

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SILVIA ZARATE,

Complainant,

vs.

WASHINGTON STATE DEPARTMENT OF
CHILDREN, YOUTH, AND FAMILIES,

Respondent.

CASE 133314-U-21

DECISION 13329-C - PSRA

DECISION OF COMMISSION

Aaron P. Orheim, Attorney at Law, Talmadge/Fitzpatrick, for Silvia Zarate.

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

SUMMARY OF DECISION

The issue before the Commission is whether the complainant met her burden to prove that her discharge violated RCW 41.80.110(1)(c). Specifically, the issue is whether the employer's stated reasons for terminating the complainant's employment were pretextual or substantially motivated by union animus. We affirm the Examiner's finding that the complainant did not meet her burden. In this case, the reasons provided for the termination were the same reasons stated in the notice of intent to discipline. Although the exhibits showed that the employer changed its reasoning while drafting the termination letter, those changes are not evidence of pretext. The employer's reasons for disciplining the complainant did not change over time.

PROCEDURAL BACKGROUND

On January 27, 2021, Silvia Zarate filed an unfair labor practice complaint against the Washington State Department of Children, Youth, and Families (DCYF). An Unfair Labor Practice Administrator issued a deficiency notice. On March 18, 2021, Zarate filed an amended

complaint. The Unfair Labor Practice Administrator dismissed the complaint. *Washington State Department of Children, Youth, and Families (Washington Federation of State Employees)*, Decision 13328 (PSRA, 2021). Zarate filed a timely appeal.

On appeal, the Commission concluded that Zarate's complaint against the DCYF stated a cause of action. *Washington State Department of Children, Youth, and Families (Washington Federation of State Employees)*, Decision 13328-A (PSRA, 2021). As established by the Commission, a cause of action existed for the following:

Employer discrimination in violation of RCW 41.80.110(1)(c) when the employer terminated Zarate's employment after she communicated to the employer an intent to file a grievance.

On November 1, 2, and 3, 2022, the Examiner conducted a hearing and concluded, in a decision issued on April 5, 2023, that the DCYF did not discriminate against Zarate when it terminated her employment. *Washington State Department of Children, Youth, and Families*, Decision 13329-B (PSRA, 2023). The Examiner first found that Zarate had established a prima facie case of discrimination. *Id.* at 10–11. Then the Examiner concluded that the DCYF had articulated legitimate, nondiscriminatory reasons for terminating Zarate's employment. *Id.* at 11. Finally, the Examiner concluded Zarate did not meet her burden to prove that the DCYF's reasons were pretextual or substantially motivated by union animus. *Id.* at 12–14.

Zarate filed a timely appeal of the Examiner's decision. Specifically, Zarate contested the Examiner's conclusion that the DCYF's stated reasons for her termination were neither pretextual nor substantially motivated by union animus. The parties filed briefs to complete the record.

BACKGROUND

By combining parts of the Department of Social and Health Services (DSHS) and the Department of Early Learning, the legislature created the DCYF in 2017.¹ The DCYF is divided

¹ Laws of 2017, 3rd Spec. Sess., ch. 6.

into regions and divisions. Since 2018, Dorene Perez has been the Regional Administrator and appointing authority for the Child Welfare Division in Region 2. At all times relevant to this proceeding, Claudia Rocha has worked as an Area Administrator reporting to Perez. As Area Administrator, Rocha supervised the Yakima County geographic area. Zarate began working in child welfare for DSHS in 2008. Until December 14, 2020, Zarate worked as a Social Service Specialist 3 in the Child Welfare Division in Region 2. Zarate worked in the Yakima office and reported to Skie Morales, who reported to Rocha. Zarate was in Perez's supervisory chain.

The DCYF is required to check the background of applicants and employees who will or may have unsupervised access to children. RCW 43.216.170. The DCYF considers job classifications with such access to be "covered positions." The Social Service Specialist 3 position Zarate worked in was one such covered position.

