

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

FRANCISCO CHIPRES,

Complainant,

vs.

BEN FRANKLIN TRANSIT,

Respondent.

CASE 136200-U-23

DECISION 13649-A - PECB

DECISION OF COMMISSION

*Francisco Chipres*, the complainant.

*Evan D. Chinn*, Attorney at Law, Summit Law Group PLLC, for Ben Franklin Transit.

PROCEDURAL BACKGROUND

On February 8, 2023, Francisco Chipres filed this unfair labor practice complaint against Ben Franklin Transit (BFT). Chipres alleged BFT violated its collective bargaining agreement with Teamsters Local 839 (Union), created a hostile work environment, and discriminated against him. On February 21, 2023, an Unfair Labor Practice Administrator (ULP Administrator) with the Commission reviewed the complaint and issued a deficiency notice pursuant to WAC 391-45-110.

On February 27, March 16, and March 28, 2023, the complainant responded to the Deficiency Notice by filing three separate amended complaints. In response, the ULP Administrator issued a Cause of Action Statement and Order of Partial Dismissal. That order dismissed Chipres's claims that BFT engaged in race or national origin discrimination and that BFT violated the contract. *Ben Franklin Transit*, Decision 13649 (PECB, 2023) at 4–5. The ULP Administrator found that these allegations were not among the claims that the agency is statutorily authorized to decide. *Id.* at 5. Nonetheless, the ULP Administrator found that the complaint alleged one possible cause of action.

Assuming all of the facts alleged to be true and provable, the discrimination allegation of Chipres's March 27, 2023, second amended complaint states a cause of action, summarized as follows:

Employer discrimination in violation of RCW 41.56.140(3) . . . within six months of the date the complaint was filed, for disciplining Francisco Chipres in retaliation for his filing an unfair labor practice complaint.

*Id.*, at 5.<sup>1</sup>

The complainant filed a timely appeal of the Order of Partial Dismissal to the Commission.<sup>2</sup> We affirm the partial dismissal and remand the case for processing of the remaining cause of action.

#### ALLEGATIONS OF THE COMPLAINTS

As alleged in the complaints, Chipres works for Ben Franklin Transit. During his tenure, Chipres applied for other positions with the employer, but BFT did not hire him. Chipres alleges that BFT's decisions not to hire him were motivated by his English language limitation, his national origin, and/or his race. In addition, Chipres asserts BFT's failure to select him for these positions violated Article 11.2 of the collective bargaining agreement between BFT and the Union. Chipres further alleged that BFT created a hostile work environment after he filed race and national origin discrimination complaints against BFT.

The amended complaints add a series of allegations beginning on January 20, 2023, that Chipres contends to be in violation of the collective bargaining agreement. That day, BFT director

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<sup>1</sup> The order is confusing, though, in that it first finds that the complaint does not allege discrimination under RCW 41.56 and then orders a discrimination claim to proceed.

<sup>2</sup> Following Chipres filing an appeal brief and BFT filing a response brief, the record was transmitted to the Commission for review. Without filing a motion to amend either his brief or his complaint, Chipres filed an Amended Appeal Brief on June 9, 2023; an Amended Complaint on June 29, 2023; and an Amended Complaint on July 6, 2023. The Commission has neither reviewed nor considered these amendments. Our review is confined to those documents reviewed by the ULP Administrator. *See Bainbridge Island School District (Bainbridge Island Educational Support Professional Association)*, Decision 13410-A (PECB, 2022) at 5; *King County*, Decision 11221-A (PECB, 2012) at 1–2.

Josh Rosas posted shifts for employees to select based on seniority. Two days later, Chipres alleges that he discovered the shift he worked was not included among the shifts posted for bidding. The next day, Chipres went to the union hall and spoke with union representative Russel Shjerven. The complaint alleges that Shjerven said he would contact the employer. Chipres waited but BFT did not add his shift to the shifts available for bidding. Chipres alleges he again contacted the Union and spoke with an unidentified union representative who instructed Chipres not to sign the shift bid form.

