STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

HUBERT GILMORE, Complainant, vs. BENTON COUNTY, Respondent.	CASE 136056-U-22 DECISION 13710 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hubert Gilmore, the complainant.

Stephen J. Hallstrom, Senior Deputy Prosecuting Attorney, Benton County Prosecuting Attorney Eric Eisinger, for Benton County.

Benton County Corrections Officer Hubert Gilmore claims that Benton County (employer) assigned him to light duty in Master Control in retaliation for his exercise of union activity. Gilmore has not established that he was engaged in union activity. Additionally, the preponderance of the evidence shows that the reason Gilmore was assigned to light duty in Master Control was because he had informed the employer that he was limited in the use of his left arm and hand. The employer was concerned about Gilmore's safety, and the safety of others, if he were assigned to a position where he would have to deal with inmates. Gilmore has not shown that this was a pretext or that union activity was a substantial motivating factor in the employer's action. Accordingly, the complaint is dismissed.

ISSUE

As framed by the preliminary ruling of December 19, 2022, the issue in this case is as follows:

> Employer discrimination in violation of RCW 41.56.140(1) [and if so derivative interference in violation of RCW 41.56.140(1)] within six months of the date the complaint was filed, by placing Hubert Gilmore on "light duty" in reprisal for union activities protected by chapter 41.56.RCW.

BACKGROUND

Hubert Gilmore has worked for the Benton County Corrections Department as a corrections officer since 2004.

On or about February 25, 2022, Gilmore put a document stating that he had a rotator cuff tear into Sergeant Glenn Hannaman's box. When Hannaman next saw Gilmore on March 1, 2022, Hannaman sent Gilmore home for the day and asked Gilmore to submit a Job Analysis form to confirm whether he could perform his functions as a corrections officer.

On March 4, 2022, Gilmore submitted a Job Analysis document filled out by his medical provider, stating, "The injured worker can perform the physical activities described in the job analysis and can return to work on 3/1/22." The referenced job was "Light Duty-Master Control." Following the employer's receipt of this document, Gilmore was allowed to return to work. On March 11, 2022, Gilmore and Chief of Corrections Robert Guerrero signed a document agreeing that, consistent with the Job Analysis, Gilmore would be placed in a light duty Master Control position. Master Control is a control room within the jail where remote doors are operated, phone calls are answered, and video camera feeds are monitored. When Gilmore was assigned to work light duty in Master Control, he would not be expected to physically respond to incidents or physically interact with inmates.

On June 10, 2022, Gilmore submitted a new Job Analysis document which stated, "Concerns regarding officer assignment. Should be assigned to B Control, C Control, Second Floor Rover, Third Floor Rover or Master Control as these assignments decrease the dependence on others and reduce the chance for re-injury." The form indicated that the restrictions were temporary and that the physician would "recheck in 3 months." After receiving this document, Guerrero determined to keep Gilmore on light duty in Master Control. At some point after this, however, Guerrero—in consultation with Benton County Human Resources—determined that Gilmore could be accommodated outside of Master Control and assigned him to a Third Floor Rover position, which was specifically mentioned as an acceptable assignment in Gilmore's Job Analysis document.

On September 19, 2022, Gilmore submitted another Job Analysis document dated September 16. The contents of the form were the same as the June 10 document, except now the form indicated that the restrictions were permanent and included the comment, "These restrictions need to stay in place until further notice." On or about November 2, 2022, Gilmore submitted another Job Analysis document which, other than the date, was identical to the September 16 document.

On November 8, 2022, Benton County Human Resources Assistant Manager Eric Wyant asked Gilmore to have his doctor complete a Fitness for Duty form. Wyant was relatively new to Benton County and, based on his prior experience dealing with disability accommodations, he believed that the Job Analysis document did not provide the employer with enough information about Gilmore's restrictions to enable the employer to appropriately accommodate him. Wyant told Gilmore that the Fitness for Duty form was necessary "to determine what, if any of the essential functions of [his] position [could] be accommodated." Gilmore questioned the need for this, and Wyant explained, "The job analysis that was submitted doesn't include the same information as the fitness for duty form, and won't give the County all the information it will need in order to engage in the interactive meeting process."

