

NO. 35823-9-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

MICHAEL SEGALINE,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

BRIEF OF RESPONDENTS

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STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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I. STATEMENT OF THE CASE

A. Introduction

An electrician who regularly obtained permits from the local office of the Washington State Department of Labor and Industries (L & I) sued the agency after agency officials barred him from their building as a result of the electrician's threatening behavior toward agency staff. The electrician's state and federal claims against L & I and one staff member were properly dismissed by the Superior Court and the summary judgment dismissal should be affirmed.

B. Statement of Facts

Michael Segaline is an electrical contractor and part owner of Horizon Electric, Inc. located in East Wenatchee, Washington. Horizon Electric is often required to obtain electrical permits for the projects it is working on from the Washington State Department of Labor and Industries (L&I). As a part owner of the company, Segaline often went to the L & I building in East Wenatchee to obtain these permits. CP 36.

1. Interaction between Segaline and L & I.

On many of his visits to the building, Segaline would become verbally threatening to L & I staff. He would yell and make threatening and harassing statements. CP 36. By the fall of 2002, Segaline's behavior had reached the point where L & I staff were afraid Segaline might

physically harm them. CP 37. L & I staff did not want to wait on Segaline, as they felt intimidated by his behavior. CP 44-45.

On June 9, 2003, L & I customer service specialist Alice Hawkins received a telephone call from Segaline. Segaline demanded that she put someone else on the line and stated that someone was going to go to jail. She then transferred the call to her supervisor, Jeanne Guthrie. Segaline then complained to Guthrie about his company's Contractor's Deposit account with L & I. CP 45. The funds to pay for electrical permits are paid out of such accounts. CP 45-46. Segaline threatened to come to the L & I building with a tape recorder and stated he would start legal proceedings. He told Guthrie "a lot of people would be behind bars". Segaline made references as to what would happen "If I wind up dead". He told Guthrie, that "if it costs you your job, so be it". CP 45.

On June 10, 2003, Dave Whittle, who was a supervisor for the Electrical Program at L & I, called plaintiff in an attempt to resolve these problems. Plaintiff refused to discuss these matters and instead argued about the legalities of recording people's conversations without their consent. Whittle agreed to meet with the electrician at the L & I building on June 19, 2003. Whittle told plaintiff he could bring a tape recorder, but was not sure if he would be allowed to use it. CP 52.

Later, on June 10, 2003, Segaline came to the L & I office and complained to Guthrie about Whittle. Segaline claimed Whittle would not allow him to use a tape recorder at the meeting to occur on June 19. He demanded that Guthrie produce a copy of the statute prohibiting him from recording the conversation or produce a copy of Whittle's resume to "join the private sector." CP 45.

On June 13, 2003, Segaline again came to the L & I office where he was waited on by Jacqueline Sanchez. Because Segaline was yelling and causing a scene at the counter in front of other customers, Sanchez asked Guthrie, as her supervisor, to deal with Segaline. Segaline yelled that he was going to call his attorney and loudly told Guthrie, "You had better get an attorney." The electrician yelled he was going to call his attorney and then started talking to someone on his cell phone, telling the person on the cell phone that L & I was refusing to take his money. Segaline was trying to pay for an electrical permit which had already been paid for out of Horizon Electric's Contractor's Deposit Account, as it had been previously authorized by Segaline's brother Joseph, who was a partner in the business. Plaintiff refused to acknowledge he had an account with L & I. Segaline demanded that Guthrie take his money and stated that he would be filing a tort claim against L & I. In order to

placate Segaline, L & I accepted the check and deposited the un-owed amount into Segaline's Contractor's Deposit Account. CP 45-46.

On June 19, 2003, L & I representatives Whittle and Alan Croft held the previously scheduled meeting with plaintiff. This was the first time Croft had met Segaline. Prior to the meeting, Croft had reviewed incident reports regarding L & I employees past encounters with Segaline and had also spoken to L & I employees regarding Segaline's behavior. All three participants at the meeting brought tape recorders and agreed that the meeting could be tape recorded. CP 52; CP 377-78.

During the meeting, plaintiff refused to consider modifying his behavior in for dealing with L & I. He stated that he would do business with L & I in the same manner as he always did. Croft observed that Segaline's body language did not match his words. Croft believed Segaline's temper was about to explode. Segaline seemed very tense and red in the face. He seemed angrier than what he was trying to project through the tone of his voice. CP 378-79. At the meeting, Segaline argued about the legality of recording conversations. Whittle then withdrew his permission to be recorded. Segaline then abruptly walked out of the meeting and went up to a nearby counter where he demanded to speak to Guthrie. When Segaline left the meeting, Croft followed him out into the lobby. Croft was concerned Segaline was getting out of control. Croft

asked Segaline to leave the building at least twice and was ignored by Segaline. Croft then called 911. After Croft called 911, he asked Segaline two more times to leave the building. Segaline ignored Croft. Segaline finally left the building just as the East Wenatchee police arrived. CP 378-79.

After talking to plaintiff in the parking lot of the L & I building, the police met with Croft. The police suggested to Croft that L & I have a no trespass notice served on Segaline so that the police could have something to enforce if Segaline caused a problem in the future. Croft then asked the police if they had a form he could use. The police said they did not, but told Croft they had enforced several no trespass notices for the Wenatchee Valley Mall and Valley North Center. CP 379.

Croft then contacted the security department at the mall and obtained a copy of the form the mall used. Subsequently, Croft contacted Washington State Patrol (WSP) Trooper Scott Jarmon and explained the problems L & I had had with Segaline. Trooper Jarmon had been assigned by the WSP to assist L & I with workplace violence issues. Trooper Jarmon told Croft that L & I can serve a no trespass notice on people prohibiting them from entering public buildings and that he, himself, had enforced such notices. CP 379.

In deciding to issue the no trespass notice, Croft relied upon his own observations of plaintiff in a meeting Croft had with him on June 19, 2003. (See CP 298: Deposition. of Croft at p. 52: “I just know the hairs on the back of my neck raised... [Segaline’s] body language wasn’t matching the words.”). Croft had also reviewed prior incident reports indicating other L & I employees felt intimidated, harassed or fearful of Segaline. He had also spoken to L & I employees about Segaline’s behavior. CP 297.

Based upon this information, Croft drafted a no trespass notice and emailed it to Jeanne Guthrie. It was decided to present Segaline with the notice next time he entered the East Wenatchee L & I building. This notice stated that Segaline was “no longer permitted invited, licensed or otherwise privileged to enter or remain” at the L & I building in East Wenatchee. The Notice also provided that:

To have this notice terminated, the subject must secure the written approval of David Whittle, Electrical Supervisor, prior to re-entry of the East Wenatchee Department of Labor and Industries service location. This trespass notice remains in effect until this approval is obtained.

CP 48, 379.

