

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-007-10

(UNFAIR LABOR PRACTICE)

KIMBERLY DAWN OVERMAN,)	
)	
Complainant,)	
)	
v.)	
)	
SEIU LOCAL 503, OPEU,)	RULINGS,
)	FINDINGS OF FACT,
and)	CONCLUSIONS OF LAW,
)	AND ORDER
STATE OF OREGON, DEPARTMENT)	
OF HUMAN SERVICES,)	
)	
Respondents.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 22, 2013, following a hearing held on July 19, 2012, in Salem, Oregon. The record closed on October 10, 2012, following receipt of the parties' post-hearing briefs.

Glenn Solomon, Attorney at Law, Portland, Oregon, represented Complainant Overman.

Christy Te, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Respondent SEIU Local 503.

Gary Cordy, Senior Assistant Attorney General, Labor and Employment Section, Salem, Oregon, represented Respondent State of Oregon, Department of Human Services.

On December 9, 2010, Overman filed this action against SEIU Local 503, OPEU (SEIU or Union) and the State of Oregon, Department of Human Services (Department). Overman alleged that the Union breached its duty of fair representation in processing her grievance over a November 2009 written reprimand. Overman also alleged that the Union breached that duty by not adequately responding to a June 14, 2010, e-mail that: (1) indicated that she was considering whether she should resign from the Department; (2) asked what the Union could do to help her before she made a decision to resign; and (3) asked whether the Union would provide some assistance, such as filing a grievance, in the event that she ultimately decided to resign.

After issuing a letter asking Overman to show cause why the matter should not be dismissed on the grounds of timeliness and failure to state a claim, and after reviewing the parties' responses, the ALJ concluded that Overman's claims were untimely and recommended that the Board dismiss the Complaint. However, before the issuance of a final order, the authority upon which the ALJ relied for the timeliness analysis was overruled by *Rogue River Education Ass'n v. Rogue River School*, 244 Or App 181, 260 P3d 619 (2011). Therefore, the Board remanded the case to the ALJ for further proceedings.

The issues are:

1. Did the Union's response to Overman's June 14, 2010 e-mail violate its duty of fair representation under ORS 243.672(2)(a)?
2. Did Overman timely file a claim that the Union violated its duty of fair representation by inadvertently not submitting the Step-3 grievance document regarding the November 2009 written reprimand within the time period required by the collective bargaining agreement? If so, did the Union's inadvertence violate its duty of fair representation?
3. Did the Union unlawfully discriminate against Overman when it failed to timely submit that same Step-3 grievance document on her behalf, even though the Union timely processed a grievance for a similarly-situated employee?

RULINGS

The ALJ's rulings were reviewed and are correct, with the exception that we do not adopt the ALJ's prehearing ruling dismissing Overman's claim concerning the Union's alleged failure to adequately respond to Overman's June 14, 2010 e-mail. For the reasons set forth below, we agree that the claim should be dismissed, but we reach this conclusion based on the fully-developed record submitted at the hearing, rather than dismissing the claim based solely on the pleadings.

FINDINGS OF FACT

1. The Department is a public employer as defined by ORS 243.650(20). SEIU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of Department employees.

2. The Department and SEIU have been parties to a series of collective bargaining agreements. At the time that Overman notified the Department of her separation from employment, the agreement that expired June 30, 2011, was in effect. The agreement included a multi-step dispute resolution process that began with a grievance and ended with binding arbitration.

3. Overman began working for the Department in September 2004. During the time relevant to this Complaint, she was employed as a Social Service Specialist 1 in the Department's Beaverton office performing child abuse and neglect investigations. Overman's position was in the Union bargaining unit.

Sometime after September 2009, at the suggestion of a Union representative, Overman wrote the Department stating that she was working in a hostile environment. She also requested accommodations under the Americans with Disabilities Act (ADA). The Department did not respond to her request.

4. On November 3, 2009, Overman received a written reprimand for failing to complete overdue Child Protective Service abuse or neglect assessments. On November 20, 2009, Union Steward Rena Chapel filed two grievances over the reprimand under the collective bargaining agreement. One alleged a violation of just cause and the other alleged a violation of family-leave provisions. On December 11, 2009, the Department denied the grievances at Step 2. During the same time period, the Union filed similar grievances on behalf of another bargaining unit employee.

