STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 252, Complainant,	)	CASE 10409-U-93-2403
vs.	)	DECISION 4691-A - PECB
LEWIS COUNTY, Respondent.	)	DECISION OF COMMISSION

Davies, Roberts and Reid, by Bruce E. Heller, Attorney at Law, represented the union.

Lewis County Prosecuting Attorney, by Eugene Butler, Chief Civil Deputy, represented the employer.

This case comes before the Commission on a timely petition for review filed by Lewis County, seeking to overturn a decision issued by Examiner J. Martin Smith.[1]

BACKGROUND

Lewis County operates the Twin Cities Senior Center and a Dial-A-Ride service through its Community Services Department. Dave Schilperoort is the director of the department. Senior Services Manager Cherylyn Reed supervises Director of Transportation Mel Mackey, who supervises drivers providing the Dial-A-Ride service.

Gene Melohn and Kathy Taylor were both employed by Lewis County as drivers for the Dial-A-Ride service. Melohn began employment in November of 1990; Taylor began employment in November of 1992. Both Melohn and Taylor were classified as "provisional at-will"

[1] Lewis County, Decision 4691 (PECB, 1994).

employees with no set hours, and both normally worked under 70 hours per month. Under the employer's policies, they did not receive the benefit package afforded regular employees and did not have access to the same disciplinary process as regular employees.

At some point after Melohn was employed, he became openly active in support of unionization among the employees of the Community Services Department. He was a member of the union's steering committee, and one of his roles was to distribute authorization cards, which he did with some vigor. Teamsters Local 252 initiated a representation proceeding with the Commission on May 14, 1992, involving a bargaining unit which included the Community Services Department and several other departments. Case 9793-E-92-1611.

Judy Markle, Judith Eklund-Meyer and Lucy Gift work for Lewis County at the Senior Center. All three women testified they were not bothered by Melohn when he first began employment. They noticed a change early in 1992, when they were bothered by his complaints about management, his continual talking about the union, and his attempts to give them union authorization cards. They noticed an increasingly hostile attitude on his part, and they became afraid.

At a gathering in February of 1993, while Reed and several employees were decorating the facility for a Valentine's Day function, Taylor made a derogatory comment about Reed's physical appearance. Taylor stated that someone should tell Reed not to wear the tight white pants she had on.

On February 25, 1993, representatives of Lewis County and Teamsters Local 252 signed election agreements and cross-check agreements which subdivided the bargaining unit sought in Case 9793-E-92-1611. Case 10284-E-93-1702 was docketed for a bargaining unit which included, with some exceptions, employees of the Lewis County

Department of Community Services, and a representation election was scheduled for March 19, 1993 in that bargaining unit.[2]

Schilperoort sent a letter to employees dated March 4, 1993 stating that he did not believe joining the union was in their best interests. He indicated the following reasons:

> 1. The County has historically offered and granted the same percentage of salary increase and the same benefit package to Union and non-Union employees alike.
>
> 2. The County Commissioners recently adopted a Personnel Policy and Procedures Manual. Major portions of this document are designed to protect employee rights, whether they are Union or non-Union.
>
> 3. You are not assured of a salary increase or an increase in work hours simply because you are in the Union.
>
> 4. The Union most likely will require an initiation fee and regular monthly dues payments from you.
>
> 5. The Union might promise you a number of things, such as job security, job promotion, etc. However, the Union cannot assure you of these things due to the fact that these things must be negotiated with County management. During the recent political campaigns, numerous statements were utilized just to "get votes". However, promises have a tendency to be quickly lost in the world of reality. Please do not fall into this trap when you consider unionization of our Department.

---

[2] Case 10285-E-93-1703 was docketed for a unit of employees in the accounting and planning departments. Case 10286-E-93-1704 was docketed for a unit of administrative service employees, and Local 252 was certified based on a cross-check conducted that same day. Case 10287-E-93-1705 was docketed for a unit of maintenance and technical employees, and Local 252 was certified based on a cross-check conducted that same day. Case 9793-E-92-1611 was limited to employees in the offices of the county assessor, auditor, clerk and treasurer.