On June 30, Segaline came into the L & I office. Alice Hawkins told Segaline he was not to be in the office and handed Segaline the no

trespassing notice. Segaline used his hand to push away the notice and told Hawkins he could be in the office any time he wanted to and that he would bring a tape recorder to record everything. Hawkins observed an object in Segaline's hand that appeared to be a tape recorder. Hawkins asked plaintiff not to record. 911 was called and the East Wenatchee Police responded. The police located Segaline in the L & I parking lot and served him with a copy of the no trespassing notice the police had received from L & I. Segaline refused to sign acknowledgement of his receipt of the document. CP 37.

2. Segaline's response to the no trespassing notice.

On August 21, 2003, Segaline came to the L & I building to purchase an electrical permit. Guthrie met with the electrician. She was concerned Segaline was in the building because he had previously been served with the no trespassing notice. Segaline indicated he had spoken to L & I Electrical Inspector Jim Dixon the previous day. The electrician claimed Dixon had authorized him to be in the building. CP 46.

Guthrie called Dixon over and learned about Dixon's telephone conversation with Segaline the previous day. CP 46. Dixon told Guthrie he had approved Segaline's emergency request for a permit and informed Segaline that he needed to purchase a permit for the service the next day. Dixon told Guthrie he did not tell Segaline to personally come to the

office. Segaline told Guthrie any order keeping him off the premises was illegal and that his rights were being violated. Dixon then went out in the lobby and took the electrical permit and check. Dixon gave Segaline a hard copy of the electrical permit and told him the rest of the paperwork would be mailed to him, as Segaline was not supposed to be there. Segaline then left the premises. CP 46.

On August 22, 2003, Segaline again came to the L & I office. Guthrie called 911, as she had re-confirmed with L & I Management on August 21 that the no trespass notice was still in effect. Larry Hively, an L & I investigator, informed Segaline that 911 had been called. CP 47.

The police arrived while Segaline was still in the L & I building. The police first conferred with an L & I supervisor who confirmed that the electrician was not allowed in the office as he had been engaging in threatening and harassing behavior toward employees. The police observed that L & I staff seemed afraid because they were standing behind doors and walls away from where plaintiff was standing. CP 55.

Segaline was told by the police to leave the building and was escorted out of the inner lobby of the building to an outer covered area by one of the policemen. The police asked Segaline to leave the building, but he refused to leave and argued with the officer claiming that he could enter the building anytime he wanted. CP 55.

Segaline admitted to the police that he had received the no trespass notice, but claimed it was not valid. CP 55. The policeman then asked plaintiff if that meant he was going to continue to return to the L & I office, to which Segaline responded, "I guess so, yes." The police then asked the electrician what it was going to take to keep him from coming back to the L & I office. Plaintiff responded by saying he wanted a call from the Attorney General of Washington. CP 56. The police at that point decided there was nothing more they could do to keep Segaline away from the L & I building short of arresting him. The police then arrested plaintiff for trespassing. The policemen were concerned that plaintiff might return to the L & I office with a weapon as he did not appear to be fully rational. CP 56.

Croft was not present at the L & I office in East Wenatchee when the August 22, 2003 events occurred. Nor was Croft contacted by the East Wenatchee L & I office as those events occurred. Croft never asked the police, nor any one else, to arrest Segaline. Croft first learned of the events of August 22, 2003 when he received an email that day from Jeanne Guthrie informing Croft that Segaline had been arrested. CP 380.

Plaintiff was booked and released on August 22, 2003. He was charged with Criminal Trespass; however the charge was later voluntarily dismissed by the prosecutor. CP 426.

B. Procedural History

Plaintiff filed his complaint naming L & I as a defendant on August 8, 2005. In his complaint he sued for negligent and/or intentional infliction of emotional distress, negligent supervision, malicious prosecution, and violation of civil rights.

On July 14, 2006, the superior court orally granted L & I's motion for summary judgment and dismissed plaintiff's claims in their entirety. However, plaintiff was granted leave to file a motion for reconsideration of his Negligent Infliction of Emotional Distress and Malicious Prosecution claims. CP 251-52. On August 4, 2006, the court signed a summary judgment order in this regard. CP 251-52.

On August 3, 2006, plaintiff filed a motion to amend his complaint to add Alan Croft as a defendant under 42 USC § 1983. CP 220. Segaline claimed his exclusion from the building violated his liberty and property interests under the Fourteenth Amendment because the building was a public building and he needed to access the building in order perform his occupation as an electrician. (CP 389-400). On September 8, 2006, the court orally granted plaintiff's motion, but found plaintiff did not act with excusable neglect and denied plaintiff's motion to relate the filing of the amended complaint back to the date the action against L & I was filed. The court held that the filing of the amended complaint would only relate

back to August 3, 2006, the date the motion was filed. An order to this effect was entered on October 13, 2006. CP 500-01. On August 8, 2006, plaintiff filed a motion for reconsideration of the court's summary judgment which was denied on October 13, 2006. CP 505-06. After this order was signed, the only remaining claim was the 1983 claim against Croft. The court dismissed this claim on summary judgment on December 21, 2006 on the ground that the claims were barred by the statute of limitations. In the alternative, the court found that Croft did not violate plaintiff's constitutional rights and that he was also entitled to qualified immunity. CP 489-91.

II. STATEMENT OF THE ISSUES

- A. Whether The Trial Court Properly Dismissed Plaintiff's State Law Claims Against L & I?**
- B. Whether Plaintiff's Federal Claims Against L & I Were Properly Dismissed On The Ground That Defendant Is Immune From Suit Under The Eleventh Amendment?**
- C. Whether Plaintiff's Federal Civil Rights Claims Against Alan Croft Were Properly Dismissed?**

II. LAW AND ARGUMENT

- A. The Superior Court Properly Dismissed Plaintiff's State Law Claims Against L & I.**

Plaintiff did not bring any state law claims against any individuals.

Instead, he only sued L & I for negligent supervision, NIED and malicious

prosecution. CP 5-6, 346.¹ The superior court properly dismissed these claims.

1. Plaintiff's malicious prosecution claim was properly dismissed.

Plaintiff did not establish a prima facie case of malicious prosecution against defendant. The elements for malicious prosecution are set forth in *Hanson v. Estell*, 100 Wn. App. 281, 286, 997 P.2d 426 (Div. 3, 2000):

At common law, an action for malicious prosecution required the plaintiff to prove (1) the defendant instituted or maintained the alleged malicious prosecution; (2) lack of probable cause to institute or continue the prosecution; (3) malice; (4) the proceedings ended on the merits in favor of the plaintiff or were abandoned; and (5) the plaintiff suffered injury or damage as a result. . . .

Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). As explained below, plaintiff cannot make a prima facie showing of a malicious prosecution case against L & I.

¹ Plaintiff also brought a tort of outrage claim, however, in responding to L & I's motion for summary judgment, he conceded there were insufficient facts to support such a claim. CP 190.

- a. **Malicious prosecution is an intentional tort that cannot be committed by and is not cognizable against a State agency.**

The malice requirement was explained in *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 502, 125 P.2d 681 (1942):

[T]he requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. Impropriety of motive may be established in cases of this sort by proof that the defendant instituted the criminal proceedings against the plaintiff: (1) without believing him to be guilty, or (2) primarily because of hostility or ill will toward him, or (3) for the purpose of obtaining a private advantage as against him.

