

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-18-03

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
LOCAL 3742,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
UMATILLA COUNTY,)	
)	
Respondent.)	
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The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) William Greer on December 19, 2003, following a hearing on August 12, 2003, in Pendleton, Oregon. The hearing closed on September 12, 2003, upon receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Douglas R. Olsen, Umatilla County Counsel, 216 S.E. Fourth Street, Pendleton, Oregon 97801, represented Respondent.

Oregon AFSCME Council 75, Local 3742 (AFSCME) filed this complaint on April 21, 2003, alleging that Umatilla County (County) did not promote AFSCME bargaining unit member Patricia Perry into a management position because of Perry's protected activity on behalf of AFSCME, in violation of ORS 243.672(1)(a) and (c). The ALJ investigated and scheduled the complaint for hearing. On June 2, the County filed an answer in which it denied the complaint's allegations.

The issue is whether the County refused to promote Patricia Perry into a management position because of her exercise of protected rights on behalf of AFSCME, in violation of ORS 243.672(1)(a) and (c).

We conclude that the County based its decision on legitimate, nondiscriminatory reasons. We will therefore dismiss the complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. AFSCME is the exclusive representative of a bargaining unit of personnel employed by the County. The County is a public employer.

2. The County's Resources Services and Development Department (Department) is responsible for several functions, including land use planning, emergency management, the County fair, watermaster, and extension service. As of the hearing date, the Department consisted of a planning director, a senior planner, two planners, a zoning aide, a cartographer, and an administrative aide.

The Department is also the County's representative to the Chemical Stockpile Emergency Preparedness Program (CSEPP), an intergovernmental agency. CSEPP monitors the incineration of chemicals at the Umatilla Army Depot, a chemical storage facility that includes land in both Umatilla County and Morrow County.

3. Doug Olson became the County's planning director in 1978. He was also the Department director from the Department's inception in 1995 until his retirement on May 1, 2003. Olson was involved in both land use planning and CSEPP activities. County Commissioner Dennis Doherty was also closely involved in CSEPP. Bob Perry served as the County's assistant planning director from the late 1980s until his retirement in November 2002.

4. Patricia Perry¹ began her employment with the County in its Mental Health Department as an office assistant 1 (1991-1993) and office assistant 2 (1993-1994). She later transferred to a zoning aide position in the Department

¹Bob Perry and Patricia Perry are not related. We will refer to Bob as "Bob Perry" and to Patricia as "Perry."

(1994-1997). She was promoted to senior planner in 1997. Perry has bachelor's and master's degrees in forestry, with a specialty in park planning.

5. Perry was the AFSCME local's president from 1994 to 2001, and, as of the hearing date, was its vice-president. Simultaneously, she has been the local's chief steward. In that role, she processed AFSCME grievances against the County. Perry was on the local's bargaining team for the two most recent collective bargaining agreements. Her various positions with AFSCME brought her into contact with the County commissioners.

6. In the first half of 2002, due to changes in Perry's duties, the County amended her classification description to senior planner/transportation planner and increased her pay by two ranges. The County commissioners approved the change. In that position, Perry acts as liaison to various intergovernmental programs and is involved in grant writing and project management. The County's classification description states that a senior planner provides "direction and guidance" to other Department employees on particular work "when necessary."

7. In the summer of 2002, Olson told the County commissioners that both he and Bob Perry were likely to retire within the next year. Olson suggested that the commissioners review the Department's function and plan for any reorganization that they considered appropriate. At that time, the Department had increasing responsibilities for the CSEPP.

8. Also in the summer of 2002, Perry asked Olson whether the County might fill Bob Perry's assistant planning director position through an internal recruitment.² Olson told her that he wanted to fill the position in that manner. When Olson asked County Human Resources Department Director Jim Barrow about that possibility, however, Barrow replied that the County commissioners generally preferred hiring through an open recruitment. Later, the commissioners told Olson that they would not consider a direct appointment for the vacancy. They stated that they wanted to see who might apply and that they welcomed Perry's application.

