

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-34-08

(UNFAIR LABOR PRACTICE)

EUGENE CHARTER SCHOOL)	
PROFESSIONALS, AFT, AFL-CIO,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RIDGELINE MONTESSORI PUBLIC)	AND ORDER
CHARTER SCHOOL,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Larry L. Witherell on March 9, 2009, after a hearing held on December 11, 2008, in Eugene, Oregon. The record closed on January 22, 2009, with receipt of the parties' post-hearing briefs.

Eben Pullman, Field Representative, and Richard Schwartz, Executive Director, AFT-Oregon, Tigard, Oregon, represented Complainant.

Andrea D. Coit, Attorney at Law, Harrang Long Gary Rudnick PC, Eugene, Oregon, represented Respondent.

On September 23, 2008, Eugene Charter School Professionals, AFT, AFL-CIO (Union) filed this unfair labor practice complaint against Ridgeline Montessori Public Charter School (School). The complaint alleges that the School violated ORS 243.672(1)(a) when it reprimanded Janell Heidenreich in writing and placed her on a plan of assistance. The School filed a timely answer.

The issues in this case are:

1. Did the School violate ORS 243.672(1)(a) by reprimanding Janell Heidenreich in writing on June 19, 2008?
2. Did the School violate ORS 243.672(1)(a) by placing Janell Heidenreich on a plan of assistance on August 23, 2008?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. The Union is a labor organization that was certified on November 12, 2008, as the exclusive representative of a bargaining unit of all of the School's teachers and classified employees, excluding substitutes, supervisory, and confidential employees.
2. The School is a public employer that employs 24 or 25 teachers and specialists. Approximately 240 students attend the School.
3. The School employs the following administrators:
Cindy Bass – Principal
Mary Bauer – Member and Secretary of the Board of Directors¹
Trish DeJohn – Montessori Program Director
Chrystell Reed – Montessori Administrator.

Bass and Reed constituted the School's administrative team during the 2007-2008 school year. DeJohn became part of the administrative team when she began working for the School in August 2008.

4. Janell Heidenreich began teaching at the School in 2001.

¹Bauer became board president in September 2008.

5. In the spring of 2008, Heidenreich became concerned about the School's treatment of teacher John Doe, a colleague at the School.² The School had placed Doe on a plan of assistance. Heidenreich believed the School was treating Doe unfairly by putting him in an unrealistic situation. Heidenreich was also upset because Doe told her that School administrators told Doe not to discuss his situation with anyone.

6. Because of her concern about Doe, on March 17, 2008, Heidenreich called board member and secretary Bauer at her home. Heidenreich told Bauer that she was concerned that the School had placed Doe on a plan of assistance and denied him meaningful support or the help of an advocate. She also told Bauer that the School's board of directors and the administrative team were moving toward a formalistic direction by imposing more rules and regulations. Heidenreich said that the School was moving away from the Montessori model and principles and becoming less personal and family-like.

Bauer responded that she was concerned about adequate protections for teachers, since she (Bauer) had been a union member when she worked for the Eugene School District.³ Bauer told Heidenreich that she believed that neither of the major teacher unions – the American Federation of Teachers (AFT) or the Oregon Education Association (OEA) – was interested in representing the School's teachers. The AFT did not have a significant presence in Oregon, and the OEA had opposed the School's formation. Bauer suggested to Heidenreich that the teachers form their own union. At no time in her conversation with Bauer did Heidenreich bring up the idea of forming a union.⁴

²John Doe is a pseudonym.

³Bauer worked as a licensed teacher for 25 years in Eugene School District 4J

⁴The testimonies of Heidenreich and Bauer were often at variance. While Heidenreich states that she did not mention unions during the March 17 telephone conversation with Bauer, she claims she mentioned unions in a subsequent telephone conversation with Bauer. Heidenreich testified that she told Bauer, "maybe we should form a union, and [Bauer's] comment was, that would be dreadful, I was teaching in 4J when there was a strike. Maybe what the teachers could do is they could gather together and speak with one voice and go to administration." Bauer denies any second such conversation. Heidenreich could not provide the circumstances, context, date, or motive for a second telephone conversation with Bauer. Heidenreich's answers were sometimes vague and highly generalized. Bauer's testimony, by contrast, was consistent, clear, and detailed. Accordingly, we rely upon Bauer's version of her conversation with Heidenreich and do not credit Heidenreich's claim that she discussed unions with Bauer.