Because L & I is a creation of statute, it cannot act with “malice”.

The proper defendant for such a claim would be the state employee who plaintiff claims acted with malice. If the state employee acted with malice, as a matter of law, such conduct would be outside the scope of his employment and the state would not be liable. *See Hardy v. State*, 38 Wn. App. 399, 401, 685 P.2d 610 (1984), (a supervisor's intentional actions directed towards a subordinate, occasioned solely by ill will, jealousy, hatred or other ill feelings, are not, as a matter of law, within the scope of the supervisor's employment.)²

² Through a separate independent process the employee may request representation by the Attorney General which would be provided if the Attorney General

In *Snyder v. Medical Services Corp .of Eastern Washington*, 145 Wn.2d 233, 35 P.3d 1158 (2001) plaintiff sued her employer alleging a failure to reasonably accommodate her mental disability and outrage based upon the conduct of her supervisor, Ms. Hall. The Supreme Court affirmed the dismissal of Snyder's outrage claim at summary judgment based upon the fact that she had sued her employer, Medical Services Corporation, but not her supervisor, Ms. Hall, personally:

However Snyder's outrage claim was against MSC, not Hall and consequently it must fail.

...

MSC is not liable, as a matter of law, for the intentional torts committed by Ms. Hall acting outside the scope of her employment. Consequently, Snyder's claim for outrage was properly dismissed on summary judgment as well.

Snyder, 145 Wn.2d at 242, 243.

Plaintiff has failed to state a claim of malicious prosecution against L & I. See *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844, (2005) (a party may raise failure to establish facts upon which relief can be granted for the first time in an appellate court, citing RAP 2.5(a)(2)).

b. There is no evidence that an L & I employee acted with malice.

Even if Segaline had sued an individual state employee for

found that the employee had acted in good faith and within the scope of his employment. See RCW 4.92.070-75.

malicious prosecution that claim would also be properly dismissed because there is no evidence that a L & I employee acted with “malice.” There is no evidence L & I staff had improper or wrongful motives in calling the police. It is undisputed L & I staff were afraid of Segaline, that he was served with a no trespass notice and that he refused to comply with the notice at the time of his arrest.

The no trespass notice was valid. Employers and businesses have the authority to exclude a person from that portion of their premises that are generally open to the public and seek criminal prosecution if that person insists on returning to the premises. See, *State v. Kutch*, 90 Wn. App. 244, 951 P.2d 1139 (Div. 3, 1998), (defendant successfully prosecuted for burglary when he shoplifted at shopping mall after receiving no trespass notice revoking his invitation to enter the mall). See also Chapter 9A.50 RCW (making it a crime for a person to willfully or recklessly disrupt the functioning of a health care facility).

Not only do facilities such as L & I have the authority to exclude people, but they have a duty to protect employees from people who make threats and exhibit dangerous propensities. This duty extends to threats of physical violence and sexual harassment. See *Minahan v. Western Washington Fair Ass’n*, 117 Wn. App. 881, 73 P.3d 1019 (div. 2, 2003) (employer owes to an employee a duty to provide a safe place to work

which includes duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee); *Glasgow v. Georgia Pacific Corp.*, 103 Wn. 2d 401, 693 P.2d 708 (1985) (employer's failure to correct hostile working environment caused by sexual harassment constituted illegal discrimination)

In issuing the no trespass notice, L & I employees were seeking to provide a safe work place. There is no evidence they acted out of malice against the plaintiff.

c. L & I made a full and fair disclosure to the Police.

Probable cause is a complete defense to an action for malicious prosecution. The test for probable cause varies between an informant and a probable cause decision-maker. For an informant, i.e., the one who supplied the information on which a suit was based, to demonstrate probable cause, he or she must have provided the probable cause decision maker with a full and fair disclosure in good faith of all the material facts known to him or her. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 696-97, 82 P.3d 1199 (Div. 2, 2004). *See also Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485 at 499-500 (If defendant made full and fair disclosure in good faith to prosecutor prior to prosecutor bringing criminal charges

against plaintiff, probable cause is established as a matter of law and operates as a complete defense to any subsequent action by the accused).

Here L & I staff made a full and fair disclosure to the police of the material facts known to them regarding the no trespass notice. Indeed, one of the officers who arrested plaintiff had been present when Segaline was originally served with the no trespass notice. CP 55. It was the police who originally suggested serving plaintiff with the no trespass notice. CP 379. There are no facts of which the police were unaware at the time of their decision to arrest plaintiff.

Moreover, when the police arrived Segaline was still in the L & I building. CP 55. Under RCW 9A.52.070, a person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building. As a matter of law, there was probable cause and plaintiff has no action for malicious prosecution.

2. Plaintiff's state law claims against L & I were properly dismissed because L & I merely asked the police for assistance, thus leaving it to the police to determine the appropriate response.

Under common law, liability will not be imposed on a defendant who does nothing more than detail his or her version of the facts to a police officer and ask the officer for assistance, thus leaving it to the officer to determine the appropriate response. *McCord v. Tielsch*, 14 Wn.

App. 564, 566, 544 P.2d 56 (1975) (citing *Parker v. Murphy*, 47 Wn. 558, 92 P. 371 (1907)).

When the police arrested Segaline, they were aware of the no trespassing notice that had previously been served upon the electrician. The police removed the plaintiff from the premises and asked him if he was going to continue to return to the L & I office. When Segaline indicated he would continue returning to the premises unless he received a call from the Attorney General of Washington, the police exercised their discretion and arrested the electrician as they were authorized to do. See RCW 10.31.100. L & I did not preclude the police from exercising their discretion in deciding to arrest plaintiff, nor did L & I make any misrepresentation to the police.

In *McCord*, plaintiff sued the Seattle Opera Association, its director Glynn Ross and others for assault, false imprisonment, malicious prosecution, and for violation of his civil rights. Plaintiff was arrested while soliciting signatures outside the entrance to the Seattle Center Opera House. The Opera House had asked plaintiff to move, but he refused. The Opera House then called the police and informed them that a man was creating a disturbance in an area rented by the Opera Association and that the man had refused to move when requested by a security guard. The police arrested plaintiff when he refused to obey the police officers'

requests to move.

Plaintiff's false imprisonment claim against the Seattle Opera Association and its director was dismissed on summary judgment. Plaintiff appealed asserting that it was error to dismiss his claim because the defendant had supplied the police with misleading information which caused the police to effectuate the arrest. Specifically, plaintiff claimed that the Seattle Opera Association's lease did not cover the area where plaintiff was standing when he was arrested.

In affirming the partial summary judgment, the court of appeals ruled at *McCord v. Tielsch*, 14 Wn. App. at 567:

Even assuming, as we do here, that the officers' reliance on Ross' interpretation of the lease was misplaced, they were left with a range of reasonable options for action, including further investigation, short of making an immediate arrest. On this record, reasonable men could not conclude that Ross invited the officers to respond to McCord's presence by arresting him; neither could they conclude that Ross' erroneous statement as to the coverage of the Opera Association's lease precluded the intelligent exercise of the officers' discretion. Summary judgment was therefore properly granted on the claim for false imprisonment.

