

NO. 42945-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL SEGLAINE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondent,

BRIEF OF APPELLANT

12 MAR 15 PM 11:17
STATE OF WASHINGTON
BY *[Signature]*
Clerk of Court

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ASSIGNMENT OF ERRORS, AND ISSUES:

I. The trial court erred in dismissing the Negligent Supervision cause.

A. Negligent supervision is distinct from the doctrine of *respondeat superior*, and is separately actionable even if Mr. Croft is dismissed.

B There is a genuine issue of material fact for each element.

1. Defendant had a duty to protect plaintiff from violations of State law, malicious prosecution and violation of Civil Rights.

2. Defendant violated its duty by failing to train and supervise its employees and by affirming its employees' wrongful acts.

3. Plaintiff presented competent evidence of damages

II. The trial court erred in dismissing the Malicious Prosecution action.

A. Elements of proof 1, 3, and 5. are not disputed.

B. There is a genuine issue of material fact regarding "Want of probable cause"

1. Criminal case dismissal is prima facie lack of probable cause.

2. The "no trespass" notice is not automatic probable cause

a. The trespass defendant is entitled to claim a right of entry

b. A "trespass notice" is not presumed valid, as a court order.

c. A "trespass notice" is challengeable for due process and substance.

3. Mr. Segaline established a genuine issue of material fact and

law that his State and Constitutional rights were violated.

- i. State License Law property and due process rights.
 - ii. Liberty interest and due process, Amend. 1 and 14.
 - iii. Property interest in license and due process, Amend. 14.
 - iv. Liberty and due process right to Free Speech neutrality .
4. Defendant failed to establish probable cause by making a full and fair disclosure of facts prior to prosecution.

C. There is a genuine issue of material fact as to Malice.

1. Malice may be knowledge of innocence, ill will, or advantage.
2. Malice was evidenced by reckless disregard of plaintiff's rights

III .The trial court erred in denying plaintiff's "continuing violation" statute of limitations theory for the Civil Rights cause, as a matter of law

A. The trial court erroneously concluded that it had no authority to rule upon the matter based upon the "law of the case" doctrine.

B. Even if the trial court could not rule on this issue, the Appeals court should consider this issue under RAP 2.5 (C)(2).

C. The 42 USC 1983 cause of action is timely per established law.

IV. There is a genuine issue of material fact on the merits of the 42 USC cause of action, so if timely, it should be remanded for trial.

A. The "violation of rights" prong has been presented supra.

B. There is no qualified immunity for Mr. Croft.

STATEMENT OF CASE

A. STATEMENT OF PROCEDURE

The First Amended Complaint, joining Alan Croft individually for a 42 USC 1983 action, was allowed as of August 3, 2009; (CP 236-7) The statute of limitations for that cause of action is 3 years. In the initial action at the trial court level, the civil rights action was dismissed based upon the holding that it commenced in June, 2006 when Mr. Croft issued a notice of trespass against Mr. Segaline. CP 238-40. The court of Appeals upheld the dismissal, CP 258-9. The Supreme Court upheld that portion of the Court of Appeals decision that determined that the cause of action first accrued in June 2006. CP 260; 269-271 However, no court ruled whether the Civil Rights cause was timely under a continuing violation theory. The Washington State Supreme Court found the argument not ripe:

For the first time on appeal Segaline argues that his claim is timely under the continuing violation doctrine. Neither the trial court nor the Court of Appeals addressed this argument. This court has no record upon which to address it now and declines to do so. CP 269

Fn. 8, *Segaline v. State* 169 Wn. 2d. 467, 238 P.3d 1107 (2010).

B. STATEMENT OF FACTS

From 1992 to 2003, plaintiff Mr. Segaline obtained electrical permits for his business, Horizon Electric, without incident. In June, 2003, some L & I staff complained about 2 “communication” incidents with Mr. Segaline.

Alan Croft is the regional Safety and Health Coordinator for the East Wenatchee Department of Labor and Industries. (L & I) CP 40. Mr. Croft requested an opinion, process, or protocol from the attorney general via his Chain of command, regarding when licensee/members of the public may be excluded from the L&I Office. His numerous requests began shortly after he met with plaintiff on June 19, 2003. CP 42—4. He needed guidance on the issues with Mr. Segaline, and he also made a general request when he learned that his counterparts statewide were concerned about the same issue. CP 46. There is no written departmental policy or procedure on this issue, CP 48. The common practice would be to “deal with” the incident locally, then to refer it “eventually” to the security coordinator for the department, contact the person of interest and consider the level of threat the person presents. CP 48,49.

Mr. Croft never received any guidance from his superiors on this issue; CP 47; he decided to issue the notice without any direction from any other L & I employee. CP 173—184. In October, 2003, (after Mr. Segaline had been issued a “trespass notice,” had been prosecuted, and after the charges had been dismissed) Security Coordinator Sgt. Patty Reed, CP 49, informed him she had still not heard back from the attorney general with a requested advisory opinion.. CP 45. Mr. Croft continued to ask for help, because he was never sure that it is ever permissible for L

& I to use a “trespass notice” as to persons like Mr. Segaline, and he knew the “notice” might be illegal prior to issuing it in June, 2003. CP 71—2. Mr. Croft testified that he had never met Mr. Segaline, and was not present for any of the incidents being complained about; when he decided to meet with Mr. Segaline on June 19, 2003, he had not concluded that Mr. Segaline had intimidated or harassed any L & I staff, or had disrupted business. CP 52. Mr. Dave Whittle, a supervisor, was the other person that Mr. Croft invited to the June 19 meeting with Mr. Segaline. No security staff was invited because he had no security concern. CP 53,54. Mr. Segaline was not notified that the meeting related to any security concerns or to his right to enter the L & I office, or to any allegations that he had harassed anyone.. CP 155. The idea of a “no trespass” notice had not yet occurred to Mr. Croft, and he did not discuss it with Mr. Segaline on June 19. CP 61-62. Both parties agreed to tape record the meeting. CP 55. Mr. Segaline did not yell at the meeting, although he raised his voice a few times. He did not call Mr. Croft any names, or use profanity; he seemed to be trying to remain reasonable. CP 54,55,57. At the end of the meeting Mr. Segaline left, stating he would go and talk to Ms. Guthrie, the supervisor of the office staff from whom he usually purchased electrical permits. CP 155. According to Mr. Croft, his voice was elevated or raised a bit, but he did not yell. CP 56, 57.

When Mr. Segaline left the meeting room and walked out to the public area, Mr. Croft called the police. He did not give prior notice to Mr. Segaline, or request any change in Mr. Segaline's behavior. Mr. Segaline had not refused to leave L & I prior to calling the police; he called the police, yet, he had not asked Mr. Segaline to leave. CP 58—60.

After the meeting June 19 and after Mr. Segaline had left the L&I office, Mr. Croft first heard about a trespass notice from one of the police officers, whom he had called, along with the admonition that excluding a person from a public place might be "controversial" as opposed to trespass from private businesses. CP 62. Later, On June 26, while researching the topic, he discovered RCW § 9A.52.090, and learned that a defense to criminal trespass is whether a person has a lawful claim to remain on the premises. CP 73. After the June 19 meeting, on June 23, Mr. Croft wrote a memorandum to his supervisors, in which he stated:

The right of trespass by the department is being explored. If valid, procedures should be established, including a formal trespass warning form or letter.

If Mr. Segaline's inappropriate behavior continues or escalates, other alternatives should be considered.
CP 198.

It is uncontested in this case that Mr. Segaline never again engaged in behavior that a department staff considered "inappropriate", yet Mr. Croft issued a "trespass notice". There was never a "formal trespass

warning” before issuance of this ‘notice” CP 155-6.

The transcript of the June 19 meeting confirms that no one provided notice to Mr. Segaline of any incident of concern-- there was an assertion to Mr. Segaline that he had made “threats” to the staff. CP 454. Mr. Segaline asked for specifics, but Mr. Croft said, “I don’t know off the top of my head. I’ll have to look at the report.” CP 454. Mr. Segaline denied making threats, and stated he is “very civil”. CP 454. Later in the meeting, Mr. Segaline was told he was being “asked” to send a delegate to go to the L & I office. He replied that he, Segaline, would come in. CP 455. The Department of L & I response was

Alright then we will have to discuss, we will happily discuss, then, how we are going to handle that. We are asking you not to do that as the administrator of the company. OK so you need to make sure that you follow the rules of the company. And all of the rules of the RCW. We are asking you not to come in here because you are harassing our staff and are asking you not to do that. CP 456.

Mr. Segaline again denied harassing the staff, and said he would limit his contact with the staff to strictly business and he would record the transactions with L & I. CP 456.

Mr. Segaline next entered the office of L & I on June 30 (when he was given the “notice of trespass”), August 21 (to purchase an electrical permit) and August 22 (when he was

arrested). Each time, there was no inappropriate behavior by Mr. Segaline. CP 74—6; CP 136,117,118.

Mr. Croft continued to seek justification to exclude Mr. Segaline from the Department of L & I, and repeatedly requested legal opinions from June, 2003 well into October, 2003. CP 220--227; 70—71. He had created the notice, and he directed the staff supervisor, Ms. Guthrie, to use it. CP 65. He had the authority to issue the “no trespass” notice and he had informed the persons in his line authority of the progress of this issue. CP 68—70; 78. 208 He received security officer Patty Reed’s opinion on September 8, 2003, that Mr. Segaline’s actions would not merit removal from the L & I office. CP 415. Yet, after the dismissal of criminal charges, he still sought ways to exclude Mr. Segaline. CP 227.

Mr. Croft knew that a statement that the department is wasting time and that the department should be sued, is not a threat and that similar statements do not support adequate reasons to remove a licensee from a State office. CP 63--64. He also investigated Mr. Segaline, and concluded that Mr. Segaline was not a high risk. CP 77.

Ms. Guthrie is the supervisor for the counter staff in the L & I office. It is her understanding that all members of the public have a right to service in the L & I office. CP 82. She saw Mr. Segaline come into the

office for his business from 1992 to 2003, approximately every 3 months, and during all those years his behavior was not an issue. CP 83; 111-112.

On June 9, 2003 she recalls a telephone call from Mr. Segaline in which he complained about a “bogus CD account”. It was difficult to understand his concerns. CP 90-91. He told her he would bring in a tape recorder, a lot of people would be behind bars, people would be held accountable, and if it costs your job, “so be it”. Then, his voice trailed off, and she thought he hung up, so she hung up the telephone. CP 85—89. This telephone call had been transferred to her from a staff person and Ms. Guthrie thought the staff member felt threatened, but does not really remember more than in her notes. (The record contains no notes by her that the staff member felt threatened.) Mr. Segaline talked loudly but did not yell. CP 87—89. The call lasted less than 5 minutes. CP 113.

On June 10, she saw Mr. Segaline, when he stood on the “public” side of the waist-high counter for 3 or 4 minutes and informed Ms. Guthrie that he planned to tape record the June 19 meeting. CP 91-93. His voice was calm. Ms. Guthrie felt that his plan to tape record the future meeting was an “implied threat.” However, Mr. Segaline did nothing confrontational that day. CP 95—97.

Ms. Guthrie also met with Mr. Segaline in June, for ½ hour, along with Ms. Sanchez, her staff person, for issuing 4 permits. Mr. Segaline

stayed on the “public” side of the counter. He talked very loudly and she felt it was disruptive. Mr. Segaline wanted to purchase 4 permits, one of which Ms. Guthrie said had already been paid out of a CD account. Mr. Segaline waived his hands, but not at her, rather, gesturing at a clock on the wall and saying the department was wasting his time. CP 101—106.

After the June 19 meeting with Mr. Croft, Ms. Guthrie described Mr. Segaline’s parting statements as ‘yelling’, CP 107, in contradiction to Mr. Croft’s opinion that Mr. Segaline did not yell at that time. CP 56-7.

Ms. Guthrie observed on June 30 when Lou Hawkins tried to give the trespass notice to Mr. Segaline. CP 108. Mr. Segaline was in the L & I public area, and he stayed about 5 minutes. Ms. Hawkins pushed the notice to him and he pushed it back to her stating that he had a right to be here and he could come anytime he wanted and he could record if he wanted. His voice became loud after he was shown the notice.. CP 108-110.

There were no other times that Ms. Guthrie had any difficulties issuing permits in the L & I office for Mr. Segaline. CP 121.

Alice Lou Hawkins , one of Ms. Guthrie’s staff persons, also knew Mr. Segaline since 1991, as an electrical contractor. CP 127. Prior to 2003, she never had concerns about his behavior, although she saw him approximately monthly. There were only two incidents—the same two as

Ms. Guthrie-- that she related that were of concern to her. CP 128, 136. In June, 2003, Mr. Segaline was red faced and said “one of us is going to jail”; Ms. Hawkins was uncomfortable with this, and she told Mr. Segaline to leave the department. Mr. Segaline said he could be in the office if he wanted. She testified he was yelling, but could not exactly recall about what. CP 129—131. She said she was intimidated and afraid because Mr. Segaline’s face was red and his voice was loud and for a minute he leaned across the counter and directed his comments to her. However, He left on his own accord. CP 136—139. The meeting lasted only 2 to 3 minutes. CP 139. (vs. 30 minutes, per Ms. Guthrie. CP 101-6)

Ms. Hawkins gave Mr. Segaline the trespass notice on June 30, and he “yelled,” and he told her “we” (L & I) needed to get an attorney. CP 132—135. Ms. Hawkins has issued permits several times to Mr. Segaline since 2003 without incident. CP 141.

Officer Michael Schultz was present and arrested Mr. Segaline, putting on the handcuffs, on August 22, 2003. He relied upon L & I for “cause” for the arrest; he saw no threatening behavior. CP 149, 150.