7. In early April 2008, Heidenreich talked with officials at the national offices of both the National Education Association (NEA) and the AFT in Washington D.C. In these conversations, Heidenreich expressed concern about conditions at the School and acknowledged the benefits of union representation. Heidenreich did not discuss strikes or calling a strike with either the NEA or AFT.

8. In late May 2008, Doe told Heidenreich that the School was offering him the option of resigning or having his contract non-renewed. Doe agreed to resign. Heidenreich was upset by Doe's situation, and told fellow teacher Jen Wyld that she was "thinking that maybe we should call a strike."

9. On May 30, shortly after learning about Doe's situation, Heidenreich called Bass at her office. Heidenreich made this call on a portable telephone provided to each teacher, and called from the hallway outside her classroom. When Bass answered the telephone, Heidenreich said, in an emotional voice, "you've told me that I've lost my joy⁵ with my children and because you've told me I have trouble communicating and because of what you've just done to my colleague, I'm calling a strike."⁶ Heidenreich then hung up. Heidenreich did not mention any intention to form a union in her conversation with Bass. Other than her comment to Wyld – that she was thinking about calling a strike – Heidenreich did not discuss the possibility of a strike or any other job action with other School teachers.⁷

⁵Heidenreich's remark regarding her loss of joy with the children referred to a comment that School administrator Reed made to her during Heidenreich's evaluation for the 2006-2007 school year. An external Montessori consultant made a similar comment about Heidenreich. Heidenreich's statement about "trouble communicating" referred to a notation on Heidenreich's June 11, 2007, evaluation form (for the 2006-2007 school year) and a conversation between Bass and Heidenreich at about the same time. The School's 2007 evaluation form rated teachers as underdeveloped, emerging, proficient, and distinguished in a number of areas. In her 2007 evaluation, School administrators rated Heidenreich as proficient or distinguished in all areas except "Communication;" in this area, they ranked Heidenreich as emerging. A rating of emerging means that the teacher needs to improve.

⁶Heidenreich testified that she said, "in light of the fact that [Doe] has been given a choice of not having his contract renewed or resigning, and in light of the fact that my review said that I'd lost my spark with children, I am considering calling a strike." The difference between the two accounts of this conversation is a distinction without a difference

⁷When asked if she had any intention of actually causing a strike, Heidenreich answered "I don't know." When asked "Who would know?", Heidenreich responded, "It was a time of great frustration, high emotion."

10. Bass was surprised by Heidenreich's call and immediately called Montessori administrator Reed to her office. When Reed arrived, Bass telephoned Bauer. Bass told Bauer about Heidenreich's telephone call and asked that Bauer and the other board members come to the School on Monday, June 2. Based on Heidenreich's statements, the School administrators believed that there was a possibility of a strike or other job action on that day. The administration began preparing for a potential disruption to the School program. Bass instructed office manager Kayla Berkfield to call in two substitute teachers. The administrators planned to use Bauer, Bass, Reed, the substitutes, and perhaps some other board members to cover classrooms on Monday morning, if necessary.

11. After calling Bass on May 30, Heidenreich personally invited teachers to meet at her house on Saturday, May 31, to talk about what happened to Doe, and how they could band together to protect themselves. Heidenreich also asked teachers if they would be interested in discussing a job action. Three teachers told Bass about the meeting at Heidenreich's house on May 31. Reed learned about the meeting at an evening event on May 30 for third-grade students. Bass and Reed assumed the meeting was related to Heidenreich's telephone call and her threat to strike.

12. Two or three teachers attended the meeting at Heidenreich's house on Saturday, May 31. Heidenreich and the other teachers discussed various concerns they had about the School and the possibility of joining together to form a union. Heidenreich mentioned that she had threatened to strike, but did not encourage other teachers to join her in any job action.

13. On Monday, June 2, 2008, School administrators were prepared for a walkout or strike. Two substitute teachers, four board members, and administrators Bauer, Bass, and Reed were ready to cover classes if teachers did not report to work. First thing Monday morning, Bass and Reed checked every classroom to ensure that the teacher and the assistant were present and that everything was proceeding normally. All the teachers, including Heidenreich, reported to work as normal. There was no strike, walkout, or other job action on June 2.

