STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF SEATTLE, Employer.	)	
VICKI LYNN JOY, Complainant,	)	CASE 20344-U-06-5182 DECISION 9439-B - PECB
vs.	)	
CITY OF SEATTLE, Respondent.	)	DECISION OF COMMISSION

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

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

This case comes before the Commission on a timely appeal filed by Vicki Lynn Joy (Joy) seeking review and reversal of certain findings of fact, conclusions of law, and the order dismissing her complaint issued by Examiner Christy Yoshitomi.[1] The City of Seattle (employer) supports the Examiner's decision.

Joy filed an amended unfair labor practice complaint with this agency alleging that the employer discriminated against her in violation of RCW 41.56.140(1) when it terminated her for presenting a grievance regarding her termination. Joy worked as a janitor for the Seattle Center and was included in a bargaining unit repre-

[1] *City of Seattle*, Decision 9439-A (PECB, 2007).

sented by the Joint Crafts Council (union).[2] Due to Joy's medical needs, the employer placed her on leave until it could find a work schedule to accommodate those needs. Although Joy's doctor faxed certain documents to the employer between September 19 and 21, 2005, that would allow her to work, Joy was not scheduled for any shifts. The union advised Joy to contact the employer directly, which she did, but she did not receive a response. On September 26, 2005, Joy called Human Resources Manager John Cunningham and left two messages. The first message stated:

> 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 stated:

> 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, Robert Nellams, Acting Director of the Seattle Center, decided to terminate Joy based upon not only the messages, but also Joy's history of discipline.[3] Following a hearing, the

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[2] The Joint Crafts Council was not a party to and did not represent Joy in this matter.

[3] The employer presented evidence demonstrating that Joy had been disciplined multiple times for attendance and interpersonal problems with her co-workers, including a multi-day suspension from work.

Examiner dismissed Joy's complaint, finding that Joy failed to demonstrate that she engaged in protected activity that resulted in her discipline.

Applicable Legal Standard

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A prima facie case of discrimination can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

2. The employee is discriminatorily deprived of some ascertainable right, benefit, or status; and

3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or

by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

We agree with the Examiner that Joy failed to establish a prima facie case of discrimination, and her complaint was properly dismissed, based upon the fact that this record demonstrates no connection between Joy's termination and an exercise of protected activity. Although Joy demonstrated that she was deprived of a right, even viewed in a light most favorable to Joy, nothing in either of her phone calls establishes that she was exercising a protected right, such as requesting that the employer meet with her union to resolve the situation. The tenor and tone of Joy's messages demonstrate that she was venting frustration over her situation, but that frustration does not equate to protected activity. For example, in *City of Yakima*, Decision 9451-B (PECB, 2007), a union established its prima facie case by claiming that the employer exercised the provisions of a last-chance employment agreement to terminate a bargaining unit member in retaliation for the union's filing of an unfair labor practice. The union established its prima facie case by demonstrating through the evidence and testimony of its case in chief a causal connection between the two events, the employee's termination and the protected right of filing an unfair labor practice complaint.[4]

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[4] Although the union in *City of Yakima* established its prima facie case, the employer demonstrated non-discriminatory motives for exercising the last-chance employment agreement, and the union failed to carry its ultimate burden that the employer's motive was discriminatory.

Here, Joy failed to establish the exercise of a collective bargaining right. Accordingly, the Examiner correctly dismissed her complaint.

Other Arguments on Appeal

On appeal, Joy asserts that the Examiner erred by ruling that Joy's phone calls were not protected concerted activity, and urges this Commission to overturn *City of Seattle*, Decision 489-A (PECB, 1978) and its progeny. In *City of Seattle*, this Commission affirmed an Examiner's decision finding that Chapter 41.56 RCW did not contain a "concerted activities" clause similar to the National Labor Relations Act (NLRA), and therefore this agency has no statutory jurisdiction over certain claims.

Section 7 of the NLRA is typically referred to as the "concerted activities" clause, and provides in part:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection*. . . .

(emphasis added). The "concerted activities" clause of Section 7 has been interpreted to provide that even in a wholly unorganized shop, a work stoppage for the purpose of protesting working conditions is activity protected by Section 7. *City of Seattle*, Decision 489 (PECB, 1978), *aff'd*, *City of Seattle*, Decision 489-A (PECB, 1978)(citations omitted). However, although Chapter 41.56 RCW was modeled after the NLRA, and many of the provisions of our act are based upon the NLRA, no equivalent to Section 7 exists in Chapter 41.56 RCW. Based upon this omission, this Commission has consistently declined to interpret Chapter 41.56 RCW to provide for

the protection of employee concerted activities similar to the NLRA.

Washington's Private Sector Labor Laws

To support her contention that *City of Seattle* should be overruled, Joy points to a decision of the Washington State Supreme Court recognizing that Chapter 49.32 RCW protects concerted activity. Chapter 49.32 RCW, enacted in 1933, sets forth a policy that strictly limits state court involvement in private sector labor disputes while at the same time providing certain protections to the private sector employees involved in such disputes. With respect to the protections provided to private sector employees, RCW 49.32.020 provides:

> "[T]he individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections. . . ."

In *Bravo v. Dolsen Companies*, 125 Wn.2d 745 (1995), the Court recognized that under Chapter 49.32 RCW, all private sector employees, not just unionized employees, who went on strike and picketed their employer were engaged in protected concerted activities. Accordingly, when the employer terminated non-unionized employees for going on strike and picketing the employer's workplace, the employer interfered with their protected rights under RCW 49.32.020.

Joy's reliance on the *Bravo* case is misplaced on several accounts. First, the statutory framework on which the *Bravo* court based its decision applies exclusively to private sector employees who may or may not be asserting their collective bargaining rights. Chapter 49.32 RCW is inapplicable to public sector employees, who collectively bargain under the provisions of Chapter 41.56 RCW.[5] Thus, unlike Chapter 41.56 RCW, which is silent regarding the protection of concerted activities, RCW 49.32.020 specifically provides protection for people engaged in concerted activities.[6]

We find no intent in the *Bravo* decision to extend protection of concerted activities to public sector employees. Until the Legislature or a court of competent jurisdiction directs this Commission to rule otherwise, the interpretation of Chapter 41.56 RCW declining to extend protection to concerted activities as outlined in *City of Seattle* shall continue as the proper interpretation of law.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order of Dismissal issued by Examiner Christy Yoshitomi are AFFIRMED and ADOPTED as

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[5] We can presume that the Legislature was aware of Section 7 of the NLRA and RCW 49.32.020 when it passed Chapter 41.56 RCW.

[6] We note that in addition to Chapter 41.56 RCW, none of the other public sector collective bargaining laws administered by this Commission, including Chapter 28B.52 RCW, Chapter 41.59 RCW, Chapter 41.76 RCW, and Chapter 41.80 RCW, contain a "concerted activities" clause similar to Section 7 of the NLRA.

the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 21st day of January, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner