STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF BELLINGHAM, Employer.	
MORGAN LIBBY, Complainant, vs. GUILD OF PACIFIC NORTHWEST EMPLOYEES, Respondent.	CASE 134326-U-21 DECISION 13525-A - PECB DECISION OF COMMISSION

Darin M. Dalmat and *Alyssa Garcia*, Attorneys at Law, Barnard Iglitzin & Lavitt LLP, for Morgan Libby.

Nicholas E.D. Power, Attorney at Law, The Law Office of Nicholas Power, PLLC, for the Guild of Pacific Northwest Employees.

The Public Employees' Collective Bargaining Act prohibits interference with a public employee "in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any right under" the statute. RCW 41.56.040. The right to be free from interference is enforceable under the unfair labor practice provisions of the statute. RCW 41.56.140(1) and .150(1). While employees have the right to be free from interference, Congress and the legislature are prohibited from passing laws that impinge upon the right to petition; i.e., file a lawsuit to remedy a violation of the law. U.S. Const. Amend. I; Wash. Const. Art. I, § 4. Thus, whether a lawsuit is an unfair labor practice must be considered in light of the constitutional protections granting individuals the right to petition the government for redress of grievances. *See generally BE & K Construction v. National Labor Relations Board*, 536 U.S. 516 (2002).

This case involves a deep-seated conflict among Morgan Libby, Jael Komac, Dean Tharp, the Guild of Pacific Northwest Employees (Guild), and the Washington Council of County and City Employees (WSCCCE). The conflict has roots in Libby's disagreement with Komac's actions as president of the WSCCCE Local 114 to fund and participate in a lawsuit against the WSCCCE. Libby created a Facebook page titled Guild of Pacific Northwest Employees, identified herself as a union, and used the page as a forum to criticize the Guild and its leadership during the Guild's campaign to replace the WSCCCE as the exclusive bargaining representative and after the Guild was certified.[1] The Guild filed a lawsuit in Whatcom County Superior Court alleging Libby engaged in trade name infringement and violated the Consumer Protection Act.

On July 13, 2021, Libby filed an unfair labor practice complaint alleging the Guild interfered with employee rights by filing and maintaining a lawsuit against her. Examiner Elizabeth Snyder conducted a hearing and concluded that the lawsuit was not objectively baseless and did not require analysis of the Guild's motives. *City of Bellingham (Guild of Pacific Northwest Employees)*, Decision 13525 (PECB, 2022). Libby filed a timely appeal. In this case, we must balance the right of an organization to petition the government for redress of grievances and the rights of employees to speak against their exclusive bargaining representative without interference.

ISSUE

The issue before the Commission is whether the Guild of Pacific Northwest Employees interfered with employee rights in violation of RCW 41.56.150(1) when it filed a lawsuit against bargaining unit employee Morgan Libby. We affirm the Examiner. The Guild's lawsuit was reasonably based; therefore, it did not interfere with employee rights.

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[1] Libby used the Facebook page to criticize Komac and the actions of the Local 114 leadership while Komac was president of the WSCCCE Local 114.

BACKGROUND

The Guild represents employees working for the City of Bellingham. *City of Bellingham*, Decision 13202 (PECB, 2020). Morgan Libby works in the City of Bellingham Police Department. Libby's position is included in the bargaining unit.

On October 12, 2019, Libby created a Facebook page titled "Guild of Pacific Northwest Employees." The page address is http://www.facebook.com/guildofpnwe. On the "about" section of the page, Libby identified as a "Labor Union."

On October 14, 2019, the Guild filed a petition to replace the WSCCCE as the exclusive bargaining representative of employees at the City of Bellingham.[2] On October 17, 2019, the Guild created a Facebook page. The address of the Guild's Facebook page is http://www.facebook.com/GuildofPacificNorthwestEmployees/.

Libby's Facebook page was active in 2019 through the change of representation election in 2020. Libby was critical of the Guild leadership and Jael Komac, who became the Guild president. Following the certification of the Guild as the exclusive bargaining representative, Libby did not post again on the Facebook page until October 8, 2020.