14. When no incident developed on the morning of June 2, Bass asked Heidenreich to come to her office. Bauer, Bass, and Reed were present when Heidenreich arrived. After Heidenreich sat down, Bass said they were concerned about Heidenreich's threat to call a strike and that they thought Heidenreich's actions were unprofessional, unethical, not competent, and a threat to the welfare of the School.

Heidenreich immediately responded that Bass was absolutely correct and hit her hand on the table as if emphasizing her response. Bass was pleasantly surprised and assumed Heidenreich was going to take responsibility for what happened.

Heidenreich and Bauer then talked briefly about the School. Bass asked Heidenreich if there was anything else. Heidenreich responded that there was something formative occurring, but that she could not talk about it at this point. Heidenreich then walked out of the office. Bass, Bauer, and Reed were confused by Heidenreich's departing comments. However, none of the administrators followed up with Heidenreich to find out what she meant.

15. The School administrative team is responsible for evaluating and disciplining employees. However, the administrators generally discuss more serious actions with the board of directors in executive session

16. The employment contract between the School and each teacher, including Heidenreich, provides, in part:

"4. Duties and Performance. * * *

"* * * * *

"b Teacher shall devote his/her time, energy and skill to the performance of the services in which Ridgeline is engaged, at such time and place as Ridgeline may direct. Teacher shall faithfully and industriously assume and perform with skill, care, diligence and attention all responsibilities and duties connected with his/her employment on behalf of Ridgeline. Teacher shall not undertake any activity or performance of services that impairs or impedes his/her ability to complete the duties as a Teacher, or otherwise conflicts with the best interests of Ridgeline.

"* * * * *

"5. Termination of Employment. * * *

"a. Termination by Ridgeline For 'Cause'. Ridgeline may, at any time and without notice, terminate the Teacher for 'cause.' Termination by Ridgeline of the Teacher for 'cause' shall include but not be limited to termination based on any of the following grounds: * * * (e) breach of the Teacher's duty of loyalty, including the diversion or usurpation of opportunities properly belonging to Ridgeline; (f) willful disregard of policies and procedures; (g) breach of any of the

material terms of this Agreement; (h) insubordination or deliberate refusal to follow the instructions of the Principal; and (i) violation of any State, Federal [*sic*] Local, or Teacher Standards and Practice Commissions (“TSPC”) laws, regulations, or guidelines concerning professional conduct of Teachers.” (Emphasis in original.)

17. The administrative team discussed Heidenreich’s May 30 conduct and concluded that it warranted some form of discipline. On June 17, a board meeting was called to consider disciplining Heidenreich. Bass and Reed attended the board meeting and discussed the matter with the board members. Bass and Reed believed the incident could not be ignored and recommended that the School issue a letter of reprimand to Heidenreich for unprofessional and reckless behavior. Bass and Reed told the board members that the May 30 telephone call was an indication of Heidenreich’s ongoing communication difficulties. Bass and Reed also recommended that Heidenreich be placed on a plan of assistance to address these problems. The board approved the administrators’ recommendations. Bass and Reed decided to wait to implement the plan of assistance until August, when new Montessori director DeJohn would begin working at the School. They believed that Heidenreich would be more receptive to the plan of assistance if DeJohn was involved.

18. Bass planned to give Heidenreich the written reprimand at the same time she gave Heidenreich her 2008-2009 teaching contract, on June 19, the last day of the school year. However, Heidenreich did not work that day.

On June 19, Bass or Reed called and left a telephone voice message asking Heidenreich to come into the office. Meanwhile, Bass left for another commitment. Heidenreich came to the School at the end of the day and met with Reed, who gave Heidenreich her teaching contract and a letter of reprimand signed by Bass and Reed. The letter of reprimand stated

“June 19, 2008

“Dear Janell,

LETTER OF REPRIMAND

“This letter of reprimand is in reference to the events of May 30 – June 2, 2008:

- “1. On Friday, May 30, 2008 at 8:45 a.m. you made a phone call to Cindy Bass in the office during instructional time and stated, ‘Because you told me I have lost my spark with my students, and because you said that I have trouble communicating, and because of what you did to my colleague, I am calling a strike.’

