STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JEREMY M. MATTHEWS Complainant, vs. EDMONDS COMMUNITY COLLEGE Respondent.	CASE 131333-U-19 DECISION 13000-A - CCOL DECISION OF COMMISSION

Jon H. Rosen, Attorney at Law, The Rosen Law Firm, for Jeremy M. Matthews.

Arlene K. Anderson, Assistant Attorney General, Attorney General Robert W. Ferguson, for Edmonds Community College.

On February 28, 2019, complainant Jeremy M. Matthews filed an unfair labor practice complaint alleging that Edmonds Community College (employer) interfered with his rights and discriminated against him thereby violating RCW 28B.52.073(1)(a) and (c). Unfair Labor Practice Administrator Emily K. Whitney reviewed the complaint under WAC 391-45-110 and issued a deficiency notice on March 26, 2019.

In the deficiency notice, the Unfair Labor Practice Administrator analyzed the interference and discrimination allegations and concluded that the complaint lacked dates, lacked allegations of specific facts, and did not describe facts that could constitute either interference or discrimination. In the deficiency notice, the Unfair Labor Practice Administrator provided the complainant the option to file an amended complaint, not file an amended complaint and have the complaint dismissed, or withdraw the complaint.

On April 12, 2019, the complainant filed an amended complaint with a factual summary attached. The factual complaint identified the individuals involved and was organized by date, but it was not in numbered paragraphs.

On May 9, 2019, the Unfair Labor Practice Administrator dismissed the amended complaint. *Edmonds Community College*, Decision 13000 (CCOL, 2019). The dismissal included the reasons the amended complaint did not state a cause of action. The complainant filed a timely appeal. The complainant and respondent filed briefs. On July 15, 2019, the complainant filed a motion to strike the employer's brief.

This appeal presents three issues. First, whether the complainant's original and amended complaints state a cause of action, or in other words, whether the complainant has alleged sufficient facts to proceed to hearing. Second, whether a preliminary ruling can be issued for interference and discrimination on the same set of facts. Third, whether we should strike the employer's response brief.

We conclude that the facts, as alleged, are sufficient to state a cause of action. A cause of action for interference and a cause of action for discrimination may be based on the same set of facts. Finally, we decline to strike the employer's brief.

ANALYSIS

Applicable Legal Standards

Standard of Review

An unfair labor practice complaint is reviewed under WAC 391-45-110 to determine whether the facts, as alleged, state a cause of action. At the preliminary ruling stage, all facts are assumed to be true and provable. *Whatcom County*, Decision 8245-A (PECB, 2004).

Interference

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights. RCW 28B.52.073(1)(a). An employer may interfere with employee rights by making statements, through written communication, or by actions. *Snohomish County*, Decision 9834-B (PECB, 2008); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *remedy aff'd*, *Pasco Housing Authority v. Public Employment Relations Commission*, 98 Wn. App. 809 (2000). An employer interferes with employee rights when an employee could

reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

To prove an interference violation, the complainant must prove, by a preponderance of the evidence, that the employer's conduct interfered with protected employee rights. *Grays Harbor College*, Decision 9946-A (PSRA, 2009); *Pasco Housing Authority*, Decision 5927-A. To meet its burden of proving interference, a complainant need not establish that an employee was engaged in protected activity. *State – Washington State Patrol*, Decision 11775-A (PSRA, 2014); *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014). The complainant is not required to demonstrate that the employer intended or was motivated to interfere with an employee's protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000). Nor is it necessary to show that the employee was actually coerced by the employer or that the employer had union animus. *Id.*

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 28B.52.073(1)(a) and (c); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that:

1. the employee participated in protected activity 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 protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A.

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

Application of Standards

On appeal, the complainant argued that he alleged specific facts, with specific dates and actions. We agree. The attached statement of facts contained sufficient information, when assumed true and provable, to conclude that the complainant stated a cause of action for discrimination and interference.

The complainant alleged sufficient facts to state a cause of action for discrimination. The complainant filed a grievance. The complainant alleged that the employer took various adverse actions, such as cancelling classes and excluding the complainant from activities in which he should have been included as a tenured faculty member, among other allegations. Assuming the facts are true and provable, they would constitute a deprivation of rights. The complainant alleged sufficient facts to establish a causal connection.

