NO. 35652-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Appellant,

v.

ROBERT O'NEEL, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is an appeal by Washington State prisoner Allan Parmelee following entry of a superior court order denying his motion for judgment on the pleadings and granting the Defendant-Respondents' motion for judgment on the pleadings.[1] CP 105, 122. Mr. Parmelee alleged he was wrongfully infracted for calling the Superintendent of Clallam Bay Corrections Center a "man-hating lesbian" in a letter written to Department of Corrections (DOC) Secretary Harold Clarke. He alleged that RCW 9.58 was not re-codified under RCW 9.94A; therefore, any libel or slander could not be considered a crime. CP 105. He also alleged libel and slander against the Defendants, under the same statute, RCW 9.58.[2] *Id.* He alleged the Defendants violated his First Amendment rights when they infracted him. *Id.* In response, the Defendants argued: (1) RCW 9.58 was not superseded by RCW 9.94A; (2) libel and slander were not protected activities under the First Amendment; and (3) Mr. Parmelee does not have a constitutional right to be placed in any area of a facility as a result of an infraction. CP 122.

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[1] Plaintiff's counsel refers to the Respondent's dispositive pleading as a motion to dismiss pursuant to CR 12(b)(6); however, the Defendants that had been served did file an answer. The pleading was properly brought as a motion for judgment on the pleadings under CR 12 (c). Furthermore, it does appear, from the court's final order, that the motion was improperly called a 12(b)(6) motion. The standard of review is the same for both motions. CP 87.

[2] The Plaintiff later withdrew his claims for libel and slander, arguing instead that RCW 9.58 was superseded.

After filing numerous documents and briefs, the court considered the motions without oral argument. The superior court granted Mr. Parmelee's request to strike his claims regarding RCW 9.58 and ruled that RCW Chapter 9A did not "usurp all of the existing criminal statutes at the time of enactment". CP 86. The superior court also ruled that Mr. Parmelee failed to state a claim of libel, slander, retaliation, community liability and supervisory liability. CP 87. The Defendants-Respondents' motion for judgment on the pleadings was granted in its entirety. *Id.*

II. COUNTER-STATEMENT OF THE ISSUES

1. Before the superior court, Mr. Parmelee did not challenge the constitutionality of RCW 9.58 on its face or as applied to him. Should the Court disregard these arguments because they were not raised in the superior court?

2. Mr. Parmelee wrote a letter to the Secretary of DOC calling Superintendent Sandra Carter a "man-hating lesbian". As an inmate, is Mr. Parmelee afforded any First Amendment rights to do so?

3. Mr. Parmelee received an infraction for writing the letter naming Superintendent Carter a "man-hating lesbian" and received 10 days of segregation. Does this constitute an "atypical and significant hardship" triggering due process analysis?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS.

Mr. Parmelee is a Washington State inmate in the custody of the Department of Corrections (DOC). Mr. Parmelee was sentenced to DOC custody for two counts of first degree arson for the fire-bombing of two automobiles belonging to female attorneys opposing him and his co-worker in civil legal actions.[3]

On July 20, 2005, Mr. Parmelee attempted to mail a letter to the Secretary of DOC, alleging that Sandra Carter, the Superintendent of Clallam Bay Corrections Center (CBCC) is a "man-hating lesbian." CP 691; 717-18. This letter was not permitted to be sent out of the institution and Mr. Parmelee was infracted for "[c]omitting any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules." WAC 137-28-260 (1)(517).[4] Prison officials infracted Mr. Parmelee under this disciplinary rule for violating the law against criminal libel, RCW 9.58.010.[5] CP 714. Specifically, Mr.

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[3] Mr. Parmelee has also been convicted on one count of felony stalking and at least two counts of misdemeanor stalking-related offenses. *See State v. Parmelee*, 108 Wn. App. 702, 704-07, 32 P.3d 1029 (2001); *In re Personal Restraint of Parmelee*, 115 Wn. App. 273, 276, 63 P.3d 800 (2003); *State v. Parmelee*, 121 Wn. App. 707, 709, 90 P.3d 1092 (2004).