9. In August 2002, Olson recommended that the County commissioners consider reorganizing the Department. One specific recommendation was to change the name of the "assistant planner" position to "planning manager," increase the supervisory responsibility of the position, and increase the pay by two ranges.

²The County had promoted Bob Perry from senior planner to assistant planning director through an internal, noncompetitive process.

Because Bob Perry, the incumbent assistant planning director, would retire on November 29, 2002, Olson further recommended filling the planning manager position by November 15 to allow for some overlap between the incumbent and the new planning manager. In September, the County adopted Olson's recommendations.

10. On October 9, 2002, the County initiated the planning manager recruitment by posting an announcement which stated that the recruitment would close on October 23. One job requirement stated in the announcement was "exceptional ability to: plan, organize, manage, and review work of subordinate employees * * *." Also on October 9, Olson sent a copy of the announcement by e-mail to all Oregon planning directors.

11. Perry decided to apply for the planning manager position. Both Olson and Bob Perry encouraged her to apply.

12. On October 9, after receiving Olson's e-mail, Morrow County Planning Director Tamra Mabbott called Olson to discuss the planning manager recruitment.

Before Mabbott became Planning Director in Morrow County, she worked for Umatilla County from 1991 to 1995 as a senior planner. She had formal education (including a master's degree in urban planning from UCLA) and experience as a planner and was widely respected as the Morrow County Planning Director. Mabbott had supervisory, managerial, and planning director experience, and she was Morrow County's representative to the CSEPP. From her prior employment with Umatilla County, Mabbott was familiar with County personnel and planning issues.

Mabbott expressed interest in the Umatilla County position, but told Olson that she had applied for a position with Walla Walla, Washington. She interviewed for that position on October 9, the same day she received Olson's e-mail.

13. At hearing, Perry acknowledged that Mabbott is qualified for the planning manager position.

14. Upon learning of Mabbott's interest in the planning manager position, the County commissioners considered how to approach the situation. Commissioner Doherty, who had worked with Mabbott on CSEPP issues, knew that she had management experience as the Umatilla County planning director, had planning experience beyond the minimum qualifications specified in the recruitment announcement, and could move easily into the County planning director position soon.

to be vacated by Olson. The commissioners decided simultaneously to offer Mabbott the assistant planning director position (soon to be vacated by Bob Perry) and to cancel the planning manager recruitment. Mabbott tentatively accepted the offer.

15. During the process of negotiating an employment contract with Mabbott, Olson directed Administrative Assistant Valerie Thorne to type a draft and admonished her not to discuss the project with anyone. When Thorne told Olson that Perry was interested in the position, Olson responded that the commissioners wanted to hire Mabbott, who was known and qualified, and did not want to hire Perry because of her union activities.³

16. Around October 14, 2002, Olson told Perry that the County had hired Mabbott to the assistant planning director position, with the intention of moving Mabbott into the planning manager position, and that the County had canceled the planning manager recruitment.⁴ As of that date, Perry had not completed her application for the planning manager vacancy.

³ Thorne testified that Olson used words to the effect of “the commissioners do not want to hire Perry because of her union involvement and their dealings with her.” Olson testified that he used words to the effect of “we’ll see; the board of commissioners wants to hire Mabbott.” Olson testified that he did *not recall* making the statement described by Thorne in her testimony.

A witness who *does not recall* making a particular statement has not *denied* making the statement. Such a witness simply does not recall one way or the other whether the statement was made. Given Olson’s failure to deny the statement, our finding that he later made a similar statement (see footnote 5), and the fact that Thorne had no direct stake in the outcome of this case, we credit Thorne’s testimony.

⁴At hearing, Perry testified that Thorne told her about an October 2002 conversation between Thorne and Olson. Perry testified that Thorne said: the County planning commission held a meeting on October 24; before the meeting began, while Perry was out of the room, Thorne overheard Olson tell commission members that the County had hired Mabbott; Thorne said to Olson words to the effect of “you better tell them the shady reason for what happened”; and Olson responded with words to the effect of “it wouldn’t matter anyway—Perry wouldn’t have gotten the job because of her union involvement.”

