STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BEN FRANKLIN TRANSIT, Complainant, vs. TEAMSTERS LOCAL 839, Respondent.	CASES 131976-U-19, 131977-U-19, 131978-U-19
TEAMSTERS LOCAL 839, Complainant, vs. BEN FRANKLIN TRANSIT, Respondent.	CASES 132082-U-19, 132083-U-19, 132084-U-19, 132085-U-19, 132086-U-19 DECISION 13409-A - PECB DECISION OF COMMISSION

David W. Ballew, Attorney at Law, Reid, McCarthy, Ballew & Leahy, L.L.P., for Teamsters Local 839.

Shannon E. Phillips, Attorney at Law, Summit Law Group PLLC, for Ben Franklin Transit.

On August 7, 2019, Ben Franklin Transit (employer) filed three unfair labor practice complaints against Teamsters Local 839 (union), involving the Coach Operators, Dial-A-Ride, and Maintenance bargaining units represented by the union. The employer alleged the union breached its good faith bargaining obligation through the conduct of the union's lead negotiator during negotiations. Unfair Labor Practice Administrator (Administrator) Emily Whitney issued a consolidated preliminary ruling for all three cases.

On September 9, 2019, and October 23, 2019, the union filed five unfair labor practice complaints and amended complaints against the employer, involving the Coach Operators, Dial-A-Ride Drivers, Maintenance, Dial-A-Ride Dispatchers, and Administrative Assistants bargaining units. The union alleged the employer dominated the union, refused to bargain by filing for a protection order against the union's lead negotiator, breached its good faith bargaining obligation by revoking tentative agreements, and refused to provide information. The Administrator issued a consolidated preliminary ruling.

The complaints filed by the employer and filed by the union were consolidated for hearing before Examiner Dario de la Rosa.

The hearings in this matter took place on February 27 and 28, March 4 and 5, and October 28, 2020. The transcript was 1,285 pages long. The parties filed post-hearing briefs. Upon request, the parties filed supplemental briefs on the appropriate legal standard to determine whether a lawsuit filed by one party to a collective bargaining relationship against another violates the statute.

The Examiner concluded that the union breached its good faith bargaining obligation because Russell Shjerven's behavior was hostile, abusive, and not reasonable. *Ben Franklin Transit (Teamsters Local 839)*, Decision 13409 (PECB, 2021). The employer did not breach its good faith bargaining obligation when it supported Wendi Warner in obtaining a restraining order against Shjerven. *Id*. The employer dominated the union by instructing the union to assign a representative other than Shjerven to work with the employer while the temporary restraining order prohibiting contact between Warner and Shjerven was in effect. *Id*. The employer did not revoke tentative agreements. *Id*. The employer did not refuse to provide information when the employer's lead negotiator did not respond to the union's requests to depose him in the civil matter concerning the restraining order. *Id*.

On October 19, 2021, the union appealed the Examiner's decision. On October 26, 2021, the employer filed a cross-appeal. The parties filed briefs to complete the record.

ISSUES

There are five issues before the Commission.

1. Did the Examiner err in holding that the union breached its good faith bargaining obligation in violation of RCW 41.56.150(4) through the conduct of union representative Russell Shjerven in negotiations on June 28 and July 22–24, 2019?

2. Did the Examiner err in holding that the employer breached its good faith bargaining obligation in violation of RCW 41.56.140(4) when Wendi Warner filed a petition for a temporary protection order against Russell Shjerven during negotiations for a successor collective bargaining obligation?

3. Does substantial evidence support the Examiner's conclusion that the employer dominated the union in violation of RCW 41.56.140(2) by instructing the union to name a representative other than Russell Shjerven as its representative in bargaining and by assigning Warner to grievance meetings in August 2019, thereby preventing bargaining unit members from selecting Shjerven as their representative?

4. Does substantial evidence support the Examiner's conclusion that the employer did not withdraw from tentative agreements in violation RCW 41.56.140(4)?

5. Does substantial evidence support the Examiner's conclusion that the employer did not refuse to provide information in violation of RCW 41.56.140(4)?

We reverse the Examiner's conclusion that the union breached its good faith bargaining obligation. Union representatives retain their First Amendment freedom of speech when engaged in collective bargaining. On the remaining issues, we affirm the Examiner.

BACKGROUND

In his decision, the Examiner fully detailed the facts of the case. Accordingly, we provide only a brief recitation of facts to frame our decision.

On June 28, 2019, the employer and union met to negotiate the successor collective bargaining agreements covering the Dial-A-Ride Drivers and the Coach Operators. The union's secretary-treasurer, Russell Shjerven, was the union's lead negotiator. John Lee was the employer's lead negotiator. The employer's team included Director of Human Resources and Labor Relations Wendi Warner, among others. The meeting began with pleasantries. Shjerven stated that the union could tentatively agree to some of the issues the parties had previously discussed.