- “2. At no time between the time of the above phone call and the beginning of school on the following Monday, June 2, 2008, did you retract the threat of a strike.
- “3. On June 2, 2008 you were informed by Cindy Bass in the presence of Chrystell Reed and Mary Bauer that your behavior with respect to the threatened strike had not been ‘ethical’ or ‘competent.’ You did not dispute that statement.

“Your above actions created a substantial disruption to the learning process and were an activity that conflicted with the best interests of Ridgeline School. You failed to demonstrate skill in communicating with staff and others and to use professional judgment, thereby impacting the school climate and finances in a negative manner. Based on these actions and some aspects of your past performance, you will be placed on a Plan of Assistance when you resume your duties at Ridgeline in August 2008. Should conduct of this type reoccur, it would result in disciplinary action, up to and possibly including, dismissal.”

After Heidenreich read the reprimand, Reed asked if she had any questions. Heidenreich said she did not. Bass had returned to the School by this time and joined the meeting. Bass told Heidenreich she would receive a plan of assistance at the beginning of the next school year, and that Montessori administrator DeJohn would help implement the plan of assistance. Heidenreich signed a copy of the letter to indicate that she received it and left the office

20. After receiving the letter of reprimand, either during the last week of June or the first week of July, Heidenreich called fellow teacher Wyld. Heidenreich told Wyld she had received a letter of reprimand. Heidenreich said she had started making calls to see what protection she had since she believed the School had treated her unfairly. Heidenreich also said she had spoken to both the AFT and NEA.

21. In late July, Heidenreich invited Wyld to join a Union organizing team and attend a meeting with a Union field representative. The purpose of the meeting was to determine if teachers were interested in forming a union.

22. Some time after this initial Union organizing meeting, Wyld volunteered to talk to the administration about the Union organizing efforts. Wyld made an appointment to meet with School administrator Reed in early August, before the 2008-2009 School year started. However, before Wyld met with Reed, a Union representative again met with the School teachers. At this second meeting, the group decided not to tell School administrators about their activities.

23. On August 6, 2008, Reed went into the School's office where she met the office manager, Kayla Berkfield. Berkfield said she had been at a party the previous night and some teachers were talking about a union. Berkfield asked if Reed knew anything about this matter. Reed replied that she knew nothing about any union activity. Reed then told Bass what she had heard.

At the end of the second week in August, Reed was in the School office with Wyld. Reed asked Wyld if she knew anything about a union. Wyld responded yes, that employees were learning about unions.

Bass and Reed were unaware of any union activity among the teachers, including Heidenreich, until August 2008.

24. On August 25, Bass gave Heidenreich a plan of assistance. The plan was not considered discipline, and the administrators believed it was an evaluation tool that would help Heidenreich improve her performance.⁸ The plan stated, in pertinent part:

“For the past several years a pattern of interpersonal conflict between you, Janell Heidenreich, and the Ridgeline Board of Directors as well as the administrative team has persisted. This relationship was further damaged by your actions on May 30, 2008, which conflicted with the best interests of Ridgeline Montessori Public Charter. These concerns were noted on your 2006-07 evaluation and the Letter of Reprimand given to you on June 19, 2008. Therefore, as you were informed when we met on June 19, the administrative team has prepared this plan of assistance in order to help you meet expectations.

“Job Deficiencies

“A. You have not exhibited effective communication skills or maintained a positive working relationship, particularly in

⁸The School's evaluation policies provide for formal classroom and workplace observations and informal observations. “When work-performance concerns occur, improvement strategies will be initiated as part of the normal evaluation cycle. If greater intervention is required, a Plan of Assistance will be utilized. The minimum length of a Plan of Assistance for a permanent teaching employee is 45 working days, * * * .”

relation to members of the board and the administrative team.[⁹]

- “B. You have not demonstrated professionalism in terms of supporting and adhering to governmental regulations and Ridgeline policies.

“Expectations and Action Plan for Improvement

“The following expectations must be met in order to bring your performance to a satisfactory level:

“Goal 1 – Establish and maintain a cooperative relationship and positive communication with all stakeholders.