Similarly, nothing L & I did deprived the East Wenatchee Police officers of the intelligent exercise of their discretion. Plaintiff's state law claims were properly dismissed.

3. The Superior Court properly dismissed plaintiff's NIED claim.

As in all negligence cases, a NIED claim requires that a plaintiff establish duty, breach, proximate causation, and damage or injury. *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). Here, Segaline's NIED claims fails on duty and causation.

a. L & I did not breach a duty to Segaline.

Courts have recognized the limitations of direct actions for NIED. *See, e.g., Keates v. City of Vancouver*, 73 Wn. App. 257, 266, 869 P.2d 88 *review denied*, 124 Wn.2d 1026, 883 P.2d 327 (Div. 2, 1994) (no cause of action for negligent infliction of emotional distress by a person interrogated by police); *Calhoun v. Liberty Northwest Ins. Corp.*, 789 F. Supp. 1540, 1548 (W.D., Wash., 1992) (routine discharge for poor work performance does not give rise to cause of action for negligent infliction of emotional distress); *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 871 P.2d 601, *review denied*, 124 Wn.2d 1029, 883 P.2d 326 (Div. 1, 1994) (neighboring landowners have no cause of action against developers for negligent infliction of emotional distress when development was not unreasonable and damages not foreseeable).

“[T]he defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.” *Snyder v. Medical Service Corp.*, 145

Wn.2d at 233 (quoting *Hunsley v. Giard*, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976)). Conduct is unreasonably dangerous when its risks outweigh its utility. *Snyder*, 145 Wn.2d at 245.

Under the foregoing principles, the superior court did not err in dismissing Segaline's NIED claim. The conduct in question, the serving of a no trespass notice upon the plaintiff, is not unreasonably dangerous. It does not present a likelihood of mental or physical injury. In addition, the risks of harm do not outweigh the utility of the activity. The state and public have a significant interest in preserving the safety of public buildings. Denying access to persons who engage in threatening behavior by serving no trespass notices help preserve the safety of the public and state workers. Promotion of worker safety is the primary purpose of L & I.

In *Keates*, the court held that there was no cause of action for negligent infliction of emotional distress by a person interrogated by police. In upholding the lower court's summary judgment dismissing plaintiff's claim, this court compared the utility of police interrogation with its risk of harm and concluded that the "utility of the investigative conduct, including the infliction of emotional distress on the subject of an interrogation, vastly outweighs the risk of harm". *Keates*, 73 Wn. App. at 266. The risk of harm is to be evaluated by assessing how it would affect

a person of ordinary sensibilities. *Keates*, 73 Wn. App. at 266-67.

In *Keates*, this court upheld the trial court's summary judgment dismissing plaintiff's claim despite the fact that two mental health experts diagnosed Keates as suffering from Post Traumatic Stress Disorder, which they linked to the police interrogation.

As a matter of law it is not foreseeable that severe emotional distress would result from giving written notice to Segaline that he was not to come back to the L & I building until he worked things out with L & I security. By serving the no trespass notice, defendant did not breach a duty owed to plaintiff.

b. Plaintiff has failed to produce evidence he has a “diagnosable mental disorder” that was caused by defendant’s negligence.

Plaintiff also failed to produce evidence of causation. To establish his NIED claim, plaintiff must come forward with expert medical evidence proving he has a “diagnosable mental disorder” that was *caused by* defendant L & I's negligence. *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998); *Haubry v. Snow*, 106 Wn. App. 666, 31 P.3d 1186 (Div. 1, 2001), partially overruled on other grounds in *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003). A plaintiff must also establish that the emotional distress is manifested by objective symptoms. *Hunsley*, 87 Wn.2d at 436.

Plaintiff has failed to produce any medical evidence showing he has a diagnosable emotional disorder caused by L & I. Plaintiff submitted two declarations from Dr. Mays, a psychologist. The first declaration indicates plaintiff has distress, agitation and that he would be functioning at a “better level” psychologically than if he had not been involved in the events culminating in his arrest and detention. However, the declaration does not indicate Segaline has a diagnosable emotional disorder as a result of his arrest and detention. In his second declaration, the psychologist states:

The formal diagnoses of an Adjustment Reaction with Anxiety is a specific diagnoses, Mr. Segaline displays symptoms of that condition, and would have had an emotional reaction were he merely to be precluded from access to the building in a way which he perceived as wrong and a violation of his rights, separate from his later arrest and detention.

CP 219.

In this declaration, Dr. Mays merely indicates that, because of the diagnosable emotional disorder Segaline already had, he experienced caused “an emotional reaction” due to receiving the no trespass notice. This is insufficient as a matter of law.

4. L & I is immune from plaintiff’s state law claims under RCW 4.24.510.

L & I is immune from plaintiff’s state law claims under RCW 4.24.510, insofar as those claims are based upon communications made to

the East Wenatchee police. RCW 4.24.510, provides, in relevant part:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. ...

The immunity created by the statute is broadly construed. The statutory phrase “immune from civil liability on claims based upon the communication” refers to the starting point or foundation of the claim, and does not limit immunity only with respect to L & I’s 911 call to the police. It grants immunity from causes of action based on the method of arriving at the content of the communication as well. *See Dang v. Ehredt*, 95 Wn. App. 670, 683, 977 P.2d 29 (Div. 1, 1999) review denied 139 Wn.2d 1012, 994 P.2d 847 (1999).

In *Dang v. Ehredt*, plaintiff sued the police, a bank and several bank employees for false arrest, false imprisonment, negligence and for civil rights violations. Plaintiff was arrested when she attempted to cash her paycheck at her own bank. The bank suspected the check was counterfeit because the account had been closed after several counterfeit checks had been drawn on it. The bank called the police, who arrived,

investigated and eventually arrested plaintiff. Subsequently, it was learned that plaintiff's check was not counterfeit. The Court of Appeals affirmed the summary judgment dismissal of the bank and its employees by holding that RCW 4.24.510 granted civil immunity from plaintiff's claims. The court rejected plaintiff's argument that the statute only granted immunity from defamation actions and dismissed all of plaintiff's claims against the bank and its employees. In rejecting plaintiff's argument, the court stated in *Dang*, 95 Wn. App. at 683:

[A]llowing a cause of action for the events surrounding the communication to the police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute..., no meaningful distinction can be drawn between the cause of action based on the bank's communication to the police and a cause of action based on the method of arriving at the content of the communication.

Similarly, in *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 652, 20 P.3d 946 (Div. 2, 2001), an attorney's statement regarding death threats made by a husband in a divorce proceeding and the attorney's request to the superior court administration for security in the courtroom were held to be privileged communications under RCW 4.24.510. This court noted that the statute bars *all civil claims*, including claims of defamation, fraudulent concealment and negligent or intentional emotional distress.

L & I is immune from plaintiff's state law claims to the extent

they are based upon L & I's communication with the East Wenatchee Police. This immunity extends to Segaline's malicious prosecution claim against L & I. Segaline is claiming he was wrongly arrested due to a no trespass notice, which he claims was invalid. The arrest was based upon the communication L & I made with the East Wenatchee Police and is covered by the statute.

a. The State is a person under RCW 4.24.510.