Before the parties began negotiating, Shjerven launched into a profanity-laced tirade expressing his frustration about the employer leaking information discussed during a grievance meeting. Shjerven was angry the room for negotiations was not set up and the employer had been late for meetings. Shjerven said "fuck" repeatedly.

The employer team caucused. Upon returning, Lee communicated that the employer would not negotiate that day. Lee stated the employer was committed to bargaining and would contact the union with future bargaining dates. In response, Shjerven used profanity and accused the employer of refusing to bargain.

The parties scheduled three days of negotiations, July 22 through 24, 2019. The parties had three productive days of negotiations. The negotiations were punctuated with comments that Warner attributed to Shjerven and Warner found offensive.

As the July 24, 2019, meeting neared an end, the employer persuaded Shjerven to stay beyond the agreed end time to review the tentative agreements. Shjerven and Lee reviewed the list of issues for agreement. Lee and Shjerven were unable to agree on the number of agreements. A conflict between Warner and Shjerven quickly escalated.

Warner's, Lee's, and Shjerven's accounts of the events vary. The witnesses testified Shjerven made a comment to the effect, "John, you have to put a leash on her." Warner testified that Shjerven was shaking his fist and pointing his finger near her. None of the other attendees, including attorney Lee, saw Shjerven threaten Warner with his fist. Shjerven testified that Warner screamed at him. As they exited the room, Shjerven and Warner continued to argue.

The next day, Warner filed an ex parte Petition for an Order for Protection alleging harassment in Benton County Superior Court. Among other things, Warner advised the court under oath that Shjerven had during negotiations the previous day gotten out of his chair and come toward her directly, "raising his arms and shaking his fist at me."[1] Warner testified that she felt threatened and intimidated. The court granted Warner an ex parte Temporary Protection Order and set a hearing date for August 2, 2019, to consider whether the temporary order should be converted into a one-year Order of Protection. Pursuant to the temporary order, Shjerven could not be within 500 feet of Warner's residence or place of employment.

The employer sent a copy of the court order to the union on July 30, 2019, and requested that, until the terms of the court order changed, the union identify who would represent employees in Shjerven's absence. The employer asked to reschedule meetings, pending the outcome of the petition for a protection order.

Warner initially sought the protection order on her own. Later, the employer supported Warner and paid for Warner's attorney. After an August 30, 2019, hearing on the merits, Superior Court Judge Samuel P. Swanberg dismissed Warner's petition. The court concluded that Warner failed to establish that on July 24 that she had a "reasonable physical fear --of physical assault," and stated from the bench that "this was not unlawful conduct." In addition, the court held that Shjerven's "foul" and "vulgar" language was "constitutionally protected free speech" that could not form the basis for an order for protection under chapter 10.14 RCW. The court entered a Denial

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[1] Employer Ex. 40.

Order on Warner's application holding that "[a] preponderance of the evidence has not established that there has been harassment."

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006). The Commission reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Duty to Bargain

A public employer and a union representing public employees have an obligation to bargain in good faith over mandatory subjects of bargaining. RCW 41.56.030(4). The obligation to bargain in good faith is enforced through RCW 41.56.140(4) (employers) and RCW 41.56.150(4) (unions).

The statute "regulates the subjective conduct and motivations of the parties in a collective bargaining situation, but expressly refrains from mandating any result or procedure for achieving final resolution of an intractable bargaining dispute." *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 459–60 (1997) (quoting Stuart S. Mukamal, *Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 6 J.L. & Com. 107 (113–14) (1986)). The parties are left to resolve disputes themselves, "subject to intervention by PERC or the courts only when the

conduct of a party indicates a refusal to bargain in good faith, which . . . [is] 'an absence of a sincere desire to reach an agreement.'" *Id*. at 460. Whether a party has failed to negotiate in good faith is a mixed question of fact and law. *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 469 (1997).

"[P]arties are expected to negotiate in good faith, and a breach of good faith can lead to the finding of an unfair labor practice." *Entiat School District*, Decision 1361 (PECB, 1982), *remedy aff'd*, Decision 1361-A (PECB, 1982). Less-than-commendable conduct does not automatically lead to the conclusion that a party has refused to bargain. *City of Snohomish*, Decision 1661-A (PECB, 1984). However, engaging in tactics evidencing an intent to frustrate or stall an agreement will result in a finding of refusal to bargain. *Id*. The Commission evaluates the totality of the circumstances, including considering evidence of good faith bargain along with evidence of bad faith bargaining. *Id*. (citing *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); *Island County (Teamsters Union Local No. 411)*, Decision 857 (PECB, 1980)).