- “a. You must develop and maintain an active communication with all members of the Ridgeline community, especially the administrative team.
- “b. You must exhibit behavior congruent with expectations for students (non-judgmental, unbiased, deferential, etc).
- “c. You must listen openly and respectfully to others, avoiding passive aggressive behaviors such as ambiguity, obstructionism, victimization, behind the back comments, blaming, etc.
- “d. In your interactions with administrative team members, you must communicate a sincere willingness to work cooperatively in the best interest of the Ridgeline community [*sic*]

“Goal 2 – Meet professional standards of conduct related to supporting and adhering to Montessori tenets, state law, and school policies.

⁹Standard 14 (“Communication”) under the School’s required professional responsibilities provides:

“Communicates effectively and respectfully with all stakeholders: students, parents, colleagues, and administrators.
Facilitates meetings effectively if required
Collaborates with colleagues and other professionals
Is aware of proper channels of communication, administrative functions, and professional conduct.”

- “a. You must utilize student performance assessments to identify special needs and utilize the referral process for academic support as well as TAG identification.
- “b. You must adhere to the Ridgeline Behavior Plan in a consistent manner.
- “c. You must attend all professional obligations, including inservice sessions, staff meetings, Step 1 meetings, and Curriculum Sharing sessions, and use approved personal or professional leave for all absences other than illness.
- “d. You must comply with all other state or Ridgeline policies, administrative procedures and oral or written directives given by any member of the administrative team.
- “e. You must maintain the prepared environment in a clean, clutter-free, attractive, esthetically pleasing environment.”

* * *

25. On September 3, 2008, the Union filed a representation petition with this Board in Case No. CC-04-08.

26. On September 23, 2008, the Union filed the complaint in this case.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The School did not violate ORS 243.672(1)(a) when it reprimanded Janell Heidenreich in writing on June 19, 2008.

3. The School did not violate ORS 243.672(1)(a) when it placed Janell Heidenreich on a plan of assistance on August 23, 2008.

DISCUSSION

The Union alleges that the School violated ORS 243.672(1)(a) when it reprimanded Heidenreich in writing and put her on a plan of assistance. Under ORS 243.672(1)(a), it is unlawful for a public employer to interfere with, restrain, or coerce an employee in or because of the exercise of rights guaranteed in ORS 243.662. ORS 243.662 guarantees public employees “the right 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.” Subsection (1)(a) contains two separate prohibitions. First, it prohibits public employers from acting “because of” employees’ exercise of protected rights. Second, it prohibits employer actions that tend to chill employees “in the exercise” of their protected rights. The Union contends that the School’s actions violated both the “because of” and “in the exercise” prongs of subsection (1)(a).

“Because of” Claim

To decide if an employer violated the “because of” portion of subsection (1)(a), we consider only the employer’s motive for the disputed action. If the employer acted “because of” an employee’s exercise of activity protected under the Public Employee Collective Bargaining Act (PECBA), then the employer’s actions are unlawful. *Portland Association of Teachers and Denise Poole v. Multnomah County School District No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). An employer’s actions need not be motivated by hostility, anti-union animus, or any subjective intent to restrain or interfere with employees’ protected rights. To prove a “because of” violation of subsection (1)(a), a complainant need only show that the employer took action because the employee chose to exercise a protected right. *Portland Association of Teachers and Dave Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 and n 10 (1986).

In cases alleging a violation of the “because of” portion of subsection (1)(a), we begin by determining the reasons for the employer’s action. This is a fact determination based on the entire record. *PAT and Poole*, 171 Or App at 626. Our analysis continues as follows:

“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.” *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004).

Here, the Union contends that the School reprimanded Heidenreich and placed her on a plan of assistance because of the union activities in which Heidenreich engaged – calling School principal Bass and threatening to strike, contacting AFT and NEA officials,

and organizing meetings at her house to discuss the union. We consider each of these reasons in turn, beginning with Heidenreich's May 30 phone call to Bass.

The School agrees with the Union that Heidenreich's reprimand and plan of assistance were based on her May 30 phone call to Bass. However, the School contends that the statements Heidenreich made during this phone call were a reckless and impulsive expression of Heidenreich's own personal opinions about School working conditions, and involved no PECBA-protected activity. We agree. Protected activity does not include strictly individual complaints about working conditions and other protest actions that are unrelated to the activities of a labor organization. In *White v. Oakland School District No. 1*, Case No. C-128-78, 5 PECBR 2830, 2839, AWOP, 49 Or App 483, 621 P2d 682 (1980), we concluded that a school district did not violate subsection (1)(a) when it discharged a teacher in part because she joined a group of teachers who met with the District superintendent to complain about a principal. We noted that the meeting was not sponsored by a labor organization and held that the complainant's presence at the meeting "cannot be viewed as participation in the activities of a labor organization." *Id.* at 2840. In *Lucas v. Coos County Sheriff's Office*, Case No. UP-119-90, 13 PECBR 97, 102 (1991), we concluded that an individual's decision to engage in a "one-man work-to-rule" response to the employer's policies was not protected activity, because the conduct was not sanctioned by the union. In *Norris v. Oregon State Police Department*, Case No. C-128-77, 3 PECBR 1994, 2002 (1978), we held that an officer's declaration that "the superintendent is an uneducated moron" was not a PECBA-protected statement since it was an individual complaint that had no connection to any action by a labor organization.

Based on our examination of the circumstances surrounding Heidenreich's May 30 phone call to Principal Bass, we conclude that Heidenreich's threat to call a strike was not an activity that is protected under the PECBA. Instead, it was an expression of Heidenreich's own personal frustration about working conditions at the School that was unrelated to any type of union action. Two of the issues that angered Heidenreich enough to make the phone call – that administrators told her she had lost her enthusiasm and that she had difficulty communicating – involved her own personal complaints about the administrators' assessment of her work. Her protest about the School's unfair treatment of Doe was also an individual concern, since Heidenreich had not discussed Doe's situation with any teachers other than Doe himself. Except for her comment to fellow teacher Wyld that she might call a strike, Heidenreich made no attempts to enlist support of her colleagues for her threatened job action before her phone call. Heidenreich herself admitted that her phone call was a spontaneous expression of anger, and that she did not know if she intended to actually call a strike.

We also note that the job action Heidenreich threatened in her May 30 phone call was unlawful. The PECBA regulates strikes by public employees. ORS 243.726(1) prohibits strikes by “any public employee who is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the Employment Relations Board or recognized by the employer; * * *.”¹⁰ Heidenreich was not in such a bargaining unit. If participation in a strike by an unrepresented employee is proscribed by statute, it follows that Heidenreich was not engaged in protected activity when she threatened a strike.

In sum, we hold that Heidenreich’s May 30 phone call, in which she threatened an unlawful strike, was an individual protest that did not involve activities protected under ORS 243.662.

Next, we consider the Union’s contention that the School reprimanded Heidenreich and placed her on a plan of assistance because she contacted the AFT and NEA and held meetings in her home to discuss Union organizing with other School teachers and a Union representative. The Union asserts that the actions the School took against Heidenreich violated subsection (1)(a) because they were motivated by School administrators’ dislike of these union activities.

Heidenreich’s phone call to the two unions and the meetings she held to discuss forming a union were clearly activities protected under the PECBA. In order to demonstrate a causal link between an employer’s action and an exercise of protected rights, however, a complainant must show that the employer knew about the employee’s participation in protected activities. *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047, 4051 (1980). *See also Oregon School Employees Association v. School District No. 9 of Jackson County*, Case No. C-203-78, 4 PECBR 2545, 2551 (1979); *Harrison v. Central Linn School District No. 552-C*, Case No. C-152-76, 3 PECBR 1593 (1977), *aff’d*, 34 Or App 221, 578 P2d 460, *rev den*, 284 Or 1, *amended order*, 4 PECBR 2097 (1978); *McGrew v. Marion County Fire District No. 1*, Case No. C-103-77, 3 PECBR 1747 (1978).

