

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 286,)	
)	
Complainant,)	CASE 21698-U-08-5533
)	
vs.)	DECISION 10097-A - PECB
)	
PORT OF SEATTLE,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	

Terry A. Roberts, Attorney At Law, for the union.

David Leon, Labor Relations Manager, and *Lisa Hornfeck*,
Labor Relations Manager, for the employer.

On May 8, 2008, the International Union of Operating Engineers, Local 286 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission, naming the Port of Seattle (employer) as the respondent. The union alleged that the employer: interfered with employee rights and discriminated in violation of RCW 41.56.140(1) by its termination of Mark Cann, an operating engineer; violated RCW 41.56.140(4) by refusing to provide relevant information about the termination; and attempted to dominate or assist the union in violation of RCW 41.56.140(2). A preliminary ruling issued on June 6, 2008, dismissed the allegation regarding illegal domination and assistance. The employer filed its answer to the complaint on June 26, 2008, and a hearing was held on September 23 and 24, 2008, before Examiner Terry Wilson. During the hearing, the union dropped its allegation that the employer refused to provide information, and the parties stipulated that the

sole issue to be determined is whether the employer violated RCW 41.56.140(1) when it terminated the employment of Mark Cann.

APPLICABLE LEGAL STANDARDS

Under RCW 41.56.160, the Commission is empowered to hear and determine unfair labor practice allegations and to issue appropriate remedies. WAC 391-45-270(1)(a) provides that the complainant in any unfair labor practice proceeding has the burden of proof. In addition, RCW 41.56.140 reads as follows:

It shall be an unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

An "interference" violation occurs under RCW 41.56.140(1), when an employee could reasonably perceive an employer action as a threat of reprisal or force or promise of benefit associated with union activity. *Port of Tacoma*, Decision 4626-A (PECB, 1995). A finding that interference has occurred is not based on the actual feelings of a particular employee, but on whether a typical employee in the same circumstances could reasonably see the employer's actions as discouraging union activity. An employer's intentions when engaging in the disputed actions are legally irrelevant. *City of Bremerton*, Decision 2994 (PECB, 1988); *City of Seattle*, Decision 3066 (PECB, 1988), *aff'd* Decision 3066-A (PECB, 1989).

A "discrimination" violation occurs under RCW 41.56.140(1) when an employer actually takes action against an employee in reprisal for union activity. The standard for determining discrimination allegations was adopted by the Commission in *Educational Service District 114*, Decision 4631-A (PECB, 1994) and *City of Federal Way*,

Decisions 4088-B and 4495-A (PECB, 1994) based on the decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

The first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliation. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so; and
2. That he or she was discriminated against; and
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

If a plaintiff provides the evidence of a causal connection, a rebuttable presumption is created in favor of the employee. While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his or her prima facie case, the employer has the opportunity to articulate a legitimate, non-retaliatory reasons for its actions. The employee may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or
2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Educational Service District 114 Decision 4631-A. That standard has been followed in numerous subsequent decisions. See *Mansfield*

School District, Decision 5238-A (EDUC, 1996); *Pasco Housing Authority*, Decisions 6248, 6248-A (PECB, 1998).

DISCUSSION

Mark Cann testified that, on December 12, 2007, he was told by his foreman, Wallace Mathes, to pick up a rope located in the Satellite Transit System maintenance area. Mathes explained that the rope could be a safety hazard. According to Cann, in response, he told Mathes how he had tied the rope in a noose in the past. Mathes laughed, and nothing more was said between the two. Later that work day, Cann re-visited the maintenance area accompanied by co-workers Terry Chapman and Marty Jewell. They were later joined by Barry Basher, another co-worker. Cann testified that he picked up the rope, and in a joking fashion, he tied one end of the rope into a noose. He then had Terry Chapman hold the rope as he tightened the knot. As he was tying the knot, Cann said to his co-workers that this is for Richard Calhoun to put himself out of his misery. After which, he threw the rope over a beam. Rafael Rivera, an African American employee of the Port, was in the immediate area when the above incident occurred.

