

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH L. FISHER,

Complainant,

vs.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Respondent.

CASE 131313-U-19

DECISION 12997 - PSRA

ORDER OF DISMISSAL

On February 15, 2019, Kenneth L. Fisher filed a complaint charging unfair labor practices with the Public Employment Relations Commission under chapter 391-45 WAC, naming the Washington State Department of Transportation as respondent. An amended complaint was filed on February 19, 2019. The amended complaint was reviewed under WAC 391-45-110,¹ and a deficiency notice issued on March 19, 2019, indicated that it was not possible to conclude a cause of action existed at that time. Fisher was given a period of 21 days in which to file and serve a second amended complaint or face dismissal of the case.

On April 9, 2019, Fisher filed a second amended complaint. The Unfair Labor Practice Administrator dismisses the second amended complaint for failure to state a cause of action.

ISSUES

The second amended complaint alleges:

Employer refusal to bargain in violation of RCW 41.80.110(1)(e) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the

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.

complaint was filed, by refusing to bargain with the union regarding the disciplinary impacts related to the use of a “core values” document.

Employer discrimination in violation of RCW 41.80.110(1)(c) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed, by

- (a) its discipline of Kenneth Fisher related to unidentified protected activity.
- (b) unidentified employer action toward Kenneth Fisher for filing an unfair labor practice complaint.

Employer domination in violation of RCW 41.80.110(1)(b) [and if so, derivative interference in violation of RCW 41.80.110(1)(a)] within six months of the date the complaint was filed by providing different discipline to bargaining unit employees.

The second amended complaint alleges a refusal to bargain violation. An individual employee does not have standing to bring a refusal to bargain violation before the Commission. The second amended complaint lacks facts alleging discrimination and domination violations. Because the complainant does not have standing to bring a refusal to bargain violation before the Commission and the second amended complaint also lacks facts alleging discrimination and domination claims, the second amended complaint is dismissed for failure to state a cause of action.

BACKGROUND

Kenneth Fisher is a full-time permanent maintenance technician 2 for the Washington State Department of Transportation (employer). Fisher’s position is represented by the Washington Federation of State Employees (union). On June 4, 2018, Fisher was allegedly required by the employer to attend an investigative interview related to his off-duty activities on May 24, 2018. During the June 4 interview, Fisher admitted to his own actions. Other coworkers of Fisher, who were also bargaining unit members, received various levels of discipline related to the off-duty activities of May 24. On July 16, 2018, Fisher attended a predisciplinary hearing.

On August 20, 2018, Fisher allegedly attended another investigative interview related to new allegations occurring on or about August 8, 2018. A union representative attended the August 20 meeting. At the end of the August 20 interview, Fisher received a formal disciplinary notice of a six-month, five percent reduction-in-pay effective September 5, 2018. The disciplinary notice contained references to a “core values” document, the disciplinary impacts of these “core values” had allegedly not been negotiated with the exclusive bargaining representative. The August 20 investigation allegedly resulted in a corrective letter of concern issued on November 6, 2018.

On August 20, 2018, Fisher felt compelled to resign his positions of union steward and local president, and provided written notice to the union on August 21, 2018.

The union filed grievances on behalf of Fisher on September 5, 2018. The grievances allegedly contained allegations that Fisher intended to file an unfair labor practice with the Public Employment Relations Commission (PERC).

ANALYSIS

Timeliness

There is a six-month statute of limitations for unfair labor practice complaints. “[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.” RCW 41.80.120(1). The six-month statute of limitations begins to run when the complainant knows or should know of the violation. *State – Corrections*, Decision 11025 (PSRA, 2011), citing *City of Bremerton*, Decision 7739-A (PECB, 2003). The start of the six-month statute of limitations begins to run when an adverse employment action is communicated to employees and where the employer does not attempt to conceal its actions, even if the exclusive bargaining representative did not have actual notice of the alleged violation. *State – Corrections*, Decision 11025, citing *City of Chehalis*, Decision 5040 (PECB, 1995).

The complaint was filed on February 15, 2019. For the complaint, amended complaint, and second amended complaint to be timely filed, the facts alleged must have occurred on or after

August 15, 2018. Those facts alleged that occurred on or after August 15, 2018, are timely filed. The facts alleged that occurred prior to August 15, 2018, are untimely filed and will be considered for background information only.

Refusal to Bargain

Applicable Legal Standard

Individual employees can only allege certain types of violations against the employer and union. An individual employee can allege interference, discrimination, and domination violations against the employer.