Schilperoort went on to explain that if the union was voted in employees could expect the following changes:

> 1. Union membership will be compulsory.
>
> 2. Union initiation fees and monthly dues will be assessed and collected from you.
>
> 3. The working relationship that we now have will become much more regulated and structured.
>
> I do not view any of these as positive changes for you.
>
> The County operates on a budget. This document is carefully monitored. Thus, for you to believe that you could receive more hours, more pay, more benefits, etc., just by joining the union--you are being sadly misled ....
>
> I would encourage you to VOTE NO UNION on your ballot.
>
> You need to be alert to the fact that you need to vote. Only returned ballots are counted. Thus, a handful of people could determine your future unless you get involved in the process.

Taylor had not been involved in the union campaign. She was upset with the letter from Schilperoort, however, and responded on or about March 11 of 1993. She wrote:

> I find your letter of March 4, 1993, both threatening and inappropriate. How dare you use your appointment as a tool of intimidation. The vote to unionize is our right, whether it passes or not. Are the commissioners aware of the tone of your letter?
>
> I find it ironic that you would be as concerned about us at this late date, when the vote is already out.

On March 18, 1993, Eklund-Meyer and Markle submitted a memorandum to Reed, and Lucy Gift wrote a separate memorandum to Reed, all expressing their concerns about Melohn's behavior. They mentioned Melohn's complaints of low pay, lousy time schedules, unsympathetic

supervisors, and other working conditions. They also noted that he became very vocal about how the union would be beneficial to the department. They stated Melohn badgered them about signing union authorization cards, and that a card with a forged signature of Judy Markle showed up on file with the union. They referred to his increasingly hostile attitude. They claimed that, at a union informational meeting, he alluded to being privy to records that would shock people. They referred to subtle harassment that continued and expanded to include derogatory comments about employees. They spoke of his sizzling and glaring expressions when making comments about having to report the behavior of employees, suggesting that he wasn't joking when he made the comments. They detailed physical symptoms they were experiencing, and attributed them to Melohn.

The ballots cast in the Community Services Department bargaining unit were counted on March 19, 1993. A majority of those voting in the election favored no representation.[3]

Schilperoort discussed concerns regarding Melohn's behavior with Eklund-Meyer, Markle, Gift and Reed, as well as with the employer's legal counsel and board of commissioners. On March 29, 1993, Schilperoort directed Mel Mackey to stop giving driving assignments to Melohn, which effectively terminated Melohn's employment.

On April 2, 1993, Schilperoort talked with Taylor about her remarks concerning Reed's appearance. After some discussion, during which Taylor voiced some objections and accused Schilperoort of trying to intimidate her, he ended the meeting. Later that day, Mackey told Taylor that Schilperoort had instructed him to tell her she would have no more driving assignments. This action terminated Taylor's employment.

---

[3] On the same day, the employees in the accounting and planning bargaining unit voted 6 to 0 against representation by Teamsters Local 252.

On April 13, 1993, Teamsters Local 252 filed a complaint charging unfair labor practices with the Commission. The complaint alleged that Melohn and Taylor were discharged in retaliation for their support of the union, in violation of RCW 41.56.140(1). Examiner J. Martin Smith held a hearing on July 14, 1993, and issued his findings of fact, conclusions of law and order on April 28, 1994. The Examiner applied the "substantial factor" test, and found that the discharges of Melohn and Taylor were in violation of RCW 41.56.140(1). He directed the reinstatement of both individuals, along with other specified remedies. The employer petitioned for our review.

POSITIONS OF THE PARTIES

The employer challenges numerous findings of fact made by the Examiner, as well as his legal analysis. It argues that it had a right and duty to terminate Melohn, since his remarks were not protected speech and the statements fostered disharmony, adversely affected morale and impaired efficiency. The employer contends that Taylor was not an active union supporter, that her remarks about Reed were offensive, and that she was defiant to Schilperoort. It argues both employees were at-will provisional employees and that it was within its rights to take disciplinary action against both of them. It states that in these situations, the employer risks an unfair labor practice complaint under Chapter 41.56 RCW or a complaint for alleged sexual harassment under Chapter 41.60 RCW, and the employer's action should be entitled to deference under these conditions, since it could be required to defend against potentially conflicting liabilities. It argues that the Examiner applied the incorrect test for the burden of proof, and that the Wright Line test should apply.