That night, Cann received a phone call from a co-worker, informing him that Rivera was upset by the incident. Cann immediately contacted a supervisor and made arrangements to discuss the situation. On December 13, 2007, Cann and Rivera met with Tim Wray, a first line supervisor at the Port. Cann apologized to Rivera and thought the incident was resolved. However, he was placed on administrative leave on December 14, 2008, after John Okamoto, a senior official at the Port of Seattle, learned about the incident. And, following an investigation conducted by the

human resources and development department, Cann was fired on February 11, 2008.

The union contends that Cann's motivation in tying the noose was to joke about Calhoun, whom Cann describes as his 75 year-old white friend. It argues that he was not trying to insult or offend anyone, nor was he trying to make a socio-political statement. It asserts that his true motivation is reflected in the fact that upon realizing he offended Rivera he apologized immediately.

The union also argues that Cann was actually terminated due to his union activities as a shop steward. It asserts that others have violated the employer's anti-harassment policies, including those who assisted Cann in the noose incident; however, those employees were treated with much more leniency. This difference in treatment, the union argues, is due to Cann's position as a union shop steward, a position he held since June 2006.

The employer counters that Cann was terminated because he violated their human resource policy concerning harassment, specifically, HR Policy 22. HR Policy 22 states that the Port of Seattle will not tolerate any conduct, including unwelcomed gestures or symbols, that is derogatory of a person's age, race, or color. According to the employer, prior to the noose incident, it had gone through a highly scrutinized investigation in which port police officers were found to be in violation of anti-harassment policies. During this time, Mick Dinsmore, the Port Chief Executive Officer, ordered all employees, including Cann, to retake training on the anti-harassment policy. To further cement their dedication for creating a better work environment, the employer issued an e-mail in June 2007 which stated that there would be zero tolerance for violating HR Policy 22. Thus, in line with this policy, Cann's employment was

terminated because he violated HR Policy 22. The employer argues that Cann's status as a union member was not a determining factor.

ANALYSIS

The union attempts to establish an interference claim and a prima facie case of discrimination based on Cann's work as a shop steward. Around the time of the noose incident and the resulting discipline, Cann was active in representing a union member whose employment was being terminated due to attendance issues. Thus, the employer clearly had recent notice of Cann's status with the union. That the employer was motivated to terminate Cann for purely retaliatory reasons, in the union's view, is illustrated by the fact that his employment was immediately terminated despite having no history of disciplinary problems while Chapman, who also participated in the incident, received only a verbal warning. According to the union, the employer's motivation is also exemplified in a letter authored by Okamoto, which reads "the perpetrator (a shop steward) has been identified."

Prima Facie Case of Discrimination and Interference

Cann's active representation of a union member is the type of protected activity the Commission envisioned when it issued *Educational Service District 114*, Decision 4631-A (PECB, 1994). Thus, the union meets the first element in establishing a prima facie case of discrimination. The termination of Cann was a negative action, thus meeting the second element in establishing a prima facie case. However, now the union has the burden to prove that the employer terminated Cann due his union activities. Similarly, in order to prove a claim of illegal interference, the preponderance of the evidence must establish that the employer terminated Cann in retaliation for union activity. In essence, the

record must demonstrate that there existed a causal connection between Cann's activity as a shop steward and his termination. The union offers that in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) the court noted that a prima facie case may be shown by circumstantial evidence. While it is true that circumstantial evidence may establish a prima facie case, the totality of that evidence must still be persuasive.

The union offers four arguments to support its assertion that Cann was discriminated against and illegal interference occurred: other employees involved in the incident were not terminated; Cann had no prior disciplinary problems; Cann did not intend to offend anyone; and the proximity between the time Cann worked as a shop steward and his termination.

Others Were Not Terminated

Given the facts presented, there is little probative value to the fact that the employer chose to give Chapman, who is not a union steward, a verbal warning, while terminating Cann. Chapman testified he felt compelled to adhere to Cann's request to hold the rope because Cann had a supervisory role over him. Chapman also testified that he initially refused Cann's request at least three times. There is also little value to the fact that Basher and Jewell were not terminated, for the record does not indicate they were actively involved in tying the noose or making comments concerning possible uses for the noose. Basher testified that he arrived at the maintenance area at the time when Cann asked Chapman to hold the rope while he tightened it.