DCYF policy 11.02 governs background checks.² As part of that policy, the DCYF maintains a "Disqualifying List" for covered positions³ and a "Secretary's List of Crimes and Negative Actions" for use by all programs.⁴ The Secretary's List of Crimes and Negative Actions disqualifies an employee or applicant from employment for conviction of a crime, pending criminal charges, and negative actions taken by an agency against an applicant.⁵ "A 'negative action' includes the denial, suspension, revocation, or termination of a license, certification, or contract for the care of vulnerable population, including children"⁶ The policy further

² Complainant Exhibit (C)-102. During the transition from DSHS to DCYF, the DCYF adopted new policies or acted under some existing DSHS policies. DCYF policy 11.02, which governs background checks, became effective on July 1, 2018.

³ *Id.* at policy 11.02 p. 3.

⁴ Respondent Exhibit (R)-4. R-4 is the DSHS Secretary's List.

⁵ R-4; C-102.

⁶ R-4.

provides that an employee with a background check disqualification may be subject to voluntary demotion, job restructuring, job reassignment, nondisciplinary separation, or disciplinary action.⁷

The DCYF Licensing Division/Child Protective Services (LD/CPS) administers the foster parent licensing program and is responsible for Child Protective Services investigations. Outside her employment, Zarate was a licensed foster parent. On January 21, 2020, the LD/CPS received an intake alleging Zarate had physically abused a foster child in her care.⁸ The LD/CPS initiated an investigation, separate from Zarate's employment, into whether the allegations of child abuse were founded.

Rocha informed Perez that LD/CPS was investigating Zarate for the alleged abuse of a foster child in Zarate's care.⁹ On January 23, 2020, pending the outcome of the LD/CPS investigation, Perez placed Zarate on an alternative assignment consisting of closing cases and performing clerical duties.¹⁰ Beginning on April 15, Zarate was on protected leave. She returned to work on August 19, 2020.¹¹

On July 30, 2020, the LD/CPS verbally notified Zarate that the investigation had resulted in a founded finding of abuse,¹² which "means that LD/CPS investigated the allegation(s) and, based on the information available, has determined that it was more likely than not that the abuse and/or neglect occurred and you [Zarate] are the person responsible for the abuse and/or neglect."¹³

⁷ C-102 at policy 11.02.

⁸ C-113.

⁹ Tr. 94.

¹⁰ C-105.

¹¹ Tr. 586: 6-7.

¹² C-121; R-2 at 204 of 681.

¹³ C-113.

By the end of July 2020, LD/CPS Area Administrator Mike Grogan notified Perez of the results of the investigation.¹⁴ On August 24, 2020, the LD/CPS notified Zarate of the result in writing.¹⁵

On July 31, 2020, Perez referred Zarate for a workplace investigation.¹⁶ The investigation was prompted by three separate issues: (1) the founded finding of physical abuse; (2) Zarate having accessed the LD licensing file and LD/CPS file of a coworker; and (3) Zarate having accessed her LD licensing file and LD/CPS file.¹⁷ When Zarate returned from protected leave on August 19, 2020, Perez notified her that she was under investigation.¹⁸

The DCYF's internal investigation lasted from August to September 2020. On October 14, 2020, the DCYF issued its final investigative report.¹⁹ The report detailed the allegations of the LD/CPS investigation against Zarate as well as Zarate accessing her confidential files and the files of a coworker. The report included summaries of interviews with witnesses who spoke to Zarate's character and experience. After receiving the final investigative report, Perez issued Zarate a notice of intent to discipline on November 2, 2020.²⁰ The basis for potential discipline included three allegations referred for investigation, though they were stated in a different order. First, Zarate had accessed restricted information in FamLink about a coworker's foster parent profile and CPS intakes. Second, Zarate had accessed restricted information in FamLink about her own foster parent profile and CPS intakes, including the 2020 intake that resulted in the founded finding and

¹⁴ Tr. 100:24.

¹⁵ C-113; R-2 at 232 of 681.

¹⁶ C-109.

¹⁷ *Id.* The referral for investigation included an additional allegation that the investigator found unsupported.

¹⁸ C-111. Despite identifying multiple reasons in the referral for a workplace investigation, in the notice of investigation the only reason for the investigation Perez identified was the "allegation(s) of child abuse/neglect resulting from recent Licensing Child Protective Service (CPS) findings."

¹⁹ R-2.