Gilmore submitted a Fitness for Duty form on November 14, 2022. His physician indicated that Gilmore can "never" work above his shoulders, forcefully grasp, or perform a high impact vibratory task for his left side. The form also indicated that he may not lift or carry more than five pounds with his left arm or exert more than five pounds of pressure either pushing or pulling with his left arm. The comment about "concerns regarding officer assignment" from Gilmore's previous two Job Analysis forms was also on this document.

On November 15, 2022, Gilmore began his shift working the Third Floor Rover position, but after a few hours he was assigned to Master Control. Guerrero testified, "Once I saw this updated [Fitness for Duty] form, I had concerns for Officer Gilmore's safety, the safety of his coworkers, and the inmates, and moved him back to Master Control as this was the first time I had seen this type of information." Wyant testified, "[I]t's the Chief's assessment that the forceful grasping of your left hand would leave him susceptible in the event that, you know, any altercations with inmates or self-defense or anything like that, that would put potentially him at risk or his peers or

other inmates." Wyant indicated that if Gilmore's physician said that Gilmore was no longer restricted in his physical abilities, he might not need to be restricted to Master Control any longer.

Gilmore met with Wyant and Guerrero on December 2, 2022. At this meeting, the parties discussed Gilmore's Fitness for Duty form and his assignment. Gilmore was informed that he would need to continue working light duty in Master Control until his physician released him to full duty. After the meeting, Guerrero sent Gilmore a letter stating,

> [W]e also discussed the reason why your master control duty assignment was adjusted on November 15, 2022, and we explained that this was a result of having the fitness for duty form come in which noted that you are unable to forcefully grasp with your left hand, and as such I directed that you will not conduct rounds while working in master control as performing those duties would not be in line with the workability noted on the fitness for duty form.

On December 5, 2022, Gilmore sent a letter to Guerrero and Wyant. He asserted that his doctor had said he could work other positions and that he felt comfortable doing so.

At the hearing, Gilmore agreed that his injuries could affect his ability to employ self-defense tactics and other parts of his job if an inmate were to start a fight, try to run, attack another inmate, or attack a corrections officer. Gilmore introduced evidence that he has, however, successfully dealt with inmate incidents before.

Gilmore filed his complaint in this matter on November 22, 2022. An unfair labor practice administrator issued a preliminary ruling finding that Gilmore's complaint stated a cause of action for discrimination on December 19, 2022. The employer filed an answer on January 9, 2023. A hearing was held on May 25, 2023, in Kennewick, Washington. The parties submitted briefs on July 28, 2023.

ANALYSIS

Applicable Legal Standard

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140; *Tacoma School District (Tacoma Education Association),* Decision 5466-D (EDUC, 1997); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348 (2014) (citing *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46 (1991)). To prove discrimination, the complainant must first establish a prima facie case by showing the following:

1. The employee participated in protected activity 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.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. at 348. If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *Id.*; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate nondiscriminatory reason for the adverse employment action. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. The respondent bears the burden of production, not of persuasion. *Id.* If the respondent meets its burden of production, the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or that union animus was a substantial motivating factor for the employer's actions. *Id.*

Application of Standard

According to the preliminary ruling, the issue is whether the employer placed Gilmore on "light duty" in reprisal for his exercise of protected union activity.

In his brief, Gilmore did not address this issue or the Commission's analysis regarding discrimination for union activity. Instead, in his brief, Gilmore argued that the employer had violated the Americans with Disabilities Act (ADA) and the Washington State Law Against Discrimination. These claims are not within the jurisdiction of the Public Employment Relations Commission. As the Commission recently stated in *Ben Franklin Transit,* Decision 13649-A (PECB, 2023),

> [t]he Commission does not have the authority to remedy allegations of employment discrimination based on race, national origin, or other protected characteristics. That authority rests with a different state agency, the Washington Human Rights Commission. Thus, where a party alleges this type of discrimination, the charge is properly dismissed by the Public Employment Relations Commission.

(citations omitted).

A preliminary ruling issued under WAC 391-45-110 limits the issues that an examiner may consider or rule upon. *King County*, Decision 9075-A (PECB, 2007); WAC 391-45-110(2)(b). Consequently, I can only consider the issue framed by the preliminary ruling. I must consider this issue even though Gilmore did not address it in his brief. *See, e.g.*, *City of Seattle*, Decision 2935 (PECB, 1988) (analyzing claims even though union did not file a brief); *Yakima County (Teamsters Local 670)*, Decision 13338 (PECB, 2021).