Plaintiff argues L & I is not immune under RCW 4.24.510 because L & I is not a "person" under the statute. However, in *Gontmakher v. The City of Bellevue*, 120 Wn. App. 365, 85 P.3d 926 (Div. 1, 2004), the city was held to be a "person" entitled to immunity under the statute. The *Gontmakher* court made a detailed analysis as to why the definition of "person" was not limited to natural persons, but included government entities. First, the court relied upon RCW 1.16.080(1) which provides:

[t]he term 'person' may be construed to include the United States, *this state*, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.

(Emphasis added).

The *Gontmakher* court went on to note:

[that the] legislature is presumed to know the general definition of "person" under RCW 1.16.080, and that if the legislature intended to employ a limited definition of "person," the normal and expected practice would be for it to

expressly do so.

The court also noted that RCW 4.24.510 has already been applied to entities, as opposed to natural persons, including a community council and a bank. *See Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002); *Dang v. Ehredt, supra*. Finally, the court found a strong public policy for including governmental entities within the protection offered by the statute. The court noted that the type of statement made by the city in *Gontmakher* are common and important to proper agency functioning, *Gontmakher*, 120 Wn. App. at 371-72.

In enacting the anti-SLAPP statute, the legislature sought to prevent the chilling effect that abusive lawsuits would have on citizens who wish to communicate with their government. See RCW 4.24.500. This purpose would be thwarted if a corporation or public entity could still sued in retaliation for a statement made by its employee to a public agency, even though the employee who made the statement was immune from suit.

There is a strong public policy regarding the type of communication upon which Segaline bases his claim. Governmental agencies and their employees have the need to communicate with law enforcement on such matters as work place safety without fear of being sued. Violence in the workplace is a serious safety and health issue. Its most extreme form, homicide, is the fourth-leading cause of fatal

occupational injury in the United States.

See U.S. Department of Labor, Occupational Health and Safety Administration, www.osha.gov.SLTC/workplaceviolence.

L & I is a “person” under the statute.

b. The immunity created by RCW 4.24.510 applies to an action for malicious prosecution.

Plaintiff argues that the immunity created by RCW 4.24.510 can never apply to an action for malicious prosecution because it would, in effect, nullify RCW 9.62.010 and RCW 9A.84.040(1). This argument is specious. Washington’s anti-SLAPP statute is a **civil statute** creating immunity from civil lawsuits based upon communications with governmental agencies. RCW 9.62.010 and RCW 9A.84.040(1) are **criminal statutes** concerning false reporting, false arrest and malicious prosecution. The statutes do not conflict with each other and have separate purposes.

A civil right of action does not arise from the violation of a criminal statute unless such intent is expressed therein or clearly implied. See, e.g., *Beegle v. Thomson*, 138 F.2d 875, 880 (7th Cir., 1943), *cert. denied*, 322 U.S. 743 (C.C.A. 7(111.), 1944); *Mezullo v. Maletz*, 118 N.E.2d 356, 359 (1954); *Parker v. Lowery*, 446 S.W.2d 593, 595 (Mo., 1969).

The criminal statutes plaintiff relies upon contain no express provisions permitting a private cause of action based upon their violation. When the Legislature has intended to create a private civil right of action based upon violation of a criminal statute, it has done so explicitly. *See, e.g.*, RCW 70.105D.080 (authorizes a private right of action for the recovery of remedial action costs under the Model Toxics Control Act); RCW 70.94.430-31 (authorizes both criminal and civil penalties for violations of the Clean Air Act); RCW 9A.82.100 (provides civil remedy for damage from criminal profiteering activity). There is no conflict between RCW 4.24.510 and these criminal statutes.

Plaintiff also argues Washington's anti-SLAPP statute is inconsistent with RCW 4.24.350. However, RCW 4.24.350 simply establishes that a cause of action for malicious prosecution exists, it does not address what defenses may be available to defeat such a cause of action. The two statutes are not inconsistent.

c. RCW 4.24.510 does not limit its grant of immunity to communications made in good faith.

Plaintiff asserts the superior court erred in granting summary judgment under RCW 4.24.510 because the statute contains a "good faith" requirement and there is an issue of fact as to whether L & I communicated in good faith with the police department. Plaintiff errs on both assertions.

No such good faith requirement can be inferred. When RCW 4.24.510 was originally enacted it did contain a “good faith” requirement. At that time RCW 4.24.510 limited immunity to “a person who in good faith communicates a complaint” to an agency. However, in 2002, RCW 4.24.510 was amended and the “good faith” language was eliminated. Now the statute grants immunity to people regardless of whether they acted in good or bad faith. *Gontmakher*, 120 Wn. App. at 372. *See also Harris v. City of Seattle*, 302 F. Supp. 2d 1200, 1202 (2004) (In *dicta* stating “In 2002, the statute was amended to remove the good faith requirement”).

In the alternative, plaintiff argues RCW 4.24.510 is unconstitutional unless a good faith requirement is read into it. Without such a requirement, plaintiff claims the statute denies him access to the courts and is overly broad and vague. In support of this argument, plaintiff cites several cases in which courts interpreted federal and state constitutional free speech provisions. *See, e.g., Richmond v. Thompson*, 130 Wn. 2d 368, 922 P.2d 1343 (1996); *Florida Fern Growers Ass’n v. Concerned Citizens of Putman County*, 616 So.2d 562 (Fla. 5th Dist., 1993). These cases interpret constitutional provisions and the interplay between the right of free speech and the right to petition the government. These cases are not concerned with the power of the legislature to enact tort laws or create immunity from suit. These cases are not interpreting an anti-SLAPP statute.

The legislature has the authority to create torts. *See, e.g.*, RCW 49.60 (Washington's Law Against Discrimination). It also has the authority to create immunities limiting who can be sued for tortuous acts. *See, e.g.*, RCW 4.24.300 (Washington's Good Samaritan Law granting immunity from liability for certain types of medical care). By enacting Washington's anti-SLAPP statute, the legislature is simply creating another immunity.

Nor does the statute eliminate plaintiff's access to the courts. The statute did not bar plaintiff from filing a 42 U.S.C. § 1983 action against L.& I personnel in state or federal court for money damages. The immunity afforded by RCW 4.24.510 does not chill plaintiff's First Amendment Rights, it only affects his ability to assert state tort claims against L & I based upon its communications with other governmental agencies.

d. The superior court did not err in awarding damages under RCW 4.24.510.

The superior court did not err in awarding statutory damages under RCW 4.24.510, which provides in part:

A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

First, the statute provides that statutory damages **may** be denied,

not that such damages **shall** be denied, if the court finds the information was communicated in bad faith. The superior court was acting within its discretionary authority in awarding statutory damages.

Second, even if the statute prohibited a statutory damages award when there was evidence of bad faith, there is no evidence L & I acted in bad faith. Although good or bad faith is usually a question of fact, it may be resolved on summary judgment where no reasonable minds could differ on the question. *See, e.g., Dutton v. Washington Physicians Health Program*, 87 Wn. App. 614, 622, 943 P.2d 298 (Div. 1, 1997); *Whaley v. State*, 90 Wn. App. 658, 663, 956 P.2d 1100 (Div. 1, 1998).