Mr. Segaline denies ever threatening anyone, rather he states was careful to inform the department personnel that he had a right to be in the building and conduct his business and that they needed to consult an attorney. He informed them that they were trampling on his rights. He

told them he had a right to tape record in the public area, per an attorney who had so advised him. He was not warned (or ever informed) that the department called the police on June 19—he had left the building that day. . He was never provided notice or opportunity for a hearing prior to issuance of the “trespass notice” (which was not signed by any person), handed to him when he entered the department to peaceably transact business on June 30. He peacefully came into the department to do business on August 22, and was arrested without warning, after purchasing a permit the previous day without incident in the same office. CP 154-158; CP 367-377.

He was ultimately charged with the crime of trespass, which charges were voluntarily dismissed by the City of Wenatchee. CP 227. Mr. Alan Croft continued to actively pursued the pattern of depriving Mr. Segaline of his access to the L & I permit desk by confirming to Ms. Guthrie on August 21 2003 that the trespass ‘notice” should be enforced. CP 408; 416. Ms. Guthrie e-mailed to staff that “management” had directed to enforce the “no trespass” notice. After dismissal of the criminal charges, well into October 2003, Mr. Croft branded Mr. Segaline as a law breaker, e-mailing to L & I staff, that Mr. Segaline could enter the premises as long as he did not break “another” law.CP 422.

Mr. Segaline documented damage as a result of the criminal

prosecution, and violations of his rights, CP 154-8; Dr. Mark Mays, (CP 151-53; 159—62) explained, in part:

[a] separate and distinguishable cause of his emotional difficulties has been his incapacity to function as had previously been the case through seeking licenses, authorizations, and as I understand it, inspections, all of which required physical access and contact with this facility. It should be understood that Mr. Segaline's primary investment in life is not in his own marriage and family, since he has none, nor is it in his social group, since that is limited. He's not a person with great interests or activities. His primary investment in his identity and the way in which he connects with other people, is that of his work as an electrician.

ARGUMENT: STANDARD OF REVIEW. The court of Appeals will make a de novo determination regarding the errors of law that are the subject of this appeal. Summary judgment must be denied if there is a genuine issue of material fact, considering the evidence of record submitted by plaintiff to be true. CR 56. Statute of Limitations issue are also issues with de novo review by the Appeals court.

I. THE TRIAL COURT ERRED IN DISMISSING THE NEGLIGENT SUPERVISION CAUSE.

A. Negligent supervision is distinct from *respondeat superior*, and is separately actionable even if Mr. Croft is dismissed.

'An employer can be liable for negligently supervising an employee.' *Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.*, 90 Wn. App. 468, 475, 957 P.2d 767 (citing *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), review denied, 123 Wn.2d

1027 (1994); *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, review denied, 120 Wn.2d 1005 (1992).

An employer is not liable for negligently supervising an employee whose conduct was outside the scope of the employment unless the employer knew, or in the exercise of reasonable care should have known, the employee presented a risk of danger to others. *Thompson v. Everett Clinic*, 71 Wash. App. 548 (1993) (Citing *Peck v. Siau*, 65 Wash. App. at 294 (citing Restatement (Second) of Torts § 317(b)(ii)); see also *Scott v. Blanchet High Sch.*, 50 Wash. App. 37, 44, 747 P.2d 1124 (1987), review denied, 110 Wash. 2d 1016 (1988)).

Still, an employer can be liable even when an employee is acting outside of the scope of employment if the employee was aided in accomplishing the tort by the existence of the agency relation. *C.J.C. v. Corporation of the Catholic in Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1998) (Church liable for negligent supervision of minister); *Thompson v. Berta Ent.*, 72 Wash. App. 531, 538, 864 P.2d 983 (1994)). But liability in this type of instance is limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment. *C.J.C.* (Citing *Bozarth v. Harper Creek Bd. of Ed.*, 94 Mich.App. 351, 354, 288 N.W.2d 424 (1979)).

Separate from the theory of negligent supervision is the traditional notion of *respondeat superior*. *Niece v. Elmview Group Home*, 929 P.2d 420, 131 Wash.2d 39 (1997) (an employer is vicariously liable for the torts of an employee who is acting on the employer's behalf.)

Liability under Negligent Supervision is analytically distinct and separate from vicarious liability. “[S]uch negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of *respondeat superior*.” *Scott v. Blanche High Sch.*, 50 Wash. App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am. Jur. 2d Master and Servant sec. 422 (1970)), review denied, 110 Wash. 2d 1016 (1988).

In this case, both for negligent supervision and vicariously, L & I is liable for the actions of its employees. The employees acted within the scope of their duties, per testimony by Mr. Croft, who also reported his actions to his superiors. He repeatedly requested guidance on this matter and did not receive any assistance from his supervisors. Mr. Croft’s superiors negligently failed to train, advise, supervise, or control Mr. Croft. Thus in addition to being vicariously liable for L & I employees, the additional evidence necessary for a Negligent Supervision case is present. L & I failed to prevent the damage to Mr. Segaline, although it was fully informed before, during and after his actions, and by inaction, endorsed Mr. Croft.

Vicarious liability and a cause of action for negligent supervision are not duplicative—the latter must remain of record in order for the plaintiff to prevail when an employee has been dismissed, as in this case, because of the statute of limitations. *Oja & Assoc. v. Park Towers* 89 Wn.2d 72, 569 P.2d 1141, (1977) held, that dismissal of employees based upon the statute of limitations did not cancel the vicarious liability of the employer, who was timely sued. That case upheld the Court of Appeals decision in the same matter, at 15 Wn. App 356, 549 P.2d 63 (1976), 361:

Under the facts and law of this case, the Statute of limitations defense was uniquely personal to the two construction companies. We therefore reject the contentions by Washington Park Towers . . .

The *Oja* case is still the current authority that a dismissal based upon a personal defense of an agent does not dismiss the principal. (See *Glover v. Tacoma General Hospital* 98 Wn2d 708, 658 P.2d 1230 (1983) regarding settlement whether the settlement by an agent is sufficiently “on the merits” to satisfy all vicarious liability) . *Oja* was also cited in *Bank of America NT & SA v. David W. Hubert, P.C.* 153 Wn.2d 102 (2004), (principal is vicariously liable for an agent’s acts if the agent has not been dismissed on the merits, and a principal can be liable for negligent supervision even if the responsible employee has been procedurally dismissed from the lawsuit.)

In this case, additionally, if the 42 USC 1983 cause of action is not found, in this appeal, to be within the statute of limitations, Negligent Supervision is a necessary cause of action so that the State, which is not otherwise liable for a Civil Rights action, would be liable.

B There is a genuine issue of material fact for each element.

1. Defendant had a duty to protect plaintiff from violations of State law, malicious prosecution and violation of Civil Rights.

Persons have the right to enter public places of business if they are licensed, invited, or otherwise privileged' to do so. *State v. Finley*, 97 Wn. App. 129, 136, 982 P.2d 681(1999). The State has the burden to prove that it properly revoked Mr. Segaline's right to enter the L & I office. Mr. Segaline is a licensed electrical contractor who has a legitimate purpose to enter L & I, and who entered that office at the invitation of the office and to conduct his business. As administrator of his business, he is required that he obtain permits issued by L & I to engage in his business RCW Chapter 19.28. By law, L & I is the issuing and enforcement authority for this license.RCW § 19.28.006 (5).

When a Government agency is an exclusive provider of a certain service, it has no choice but to provide that service. i.e., *Nolte v. City of Olympia* 96 Wn. App 944 (1999), in which a City was the exclusive

provider of water and sewer services, this created a public duty to serve all of the applicable area, :subject to such reasonable conditions, if any, as the law may allow.”, Id at 958. Mr. Segaline, as a licensee, is a member of a particular class of persons for whom the Department of L & I offices is open in order for him to do business, and there is a duty to serve him.

For limited specified reasons, i.e., fraud, incompetence, or failure to remedy a serious violation that presents imminent danger to the public, L & I may revoke or suspend the license (RCW § 19.28.241); Even a temporary emergency action, however, invokes procedural rights. To make an emergency action permanent, L & I must give Mr. Segaline written notice, by registered mail, return receipt requested, with the allegations enumerated , and giving him the opportunity to request a hearing before the Board. He has the right to present witnesses and give testimony, and the hearing must be conducted in compliance with RCW Chapt. 34.05, the Administrative Procedures Act. An impartial Board, the majority of which must agree with suspension, will hear the allegations of the Department. RCW § 19.28.241 (3). Mr. Croft is charged with knowing this process.

The notice of the department to the licensee is effective 20 days after its issuance; if the licensee appeals, the action is stayed pending

appeal. RCW § 19.28.341. The 20 days do not begin to run until a notice in compliance with this chapter is served by certified mail.

As set forth in great detail in the next section of this brief, L & I also has duties to Mr. Segaline based upon his Constitutional rights to due process prior to deprivation of property and liberty, and in a speech-neutral way.

L & I also has a duty to shield Mr. Segaline from the tort of its employees in pursuing Malicious Prosecution of him, elements of which are analyzed in the next section of this brief.

2. Defendant violated its duty by failing to train and supervise its employees and by affirming its employees' wrongful acts.

In addition to vicarious liability, the gravamen of the Negligent Supervision case is that the employer had specific knowledge, or reasonably should have known, of the wrongful act of its employees, and failed to supervise or train them. Mr. Croft's continuous requests for assistance that his superiors ignored, and his on-going information to his superiors support this element.

3. Plaintiff presented competent evidence of damages.

Plaintiff's damages are the same as for the underlying causes, and discussed if contested at that point, i.e. CP 151—162.

II. THE TRIAL COURT ERRED IN DISMISSING THE MALICIOUS PROSECUTION ACTION.

The elements of malicious prosecution are: (1) the prosecution was instituted or continued by the defendant; (2) there was want of probable cause for the institution or continuation of the prosecution; (3) the proceedings were brought or continued through malice; (4) the proceedings terminated on the merits in favor of the plaintiff, and (5) the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942).

A. Elements of proof 1, 3, and 5. are not disputed.

There is no dispute that defendant instituted the prosecution by calling the police and involving enforcement of its “no trespass” notice. There is no dispute that the proceedings were terminated on the merits in favor of Mr. Segaline. CP 227. There is no dispute that plaintiff suffered injury or damages. The record contains extensive references to emotional distress damages. CP 151-3;159-62 Damages as a result of having one's rights violated can be proven, even without an expert opinion, with testimony regarding distress as a result of violation of rights. *Den v.*

Municipality of Metro 104 Wn. 2d 627, 641, 708 P.2d 393 (1985.)

Damages are presumed if one's civil rights are violated. *Miles v. F.E.R.M. Enterprises*, 29 Wn. App 61, 627 P.2d 564 (1981).

Legal damage is established, because he was booked into jail and appeared in court, which is sufficient interference with the person to establish damages that support a claim for malicious prosecution. *Banks v. Nordstrom, Inc.* 57 Wn. App 251, 787 P.2d 953 (1990).

B. There is a genuine issue of material fact regarding "Want of probable cause"

1. Criminal case dismissal is prima facie lack of probable cause.

A dismissal or termination of the criminal proceeding establishes a prima facie case of want of probable cause. The rule, consistently applied in case law to the present, is stated in *Pallett v. Thompkins*, 10 Wash. 2d 697, 699-700, 118 P.2d 190 (1941):

A *prima facie* case of want of probable cause (from which malice may be inferred) is made by proof that the criminal proceedings were dismissed or terminated in plaintiff's favor.

The defendant, can rebut with evidence to show probable cause, in which event the plaintiff must come forward affirmatively with evidence. *Peasley v. Puget Sound Tug & Barge* 13 Wn.2d 485, 125 P.2d 681 (1942).

2.The "no trespass" notice is not automatic probable cause

Plaintiff has fully developed the record regarding disputed facts surrounding the issuance of the “trespass notice”, but L & I maintains that he did not have the right to challenge the underlying validity of that notice as part of the defense to the trespass charges, and therefore that the notice established probable cause.

3. The trespass defendant is entitled to claim a right of entry

The criminal trespass statute, RCW 9A.52.080 allows the defense that the defendant claimed a right to enter and remain on property. In *State v. Batten* 20 Wn. App 77, 578 P.2d 896 (1978) a conviction for trespass was reversed when the trial court failed to allow the defendant to present proof of his claim of right of entry. Washington courts have recognized that a defendant can make Constitutional arguments in defense of a criminal trespass charge. *State v. Gossett* 11 Wn. App 864, 527 P.2d 91 (1974) (allowing a trespass defendant to defend his right to entry based upon his first Amendment right to freedom of assembly.)

A defendant has a right to challenge the factual and legal basis of a trespass notice. *State v. Finley* 97 Wn. App 129 (1999) (the State has the burden to prove that permission to enter or remain was properly revoked)

In *State v. R.H.* 86 Wn. App 807, 939 P.2d 217 (1997), a conviction for trespass was reversed because the prosecution did not carry its burden of proof that the defendant failed comply with all lawful conditions

imposed for access to or remaining on the premises. A verbal no trespass notice was given by a police officer earlier that day, however: *Id.* at 812:

But what R.H. “understood” or “believed” is not relevant to whether his presence was unlawful. Under this analysis, one would be guilty of trespass by returning to property after being unjustly ordered to vacate it. That, the law does not condone. See, e.g. *Cox v. Louisiana* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed 2d 471 (1965)

Thus, even if the state employees believed the “trespass notice” was valid, it did not establish probable cause.

4. A “trespass notice” is not presumed valid, as a court order.

L & I would like the court to treat the “trespass notice” like a no-contact order or warrant, and presumed it is valid.

