STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DANIEL MICHAEL LEWIS, Complainant, vs. EASTERN WASHINGTON UNIVERSITY, Respondent.	CASE 134227-U-21 DECISION 13385 - PSRA ORDER OF DISMISSAL

Daniel Michael Lewis, the complainant.

Cheryl L. Wolfe, Senior Counsel, Attorney General Robert W. Ferguson for the Eastern Washington University.

On May 28, 2021, Daniel Michael Lewis (complainant) filed an unfair labor practice complaint against Eastern Washington University (employer) alleging the employer interfered with Lewis's protected employee rights, violated his *Weingarten* rights, discrimination against him in violation of chapter 41.80 RCW, and violated the collective bargaining agreement that applied to him. The complaint was reviewed under WAC 391-45-110[1] and a deficiency notice issued on June 29, 2021, which notified Lewis that a cause of action could not be found at that time. Lewis was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

No further information has been filed by the complainant. The complaint is dismissed for failing to state a cause of action.

---

[1] At this stage of the proceedings, all of the facts alleged in the complaint or amended 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.

BACKGROUND

Daniel Michael Lewis worked as a Custodian at Eastern Washington University (employer). Lewis's position was represented by the Washington Federation of State Employees (union) for purposes of collective bargaining.

According to the complaint, Raymond Godin, Manager of Custodial Services, interviewed Lewis by telephone and hired him to work on March 16, 2021. On that same day, Lewis shadowed an unidentified Custodian to observe the job duties that Lewis would be performing. On March 17, 2021, the employer assigned Lewis to 6 days of shift training. On or around April 12, 2021, Lewis met Lead Custodian Theo Bukowski who observed Lewis's work between April 12, 2021, and April 16, 2021. According to the complaint, Bukowski did not provide Lewis any training, guidance, or feedback.

On April 19, 2021, Lewis alleged that he was working his shift when Bukowski approached and the two engaged in a conversation. Lewis alleged that he asked Bukowski how to join the union and Bukowski allegedly responded that Lewis's employment would be in jeopardy if he joined the union. Lewis also alleged that between April 26 and 30, 2021, Bukowski did not train, provide guidance, or provide feedback to Lewis even though Lewis suggested that training be provided. Lewis claims that after he made these suggestions, he was treated adversely by Bukowski and Custodial Supervisor Meredith Lewis.[2]

On May 7, 2021, Bukowski sent a text to Lewis's personal cell phone summoning him to the custodial office for a meeting. Meredith also attended this meeting. Meredith allegedly told Lewis that if he "took overtime" again that Lewis would be subject to discipline. Lewis's complaint did not specify any facts describing the overtime event, but Lewis claims that he explained the reason he took overtime; specifically, that he had not been trained on the night shift closing procedures and he was unclear as to whether he could clock off and the end of his shift despite the fact that all

---

[2] In order to avoid confusion, Meredith Lewis will be referred to by her first name. No disrespect is intended.

of his tasks had not been completed. Lewis was also allegedly told that he could not use his personal cell phone while on duty.

Also on May 7, 2021, Buskowski allegedly told Lewis that he "could be let go for any reason" and that the even if the employer had to make up a "bullshit" reason, Lewis could be terminated. In a third meeting that same day with Meredith, Lewis asked for a union shop steward to be present to address Meredith's statements regarding any disciplinary action for overtime use. Meredith told that he Lewis was "free to reach out for a union rep." Lewis alleges that he was never provided a representative but the complaint did not specify whether Meredith continued the meeting despite Lewis's request.

Between May 10 and 14, 2021, Bukowski allegedly instructed Lewis that he was to take his breaks and lunches in the breakroom despite the fact that other employees are allowed to take their breaks wherever they wanted. Bukowski also allegedly instructed Lewis to notify Bukowski when he takes his breaks and lunch, but this directive was later rescinded. Between May 18 and 21, 2021, Lewis claimed he reached out to Bukowski and Meredith for assistance without success.

On May 21, 2021, Godin and Meredith presented Lewis with a memorandum concerning a meeting about Lewis's employment. Lewis was also advised to bring a union representative to that meeting. On May 24, Lewis attended the meeting and Godin presented Lewis a letter terminating his employment.

ANALYSIS

Independent Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 41.80.110(1)(a). The Commission recently clarified the standard for employer interference in *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). To prove interference, the complainant must prove, by a preponderance of the evidence, the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997),

remedy aff'd, Pasco Housing Authority v. Public Employment Relations Commission, 98 Wn. App. 809 (2000). An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A.

The complainant is not required to demonstrate that the employer intended or was motivated to interfere with employees' protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee involved was actually coerced by the employer or that the employer had union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A.