In making this determination of good faith, there is no requirement that the person making the communication acted “reasonably”. *See Deschamps v. Mason County Sheriff’s Office*, 123 Wn. App. 551, 560, 96 P.3d 413 (Div. 2, 2004) ([T]he absence of a reasonable element in *evaluating* good faith is a separate and distinct posture from our review of a summary judgment when, after *determining* the existence, or nonexistence, of good faith, we ask if reasonable minds could differ on the question).

Under the foregoing standards, the L & I employees communicated with the police in good faith. Plaintiff has failed to point to anything in the record to demonstrate bad faith regarding the communication with the

police. L & I called the police when Segaline entered the L & I building because Segaline had previously been served with a no trespass notice and L & I personnel were in fear of him. There is no evidence L & I employees who communicated with the police believed the no trespass notice was not valid. As a matter of law L & I is entitled to statutory damages under RCW 4.24.510. The superior court did not abuse its discretion in making the award.

5. Plaintiff's negligent supervision claim was properly dismissed.

Plaintiff claims L & I negligently supervised Croft. (See Appellant's brief at page 45.) This claim was properly dismissed. If Croft was acting within the scope of his employment, then a negligent supervision claim is redundant as an employer is generally vicariously liable for tortious acts of an employee conducted within the scope of employment. See *Shielee v. Hill*, 47 Wn.2d 362, 287 P.2d 479 (1955); *Gilliam v. Dep't of Social & Health Servs.*, 89 Wn. App. 569, 950 P.2d 20 (Div. 1, 1998); Restatement (Second) of Agency § 216 (1958). Plaintiff's failure to present evidence to support a NIED claim against L & I under a vicarious liability theory requires the dismissal of his negligent supervision claim as well.

If the basis of the negligent supervision claim is that L & I failed to

prevent Croft from committing an act outside the scope of his employment, to wit: malicious prosecution, then the negligent supervision claim was properly dismissed because there is no legal or factual basis to support a malicious prosecution claim against Croft. *See* discussion at *infra* at pp. 13-19. Croft did not participate in the arrest and subsequent criminal prosecution of Segaline. *See* discussion at *supra* at pp. 40-41. The negligent supervision claim was properly dismissed.

B. Plaintiff's Federal Claims Against L & I Were Properly Dismissed On The Ground That The State is Immune From Suit Under The Eleventh Amendment.

Plaintiff sued L & I under 42 U.S.C. § 1983, for alleged violations of his civil rights. Specifically, he claims loss of a liberty interest and violation of procedural due process in being excluded from the L & I premises. (Plf's Brief at page 25-28). This court should affirm the trial court's dismissal of these claims on the ground that the department is immune from suit under the Eleventh Amendment.

The Eleventh Amendment bars suits for money damages brought under § 1983 against a state. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-71, 109 S. Ct. 2304, 2309-12, 105 L. Ed. 2d 45 (Mich., 1989); *see also Hafer v. Melo*, 502 U.S. 21, 27, 112 S. Ct. 358, 362, 116 L. Ed. 2d 301 (Pa., 1991). This amendment prohibits § 1983 suits against not only states themselves, but also state agencies and departments. *Florida*

Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149-50, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981); *Quern v. Jordan*, 440 U.S. 332, 345, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (Ill., 1979).

L & I is a department of the state. See RCW 43.17.010. As such, plaintiff's claims based upon federal law against L & I were properly dismissed.

C. Plaintiff's § 1983 Claims Against Alan Croft Were Properly Dismissed.

Segaline claims Croft violated his liberty and property interests under the Fourteenth Amendment were violated by excluding him from the L& I building. (CP 389-400). The superior court's summary judgment dismissal of these claims should be affirmed.

1. Plaintiff's § 1983 claims against Alan Croft are barred by the statute of limitations.

a. The statute of limitations began to run on June 30, 2003, the date Segaline was served with the no trespass notice.

The federal standard for accrual of a section 1983 action is when a plaintiff "knows or has reason to know of the injury which is the basis of the action." *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir., 1983); *Cloud v. Summers*, 98 Wn. App. 724, 731, 991 P.2d 1169 (Div. 1, 1999). "[I]f a plaintiff should have known of the injury or its source, it is of no moment that he lacked actual

subjective knowledge.” *Ernstes v. Warner*, 860 F. Supp. 1338, 1341 (S.D.Ind., 1994); *Cloud v. Summers*, 98 Wn. App. at 731. Plaintiff’s claims against Croft are subject to a three year statute of limitations under 42 U.S.C. § 1983. *Robinson v. Seattle*, 119 Wn.2d 34, 85, 830 P.2d 318 (1992).

While Segaline filed his amended complaint naming Croft as a defendant within three years of his arrest, Croft was not involved in the arrest. Croft was not present when Segaline was arrested, nor did he ever ask the police to arrest Segaline. Croft only learned of the arrest after it had already occurred. CP 377, 380.

Croft was responsible for drafting the no trespass notice and having it served upon Segaline. Plaintiff was served with the no trespass notice on June 30, 2003. The electrician is claiming his civil rights were violated because he could not gain physical access to the L & I facility after he was served with the no trespass notice. CP 346. On the day he was served with the notice, plaintiff knew or had reason to know of the injury which is the basis of the action because the notice on its face barred him from the L & I premises. On that day, Segaline was told he had to leave the premises. Segaline objected and informed L & I personnel that they were denying him service. CP 469. Plaintiff’s cause of action accrued on June 30, 2003, when he was served the no trespass notice.

Under court's ruling regarding the relation back of the filing of the amended complaint naming Croft as a defendant, plaintiff's action against defendant Croft was not commenced until August 3, 2006. It is barred by the three year statute of limitations.

b. The Superior Court did not err in limiting the relation back of the First Amended Complaint to August 3, 2006.

A determination of the relation back of an amendment rests within the trial court's discretion and will not be disturbed on appeal absent manifest abuse of discretion. CR 15(c); *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 142 P.3d 179 (Div. 2, 2006). Plaintiff argues the court abused its discretion in failing to allow the amendment adding Croft as a defendant back to the date the action was originally filed, which would have placed plaintiff's claims against Croft within the limitations period. The superior court ruled that plaintiff had not shown excusable neglect for failing to name Croft as a party earlier. The superior court did not err.

The law in Washington governing the relation back of amendments to pleadings is stated in *Tellinghuisen v. King Cy. Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984), as follows:

[A]n amendment adding a party will relate back to the date of the original pleading if three conditions are met. First, the added party must have had notice of the original

pleading so that he will not be prejudiced by the amendment. CR 15(c)(1). Second, the added party must have had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him. CR 15(c)(2). Finally, the plaintiff's failure to timely name the correct party cannot have been "due to inexcusable neglect." [Citation omitted.]