[4] New prison disciplinary rules were promulgated, effective May 1, 2006. *See* WAC 137-25-030 (setting forth serious infractions).

[5] RCW 9.58.010 provides:

Parmelee was infracted under former for committing libel or slander. CP 713. He received 10 days of segregation and his sentence was not extended beyond his current sentence. CP 95.

An inmate may be segregated from the prison population for administrative or disciplinary reasons. Segregation, whether for administrative or disciplinary reasons, includes individual confinement and limited telephone use and other privileges. *See Sandin v. Connor*, 515 U.S. 472, 476, n. 2, 485-86, 115 S. Ct. 2293, 2296, 2301 (1995); *see also Matter of Galvez*, 79 Wn. App. 655, 657, 904 P.2d 790 (1995).

At his hearing, Mr. Parmelee entered a written statement explaining his position on the infraction filed against him. CP 722-36. He also submitted a request for staff to respond to written questions, including questions regarding Ms. Carter's sexuality. *Id.* The questions were not permitted because "they are designed to question the integrity of staff and not addressing the guilt or innocents [sic] of the offender". *Id.* Mr.

> Every malicious publication by writing, printing, picture, effigy, sign[,] radio broadcasting or which shall in any other manner transmit the human voice or or reproduce the same from records or other appliances or means, which shall tend: --
>
> (1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or
>
> (2) To expose any living person to hatred, contempt, ridicule, or obloquy; or
>
> (3) To injure any person, corporation or association of persons in his or her business or occupation, shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor.

Parmelee claimed this was a violation of his substantive due process rights.

B. PROCEDURAL FACTS.

On December 27, 2005, Mr. Parmelee filed his complaint for libel, slander, due process violations, first amendment violations and malicious prosecution against a number of DOC employees. CP 684-711. Specifically, he filed his lawsuit against Robert O'Neel, Richard Monger, Harold Clarke, Eldon Vail, Lynn DeLano, Kathryn Bail, Carroll Riddle, Sandra Carter, John Palmer, John Aldana, Sandra Diimmel, Jerry McAffie, Tina Adams, Nathan Cornish, Michael Erlenmeyer, and the community partners of each. *Id.* The complaint was not served on the first defendant until June 15, 2006. CP 629. Subsequent to that service, other individuals were either personally served or waived service. *Id.* To date, Mr. Clarke, Mr. Vail, Ms. DeLano, Ms. Bail, Ms. Diimmel, and Mr. Erlinmeyer have yet to be served with the lawsuit. CP 91. Many motions regarding DOC staff and service were filed by both parties. CP 452, 668, 318, 466, 262, 337, & 679.

Following submission of the Defendants' Answer, Mr. Parmelee submitted his motion for judgment on the pleadings. Defendants responded with a cross motion for judgment on the pleadings. CP 105, 122. The cross-motions were considered without oral argument on

September 22, 2006, by the superior court commissioner. CP 86. The commissioner entered a memorandum opinion on October 3, 2006, granting the Defendants' motion and denying the plaintiff's motion. CP 86. Mr. Parmelee moved to revise the commissioner's ruling; the Defendants were not served with that motion. CP 48. The superior court judge denied that motion on October 19, 2006. CP 47. Finally, Mr. Parmelee filed a motion for reconsideration, which was also not served on Defendants. Judge Woods denied the motion on November 9, 2006. CP 23-24. This was a final, appealable order.

On November 27, 2006, Mr. Parmelee filed in the superior court a notice of appeal that was not served on the Defendants. While Mr. Parmelee attaches a certificate of service the record does not indicate that service actually occurred. CP 17.

IV. STANDARD OF REVIEW

An appeal of a motion to dismiss for failure to state a claim is reviewed de novo, whether it is brought pursuant to CR 12 (b)(6) or CR 12 (c). *North Coast Enter., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 858, 974 P. 2d 1257 (Div. 1, 1999); *Modern Sewer Corp. v. Nelson Distrib., Inc.*, 125 Wn. App. 564, 568, 109 P.3d 11 (Div. I, 2005). When considering motions to dismiss, the courts assumes the allegations in the complaint are true. *Reid v. Pierce Cy.*, 136 Wn.2d 195, 200, 961 P.2d 333

(1998). The court may also make any reasonable inferences in making its determination. *Id.* When a plaintiff brings a motion for judgment on the pleadings, the court must accept every fact, as pleaded by the nonmoving party, as true. *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965).