But the character of a “trespass notice” is not the same as a “no contact” order, or a warrant that has been issued by a magistrate. In *Bender v. Seattle* 99 Wn.2d 582, 664 P.2d 492 (1983) the court distinguished between a warrant obtained by one officer and then served by another, which is the usual process that shields the second officer from an action of false arrest, and one with no intervening fact finder:

A different situation is presented, however, when the same officer provides information to obtain the warrant and then also executes the warrant. When one officer serves both functions, he is not merely directed to fulfill the order of the court; he is in a position to control the flow of information to the magistrate upon such probable cause

determinations are made. We see no distinction between an officer who makes an invalid, warrantless arrest and one who knowingly withholds facts in order to obtain a warrant.

Even court orders are subject to challenge in a criminal proceeding if not issued by a competent court, not statutorily sufficient, vague, or inadequate on its face. *State v. Miller* 156 Wn. 2d 23(2005).

In this case, Mr. Seglaine was arrested pursuant to the direction of Mr. Croft, who also unilaterally issued the “no trespass “ notice, in violation of Mr. Seglaine’s rights. That is why the no trespass notice serves absolutely no function in evidencing probable cause.

5. A “trespass notice” is challengeable for due process and substance.

State v. Green 157 Wn. App 833 (2010) recently held that a “no trespass” notice that fails either procedurally or substantively is insufficient to overcome the defense of lawful entry in a criminal trespass proceeding. In that case, the parent had a right to enter the school of her child. In this case, Mr. Seglaine has a right to enter the L&I building to exercise his license to engage in his occupation.

The *Green* court found that the “no trespass” notice did not, without more, prove that the defendant violated a lawful condition to be present at school. It found that a “notice” is not a judicial order, and is not be given the same deference. The *Green* court found that procedural due process

requires notice and an opportunity to be heard before the government can take a liberty or property interest. (Citing *inter alia*, *Bang D. Nguyen v. Dept of Health Med. Quality Assurance Comm'n* 144 Wn.2d 516, 29 P.3d 689 (2001), a licensing case regarding due process in revocations.)

Mr. Segaline is entitled to both general due process notions and to statutory licensing procedures before his liberty and property interests in his license can be taken away. While in *Green* there was a right to appeal the no trespass' order, but no notice of that right, L & I in this case never notified Mr. Segaline of any right to appeal its issuance of the 'no trespass' notice. The *Green* court reviewed the *Matthews* -- 424 U.S. at 335--test to consider criteria to meet due process requirements: a balancing test between the private interest to be protected, the risk of erroneous deprivation by government procedure, and the government's interest in maintaining its procedure, cited in *Soundgarden v. Eikenberry* 123 Wn.2d 750, 871 P.2d 1050 (1990). The court commented:

Green was not afforded a right to present information, hear from witnesses, or argue the propriety of the restrictions on her statutory rights. The letter implied the administrative notice was final.

. . .

We hold that under the *Matthews* test, without notice of procedures to challenge the notice of trespass, no protection existed to prevent the erroneous deprivation of Greens right to be at her child's school.

The *Green* court also held that the defendant had a right to challenge the factual basis for the no trespass order. The State would also need to prove with competent evidence that the defendant's behavior merited being excluded.

6. **Mr. Segaline established a genuine issue of material fact and law that his State and Constitutional rights were violated.**
 - a. **State License Law property and due process rights.**

Mr. Segaline's property and due process rights were violated, per RCW Chapt. 19.28. (licensing laws) and RCW Chapt. 34.05, (Admin. Procedures Act.)

Mr. Segaline has a property and liberty interest if L & I refuses to serve him and specifically if it withholds the right to purchase a permit. *Mission Springs v. City of Spokane* 134 Wn. 2d 947, 954 P.2d 250 (1998). In the *Mission* case, the plaintiff had a present right to issuance of a building permit. Mr. Segaline had a right to an electrical permit on August 22, 2003. The court in *Mission* found that the building permit was withheld without any process, let alone "due" process. (at 967). Mr. Seglaine's argument is identical and per *Mission*, denial of the permit on August 22 was arbitrary and violated rights set by statute..

- b. **Liberty interest and due process, Amend. 1 and 14.**

Mr. Segaline also has property and liberty rights protected by the Constitution of the United States, First and Fourteenth Amendments. Part of the L & I building is open to the public, and Mr. Segaline is a specific invitee as a licensee who must purchase permits to engage in his occupation. Mr. Segaline's is entitled to due process prior to his right being curbed. The elements of due process minimally are notice and an opportunity to be heard in a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972).

There is a general liberty interest to be in any public place, per the holding in *Chicago v. Morales*, 527 U.S. 41 (1999).

The Supreme Court analyzed three types of forums in *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 103 S. Ct. 948 (1983). The first is a "traditional public forum" which includes streets, parks, public sidewalks, or other public places, which have been devoted to assembly and debate. A public forum designation will require strict scrutiny of any action that restricts expression. Strict scrutiny requires proof of a compelling interest in restriction of the speech, restrictions narrowly tailored to meet the interest, and the existence of alternative channels of communication.

The second *Perry* category is "limited public forum" which is property that the government has intentionally opened for use by the public. The courts will apply intermediate scrutiny to rules that regulate

conduct, but will apply the same strict limitations to content-based decisions or restrictions. Intermediate scrutiny requires that restrictions of speech-related activities be viewpoint neutral and reasonably related to a legitimate interest.

The final category consists of a “non-public” forum, where owners are not restricted.

L&I a public forum, or limited public forum, had no right to limit Mr. Segaline’s participation except in a “viewpoint neutral” way. It could not exclude him because it did not like his speech or ideas.

In addition to the liberty interest in the forum, and a property interest in a licensee’s right to pursue his profession, there is a recognized liberty interest. In *Schwartz v. Board of Bar Examiners* 353 U.S. 232, 238-39 (1957), the U.S. Supreme Court held:

A State cannot exclude a person from the practice of [any] occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment.

One need not be a licensee to have a liberty interest in access to a government building. In *Wayfield v. Town of Tisbury* 925 F. Supp. 880 (D. Mass. 05/21/1996), Appendix I hereto, the plaintiff had an unpleasant confrontation with a library staff person. The library issued a “no

trespass” notice. Several days later; when the plaintiff returned to the library, he was arrested and charged with trespass. The charges were dropped, and the plaintiff sued for deprivation of his constitutional rights without due process.

The *Wayfield* court recognized a property and liberty interest in a citizen’s access to a public library, a public forum. The court opined that public forum analysis would be extraneous if access to the building was related to a privilege or license. The *Wayfield* case held that in a non-emergency situation, a plaintiff is deprived of due process by a trespass notice that summarily bars access to the library.

Mr. Segalini has the right to present in a Malicious prosecution action that he was unlawfully deprived of due process by the trespass notice that was summarily issued in a non-emergency situation, in violation of state licensing laws and general notions of Due Process.

Other U.S. Supreme Court authority supports a general due process right for citizens to use government offices that are specifically established for their use. In *Goss v. Lopez* 419 U.S. 565 (1975) students were suspended for 10 days without due process. The court declared:

Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. *Id at 574— citations omitted*—Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door.

In this case, applying *Matthews* criteria, there was no emergency, and no reason why process was not afforded to Mr. Segaline prior to depriving him of access to the licensing service counter to purchase permits for his business. The nature of the harm to him was extreme, because it prevented him from practicing his profession. The probability of abuse of discretion was great, because there were no established procedures set forth to handle this type of issue. (see *Wayfield* case, Appendix I, discussion at pp 8 *et seq*).The need for extensive protections was great, as already legislatively acknowledged and preserved in the State laws regarding licensing electricians.

c. Property interest in license and due process, Amend.14.

The U.S. Supreme Court has repeatedly ruled that a license to practice one's profession is a protected property right. *Bell v. Burson* 402 U.S. 535, (1971), [attached in total and appended hereto]

Once licenses are issued, as in petitioner’s case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. *Id at 539.*

In addition to statutory due process set by State law, Mr. Segaline has the right to due process prior to interference with his Property as required by the Fourteenth Amendment.

“[i]n reviewing State action in this area, . . .we look to the substance, not the bare form, to determine whether constitutional minimums have been honored.” *Id. at 541.*

Bell holds that the hearing must be meaningful and appropriate to the nature of the case, and :

It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford “notice and opportunity appropriate to the nature of the case” before the termination becomes effective. *Id at 542.*

The record establishes that there was no “emergency” on June 19 that resulted in the need to issue the June 30 “notice of trespass” to Mr. Segaline, or to call the police on June 19 or August 22, or to have Mr. Segaline arrested on August 22.

The due process right exists even if the action on the license is not a revocation. See *Sidham v. Peace Officer Standards and Training, Utah State*, 265 F.3d 1144 (10th Cir. 9/24/2001), in which a state licensing authority claimed it could not have violated a licensee's rights because it did not suspend or revoke the license; it took action, however that deprived the plaintiff of exercising his profession. The *Sidham*, court recognized that actions of the state could constitute "effective revocations." It quoted *Reed v. Village of Shorewood* 704 F.2d 943 (7th Cir 1983) :

The defendants never succeeded in taking away the plaintiffs' license either by revocation or non-renewal. . .but "deprive" in the due process clause cannot just mean "destroy." If the State prevents you from entering your house it deprives you of your property right even if the fee simple remains securely yours. A property right is not bare title, but the right of exclusive use and enjoyment. [Here] the plaintiffs were deprived of their property right in the license even though the license was never actually revoked

d. Liberty and due process right to Free Speech neutrality

Certain types of speech, such as fighting words and 'true threats' receive no protection under the First Amendment. *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797, review denied, 136 Wn.2d 1029 (1998). A 'true threat' is made under circumstances that a reasonable person would

interpret to convey a serious expression of intent to inflict bodily harm. *Id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)). Threatening an individual with financial or personal harm that is not physical does not constitute a 'true threat.' *Knowles*, 91 Wn. App. at 374.

The government may regulate protected speech by view-point neutral, reasonable time, place and manner restrictions. *Knowles*, 91 Wn. App. at 374-75 (citing *City of Seattle v. Ivan*, 71 Wn. App. 145, 152, 856 P.2d 1116 (1993)). The extent of permissible regulation depends on whether the speech occurs in a private or public forum. *City of Seattle v. Huff*, 111 Wn.2d 923, 926-27, 767 P.2d 572 (1989). Speech receives greater protection in the public forum. *Knowles*, 91 Wn. App. at 375.

Private speech may be regulated if the distinctions drawn are reasonable in light of the purpose of the statute and if they are view-point neutral. *Knowles*, 91 Wn. App. at 375-76 (citing *City of Seattle v. Eze*, 111 Wn.2d 22, 32, 759 P.2d 366, 78 A.L.R.4th 1115 (1988)). The reasons set forth by the L & I for excluding Mr. Segaline are not viewpoint neutral, but based upon offense taken at Mr. Segaline's expression of his political views. Mr. Segaline said that L & I overstepping its authority as the "administrative" arm of the government, that it violated his rights by limiting recording of a meeting, that it refused to close a contractor's account that he did not authorize, that he would sue it, etc. Importantly,

Ms. Guthrie's explanation of why she felt "threatened" was not based upon any threat to person or property, but because he said he would bring a lawsuit. These are political issues, not speech creating a true threat. Thus, in addition to his right to enter the state office as a licensee and invitee, he had a right to not be ejected from the office because he expressed viewpoints that were offensive to State staff. There must be Heightened scrutiny of a government action when it is not politically neutral. Under *Cornelius v. NAACP Legal Defense and Educational Fund* 473 U.S. 778, 105 S.Ct. 3439, 87 L.Ed 2d 567 (1985), there is heightened scrutiny of political neutrality in order to eject speakers from a public forum. However, that case distinguishes the holding as to persons who were intended to be benefitted by the government office; Since L&I was a forum created to specifically benefit Mr. Segaline, a licensee, *NAACP*, supports that Mr. Segaline has an enhanced right over even a public forum; action to exclude him must be politically neutral.

Although the L&I office is a forum for his benefit and he could not be excluded except for cause and with due process, and in a free-speech neutral way, Mr. Segaline was excluded because he talked loudly for a few minutes. He never called anyone a name, never used profanity, and never threatened anyone. The purportedly offensive conduct occurred

June 9, 2003, but on every subsequent occasion he entered the premises and conducted his business quietly, peacefully, and uneventfully. Yet, a “no trespass” notice was issued June 30, and he was arrested on August 22. There was no emergency, and no justification for ignoring all of the State and federal protections to his property and liberty interests.

7. Defendant failed to establish probable cause by making a full and fair disclosure of facts prior to prosecution.

Mr. Segaline has presented a genuine issue of fact regarding whether his statutory and constitutional rights were violated by the no trespass notice. L & I cannot rely upon the “no-trespass” notice as a conclusive fact for summary judgment. Rather, L & I must prove that it made to the prosecuting attorney a full and fair disclosure, in good faith, of all the material facts known prior to the arrest and prosecution. *Robertson v. Bell* 57 Wn.2d 505 (1961). Where the evidence presents an issue of fact regarding purported full disclosure, summary judgment is precluded on probable cause and that issue must go to the jury. *Id.* In *Bell*, failure to disclose facts that could be exculpatory regarding the right of a person to take furniture, was deemed lack of full disclosure, and the issue of probable cause properly went to the jury. In this case, L & I disclosed only the fact of the ‘no trespass’ notice, and told the arresting officer,

falsely, that Mr. Segaline was harassing and threatening L & I staff. It did not even disclose that it had one day earlier, uneventfully, sold him a permit. Upon learning of that fact, the prosecutor dismissed the charges. CP 422. L & I withheld facts and there is a genuine issue whether there was a lack of probable cause.

C. There is a genuine issue of material fact as to Malice.

Dismissal of the action and lack of probable cause may create facts adequate to infer malice.. *Peasley v. Puget Sound Tug & Barge Co*, 13 Wn.2d 485 (1942) . When additional proof is necessary:

. . . the 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. *Peasley v. Puget Sound Tug & Barge Co.*, supra at 502.

1. Malice may be knowledge of innocence, ill-will, or advantage.

The rules in the *Peasley* case have been consistently applied. Per *Bender v. Seattle* 99 Wn.2d 582, 664 P.2d 492 (1983):

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 of ill will toward him, or for the purpose of gaining a private advantage as against him.

. . .

. . . if a factual issue as to probable cause or

malice exists, the question must be submitted to the jury. The credibility of witnesses and the weight to be given the evidence are matters that rest within the province of the jury.

In *Bender* the prosecutor was not initially provided with exculpatory information, such as the correct record-keeping of the business person charged with the crime. Upon learning the information the prosecutor dismissed the charge and stated that he would not have charged the case if he had known the entire truth. *Id* at 582—4. In Mr. Segaline’s case, the prosecutor also dismissed the criminal trespass action after learning exculpatory information.

Malice is also described in *Peterson v. Littlejohn* 56 Wn. App 1, 781 P.2d 1329 (1989), as spite, ill will, or personal hatred. Here, the facts show that Mr. Croft knew that the no trespass notice was not valid, but he ordered Mr. Segaline to be arrested anyway; they show that the staff at the L & I office was irritated and preferred not to have to serve Mr. Segaline. There is a genuine issue of material fact that by the trespass action, they would gain an advantage, that is, he would not come into the office, if he was prosecuted for a crime.

Malice was evidenced by reckless disregard of plaintiff’s rights

In *Banks v. Nordstrom* 57 Wn. App 251 (1990), a prosecution

continued after the defendant learned that the accused was innocent; this created a genuine issue of material fact for the jury to resolve. Here, Mr. Segaline cited parts of the record showing that Mr. Croft knew he was not dangerous, CPO 94—97; CP 73—4. knew the “no trespass” notice was bogus, instituted this prosecution in disregard of his rights, and sought to re-prosecute him.

Malice can be shown by a want of probable cause combined with demonstration of feelings of bitterness. *Moore v. Smith* 89 Wn. 2d 932, 578 P.2d 26 (1978) (where police officers had made comments that were less than complimentary to an attorney, who as charged with a crime). Here, L & I mischaracterized Mr. Segaline’s conduct on the day of his arrest, falsely, as threatening and harassing staff, CP 169-70; Mr. Croft continued after the criminal charges were dismissed to try to find some way to issue another “notice” against Mr. Segaline, 419 and he characterized Mr. Segaline as if he had been guilty (i.e. “as long as he *does not break another law*. . . CP 422) falsely implying that Mr. Segaline had violated the law in the past. The affirmative action of continuing a prosecution is a basis to infer malice. *Peterson v. Littlejohn* 56 Wn. App 1, 781 P.2d 1329 (1989). Croft’s conduct shows malice, especially since the record is uncontested that after early June, 2003, Mr. Segaline never was involved in another incident with staff that was

“disruptive.” CP 94—96.

**III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF’S
“CONTINUING VIOLATION” STATUTE OF LIMITATIONS
THEORY FOR THE CIVIL RIGHTS CAUSE, AS A MATTER OF
LAW**

There is no issue of fact, but that the date of the arrest, August 22, 2003, was within 3 years of the filing of both the original complaint and the First Amended complaint (August 3, 2006), which joined Mr. Croft as a defendant on the 42 USC 1983 cause of action. That was the date that the Malicious Prosecution cause of action accrued, and the same factual basis of malice that disregards plaintiff’s rights may also sustain an action 42 USC 1983. *Peterson v. Littlejohn* 56 Wn. App 1, 781 P.2d 1329 (1989). Yet, under the court’s current rulings in this case, the former is timely filed and the latter is not.

A. The trial court erroneously concluded that it had no authority to rule upon the matter based upon the “law of the case” doctrine.

In general, “law of the case” means that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Robinson v. Perez* 156 Wn. 2d 33 (2005). Simply, the prior case on appeal did not rule upon the principle of law of continuing violation in analyzing whether or not the 42 USC 1983 action was timely, and therefore the ruling as to when the cause of action accrued was not “law of the case” that precluded a further ruling on

the continuing violation theory. The trial court was incorrect in denying the motion based upon “law of the case”.

b. The remand placed discretion to rule with the trial court

Statute of limitations issues are subject to reconsideration until final judgment on all claims in a case.

[A] n order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.”

Moratti v. Farmer’s Insurance Company of Washington 162 Wn. App 495 (2011) citing *Washburn v. Beat Equip. Co.* 120 Wn. 2d 246,300, 840 P.2d 960 (1992).

In *Moratti* a court reversed its ruling regarding whether the statute of limitations defense was available to a party, and dismissal at trial was upheld. Here, the case was remanded back to the trial court for all remaining issues. Timeliness of Segaline’s Civil Rights claim based upon a continuing violation remained because the Washington State Supreme Court declined to rule upon it and found that it had not been yet considered in this case. Thus, the trial court erred in denying the motion based upon “law of the case”.

B. Even if the trial court could not rule on this issue, the Appeals court should consider this issue under RAP 2.5 (C)(2).

To prevent the Appeals Court from the undesirable effect of perpetuating erroneous decisions that would work an injustice on parties, RAP 2.5 (c)

(2) provides discretion for the court to re-determine issues previously considered on appeal in the same case. *Roberson v. Perez* 156 WN.2d 33 (2005). Even if this court determines that the previous raising of a statute of limitations issue (although not this issue) previously creates a ‘law of the case’ impediment, it should review the established law on the subject that allows the 42 USC 1983 case to survive based upon the continuing violation theory.

Considering this statute of limitations theory will not cause prejudice to the parties, since as briefed above, Mr. Segaline will have the right to present the evidence relating to the civil rights cause as part of his negligent supervision and malicious prosecution cases. Rather, since the same elements and facts support other timely causes of action, there is an intuitive injustice with ignoring the timing of Mr. Segaline’s arrest as a significant new event establishing a continuing Civil Rights cause of action on August 22, 2003, within 3 years of the amendment date of August 6 2003.

“Law of the case” on a second appeal is narrowly construed; it does not control as to matters on appeal that were not explicitly or implicitly considered in the previous appeal. *State v. Trask* 98 Wn. App 690 (2000). (prior appeal concerned award of interest, second appeal allowed numerous issues regarding interest calculation, where the first appeal did

not precisely brief the issues; the court corrected certain erroneous aspects of prior decision, with specific briefing on those issues, and also reversed part of the rulings in the first appeal.)

If the court does not consider the continuing violation theory in this case, it will be perpetuating an erroneous decision, thus even if it believes that the “law of the case” applies, it should exercise its discretion to consider the arguments herein to prevent a manifest injustice—depriving plaintiff of his cause of action—that would result if the decision is not corrected. *Eserhut v. Heister* 62 Wn. App 10, 812 P.2d 902 (1991).

C. The 42 USC 1983 cause of action is timely per established law.

The U.S. Supreme Court ruled in its benchmark case of *Wilson v. Garcia* 471 U.S. 261, 85 L.Ed. 2d 254, 105 S.Ct. 1938 (1985) that the state tort statute of limitations applies for Civil Rights causes of action. However, that case does not control how to determine whether the facts fall within the statute of limitations. The decisions in the prior appeal of this case rule that Segaline’s causes of action accrued by June 30, 2003, but do not consider the theory of continuing violation.

The controlling law under 42 USC 1983 as to when the cause of action arose—as opposed to the length of the statute of limitations—is federal law. *Robinson v. The City of Seattle* 119 Wn. 2d 34, (1992). If the facts of

a case demonstrate that the actions are part of a continuing pattern of deprivation of rights, that culminated with a major act within the statute of limitations, then the 42 USC 1983 case is not time barred. *Kimes v. Stone* 84 F.3d 1121 (9th Cir. 05/22/1996) Although the Court of Appeals in the initial appeal of the instant case before the bar defined Segaline's cause of action as first accruing on June 30, 2003, (when Segaline was handed the "no trespass" notice) there is no dispute that the August 22 arrest was part of a pattern of closely related actions that involve issuance and enforcement of the "no trespass notice", all initiated by the same persons, establishing a continuous pattern of depriving plaintiff of his constitutional right to enter the Dept. of L & I to pursue his licensed business. If acts are related closely enough to create a continuing violation and at least one of the acts falls within the statute of limitations, the case is timely. *Green v. Los Angeles County Superintendent* 883 F.2d 1472, 1480 (9th Cir. 1989) --Appendix # II hereto. Failure to allow a case based upon a continuous violation is an error of law. *Sosa v. Hiramoka* 920 F.2d 1451 (9th Cir. (1990)), (dismissal reversed when continuing acts supported one theory of deprivation of rights.) Accord, *Gutowsky v. County of Placer* 108 F.3d 256, 97 Cal. Daily Op. Serv. 1684 (9th Cir. 03/06/1997)

The U.S. Supreme Court reviewed and approved a 9th Circuit Court of

Appeals civil rights employment case, allowing a continuing violation theory to justify the timeliness of a case, *National Railroad Passenger Corp. v. Abner Morgan* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed. 2d 106, 2002 SCT.0000110. (hostile work environment discrimination action is timely if at least one hostile act that fits a pattern or type falls within the statute of limitations.) subsequently, the 9th Circuit has applied this principle. *Kang v. U. Lim America* 296 F.3d 810 (9th Cir. 2002) held:

When an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment maybe considered by a court for the purpose of determining liability.

Kang, citing *National Railroad Passenger Corp.*

Washington courts have also consistently and correctly applied federal law regarding the theory of continuing violation. *Milligan v. Thompson* 90 Wn. App 586, 953 P.2d 112 (1998) held that although the precipitating event for 42 USC 1983 action was more than 3 years prior to the filing date for the case,

discriminatory acts emanating from the same discriminatory **We see no reason to bar recovery for conduct occurring after the demotion and within the applicable statutory time period.**

Id at 594.

The doctrine of continuing violations applies to two types of employment situations: serial violations and systemic violations. (citations omitted.) Milligan

alleges serial violations, , violations composed of a number of animus, each act constituting a separate actionable wrong. (cit. omitted.) If at least one of the discriminatory acts in the series falls within the limitations period, and there is a substantial relationship between the timely and untimely claims, the continuing violation doctrine allows the plaintiff to reach back and recover for the earlier acts outside the limitation period.

Id at 595—596.

Here, Segaline was arrested within the Statute of limitations period and deprived of his liberty; that act was related to the June 30 issuance of the trespass letter, and also was an act initiated by Mr. Croft, that continued the deprivation of his Civil Rights.

Another recent Court decision that articulated criteria for applying the continuing violation doctrine, is *Missie Lewis v. State of Arizona* 2011.DAZ.0001514 (D.Ariz. 08/22/2011):

The factors a district court may consider in determining whether the new claim is reasonably related to the allegations contained in the EEOC charge include “the alleged basis of the discrimination, dates of discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred. In addition, the extent that those claims are consistent with the plaintiff’s original theory of the case” *B.K.B. v. Maui Police Dept.* 276 Fed. 3d 1091, (9th Circ. 2002)

Other federal courts in the 9th Circuit, widely recognize the theory of continuing violations, sometimes called “systemic policy” (an

organization-wide practice) and claims of a series of related acts against an individual. *Andrews v. Hafey* 2006.ECA.0006928(E.D.Cal 06/12/2006) (Citing *Green*). Also see *Anthony v. County of Sacramento* 845 F. Supp 1396 (E.D. Cal. 1994), Appendix III hereto, an example of a case applying the continuing violation to a 42 USC 1983 claim. The weight of authorities evidences that this court would perpetuate a clearly erroneous decision unless it rules the 42 USC 1983 action timely.

VI.THERE IS A GENUINE ISSUE OF MATERIAL FACT ON THE MERITS OF THE 42 USC

Although L & I did not move on remand for summary judgment on the merits for the 42 USC 1983 case, the trial court granted summary judgment ruled in 2006 alternatively, both procedurally and on the merits—and this ruling has never been reviewed by an appellate court although it was briefed in the prior appeal. Mr. Segaline has presented competent evidence of a genuine issue of material fact for each element.

This cause is based upon the statutory language of 42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A. The “violation of rights” prong has been presented supra.

For a person to be liable under this statute, there must first be a violation of/ taking of a liberty or property interest. *Becker v. Washington State University* 165 Wn. App 235 (2011). This prong has been analyzed under state law and federal law, previously in this brief.

Proximate cause is proven if the individual directly participated in the deprivation of rights, or set in motion a series of events which the actor should reasonably know would cause another to suffer a constitutional injury. *Arnold v. International Business Machines* 637 F.3d 1350, 1355 (9th Circ.1981) cited in *Moranga v. Vue* 85 Wn. App 822, 935 P.2d 637 (1997) at 834. Mr. Croft has taken unilateral responsibility that the issuance of the no trespass notice was his idea, which he ordered his staff to enforce, and which he tried to renew after dismissal of the trespass prosecution.

. B There is no qualified immunity for Mr. Croft.

Becker, a 2011 case, sets forth the elements of immunity (at 254):

Government officials are protected from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. [citations omitted]. The allegations of blatant disregard for established regulations give rise to an inference of arbitrary or capricious action. [citations omitted.] Whether a government official enjoys qualified immunity is a purely legal question. [citations omitted]

The first prong of immunity analysis—that of whether a clearly recognized right has been violated—has been addressed throughout this brief. The second prong, whether Mr. Croft (or whether a reasonable state official) could have in good faith thought that his actions are consistent with known constitutional rights, also must be resolved in plaintiff’s favor.

The evidence of record shows that Mr. Croft’s knew procedural requirements and that his authority was limited by state law, through his statement to Mr. Segaline in the June 19, 2003 meeting that a licensees must follow all of the RCW’s. CP 456. As a state employee Mr. Croft is responsible for knowing the license statute and the administrative procedure act. Mr. Croft also admitted that he knew that the “no trespass” notice might violate Mr. Segaline’s rights, and he was concerned enough to ask for guidance from his superiors, and that he never received the guidance, and he does not know even today if issuing the notice was

constitutionally permissible. CP 42-4; 71—2; A reasonable administrator would know that he was violating Mr. Segaline’s rights.