5. The collective bargaining agreement provided that documents moving a grievance to Step 3 must be filed by the Union and received by the Department within 15 calendar days after the Department's Step-2 response is due or received.

6. Union Steward Rena Chapel incorrectly believed that she had 30 days to file the Union's Step-3 grievance documents. On January 6, 2010, Overman ate lunch with Chapel and Union Stewards Bruce Smith and Rebecca Montebianco. During that lunch, Smith told Chapel that Step-3 filings were due within 15 days. Chapel stated that this meant that her filings for Overman were past the deadline. The stewards informed Overman that her grievances regarding the written reprimand for the overdue assessments were "null and void" and would not proceed.

7. The Union timely filed a Step-3 grievance for the other employee. As a result, the Union eventually resolved the grievance in favor of the other employee, but not for Overman. There is no evidence in the record that the difference in treatment was based on any

discriminatory or other wrongful motive, or was intentional. The difference in treatment was due solely to Steward Chapel's incorrect belief regarding the Step-3 grievance process time limit.

8. Overman did not receive any performance-related discipline after the November 2009 written reprimand.

9. During January 2010, Overman was under the care of a physician. The physician would not release her to work more than full time (overtime work) for an indefinite period of time. As a result, Overman contended that she was disabled for purposes of the ADA and Oregon's disability law, ORS 659.400 *et seq.*, during this time period. Employees in Overman's position normally worked 32 to 40 overtime hours per month. Department officials told Overman that if she could not work overtime, she would be terminated. As a result of this warning, Overman lost Department approval to use flex time. Overman did not inform Union officials of these events.

10. On January 26, 2010, Overman filed a complaint with the Bureau of Labor and Industries and the Equal Employment Opportunity Commission alleging unlawful employment discrimination.

11. On April 27, 2010, Overman played a prank on a coworker who was responsible for dispatching state vehicles. Overman telephoned the coworker and told her that one of the dispatched state vehicles was leaking gasoline and had been stolen. That report triggered the coworker's duty to call the police and fire departments.¹

12. On May 13, 2010, Department officials held a fact-finding meeting with Overman regarding possible discipline for the prank. Union Steward Melissa Uglesich was present at the meeting.

13. On Monday, June 14, 2010, at 12:30 a.m, Overman sent an e-mail to Union President Linda Burgin, an otherwise unidentified individual named Stearns, and Union attorney Joel Rosenblit. The e-mail's subject line stated, "please respond." In her e-mail, Overman:

(1) Asked the Union to hold Steward Chapel accountable for failing to file Overman's Step-3 grievance documents;²

(2) Stated that the previously-imposed discipline had prevented her from receiving two promotions, and that a supervisor told her entire work unit that he did not want to hire an employee with personal issues; and

¹The parties dispute whether the coworker actually called the police and fire departments before learning of the prank, and how much work time or overtime the prank cost the employer and coworker. This dispute is not material to our disposition of this case, and we do not resolve it.

²The record does not reveal what Overman meant by seeking to hold Steward Chapel accountable. Chapel was apparently a member of Overman's bargaining unit.

(3) Stated that the Department had informed her, in January 2010, that unless she was released to work with no medical restrictions, she would be terminated. The medical restrictions at issue were the inability to work more than 40 hours per week.

14. Overman's June 14 e-mail also stated:

"Now it is June and I again am pending the decision on another disciplinary hearing.³ I was told I would hear back by now, with no resolve [*sic*]. It is unfortunate that the job in itself is not difficult, but the management, or lack of [thereof] is impossible. My doctor[s] are telling me to quit, it is not worth the stress. On Friday, I nearly did after another worker yelled at me for not submitting a form in on their schedule which the schedule was un-[beknownst] to me.

"Back in Sept of 2009 my union rep[resentative] told me to write a letter outlining that I was working in a hostile environment because of things like that that have gone on. I also took it upon myself to ask for ADA accommodations, knowing full well I would qualify. There has been no resolve [*sic*] to either request. I feel that that was stirring up a hornets' nest and [I] placed my trust in the rep[resentative].

" * * * * *

"I am at the point [at] which I am ready to quit. Before I do however, I want to know what the union can do to help me other than offer free pizza once a month and a tax break on the dues I have paid.

"Now I am at a point where I feel pressed for time because I will walk away from this job and everything I have invested in the past 5 ½ years, if there is nothing the Union is capable of doing to amend this situation and the hardship it has caused.

" * * * * *

"I * * * have never had an issue with manager[s], supervisors, educators[,] [etc.] until last fall when I stood up to management and said they could no longer deny my request for medical leave. I stated I would not get my work done timely and was told I would have consequences. The consequences have not let up unfortunately.

³Overman's June 14 e-mail did not disclose what part of the discipline process she was going through, whether she had received the assistance of a Union representative in that process, what misconduct she was accused of, or what the possible or likely sanction would be. In fact, Overman was referring to the discipline process regarding the prank.

“In closing, if I resign, assuming that is the course I choose [to] take, will the union aid in any further actions such as filing a grievance on my behalf for the latest disciplinary act that I am receiving? And finally, I ask again if this can be fixed? Thank you for your time, and your feedback. It is greatly appreciated.”

15. On the same day that Overman sent the e-mail (June 14), President Burgin forwarded Overman’s e-mail to Roxy Barnstead in the Union Member Resource Center for response.

16. On June 15, Barnstead e-mailed Overman stating that Burgin had directed her to follow up on Overman’s e-mail, asking Overman to “[p]lease call me * * * as soon as you can.”

17. On June 16, 2010, Overman and Barnstead spoke by telephone. Based on Overman’s statements during the call, Barnstead concluded that Overman’s primary concern was that the Department had scheduled a second fact-finding meeting related to the prank incident, and that Overman might be terminated for the prank. Barnstead told Overman that it was possible that the Department would impose discipline for the prank. Barnstead also stated that Overman had the option of resigning in exchange for having the discipline removed from her personnel file. Overman told Barnstead that she would send Barnstead additional documents related to the prank incident so that Barnstead could further assess the situation. However, Overman did not provide those documents or contact Barnstead again.

18. On Thursday, June 17, 2010, Overman submitted to Department managers a voluntary letter of resignation, effective July 16, 2010. In her letter, Overman stated that she decided to resign “to pursue other endeavors.” There is no evidence that Overman sent the Union a copy of this letter.

19. After Overman’s June 16 conversation with Barnstead, Overman did not communicate with any Union official before her June 17 submission of her resignation. She also did not communicate with any Union official after that date. Overman did not tell the Union that she believed that she had been forced out of her job and did not ask any Union official to investigate or file any additional grievance for her after she submitted her resignation.

20. The Department issued a written reprimand regarding the prank to Overman on July 16, 2010. She did not ask the Union to file a grievance over that reprimand.

21. Overman’s actual last day of employment was July 19, 2010.

22. In August 2010, Overman learned that the other November 2009 grievant, whose Step-3 filing was timely, had prevailed in that grievance.

23. Overman filed this Complaint in December 2010; the Amended Complaint was filed November 17, 2011.

24. On July 18, 2012, the day before the hearing, Overman entered into a settlement agreement with the Department, in which Overman released the Department from “all claims arising under or asserting any alleged violation of * * * any Collective Bargaining Agreement.”⁴

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Union’s response to Overman’s June 14, 2010 e-mail did not violate its duty of fair representation.
3. Overman’s claim that the Union violated its duty of fair representation by arbitrarily not submitting a Step-3 grievance document regarding a November 2009 written reprimand within the time period required by the collective bargaining agreement is untimely.
4. The Union did not unlawfully discriminate against Overman when it failed to timely submit that same Step-3 grievance document on her behalf, even though the Union timely processed a grievance for a similarly-situated employee.

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to “[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to ORS 243.782.” Under this statute, a labor organization is required to fairly represent all employees in a bargaining unit for which it is the exclusive representative. *Putvinskis v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 894 (2000). A union’s handling of a grievance violates its duty of fair representation only where its actions are “arbitrary, discriminatory, or in bad faith.” *Coan et al v. City of Portland / Coan et al v. Laborers International Union of North America*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351, *recons*, 10 PECBR 433 (1987), *AWOP*, 93 Or App 780, 764 P2d 625 (1988).

There is no dispute that Overman was in the Union bargaining unit, and that the Union had a duty to fairly represent her. Overman contends that the Union violated that duty by failing to adequately respond to her June 14, 2010 e-mail.

Contrary to that allegation, however, Overman acknowledged that *within hours* of her e-mail being sent, Union President Burgin forwarded the e-mail to a specific Union staff person (Barnstead). The next day, Barnstead e-mailed Overman, stating that the President had directed

⁴Respondent Union sought to introduce this document into evidence; Complainant objected on grounds the settlement was confidential. The parties agreed that the above language was contained in the document. That language is the critical part of the document for this case, and the ALJ properly acted within his discretion in declining to receive the rest of the document because it lacked relevance to the legal issues addressed in this Order.

her to follow up on Overman's e-mail, and further asked Overman to "[p]lease call me * * * as soon as you can."

On June 16, 2010, Overman and Barnstead spoke by telephone and Barnstead concluded that Overman's primary concern was that the Department had scheduled a second fact-finding meeting related to the prank incident. As set forth in more detail above, Barnstead counseled Overman on potential disciplinary outcomes and options available to Overman in response to that potential discipline. Overman committed to sending Barnstead additional documents related to the prank incident, so that Barnstead could further assess the situation. Overman, however, did not provide those documents or contact Barnstead again. Moreover, the record does not establish that Overman provided Barnstead or the Union with a copy of her subsequent June 17, 2010 resignation letter.

Finally, after Overman's June 16 conversation with Barnstead, Overman did not communicate with any Union official before her June 17 submission of her resignation or thereafter. Overman also did not tell the Union that she believed that she had been forced out of her job and did not ask any Union official to investigate or file any additional grievance for her after she submitted her resignation.

Under these circumstances, we find that the Union promptly and ably responded to Overman's June 14 e-mail. Specifically, President Burgin forwarded Overman's e-mail to Barnstead, without delay. Barnstead promptly contacted Overman and counseled her on possible options. Thereafter, Overman stated that she would provide Barnstead with additional documents; Overman, however, did not ultimately do so. Moreover, Overman could have, but did not, contact Barnstead to update her on her situation, particularly her intention to resign that very week. The record does not establish that, once Overman resigned, she contacted Union officials, either to inform them that she had resigned or that she believed that her resignation was a constructive discharge that she wished to grieve. Moreover, the record does not establish that any of the Union's actions undertaken in response to the June 14, 2010 e-mail were arbitrary, discriminatory, or in bad faith.

Consequently, we find that the Union's actions surrounding Overman's June 14, 2010 e-mail and her subsequent resignation did not violate its duty of fair representation under ORS 243.672(2)(a). We will dismiss this portion of the Complaint.

We next turn to Overman's allegation that the Union violated its duty of fair representation by arbitrarily not submitting Step-3 grievance documents within the time constraints required by the collective bargaining agreement. A good-faith decision not to pursue a meritorious grievance, even if mistaken, does not violate a union's duty of fair representation. *Chan v. Leach and Stubblefield, Clackamas Community College*; and *McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 575, *recons den*, 21 PECBR 597 (2007). However, a union's unintentional acts or omissions may violate its duty of fair representation under certain circumstances. *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 423-24 (1993).

Specifically, a union's unintentional acts or omissions may be actionably arbitrary if three conditions are met: (1) the act or omission reflects a reckless disregard for the rights of the individual employee; (2) the act or omission seriously prejudices the injured employee; and (3) the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case. *Id.* Here, we need not decide whether the Union's failure to timely submit the Step-3 grievance documents is actionably arbitrary because, as explained below, Overman's claim in that regard is untimely.