V. ARGUMENT

A. MR. PARMELEE'S ARGUMENTS THAT RCW 9.58 IS UNCONSTITUTIONAL SHOULD NOT BE CONSIDERED AS THEY WERE NOT RAISED IN SUPERIOR COURT.

On appeal, Mr. Parmelee argues that RCW 9.58 is unconstitutional both on its face and as applied. Neither of these issues were raised in the superior court. As this information was not argued in the lower court, it should not be considered by this Court. RAP 2.5; *Marriage of Knutson*, 114 Wn. App. 866, 870, 60 P.3d 681 (2003).

Issues regarding constitutional claims may be raised for the first time on appeal; however, the majority of these cases are criminal cases[6] examining manifest error of the procedure for the trial below. *See State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Kerwin*, 137 Wn. App. 387, 153 P.3d 883 (Div. II, 2007).

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[6] *See State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) ("the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.") (inner quotes and citations omitted).

Although RAP 2.5(a)(3) may also apply to civil cases, the rule requires that the error be truly constitutional in nature and that it be "manifest," meaning the error had practical and identical consequences in the trial of the case." *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d (2007) (citations omitted). "If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (citations omitted)

Defendant-Respondents are not aware of a civil case involving RAP 2.5(a)(3) brought by a civil prisoner pertaining to a disciplinary infraction where the only penalty received was a brief period of disciplinary segregation. One case has held that an issue not raised below may be brought on appeal in a civil matter; however, this case is again limited to an issue that was raised during the proceedings themselves. *See In re Dependency of T.L.G.*, 139 Wn. App. 1, 19, 156 P.3d 222 (2007). In *T.L.G.*, the trial court entered an order forbidding the father from discussing issues in the dependency matter with other individuals. *Id.* He argued, for the first time on appeal, that this "gag order" was a violation of his First Amendment rights. *Id.* The court allowed the argument, as it was a constitutional issue. *Id.* None of the cases applying RAP 2.5(a)(3)

appear to have allowed the argument when it could have been raised from the complaint forward.

Here, there has not been a record developed in the superior court regarding a constitutional challenge to RCW 9.58 because Mr. Parmelee did not bring it. He did not sue under that theory, nor did the state respond under that theory. Mr. Parmelee could have alleged in his complaint that RCW 9.58 was unconstitutional on its face or as it was applied to him. He also could have made that argument in his motion for judgment on the pleadings and in response to the Respondents' motion to dismiss. He failed to do so. In fact, he sued under that statute, alleging claims of libel against the state actors, before he withdrew his claims.

Furthermore, the alleged constitutional error is not manifest under RAP 2.5(a)(3). RCW 9.58 applied to this matter, not as a criminal prosecution, but as a prison disciplinary hearing in which Mr. Parmelee lost no good conduct time. It also applied to Mr. Parmelee as an inmate. Under RAP 16.4,[7] and for the reasons discussed in this brief below, Mr. Parmelee could not have challenged this in a personal restraint proceeding because he could not claim that he was under a restraint. As discussed below, the constitutional issues are not manifest because Mr. Parmelee did

[7] *See* RAP 16.4(c)(7) (allowing a petition against an ongoing restraint alleged to be "in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.").

not have the legally protected right to call Superintendent Carter a "man-hating lesbian" in a letter addressed to Secretary Clarke. He should not be allowed to include a challenge to the statute itself because it occurred to him while on appeal.

Regardless of whether RCW 9.58 is constitutional on its face or as applied to Mr. Parmelee (or even superseded), DOC has been empowered to implement prison disciplinary rules. RCW 72.01.090; 72.09.130. As the United States Supreme Court has recognized, it is a primary goal of prison systems to promote a safe and secure environment within the prison for staff, inmates, and community members. *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 1878 (1979). "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . . ." *Id.*

Should the Court find that these items were somehow properly raised below; the Respondents request an opportunity to properly brief these issues, as it would be rather extensive.