The union asserts Melohn's remarks were not illegal, that the complaints of Melohn's co-workers were confined to his persistence

on behalf of the union, and that his remarks did not pertain to their gender, so that the employer's claim that Melohn engaged in sexual harassment is without merit. It agrees with the Examiner's application of the "substantial factor" test. The union urges the Commission to affirm the Examiner's decision as to both Melohn and Taylor.

DISCUSSION

Employer's Allegations of Error

In its petition for review, the employer listed 29 alleged errors in the Examiner's order. We have reviewed the alleged errors and find most to be without merit. Except for those which we have corrected in the Amended Findings of Fact, the Examiner's findings are entirely consistent with evidence in the record. Parties have a responsibility to explain the reasons for their appeals to this Commission. The employer has failed to do so as to some of its asserted errors. For example, to allege without explanation that there is an error in paragraph nine of the Examiner's finding of fact does not assist the Commission in determining the party's position. Nor does it assist us in assessing cited material so we can make a final decision. We choose not to try to read the employer's mind. The Commission has found no factual errors that are significant enough to change the result in this case.

The Appropriate Legal Standard

For many years, this Commission applied a two-stage analysis in discrimination cases, by which the burden of proof was shifted.[4] The burden of proof was initially on the complainant, to establish

---

[4] See, City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980).

a prima facie case that protected activity could have been a basis for the disputed employer action. If that burden was met, the burden of proof was shifted to the respondent, to establish valid reasons for its actions.

In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission adopted the "substantial factor" test.[5] The complainant now retains the burden of proof at all times, but need only establish that union animus was a substantial factor in the employer's decision to take adverse action against an employee.

Under the "substantial factor" test, the first step in the processing of a discrimination claim is for the injured party to make out a prima facie case showing a retaliatory discharge. 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. 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 complainant provides evidence, which may be circumstantial, of a causal connection, and shows that pursuit of a protected right was a cause of the adverse action, a rebuttable presumption is created in favor of the complainant.

While the complainant carries the burden of proof throughout the entire proceeding, there is a shifting of the burden of production. Once a prima facie case is established, the employer has the

---

[5] This test is based on two decisions issued by the Supreme Court of the State of Washington in 1991. In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Supreme Court adopted the "substantial factor" test in cases involving discriminatory discharges under statutes that parallel Chapter 41.56 RCW.

opportunity to articulate legitimate, nonretaliatory reasons for its actions. If the employer fails to produce any evidence of other motivation for the discharge, however, the complainant will prevail.

The complainant has the ultimate burden to show that protected activity was a "substantial motivating factor". That can be done by showing that:

1. The employer's proffered reasons are pretextual; or

2. Although some or all of the employer's stated reason are legitimate, the employee's pursuit of rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.[6]

As the Examiner stated in this case, complainants in the past:

> [F]aced the difficult task of defeating a claim that other reasons advanced by the employer predominated over the unlawful motivation. Without a doubt, the complainant's burden of proof is lower than it had been, and the difficulties have increased for an employer whose actions bear the fingerprints of anti-union animus.
>
> Decision 4691, at page 16.

We approve the Examiner's use of the "substantial factor" test in this case.

The Application of the Legal Standard

The Prima Facie Case -

The record clearly indicates that Melohn was the leader of the union campaign, and that the employer knew of his involvement. Although Taylor was not an active union advocate, her written

---

[6] See, Wilmot, supra, at page 70.

response to Schilperoort's March 4, 1993 letter was clearly protected activity.[7] The employer describes the language of Taylor's letter as "defiant and insubordinate", but that characterization does not suffice to deprive Taylor of the protection of Chapter 41.56 RCW.

The record also shows that the employer expressed anti-union views. Schilperoort's March 4 letter expressed an anti-union attitude, and made the inaccurate statement that union membership would be compulsory.[8] It is clear from Schilperoort's letter encouraging employees to oppose the union in the election, that the employer was in favor of keeping the union out.