Attempting to have the other party's designated negotiators removed from the bargaining responsibilities violates the duty to bargain in good faith. *See Fort Vancouver Regional Library (Washington Public Employees Association)*, Decision 2350-D (PECB, 1989).

Application of Standards, Issue 1:
Did the union breach its good faith bargaining obligation through the conduct of union representative Russell Shjerven in negotiations on June 28 and July 22–24, 2019?

The employer alleged that Shjerven's behavior in the June 28 and July 22–24, 2019, negotiations were of such a nature that the union breached its good faith bargaining obligation. Analyzing each incident in turn, the Examiner agreed that Shjerven's conduct at the June 28, negotiation session was "hostile, threatening, not reasonable, and not protected by chapter 41.56 RCW." Decision 13409 at 22. Thus, the Examiner found the union breached its good faith bargaining obligation through Shjerven's conduct on June 28.

The employer next alleged that Shjerven's conduct and behavior at the end of the July 24, 2019, meeting was bad faith bargaining. The Examiner agreed, finding the behavior to be "hostile, abusive, and not reasonable." Decision 13409 at 25.

On appeal, the union argues the Examiner failed to apply Commission precedent; rather, the Examiner applied a National Labor Relations Board (NLRB or Board) decision, *General Motors LLC*, 369 NLRB No. 127 (2020), that the NLRB General Counsel has identified as a decision of concern. Next, the union distinguishes *General Motors*, which involved an employee union representative, from this case, which involves a non-employee union representative. The union asserts that Shjerven's speech was protected by the First Amendment and those protections must be considered when evaluating whether the union breached its good faith bargaining obligation.

In response, the employer argues that Washington's labor laws do not give union representatives the right to act abusively when pursing union interests. The employer urges the Commission to adopt *General Motors* to effectively balance the collective bargaining and antidiscrimination laws. The employer asserts that sexually harassing conduct that occurs during bargaining is a breach of the good faith bargaining obligation.

Background evidence outside of the statute of limitation is not evidence of bad faith bargaining. As an initial matter, the statute of limitations in an unfair labor practice case begins six months before the filing date of the complaint. RCW 41.56.160(1). As the Commission stated in *State – Ecology*, Decision 12732-A (PSRA, 2017),

> [w]hile evidence of events occurring outside of the six-month statute of limitations can be relevant and is admissible to establish background leading to the complained-of conduct, we encourage parties to focus on events that occurred within the statute of limitations. Evidence not relevant to the proceeding, especially outside the statute of limitations, should properly be excluded.

Here, as in *State – Ecology*, the Examiner admitted evidence relating to events that occurred outside the statute of limitations. The employer presented extensive documentary evidence and witness testimony about the communications between Shjerven and Warner over the course of

Warner's tenure with the employer. The extensive background in this case was offered to support the employer's allegation that Shjerven harassed Warner and created hostile a work environment that resulted in the union breaching its good faith bargaining obligation. Much of that evidence occurred outside of the six-month statute of limitations and is not relevant to determine the propriety of the complained-of conduct.

The Commission may only remedy alleged violations of the law occurring within the six-month statute of limitations. Therefore, the evidence of events occurring outside of the statute of limitations has not been considered in determining whether the union breached its good faith bargaining obligation.

General Motors does not apply when determining whether a union breached its good faith bargaining obligation.

The Examiner determined that *General Motors* was applicable to cases decided under chapter 41.56 RCW. In doing so, the Examiner rejected the Commission's existing precedent because the Commission's precedent "relied upon the now rejected federal precedent to allow parties to freely use 'intemperate, abusive or insulting language without fear of restraint.'" Decision 13409 at 21. The Examiner termed the Commission's precedent "archaic views of the kinds of behaviors once protected by chapter 41.56 RCW." *Id*. We overrule the Examiner's rejection of Commission precedent and his adoption and application of *General Motors*.

To begin*, General Motors* is factually distinguishable. There, a General Motors employee serving as a union committeeperson had several heated exchanges with managers while engaged in protected concerted activity. This included vulgar speech, mockery, and a veiled threat. He filed a charge with the NLRB after being suspended on three separate occasions. An administrative law judge (ALJ) held that the employee's conduct leading to the first suspension was protected but that the conduct leading to his second and third suspensions was not. On appeal, the then three-member Board abandoned its longstanding four-part analytical approach to cases involving offensive speech by employees while engaged in protected activity, as established in *Atlantic Steel Co*., 245 NLRB 814 (1979), in favor of the burden-shifting framework of *Wright Line*, 251 NLRB 1083

(1980), *enf'd*., *National Labor Relations Board v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Board remanded the case to the ALJ.