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B. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING THE DUE PROCESS RECEIVED FOR HIS INFRACTION.

Mr. Parmelee challenged the due process of a disciplinary hearing for an infraction he received for writing a letter about CBCC staff and specifically, Superintendent Carter. He claims that he was not allowed to present certain evidence at that hearing. CP 684. As a result of a guilty finding, he received 10 days of segregation, but he did not lose good conduct time extending his prison time. CP 122.

Mr. Parmelee argues that his federal constitutional rights were violated when he was infracted for writing and mailing a defamatory letter to Secretary Harold Clarke. Petitioner's Brief at 14. Plaintiff asserts that the infraction hearing he received was a violation of his due process rights. Petitioner's claims are meritless, as the punishment was not "atypical and significant hardship" and were properly dismissed by the trial court.

"A due process claim is cognizable only if there is a recognized liberty or due process interest at stake." *Rizzo v. Dawson*, 778 F.2d 527, 530 (9th Cir. 1985) (citing *Board of Regents of California v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). The threshold inquiry is not whether Mr. Parmelee was given proper process at his disciplinary hearings, but rather whether he had any liberty interest in the sanctions he

received as a result of his disciplinary hearing. If Mr. Parmelee did not have a liberty interest, the Defendants did not have a constitutional requirement to provide process. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (citing *Meachum v. Fano*, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)). Similarly, absent a liberty interest, this Court should end its inquiry into Mr. Parmelee's due process claims. *Id.* In *Sandin*, the United States Supreme Court addressed the issue of liberty interests in the disciplinary hearing context. Following *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Supreme Court in *Sandin* recognized that the type of liberty interest that arises from state statutes is one that:

> [W]hile not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, 515 U.S. at 484.

Only certain punitive actions taken by prison staff involve liberty interests. *Id.* The Court specifically stated that discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law. *Id.* at 484-85. Deprivation of good time credits undoubtedly implicates a liberty interest. *Wolff*, 418 U.S. at 558. However, both the United States and

Washington State Supreme Courts have stated that classification is merely an incident of prison life and is not a protected liberty interest. *Sandin*, 515 U.S. at 485 (finding no liberty interest arising from a 30-day placement in segregation because it did not "present a dramatice departure from the basic conditions of the [the inmate's] sentence."); *see also Matter of Galvez*, 79 Wn. App. at 657; *In re Dowell*, 100 Wn.2d 770, 674 P.2d 666 (1984).

Here, Mr. Parmelee received only ten days segregation for his placement in segregation. Consequently, Mr. Parmelee did not incur an atypical and significant hardship under *Sandin* implicating due process. Therefore, his claim under due process fails.

Mr. Parmelee cannot base his due process claim on his placement in segregation. *Toussaint*, 801 F.2d at 1080; *Resnick v. Hayes*, 213 F.3d 443 (2000). He also does not offer any other liberty interests in his pleadings. *See* CP 684-711. Mr. Parmelee has not been deprived of any life, liberty, or property, and therefore, alleges neither injury, nor a liberty interest to support his claims.

C. THE TRIAL COURT PROPERLY FOUND THAT MR. PARMELEE DID NOT STATE A CLAIM FOR FIRST AMENDMENT VIOLATIONS.

Mr. Parmelee argues that the letter written to Secretary Clarke is protected by the First Amendment. Prison inmates retain their First

Amendment rights, subject to limitations justified by reasonable penological interests. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The First Amendment is not absolute; certain categories of speech are not protected, including libel. *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)(citations omitted). As Mr. Parmelee was infracted for libel and did not show any supporting evidence that he is correct in his assumption that Defendant Carter is a "man-hating lesbian," his speech was not protected under the First Amendment and his argument failed.