On June 2, the date on which Bass and other School administrators decided to reprimand Heidenreich and put her on a plan of assistance, School administrators and School board members knew nothing about Heidenreich’s April calls to the unions and knew only that Heidenreich planned to meet with teachers on May 31. Nothing in the record indicates, however, that Heidenreich’s reprimand was based in any way on School

¹⁰Additional requirements for a lawful strike are set forth in ORS 243.672(2). None of these requirements were met in this case.

administrators' or Board members' concerns about this one meeting. The record clearly shows that School administrators and School board members chose to reprimand Heidenreich because they believed she acted recklessly and unprofessionally when she called Principal Bass and threatened an illegal strike. There is no evidence that School board members or administrators were hostile toward the prospect of teachers organizing or the possibility of a staff union.¹¹ To the contrary, one of the Board members who participated in making the decision to reprimand Heidenreich encouraged Heidenreich to join with other teachers at the School to form a union.

It was not until early August 2008 that School administrators learned about the teachers' July and August meetings at which they discussed the Union. This was after the administrators reprimanded Heidenreich and after they decided to put her on a plan of assistance.¹² Accordingly, this protected activity – meeting to discuss forming a union – played no part in the School's decision to discipline Heidenreich.

Because the School's reasons for reprimanding Heidenreich and placing her on a plan of assistance were not based on protected activity, the School did not violate the "because of" portion of subsection (1)(a) when it took these actions.

"In the Exercise" Claim

We next consider whether the School violated the "in the exercise" prong of subsection (1)(a). To determine if an employer's actions violate this portion of the statute, we do not consider the employer's motive. Instead, we focus on the effect of the employer's conduct. If the employer's actions, when viewed objectively, have the natural and probable effect of chilling employees in their exercise of PECBA-guaranteed rights, the employer violates the "in the exercise" prong of subsection (1)(a). *Portland Association of Teachers and Poole*, 171 Or App at 623-624. A violation of the "in the exercise" portion

¹¹While proof of employer hostility toward a union is not necessary to a finding that the employer violated the "because of" prong of subsection (1)(e), evidence of anti-union animus may show an unlawful motivation. *Oregon School Employees Association v Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 n 2 (2007).

¹²The record establishes that administrators decided to place Heidenreich on a plan of assistance before they knew about the meetings teachers held to discuss the Union in July and August 2008. Although School administrators did not implement Heidenreich's plan of assistance until August 25, there is no evidence to indicate any unlawful motive for this delay. To the contrary, School administrators had a valid reason for waiting until August to start the plan – they wanted to involve new Montessori administrator DeJohn in the plan.

of subsection (1)(a) may be either derivative or independent. An employer that violates the “because of” prong of subsection (1)(a) also violates the “in the exercise” prong of subsection (1)(a). An employer’s conduct may also independently violate the “in the exercise” portion of the statute; this typically occurs when an employer’s representative makes threatening or coercive statements. *Cove School District#15*, 22 PECBR at 219.

Because we hold that the School did not violate the “because of” portion of subsection (1)(a), we find no derivative “in the exercise” violation of the statute. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 350, *Order on Reconsideration*, 20 PECBR 388 (2003).

Nor do we hold that the School independently violated the “in the exercise” prong of subsection (1)(a). An employer’s lawful conduct, when viewed objectively,¹³ does not have the natural and probable effect of chilling employees in their exercise of protected rights. *OSEA v. Lebanon School District No. 16C*, Case No. UP-53-91, 13 PECBR 292, 299 (1991), quoting *OSEA v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407 n 7 (1990); *Lucas v. Coos County Sheriff’s Office*, 13 PECBR at 103.

The School did not interfere with, restrain, or coerce employees in or because of their exercise of protected rights in violation of subsection (1)(a) when it reprimanded Heidenreich and placed her on a plan of assistance. We will dismiss the complaint.

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¹³An employer could, however, present an entirely lawful act in such a way that reasonably leads others to believe it was unlawfully based on protected activity. For example, an employer could discharge a union activist for stealing but warn other employees that “this is what happens when you support the union.” See *Portland Association of Teachers and Bailey v Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 n 13 (1986) (an employer’s stated reason for acting can violate subsection (1)(a) even if the stated reason is untrue).

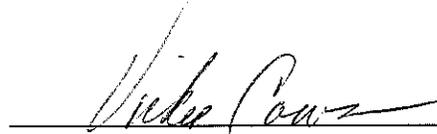
ORDER

The complaint is dismissed.

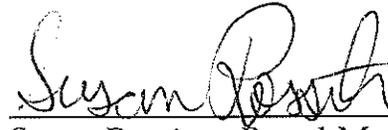
DATED this 15th day of September 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.