Gilmore has not satisfied the first element of the prima facie case, specifically, that he engaged in protected union activity. Gilmore asserted in his complaint that the employer had "deprive[d him] of [his] right to the benefits of reasonable accommodation provided in the [collective bargaining agreement], a protected activity." However, Gilmore has not presented any evidence that he actually invoked the collective bargaining agreement, or any rights therein, leading up to the alleged adverse action. *See Everett Community College*, Decision 8850-A (PSRA, 2006) (holding that the employee "presenting grievances" to supervisor about disability accommodations, among other things, was not engaged in protected activity: "Simply raising these issue[s] with an employer, even where such is addressed in a collective bargaining agreement, is insufficient, in and of itself, to bring that discussion into the 'protected activities' arena. During the conversation

at issue, [the employee] did not indicate that he was raising the issue in a collective bargaining context."); *Seattle Colleges*, Decision 13681 (CCOL, 2023) (holding that requesting an ADA accommodation was not protected activity: "These facts do not articulate that they were on behalf of the union.").

In his complaint, Gilmore also asserted that he had "file[d] a Washington State Human Rights Commission complaint . . . , a protected activity." At the hearing, Gilmore did not actually introduce any evidence that he had filed such a complaint, making only passing references to it. Moreover, there is no evidence that Gilmore's filing of a Human Rights Commission complaint was "union activity" rather than an individual act. *See Seattle School District*, Decision 5237-B (EDUC, 1996) ("The Commission has long held that individual activity in the presentation of grievances to an employer constitutes protected activity under state law and Commission precedent only when it takes place in a collective bargaining context. Individual activity in protesting terms of employment has not been considered protected activity under state law.") (citations omitted).

Even if Gilmore had established a prima facie case, the employer presented a legitimate nondiscriminatory reason for placing Gilmore on light duty in Master Control. Gilmore had informed the employer that his physical abilities were restricted, so the employer assigned him to light duty in Master Control, "which eliminated any opportunity for [Gilmore] to be unnecessarily exposed to a threat of interacting with inmates in situations where self-defense and/or the defense of others might be required." Gilmore has not shown that the employer's stated reason was a pretext or that the employer's true reason for assigning him to Master Control was to retaliate against him for exercising union activity. Nor is there any evidence of union animus playing any part in the decision. Considering the full record and the demeanor of the witnesses, I am persuaded that the actual reason that Gilmore was assigned to Master Control was because Guerrero and Wyant were concerned that the restrictions on Gilmore's physical abilities could create safety risks for Gilmore and others.[1]

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[1] Gilmore disagrees that it was necessary for the employer to assign him to Master Control and presented evidence to argue that he would have been physically able to deal with inmates. Nonetheless, Gilmore has

CONCLUSION

Gilmore has not carried his burden of proof in establishing that his assignment to light duty in Master Control was discrimination for his exercise of protected activity.

FINDINGS OF FACT

1. Benton County (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. Hubert Gilmore is a public employee within the meaning of RCW 41.56.030(12) and works for the employer as a corrections officer.

3. Robert Guerrero is the employer's Chief of Corrections.

4. Eric Wyant is the employer's Human Resources Assistant Manager.

5. On or about February 25, 2022, Gilmore put a document stating that he had a rotator cuff tear into Sergeant Glenn Hannaman's box. When Hannaman next saw Gilmore on March 1, 2022, Hannaman sent Gilmore home for the day and asked Gilmore to submit a Job Analysis form to confirm whether he could perform his functions as a corrections officer.

6. On March 4, 2022, Gilmore submitted a Job Analysis document filled out by his medical provider, stating, "The injured worker can perform the physical activities described in the job analysis and can return to work on 3/1/22." The referenced job was "Light Duty-Master Control." Following the employer's receipt of this document, Gilmore was allowed to return to work.

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not established that the employer's stated reason was pretextual. The question here is not whether the employer made the best decision about how to react to Gilmore's physical limitations. The sole issue at this point is whether the employer's reason for assigning Gilmore to Master Control was pretextual or whether the employer was actually motivated by Gilmore's exercise of protected activity or union animus. *See East Wenatchee Water District*, Decision 1392 (PECB, 1982); *City of Vancouver*, Decision 10621-B (PECB, 2012), *aff'd in part*, *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 333.