Here, Shjerven is not an employee of Ben Franklin Transit but rather the elected head of the union. He was not and could not be disciplined by the employer. As such the Examiner's adoption of *General Motors*, which applied the *Wright Line* "mixed motive" analysis to cases involving employee discipline while engaged in protected activity, is factually inapposite both directly and by analogy.

In addition, even if this were a case requiring analysis of motive, this Commission long ago rejected the *Wright Line* "mixed motive" analysis for discrimination cases in favor of the Washington State Supreme Court's "substantial motivating factor" analysis set out in *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46 (1991) (alleging retaliatory discharge for filing worker's compensation claim). *See Educational Service District 114*, Decision 4361-A (PECB, 1994) ("[T]he Commission today ceases to follow the NLRB in embracing *Mt. Healthy/Wright Line* and begins to use the *Burdine/McDonnell Douglas* line of cases, as clarified by *Wilmot* and *Allison* to support the burden of proof in all retaliatory discharge cases . . . ."). We decline the Examiner's implicit invitation to return to the *Wright Line* framework of analysis.

It is correct that "decisions construing the National Labor Relations Act (NLRA), while not controlling, are persuasive in interpreting state acts which are similar or based upon the NLRA," *Nucleonics Alliance, Local Union No. 1-369 v. Washington Public Power Supply System*, 101 Wn.2d 24, 32 (1984). Chapter 41.56 RCW is similar to the NLRA. *Id*. While the Commission has followed the NLRB in some cases, the Commission has applied Washington state court standards and adopted its own standards in other circumstances. *See Educational Service District 114*, Decision 4361-A. The Commission has not applied the *Wright Line* analysis since deciding *Educational Service District 114*. Accordingly, it was improper for the Examiner to engraft an analysis the Commission has explicitly rejected.

Shjerven's conduct must be evaluated under the refusal to bargain standard.

The issue of whether a union representative's conduct breaches the union's good faith bargaining obligation is a question of first impression. We disagree with the Examiner that the first question that must be answered is whether the complained-of conduct was reasonable and protected by chapter 41.56 RCW. Decision 13409 at 21. Whether conduct is reasonable is an issue when an employer has acted against an employee and the unfair labor practice complaint alleges discrimination or interference. *King County*, Decision 12582-B (PECB, 2018) (finding the employee had not lost protection of the act when the employee challenged management in an abrasive and confrontational manner during a staff meeting). In the case before us, Shjerven is not an employee of the employer. Rather, he is an employee of the union and not a public employee within RCW 41.56.030(12). While the employer questioned Shjerven's conduct, the allegation was that the conduct was a breach of the union's obligation to bargain in good faith, not whether an employee's union activity retained protection under the statute. It is not necessary to determine whether Shjerven's behavior was reasonable to determine whether his conduct frustrated bargaining.

The employer asks us to find that Shjerven created a hostile work environment and sexually harassed Warner thereby breaching the union's good faith bargaining obligation in violation of RCW 41.56.150(4). We recognize that employers have a duty to ensure employees are free from harassment in the workplace. The courts and the Human Rights Commission, not this Commission, are tasked with enforcing Washington's Law Against Discrimination and remedying workplace harassment.[2] We are not determining whether Shjerven sexually harassed Warner. We are not evaluating whether Shjerven's conduct created a hostile work environment for Warner. Our focus

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[2] The Commission has recognized that an employer may create a hostile work environment in retaliation for an employee engaging in union activity. *See Seattle School District*, Decision 12842-A (PECB, 2018). We do not apply *Seattle School District* to this case because the allegation is that the union breached its good faith bargaining obligation.

in this case is limited to whether Shjerven's behavior during the June 28 and July 22–24 negotiations breached the union's duty to bargain in good faith.[3]

Participants to collective bargaining enjoy freedom of speech during bargaining.

The First Amendment of the United States Constitution and Article 1, Section 5 of the Washington Constitution protect individual's freedom of speech. Some of the statutes administered by the Commission contain additional safeguards an of individual's speech. "[E]xpressing of any views, argument, or opinion, or the dissemination thereof to the public, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefit." RCW 41.59.140(3); RCW 41.76.050(3); RCW 41.80.110(3); RCW 47.64.130(3); RCW 28B.52.073(3). Only chapter 41.56 RCW lacks a "free speech" provision such as RCW 41.59.140(3) or Section 8(c) of the National Labor Relations Act. *City of Sunnyside (Sunnyside Police Patrolman's)*, Decision 751 (PECB, 1979). The agency has, however, interpreted chapter 41.56 RCW "in light of the experience which led to the enactment of Section 8(c) . . ." *Id*. Chapter 41.56 RCW has "been interpreted as allowing unions and managements some range of free speech in making public expressions of their views." *City of Bremerton (AFSCME Local 2052)*, Decision 976 (PECB, 1980) (citing *Spokane School District*, Decision 310 (EDUC, 1977), *aff'd*, Decision 310-A (EDUC, 1978); *City of Sunnyside (Sunnyside Police Patrolman's)*, Decision 751).