Unfair labor practice complaints are subject to a 180-day statute of limitations. ORS 243.672(3). In *Rogue River*, 244 Or App at 189, the court held "that ORS 243.672(3) incorporates a discovery rule, which means that the limitation period begins to run when a public employee * * * knows or reasonably should know that an unfair labor practice has occurred."

Overman concedes that she was informed by the Union in January 2010 that the aforementioned grievance documents had not been timely submitted, and that, as a result, her grievance regarding her November 2009 written reprimand was "null and void." Thus, in January 2010, Overman knew or reasonably should have known that the alleged arbitrary action of not timely submitting Step-3 grievance documents had occurred. *See Rogue River*, 244 Or App at 189. Overman did not, however, file her unfair labor practice complaint concerning the alleged arbitrary grievance processing until December 2010, more than 180 days after she knew or reasonably should have known that the alleged unfair labor practice had occurred.

Consequently, the Amended Complaint (which we relate back to the original pleading) was untimely regarding the allegation that the Union arbitrarily processed claimant's grievance over the November 2009 written reprimand, and we will dismiss this portion of the Complaint.⁵

Finally, we turn to Overman's allegation that the Union's grievance processing regarding the November 2009 written reprimand was discriminatory. A union's actions are discriminatory if there is "substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT*, Case Nos. UP-80/93-90, 13 PECBR 328, 354 (1991).

Overman's assertion of "discriminatory" Union conduct is premised on a comparison between the Union's untimely submission of Step-3 grievance documents on her behalf and a timely submission of such documents on behalf of a similarly-situated employee.⁶ *See Strickland*

⁵The Union argues that this case should also be dismissed because the Department, having reached a settlement with Complainant, is no longer a Respondent. The Union argues that the Department must be a party to the case as an element of Complainant's cause of action and as a party essential for Complainant's relief. Because of our disposition of this case, we need not reach that issue.

⁶Because Overman did not find out about the Union's grievance processing for the similarly-situated employee until August 2010, we find her December 2010 complaint alleging discriminatory grievance processing to be within 180 days from when she knew or reasonably should have known about the alleged discriminatory conduct; her complaint alleging that the Union breached its duty of fair representation by discriminating against her, therefore, is timely. *See* ORS 243.672(3); *Rogue River*, 244 Or App at 189.

v. *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90, 13 PECBR 113, 124 n 6 (1991) (“discrimination” refers to treatment different from that afforded to others who are similarly situated). A union’s decision is in “bad faith” if it intentionally acts against a member’s interest and does so for an improper reason. *Stein v. Oregon State Police Officers’ Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73, 80 (1992).

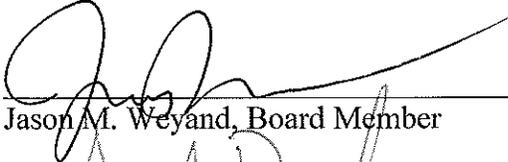
Overman’s only specific evidence of different treatment is that the Union failed to advance her grievance to Step 3 in late December 2009, while advancing the grievance of the other employee. We have determined that this difference in treatment was not due to any intentional discrimination or improper motive of the Union. The difference was due solely to the Union steward’s *unintentional* error regarding the Step-3 grievance deadline. The Union’s conduct was not based on any factor related to Overman, such as her disability, union activity, or reputation, or part of an attempt to inappropriately favor the other employee. As the error was unintentional, there is no “evidence of discrimination that [was] intentional, severe and unrelated to legitimate union objectives.” *Howard*, 13 PECBR at 354. Therefore, Overman has not proved the necessary elements to establish that the Union’s handling of her grievance violated ORS 243.672(2)(a). Accordingly, we will also dismiss this portion of the Complaint.

ORDER

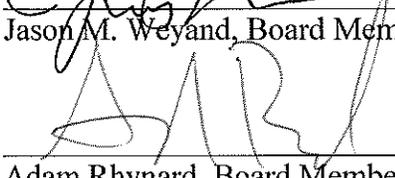
The complaint is dismissed.

DATED this 1 day of April 2013.

*Kathryn A. Logan, Board Chair



Jason M. Weyand, Board Member



Adam Rhynard, Board Member

*Chair Logan did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.