AFSCME did not carry its burden of proving Olson made this statement to Thorne. First, although Thorne was called to testify to other similar conversations with Olson, she did not refer to that conversation in her testimony. Second, Perry’s testimony amounts to double hearsay. It concerns a statement Thorne allegedly made to Perry (first level of hearsay) about a statement Thorne allegedly heard Olson make (second level of hearsay). That is not as reliable as the direct testimony from Thorne that AFSCME could have offered.

17. Around October 15, 2002, Olson told Perry that he was sorry the recruitment and hiring sequence happened as it did. He told her that the director of the County Human Resources Department had approved the process.

18. Perry believes that she has the qualifications required for the assistant planning director position. The record reflects that Perry has experience as a planner but no formal education in that field; she has minimal experience as a supervisor or manager; and she has had little involvement with CSEPP.

19. Mabbott started work on November 15, 2002. Over the next several months, Mabbott took over some of Perry's work.

20. In March 2003, Mabbott disagreed with a statement Perry made in an intergovernmental meeting. Mabbott asked Olson to facilitate a meeting between her and Perry. After discussing the particular issue, Perry expressed her frustration that the County selected Mabbott for the management position vacancy. Olson responded by saying that Mabbott was highly qualified for the position and that Perry had been involved in some union activities.⁵

21. In the summer of 2003, the County promoted Mabbott to planning director and changed the vacant assistant planner position into a planner position.

⁵ We have three versions of the conversation. Perry testified that Olson said words to the effect of "you are very well qualified but the reason you did not get the position was because of your union activities." In his testimony, Olson denied saying that Perry was not hired because of her union activities. Mabbott, who was also present for the conversation, testified that Olson said to Perry words to the effect of "Mabbott has management experience and you don't" and "you do have your union involvement."

We credit Mabbott's testimony. Both Olson and Perry were under significant stress during the meeting. After Mabbott expressed interest in the position that Perry sought, Olson essentially withdrew his previously enthusiastic support of Perry, a long-time fellow employee. In contrast, as of that meeting date, the County had already hired Mabbott, and she did not have the stress of dealing with a fracture in a long-term professional relationship. Under the circumstances, Mabbott was in a better position to note and accurately recollect the conversation.

Further, when Mabbott testified that Olson had referred to Perry's union activity, she provided evidence that was adverse to her employer's interest. In that context, Mabbott's testimony has an additional ring of truth. We find that Olson said in this meeting that one consideration in the hiring process was Perry's union involvement.

22. Thorne, in her March 2003 annual evaluation conference with Olson, said words to the effect of “you realize it was Perry’s union involvement and adversarial role that prevented her from being hired.” Olson replied with words to the effect of “[r]emember, what we did was perfectly legal.”

23. Olson never heard the commissioners state that they decided not to hire Perry because of her union activities. Olson, Barrow, and County Commissioners Hansell, Doherty, and Holeman all deny that Perry’s union activities were a factor in the County’s decision to hire Mabbott as planning manager.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over these parties and the subject matter of this dispute.
2. The County’s refusal to promote Perry into a management position did not violate ORS 243.672(1)(a) or (c).

ORS 243.672(1)(A) CLAIM

ORS 243.672(1)(a) states two separate violations. First, it prohibits an employer from taking certain actions “because of” an employee’s exercise of protected rights. Second, it prevents employer actions that have a natural and probable tendency to chill an employee “in the exercise” of protected rights. *See, generally, Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596 (2004); and *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635 (1986).

AFSCME alleges that the County refused to promote Perry “because of” her union activities. In *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337 (2003), this Board discussed its method of analyzing complaints under the “because of” branch of ORS 243.672(1)(a):

“ORS 243.672(1)(a) prohibits public employers from interfering with, restraining, or coercing employees in or because of the exercise of their ORS 243.662 rights ‘* * * to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.’

“To state a claim, a complainant must plead protected employee activity, employer action toward the employee, and a connection between the two that suggests a causal relationship. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *reconsidered* 17 PECBR 549 (1998), *rev’d and remanded* 171 Or App 616, 16 P3d 1189 (2000), *order on remand* 19 PECBR 284, 295 (2001). The employer has the opportunity to offer a legitimate, nondiscriminatory reason for its action. If it does, then a question of law or fact exists which requires a hearing. *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 786-787 (1998).