The Commission impinges freedom of speech only in limited circumstances. *See* WAC 391-25-480. In the absence of a pending representation petition, the Commission does not regulate speech by a union or union members unless the speech is violent, intimidating, or involves

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[3] The employer presented testimony of witnesses Katherine Weber and Julie Kmec as expert witnesses. Weber testified about the legal standard for hostile work environment and whether Shjerven's conduct was bullying. Kmec testified as to her opinion about whether Shjerven sexually harassed Warner. The testimony was not relevant because, as noted, we are not deciding whether Shjerven sexually harassed Warner or created a hostile work environment. And, even if that were the issue before us, "Legal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344 (1993).

a threat of reprisals. *City of Bellingham (Washington State Council of County and City Employees)*, Decision 13299-A (PECB, 2021) (citing *Community College District 13 (Lower Columbia College)*, Decision 8117-B (PSRA, 2005). Unions, their employees, and their members retain the First Amendment rights when engaged in collective bargaining under chapter 41.56 RCW.

In this case, Shjerven used profanity and argued aggressively with the employer, including Warner. The comments attributed to Shjerven were offensive and inappropriate for the workplace. Shjerven did not, however, threaten the employer or Warner with violence. Shjerven's speech did not rise to the level necessary to deprive him of his freedom to express himself or his displeasure with the employer. Shjerven's speech is protected by the First Amendment and the Washington Constitution. We reverse the Examiner and, in agreement with the Benton County Superior Court, find that Shjerven's vulgar language was nonetheless "constitutionally protected free speech."[4]

Shjerven's conduct on June 28 did not breach the union's good faith bargaining obligation. Negotiations are an appropriate setting for the parties to share their frustrations about the process. After the June 28, 2019, meeting began with the customary pleasantries, Shjerven stated he wanted to address an issue related to a recent grievance meeting. Shjerven then began dressing down the employer for "leaking" information from a grievance meeting. Shjerven did not deny that he used the work "fuck" multiple times. Shjerven admitted he was "real upset" and raised his voice. Shjerven's rant occurred at the opening of a session to negotiate a successor collective bargaining agreement. The subject matter of Shjerven's rant was an appropriate topic for the parties to discuss during negotiations. Shjerven's diatribe lasted less than five minutes. Shjerven's behavior was not violent. Shjerven's rant did not go to such an extreme as to find that the union breached its good faith bargaining obligation.

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[4] *See Cohen v. California*, 403 U.S. 15 (1971) (reversing on First Amendment grounds disorderly conduct conviction of man entering a state courthouse wearing jacket with "Fuck the Draft" written on it); *State v. Montgomery*, 31 Wn. App. 745 (1982) (finding arrest for disorderly conduct, and subsequent conviction for possession, improper where 15-year-old shouted "fucking pigs" at passing policemen.)

It is undeniable that Shjerven's behavior at the June 28 meeting was uncivil. Even with this lack of civility, we decline to determine what behavior is good enough to be good faith bargaining and whether Shjerven's conduct is bad enough to be bad faith bargaining. We will not determine how many epithets are required to find a party engaged in bad faith bargaining. On the balance, Shjerven's conduct on June 28 falls onto the spectrum as heated rhetoric and not a breach of the union's good faith bargaining obligation.

Shjerven's conduct at the end of the July 24 negotiations did not breach the union's good faith bargaining obligation.

The Examiner concluded that Shjerven's conduct at the end of the July 24 negotiations was "bad faith bargaining because his actions were hostile, abusive, and not reasonable." Decision 13409 at 25. While Shjerven was verbally aggressive, and Warner claimed she felt threatened and feared for her safety, we agree with the Examiner, Decision 13409 at 15, and the holding of the superior court that the evidence does not support finding that Shjerven physically threatened Warner. In the absence of a threat of physical violence, Shjerven's language and aggressive response was not a breach of the union's good faith bargaining obligation. Shjerven's conduct, and that of the union leading up to the confrontation, does not evidence an absence of a sincere desire to reach an agreement. Considering the totality of the circumstances, the union did not breach its good faith bargaining obligation.