In *Turner v. Safley*, the United States Supreme Court held that an inmate's right to free speech is impinged only if a regulation affecting speech is not rationally related to a legitimate penological interest. *Turner*, 482 U.S. at 89.[8] Four factors are considered in determining whether a regulation is reasonably related to a legitimate penological interest. *Id.* at 89. The first factor is whether there is a valid, rational connection between the regulation and the legitimate penological interest. *Id.* With regard to the freedom of speech, the governmental objective must be neutral, i.e., it must operate without regard to the content of the speech. *Id.* at 90. The second factor is whether there are alternative means of exercising the right available to the inmate. *Id.* The third factor is consideration of impact

[8] *See Turner*, 482 U.S. at 89 ("In our view, such a standard is necessary if prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations." (inner quotations omitted).

accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of resources. *Id.* The fourth factor is whether alternatives are available to the prison for achieving the governmental objectives. *Id.* The lack of alternatives for the prison is evidence of the reasonableness of the regulation. *Id.*

Despite Mr. Parmelee's cited cases to numerous cases federal cases he claims support his contention that an inmate may not be infracted for the content of his speech, including *Bradley v. Hall*, 64 F.3d 1276 (9th Cir. 1995). In *Bradley*, the Ninth Circuit balanced the importance of the constitutional right at issue with the importance of the penological interest served by a prison regulation. Mr. Parmelee neglected to mention that the United States Supreme Court has clearly rejected the analysis contained in *Bradley*. *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). In *Shaw*, the Supreme Court reviewed a Ninth Circuit decision which applied the test articulated in *Bradley* to a case involving a Montana prisoner who was sanctioned for attempting to provide legal advice to another prisoner. The Ninth Circuit found the discipline imposed on the prisoner was an excessive response that violated his First Amendment rights. The Supreme Court held that the Ninth Circuit applied the wrong analysis, and emphasized that the test for evaluating prisoner's First Amendment challenges is found in *Turner*. *Id.* "To

increase the constitutional protection based upon the content of a communication first requires an assessment of the valued of that content. But the *Turner* test, but its terms, simply does not accommodate valuations of content. On the contrary, the *Turner* factors concern only the relationship between the asserted penological interest and the prison regulation. *Shaw*, 532 U.S. at 230. Therefore, the Ninth Circuit's use of a balancing test in *Bradley* was a misinterpretation and misapplication of the *Turner* test. *Id.*

The Washington Court of Appeals has previously applied the *Turner* analysis to Mr. Parmelee. Mr. Parmelee was infracted by the King County Jail for improper statements in grievances or other written comments directed towards jail officers that violated the King County Jail's "insolence" rule. *See In re Parmelee*, 115 Wn. App. 273, 284, 63 P.3d 800 (2003).

Parmelee argued that there was a First Amendment right to refer to an officer as a "piss-ant" and an "asshole" in a grievance. *Id.* at 276-77. He also argued that there was a First Amendment right to refer to another officer as a "prick" and stated in a grievance that the officer should get fired before he get's "fucked up". *Id.* at 278-79. Mr. Parmelee challenged the sanctions he received, claiming his rights were violated. *Id.*

On review, the Court of Appeals declined to follow the Ninth Circuit's holding in *Bradley*. Instead, the Court followed the United States Supreme Court's direction in *Shaw*, and applied the four part test articulated in *Turner*. The Court found that there are legitimate reasons to prohibit use of profane language in grievances, including: (1) requiring inmates to behave respectfully towards prison staff; and (2) limiting tension between guards and residents, not only for the specific petitioner, but for all inmates. *In re Parmelee*, 115 Wn. App. at 284-87. The Court also found that there were other avenues available, including use of other words to properly address the problems alleged, and that such profane statements would not be allowed in a court petition or other legal process. *Id.*

The Court of Appeals decision in *Parmelee* is in accord with a number of federal circuit decisions. *See Hale v. Scott*, 371 F.3d 917 (7th Cir. 2004); *Hadden v. Howard*, 713 F.2d 1003, 1005 (3rd Cir. 1983); *Gibbs v. King*, 779 F.2d 1040, 1045 (5th Cir. 1986); *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001); *Leonard v. Nix*, 55 F.3d 370, 374-76 (8th Cir. 1995).