The complainant's second argument on appeal was that the Unfair Labor Practice Administrator erred when she did not address the interference allegation. We agree. In the deficiency notice, the Unfair Labor Practice Administrator addressed both interference and discrimination. However, on the order of dismissal she addressed only the discrimination allegation.

In *Reardan-Edwall School District*, Decision 6205 (PECB, 1998), the Public School Employees (PSE) alleged that the employer unilaterally changed its substance abuse policy and interfered with employee rights. The examiner found PSE's claims as they related to the substance abuse policy to be untimely. PSE alleged that the school district discriminated against an employee and interfered with the rights of bargaining unit employees by targeting the employee for discharge

because of her union activity. The examiner concluded that the employer did not discriminate against the employee. The examiner did not, however, address the union's interference allegation.

On appeal, the Commission affirmed the examiner. *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). PSE argued that the examiner failed to analyze the independent interference allegation. In affirming, the Commission wrote:

> PSE misstates the law. Independent interference violations cannot attach to facts where a "discrimination" claim is dismissed under the test established in *Wilmot* and *Allison*. Since the Commission has concluded that allegations of discrimination should be dismissed, we make no findings in regard to interference claims arising out of the same facts.

The Commission's decision in *Reardan-Edwall* has been construed to mean that preliminary rulings are not issued for discrimination and interference allegations that are based on the same set of facts. In this case, the complainant asserted that the employer violated RCW 28B.52.073(1)(a) (interference). The Unfair Labor Practice Administrator initially analyzed both discrimination and interference. Thus it was clear that the complainant was seeking a cause of action for both. We find in this instance the complainant alleged sufficient facts to establish a cause of action for interference and discrimination.

This decision is not to be construed to suggest that each time a party pleads discrimination it will automatically receive an interference cause of action as well. Rather, parties are responsible for pleading their cases in a manner so that it is clear to the unfair labor practice administrators that the party is requesting a cause of action for both discrimination and interference.

While we do not rule out the possibility that an interference violation could be found on facts that did not constitute discrimination, an appeal of an order of dismissal at the preliminary ruling stage is not the appropriate case to answer that question. Rather, it may best be answered on a developed record after parties have an opportunity to present evidence before an examiner and to brief the issue.

We decline to strike the employer's brief. While the employer's brief did address the merits of the case, we confine our review to the facts alleged in the amended complaint and not those asserted by the employer in its response brief.

CONCLUSION

Assuming the facts pled are true and provable, the amended complaint stated a cause of action for interference and discrimination. The complainant is responsible for establishing the facts alleged at the hearing. A preliminary ruling may issue for interference and discrimination based on the same set of facts.

ORDER

1. The Order of Dismissal issued by Unfair Labor Practice Administrator Emily K. Whitney is VACATED.

2. The amended complaint charging an unfair labor practice filed in this matter has been reviewed under WAC 391-45-110. The allegations concern:

> Employer interference in violation of RCW 28B.52.073(1)(a) within six months of the date the complaint was filed by failing to communicate with Jeremy M. Matthews for engaging in protected activity.
>
> Employer discrimination in violation of RCW 28B.52.073(1)(c) within six months of the date the complaint was filed by discriminating against Jeremy M. Matthews for filing grievances.

3. The employer shall file and serve its answer to the allegations listed in Paragraph 2 of this Order within 21 days following the date of this Order.

ISSUED at Olympia, Washington, this 20th day of August, 2019.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

KENNETH J. PEDERSEN, Commissioner

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 08/20/2019

DECISION 13000-A - CCOL has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 131333-U-19

EMPLOYER: EDMONDS COMMUNITY COLLEGE

REP BY:
CASEY KING
EDMONDS COMMUNITY COLLEGE
20000 68TH AVE W MS HUMRES
LYNNWOOD, WA 98036
casey.king@edcc.edu

ARLENE K. ANDERSON
OFFICE OF THE ATTORNEY GENERAL
GRENWICH BUILDING
3501 COLBY AVE STE 200
EVERETT, WA 98201
arlenea@atg.wa.gov

PARTY 2: JEREMY M. MATTHEWS

REP BY:
JEREMY M. MATTHEWS
7303 NE 204TH ST
KENMORE, WA 98028
whereisjeremy@gmail.com

JON ROSEN
THE ROSEN LAW FIRM
705 2ND AVE STE 1200
SEATTLE, WA 98104-1798
jhr@jonrosenlaw.com