Conclusion

Our evaluation of Shjerven's conduct is limited to whether Shjerven's June 28 confrontation of the employer and the heated exchange at the end of negotiations on July 24 were a breach of the union's good faith bargaining obligation. Because we find Shjerven's statements and conduct to be within the broad protection of speech and did not evidence an absence of a sincere desire to reach an agreement, we reverse the Examiner's conclusion that the union breached its good faith bargaining obligation.

Application of Standards, Issue 2:
Did the employer breach its good faith bargaining obligation when Wendi Warner filed a protection order against Russell Shjerven during negotiations for a successor collective bargaining agreement?

The union alleged the employer breached its good faith bargaining obligation when Warner obtained an ex parte order of protection against Shjerven. The Examiner applied *BE & K Construction Co. v. National Labor Relations Board*, 536 U.S. 516 (2002) and *BE & K Construction Co.*, 351 NLRB 451 (2007) to conclude that Warner's request for a temporary restraining order was not objectively baseless and was not an unfair labor practice. The Examiner concluded that the employer did not breach its good faith bargaining obligation. The union appealed.

The Examiner correctly identified the issue of whether the employer breached its good faith bargaining obligation when the employer's representative initiated a personal civil action against the union's representative for conduct during negotiations as an issue of first impression. In the absence of Commission precedent, we look to the decisions of the NLRB for guidance. *See Nucleonics Alliance, Local Union No. 1-369 v. Washington Public Power Supply System*, 101 Wn.2d 24, 32. The NLRB has addressed whether a civil lawsuit filed by one party in the bargaining relationship against the other is an unfair labor practice. *BE & K Construction Co.*, 351 NLRB 451. We adopt and apply that standard to this case.[5]

"[T]he filing and maintenance of a reasonably based lawsuit" is not an unfair labor practice, "regardless of the motive for initiating the lawsuit." *BE & K Construction Co.*, 351 NLRB at 456. "[A] lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'" *Id.* at 457 (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993).

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[5] Both the employer and the union argued the *BE & K Construction Co.* standard to the Examiner and the Commission in this matter.

The union argues that Warner's objective in obtaining the restraining order was illegal. Specifically, the union asserts that Warner wanted the union to assign someone other than Shjerven to represent the bargaining units. In response, the employer asserts that the lawsuit was not an unfair labor practice because it was reasonably based and not objectively baseless. Further, the employer suggests the inquiry is whether the petition was reasonable from Warner's perspective when she filed the petition. The employer asserts that the union has not established that no reasonable litigant could realistically expect success on the merits.

Relying on the First Amendment right to petition the government for the redress of grievances, the Supreme Court explained the importance of access to judicial proceedings, even for parties engaged in collective bargaining, in *BE & K Construction Co. v. National Labor Relations Board*, 536 U.S. 516, 524–528. The Court was addressing "reasonably based but unsuccessful lawsuits." *Id*. at 531. This "class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds." *Id*. at 532.

In determining whether Warner's suit lacks a reasonable basis or is "objectively baseless," we are not evaluating whether Warner satisfied her burden of proof to obtain a protection order. Warner reasonably believed she was being harassed under the statute. While the superior court found that she ultimately did not meet her burden of proof to obtain a protection order, the superior court also found that Shjerven's conduct was directed at Warner and "would alarm, annoy, harass, or be detrimental to a reasonable person." Not satisfying the burden of proof to obtain a protection order does not equate to lacking a reasonable basis or being an objectively baseless petition.

The Examiner concluded "Warner's suit was reasonably based and was not objectively baseless and, therefore, did not constitute an unfair labor practice." Decision 13409 at 27. The Examiner found credible Warner's belief that Shjerven threatened her. *Id*. We agree with the Examiner,

Warner's petition for a temporary restraining order was reasonably based and not objectively baseless.[6]

Application of Standards, Issue 3:

Did the employer dominate the union by assigning Warner to grievance meetings in August 2019, thereby preventing bargaining unit members from selecting Shjerven as their representative?

The Examiner concluded that the employer dominated the union in violation of RCW 41.56.140(2) when, after Warner obtained a temporary restraining order against Shjerven, the employer sent the union a letter asking which union representative would attend meetings in Shjerven's absence and assigning Warner to all meetings involving the union after Warner obtained the restraining order. On appeal, the employer argues that the union did not propose alternatives that would allow Shjerven to participate indirectly. The employer asserts that the union did not prove the employer intended to dominate or interfere with the union. According to the employer, the Examiner's finding that Warner did not attend all meetings in question was in error. Rather, Warner's absence from meetings was due to a medical leave. The employer argues that the Examiner's decision does not adequately consider that the employer could have been subject to a retaliation claim under the Washington Law Against Discrimination (WLAD) if the employer reassigned Warner because of limitations that resulted from Warner complaining about harassment. In response the union argues that the employer demanded that the union assign an alternate representative.