“In analyzing a subsection (1)(a) ‘because of’ claim, we focus on the reason for the employer’s conduct. If the employer acted to interfere with, restrain, or coerce employees because of the employees’ exercise of protected rights, the action is unlawful. *Tri-County Metropolitan Transit District*, 17 PECBR at 786.

“* * * * *

“Subsection (1)(a) complaints typically fall into one of two categories, pretext cases and mixed-motive cases. In a pretext case, a complainant must prove that the employer’s asserted legitimate reason for its action is not the actual reason. Said differently, we must be persuaded that the employer’s stated reason is a sham, and that the employer actually acted for another—and unlawful—reason. In a mixed-motive case where the evidence establishes that the employer had both lawful and unlawful motives for its action, complainant must prove that the employer would not have taken the disputed action but for the employer’s unlawful motive. In other words, we must determine whether, absent complainant’s protected activity, the employer would have treated the complainant the same way. *STEA v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228 (2001) [AWOP 188 Or App 112,

70 P3d 903 (2003)].” 20 PECBR at 348-349 (emphasis added).

AFSCME asserts that the County considered a mixture of lawful factors (qualifications) and unlawful ones (protected union activities) in deciding whether to promote Perry. It asks us to apply a mixed-motive analysis. This request is analytically premature. We apply a mixed-motive analysis only after we have (1) made the factual determination that the employer acted for multiple reasons, and (2) made the legal determination that some of those reasons are lawful and some are not. We must first make these determinations before we can then proceed to a mixed-motive analysis and ask whether the unlawful reason “was a sufficient factor to attribute the decision to it.” *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 639, 16 P3d 1189 (2000).

At the outset of a case, we cannot tell whether to use a pretext analysis or a mixed-motive analysis. We make that determination later in the analytical process. Instead, once the complainant has properly pled a prima facie case, we begin the analysis in *all* cases under the “because of” branch of (1)(a)—that is, both mixed-motive and pretext cases—by examining the reasons for the employer’s actions. This is a factual inquiry. Typically, the employer asserts it acted for legitimate, nondiscriminatory reasons; the union asserts the employer acted in response to protected union activity.

Once we have determined the reason or reasons for the employer’s actions, we must then decide if those reasons are lawful. If all of the reasons are lawful, we will dismiss the complaint. If all of the reasons are unlawful, or if the employer’s purportedly lawful reasons are merely a pretext for its unlawful conduct, then complainant will prevail. If we conclude that the employer acted for a combination of lawful and unlawful reasons, then we apply a mixed-motive analysis.

Applying this analysis, we begin by examining the reason the County offers to explain its actions. The County—not unreasonably—considered Mabbott to be an experienced, well-qualified, and known applicant. In addition, the County knew it had to act promptly because Mabbott was applying for another position and might not be available when the scheduled recruitment ended. The County’s decision to hire Mabbott for these reasons is legitimate and nondiscriminatory.

AFSCME asserts that the reason offered by the County is a pretext to hide its unlawful reasons. AFSCME relies primarily on Olson’s statements. We found that Olson twice stated that the commissioners refused to promote Perry because of her

union activities.⁶ We are troubled by those statements.⁷ Nevertheless, finding that Olson made the statements is not the same as finding the statements are true. That is, just because Olson said the commissioners considered Perry's protected activities does not conclusively establish that they did. The record as a whole convinces us that the commissioners did not consider Perry's protected union activities.⁸ Significantly, we found that Olson never heard the commissioners say they refused to promote Perry because of her union activities, and each witness who was present at the deliberations and decision denied that Perry's union activities were a factor.⁹

We also find it significant that the record lacks any indication that Perry, in her role as an AFSCME activist for almost a decade, had a highly adversarial or bitter relationship with County managers and elected officials. To the contrary, the County promoted Perry into progressively more responsible positions during the time that she was the AFSCME local's president and negotiator. The County most recently promoted Perry in the first half of 2002 when the commissioners approved a change in her classification and increased her pay by two ranges. This occurred only months before the decision to hire Mabbott instead of Perry. There is no evidence of any acrimony arising from Perry's union activity that might have caused the commissioners to change their attitude towards Perry in the short time between Perry's most recent promotion and the decision to hire Mabbott.