Here, Bukowski's statements that Lewis's employment would be in jeopardy if he joined the union potentially stated a cause of action for interference, but as the deficiency notice pointed out, the complaint did not allege facts that Bukowski was not a bargaining unit member and had the ability to materially affect Lewis's employment status. Lead employees are generally included in the same bargaining unit with other nonsupervisory employees, *see City of Lynnwood*, Decision 8080-B (PECB, 2006), and if Bukowski was a fellow bargaining unit employee, his statements about the union could be imputed upon the employer. Because Lewis failed to file an amended complaint describing Bukowski's bargaining unit status, this allegation must be dismissed.

Weingarten Violations

In *NLRB v. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*), the Supreme Court of the United States affirmed a National Labor Relations Board (NLRB) decision holding that under the National Labor Relations Act (NLRA), employees have the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Seattle School District*, Decision 10732-A (PECB, 2012). In *Okanogan County*, Decision 2252-A (PECB, 1986), the Commission held that the rights announced in

Weingarten are applicable to employees who exercise collective bargaining rights under chapter 41.56 RCW. *See also Methow Valley School District*, Decision 8400-A (PECB, 2004).

There are four elements necessary for Weingarten rights to be applicable:

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

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

3. The employee must reasonably believe potential discipline might result from the information obtained during the interview. *Mason County*, Decision 7048 (PECB, 2000).

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

State – Washington State Patrol, Decision 4040 (PECB, 1992); *Seattle School District*, Decision 10066-B (PECB, 2010). An employee has a right to union representation at an "investigatory" interview which the employee reasonably believes could result in discipline. *City of Bellevue*, Decision 4324-A (PECB, 1994) (citing *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975); *Okanogan County*, Decision 2252-A). It is the nature of an "investigatory" interview that the employer is seeking information from the employee. A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. *City of Bellevue*, Decision 4324-A. Discipline often can and does result from "investigatory" meetings, and the Commission has found interviews to be "investigatory" where they were part of an investigation concerning improper conduct. *Snohomish County*, Decision 4995-B (PECB, 1996). If the interview is not investigatory in nature, *Weingarten* rights do not apply.

Lewis's complaint failed to describe a *Weingarten* violation. At the first May 7, 2021, meeting with Meredith, Lewis did not allege that he requested to have a union representative present at that meeting. At the second May 7, 2021, meeting Lewis requested to have union representative and Meredith told Lewis to reach out to his union representative. The complaint does not detail what

occurred after Meredith's statement. The complaint and absent facts demonstrating that the employer compelled Lewis to continue to attend the meeting and the employer precluded Lewis from having a union representative in attendance during that meeting, a *Weingarten* violation cannot be found.

Employer Discrimination

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.80.110(1)(a). An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by chapter 41.80 RCW. *University of Washington*, Decision 11091-A (PSRA, 2012); *Educational Service District 114*, Decision 4361-A (PECB, 1994). RCW 41.80.050 grants employees the right "to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities."

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. *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.

Lewis's complaint did not alleged that the employer terminated his employment in retaliation for activates protected by chapter 41.80 RCW. Rather, Lewis has only alleged that the employer terminated his employment for other reasons, such as racial discrimination. This agency lacks jurisdiction over those kinds of allegations and absent facts claiming the employer terminated Lewis's employment in retaliation for activates protected by chapter 41.80 RCW, this allegation must be dismissed.

Contract Violations

Finally, Lewis's complaint suggests that the employer may have violated the collective bargaining agreement when it terminated his employment. The Commission has consistently refused to resolve "violation of contract" allegations or attempts to enforce a provision of a collective bargaining agreement through the unfair labor practice provisions it administers. *Anacortes School District*, Decision 2464-A (EDUC, 1986) (citing *City of Walla Walla*, Decision 104 (PECB, 1976)). The Commission has consistently held that any remedy for a contract violation will have to come through the grievance and arbitration machinery of that contract, or through the superior courts. *South Whidbey School District*, Decision 11134 A (EDUC, 2011) (citing *Tacoma School District*, Decision 5722-E (EDUC, 1997)).

ORDER

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

ISSUED at Olympia, Washington, this 29th day of July, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DARIO DE LA ROSA, Unfair Labor Practice Administrator

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

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 07/29/2021

DECISION 13385 - 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 134227-U-21

EMPLOYER: EASTERN WASHINGTON UNIVERSITY

REP BY:
DAVID MAY
EASTERN WASHINGTON UNIVERSITY
214 SHOWALTER HALL
CHENEY, WA 99004
president@ewu.edu

CHERYL L. WOLFE
OFFICE OF THE ATTORNEY GENERAL
1116 W RIVERSIDE AVE STE 100
SPOKANE, WA 99201-1106
cheryl.wolfe@atg.wa.gov

PARTY 2: DANIEL MICHAEL LEWIS

REP BY:
DANIEL MICHAEL LEWIS
1103 WEST 9TH AVENUE APT 6
SPOKANE, WA 99207
mlcincinnati09@aol.com