The timing of an employer's actions can be sufficient to infer that protected conduct was at least a motivating factor in the employer's decision.[9] In this case, a representation election was conducted by mail ballot between March 5 and March 19, 1993. On March 29, 1993, Schilperoort advised Mackey to stop assigning driving to Melohn, and on April 2, 1993, Schilperoort advised Mackey that Taylor was to have no more driving assignments. The

---

[7] The Examiner concluded that Reed had identified Taylor as one of five persons Reed believed were involved in getting the Teamsters on the ballot. Based on our review of the record, the Commission believes the Examiner misconstrued Reed's testimony. Reed described Taylor as "neither here nor there" regarding the union, which we interpret to mean Reed understood Taylor was neutral. In view of this conclusion, we have amended paragraph 13 of the findings of fact to delete the words "and Reed indicated her belief that Kathy Taylor and three other employees were supporters of the union effort".

[8] As the Examiner stated, employees would not be obligated to join the union merely because it won the election. They would only be so obligated if the parties negotiated a collective bargaining agreement containing a "union security" clause.

[9] See, Kitsap County Fire District 7, Decision 3610 (PECB, 1990).

fact that these discharges took place on the heels of the representation election provides a basis to infer that protected activity was a motivating factor in the employer's decision.[10]

The record is also sufficient to support a finding of a causal connection between the exercise of rights by Melohn and Taylor and their discharges. The burden of production was thus properly shifted to the employer, for it to show that the union activities of Melohn and Taylor were not a substantial factor in the decisions to discharge them.

The Employer's Stated Reasons for Discharging Melohn -
The employer argues that Melohn would have been discharged anyway, for substantial legitimate reasons. The Examiner did not credit the reasons asserted by the employer for Melohn's termination, and he properly refrained from treating this as a "just cause" case. We agree with the Examiner's conclusion that the employer's efforts fail to show some non-pretextual, non-retaliatory reason for discharging Melohn.

The Examiner did not consider Melohn's driving record, and specifically a traffic citation in August of 1992, because there was no contemporaneous discipline. We concur.

The Examiner did not credit the employer's assertion that Melohn was discharged because of an incident when Melohn talked with an employee of another employer (a hospital staff member) about a personal matter regarding an elderly woman for whom he had done repairs and yard work. Again, we concur. Melohn was reprimanded

---

[10] See, City of Olympia, supra, where the Commission agreed that union organizational activity does not give a union adherent immunity from discharge for cause during or following an election period. As in this case, however, the discharge of the principal union activist there on the heels of an unsuccessful election raised suspicion of a discriminatory motive.

for his involvement in that incident, which allegedly involved accusations by Melohn that the hospital staff improperly influenced the woman into changing her will. A hospital official later wrote to Reed, however, indicating she was satisfied regarding Melohn's intentions and actions as a result of a meeting with Melohn, who she described as having been a loyal volunteer. It thus appears to us that the employer took disciplinary action in the form of a reprimand, and then "upped the ante" to a discharge without any justification for increasing the disciplinary response.

The employer argued that it had a right and duty to curb Melohn's harassment of three women who were complaining of fear and physical symptoms resulting from Melohn's pressure and his distribution of union authorization cards. We agree with the Examiner that the record does not provide a basis to conclude that Melohn's words were in themselves threatening or intimidating, or that they indicated physical harm might befall the three employees. The Examiner concluded that Melohn's demeanor may have been **socially hostile**, but it was not **physically** hostile. We agree. The actual content of the statements fell short of coercion or threats of adverse consequences if those employees voted against the union. If Melohn had engaged in serious sexual harassment of his co-workers, it would be easier to conclude that such behavior, and not his union activities, is what motivated the termination decision. Evidence of such behavior is lacking in this case. There may have been behavior which merited corrective counseling, but nothing so egregious as to merit summary discharge without prior admonition.

The Employer's Stated Reasons for Discharging Taylor -
Schilperoort called Taylor in for a meeting on April 2, 1993. The purpose of the meeting was to let Taylor know that her previous comment about Reed's personal appearance was inappropriate. The employer claims that Taylor became defiant to Schilperoort at that meeting. The employer described Taylor as insubordinate, because she offered to apologize to Reed, but not to everyone in the

office. The Examiner concluded that her perceived status as a "provisional" employee and the verbal confrontation were used as pretexts by the employer to punish Taylor for her exercise of rights protected by the statute. We agree. Schilperoort's insistence that Taylor apologize to everyone and his resort to summary discharge were such an overreaction as to call his real motivation into question.[11] The Commission finds that Taylor's response to Schilperoort's anti-union letter was a substantial factor in the employer's decision to discharge her.

