes (a producer), and Tami Kosch (a producer).
9. The KUOW employees began organizing with the union in spring 2017. In November 2017 employees began signing a petition openly at work with the intent to deliver it to management. On December 3, 2017, a delegation of employees submitted the petition to Mathes. Five of the seven incumbent drive-time employees (Fox, Malcolm, Craze, Henderson, and Kosch) signed the union petition.
10. During the fall of 2017, Strachan, Jackson, and other content directors talked about issues they noticed with the quality of the drive-time shows.
11. On November 27, 2017, Strachan, Jackson, and other content directors met to discuss how the drive-time shows' quality could be improved with changes to staffing. The group decided that the newscaster and host roles should be combined. The group also decided that the drive time shows needed producers with journalism experience. The group also decided to have stand-alone board operator positions. Subsequent to the

November 27, 2017 meeting, the group also decided to create a new reporter position for the drive-time shows.

12. Strachan decided that the new positions should be filled through a competitive process rather than automatically transferring the incumbent drive-time show employees into them. Strachan believed the new positions required different skills and experience from the existing positions, and that the drive-time shows were KUOW's most important programs and needed the best candidates. Strachan also believed that in prior reorganizations where employees were automatically transferred to new positions, the employees resented the involuntary transfer, and some were transferred into positions for which they were not well qualified.
13. On December 8, 2017, the union filed a representation petition with the Commission. The Commission conducted a cross-check of the union's petition on February 13, 2018; an interim certification was issued on February 22, 2018; and a final certification was issued on July 31, 2018.
14. On April 4, 2018, Denis notified the union that the employer was going to reorganize the staffing of the drive-time shows. Also on April 4, 2018, Strachan notified the drive-time employees and the other KUOW employees of the reorganization. Strachan said that seven existing positions would be eliminated and the incumbents would be laid off but they would be invited to apply for seven new positions that were being created.
15. The new drive-time positions were filled using a job-related hiring process led by Jackson. The process included panel interviews and a performance assignment.
16. The successful candidates had the skill, energy, and enthusiasm that KUOW was seeking.
17. Three of the incumbent drive-time employees were hired into new positions (Malcolm, Gomes, and Kosch), and four were laid off (Fox, Craze, Henderson, and Wood).

18. The record did not show that any members of management indicated to union-represented employees that the reorganization was the result of the union organizing campaign and election.
19. The activities described in paragraphs 9 and 13 of these findings of fact are protected activity.
20. By the actions described in paragraphs 14 and 17 of these findings of fact, the employer deprived the employees of some ascertainable right, benefit, or status.
21. A causal connections exists between the protected activities described in paragraphs 9 and 13 of these findings of fact, and the employer's actions described in paragraphs 14 and 17 of these findings of fact.
22. The reasons for the employer's actions described in paragraphs 10, 11, 12, 15, and 16 of these findings of fact are legitimate nondiscriminatory reasons.
23. The union has not established that the employer's stated reasons were pretextual.
24. The union has not established that union animus was a substantial motivating factor for the employer's actions.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 and Chapter 391-45 WAC.

2. As described in findings of fact 3 through 24, the union failed to sustain its burden of proof to establish that the University of Washington discriminated against the union and the drive-time show employees and violated RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 22nd day of April, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Sean Leonard", is written over the printed name.

SEAN LEONARD, 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.



# RECORD OF SERVICE

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ISSUED ON 04/22/2019

DECISION 12988 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

A handwritten signature in blue ink, appearing to read "Amy Riggs", is positioned above the typed name.

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