Plaintiff has the burden of proving these three conditions precedent under CR 15(c) for relation back. *See, e.g., Foothills Dev. Co. v. Clark Cy. Bd. of Cy. Comm'rs*, 46 Wn. App. 369, 375, 730 P.2d 1369 (Div. 2, 1986), *review denied*, 108 Wn.2d 1004 (1987); *Anderson v. Northwest Handling Sys., Inc.*, 35 Wn. App. 187, 191, 665 P.2d 449 (Div. 1, 1983).

Plaintiff is unable to establish excusable neglect. Inexcusable neglect, regardless of whether prejudice can be shown, is sufficient ground for denying a motion to amend a complaint to add a new defendant. *Haberman v. WA Pub. Power Supply Sys*, 109 Wn.2d 107, 173-74, 744 P.2d 1032 (1987), *as amended*, 750 P.2d 254, *appeal dismissed*, 488 U.S. 805 (1988). If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. *Id.* at 174.

Plaintiff neglected to name Croft as a defendant even though Croft was identified by L & I as the person who drafted the no trespass notice in interrogatory answers to plaintiff on December 19, 2005. CP 291, 294.

Furthermore, plaintiff deposed Croft on June 9, 2006, 21 days before the limitations period ran, yet did not file his motion seeking to add Croft as a party until August 3, 2006. CP 230; 220. This is inexcusable neglect.

Plaintiff has also failed to meet his burden of proving the second condition in CR 15(c) for relation back of the proposed amendment. Under this condition plaintiff must prove Croft had actual or constructive knowledge that plaintiff made a mistake in not naming him originally as a defendant. Plaintiff presented no evidence at all in this regard.

The superior court did not abuse its discretion in determining that the filing of the amended complaint would not relate back to the date of the filing of the original complaint. Plaintiff's claims against Croft are barred the by statute of limitations.

2. The Superior Court's dismissal of plaintiff's civil rights claims against Croft may be affirmed on the alternative grounds that plaintiff's constitutional rights were not violated and that Croft is entitled to qualified immunity.

Qualified immunity is a three part analysis that considers: 1) whether a violation of a constitutional right has been shown, 2) whether the law was clearly established at the time the constitutional deprivation occurred, and 3) whether a reasonable official would recognize that his actions violated clearly established law. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2155, 150 L. Ed 2d 272 (2001); *Sorrels v. McKee*,

290 F.3d 965, 969 (9th Cir., 2002); *Cruz v. Kauai County*, 279 F.3d 1064, 1068 (9th Cir., 2002).

Since the first element of the qualified immunity analysis is the determination of whether a constitutional violation has occurred, the state has combined its discussion of the merits of plaintiff's § 1983 action against Croft with its analysis of qualified immunity.

a. Croft did not violate Plaintiff's due process rights.

Plaintiff argues he had a property and liberty interest in entering the L & I building because he needed to enter the building in order to conduct his business as an electrician. Segaline claims he was deprived of this property and liberty interest without due process of law when Croft issued the no trespass notice excluding him from the L & I premises and then had him arrested when he ignored the notice and re-entered the building. (*See* Plf. Brief pp. 30-38.). Croft did not violate plaintiff's due process rights.

b. Croft did not participate in having Plaintiff arrested.

There is no vicarious liability under 42 U.S.C. § 1983. *Gurno v. Town of LaConner*, 65 Wn. App. 218, 229, 828 P.2d 49 (Div. 1, 1992). Personal participation in the alleged violation is an essential allegation in a § 1983 claim. *Barren v. Harrington*, 152 F.3d 1193 (9th Cir., 1998); *Hannum v. Friedt*, 88 Wn. App. 881, 947 P.2d 760 (Div. 2, 1997). Croft

was not involved in Segaline's arrest and only learned of it after it already had occurred. CP 377, 380.

Plaintiff's assertion that Croft was involved in the arrest is based upon an email sent to 16 people by L & I employee Jean Guthrie the day before the arrest, in which she indicates she had "reconfirmed instructions regarding Michael Segaline." CP 421. The email does not indicate with whom Guthrie had "reconfirmed instructions." Plaintiff speculates it was Croft with whom Guthrie conferred. Croft has no recollection in that regard. CP 476. Whether it was Croft or not does not matter, the "instructions" were not to have Segaline arrested, but were to call 911 if Segaline appeared at the L & I building, so that the police could remove him from the premises. CP 421. Simply giving pre-approval to a co-worker to call the police if Segaline appeared at the L & I office does not constitute a violation of plaintiff's civil rights.

Even if Croft had been involved in the arrest, because there was probable cause to arrest and no evidence of retaliatory motive, plaintiff's claim would still fail in this regard. *See Hartman v. Moore*, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006) (retaliatory motive and absence of probable cause must be proven to support a § 1983 action against criminal investigators for inducing prosecution in retaliation for speech).

c. Plaintiff had no property or liberty interest in having access to the L & I building.

Nor did the issuance of the no trespassing notice violate plaintiff's due process rights. Banning Segaline from the L & I building is not the equivalent of revoking his electrician's license without due process of law. Segaline could obtain the necessary electrical permits without entering the L & I building. For instance, he could have faxed the permit to the L & I office, or he could have had a third person, such as an employee, customer or friend bring the permit to the L & I office for processing. In fact, Segaline took advantage of these alternative ways of processing the permits. CP 460. Another alternative available to Segaline in 2003 was to mail the permit to L & I. CP 460. The no trespass order did not stop plaintiff from acting as an electrical contractor. Plaintiff had no liberty or property interest in having access to the building.

In *Royer ex rel. Estate of Royer v. City of Oak Grove*, 374 F.3d 685 (8th Cir., 2004), the appellate court rejected arguments similar to Segaline's. In *Royer*, the former president of several nonprofit foundations, sued a city for allegedly interfering with his rights of free association and due process when the city partially banned him from a public building. One of the foundations operated a daily lunch service in

the public building. Plaintiff was accused of sexually harassing one of the employees who worked in the building with the lunch service program.

The Eighth Circuit rejected plaintiff's due process claim and upheld the trial court order granting summary judgment:

To implicate the Due Process Clause of the Fourteenth Amendment, Royer must show that he has a property or liberty interest that has been affected by the government action. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *City of Pierre v. FAA*, 150 F.3d 837, 842 (8th Cir., 1998). Like the District Court, we agree that Royer can point to no property interest in having unlimited access to a public building. Consequently, the only constitutionally protected interest in play is Royer's right to freedom of association.As we have already noted, Royer's associational rights were not significantly affected; rather, the impact on his rights was minimal at best. Consequently, we cannot say that any due process protection was required.

Royer, 374 F.3d at 689

As in *Royer*, Segaline has no due process rights implicated by the no trespass notice. He had no property interest in having access to the L & I building. In this sense, Segaline's claim is readily distinguishable from *Wayfield v. Town of Tisbury*, 925 F. Supp. 880 (D.Mass., 1996), upon which plaintiff heavily relies. *Wayfield* held that a library patron has a liberty or property interest in having access to a public library. The ability to use a public library implicates important First Amendment rights. *Wayfield*, 925 F. Supp. at 888. No similar rule of law generically applies

to public buildings or to the lobby of the L & I building.

