City of Seattle, Decision 9439-A (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

VICKI LYNN JOY,	)	
	)	
Complainant,	)	CASE 20344-U-06-5182
	)	
vs.	)	DECISION 9439-A - PECB
	)	
CITY OF SEATTLE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

Action Employment Law, by *John Scannell*, Attorney at Law, for the employee.

Seattle City Attorney Tom Carr, by *Amy Lowen*, Assistant City Attorney, for the employer.

On April 18, 2006, Vicki Lynn Joy filed an unfair labor practice complaint with the Public Employment Relations Commission against the City of Seattle (employer), charging employer interference with employee rights in violation of RCW 41.56.140(1). On June 1, 2006, an amended complaint was filed charging employer interference and discrimination in violation of RCW 41.56.140(1). A preliminary ruling issued was on June 2, 2006, stating a cause of action to exist. Subsequently, the employer filed a motion for summary judgement on August 11, 2006. The motion for summary judgement was denied and the hearing proceeded on December 6, 2006.

Based on the evidence provided, the Examiner finds that the employee was not engaged in protected activity, a threshold issue for an interference and discrimination violation under RCW 41.46.140(1). Therefore, the complaint is dismissed.

ISSUE PRESENTED

Did the employer interfere or discriminate against Joy in violation of RCW 41.56.140(1) by terminating her in reprisal for protected union activity?

Interference

An interference violation is committed where an employee could reasonably perceive employer actions as a threat of reprisal or force or promise of benefit associated with the pursuit of rights under Chapter 41.56 RCW. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened. *City of Omak*, Decision 5579-B (PECB, 1997); *City of Tacoma*, Decision 8031-A (PECB, 2004). The Commission noted in its decision in *King County*, Decision 6994-B and 6995- B (PECB, 2002), that "the legal determination of interference is based not upon the reaction of the particular employee involved, but rather on whether a typical employee in a similar circumstance reasonably could perceive the actions as attempts to discourage protected activity." *See also Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004).

The complainant has the burden of proof in unfair labor practice claims. WAC 395-45-270(1)(a). A complainant is not required to show intent or motive for interference or that the employee involved was actually coerced, or that the respondent acted with union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights. *See City of Wenatchee*, Decision 8802-A (PECB, 2006).

Discrimination

The Commission decides discrimination allegations under standards drawn from 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). In those cases the Court said that the injured party must make 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;

2. The employee has been deprived of some ascertainable right, benefit, or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Discrimination and interference claims are interrelated in that both require evidence of protected activities. If a discrimination claim and an interference claim are based on the same set of facts, and a discrimination claim is dismissed for failing to meet the test of protected activities, an independent interference claim will not be found. *Seattle School District*, Decision 5237-B (EDUC, 1996); *Brinnon School District*, Decision 7210-A (PECB, 2001).

The "mere assertion that one is engaged in a protected activity does not extend statutory permission to that specific act. Unless the underlying activity is a protected activity, actions arising from the disputed activity cannot be defined as protected activities . . . " *City of Tacoma*, Decision 6793 (PECB, 1999). The exercise of protected activity has been found to include the filing of a grievance or unfair labor practice complaint, *Mukilteo School District*, Decision 5899-A (PECB, 1997). However, as stated in *Community College District 5*, Decision 8850-A (PECB, 2006) "the employee must actually put the employer on notice that the employee

considers the issue to concern collective bargaining rights and/or that they would be seeking union assistance on the issue" unless the context of the meeting is sufficient to understand the employees' intent of filing a grievance. Therefore, the employer must recognize the filing of a grievance in order for it to be protected activity. *Community College District 5*, Decision 8850-A (PECB, 2006).

The "Protected Activity"

Joy was employed by the employer and worked as a janitor at the Seattle Center. In this position, Joy was included in a bargaining unit represented by the Joint Crafts Council. On July 20, 2005, Joy was placed on leave without pay until the employer could find a work shift to accommodate her medical needs.[1] Between September 19 and 21, 2005, Joy's doctor faxed a note to her employer which allowed her to return to work. Joy then contacted the union to find out when she was scheduled for a shift, but was told to contact the employer. After leaving a message and not hearing a response from the employer by September 26, 2005, as to when she should return to work, Joy left two messages for human resource manager, John Cunningham. The first message was left at 5:36 P.M. in which she stated the following:

> Yeah, John, this is Vicki [Joy]. You know, I don't respect you at all, you haven't called me like you said you were going to do. You promised me work, like you haven't done. You ruined my whole life. I'm down to four dollars. I'm on the street. We're going to - - we're taking care of it. Thanks to you, but no thanks. I just - - I have no respect for you ever and I wish the worst for you forever and ever.