According to the complaint, that same week, Rosas provided employees with an “insurance increment” form to sign. Chipres spoke with union steward Wayne Welle about the form telling Welle that he was not comfortable signing it. According to the complaint, Welle told Chipres that Chipres did not have to sign it. The complaint alleges that on January 26, 2023, Rosas called Chipres in for a meeting about the form. According to the complaint, Rosas said Chipres’s employment depended on Chipres signing the form, and so Chipres signed the document under protest. Rosas then sent Chipres home and instructed Chipres to wait for BFT to call.

In his March 28, 2023, amended complaint, Chipres added a new allegation. In that pleading, he alleged that after he filed his original complaint with the Commission, BFT took adverse actions against him motivated by that filing. Specifically, the complainant alleges as follows:

I would like to inform the public employment relation commission, that after I filed my complain with this agency, suddenly the employer notified me to return to my employment . . . [O]n march 22 2023 I received a certified letter from Ben Franklin Transit expecting me to return to my employment on march 20 2023 with a suspension on my record as a punishment & also assigning me to a shift that no one wants, not even the new hires, on the same day that I returned to work Josh Rosa with the presence of Wayne Welle handed me a document for another louder-mill hearing signed by Chad Crouch, the hearing is going to take place on April 10 2023, issuing another suspension to my record for not returning to work on march 20 2023, all this is just a pretext & punishment for exercising my right filing my complaint with the public employment relation commission, this action discriminate & interfere with the RCW 42.56 . . . .

Second Am. Compl. (corrected) at 1–2.

### ANALYSIS

When a party files an unfair labor practice complaint with the agency, a ULP Administrator reviews the complaint to determine whether the facts alleged state a cause of action. WAC 391-45-110; *see also* RCW 34.05.419. During this initial review, all facts are assumed true and provable. *Whatcom County*, Decision 8245-A (PECB, 2004) at 3. The initial review allows the agency to identify complaints that the agency cannot remedy. *See* RCW 34.05.416. As part of this review, if the ULP Administrator determines the complaint does not state a cause of action, the ULP Administrator will issue a deficiency notice. WAC 391-45-110(1). In response, a party may file an amended complaint. WAC 391-45-110(1). If any amendment does not state a cause of action, then the ULP Administrator dismisses those portions of the complaint. WAC 391-45-110(1).

The name “Public Employment Relations Commission” is sometimes interpreted to imply a broader scope of authority than the legislature conferred upon the agency. *King County*, Decision 13162-A (PECB, 2020) at 4. However, the agency’s jurisdiction is limited to employment disputes arising between public employers, public employees, and unions representing those employees under Washington’s collective bargaining laws. *Id.* The Commission cannot remedy all disputes arising within public employment. Therefore, the question before us is whether the ULP Administrator properly dismissed those portions of the complaint that alleged national origin or race discrimination and those portions that alleged violations of the collective bargaining agreement.<sup>3</sup>

#### The Allegations of National Origin and Race Discrimination Were Properly Dismissed

The Commission does not have the authority to remedy allegations of employment discrimination based on race, national origin, or other protected characteristics. *See generally*

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<sup>3</sup> The Commission does not defer to the ULP Administrator’s decision. Rather, the Commission assumes the alleged facts are true and provable and reviews the complaint under WAC 391-45-110. *Whatcom County*, Decision 8245-A at 3.

*Local 2916, IAFF v. Public Employment Relations Commission*, 128 Wn.2d 375, 379 (1995) (stating the Commission “has no more authority than is granted to it by the Legislature.”); RCW 41.58.020 (empowering the Commission to prevent, minimize, and settle labor disputes); RCW 41.56.010 (stating the intent of the statute is to provide a basis for employees to select, join, and be represented by labor organizations in matters concerning their employment). That authority rests with a different state agency, the Washington Human Rights Commission. *See* RCW 49.60. Thus, where a party alleges this type of discrimination, the charge is properly dismissed by the Public Employment Relations Commission. These allegations were properly dismissed.