²⁰ C-120.

criminal investigation. Third, the LD/CPS investigation had resulted in a founded finding of physical abuse of a foster child and criminal charges of assault.²¹

On November 12, 2020, Perez conducted a pre-disciplinary meeting. Perez, Human Resource Field Operations Manager Phedra Quincey, and Senior Human Resource Consultant Megan O’Neil attended on behalf of the DCYF. Zarate attended with her private attorney. During the meeting, Zarate admitted to and apologized for accessing the database without authorization. Zarate told Perez she was challenging the founded finding against her and would fight the criminal charges.

In the weeks following the pre-disciplinary meeting, Zarate sent letters to Perez and DCYF Secretary Ross Hunter.²² On November 17, 2020, Zarate sent a letter requesting that a management employee attend her December 7, 2020, criminal hearing.²³ Zarate “want[ed] DCYF to see first hand what happened in [her] case and for this [to] be a learning lesson for future cases.”²⁴ Zarate asserted that families and foster parents “don’t stand a chance against” the DCYF.²⁵ The letter stated, “[A]s soon as everything gets overturned, I will be demanding answers and reimbursement for all the damages.”²⁶ In that same letter, Zarate accepted responsibility for the computer violations. She stated she would “respect whatever decision” Perez made but also that she was committed to advocating “for better rights and protections for the families, Foster Parents, and [her] fellow co-workers.”²⁷

²¹ R-2 at 52 of 681; C-121. On September 11, 2020, Zarate was summoned to appear in Yakima County court on assault charges.

²² C-121; C-124; C-125.

²³ C-121.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Around this time, the Human Resources Department was drafting a disciplinary letter discharging Zarate from employment. On November 18, 2020, O’Neil sent a draft termination letter to Quincey.²⁸ The draft letter listed the two charges of accessing confidential information as the basis for discipline.²⁹ O’Neil struggled with how to incorporate the founded finding and pending criminal charges. The draft letter stated, “Regarding the third allegation, since DCYF has not implemented a policy regarding criminal activity that results in automatic termination, this allegation is not sustained.”³⁰

On November 25, 2020, Quincey responded to O’Neil’s draft letter.³¹ Quincey deleted the references to the founded finding; added a comment saying, “[W]e aren’t disciplining her for this allegation”; and moved the information about the third allegation (founded finding and criminal charges) to the section about the pre-disciplinary meeting.³² In response to the proposed statement that the DCYF lacked a policy about criminal charges, Quincey suggested they discuss the issue with Labor Relations Administrator Jeanette Dixon as well as their legal counsel.³³

Meanwhile, on November 30, 2020, Zarate sent a letter to Perez and a separate email to Hunter. To Perez, Zarate communicated her intent to join another employee’s grievance.³⁴ Zarate also asserted that Quincey’s involvement with the “HR investigation” rendered it biased because Quincey had previously worked for the union that represented the DCYF employees and had represented Zarate in a grievance in 2017.

²⁸ C-147.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The letter included sections about the basis for discipline, background, and pre-disciplinary meeting, among others.

³³ *Id.*

³⁴ C-124.

In her email to Hunter, Zarate asserted that her “rights [were] continuously being violated and being retaliated against.”³⁵ Hunter delegated to Perez the responsibility to respond to the email. Following Zarate’s email to Hunter, on December 2, 2020, Quincey emailed Chief Human Resources Officer Marcos Rodriguez explaining that Perez was considering termination but was “focusing more on the misuse of state resources” as the basis for that decision.³⁶ Quincey also explained that they were in the process of consulting with the Attorney General’s office. Quincey drafted a response email for Perez to send to Zarate.

On December 8, 2020, Perez responded to Zarate’s November 30, 2020, email.³⁷ Perez reiterated that she was considering the appropriate level of discipline based on the workplace investigation unit’s report. Perez also reiterated that she was not involved in the LD/CPS investigation and that Zarate could use the Licensing Division’s process to appeal the founded finding of abuse.

During this time, the DCYF continued to work on the termination letter. On December 1, 2020, O’Neil sent the proposed discipline letter to Dixon to review.³⁸ O’Neil explained, “It was decided we would not include the allegation of the founded finding for child abuse from the LD CPS investigation, due to not having a current policy/secretary’s list.”³⁹ In an email response to O’Neil on December 2, 2020, Dixon stated that she had concerns with the termination letter and suggested they meet with the Assistant Attorney General. At the hearing before the Examiner, Dixon could not recall her concerns or the conversations about the letter.