Mr. Croft also acted arbitrarily—He admitted that he did not think Mr. Segaline was dangerous based upon his own investigation CP 77 and he did bring security officers to the meeting with Mr. Segaline. CP 52-4. He never saw Mr. Segaline threaten anyone, and he was unable to tell Mr. Segaline at the June 19 meeting about even one such incident. CP 454. His staff told the officer, falsely, on August 22 that Mr. Segaline was threatening staff. There was no physical threat or emergency –The staff complained on June 10, but the “notice” was issued June 30, and there were no ensuing incidents of concern.

In the previously cited *Mission* case, (*Id.*, at 968) a City Council action denying a permit that was properly ready for issuance was not entitled to qualified immunity. Here,. Mr. Croft directed staff to have Mr. Segaline arrested for applying for a permit to which he was entitled, at the L&I office. This was arbitrary and he is not entitled to immunity..

Like the bad faith requirement in malicious prosecution, a defendant acting with recklessness or gross negligence to violate rights of a plaintiff acts with sufficient intent and knowledge to trigger protections

of the Fourteenth Amendment and 42 USC 1983. *Peterson v. Littlejohn* 56 Wn.App 1, 781 P.2d 1329 (1989). Mr. Croft knowingly violated Mr. Segaline's rights and he did not wait for the legal opinion that he had requested, he ignored the security officer's opinion that there was no cause to exclude Mr. Segaline, CP 415, and he did not follow the due process required by State Law. *Vinson v. Cambell County Fiscal Court* 820 F.2d 194 (6th Cir. 1987).

Because Mr. Croft was fully aware that there was no procedure or practice that allowed a licensee to be barred from L&I by summary issuance of a piece of paper, he is not protected by qualified immunity from being a defendant in the cause of action of violation of 42 USC 1983.

CONCLUSION: The court should reverse the summary judgments for the Negligent Supervision and Malicious Prosecution actions and remand for trial, and the court should rule that the 42 USC 1983 action as to Mr. Croft is timely and remand for trial.

Respectfully submitted this 14th day of March, 2012.



Jean Schiedler-Brown, WSBA # 7753

For Appellant, Michael Segaline

WAYFIELD v. TOWN OF TISBURY, 925 F. Supp. 880 (D.Mass. 05/21/1996)

- [1] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
- [2] 92-11461-RCL
- [3] 925 F. Supp. 880, 1996.DMA.0000108<<http://www.versuslaw.com>>
- [4] May 21, 1996
- [5] **DAVID WAYFIELD, Plaintiff**
v.
TOWN OF TISBURY, et al., Defendant
- [6] DAVID WAYFIELD, Plaintiff, [PRO SE], Vineyard Haven, MA. , For TOWN OF TISBURY, Defendant: Regina M. Gilgun, Merrick & Louison, Boston, MA. Douglas I. Louison, Merrick and Louison, Boston, MA.
- [7] Reginald C. Lindsay, United States District Judge
- [8] The opinion of the court was delivered by: LINDSAY
- [9] OPINION
- [10] Lindsay, District Judge.
- [11] This matter is before the court on the defendants' motion for summary judgment. The plaintiff, David Wayfield, has one remaining claim, others having been disposed of by the Court of Appeals for the First Circuit (Wayfield v. Tisbury, No. 93-1535, slip op. (1st Cir. Nov. 29, 1993)) or by an order of this court (Wayfield v. Tisbury, No. 92-11461, slip op. (D. Mass. Sept. 8, 1995)). Wayfield claims that officials of the Vineyard Haven Public Library in Tisbury, Massachusetts failed to afford him constitutionally-required due process when they suspended his library privileges without a hearing. The defendants, Marjorie Convery, director of the library, and the library trustees, assert that Wayfield has no liberty or property interest in access to the Vineyard Haven Public Library' and that, for that reason, his due process claim must fail.
- [12] For the following reasons, the defendants' summary judgment motion on this claim is DENIED.

APPENDIX I

[13] I. Standard for Summary Judgment

[14] Summary judgment is appropriate as to a claim or defense "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of establishing the lack of a genuine, material factual issue. *Snow v. Harnischfeger Corp.*, 12 F.3d 1154, 1157 (1st Cir. 1993), cert. denied, 130 L. Ed. 2d 15, 115 S. Ct. 56 (1994) (citing *Finn v. Consolidated Rail Corp.*, 782 F.2d 13, 15 (1st Cir. 1986)). It appears that there are no disputed material facts in this case. The question to be decided therefore is whether the defendants are entitled to judgment as a matter of law. The court concludes that they are not.

[15] II. Facts

[16] Except where otherwise noted, the following facts are not disputed in this case, and where there are disputes about the facts, those disputed facts are not material to the disposition of the present motion.

[17] Wayfield is an adherent of a movement called "historical revisionism." He believes that the Vineyard Haven Public Library "discriminates against [white] Christians in the use of its facilities and resources [and] plays down the holocaust of some 50 million Christians in the Soviet Union in Eastern Europe under Judeo-Communism and plays up the Jewish holocaust under the Third Reich." Amended Complaint, pars. 81, 82. For some time he has waged a campaign to expose "his neighbors and especially the children of Tisbury" to writers who espouse the doctrines of historical revisionism. Amended Complaint, par. 13.

[18] On December 14, 1990, Wayfield went to the Vineyard Haven Public Library where he spoke to Convery in an attempt to persuade her to add to the library's collection several books and periodicals on historical revisionism. Wayfield says that sometime later that day -- Convery says the next day -- he was approached by Convery about a menorah that Convery thought was missing from the library. Convery questioned Wayfield insistently about the apparently missing menorah *fn1" and asked to inspect a shoulder bag Wayfield was carrying. Wayfield refused to permit his bag to be inspected. Wayfield's version of what happened is that Convery screamed at him, assaulted him, and tried to grab the shoulder bag. In any event, after the encounter with Convery, Wayfield left the library.

[19] On December 18, 1990, Wayfield received a certified letter from Convery informing him that "as a result of the disruptive incident that occurred on Saturday, December 15, 1990, in the Vineyard Haven Public Library and the disappearance of the menorah, your presence on the property or in the building will no longer be permitted." On December 20, 1990, Wayfield received another letter, this time from the library trustees, advising him that

because of the "disruptive incident which occurred on Saturday afternoon, December 15, 1990," his library privileges were suspended until April 2, 1991. When Wayfield returned to the library in January, 1991, he was charged with trespassing. The trespassing charges were eventually dropped.

[20] It does not appear from the record that in December, 1990 or January, 1991 the library had an established a policy for suspension of library privileges under circumstances like those presented in Wayfield's case.

[21] III. Discussion

[22] Wayfield's claim is that, in depriving him of library access without affording him a hearing, the defendants deprived him of due process of law under the Fourteenth Amendment to the Constitution. The first step in determining whether a plaintiff has a due process claim is to identify a specific liberty or property interest affected by the alleged governmental action. *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). The next step, if a liberty or property interest has been affected, is to evaluate what process was due the plaintiff, and whether he was afforded it. *Id.*; see also *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

[23] In this case, Wayfield argues that he has a liberty or property interest in using the public library. He bases this argument on the library's public nature ("Public libraries are tax-supported institutions, municipal, public service corporations." Plaintiff's Brief on the Question of Due Process and Equal Protection ["Plaintiff's Brief"] at 1) and on his "liberty inherent in his classification of citizenship in the Commonwealth of Massachusetts." Plaintiff's Brief at 2. The defendants do not argue against this interpretation. They declare instead that "plaintiff's interest in attending the Vineyard Haven Public Library is neither recognized by state law nor is it a fundamental or natural right," Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment ("Defendants' Supplemental Brief") at 3. They do not cite any cases to support that statement, and indeed they proceed upon the assumption *arguendo* that the court nevertheless has determined that a right to access to a public library exists.

[24] A. "Rights" Protected by Due Process

[25] 1. Two Classes of "Rights "

[26] "Rights" that merit due process protection under the Fourteenth Amendment may be either of two types. The first of these are those rights deemed "fundamental" or "natural." *Medina v. Rudman*, 545 F.2d 244, 249 (1st Cir. 1976) (citing *Schwartz v. Board of Bar Examiners*, 464 U.S. 232 (1957)); *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625

(1923). The second encompasses rights recognized by state law as being common to all citizens; being so recognized they achieve the status of "liberty" or "property" interests when they are altered or extinguished. *Medina*, 545 F.2d at 250 (citing *Paul v. Davis*, 424 U.S. 693, 708, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)).

[27] Rights in the first class, that is, "fundamental rights," are "chiefly those having to do with marriage, procreation, contraception, family relationships and child rearing and education," and "the rights created by other provisions of the Constitution." *Medina*, 545 F.2d at 250, n.7 (citing *Paul*, 424 U.S. at 712-13). They also include "the right to earn a living and engage in one's chosen profession." *Medina*, 545 F.2d at 249 (citing *Schwartz*, 464 U.S. 232 (1957)); *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923). *Wayfield* does not argue that his asserted liberty or property interest in using the library falls into these categories.

[28] The second class of rights that merit due process protection comprises a much broader spectrum. Specifically, as noted above, it includes rights which have been recognized by state law and have thus become "liberty" or "property" for the purposes of the Fourteenth Amendment. The Supreme Court, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), defined "property" as "an individual entitlement grounded in state law which cannot be removed except 'for cause.'" *fn2" *Id.* at 430 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)); *Goss v. Lopez*, 419 U.S. 565, 573-74, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). The Court went on to enunciate the breadth of possible "property" interests:

[29] Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 93 L. Ed. 1556, 69 S. Ct. 1173 (1949) (parallel citations omitted) (*Frankfurter, J., dissenting*); *Arnett v. Kennedy*, 416 U.S. 134, 207-208, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (parallel citations omitted); *Board of Regents v. Roth*, 408 U.S. at 571-572, 576-577 (1972) (parallel citations omitted). See, e.g., *Barry v. Barchi*, 443 U.S. 55, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979) (parallel citations omitted) (horse trainer's license protected); *Memphis Light, Gas & Water Div. v. Craft*, [436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)] (utility service); *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (parallel citations omitted) (disability benefits); *Goss v. Lopez*, [419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975)] (high school education); *Connell v. Higginbotham*, 403 U.S. 207, 29 L. Ed. 2d 418, 91 S. Ct. 1772 (1971) (parallel citations omitted) (government employment); *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) (parallel citations omitted) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (parallel citations omitted) (welfare benefits).

Wayfield

- [30] Logan, 455 U.S. at 430-31. To this list, the court added the right to use the Fair Employment Practices Act's adjudicatory procedures. Logan, 455 U.S. at 431.
- [31] The Court of Appeals for the First Circuit has found the following to be protected rights which cannot be denied without due process: a doctor's property right in his or her medical license, *Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992); a previous court's finding that the plaintiff merited a license to operate a pool hall, *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983); and the right to apply for a driver's license, *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973). By contrast, courts in this Circuit have found that the "right" to apply for a liquor license, *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir. 1981), reh'g en banc, 662 F.2d 102, and the "right" to be licensed to operate electronic game machines, *O'Neill v. Nantucket*, 545 F. Supp. 449 (D. Mass. 1982), aff'd 711 F.2d 469 (1st Cir. 1983), are not rights protected by the due process guarantee.
- [32] 2. Determining Whether the Right to Access to a Public Library is Recognized by State Law as a Right Common to All Citizens
- [33] Under the analysis in Logan, the first inquiry is whether Wayfield has "an individual entitlement grounded in state law," Logan, 455 U.S. at 430. In this case, neither party has cited any state statute or local law or regulation governing the maintenance and use of the library. Nor has the court found any such state statute or local law or regulation. Recourse to an applicable statute or local law or regulation would help to resolve the issue of whether Wayfield has a protected liberty or property interest, because
- [34] the more narrowly drawn the statute or "the more circumscribed is the government's discretion (under substantive state or federal law) to withhold [the] benefit, the more likely that benefit constitutes 'property,' for the more reasonable is reliance upon its continued availability and the more likely it is that a hearing would illuminate the appropriateness of withholding it in an individual case.
- [35] *O'Neill*, 545 F. Supp. at 452 (quoting *Beitzell v. Jeffrey*, 643 F.2d 870, 874 (1st Cir. 1981)). Most of the cases cited above include an analysis of a state or a local law which creates the plaintiff's alleged "right." In this case, the parties, as noted, have pointed to no such state or local law.
- [36] In the absence of a state statute or local law, the court is left to reason from governing caselaw. The First Circuit's opinion in *Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976), cert. denied 434 U.S. 891, 54 L. Ed. 2d 177, 98 S. Ct. 266 (1977), provides an appropriate framework for analysis. *Medina* involved an application to participate in a greyhound-

rating license. The court in that case, albeit tentatively, stated that

- [37] A state-recognized interest might also exist if [the state] law could be said to confer upon [the plaintiff] a right, upon equal terms with others generally, to be licensed so as to engage in a common activity or pursuit. . . . It seems likely that when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists.
- [38] Medina, 545 F.2d at 250. This excerpt could describe the issuance of a library card and the privilege of using public libraries. Though this theory of due process rights has its genesis and finds its most frequent expression in cases construing rights affecting employment, see, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) (application for bar examination); *Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992) (medical license), the cited language from Medina does not specifically require that the "state-recognized interest" be related to employment. Indeed, the Medina court posited the "common activity or pursuit" rationale as a separate, independent reason for the Supreme Court's holding in *Schwartz*.³
- [39] The court in Medina distinguished the plaintiff's claimed "right" from the category described in the excerpt quoted above by pointing out that "racing licenses have not been viewed by the New Hampshire courts as open to all persons who meet prescribed standards. Rather they are treated as discretionary with the racing Commission." Medina, 545 F.2d 244, 250. Applying this distinction to Wayfield the court is again disadvantaged by the lack of a state statute or local law (or even a policy statement) regarding the library's governing mechanisms. But it seems more likely that library access is intended to be "open to all persons who meet prescribed standards" (e.g., residency and minimum age) than that it is "treated as discretionary" by a supervisory board. L+I
licenses
- [40] One final point: Wayfield argues that the suspension of his library privileges is an occurrence important enough to warrant due process protection. He is correct. There is a distinction in the caselaw between plaintiffs who are applying for licenses and those who seek to bar the suspension or revocation of their licenses. Plaintiffs in the latter class, the already-licensed, have a vested property interest in the license, which forecloses denial without due process. *Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992) (medical license); *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983) (license to operate pool hall); *Medina v. Rudman*, 545 F.2d at 250 ("Doubtless once a license, or the equivalent, is granted, a right or status recognized under state law would come into being, and the revocation of the license would require notice and hearing . . ." *id.*); *Wall v. King*, 206 F.2d 878 (1st Cir. 1953), cert. denied 346 U.S. 915, 98 L. Ed. 411, 74 S. Ct. 275 (driver's license). Cases finding that plaintiffs have a "liberty or property" interest in a previously-granted license have been the foundation for cases determining that plaintiffs have a "liberty or property" interest in applying for a license. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) (right to apply for bar examination); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (right to apply for driver's license). Wayfield held

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring)).

