STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

NORMA RODRIGUEZ, Complainant, vs. WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, Respondent.	CASE 134221-U-21 DECISION 13391 - PSRA ORDER OF DISMISSAL

Norma Rodriguez, Complainant.

Cheryl L. Wolfe, Senior Counsel, and *Sara L. Wilmot*, Assistant Attorney General, Attorney General Robert W. Ferguson for the Washington State Department of Children, Youth, and Families.

On May 26, 2021, Norma Rodriguez (complainant) filed an unfair labor practice complaint alleging the Washington State Department of Children, Youth, and Families (employer) committed unfair labor practices through allegations that are outside of this agencies jurisdiction. The complaint was reviewed under WAC 391-45-110.[1] A deficiency notice issued on June 22, 2021, notified Rodriguez that a cause of action could not be found at that time. Rodriguez was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the case.

On July 14, 2021, Rodriguez filed an amended complaint. The amended complaint is dismissed for failure to state a cause of action.

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[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

Norma Rodriguez (complainant) was employed as a Social Worker, FAR/Investigator at the Washington State Department of Children, Youth, and Families (employer). Rodriguez's position was represented by the Washington Federation of State Employees for purposes of collective bargaining. As a state civil service employee, Rodriguez's collective bargaining rights are governed by the Personnel System Reform Act of 2002, chapter 41.80 RCW. Rodriguez alleged that the employer "violated RCW 41.80.110(2)(a) by a breach of its duty of fair representation" and "refused to bargain in violation of RCW 41.56.140(4)" through the following acts:

In late September 2019, Rodriguez contracted pneumonia. On December 19, 2019, she was placed on workforce investigation while out on medical leave. The complaint does not explain why the employer initiated an investigation into Rodriguez's employment.

On January 21, 2020, Rodriguez's coworker Sylvia Zarate asked Rodriguez to be a witness in a personal matter involving the employer and law enforcement. On March 3, 2020, the employer placed Rodriguez on an employee plan while she was still on medical leave. The employee plan required Rodriguez to check in with the employer every morning. The complaint does not explain if the remedial employee plan was associated with the December 19, 2019, investigation and does not explain if the employer knew that Zarate asked Rodriguez to be a witness in the personal matter involving the employer. Rodriguez asserts the employee plan violated the Washington Law Against Discrimination, chapter 49.60 RCW.

On April 15, 2020, Rodriguez filed a public records request with the employer pursuant to chapter 42.56 RCW. Rodriguez asserts that the employer, on an unidentified date, transferred Zarate to a new work location in retaliation for Rodriguez's public records request. Rodriguez also asserts that she requested reports from the Granger and Toppenish police departments concerning Zarate so that she could provide those to Zarate. Rodriguez claims that there is evidence in the Granger police reports that proves Rodriguez's supervisors violated state law and employer polices.

On April 22, 2020, Rodriguez alleges that she met with Area Administrator Claudia Rocha. During that meeting Rodriguez asserts that Rocha made several false statements. The complaint does not include facts detailing the subject matter of this meeting.

Rodriguez asserts that on August 21, 2020, the employer obtained the police reports regarding Zarate. Rodriguez claims that the employer's request and "meddling" into this criminal matter was not only an unfair labor practice but also violated several criminal statutes.

On August 28, 2020, Rodriguez received an email from the employer informing her that she was being investigated for employee misconduct. On September 4, 2020, Rodriguez met with Perez and Human Resources Consultant Megan O'Neal. During that meeting, the employer informed Rodriguez that it initiated the investigation due to Rodriguez's use of medical leave. Rodriguez asserts in her complaint and amended complaint that the employer initiated the investigation in retaliation for her public records request.

On September 12, 2020, Rodriguez returned to work from medical leave. On October 23, 2020, Human Resources Investigator Beverly Payne informed Rodriguez that a previously scheduled meeting was canceled. The complaint does not describe the subject matter of that meeting. Rodriguez alleges that on November 5, 2020, Payne conducted an interview and questioned Rodriguez about a tablet charger. Rodriguez allegedly informed Payne that she had gotten the charger from Zarate.

On November 7, 2020, Rodriguez alleged received a backdated email from Perez. The complaint does not describe the contents of that email but asserts backdating an email is a violation of state law. On November 9, 2020, Rodriguez emailed Payne, Rocha, Workforce Administrator Renata Rhodes, and Human Resources Director Phedra Quincy to inform them that she would not sign the Investigative Interview Roles and Expectations form or any other documents the employer was requiring Rodriguez to sign. The complaint does not explain how or when these documents were presented to Rodriguez. Rodriguez claims in her email that the investigation was not valid and also claims that Payne forged her signature on the document.

On November 17, 2020, Rodriguez submitted a reasonable accommodation form due to the human resources investigation and other workplace stress. Rodriguez allegedly spoke with Union Shop Steward Debbie Stills on that same day and learned that Perez had allegedly placed Rodriguez under investigation due to her friendship with Zarate. Stills allegedly reiterated this assertion on December 17, 2020.

On November 30, 2020, Zarate emailed Secretary Ross Hunter, the head of the agency, to inform him that Zarate found it odd that her friends were being investigated and stated that she believed the employer was retaliating against her friends.

On December 30, 2020, Rodriguez received her final investigative report. Rodriguez alleges the report contains numerous false statements, errors made by payroll, and that Perez knowingly withheld information in order to create a negative report against Rodriguez.

