

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UP-7-08

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES')
ASSOCIATION,)
)
)
Complainant,)
)
v.)
)
CLACKAMAS COUNTY/CLACKAMAS)
COUNTY DISTRICT ATTORNEY,)
)
Respondent.)
)
)
_____)

ORDER ON REMAND

This Board issued an Order on April 15, 2009, dismissing the complaint in this matter. 23 PECBR 90 (2009). On May 25, 2011, the Court of Appeals remanded the case to this Board. 243 Or App 34, ____ P3d ____ (2011). An appellate judgment was issued on August 30, 2011.

In our original Order, we dismissed the Association's complaint which alleged that statements the Clackamas County (County) District Attorney made to a Clackamas County Employees' Association (Association) representative violated ORS 243.672(1)(a). County District Attorney John Foote made these statements at a meeting in which Association Vice President Felipe Morales represented a bargaining unit member whom Foote wanted to discharge. At the meeting, Foote became angry at Morales and told Morales that if he did not stop smirking, Foote would remove him from the District Attorney's office and never allow him to return. After the meeting, Foote told other employees that Morales would not be barred from the District Attorney's office.

We applied the standard we use to determine whether threats made by an employer violate subsection (1)(a) of ORS 243.672: whether the threats have the natural and probable effect of chilling employees in their exercise of rights protected under the Public Employee Collective Bargaining Act (PECBA). We concluded that Foote's remarks to Morales did not have this type of chilling effect and did not violate subsection (1)(a). We based our conclusion on "the impulsive and brief nature of Foote's statements, the lack of any threat of adverse employment-related consequences to Morales," and Foote's prompt disavowal of any intent to bar Morales from the District Attorney's office. 23 PECBR at 99.

The Association petitioned for judicial review, asserting that we erred in dismissing the complaint. The Court of Appeals agreed with the Association. In its decision, the court distinguished between employer statements that constitute threats "directed at protected activity" and statements that are "generic expressions of anger that may be made in the heat of a collective bargaining dispute." 243 Or App at 42. It cited two of our cases to illustrate this distinction. In *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310 (1999) (*OPEU I*), a county commissioner told the local union president that the commissioner wanted the bargaining unit to be represented by a different union, that the commissioner wanted specific union staff members removed from the bargaining unit, and that the commissioner would not bargain with certain members of the union bargaining team. We concluded that the commissioner's statements violated subsection (1)(a) because they demonstrated that the commissioner was unwilling to engage in an activity protected under the PECBA: negotiations. In *Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245 (1999) (*OPEU II*), we held that statements by the same county commissioner—words to the effect that he was so angry at the public employees picketing his business that he could kill someone—did not violate the law. We reasoned that the commissioner's statements did not concern PECBA-protected rights.

In regard to these cases, the Court of Appeals stated:

"We find persuasive the board's reasoning in *OPEU I* that statements that an employer makes that indicate an unwillingness to negotiate with members of a bargaining unit are likely to chill employees from engaging in protected activities. And, as *OPEU II* illustrates, harsh language alone does not constitute an unfair labor practice." 243 Or App at 42) (Footnote omitted).

The court held that District Attorney Foote's statements, in which he "threatened to remove an association representative from a protected meeting and threatened to

never allow the representative to attend a meeting in the district attorney's office again," were directed at protected activity. *Id.* The court concluded that these statements would chill Association bargaining unit members in their exercise of protected rights. Accordingly, the court held that we incorrectly interpreted ORS 243.672(1)(a) when we concluded that the District Attorney's statements did not "interfere with, restrain, or coerce employees in the exercise of protected activity," and remanded the case to us. 243 Or App at 43.

Because the court held that the District Attorney's statements violated ORS 243.672(1)(a), the only issue left for us is to formulate an appropriate remedy.

When we conclude that a party engaged in an unfair labor practice, we must order the party to cease and desist from the unlawful activity. ORS 243.676(2)(c). A cease and desist order is the appropriate remedy in this case, and we will issue such an order.¹

ORDER

The County will cease and desist from violating ORS 243.672(1)(a).

DATED this 21st day of November 2011.

*Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson not available.

¹We also note that the Association can file a petition for representation costs under OAR 115-035-0055, and we will consider its request at the appropriate time.