- [48] The rule in Mathews has since been explained by the Supreme Court. Under later cases considering "postdeprivation" due process, it is clear that such due process is an exception, and not the rule. Specifically, it applies in cases in which the government officials who are alleged to have deprived the plaintiff of his or her rights are found not to have been acting in accordance with approved procedure. In these cases, when the "random and unauthorized acts" of a state actor result in a deprivation of property, the proper inquiry is that set forth in Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In those situations
- [49] the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing.
- [50] *Id.*, at 541. The Parratt Court went on to adopt the reasoning of Justice (then Judge) Stevens, writing for the Seventh Circuit in *Bonner v. Coughlin* 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978) and distinguishing the actions of a state official, acting in accordance with state policies, from the actions of a renegade state official:
- [51] ...there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete.
- [52] *Id.*, at 1319.
- [53] In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), for example, the Court found that the plaintiff had a property right in his ability to sue his employer under the Fair Employment Practices Act. In that case, the state, which

Wayfield
library privileges, which were suspended. His case thus falls into the first category -- cases in which the plaintiff already holds a license -- a category in which, the First Circuit has recognized, due process is required.

- [41] Thus, under the analysis set forth in *Medina* and related cases, this court finds that *Wayfield* states a sufficient claim to support a finding that the suspension of his access to the library was a deprivation of a "liberty or property right." The court must next determine whether *Wayfield* was afforded pre- or postdeprivation due process sufficient to satisfy the mandate of the Fourteenth Amendment.
- [42] B. What Process is Due
- [43] *Wayfield's* loss of his library privileges is only actionable under ? 1983 if he was deprived of his liberty or property interest without due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) (citing *Parratt v. Taylor*, 451 U.S. 527, 537, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981)). Thus, the court must determine what process, if any, *Wayfield* was afforded, and whether that process was sufficient under the Fourteenth Amendment.
- [44] The inquiry into the nature of process due a person when his or her rights are curtailed is ordinarily governed by the familiar three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). That test requires that the court consider:
- [45] 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.
- [46] *Id.*, at 335.
- [47] The Court in *Mathews*, retreating from the high-water mark of *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), *fn4" found that so-called "predeprivation hearings" (hearings affording the person whose liberty or property interest is at stake an opportunity to respond before any deprivation of rights is effected) are not necessary before every curtailment of a protected right. Instead, in some cases, a postdeprivation hearing affords sufficient process. Thus, the three-part test quoted above is used to determine whether the necessary safeguards were in place, and is appropriate regardless of when the "process" was afforded, or, in the words of the Supreme Court, when the plaintiff had "notice of the case . . . and [the] opportunity to meet it," *Mathews*, 424 U.S. at 348 (quoting

had negligently scheduled Logan's hearing after the 120-day limitations period, thus extinguishing Logan's right to his claim, was found to have abridged Logan's property right, in violation of the due process clause. Logan, 455 U.S. at 433. Despite the fact that Logan had a claim against the state Fair Employment Practices Commission under state tort law, the Court held that that postdeprivation process was not sufficient to deny Logan his constitutional claim. Such an argument, the Court said, "misses Parratt's point." Logan, 455 U.S. at 435. In Logan, unlike in Parratt, the plaintiff was challenging the state procedure itself, not the unauthorized actions of a state official. The Logan Court made it clear that this distinction is critical to the evaluation of whether postdeprivation due process is sufficient, or whether predeprivation process is required.

- [54] In the case at bar, the difficulty comes in distinguishing on which side of this bright line the actions of the officials of the library fall. The defendants, in their moving papers, make no reference to any written or otherwise established procedure for the suspension of library privileges that existed at the time the officials of the library took action against Wayfield. Nor have the defendants proffered anything which shows what the library has done in other, similar situations, if indeed there have been any. On this state of the record, then, it is not clear whether the appropriate inquiry as to what process is due should take place under the more general test of Mathews or under the exception set forth in Parratt.
- [55] In evaluating which of these inquiries properly governs this case, the court is instructed by the warnings set forth in a more recent Supreme Court case, *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). As recognized by this Circuit's Court of Appeals, *Zinermon* refocused the inquiry on whether predeprivation process was feasible, and on the relative costs (both administrative/economic and costs to liberty or property rights) of having a predeprivation or a postdeprivation hearing. In that case, the plaintiff (Burch) was admitted to a mental institution as a "voluntary" patient. Burch "alleged that at the time of his admission he was in no condition to have executed forms indicating that his admission was voluntary" and should have been "afforded the protection of [the state's] involuntary admission procedure." *Lowe v. Scott*, 959 F.2d 323, 341 (1st Cir. 1992) (citing *Zinermon*, 494 U.S. at 115). Burch claimed the hospital officials had denied him due process by not employing the involuntary admission procedure. The hospital officials contended that the complaint "alleged that their conduct was random and unauthorized" and maintained that Parratt and a similar Supreme Court case, *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), "limited the procedural due process inquiry to the question of the adequacy of [the state's] postdeprivation remedies." *Lowe*, 959 F.2d at 341 (citing *Zinermon*, 494 U.S. at 115). This argument is similar to the argument made by the defendants in the case at bar.
- [56] Applying *Zinermon*, the First Circuit, in *Lowe*, 959 F.2d at 341, said that *Zinermon*, "requires that courts scrutinize carefully the assertion by state officials that their conduct is 'random and unauthorized' within the meaning of Parratt and Hudson, where such a conclusion limits the procedural due process inquiry under ? 1983 to the question of the adequacy of state postdeprivation remedies." *Id.* Accordingly, this court, under the First Circuit's mandate, must be cautious about accepting the defendants' argument that their actions are covered by Parratt, and not by the general analysis of Mathews.

- [57] The First Circuit provides guidance for determining which inquiry is appropriate. In its analysis in *Lowe*, the First Circuit noted that, in *Zinermon*, there had been "three reasons for distinguishing *Parratt* and *Hudson*," *Lowe*, 959 F.2d at 341. First, in *Zinermon*, it was "hardly 'unpredictable' or 'unforeseeable' that hospital officials would need to examine patients' competency prior to their admission to a mental hospital." *Id.* Thus, the state could be expected to be able to anticipate the deprivation at issue. Second, "the Court found that because the deprivation experienced by *Burch* could have been more easily anticipated than those of the prisoners in *Parratt* and *Hudson*, there was a greater likelihood that [the state] could have provided predeprivation process that would have averted *Burch*'s improper admission." *Id.* Third, "because [the state] had delegated the hospital officials broad authority to 'effect the very deprivation complained of here,' their conduct could not be said to be 'unauthorized' in the same sense as the destruction of prisoners' property [in *Parratt* and *Hudson*]." *Id.*
- [58] Applying this reasoning to the case at bar, *Wayfield* can make a colorable argument that (1) the deprivation he experienced was one that the state could be expected to anticipate (it does not require a leap of imagination to think that a patron's library privileges might be suspended); (2) the state could have provided predeprivation process (whether in the form of a warning letter and an opportunity to respond, or a hearing before the trustees, or in some other manner); and (3) that the state had delegated the library the authority to effect the deprivation, so their actions could not be said to be "unauthorized." *Wayfield* does not directly argue this point. However, because he is pro se, the court has a duty to read his papers liberally. See *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *Nestor Ayala Serrano v. Lebron Gonzalez*, 909 F.2d 8, 15 (1st Cir. 1990).
- [59] The defendants' argument is that the "emergency" nature of the situation required such rapid action that postdeprivation process is all that can be required. To support this proposition, they cite a case in which city officials demolished the plaintiff's building without first consulting him. In that case, *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994), cert. denied 130 L. Ed. 2d 419, 115 S. Ct. 512 (1994), the plaintiff's building was observed to be "dangerously close to falling onto [the street] and a neighboring occupied home." *Id.* at 1398. The city tried to call the building's owner, who was not in, and left an urgent message with his assistant. *Id.* Then, pursuant to an emergency provision in the city building code, the inspectors destroyed the building.
- [60] *Harris* is not relevant to the court's decision in this case. The facts are too far removed for any useful parallel to be drawn. In that case, the defendants acted in accordance with a municipal code; in *Wayfield*'s case, there was no applicable code. Perhaps most importantly, in *Harris*, there was an actual, physical, immediate emergency; here, in contrast, *Wayfield* received the letters notifying him of the suspension of his library privileges some days after the "emergency" "disturbance" in question.
- [61] The defendants' argument that their position is analogous to that of the state actors in *Zar v. South Dakota Board of Examiners of Psychologists*, 976 F.2d 459 (8th Cir. 1992) is likewise unavailing. The defendants in *Zar*, unlike the defendants in this case, failed to follow an applicable, written procedure. In that case, the defendant members of the Board

of Examiners of Psychologists ("the Board") failed to implement an established procedure that would have allowed the plaintiff, Dr. Zar, to contest the Board's recommendation that his medical license be revoked. The court found that the actions fit within the Parratt framework, under the Zinermon test, because the state could not have known that its employees would act as they did, since the state had promulgated rules which the defendants had ignored.

- [62] In light of the defendants' failure to make a persuasive argument that the Parratt inquiry property applies to this case, and in light of the First Circuit's warning in *Lowe* to "scrutinize carefully the assertion by state officials that their conduct is 'random and unauthorized' within the meaning of Parratt and Hudson, where such a conclusion limits the procedural due process inquiry under ? 1983 to the question of the adequacy of state postdeprivation remedies," *Lowe*, 959 F.2d at 341, the court finds that the appropriate standard for deciding what process was due Wayfield is the familiar *Mathews v. Eldridge* standard.
- [63] Under that standard, the court must look first at the "private interest that will be affected by the official action." *Mathews*, 424 U.S. at 322. In this case, that interest is significant; other courts have found that the ability to use a public library implicates important First Amendment rights. See *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992); *Brinkmeier v. City of Freeport*, 1993 U.S. Dist. LEXIS 9255, 1993 WL 248201 (N.D. Ill. 1993) (plaintiff who had allegedly harassed library staff-member denied access to library; court finds First Amendment right of access to library and notes the absence of "formal procedure whereby a person may challenge his denial of access to the library" as evidence that "the policy is less than reasonable," *id.* at *6). Thus, Wayfield's claim passes the first prong of the *Mathews* test.
- [64] The second inquiry is "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." *Mathews*, 424 U.S. at 322. The record before the court indicates that Wayfield was afforded no predeprivation process. This fact, combined with the lack of standards or rules governing the suspension of library privileges, leads the court to believe that the risks of erroneous deprivation are great.
- [65] Finally, the court must consider the "Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 322. As noted above, the officials of the library could undertake a number of not particularly onerous prophylactic measures that would protect the due process rights of its patrons without significantly burdening the library. For example, the library could send a letter to patrons who were threatened with potential suspensions, notifying them of the action pending against them and inviting them to argue their cases, in writing or in person.
- [66] The court determines that, under the three-part analysis of *Mathews v. Eldridge*, the defendants did not afford Wayfield adequate due process. Indeed, it appears from the

record in this case that they afforded him no process at all.

[67] IV. Conclusion

[68] For the foregoing reasons, the defendants' motion for summary judgment is DENIED. Given the nature and extent of this ruling, it may be appropriate for the court, sua sponte, to render summary judgment to Wayfield as to the liability of the defendants on his claim. The defendants, however, are entitled, before such a ruling is made, to notice and an opportunity to present evidence and argument as to why that ruling would be inappropriate. *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir. 1979), cert. denied sub nom *Baird v. Pratt*, 441 U.S. 952, 60 L. Ed. 2d 1057, 99 S. Ct. 2181, 99 S. Ct. 2182 (1979). Accordingly, the court orders that the defendants file papers on or before June 10, 1996 setting forth their position as to the granting of summary judgment to Wayfield with respect to the defendants' liability on Wayfield's due process claim.

[69] So ordered.

[70] Judge Reginald C. Lindsay

[71] United States District Judge

[72] DATED: 5/21/96

Opinion Footnotes

[73] *fn1 As it turns out, the menorah was not missing from the library, but had been removed from its customary location and placed behind a shelf of books.

