

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN J. DIEL, JR,

Complainant,

vs.

KING COUNTY,

Respondent.

CASE 24299-U-11-6225

DECISION 11221-A - PECB

DECISION OF COMMISSION

John J. Diel, Jr., appeared *pro se*.

Megan Pedersen, Labor Negotiator, for the employer.

On September 30, 2011, John J. Diel, Jr. (Diel) filed an unfair labor practice complaint against King County (employer). Unfair Labor Practice Manager David I. Gedrose issued a deficiency notice on October 7, 2011. Diel filed an amended complaint on October 25, 2011. On November 4, 2011, the Unfair Labor Practice Manager dismissed the complaint because Diel failed to establish a connection between his union activities and the employer's actions and lacked standing. Diel appealed the dismissal on November 23, 2011. We affirm the Unfair Labor Practice Manager's decision dismissing Diel's complaint based on Diel's failure to establish a causal connection between his protected activity and the employer's failure to hire him. We do not agree that Diel lacked standing to file the complaint.

When reviewing an order of dismissal issued at the preliminary ruling stage of case processing under WAC 391-45-110, we are confined to the assumption that all the facts alleged in the complaint are true and provable. *Whatcom County*, Decision 8246-A (PECB, 2004). The Commission does not allow parties to bring forth new facts or claims on appeal. *King County*,

Decision 8631-A (PECB, 2005), *citing Tacoma School District, Decision 5465-E (EDUC, 1997)*. We rely only on those facts alleged in the complaint and the amended complaint.

In his complaint and amended complaint, Diel, who no longer works for the employer, alleges that the employer did not interview him for a number of positions. Diel alleges that it is his belief that the employer did not interview him or consider him for a number of positions based on his union activity in 2008-2010 when he was employed by the employer. A brief timeline of the facts will be beneficial in this case.

- In 1999, Diel became a member of the Animal Control Officers' Guild (union), which represents animal control officers and sergeants employed by the employer.
- Diel served as the union's second vice president from 1999-2008 and served as president from 2008-2010.
- In his capacity as a union officer, Diel filed grievances and other actions, including causing unfair labor practice charges to be filed, against the employer. Specifically, Diel alleges that he "caused" unfair labor practice complaints to be filed on February 28, 2002 and April 8, 2005.
- On or about February 22, 2006, Diel assisted another union member filing a "PDQ" for her position.
- In 2007, the employer began to change animal control policies. Diel advocated that the union be involved in the review process.
- In June 2008, the employer proposed placing web cameras in the animal shelters. On behalf of the union, Diel objected and threatened to file an unfair labor practice complaint.
- On July 22, 2008, the employer assigned Diel to an Acting Lead Sergeant position.
- On January 23, 2009, Diel, as union president, reported his concerns about Operations Manager Gail Bisconer to the new Interim Animal Control Manager Nancy McKenney.
- On January 27, 2009, McKenney and Bisconer informed Diel that they were ending his acting assignment.
- From July 2007 through the end of 2009, Diel filed public records requests on the union's behalf.
- As a result of a Public Records Act request, made and disclosed at unspecified times, Diel obtained e-mail messages from 2009. One excerpt of an e-mail in Diel's complaint referred to Diel as a "troublemaker."
- On June 30, 2009, the union, at Diel's direction, filed an unfair labor practice complaint.
- In the fall of 2009 or early 2010, Diel began organizing the Humane Society employees for purposes of collective bargaining.