On February 16, 2021, the employer terminated Rodriguez claiming she improperly claimed 76.4 hours of leave. Rodriguez asserted that she told Rocha that she believed she was being fired for being friends and associated with Zarate, which Rocha denied.

On February 17, 2021, Union Representative Gus Gonzalez informed Rodriguez that Perez allegedly stated she did not want Rodriguez working for the employer. Perez also told Gonzalez that if Rodriguez agreed to resign, the employer would extend her medical benefits, approve her unemployment, and provide a letter of recommendation.

On February 19, 2021, Rodriguez received an email from Human Resources Consultant Joseph Brom thanking Rodriguez for her service with the department. On February 22, 2021, Rodriguez received a certificated letter from Hunter. The complaint does not describe the content of Hunter's letter. Rodriguez claims that both of these actions were attempts to directly negotiate with her despite the fact that she was going to file a grievance regarding her termination.

In addition to alleging that some of these acts constitute unfair labor practices under the statues this agency administers, Rodriguez also asserts that most, if not all of these acts violated chapter 49.60 RCW, numerous criminal statutes, and constitutional provisions.

ANALYSIS

The deficiency notice pointed out that Rodriguez's original complaint contained minor procedural defects that precluded it from being processed, including failing to number paragraphs as required by WAC 391-45-050 and failing to cite to the correct unfair labor practice statutes.[2] While the amended complaint did not cure these procedural deficiencies, these defects are immaterial because Rodriguez did not cure the substantive defects in her amended complaint.

Applicable Legal Standard

The Personnel System Reform Act of 2002, chapter 41.80 RCW, guarantees 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." RCW 41.80.050. Rodriguez's complaint and amended complaint claim that the employer committed an unfair labor practice because it breached its duty of fair representation owed to her by conducting a biased investigation and breaching numerous criminal statutes and employer policies. These claims fail to state a cause of action that can be redressed through the unfair labor practice provisions administered by this agency.

The duty of fair representation is an obligation that an *employee organization* owes to the employees it represents. The duty of fair representation arises from the rights and privileges held by a union when it is certified or recognized as the exclusive bargaining representative under a

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[2] For example, Rodriguez's complaint and amended complaint repeatedly claim that the employer committed an unfair labor practice by violating RCW 41.80.110(2)(a). That statute states that "it is an unfair labor practice for an employee organization . . . to restrain or coerce an employee in the exercise of the rights guaranteed by this chapter[.]" (emphasis added). The employer cannot violate RCW 41.80.110(2)(a) because it is not an employee organization or union within the meaning of the act. *See* RCW 41.80.005(7).

collective bargaining statute. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002) (citing *City of Seattle*, Decision 3199-B (PECB, 1991).

In a labor relations context, a public employer does not owe a duty of fair representation to represented employees. Rather, a public employer is prohibited from interfering with, restraining, or coercing an individual employee in the exercise of their rights protected by chapter 41.80 RCW. A public employer is also prohibited from discriminating against employees for the exercise of right protected by the collective bargaining statutes or for filing an unfair labor practice complaint or provided testimony at an unfair labor practice hearing. While other statues, polices, and rules may require an employer to conduct a "fair" investigation of employee misconduct, this agency's jurisdiction is limited to allegations involving activity protected by chapter 41.80 RCW.

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). None of the facts alleged in the complaint demonstrate that the employer interfering with, restraining, or coercing Rodriguez in the exercise of her protected activity. While the complaint does detail some interactions with union representatives, Rodriguez has only alleged that she was assisting a coworker and has not claimed that she perceived 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. Absent such allegations, the complaint must be dismissed.

It is also 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). 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). A cause of action for discrimination will be given if the statement of facts filed by the complainant demonstrates that an employer has deprived an employee of ascertainable rights, benefits, or status, in reprisal for the employee's protected union activities.

None of the facts alleged in the complaint demonstrate that the employer terminated Rodriguez in retaliation for her exercise of protected activity. The filing of public records requests or requesting medical leave are not acts that are protected by chapter 41.80 RCW. Furthermore, while being a witness for and assisting a fellow employee in a criminal matter could be potentially by construed as concerted activity, the collective bargaining laws administrated by this agency do not extend to employees the right to engage in protected concerted activities similar to the National Labor Relations Act. *King County (Teamsters Local 117)*, Decision 12000-A (PECB, 2014) (citing *City of Seattle*, Decision 489 (PECB, 1978), *aff'd*, Decision 489-A (PECB, 1979)). Absent allegation that the employer terminated Rodriguez's employment based upon her exercise of protected activity, the complaint must be dismissed.

Finally, Rodriguez lacks standing to file a refusal to bargain allegation. The employee organization or union 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).

Allegations Outside this Agency's Jurisdiction

Rodriguez's claims that the employer violated the Washington Law Against Discrimination, the Ethics in Public Service Act, and other criminal statues does not state causes of action before this agency. The Public Employment Relations Commission does not have jurisdiction over laws that protect employees from discrimination or public services ethics laws. This agency has no jurisdiction to address criminal or constitutional violations. As referenced above, the complaint does not allege that Rodriguez was discriminated against for engaging in protected union activity.

ORDER

The 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 10th day of August, 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 08/10/2021

DECISION 13391 - 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 134221-U-21

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