The Allegations that BFT Violated the Collective Bargaining Agreement Were Properly Dismissed.

A contract violation should be raised through the contractual dispute resolution process. *Clark Public Transportation Benefit Area (C-TRAN)*, Decision 8489-A (PECB, 2004) at 5. The “Commission has consistently refused to assert jurisdiction of contract violations with the unfair labor practice remedies.” *Id.* Remedies for a contract violation are available through the grievance and arbitration provisions of the collective bargaining agreement. *Id.*; *Bremerton School District*, Decision 5722-A (PECB, 1997) at 4. In other words, to address a violation of contract a union must file a grievance.

Even if a contractual violation amounts to a unilateral change in terms and conditions of employment, that claim must be brought by the union and not an individual employee. Once employees are organized for purposes of collective bargaining, the duty to bargain exists only between the employer and the exclusive bargaining representative. RCW 41.56.030(4); *Renton School District (United Classified Workers Union, Local 1)*, Decision 6300-A (PECB, 1998) at 7; *King County*, Decision 13162-A (PECB, 2020) at 5. Individual employees do not have standing (cannot bring) complaints alleging the employer violated the contract. *King County*, Decision 13162-A at 5. Enforcement of a unilateral change or contract violation is the responsibility of the union. *Id.* Thus, Chipres’s allegations of contractual violations were properly dismissed.

Apart from the Allegation Allowed by the ULP Administrator, the Complaint Does Not State a Cause of Action for RCW 41.56 Discrimination.

The Commission has authority to remedy allegations that an employer acts in reprisal for the employee's exercise of rights protected by the Public Employees' Collective Bargaining Act. RCW 41.56.140(1); *Educational Service District 114*, Decision 4361-A (PECB, 1994). This type of conduct is, unhelpfully in this case, called "discrimination."<sup>4</sup> To state a cause of action for this type of discrimination, the complainant must allege 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, 348–49 (2014).

In this case, the complaint alleged BFT discriminated against Chipres by not selecting him for positions, by not including his shift in the list of shifts available to bid, and by sending him home when he refused to and later signed an insurance form under protest. There is, however, no allegation of a connection between this conduct and any protected activity engaged in by Chipres. The complaint alleged that on January 23, 2023, Chipres contacted his union representative for assistance with the shift bidding process. Seeking assistance from the union is protected activity. However, the complainant does not allege BFT knew Chipres sought assistance from the Union. In addition, the first amended complaint attaches a grievance Chipres filed on March 9, 2021; however, this amended complaint does not mention the grievance or allege any connection between its filing and the allegedly adverse treatment.

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<sup>4</sup> This type of conduct would more accurately be described as "retaliation" rather than discrimination in order to distinguish it from discrimination based on protected characteristics.

The Complainant Failed to Serve the Employer and Therefore the Appeal Failed to Comply with WAC 391-08-120(3) and Is Properly Dismissed on that Basis

When a party files documents with the agency, that party must also provide those documents to the other party the same day. WAC 391-08-120(3). The amended complaints as well as the notice of appeal were sent only to the Commission. The failure to serve the notice of appeal on BFT is an independent basis to dismiss the appeal and affirm the Order of Partial Dismissal.

ORDER

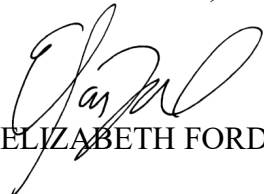
The Order of Partial Dismissal issued by the Unfair Labor Practice Administrator is AFFIRMED.

ISSUED at Olympia, Washington, this 20th day of July, 2023.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARILYN GLENN SAYAN, Chairperson

  
MARK BUSTO, Commissioner

  
ELIZABETH FORD, 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

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ISSUED ON 07/20/2023

DECISION 13649-A - PECB 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 136200-U-23

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