The Guild and its officers knew about Libby's Facebook page during the organizing campaign. Based on the language of posts on Libby's Facebook page, the Guild suspected that the WSCCCE was involved with the page. The Guild executive board members thought Libby was inappropriately using the Guild's name. The Guild's executive board decided they would ask Libby to remove her Facebook page and stop using the Guild's name on her page.

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[2] The Guild subsequently withdrew its petition. The Guild filed a new petition on January 6, 2020.

On November 30, 2020, Komac texted Libby and requested that Libby take down her Facebook page. Libby testified that she did not receive the text because she had blocked numbers on her phone.

On December 26, 2020, Komac mailed a letter to Libby and Karen Powers. Komac requested that Libby and Powers "shut down and delete all communications pertaining to your fake web site on Facebook insinuating your posted statements and actions are attributed to: the Guild of Pacific Northwest Employees; Local 1937; our members, or me - - as president if [sic] the Guild." Libby testified that she did not receive the letter.

Receiving no response to Komac's requests that Libby change the Facebook page, the Guild filed a lawsuit against Libby on January 6, 2021. The Guild identified Morgan Libby and Does 1-10 ("as-yet identified actors") as defendants. The Guild thought it could link the WSCCCE to Libby's Facebook page during the litigation. The Guild alleged Libby engaged in trade name infringement and violations of the consumer protection act by creating and maintaining her "spoof" Facebook page.

After the Guild filed its lawsuit against Libby, Libby changed the name of her Facebook page to "I don't support the Guild." The handle of the page remained @guildofpnwe. Libby continued to identify the page as a "Labor Union."

On February 9, 2021, Libby filed a motion to dismiss. The Guild responded. The Whatcom County Superior Court denied Libby's motion. The parties began discovery. The Guild moved to voluntarily dismiss the case. On September 3, 2022, the superior court granted the Guild's motion.

ANALYSIS

Applicable Legal Standards

The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. *City of Wenatchee*, Decision 8802-A (PECB, 2006). The Commission reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings

in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

"'[T]he filing and maintenance of a reasonably based lawsuit' is not an unfair labor practice, 'regardless of the motive for initiating the lawsuit.'" *Ben Franklin Transit (Teamsters Local 839)*, Decision 13409-A (PECB, 2022) (quoting *BE & K Construction Co.*, 351 NLRB 451, 456 (2007)). "[A] lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits." *Id*. at 457.

Application of Standards

On appeal, Libby argues the Examiner applied the incorrect legal standard for a claim of union interference through baseless litigation. Libby contends that the Guild's lawsuit was objectively baseless because her noncommercial speech was protected by the First Amendment. In response, the Guild asserts that it had a legitimate, non-retaliatory basis for the lawsuit against Libby. The Guild argues that it has protectable rights to its tradename.

According to Libby the elements of a claim of interference through baseless litigation are whether the lawsuit was objectively baseless and whether the lawsuit was retaliatory. In *BE & K Construction Co. v. National Labor Relations Board*, the Supreme Court addressed objectively based but unsuccessful lawsuits. The Supreme Court "limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose." *BE & K Construction Co. v. National Labor Relations Board*, 536 U.S. 516, 531 (2002). If the lawsuit was reasonably based, then the motive for initiating the lawsuit is not relevant. *Ben Franklin Transit (Teamsters Local 839)*, Decision 13409-A (citing *BE & K Construction Co.*, 351 NLRB at 456)).

Libby argues the Examiner erroneously assigned her the burden of proving the elements of the trade infringement claim. The complainant's burden is to show that the lawsuit filed against them was objectively baseless. *See Milum Textile Services Co.*, 357 NLRB 2047, 2052 (2011) (finding the General Counsel had the burden of proof on whether the lawsuit was baseless). Thus, Libby has the burden to prove the Guild could not have reasonably expected success on the merits of its trade name infringement claim at the time the Guild filed the lawsuit against Libby.