In her July 30, 2019, letter, General Manager Gloria Boyce did not present the union with an opportunity for a discussion on how to meet the requirements of the temporary restraining order and preserve the employees' rights to select their representative. The employer asked the union who would represent employees in Shjerven's "absence." This is evidence that the employer intended to prevent employees from selecting Shjerven as their representative.

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[6] The superior court found that Warner did not prove by a preponderance of the evidence that Warner was physically threatened. Whether Warner was physically threatened is not the issue before us. Warner would not have been required to show that she was physically threatened to petition for a protection order.

When allegations of harassment by a union representative exist, an employer and union should work together to accommodate an employee's request to meet with the representative of their choosing and balance the employer's obligation to protect other employees from harassment. *Seattle School District*, Decision 10732-A (PECB, 2012), exemplifies a way in which an employer can work with a union, and employees, to accommodate the employees' ability to select the representative of their choosing. The employer did not interfere with employee rights when the employer provided the employee with two options: meet with a different union representative at the school where the employee worked or meet with the representative subject to a harassment investigation at another school.

Unlike the employer in *Seattle School District*, Decision 10732-A, the employer in this case made no effort to work with the union to ensure that the employees could select their representative. "[A]n employee's right to the union representative of [their] choice is an important right and, absent special or extenuating circumstances, is properly the right of union officials, not employers, to decide." *City of Tacoma*, Decision 11064 (PECB, 2011), *aff'd*, Decision 11064-A (PECB, 2012). Here, the temporary restraining order did not prevent the employer from working with the union to accommodate employees selecting Shjerven as their representative.

The evidence supports the finding that Warner did not attend all the meetings for which the employer insisted Warner be present after Warner obtained the temporary restraining order. The Examiner identified the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which in turn support the Examiner's conclusions of law that the employer dominated the union in violation of RCW 41.56.140(2). We affirm the Examiner.

Application of Standards, Issue 4:

Does substantial evidence support the Examiner's conclusion that the employer did not withdraw from tentative agreements?

The Examiner concluded that the union did not prove that the parties had an agreement on the union's DRIVE proposal and the employer did not refuse to bargain in violation of RCW 41.56.140(4) by withdrawing from tentative agreements. The Examiner identified the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which in turn

support the conclusions of law that the employer did not revoke tentative agreements. The evidence does not support finding the parties had a common understanding that they had reached an agreement. We affirm the Examiner.

Application of Standards, Issue 5:
Does substantial evidence support the Examiner's conclusion that the employer did not refuse to provide information?

The Examiner concluded that the employer did not violate RCW 41.56.140(4) when the employer's lead negotiator, John Lee, did not respond to the union's request to depose him as part of Warner's petition for a protection order. The union sought Lee's deposition in a civil matter. The failure to comply with a request to depose a witness in a civil matter is an issue to be decided by the court presiding over the civil matter. The Examiner identified the correct legal standard. Substantial evidence supports the Examiner's findings of fact, which in turn support the conclusions of law that the employer did not violate RCW 41.56.140(4) when it did not respond to the union's request for a deposition in a civil matter.

CONCLUSION

While Russell Shjerven's vulgar language during the parties' negotiations was uncivil, the totality of the circumstances does not evidence an absence of a sincere desire to reach an agreement. Therefore, we reverse the Examiner and conclude that the union did not violate RCW 41.56.150(4) by Shjerven's behavior on June 28 and July 22–24, 2019. We affirm the Examiner on the remaining issues.

FINDINGS OF FACT

The findings of fact 1 through 12 and 14 through 33 issued by Examiner Dario de la Rosa are AFFIRMED and adopted as the Findings of Fact of the Commission. Finding of fact 13 is VACATED. The Commission substitutes the following finding of fact 13:

13. Warner testified to several comments Shjerven made in her presence over the course of bargaining July 22–24, 2019, that she found offensive. Shjerven was questioned about some of the statements and denied making the some of the statements.

CONCLUSIONS OF LAW

Conclusions of law 1, 3, 4, 5, and 6 are AFFIRMED and adopted by the Commission. Conclusion of law 2 is VACATED. We substitute the following conclusion of law 2:

2. Based on findings of fact 8 through 25, Teamsters Local 839 did not breach its good faith bargaining obligation in violation of RCW 41.56.150(4).

ORDER

The Examiner's order in cases 131976-U-19, 131977-U-19, and 131978-U-19 is VACATED. The complaints in cases 131976-U-19, 131977-U-19, and 131978-U-19 charging unfair labor practices filed in the above-captioned matters are DISMISSED.