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4). An exclusive bargaining representative is “any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers.” RCW 41.56.030(2). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues and a duty to explore possible alternatives that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. *University of Washington*, Decision 11414-A (PSRA, 2013). Failure to bargain violations include: failure to meet, failure to bargain in good faith, failure to provide relevant information, circumvention, and unilateral change.

Application of Standard

The second amended complaint alleges refusal to bargain violations against the employer related to disciplinary impacts to the use of a “core values” document. The union that is certified as the exclusive bargaining representative of the bargaining unit at issue is the only party with standing to file and pursue refusal to bargain claims against an employer. *Spokane Transit Authority*, Decision 5742 (PECB, 1996); *City of Renton*, Decision 11046 (PECB, 2011); *City of Normandy Park*, Decision 12411 (PECB, 2015). The second amended complaint does not allege that Fisher is the exclusive bargaining representative. Thus, the second amended complaint does not state a cause of action for employer refusal to bargain or employer inducement.

Additionally, the second amended complaint alleges the employer induced the union to commit an unfair labor practice. This type of violation is not a type of violation that can be brought before the Commission. Thus, these allegations must be dismissed.

Discrimination

Applicable Legal Standard

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(c). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by chapter 41.56 RCW. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in discrimination cases. To prove discrimination, the complainant must first set forth a prima facie case establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Washington State University*, Decision 11749-A (PSRA, 2013), citing *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to common experience give rise to a reasonable inference of the truth of the fact sought to be proved. See *Seattle Public Health Hospital (AFGE Local 1170)*, Decision 1911-C (PECB, 1984).

In response to a complainant's prima facie case of discrimination, the respondent need only articulate its nondiscriminatory reasons for acting in such a manner. The respondent does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the complainant to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

Discipline

A cause of action for discrimination under RCW 41.80.110(1)(c) will be given if the statement of facts indicates that an employer has deprived an employee of ascertainable rights, benefits, or status, in reprisal for the employee's protected union activities. In the present case, the second amended complaint alleges Fisher was disciplined on August 20, 2018, with a six-month, five percent reduction-in-pay. The August 20 discipline was related to allegations that occurred on August 8, 2018. The complaint lacks facts as to what protected activity Fisher was engaged in and does not describe a causal connection between the protected activity and the discipline. Thus, the allegation must be dismissed.

Filing an Unfair Labor Practice

The second amended complaint alleges that the employer discriminated against Fisher when he filed an unfair labor practice with PERC on February 15, 2019. Filing an unfair labor practice is a protected activity. The second amended complaint lacks facts alleging any employer actions or statements made after the unfair labor practice filing. The second amended complaint also lacks facts alleging a causal connection between the employers actions or statements and the filing of the unfair labor practice complaint. Thus the allegation must be dismissed.

Domination

Applicable Legal Standard

The second amended complaint alleges employer domination or assistance of a union in violation of RCW 41.80.110(1)(b). A cause of action for employer domination is provided for in all statutes administered by the Commission. The origins of the violation are based upon the

concerns set forth in the test's second clause; that is, whether an employer has attempted to create, fund, or control a company union. *See State – Washington State Patrol*, Decision 2900 (PECB, 1988).

Although the Commission has issued few decisions on employer domination, those decisions have generally revolved around whether employers have unlawfully rendered assistance to unions. Examples of such assistance are allowing the free use of employer buildings and resources for union business, providing aid to employees serving as union officers, or favoring one union over another during a representation proceeding. The meaning of the term "domination" is thus directly tied to the term "assistance" and does not imply a cause of action for alleged negative acts directed toward the union or union members.

An employer's actual or attempted control of a union through assistance, ranging from favoritism to a full-fledged company union, is deleterious to the collective bargaining rights of employees; however, those actions are distinct from interference. It is appropriate to file a complaint alleging employer domination or assistance of a union if the facts suggest that the employer is violating the statute through such acts as rendering assistance to a union or union officers, supporting a company union, or showing favoritism to one union over another during an organizing campaign.

Application of Standard

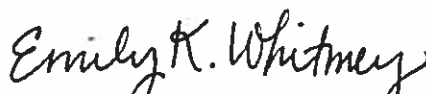
The second amended complaint lacks facts alleging a domination violation. The second amended complaint only alleges that Fisher and other bargaining unit employees were disciplined differently. This fact alone does not provide evidence of the employer showing favoritism of one union over another union or assisting a union. Because the second amended complaint lacks facts alleging domination, the allegation must be dismissed.

ORDER

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

ISSUED at Olympia, Washington, this 7th day of May, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


EMILY K. WHITNEY, Unfair Labor Practice Administrator

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



RECORD OF SERVICE

ISSUED ON 05/07/2019

DECISION 12997 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 131313-U-19

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