[74] *fn2 As for "liberty" in this context, the First Circuit has commented that, "it has long been held that . . . liberty encompasses much more than the simple right to be free from unwarranted bodily restraint." *Raper v. Lucey*, 488 F.2d 748, 752 (1st Cir. 1973) (citing *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)) (additional citations omitted). The court in *Raper* analogized that case (application for a driver's license) to a case in which a driver's license was suspended. The court found "the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place . . . is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." *Raper*, 488 F.2d at 752 (quoting *Wall v. King*, 206 F.2d 878, 882 (1st Cir. 1953), cert. denied, 346 U.S. 915, 98 L.

Ed. 411, 74 S. Ct. 275). Like the right at issue in *Wall*, the right claimed in *Raper* deserved the protection of due process. *Wayfield* does not specify whether the right he claims is a "property" or a "liberty" right. In any case, the difference between-"liberty" and "property" is of no consequence in this context; the Supreme Court has said that the same test for determining the process due is applied whether liberty or property is at stake, *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).

[75] *fn3 "The case of *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957) (parallel citations omitted), finding a right of due process with respect to bar admissions, can be explained on such a ground (as well as on the ground that the right to pursue an ordinary occupation is, by itself, a fundamental liberty interest . . .)." *Medina*, 545 F.2d at 250.

[76] *fn4 In *Goldberg*, the Court held that recipients of welfare benefits were entitled to a hearing before those benefits were terminated.

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Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 02/06/1989)

- [1] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
- [2] No. 88-5830
- [3] 1989.C09.42446 <<http://www.versuslaw.com>>; 883 F.2d 1472
- [4] submitted: February 6, 1989.
- [5] **BOBBIE JEAN GREEN, PLAINTIFF-APPELLANT,**
v.
LOS ANGELES COUNTY SUPERINTENDENT OF SCHOOLS; LOS ANGELES
COUNTY OFFICE OF EDUCATION; LOS ANGELES COUNTY BOARD OF
EDUCATION, DEFENDANTS-APPELLEES
- [6] Appeal from the United States District Court for the Central District of California, D.C. No. CV-86-4912-WDK, William D. Keller, District Judge, Presiding.
- [7] Bobbie Jean Green, Pro Se. Bellingham, Washington; Lamont N. White, Washington, D.C., for the plaintiff-appellant.
- [8] Tom A. Jerman, Los Angeles, California, for the defendants-appellees.
- [9] William C. Canby, Jr., Charles Wiggins and Diarmuid F. O'Scannlain, Circuit Judges.
- [10] Author: Wiggins
- [11] WIGGINS, Circuit Judge
- [12] Appellant Bobbie Jean Green appeals the district court's dismissal of her discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) and the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1982) because they were untimely. The district court held that Green's Title VII claim was untimely under 42 U.S.C. § 2000e-5(c),(e) because she filed her charge of discrimination with the California Department of Fair Employment and Housing (DFEH) more than 240 days after the last act of alleged discrimination, and the DFEH did not terminate its processing of Green's claim by waiving jurisdiction to the Equal Employment Opportunity Commission (EEOC) until more than 300 days from the last act of alleged discrimination. The district court dismissed Green's

Appendix II

Section 1983 claim as untimely because it was filed more than a year after the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985).

[13] Green appeals the dismissal of both claims. We reverse the dismissal of the Title VII claim and affirm the dismissal of the section 1983 claim.

[14] BACKGROUND

[15] A. Title VII Time Limit Provisions

[16] Under section 706(e) of Title VII 42 U.S.C. § 2000e-5(e),^{*fn1} a complainant must file charges with the EEOC within 180 days of the occurrence of the alleged discrimination. If, however, as is the case here, a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the alleged discrimination, the time limit for filing with the EEOC is extended to 300 days. *Id.*

[17] Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c)^{*fn2} provides that a charge may not be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." The sixty day provision is designed to "give States and localities an opportunity to combat discrimination free from premature federal intervention." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 108 S. Ct. 1666, 1669, 100 L. Ed. 2d 96 (1988). The net effect of sections 2000e-5(c) and 5(e) is that a complainant who wishes to file a charge of discrimination with the EEOC must file the charge with the appropriate state or local agency within 240 days of the alleged discriminatory conduct in order to ensure that the charge may be filed with the EEOC within the 300-day limit. *Id.* Even if the complainant files with the appropriate state or local agency after 240 days, however, "the charge still may be timely filed with the EEOC if the state or local agency terminates its proceedings before 300 days." *Id.*

[18] B. Facts and Proceedings Below

[19] Green was hired by appellee Los Angeles County Office of Education (LACOE) on October 30, 1980, as a teleprocessing analyst. Except for a short period following an automobile accident, she worked in that capacity until either April 6 or April 10, 1984.^{*fn3}

[20] Green filed a charge of discrimination against LACOE with the DFEH alleging race and sex discrimination and sexual harassment. She alleged that she was sexually harassed by other employees and was denied training and relocation because she was a black woman. The charge, which indicated that the most recent incident of discrimination occurred on April

10, 1984, was received by the DFEH on January 24, 1985, 289 days after April 10, 1984. On January 31, 1985, 296 days after April 10, 1984, a DFEH consultant sent Green a letter stating that the DFEH "will waive processing of your complaint to the federal Equal Employment Opportunity Commission. . . . The Department of Fair Employment and Housing will close your case."

- [21] On February 5, 1985, 301 days after April 10, 1984, the DFEH district administrator transmitted Green's charge to the EEOC with a transmittal form, indicating: "Pursuant to the worksharing agreement, this charge is to be initially processed by the EEOC." The worksharing agreement then in effect between the EEOC and the DFEH provided, in relevant part, that each agency was the agent of the other for the purpose of receiving charges; that charges received first by DFEH within 241 and 300 days after the alleged discrimination would be processed initially by EEOC and that the DFEH waived its 60-day period of exclusive jurisdiction over these charges; and that notwithstanding the waiver provisions, DFEH could request in writing, and be granted, the right initially to process any charge.
- [22] On February 10, 1985, the district administrator sent a "Notice of Case Closure" to Green which stated:
- [23] The consultant assigned to handle subject discrimination complaint which you filed with the Department of Fair Employment and Housing has recommended that the case be closed on the basis of processing waived to another agency.
- [24] Please be advised that this recommendation has been accepted and your case has been closed effective 2/07/85.
- [25] Green received a Right to Sue Notice from the EEOC and filed this pro se action on July 28, 1986, alleging claims under both Title VII and section 1983. On November 12, 1987, LACOE filed a motion for summary judgment on the grounds that Green's Title VII and section 1983 claims were untimely. LACOE argued that Green's Title VII claim was untimely under 2000e-5(c) because Green filed her charge after 240 days and the DFEH did not waive its right to process Green's claim until February 7, 1985, 303 days after the latest alleged incident of discrimination. LACOE alleged that Green's section 1983 claim should be dismissed because she failed to file it within one year of Wilson as required under *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). LACOE also argued that Green had failed to establish a prima facie case of race or sex discrimination.
- [26] In a minute order issued January 7, 1987, the district judge held that Green had produced sufficient evidence to defeat the portion of LACOE's motion directed at the merits of Green's Title VII claim, but requested further briefing on the timeliness issues. After receiving additional briefs from both parties, the court issued a second minute order dismissing the action. The district court noted that the January 31, 1985, notice from DFEH was "in the future tense" and the February 10, 1985, notice indicated that DFEH had

accepted a "recommendation" and had closed the case "effective 02/07/85." Based on these facts, the court concluded that "there can be no genuine dispute that the waiver in this case occurred after the expiration of the 300 day limitation period." The worksharing agreement was neither raised by the parties nor discussed by the district court. The court also held that Green had not filed her section 1983 claim within one year from the date of Wilson and that it was thus untimely. This appeal followed. We have jurisdiction under 28 U.S.C. § 1291 (1982).

[27] II

[28] STANDARD OF REVIEW

[29] Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law. See *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 677 (9th Cir. 1984); *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 (9th Cir. 1980). We view the evidence in the light most favorable to Green in order to determine whether there was a genuine issue as to any material fact. See *Ybarra*, 723 F.2d at 677; *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759 (9th Cir. 1980).

[30] III

[31] ANALYSIS

[32] A. Title VII Claim

[33] The issue on appeal is whether Green's claim was filed with the EEOC within the 300-day limitation period contained in section 2000e-5(e). At the outset we must determine the date the 300-day period was triggered. Green contends that the date from which the 300-day period should be calculated is January 28, 1986. Green argues that LACOE's discrimination against her did not end on April 10, 1984, but continued afterwards in the form of denied medical leave and benefits to which she was entitled, as well as poor recommendations to other potential employers. She contends that LACOE's discrimination against her continued until she was formally discharged on January 28, 1986. In essence, Green relies on the "continuing violation" doctrine, which, if employed, would bring the pre-April 10, 1984, conduct at which her claim is directed within the 300-day period. See *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.) ("[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period . . . [because] the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period."), cert. denied, 459 U.S. 971, 74 L. Ed. 2d 283, 103 S. Ct. 302 (1982).

- [34] LACOE contends that we should not consider this argument because it was not raised below. We need not decide this question, however, because the discriminating conduct alleged to have taken place after April 10, 1984, was not contained in Green's EEOC charge.
- [35] Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are "like or reasonably related to the allegations contained in the EEOC charge." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973)). cert. denied 469 U.S. 1108 (1985); accord *Stache v. International Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1234 (9th Cir. 1988). In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges. See *Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators*, 525 F.2d 1354, 1359 n. 3 (9th Cir. 1975) (it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination") (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)); see also *Brown*, 732 F.2d at 730 ("where claims are not so closely related that agency action would be redundant. The EEOC must be afforded an opportunity to consider disputes before federal suits are initiated"). *Stache*, 852 F.2d at 1234 (relying on *Brown*). Finally, "the remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally." *Stache*, 852 F.2d at 1233; see also *Kaplan*, 525 F.2d at 1359.
- [36] Green's EEOC charge is directed solely at conduct which took place while she was still actually working, and does not allege any incidents of discrimination after April 10, 1984. Her claim that LACOE discriminatorily denied her medical leave and benefits, disseminated poor recommendations, and discharged her are not related to her claims that she was sexually harassed and denied relocation and training. An investigation of the incidents which occurred while she was still working would not encompass her subsequent claims that she was denied medical leave and benefits and ultimately discharged because of her race and sex. Thus, even construing the EEOC charge liberally, we find that Green failed to exhaust her administrative remedies with respect to the additional claims. The appropriate date for determining whether Green's claims are untimely is April 10, 1984.
- [37] Green argues that even if the 300-day period was triggered on April 10, 1984, her charge was filed within the 300-day period because the DFEH's waiver of its right to process her charge in the worksharing agreement with the EEOC, which terminated the state proceedings, was effective on January 24, 1985, (289 days after April 10, 1984) when the charge was initially filed with the DFEH.^{*fn4}
- [38] Green's charge was filed with and received by the DFEH on January 24, 1985, 289 days after April 10, 1984. Green's charge is deemed to have been received by the EEOC on the same day, January 24, 1985, because under the worksharing agreement the DFEH was an

agent of the EEOC for the purpose of receiving charges. See *McConnell v. General Tel. Co.*, 814 F.2d 1311, 1315-16 (9th Cir. 1987) (charge filed with the state agency deemed to have been received by the EEOC as provided in the worksharing agreement), cert. denied, 484 U.S. 1059, 108 S. Ct. 1013, 98 L. Ed. 2d 978 (1988). The charge, constructively received by the EEOC, is construed to have been held in "suspended animation" until the termination of the state proceedings, see *Love v. Pullman Co.*, 404 U.S. 522, 526, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972) ("EEOC may . . . hold a complaint in 'suspended animation,' automatically filing it upon termination of the state proceedings"); see also *Commercial Office Products*, 108 S. Ct. at 1669, at which time it is deemed "filed" with the EEOC for purposes of section 2000e-5(e). The question we must resolve is whether the DFEH's waiver in the worksharing agreement of its exclusive jurisdiction over claims filed between 241 and 300 days of the occurrence of the alleged discrimination is self-executing, thus causing the state's proceedings to be terminated and the charge deemed filed with the EEOC upon filing with the DFEH. Before reaching the merits of this issue, we consider first LACOE's contention that the worksharing agreement is not properly before us because it was not raised by Green below nor discussed by the district court.

- [39] Generally we will not consider an issue raised for the first time on appeal, although we have the power to do so. See *Singleton v. Wulff*, 428 U.S. 106, 120-121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). The court will exercise its discretion, however, when "significant questions of general impact are raised; injustice might otherwise result; [or] plain error has occurred . . ." *Aguon v. Calvo*, 829 F.2d 845, 848 (9th Cir. 1987) (quoting *Guam v. Okada*, 694 F.2d 565, 570 n. 8 (9th Cir. 1982), cert. denied, 469 U.S. 1021, 83 L. Ed. 2d 367, 105 S. Ct. 441 (1984)); see also *Bolker*, 760 F.2d at 1042.
- [40] We decide to exercise our discretion and consider the worksharing agreement. The proper interpretation of the waiver provisions contained in the worksharing agreement constitutes a significant question of general impact. The issue has not been decided in this or any other circuit and its resolution will require us to build on the principles contained in *Commercial Office Products*. Resolution of this issue is also of substantial importance. Whether a state's waiver of the 60-day deferral period constitutes a termination of its proceedings "is of substantial importance because the EEOC has used its statutory authority to enter into worksharing agreements with approximately three-quarters of the 109 state and local agencies authorized to enforce state and local employment discrimination laws." 108 S. Ct. at 1669. Additionally, injustice would result if Green, who is appearing pro se, were to "lose her day in court" because she failed to uncover the worksharing agreement until after the district court dismissed the case.^{*fn5} LACOE presents no persuasive reasons why we should not exercise our discretion and consider the worksharing agreement.
- [41] We begin our analysis by noting that the use of worksharing agreements between state and local agencies and the EEOC has been encouraged by Congress and approved by the Supreme Court. Congress has authorized the EEOC to cooperate with state and local agencies by entering into "written agreements" with those agencies in order to promote "effective enforcement" of Title VII. See 42 U.S.C. 2000e-8(b); see also 42 U.S.C. 2000e-4 (g)(1). Accordingly, the EEOC has entered into "worksharing agreements" with approximately 81 of the 109 designated state and local fair employment practice deferral

agencies that enforce state and local employment discrimination laws. *Commercial Office Products*, 108 S. Ct. at 1669. These agreements, like the one at issue here,

[42] typically provide that the state or local agency will process certain categories of charges and that the EEOC will process others, with the state or local agency waiving the 60-day deferral period in the latter instance. In either instance, the non-processing party to the worksharing agreement generally reserves the right to review the initial processing party's resolution of the charge and to investigate the charge further after the initial processing party has completed its proceedings.