The Examiner's order in cases 132082-U-19, 132083-U-19, 132084-U-19, 132085-U-19, and 132086-U-19 is AFFIRMED and adopted as the order of the Commission.

ISSUED at Olympia, Washington, this 25th day of July, 2022.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the ultimate decision of the Commission rejecting the Examiner's findings and conclusions but write separately to express my disagreement with one aspect of the decision. Specifically, my colleagues credit the Examiner's finding that Director of Human Resources and Labor Relations Warner's *ex parte* application for an order of protection in superior court, was "reasonably based and not objectively baseless." The application, which was underwritten by the employer, was both baseless and pursued for the retaliatory purpose of removing the union's designated representative from the bargaining table in violation of RCW 41.56.040:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

In her sworn petition for an *ex parte* order of protection Warner complained of Shjerven's uncivil speech at the bargaining table the previous day and claimed that at the end of the meeting he was "raising his arms and shaking his fist at me," which she wrote made her feel unsafe. She also testified at the hearing in this matter that Shjerven was "threatening her with physical violence." The *ex parte* order of protection was issued by the court and directed that Shjerven not enter upon the premises of the employer.

The employer's general manager then sent a copy of the *ex parte* order to Shjerven, described the geographical limitations of the *ex parte* order, and asked that he let her know "which Union representative will be handling representation in your absence." (Employer Ex. 43.)

After an evidentiary hearing a Benton County Superior Court judge denied Warner and the employer's request to extend the *ex parte* order, finding that Warner failed to prove that Shjerven

threatened her with physical assault.[7] The judge also ruled that Shjerven's language, though intemperate, was nonetheless "constitutionally protected free speech." Warner's application for an order of protection was dismissed by the court.

Even the Examiner in this matter concluded that Shjerven's conduct at the bargaining table "did not raise to the level of physical threats or actual violence." Decision 13409. Given these conclusions of the Superior Court and the Hearing Examiner, I cannot support the majority's conclusion that Warner and the employer's application for an order of protection had a "reasonable basis," nor that Warner "reasonably believed she was being harassed under the statute."

The superior court found that Warner failed to prove that she was threatened with physical assault That finding is entitled to collateral estoppel effect here. In *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 96 P.3d 957 (2004), the court held PERC's finding that plaintiff's discharge by his employer was not motivated by his exercise of rights protected by chapter 41.56 RCW was entitled to collateral estoppel effect in his subsequent superior court action for retaliatory discharge. The same reasoning applies here in reverse. After an adversarial hearing in which Warner was represented by counsel hired by the employer, the superior court held that she failed to prove that she had a "reasonable physical fear -- of physical assault." In my view that holding precludes the majority's conclusion that Warner's application for a protection order "was reasonable because Warner perceived Shjerven to threaten her." The standard for analysis is an objective one, not one based on Warner's claimed perceptions. Objectively, as the superior court found, Warner had no reasonable basis for her claim to have been in fear of physical assault. That factual finding is owed collateral estoppel effect here.

I would hold that Warner's failed application for a protection order in superior court, which was materially supported by the employer, was in retaliation for Shjerven and the union's exercise of

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[7] There were multiple witnesses in the room when Warner claims Shjerven physically threatened her by raising or shaking his fist at her. It does not appear that any of those witnesses, including attorney John Lee who was leading negotiations for the employer, backed Warner's claim to having been physically threatened. (Tr. 208).

protected rights, in violation of RCW 41.56.040 and RCW 41.56.140(1) and (2). I accordingly dissent in part.

KENNETH J. PEDERSEN, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.

RECORD OF SERVICE

ISSUED ON 07/25/2022

DECISION 13409-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASES 131976-U-19, 131977-U-19, 131978-U-19, 132082-U-19, 132083-U-19, 132084-U-19, 132085-U-19, 132086-U-19

EMPLOYER: BEN FRANKLIN TRANSIT

REP BY:
ED FROST
BEN FRANKLIN TRANSIT
1000 COLUMBIA PARK TRAIL
RICHLAND, WA 99352
efrost@bft.org

SHANNON E. PHILLIPS
SUMMIT LAW GROUP PLLC
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2682
shannonp@summitlaw.com

PARTY 2: TEAMSTERS LOCAL 839

REP BY:
RUSSELL SHJERVEN
TEAMSTERS LOCAL 839
1103 W SYLVESTER ST
PASCO, WA 99301
team839_rshjerven@msn.com

DAVID W. BALLEW
REID, MCCARTHY, BALLEW & LEAHY, L.L.P.
100 W HARRISON ST NORTH TOWER STE 300
SEATTLE, WA 98119-4143
david@rmbllaw.com