Further, the record contains no evidence of any prior County discrimination against Perry, or any other employee, based on protected activities.

⁶See Findings of Fact 15 and 20.

⁷The pleadings allege that the County violated only the "because of" branch of (1)(a). We confine our analysis to that issue. We do not decide whether Olson's statements by themselves violate the "in the exercise" branch of (1)(a).

⁸In some circumstances, even if the final decision-maker is not unlawfully motivated, we will nevertheless find a (1)(a) violation if a lower-level supervisor with an unlawful motivation plays a significant role in the decision. *Days Creek Association of Classified Employees v. Days Creek School District 15*, Case No. UP-93-94, 16 PECBR 187, 201 (1995); *OSEA v. Medford School District*, Case No. UP-60-86, 10 PECBR 402, 428, AWOP 94 Or App 781, 767 P2d 934 (1989). Here, however, there is no evidence that Olson had any role or influence in the process that led to the decision, or in the decision itself, to hire Mabbott rather than promote Perry.

⁹See Finding of Fact 23.

Under the circumstances, we conclude that Perry's union activities were not a factor in the County's hiring decision. We find no combination of lawful and unlawful reasons for the County's decision, so we need not consider a mixed-motive analysis. The County based its decision entirely on legitimate, nondiscriminatory reasons. AFSCME did not prove that the County refused to hire Perry because of her union activity, in violation of the "because of" branch of ORS 243.672(1)(a).

We will dismiss this element of the complaint.

ORS 243.672(1)(c) CLAIM

AFSCME also alleges that the County's actions violate ORS 243.672(1)(c) which makes it an unfair labor practice for a public employer or its designated representative to:

"Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. * * *"

In *AFSCME Council 75, and Haphey and Bondietti v. Linn County*, Case No. UP-115-87, 11 PECBR 631, 650-651 (1989), we described the analysis under (1)(c):

"Like most (1)(a) interference complaints, subsection (1)(c) discrimination charges turn on a question of causation. In a typical case, an employer violates (1)(c), as well as (1)(a), when it treats an employee disparately because of the employee's union activity. In such cases, a (1)(c) violation is established by the same but for causation analysis employed under (1)(a). However, the exercise of protected rights is not a necessary element of a (1)(c) case; neither is a showing of actual encouragement or discouragement with regard to the exercise of such rights. It is sufficient that Complainant prove discrimination which is intended to affect the exercise of protected rights, and which does so or would have the natural or probable affect [*sic*] of doing so. The element of unlawful purpose (sometimes referred to loosely as intent, motive or animus) may be established by an actual showing of employer animus or may be inferred from the circumstances surrounding the discriminatory conduct. The latter usually follows from a finding that the employer conduct was

'inherently destructive' of protected rights." (Footnotes omitted; emphasis in original.)

AFSCME established that Perry engaged in protected activities. It alleges that the County would have promoted her had she not engaged in those activities. As we discussed in our analysis of the (1)(a) claim, Perry's union activities were not a factor in the County's decision. Perry was not denied the promotion because of her union activities. AFSCME failed to prove the causation element necessary to establish a (1)(c) violation.

Further, AFSCME has not proven that the County had an unlawful purpose, another critical component of a subsection (1)(c) complaint. The County closed the recruitment and hired Mabbott without receiving an application from Perry. The County, not unreasonably, considered Mabbott to be well qualified for the new position in the newly-reorganized Department. This is a lawful purpose.

Under the circumstances, AFSCME did not prove that the County had a discriminatory reason for hiring Mabbott instead of promoting Perry. We will dismiss this element of the complaint.

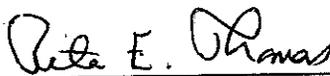
ORDER

The complaint is dismissed.

DATED this 16th day of July 2004.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.