The plaintiff in a lawsuit need not have all the evidence to prove its complaint at the time of filing. *See Milum Textile Services Co.*, 357 NLRB 2047, 2052 (2011). The discovery process provides a litigant the opportunity to discover additional evidence to prove their lawsuit. If the party determines in the process that it cannot prove its lawsuit, it does not necessarily follow that the lawsuit was baseless at the time of filing. The parties had begun discovery before the Guild sought to voluntarily dismiss the lawsuit against Libby. Taking this into account, Libby has the burden to establish that when the Guild filed its lawsuit, "or during the time it voluntarily dismissed the [lawsuit], it did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action." *See id.* at 2053.

To determine whether the Guild's lawsuit was objectively based, we must first examine the legal standards for a claim of trade name infringement.[3] "Under Washington law, a plaintiff in a trade name infringement case must establish the defendant has infringed on a distinctive feature of his name in a manner that tends to confuse the two businesses in the public mind." *Seattle Endeavors, Inc. v. Mastro*, 123 Wn.2d 339, 345 (1994). Therefore, Libby has the burden of establishing that the Guild knew it could not prove that Libby had infringed on a distinctive feature of the Guild's name in a manner that would confuse the public.

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[3] We are not analyzing whether the Guild's inclusion of the Consumer Protection Act (CPA) claim was reasonably based. It appears the CPA claim was contingent on the success of the trade name infringement claim. The parties' briefing focused on the Guild's trade name infringement claim. We find relevant, but not determinative, that the lawsuit survived Libby's CR 12(b)(6) motion to dismiss. The judge's decision that the Guild's lawsuit could move forward does not compel us to find the Guild's lawsuit to be reasonably based, but the decision informs ours.

Libby asserts that her actions in creating the Facebook page were protected by the First Amendment; therefore, her Facebook page could not be a competing commercial interest. While Libby retains her right to free speech, the legislature restricts speech when the speech includes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." RCW 19.86.020. Libby asserts that she was not engaged in commercial activity within the meaning of RCW 19.86.010(2) and that the Guild knew at the time it filed the lawsuit she had not engaged in commercial activity.

After reviewing the filings, we conclude at the time of filing the Guild reasonably believed it could prove that Libby was using its name in violation of the common law. At the time the Guild filed its lawsuit, the Guild knew Libby used the Guild's exact name and trademark, Guild of Pacific Northwest Employees, to identify her Facebook page and held her page out to be the page of a labor union. Further, when the Guild filed its lawsuit, the Guild was aware that some members of the public were confusing Libby's Facebook page for the Guild's. Individuals found the Guild through Facebook. While some individuals found Libby's page first and recognized Libby's page as an imposter page, others did not. Komac testified that one caller suggested she revise the Guild's Facebook page to make it more positive.

Finally, at the time of filing the Guild reasonably believed the WSCCCE, a competing labor union, was involved with Libby's Facebook page. The Guild perceived Libby's actions as damaging to the Guild's reputation and impacting whether individuals joined the Guild. Libby's Facebook page could have impacted whether employees joined or stopped paying dues to the Guild. Under these circumstances, we agree with the Examiner that Libby's page could have affected the Guild's ability to generate revenue and thereby engaged in commercial activity.

CONCLUSION

Libby failed to establish that the Guild's lawsuit was objectively baseless or that no litigant could reasonably expect success on the merits. We conclude at the time of filing the lawsuit, the Guild reasonably believed it could establish a case of trade name infringement. The Guild did not interfere with employee rights in violation of RCW 41.56.150(1) when it filed and maintained a

lawsuit against bargaining unit employee Morgan Libby in Whatcom County Superior Court. We affirm the Examiner and dismiss Libby's unfair labor practice complaint.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Elizabeth Snyder are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 22nd day of November, 2022.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.

RECORD OF SERVICE

ISSUED ON 11/22/2022

DECISION 13525-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 134326-U-21

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