The second message was left at 5:39 P.M. and stated the following:

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[1] This accommodation and leave without pay was conditioned upon Joy returning certain medical forms.

> Yeah, John, it's Vicki again. You know I believe in karma and it's going to come back, you know. You've ruined my life totally. I can't get unemployment, I can't get anything. I'm living on the street. You know I hope it comes back to you, I mean, ten-fold at least, because, you know, you are a big piece of shit.

On November 8, 2005, Joy was terminated in part for the above voice mail messages.[2] Joy argues that the above messages were considered "informal grievances" and the employer discriminated and interfered with her rights to engage in protected activity when she was terminated, in part, for the above messages.

No Protected Activity Found

There is no evidence presented that Joy's messages were in fact grievances as they were not submitted in a collective bargaining context and she did not file a written grievance in accordance with her collective bargaining agreement. The Joint Crafts Council has been engaged in a contract with the employer effective through December 2007, and was engaged in a contract at the time in which Joy left messages to the human resources manager and was then terminated as a result. This contract contains three steps in the grievance procedure. The first step of the grievance requires the grievance to be reduced to writing and submitted to one's supervisor within twenty days of the alleged violation. This written grievance is required to contain the section of the collective bargaining agreement that had been violated and an explanation of the grievance in detail. According to testimony, there has been no other practice where grievances have been accepted informally or in a verbal format.

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[2] Joy was also terminated for failing to return to work and receiving unemployment benefits while employed with the employer.

In addition to Joy not using the correct format to file a grievance, the messages she left were to the human resources manager and not to her supervisor. The collective bargaining agreement clearly states the first step in the grievance procedure is for the employee is to inform one's supervisor of any alleged violation. There was no indication in her messages as to how the human resource's manager could be aware that these phone messages were intended to be a grievance. Notification of a grievance to the human resources manger is not a step identified in the grievance procedure. Additionally, he would not have any way of knowing the message was intended to be a grievance since she did not make any indication that the messages concerned her collective bargaining rights or that she would be seeking union assistance.

Furthermore, the timing and tone of the messages do not establish them to be in a collective bargaining context. Again, the messages contained no indication that Joy was grieving a violation of the contract nor did the messages have any tone of a collective bargaining context to put the employer on notice that she was intending to file a grievance. The tone of the messages were that of an employee airing frustration and does not rise to the level of filing a grievance.

There is no indication that the messages left by Joy were in fact grievances or intended to be such. In her messages, Joy did not indicate to the employer that she was raising the issue in relation to her collective bargaining rights, nor did she give the indication that she intended to file a grievance over the issue. Furthermore, a written grievance was never filed in accordance with the collective bargaining contract.

Based on the above analysis, it is found that Joy was not engaged in protected activity when leaving the messages for the human resource manager on September 26, 2005. Because the activity for which Joy was terminated is not "protected activity," the employer cannot be found to have interfered with Joy's rights or discriminated against her for engaging in protected union activity. Therefore, the complaint is dismissed.

FINDINGS OF FACT

1. City of Seattle is a public employer within the meaning of 41.56.030(1).

2. Joint Crafts Council, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees at the City of Seattle. Its bargaining unit included the position held by Vicki Lynn Joy.

3. The City of Seattle and Joint Crafts Council are parties to a collective bargaining agreement in effect through December 31, 2007. This agreement contains specific procedures for employees to file grievances.

4. On September 26, 2005, Vicki Lynn Joy left voice mail messages for the employer's human resource manager expressing her frustration to the employer. These messages did not state that she intended to file a grievance over her frustration, that the messages were concerning her collective bargaining rights or that she would be seeking union assistance on the issue. Joy's messages left for the human resource manager on September 26, 2005, were not protected activity.

5. Joy did not file a grievance through the appropriate steps in the grievance procedure outlined in the collective bargaining agreement regarding her frustration.

6. Joy was terminated on November 8, 2005, in part, for the messages stated in Finding of Fact four above.

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 City of Seattle did not discriminate or interfere with employee rights violating RCW 41.56.140(1) or (4) by terminating Joy for messages she left for the human resource manager on September 26, 2005.

ORDER

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

ISSUED at Olympia, Washington, this 18th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHRISTY YOSHITOMI, 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.