³⁵ C-125.

³⁶ C-127.

³⁷ R-3.

³⁸ C-126. The exhibit does not include the draft disciplinary letter that was attached to the email.

³⁹ C-126.

On December 9, 2020, O'Neil sent Quincey an updated draft termination letter, which included charge 3 (the founded finding and pending criminal charge).⁴⁰ Quincey instructed O'Neil to send the letter to Dixon and legal counsel for review. On Monday, December 14, 2020, O'Neil sent Perez the termination letter.⁴¹ Perez approved the letter.⁴² Perez directed Rocha to deliver the letter to Zarate.⁴³

The DCYF terminated Zarate's employment on December 14, 2020. As explained in the letter, the basis of the discipline was (1) Zarate accessing restricted information in the DCYF's database about a coworker's foster-parent profile and CPS intakes without a business need; (2) Zarate accessing restricted information in the DCYF's database about her own foster-parent profile and CPS intakes from 2016 through 2020, which included the intake that resulted in the founded finding and criminal investigation and charges; and (3) the August 28, 2020, founded finding and related criminal charge, which was off-duty conduct subject to discipline and disqualification from her position. Included in the list of policies implicated was policy 11.02 concerning background checks. All three stated reasons had been communicated to Zarate throughout the disciplinary process.

ANALYSIS

Applicable Legal Standards

On appeal, 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). The

⁴⁰ C-132. The draft letter was not included with the email exhibit.

⁴¹ C-135; C-136.

⁴² C-135; C-136.

⁴³ C-135.

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 for substantial evidence in light of the entire record. *Wapato School District*, Decision 12894-A (PECB, 2019). 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. “A party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; otherwise, findings are presumed correct.” *Renton Technical College*, Decision 7441-A (CCOL, 2002) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990); *Brinnon School District*, Decision 7210-A (PECB, 2001)). 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).

Application of Standards

Neither party appealed the Examiner’s finding that Zarate had established a prima facie case of discrimination. Unchallenged findings of fact are verities on appeal. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014); *Brinnon School District*, Decision 7210-A.

Zarate appealed finding of fact 10, which stated,

The Child Protective Services investigation resulted in what is referred to as a “founded finding” against Zarate. A founded finding “means that [Child Protective Services] investigated the allegation(s) and, based on the information available, has determined that it was more likely than not that the abuse and/or neglect occurred and you [Zarate] are the person responsible for the abuse and/or neglect.”

With respect to finding of fact 10, substantial evidence supports finding the LD/CPS investigation resulted in a founded finding. As Zarate pointed out, the founded finding was not the “ultimate result” and was overturned through the appeal process. However, the founded finding

was in place at the time the DCYF terminated Zarate's employment and when Zarate filed the unfair labor practice complaint. Our decision is based on the facts that existed at the time the DCYF terminated Zarate's employment and when Zarate filed the unfair labor practice complaint.⁴⁴

Next, Zarate contested findings of fact 26 and 27. As entered by the Examiner, those findings of fact stated,

26. DCYF terminated Zarate's employment because she violated policy by accessing her friend and coworker's foster parent record and Child Protective Services case information in DCYF's database without a business need, by accessing her own foster parent record and Child Protective Services case information in the DCYF database without a business need, and that she had a founded finding of child abuse and neglect and a related criminal charge pending at the time her employment was terminated that disqualified her from doing her job.

27. The reasons DCYF cited for terminating Zarate's employment were not pretextual, nor substantially motivated by union animus.

These findings of fact combine a factual finding with a legal conclusion that pretext was not proven. While findings of fact 26 and 27 are supported by substantial evidence, we review the findings as mixed questions of fact and law. After the DCYF articulated its nondiscriminatory reasons for terminating Zarate's employment, Zarate retained the burden of persuasion to prove that the DCYF's stated reasons for the termination were either pretexts for a discriminatory reason or substantially motivated by union animus. *King County*, Decision 6994-B (PECB, 2002) (citing *Educational Service District 114*, Decision 4361-A (PECB, 1994)). Zarate has not met this burden of proof.