7. On March 11, 2022, Gilmore and Guerrero signed a document agreeing that, consistent with the Job Analysis, Gilmore would be placed in a light duty Master Control position. Master Control is a control room within the jail where remote doors are operated, phone calls are answered, and video camera feeds are monitored. When Gilmore was assigned to work light duty in Master Control, he would not be expected to physically respond to incidents or physically interact with inmates.

8. On June 10, 2022, Gilmore submitted a new Job Analysis document which stated, "Concerns regarding officer assignment. Should be assigned to B Control, C Control, Second Floor Rover, Third Floor Rover or Master Control as these assignments decrease the dependence on others and reduce the chance for re-injury." The form indicated that the restrictions were temporary and that the physician would "recheck in 3 months."

9. After receiving this document, Guerrero determined to keep Gilmore on light duty in Master Control. At some point after this, however, Guerrero—in consultation with Benton County Human Resources—determined that Gilmore could be accommodated outside of Master Control and assigned him to a Third Floor Rover position, which was specifically mentioned as an acceptable assignment in Gilmore's Job Analysis document.

10. On September 19, 2022, Gilmore submitted another Job Analysis document dated September 16. The contents of the form were the same as the June 10 document, except now the form indicated that the restrictions were permanent and included the comment, "These restrictions need to stay in place until further notice."

11. On or about November 2, 2022, Gilmore submitted another Job Analysis document which, other than the date, was identical to the September 16 document.

12. On November 8, 2022, Wyant asked Gilmore to have his doctor complete a Fitness for Duty form. Wyant told Gilmore that the Fitness for Duty form was necessary "to determine what, if any of the essential functions of [his] position [could] be accommodated." Gilmore questioned the need for this, and Wyant explained, "The job analysis that was submitted doesn't include the same information as the fitness for duty form, and won't give the

County all the information it will need in order to engage in the interactive meeting process."

13. Gilmore submitted a Fitness for Duty form on November 14, 2022. His physician indicated that Gilmore can "never" work above his shoulders, forcefully grasp, or perform a high impact vibratory task for his left side. The form also indicated that he may not lift or carry more than five pounds with his left arm or exert more than five pounds of pressure either pushing or pulling with his left arm. The comment about "concerns regarding officer assignment" from Gilmore's previous two Job Analysis forms was also on this document.

14. On November 15, 2022, Gilmore began his shift working the Third Floor Rover position, but after a few hours he was assigned to Master Control.

15. Gilmore met with Wyant and Guerrero on December 2, 2022. At this meeting, the parties discussed Gilmore's Fitness for Duty form and his assignment. Gilmore was informed that he would need to continue working light duty in Master Control until his physician released him to full duty.

16. After the meeting, Guerrero sent Gilmore a letter stating,

> [W]e also discussed the reason why your master control duty assignment was adjusted on November 15, 2022, and we explained that this was a result of having the fitness for duty form come in which noted that you are unable to forcefully grasp with your left hand, and as such I directed that you will not conduct rounds while working in master control as performing those duties would not be in line with the workability noted on the fitness for duty form.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.56 RCW and chapter 391-45 WAC.

2. As described in findings of fact 5 through 16, the employer did not discriminate against Gilmore in violation of RCW 41.56.140(3) in reprisal for his exercise of protected union activity.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 5th day of September, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN M. LEONARD, Examiner

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 09/05/2023

DECISION 13710 - 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 136056-U-22

EMPLOYER: BENTON COUNTY

REP BY:

ROBERT GUERRERO
BENTON COUNTY
7122 W OKANOGAN PL BLDG #B110
KENNEWICK, WA 99336
robert.guerrero@co.benton.wa.us

STEPHEN J. HALLSTROM
BENTON COUNTY
PROSECUTING ATTORNEY'S OFFICE
7122 W OKANOGAN PLACE STE A230
KENNEWICK, WA 99336
stephen.hallstrom@co.benton.wa.us

JEFFREY J. AULTMAN
BENTON COUNTY
BENTON COUNTY PROSECUTOR'S OFFICE
7122 W. OKANOGAN PLACE, SUITE A230
KENNEWICK, WA 99336
jeffrey.aultman@co.benton.wa.us

PARTY 2: HUBERT GILMORE

REP BY:

HUBERT GILMORE
7672 MILL CREEK RD
WALLA WALLA, WA 99362
hgilmore8859@msn.com