Mr. Parmelee alleges that his First Amendment free speech rights were violated when he was infracted for sending a letter to Secretary Clarke stating that Superintendent Carter was a "man-hating lesbian." As

stated above, such statements are not covered by the First Amendment. Mr. Parmelee has failed to demonstrate that such speech constitutes protected speech. He cannot demonstrate that his statement is anything other than malicious.

The court in *Parmelee* properly applied *Turner*. The same analysis applies here. There was a legitimate interest in prohibiting Mr. Parmelee's use of harassing, libelous and harmful statements to Defendant Carter's supervisor, Secretary Clarke.[9] As the court in *Parmelee* recognized, inmates are not afforded more protection while incarcerated than those living outside prison walls. *In re Parmelee*, 115 Wn. App. at 287. An individual would not be able to write or speak false and harassing statements without some form of punishment. Therefore, it is within the institution's legitimate interests to limit that behavior. Mr. Parmelee also had alternative means; he could have written his letter without referring to Superintendent Carter as a "man- hating lesbian." Any inmate could have presented those concerns without those statements. Finally, as stated in *In re Parmelee*, the limitation

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[9] *See* WAC 137-25-030(659) (2006) (prohibiting as a serious infraction sexual harassment defined under WAC 137-25-020 and WAC 137-28-160 as "any word, action, gesture or other behavior that is sexual in nature and that would be offensive to a reasonable person."); WAC 137-25-030(552) (2006) (prohibiting as a serious infraction the "causing [of] an innocent person to be penalized or proceeded against by providing false information."); and WAC 137-28-220 (2005) (prohibiting as a general infraction "abusive language , harassment, or other offensive behavior directed to or in the presence of staff, visitors, inmates, or other persons or groups.").

improves the relationship between inmates and prison staff to ensure that both entities are treating each other with respect. *Id.* at 284-85.

The assumption that an inmate will not be able to file grievances without using insolent, abusive, or scurrilous language also assumes that an inmate is incapable of functioning as a rational, average citizen. Citizens filing lawsuits are not permitted to use offensive, scandalous language in their pleadings before the court. In fact, in most courts, including the United States Supreme Court, the use of such language carries severe consequences for both the action itself and the individuals involved. *See* U.S. Sup. Ct. R. 24.6; *In the Matter of Teddy I. Moore*, 529 U.S. 1063, 120 S. Ct. 1715 (2000); *Knight v. Bar Association*, 321 U.S. 803, 64 S. Ct. 634 (1944).

The Supreme Court has ruled that prisoners' outgoing personal correspondence that magnifies grievances or contains inflammatory language "cannot reasonably be expected to present danger to the community inside the prison". *Thornburgh v. Abbott*, 490 U.S. 401, 411-12, 109 S. Ct. 1874, 1880-81 (1989) (emphasis in original). In contrast to outgoing personal correspondence, prison grievances are designed to be read, responded to, and acted upon inside the prison by prison staff. Inflammatory language intended for reading and dispersal within the

prison can indeed "reasonably be expected to present danger to the community inside the prison". *Thornburgh*, 490 U.S. at 411-12.

Prison systems are expected to maintain the safety and security of their institutions, including through enforcement of disciplinary rules. *Bell*, 441 U.S. at 546. "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . . ." *Id.* The establishment and enforcement of rules requiring respect for authority enhances security within the prison. *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986). As the Seventh Circuit states in *Ustrak*, they could "imagine few things more inimical to prison discipline than allowing prisoners to abuse guards and each other. The level of violence in American prisons makes it imperative that the authorities take effective steps to prevent provocation." *Id.* at 580.

Mr. Parmelee fails to show that his malicious speech is protected activity under the First Amendment. Even if his First Amendment rights were impacted, Mr. Parmelee failed to demonstrate that his right to free speech was been impinged upon by a regulation that is not rationally related to a legitimate governmental interest. Therefore, his free speech claim was properly dismissed as a matter of law.