A decision maker may consider an employer's explanations when determining whether a stated reason is pretext. *Dumont v. City of Seattle*, 148 Wn. App. 850, 869 (2009). When an employer's explanations change over time, the decision maker "may consider this as evidence that

⁴⁴ For the Commission or any of its examiners to find an unfair labor practice based on post-complaint evidence, a party must file an amended complaint. WAC 391-45-070; *Central Washington University*, Decision 12588-C (PSRA, 2017).

the employer's proffered explanation is pretextual." *Id.* (quoting 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW at 85 (4th ed. 2007)); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994).

The back-and-forth in the draft disciplinary letter did not prove the stated reasons were pretext; rather, it demonstrated the confusion within the Human Resources Department about policy 11.02. The Human Resources staff were unclear about whether they could rely on the founded finding and pending criminal charges as a basis for the termination.⁴⁵ As they worked to finalize the termination letter, the Region 2 Human Resources team members consulted with their supervisor and Assistant Attorney General. As the Examiner found in finding of fact 26, the DCYF ultimately relied on the founded finding and pending criminal charges as a basis for the termination.

The DCYF's reasons for disciplining Zarate did not change over time. Zarate knew the potential basis for discipline and the DCYF had begun drafting the termination letter *before* she engaged in protected activity on November 30, 2020. The inclusion of the third charge was consistent with the November 2, 2020, notice of intent to discipline. Therefore, the DCYF's decision to include the third charge (*i.e.*, the founded finding and pending criminal charge) as a basis for the termination was not a substantial change in the DCYF's rationale demonstrating pretext.

An articulated reason is a pretext when it is not the real reason for the adverse action and there is no legitimate business justification for the action. *Snohomish County*, Decision 12723-B (PECB, 2018) (citing *Educational Service District 114*, Decision 4361-A). On appeal, Zarate argued that the DCYF had terminated her employment because Perez believed the results of the LD/CPS investigation. However, whether Perez believed the results of the investigation is not

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C-147 at comment 8.

evidence that Perez decided to terminate Zarate's employment because Zarate had asserted her rights under the collective bargaining law.

Next, Zarate asserted that "Perez disliked [her] for her prior union/whistleblowing activity largely personally directed at Perez" and, accordingly, the reasons for the termination were pretexts.⁴⁶ In 2017, Zarate had been involved in a grievance about a different supervisor. At that time, Perez was not the appointing authority deciding the grievance. Zarate's 2017 protected activity is too attenuated to establish pretext or that the DCYF's stated reasons for termination were substantially motivated by union animus based on union activity.

Finally, the evidence does not support finding disparate treatment. Zarate was the first employee in Perez's chain of command who had a founded finding and pending criminal charges. Therefore, Zarate's case was a question of first impression for the DCYF.

Zarate was not, however, the first employee that the DCYF had terminated for inappropriately accessing confidential business records without a business justification. The DCYF presented evidence that it had terminated two other employees for this reason. The DCYF has a legitimate business interest in maintaining the confidentiality of the vulnerable individuals it has a statutory duty to protect. Additionally, the DCYF has an interest in ensuring that employees do not access their own CPS file while they are under investigation for abuse, whether or not those allegations are ultimately sustained. Zarate has not shown that she was treated differently than other employees who had engaged in similar misconduct.

CONCLUSION

To violate RCW 41.80.110(1)(c), the employer's stated reasons must be a cover for union animus. The Commission does not have jurisdiction over other forms of discrimination based on whistleblowing, gender, or race. *Ben Franklin Transit*, Decision 13649-A (PECB, 2023); *see generally International Association of Fire Fighters, Local 2916 v. Public Employment Relations*

⁴⁶ Appeal Br. at 18.

Commission, 128 Wn.2d 375, 379 (1995) (stating that the Commission “has no more authority than is granted to it by the Legislature”); RCW 41.58.020 (empowering the Commission to prevent, minimize, and settle labor disputes). Zarate has failed to carry the burden of persuasion and establish the DCYF’s stated reasons were pretexts for union animus or were substantially motivated by union activity.

ORDER

The findings of fact, conclusions of law, and order issued by Examiner E. Matthew Greer are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

ISSUED at Olympia, Washington, this 18th day of December, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK BUSTO, Commissioner



ELIZABETH FORD, 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.