- On January 16, 2010, McKenney conducted Diel's performance review. McKenney gave Diel negative ratings.
- On February 5, 2010, Diel filed an appeal of his performance review.
- In March 2010, the employer offered Diel a temporary functional analyst position. The position was not represented by a union.
- On April 20, 2010, Diel requested a voluntary layoff from the Animal Control Sergeant position. The employer denied the voluntary layoff.
- Diel resigned his Animal Control Sergeant position and took the non-represented temporary functional analysis position.
- At some point in time, Diel applied for a supervisory position and was not selected.
- On April 28, 2011, the employer interviewed Diel for an Animal Control Sergeant position.
- On April 29, 2011, the employer laid Diel off from his functional analyst position. The employer hired another employee to fill the position.
- On June 2, 2011, the employer informed Diel that the Animal Control Sergeant position would be re-advertised.
- On June 7, 2011, the employer informed Diel that he ranked second in the interviews for the Animal Control Sergeant position. Diel learned that the candidate ranking first declined a second interview. The employer reopened the candidate pool without interviewing Diel a second time.
- Diel applied for a Regional Animal Services Manager position. On August 26, 2011, the employer informed Diel he was "not competitive enough" to interview for the position.
- On September 20, 2011, the employer interviewed Diel for the Animal Control Sergeant position. On October 6, 2011, the employer informed Diel he was not selected for the Animal Control Sergeant position.
- On September 30, 2011, Diel filed this unfair labor practice complaint.
- On October 6, 2011, Diel sent an e-mail to Human Resources Service Delivery Manager Christine Andrade requesting his ranking after the Animal Control Sergeant Interview.
- On October 25, 2011, Diel filed an amended complaint.

Diel applied for the following positions in 2011: the Marketing and Licensing Manager, the Employee and Labor Relations Representative, the Admin II, the Regional Animal Services Manager, and the Animal Control Sergeant. Diel alleged that the refusals to hire him for positions he applied for were due to his prior union activities. Diel provides no evidence, other than his belief, that the employer did not hire him for subsequent positions due to his union activities.

For purposes of our analysis, we assume all of the above facts are true and provable. Diel alleged that the employer discriminated against him. Therefore, it is appropriate to evaluate whether the facts alleged establish a prima facie case of discrimination. An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. *Educational Service District 114*, Decision 4361-A (PECB, 1994); *Community College District 13 (Lower Columbia)*, Decision 9171-A (PSRA, 2007). The employee maintains the burden of proof in such discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Diel engaged in protected activity by serving as a union officer and filing grievances. Diel established adverse action by the employer's failure to hire him for positions that he applied for. Diel alleged it was his belief that the failure to hire was based on his past protected activity.

Diel failed to establish a causal connection between his protected activities and the employer's adverse action. Diel engaged in protected activity from 1999 until 2010. In April 2010, Diel voluntarily resigned his union-represented position to take a non-represented position. More than a year lapsed between when Diel engaged in protected activity and when the employer did not hire Diel. Diel's complaint and amended complaint cite excerpts of e-mail messages from 2009 labeling Diel as a "troublemaker" and stating "don't hire an insider." The time frame of when these e-mail messages were sent and when the employer did not hire Diel is too attenuated to establish a causal connection. Diel alleges that it is his belief that the employer did not hire him based on his past union activity, but more than a belief is required to find a cause of action for discrimination.

One of the reasons the Unfair Labor Practice Manager dismissed Diel's complaint was a lack of standing. Diel was not a public employee within the meaning of RCW 41.56.030(12) at the time

he filed his complaint. However, if a former public employee could establish that their past protected activity was related to the employer's failure to hire them, the fact that the individual is no longer a public employee would not be fatal to a complaint. *See Education Services District 113, Decision 4361-A (PECB, 1994).*

In the facts of this case, the fact that Diel was not an employee at the time he filed his complaint was not fatal to his complaint. Rather, the totality of the facts alleged in the complaint and the amended complaint does not establish a cause of action for employer discrimination.

NOW, THEREFORE, it is

ORDERED

The Order of Dismissal issued by Unfair Labor Practice Manager David I. Gedrose is **AFFIRMED** and adopted as the Order of Dismissal of the Commission.

ISSUED at Olympia, Washington, this 21st day of March, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner



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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY:  ROBBIE DUFFIELD

CASE NUMBER: 24299-U-11-06225 FILED: 09/30/2011 FILED BY: PARTY 2
DISPUTE: ER MULTIPLE ULP
BAR UNIT: ANIMAL CONTROL
DETAILS: -
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