

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAM PHAM,

Complainant,

vs.

FERNDALE SCHOOL DISTRICT,

Respondent.

CASE 135129-U-22

DECISION 13536 - PECB

ORDER OF DISMISSAL

Dam Pham, the complainant.

Mark Deebach, Interim Superintendent, for the Ferndale School District.

On May 31, 2022, Dam Pham (complainant) filed an unfair labor practice complaint against the Ferndale School District (employer). The complaint was reviewed under WAC 391-45-110.¹ A deficiency notice issued on June 21, 2022, notified Dam Pham that a cause of action could not be found at that time. Dam Pham 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 Pham. The Unfair Labor Practice Administrator dismisses the complaint for failure 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.

ISSUE

The complaint alleges the following:

General discrimination violations outside the Commission's jurisdiction.

The complaint lacks facts necessary to allege a discrimination violation within the Commission's jurisdiction.

BACKGROUND

The complainant was a bus driver for the Ferndale School District (employer) and was represented by Teamsters Local 231 (union). In June 2021, the complainant received a letter of reasonable assurance for the 2021-2022 school year from the employer. On August 18, 2021, the complainant was provided notice of the COVID-19 vaccine mandate. Employees needed to be vaccinated by October 18, 2021, or would be terminated. On August 26, 2021, the complainant received notice of the ability to file a religious accommodation in place of becoming vaccinated. The complainant submitted the request for a religious accommodation on September 10, and on September 16, 2021, the request was granted. In the September 6 notification the complainant learned that regular testing and other safety mitigation strategies may be required of those who are not vaccinated. In late September 2021 the complainant contracted covid and recovered quickly.

On October 15, 2021, the employer provided notice to the Bus Drivers that as part of their conditional approval of a medical or religious vaccine exemption, those employees would be required to have a rapid covid test twice weekly beginning the following week. Failure to report for testing would result in revocation of their accommodation.

On October 21, 2021, the complainant reported to work as usual, but requested a short meeting with the Transportation Operations Manager to raise several concerns. The complainant agreed to testing if the testing was subjected to all Ferndale School District employees. The complainant strongly objected to segregating the unvaccinated employees. The employer would not change the provisions of testing and the complainant refused to test.

On October 27, 2021, the complainant received a *Loudermill* notice. The complainant refused union representation for the meeting and declined to attend the *Loudermill* hearing. On November 8, 2021, the complainant received notice that the employer was recommending termination. On December 1, 2021, the complainant was terminated.

ANALYSIS

Discrimination

Applicable Legal Standard

The complaint does not describe allegations that fit within the jurisdiction of the Commission. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees, and unions. The agency does not have authority to resolve all disputes that might arise in public employment. *Tacoma School District (Tacoma Education Association)*, Decision 5086-A (EDUC, 1995). Just because the complaint does not state a cause of action for an unfair labor practice does not necessarily mean the allegations involve lawful activity. It means that the issues are not matters within the purview of the Commission. *Tacoma School District (Tacoma Education Association)*, Decision 5086-A. Washington State Human Rights Commission has jurisdiction over employment discrimination in the state of Washington. The Equal Employment Opportunity Commission (EEOC) is a federal agency that also has jurisdiction over discrimination.

It is an unfair labor practice for an employer to discriminate against employees for engaging in union activity. RCW 41.56.140(1). 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. *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

The complaint lacks facts alleging a discrimination allegation within the Commission's jurisdiction. The complaint provides facts alleging the employer terminated the complainant on December 1, 2021. The complaint lacks facts alleging the complainant participated in an activity protected by the collective bargaining statute or communicated to the employer an intent to do so. Additionally, the complaint lacks facts alleging a causal connection exists between the termination and the complainant's exercise of protected activity. Pham was provided an opportunity to correct the deficiency but did not provide an amended complaint with additional facts. Because the complaint lacks facts necessary to allege a discrimination violation, the complaint must be dismissed.

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 21st day of July, 2022.

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 07/21/2022

DECISION 13536 - PECB 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 135129-U-22

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