NOW, THEREFORE, the Commission makes the following:

ORDER

1. The findings of fact issued by Examiner J. Martin Smith are affirmed and adopted as the findings of fact of the Commission, except for paragraphs 6, 7, 11, 13, 15, and 16, which are amended to read as follows:

   6. In mid-February of 1993, Kathy Taylor made rude remarks, in the presence and hearing of other county employees, about a woman who was helping to decorate the senior center for a social function. Taylor knew that the person who was the subject of her remarks was Senior Services Director Cherylyn Reed. When she subsequently became aware of Taylor's remarks, Reed did not make an issue of them at that time.

---

[11] Taylor's remark about Reed's appearance occurred on February 14, 1993 at the latest. Her reprimand by Schilperoort occurred on April 2, 1993. This month and a half interval leads us to believe that, but for Taylor's letter chastising Schilperoort about his letter to employees, the employer would never have called the April 2 meeting and Taylor would not have been discharged.

7. On February 25, 1993, representatives of Lewis County and the Teamsters Union, Local 252, signed an election agreement for a mail ballot election to be conducted to determine the exclusive bargaining representative, if any, of certain employees of Lewis County. Kathy Taylor and Gene Melohn were both stipulated to be eligible voters in the representation election.

11. One day before the representation election results were issued, Markle, Eklund-Meyer and Gift all complained, in writing, about Melohn's attitudes, and his activities in connection with the union organizing effort. Those memoranda were prepared at the invitation of Reed.

13. Reed held a meeting with Markle, Eklund-Meyer and Gift on March 25, 1993. Schilperoort and Transportation Supervisor Mel Mackey were also in attendance. Melohn's activities and remarks were discussed, and Mackey was asked to talk to Melohn about the complaints made by Markle, Eklund-Meyer and Gift. The rude remarks that Taylor had made about Reed were also discussed.

15. Schilperoort called Taylor to his office for a meeting on April 2, 1993. During the course of that meeting, Taylor reminded Schilperoort of her written response to the anti-union letter he had written during the pre-election campaign. After discussion of the rude remarks Taylor had made about Reed, Taylor agreed to apologize personally to Reed. Taylor declined to apologize to other unspecified persons who might have heard those remarks, and asserted that Schilperoort was attempting to intimidate her. Schilperoort terminated the meeting.

16. On April 2, 1993, Schilperoort directed Mackey to terminate Taylor's employment. She was informed that day

that she had been terminated as a Dial-A-Ride driver with the Department of Community Services.

2. The conclusions of law and order issued by Examiner J. Martin Smith are AFFIRMED and adopted as the conclusions of law and order of the Commission.

3. Lewis County, its officers and agents, shall immediately take the following actions:

   a. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the order issued by the Examiner in this matter, and at the same time provide the above-named complainant with a signed copy of the notice required by that order.

   b. Notify the Executive Director of the Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the order issued by the Examiner in this matter, and at the same time provide the Executive Director with a signed copy of the notice required by that order.

ISSUED at Olympia, Washington, this 23rd day of September, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

DUSTIN C. McCREARY, Commissioner

SAM KINVILLE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL not interfere with, restrain, coerce or discriminate against employees in the exercise of their right, under Chapter 41.56 RCW, to form, join and support labor organizations, and to seek certification of an exclusive bargaining representative.

WE WILL NOT discriminate against employees Gene Melohn and Kathy Taylor or any other employees who have been or who may be identified with union organizational efforts under Chapter 41.56 RCW.

WE WILL OFFER immediate and full employment to Gene Melohn as a Dial-A-Ride van driver on the roster of the Lewis County Department of Community Services, with backpay and all rights and benefits that he would have enjoyed but for his unlawful discharge.

WE WILL OFFER immediate and full employment to Kathy Taylor as a Dial-A-Ride van driver on the roster of the Lewis County Department of Community Services, with backpay and all rights and benefits that she would have enjoyed but for her unlawful discharge.

WE WILL NOT threaten employees with reprisal or force, or make promises of benefit, in relation to their exercise or non-exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL NOT retaliate or discriminate against part-time employees of Lewis County because they are involved in the solicitation and attempted organization of a bargaining unit under Chapter 41.56 RCW.

DATED: _____

LEWIS COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.