The L & I building is a nonpublic forum and in order to satisfy the First Amendment, the actions of L & I must merely be reasonable. *See Families Achieving Independence and Respect v. Nebraska Department of Social Services*, 111 F.3d 1408 (8th Cir., 1997) (lobby of state welfare office held to be a nonpublic forum and control over access can be based upon subject matter and speaker identity, so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral).

Plaintiff also relies upon *Sidham v. Peace Officer Standards and Training*, 265 F.3d 1144 (10th Cir., 2001) for the proposition that the actions of the state may constitute “effective revocations” implicating a liberty interest. *Sidham*, however, does not involve a claim of liberty interest regarding access to a building. In *Sidham* a police officer claimed that the defendant governmental agency had imposed a stigma by informing others that the police officer had committed acts of misconduct. As a result, the police officer claimed, the defendant had foreclosed his freedom to act as a police officer, even though his certificate qualifying him to act as an officer had not been revoked.

Segaline makes no similar allegation in his suit against L & I. Even if he had made such an allegation, there is no evidence to support it, and L

& I would be entitled to summary judgment on that ground. See, e.g., *McGuire v. State*, 58 Wn. App. 195, 791 P.2d 929 (Div. 2, 1990) (affirming summary judgment dismissing plaintiff's claim of loss of liberty interest, wherein plaintiff failed to present any evidence he was deprived of other employment opportunities resulting from the alleged damage to plaintiff's reputation by defendant).

d. Plaintiff received procedural due process because he was provided an opportunity to present his side of the story prior to the no trespass notice being issued.

Assuming plaintiff did have a significant property or liberty interest in having access to the L & I building, Croft was still entitled to summary judgment because plaintiff received procedural due process.

“[D]ue process is flexible and calls for such procedural protection as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). “Due process of law guarantees ‘no particular form of procedure; it protects substantial rights.’” *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (quoting *NLRB v. Mackay Co.*, 304 U.S. 333, 351, 58 S. Ct. 904, 82 L. Ed. 1381 (1938)).

In *Neinast v. Board of Trustees of the Columbus Metropolitan Library*, 346 F.3d 585 (6th Cir., 2003), a library patron filed a civil rights

action against the library after he was evicted from the library for going barefoot. The Sixth Circuit upheld the trial court's order granting summary judgment in favor of the Library. The Sixth Circuit held that the plaintiff received procedural due process when, immediately prior to his eviction, library employees discussed the eviction process with plaintiff and notified him that "he was harassing the staff by continuing to come in without his shoes on." *Id.*, 346 F.3d at 598. Plaintiff then expressed his disagreement with the library's decision and explained that the library policy only allowed the staff to "ask him to leave." *Ibid.* The Sixth Circuit held that this minimal exchange satisfied procedural due process because it afforded plaintiff "an opportunity to present his side of the story." *Ibid.*

Similarly, Segaline received procedural due process. Once L & I staff complained to their supervisor of Segaline's disruptive behavior, L & I met with Segaline in an unsuccessful attempt to resolve the problem. CP52. At this meeting, Segaline was told that they may ban him from the premises until he could deal with L & I staff in a civil manner. CP 439, 469). Later, when the no trespass order was served upon plaintiff, Segaline explained why he did not believe the no trespass notice was justified. CP 469; Dep trans., p. 59. Segaline was afforded "an opportunity to present his side of the story." *Boals v. Gray*, 775 F.2d 686,

690 (6th Cir., 1985) (quoting *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). Thus, even if Segaline was entitled to procedural due process, L & I afforded him such due process.

3. Croft is entitled to qualified immunity because his actions did not violate clearly established due process rights at the time the constitutional deprivation allegedly occurred

Under the second element of the *Saucier* test, Croft is entitled to qualified immunity as Segaline has not met his burden of showing Croft's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "While the right to due process is 'clearly established' by the due process clause, this level of generality was not intended to satisfy the qualified immunity standard." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir., 1995). Rather, courts must look to the *Mathews* test.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court set forth three factors that normally determine whether an individual has received the "process" that the Constitution finds "due":

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335

By weighing these concerns, courts can determine whether a State has met the "fundamental requirement of due process" – "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. As the Ninth Circuit stated in *Brewster v. Board of Education*, 149 F.3d 971, 983-84 (9th Cir., 1998):

[B]ecause procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims "can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir., 1989) (quoting *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir., 1987)) (internal quotation marks omitted).

Defendant Croft is entitled to qualified immunity because there is no case law clearly establishing that Segaline was entitled to procedural due procedural due process prior to issuance of the no trespass notice.

4. Croft is entitled to qualified immunity as to plaintiff's due process claims because a reasonable official would not recognize that his actions violated clearly established law.

"The Supreme Court has made clear that qualified immunity provides a protection to government officers that is quite far-reaching.

Indeed, it safeguards “all but the plainly incompetent or those who knowingly violate the law” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

As long as an official could reasonably have thought his actions to be consistent with the rights he is alleged to have violated, he is entitled to immunity. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In making this determination, of qualified immunity, the court must examine both the law that was clearly established at the time of the alleged violation and the facts available to the public official at that time, and then determine, in light of both, whether a reasonable official could have believed that his or her conduct was lawful. *Anderson v. Creighton*, 483 U.S. at 641; *Paff v. Caltenbach*, 204 F.3d 425, 431 (3rd Cir., 2000).

The facts available to Croft at time he issued the no trespass notice were such that a official could have reasonably believed he could lawfully issue the no trespass notice. The East Wenatchee Police first suggested to Croft that he issue such a notice. The police directed Croft to contact the security department at a local mall to obtain a form for the notice, which Croft did. Subsequently, Croft contacted a Washington State Patrol (WSP) Trooper assigned to assist L & I with workplace violence issues. The Trooper told Croft that L & I can serve a no trespass notice on people

prohibiting them from entering public buildings and that the trooper had enforced such notices. CP 379.

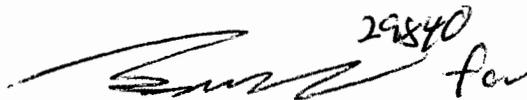
Croft was entitled to rely upon law enforcement personnel as to the legality of issuing the notice. Croft is entitled to immunity as a reasonable official would not recognize that his actions in issuing the no trespass notice violated clearly established law.

III. CONCLUSION

This court should affirm the superior court's grant of summary judgment dismissing plaintiff's claims against the defendants.

RESPECTFULLY SUBMITTED this 1 day of June, 2007.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY dn
DEPUTY

NO. 35823-9-II

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

MICHAEL SEGALINE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND
INDUSTRIES, AND ALAN CROFT,

Respondents.

NO. 35823-9-II

(Thurston County Cause
No. 05-2-01554-1)

PROOF OF SERVICE

I, Marsha Staggs, hereby certify that on June 1, 2007, I caused to be served a copy of the following document:

RESPONDENTS' BRIEF

to the attorney for Appellant, as set forth below:

Attorney for Plaintiff:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of June 2007, at Tumwater, Washington.

Marsha Staggs
MARSHA STAGGS