Cann Had No Prior Disciplinary Record

There is little evidentiary value to the fact that Cann did not have a prior disciplinary record. The environment at the Port of Seattle changed dramatically since the publicized investigation

involving Port police officers. The Port was much more sensitive to issues involving harassment. Accordingly the employees, including Cann, underwent anti-harassment re-training months prior to the noose incident, and they were notified that the employer had adopted a zero tolerance policy concerning harassment issues. Given the vile historical background of the noose in American history and its continued use as a symbol of racial intolerance, it is understandable why Rafael Rivera was initially offended and why the employer reacted so strongly.

Cann Did Not Intend To Offend

There was some testimony to support the argument that Cann did not intend to offend Rivera or to make a racist statement by tying and displaying a hanging noose. Basher and Chapman testified that they believed that Cann was making a joke at the expense of Calhoun and not Rivera. Various notes taken during the employer's investigation, including a police report, reflect that Rivera may have come to believe that Cann did not mean to harm or offend. While this may be true, the issue before the Examiner is not whether the employer was justified in terminating Cann's employment. The issue is solely whether the employer terminated Cann's employment because he had been performing the protected duties of a shop steward. Cann's intent is not relevant.

Proximity Between Cann's Union Work and Termination

During Cann's tenure as a shop steward, he participated in contract negotiations, and he worked to protect bargaining unit work. In late 2007, Cann provided representation to an employee who was being disciplined for attendance issues. The union finds significance in the proximity between Cann's termination and his union activities. Proximity between a union activity and a discipline issued by an employer does not alone establish a prima facie case of discrimination, however. With a significant union base and an

active bargaining unit, it is not surprising that Cann would have been an active shop steward. Thus, the Examiner finds little value in the fact that Cann was provided representation to another employee when the incident occurred, without some other evidence of a connection between his union responsibilities and his termination.

Summary

The union did not meet its burden of proving that the employer terminated Mark Cann in reprisal for protected union activity. Thus, it failed to establish that the employer interfered with Cann's rights, and a prima facie case of discrimination due to union activity was not established.

FINDINGS OF FACT

1. The Port of Seattle is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.020 and .030(1).
2. The International Union of Operating Engineers, Local 286, is the exclusive bargaining representative of certain engineers employed by the Port of Seattle.
3. Mark Cann, was an employee of the Port of Seattle and worked within a bargaining unit represented by International Union of Operating Engineers, Local 286. Cann began serving as a union shop steward in June 2006.
4. In late 2007, Cann, while serving as a shop steward, represented an employee who the Port of Seattle was trying to discipline for attendance issues.

5. On December 12, 2007, Cann he was told by his foreman to pick up a rope located in the Satellite Transit System maintenance area. Later that day, Cann tied one end of the rope in a noose and, with the assistance of another employee, tossed the other end over a beam. He stated that this is for employee Richard Calhoun to put himself out of his misery.
6. Rafael Rivera, an African American employee of the Port, was in the immediate area when the above incident occurred.
7. Cann was placed on administrative leave for this incident on December 14, 2008.
8. Following an investigation conducted by the employer's human resources department, the Port of Seattle terminated Cann's employment on February 11, 2008.
9. On May 8, 2008, the International Union of Operating Engineers, Local 286 filed an unfair labor practice complaint, naming the Port of Seattle as the respondent. The Union alleged that the Port of Seattle, by terminating Cann, illegally interfered with and discriminated against him in violation of RCW 41.56.140(1).

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. The evidence fails to establish the existence of any causal connection between the exercise of protected activity described in paragraph 4 of these findings of fact and the termination of employment described in paragraph 8 of these

findings of fact that would support of violation of RCW 41.56.140(1).

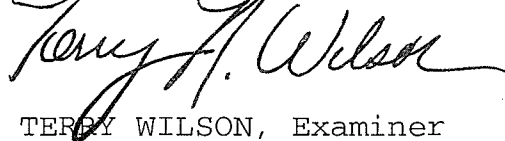
3. The employer, by its termination of Mark Cann, did not interfere or discriminate in violation of RCW 41.56.140(1).

ORDER

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

ISSUED at Olympia, Washington, this 2nd day of February, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



TERRY WILSON, 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.