D. MR. PARMELEE DID NOT STATE A CLAIM FOR RETALIATION.

Retaliation claims consist of four elements: (1) a state actor took some adverse action against an inmate, (2) because of the prisoner's protected conduct, (3) such action chilled the inmate's exercise of First Amendment rights, and (4) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).[10]

In *Barnett v. Centoni*, 31 F.3d 813 (9th Cir. 1994), the Ninth Circuit used this heightened standard to affirm the dismissal by summary judgment of an inmate's retaliation claim. The inmate in *Barnett* alleged that prison officials had retaliated against him for engaging in litigation after his classification level was changed for writing a harassing letter to a witness. *Barnett*, 31 F.3d at 814. The Court found that an individual must show he was exercising constitutional rights and the retaliatory action did not advance a legitimate penological goals. *Id.* Specifically, the Court found that maintaining the order and discipline of the institution was sufficient to overcome a retaliation allegation. *Id.*

Mr. Parmelee alleged that his infraction for sending a letter containing libelous statements regarding Defendant Carter was retaliatory.

[10] The Court in *Rhodes* indicated that prisoner retaliation claims have five (5) elements, however, elements 2 and 3 appear to be so integrally related as to be one element.

Under the standard stated above, Respondents do not disagree that Mr. Parmelee received some adverse action as a result of his letter. He was placed in segregation for 10 days. However, Mr. Parmelee has not shown that his conduct was protected. As discussed above, libelous statements are not protected by the First Amendment. Furthermore, he was afforded all necessary due process when he was punished with segregation.

Even if the Court determined that libel is covered by the First Amendment, the prison staff had a legitimate penological interest in limiting Mr. Parmelee's ability to write libelous statements about the Superintendent. The staff took action within its discretion to infract the Mr. Parmelee. Limiting Mr. Parmelee's ability to send letters calling the Superintendent a "man-hating lesbian" maintains the safety and security of the institution. Allowing otherwise would cause a safety risk to other inmates and the staff because there would be little ability to maintain order.

Mr. Parmelee assumes that because a series of adverse events--he was issued an infraction and received 10 days of segregation--occurred around the time he filed numerous complaints, correctional officials must have retaliated against him. CP 691. Therefore, Mr. Parmelee did not state that Defendants took any action to violate his constitutional rights, let alone any action in retaliation for his exercise of a constitutional right.

Absent any statements other than conclusory allegations, Mr. Parmelee's has not stated a retaliation claim. He has not pointed to any evidence that would lead one to conclude that retaliation had occurred.

The Defendants' legitimate, non-retaliatory reasons for responding as they did to Mr. Parmelee's hate-filled speech are self-evident. Mr. Parmelee's retaliation claims were baseless and were properly dismissed as a matter of law.

E. MR. PARMELEE IS NOT THE PREVAILING PARTY; THEREFORE, HE CANNOT SEEK ATTORNEYS FEES.

Mr. Parmelee is now seeking attorney's fees for the first time on appeal. *See* Petitioner's brief at 10. Unless he prevails on his motion for judgment on the pleadings in this Court, he is not a prevailing party under 42 U.S.C. § 1988 and cannot collect attorney's fees. If Mr. Parmelee is the prevailing party in this appeal, he may only request costs and statutory attorney's fees pursuant to state law.

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VI. CONCLUSION

For the foregoing reasons, Defendants-Respondents request that the judgment of the trial court dismissing Plaintiff-Appellant's action with prejudice be affirmed.

RESPECTFULLY SUBMITTED this 8th day of October, 2007.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENTS on all parties or their counsel of record as follows:

- ☒ US Mail Postage Prepaid
- ☐ United Parcel Service, Next Day Air
- ☐ ABC/Legal Messenger
- ☐ State Campus Delivery
- ☐ Hand delivered by _____

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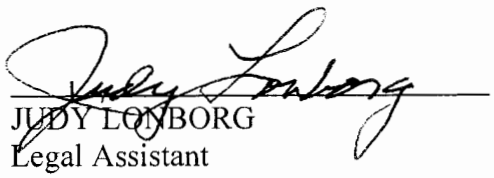
EXECUTED this 8th day of October, 2007, at Olympia, WA.



JUDY LONBORG
Legal Assistant