[43] *Id.* at 1669-70 (citation omitted).

[44] The Supreme Court found the use of worksharing agreements consistent with 42 U.S.C. §§ 2000e-4(g)(1) and 8(b) in *Commercial Office Products*. 108 S. Ct. at 1675 ("These sections clearly envision the establishment of some sort of worksharing agreements between the EEOC and state and local agencies, and they in no way preclude provisions designed to avoid unnecessary duplication of effort or waste of time."). In *Commercial Office Products*, the Court concluded that a state agency's waiver of the 60-day deferral period, pursuant to a worksharing agreement similar to the one in this case, "terminated" its proceedings under section 2000e-5(c), notwithstanding the provision in the worksharing agreement permitting the nonprocessing party to review the charge after the initial processing party's resolution of the case. *Id.* at 1669-71. reviewing the legislative history of section 2000e-5(c), the Court concluded that the two goals underlying the deferral provisions -- deference to the states and efficient processing of claims -- supported the EEOC's conclusion that waiver of the 60-day deferral period was sufficient to "terminate" the local agency's proceedings. *Id.* at 1671-74.^{*fn6}

[45] Unfortunately, *Commercial Office Products* does not provide direct guidance in resolving the issue in this case: whether the waiver provision in a worksharing agreement is self-executing. Because the state agency sent a notice of waiver to the EEOC before the expiration of the 300-day period, the Court did not consider whether the provision in the worksharing agreement itself or the notice of waiver triggered the state agency's waiver.^{*fn7} We disagree with the parties that the Court's discussion of the worksharing agreement provides any indication one way or the other whether a state's waiver of its exclusive jurisdiction should be treated as self-executing. We refuse the parties' invitation to read into the Court's decision an implicit finding based on isolated language from various portions of the Court's opinion.^{*fn8}

[46] The EEOC argues that its regulations and procedural directives take the position that a state agency's waiver in a worksharing agreement of initial processing rights for specified categories of charges causes a charge within a waived category to be deemed filed immediately with the EEOC.^{*fn9} The EEOC argues that this interpretation is reasonable and thus entitled to deference by this court.

- [47] "It is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *Commercial Office Products*, 108 S. Ct. at 1671. The EEOC's interpretation that the waiver is self-executing is not only reasonable, but in our opinion is the only logical interpretation of the agreement. Section III.E.5 of the agreement provides that all charges received by the DFEH within 241 and 300 days after the alleged discrimination are to be processed by the EEOC. Section III.C provides in part: "In order to facilitate early resolution of [the initial processing of charges assigned to the EEOC], the DFEH waives the rights granted to it under Section 2000e-5(c) . . . of Title VII to have an exclusive opportunity to resolve, for a period of 60 days, the charges assigned to the EEOC for initial processing." Section III.F provides that "the DFEH or the EEOC may request in writing, and be granted the right to initially process any charge." Read together, these sections unambiguously indicate that the waiver under section III.C is self-executing and that no additional steps are necessary to invoke the waiver. We agree with the EEOC that the agreement precludes the DFEH from processing waived charges unless it notifies the EEOC that it wishes initially to process a particular charge. LACOE's argument that section III.F "negates any automatic waiver" is without merit.
- [48] The EEOC's interpretation of the agreement is also consistent with the two goals of the deferral provisions discussed in *Commercial Office Products*. The first, according deference to the states by providing the states a "reasonable opportunity to act under state law before commencement of any Federal proceedings," *id.* at 1672, is not offended by the conclusion that the waiver provision in the worksharing agreement is self-executing. This goal is fully satisfied when states voluntarily waive that opportunity "through individually negotiated instruments." *Id.* Nothing in Title VII requires that the state reiterate its waiver with each charge or provide any particular kind of notice that it does not intend to process a charge.
- [49] The EEOC's interpretation of the agreement is also consistent with the second goal of the deferral provisions, "time economy and the expeditious handling of cases." *Id.* at 1673. To hold that a waiver does not occur until the state agency confirms what it has already stated in the worksharing agreement would simply add a procedural technicality that would delay the processing of charges. Cf. *Love v. Pullman Co.*, 404 U.S. 522, 526, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972) (requiring a "second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality"). As this case demonstrates requiring additional notice might have the effect of rendering untimely a charge filed within the 300-day limit, despite the joint effort of the DFEH and the EEOC to avoid such a result. *Commercial Office Products*, 108 S. Ct. at 1674.
- [50] Finally, although none of the other circuits have considered the question, most of the district courts that have addressed the issue have concluded that the state or local agency waives the 60-day period simply by entering into the worksharing agreement. See, e.g., *EEOC v. Velsicol Chem. Corp.*, 606 F. Supp. 104, 106 (W.D.Tenn. 1984); *Thompson v. International Ass'n of Machinists and Aerospace Workers*, 580 F. Supp. 662, 666 (D.D.C. 1984); *Douglas v. Red Carpet Corp. of America*, 538 F. Supp. 1135, 1139 (E.D.Pa. 1982); *Yeung v. Lockheed Missiles & Space Co.*, 504 F. Supp. 422, 424 (N.D.Cal. 1980); *Greenlow v.*

California Dept. of Benefit Payments, 413 F. Supp. 420, 423 (E.D.Cal. 1976).

- [51] Because we find the worksharing agreement self-executing, Green's charge must be deemed to have been filed with the EEOC when it was filed with the DFEH. Because the complaint was filed with the DFEH on January 24, 1985, 289 days after April 10, 1984, the filing was timely under 42 U.S.C. § 2000e-5(e).^{*fn10}
- [52] B. Section 1983 Claim
- [53] The district court dismissed Green's section 1983 claim because it was not filed within one year of April 17, 1985, the date *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985), was decided. If April 10, 1984, is the date the statute of limitations began to run, the one year period following the date *Wilson* was decided is the applicable period of limitation. See *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (where cause of action in California arises prior to *Wilson* but is filed after *Wilson*, the statute of limitations is either three years from the time the cause of action arises or one year from the date *Wilson* was decided, whichever period expires first).
- [54] Green again contends, however, that the pre-April 10, 1984, incidents are part of a continuing pattern of discriminatory conduct that did not end until she was dismissed. Initially, we reject LACOE's contention that Green's continuing violating argument was not raised below. In her supplemental brief filed with the district court, Green specifically discussed the post-April 10, 1984, incidents in the context of her section 1983 claim. Nevertheless, we conclude that there is no question of fact that the incidents occurring after April 10, 1984, were not sufficiently related to the pre-April 10, 1984, conduct, and that the continuing violating theory therefore does not apply.
- [55] The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements.
- [56] [A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions.
- [57] *Williams v. Owens-Illinois Inc.*, 665 F.2d 918, 924 (9th Cir.) (citation omitted), cert. denied, 459 U.S. 971, 74 L. Ed. 2d 283, 103 S. Ct. 302 (1982); see also *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1443 (9th Cir. 1984), modified 742 F.2d 520 (1984); *Reed v. Lockheed Aircraft Co.*, 613 F.2d 757, 760 (9th Cir. 1980).

[58] A discriminatory system or policy, however, is not the only means by which a plaintiff may prove a continuing violation. "To establish a continuing violation [a plaintiff has] to show 'a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.'" Valentino v. United States Postal Serv., 218 U.S. App. D.C. 213, 674 F.2d 56, 65 (D.C.Cir. 1982) (quoting B. Schei & P. Grossman, *Employment Discrimination Law* 232 (Supp. 1979)); see also Bruno v. Western Elec. Co., 829 F.2d 957, 961 (10th Cir. 1987) (quoting Valentino). A continuing violation may thus be established not only by demonstrating a company wide policy or practice, but also by demonstrating a series of related acts against a single individual. Id. at 961. In the latter instance, "[the] question . . . boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.'" Id. (quoting Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983)).

[59] Green does not allege a company wide policy of discrimination, but several incidents of harassment and discrimination against herself. Her allegations may be separated into two separate categories: first, the allegations of harassment while she was working before April 10, 1984, and, second, the incidents leading up to and including her discharge. In ruling on Green's Title VII claim, we found the alleged incidents prior to April 10, 1984, totally separate from LACOE's conduct after that date. The allegations of discrimination prior to April 10, 1984, concern the harassment from other employees and LACOE's failure to train and relocate her. Green's allegations of discrimination pertaining to the period after she left work involve LACOE's refusal to place her on medical leave and provide medical benefits, the dissemination of poor references, and her discharge. The two categories of charges "represent a separate form of alleged employment discrimination." London v. Coopers & Lybrand, 644 F.2d 811, 816 (9th Cir. 1981) (concluding that discharge was separate act from post discharge conduct for purpose of continuing violation doctrine). The statute of limitations on Green's section 1983 claim therefore began to run on April 10, 1984, and the claim must be dismissed under Usher.

[60] IV

[61] Conclusion

[62] We reverse the dismissal of Green's Title VII claim. The DFEH's waiver of the 60-day exclusive jurisdiction period in section III.C of the worksharing agreement is self-executing. When Green filed her charge with the DFEH 289 days after the last occurrence of alleged discrimination, it was constructively received and filed with the EEOC on that date. Green's charge was therefore timely under 42 U.S.C. § 2000e-5(e). We affirm the dismissal of Green's Section 1983 claim because it was not filed within one year of the issuance of Wilson v. Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985).

[63] Each party shall bear their own costs on appeal.

[64] AFFIRMED in part, REVERSED in part, and REMANDED.

Opinion Footnotes

[65] *fn1 Section 706(e) provides:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[66] *fn2 Section 706(c) provides:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under [subsection (b) of this section] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

[67] *fn3 Green testified in her deposition that on her last day, she came into work, but left before reporting in. She could not remember whether it was April 6 or April 10.

[68] *fn4 Green argues in the alternative that even if the worksharing agreement was not self-executing, the waiver was effective on January 26, 1985 (296 days after April 10, 1984),

when she received the letter from the DFEH informing her that it was waiving the initial processing of the charge. Because we conclude that the waiver contained in the worksharing agreement was self-executing and accordingly that Green's charge was deemed timely filed when it was filed with the DFEH, we need not reach this argument.

- [69] ^{*fn5} To decide this case without considering the worksharing agreement would thus cause a "miscarriage of justice" or call into question "the integrity of the judicial system" thus satisfying the first exception under Bolker, 760 F.2d at 1042.
- [70] ^{*fn6} The Court also found its construction of section 2000e-5(c) consistent with other, related sections of Title VII. Commercial Office Products, 108 S. Ct. at 1674.
- [71] ^{*fn7} The charging party filed a charge of discrimination with the EEOC 290 days after the last act of alleged discrimination. Commercial Office Products, 108 S. Ct. at 1670. Four days later, the EEOC sent a copy of that charge, and a charge transmittal form, to the Colorado Civil Rights Division (CCRD), the state agency authorized to process charges of discrimination. The form stated that pursuant to the worksharing agreement, the EEOC would initially process the charge. Id. Prior to the expiration of the 300 day period, the CCRD returned the charge transmittal form to the EEOC indicating it waived its right under Title VII initially to process the charge. The CCRD then sent a letter to the charging party stating that it waived its right to process the charge. Id.
- [72] ^{*fn8} The EEOC relies on excerpts from several portions of the opinion in support of its position that the Court treated the waiver as occurring in the agreement itself. For example, the EEOC cites to the Court's statement that a waiver is a "voluntary choice made through individually negotiated agreements." Commercial Office Products, 108 S. Ct. at 1673. This statement, however, was meant as support for the conclusion that a state's waiver of the deferral provision satisfies the goal of giving deference to the states because the waiver is voluntarily made in a written document. Id. The statement does not indicate one way or the other exactly when the waiver becomes effective.

LACOE, on the other hand, cites the Court's reliance on *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985), in support of its position. In *Isaac*, the First Circuit held that a state agency "terminated" its proceedings when it sent a transmittal form to the EEOC stating that it "will not process this charge . . . per agreement [with] the EEOC." Id. at 824. The Court's citation to *Isaac* does not aid in the interpretation of the Court's ruling for two reasons. Initially, the First Circuit in *Isaac*, like the Court in *Commercial Office Products*, did not specifically consider the question whether the worksharing agreement was self-executing because the state agency waived consideration of the claim well within the 300-day limit. Id. at 819. In any event, the Supreme Court's discussion of *Isaac* was limited to review of the First Circuit's analysis of the definition and common usage of the term "terminate" for the purpose of determining whether a state agency "terminates" its proceedings when it declares that it will not proceed for a specified interval of time. Commercial Office Products, 108 S. Ct. at 1671. Determination of when the waiver was effective simply was not before the Court in *Commercial Office Products*, and we think it

unwise to attempt to resolve the present issue by reading hidden meaning into the Court's opinion.

[73] *fn9 When a charge is received first by the EEOC, the Commission's regulations provide that if it is "within a category of charges over which the 706 Agency has waived its rights to the period of exclusive processing . . . , the charge is deemed to be filed with the Commission upon receipt" 29 C.F.R. § 1601.13(a)(4)(ii)(A). A charge submitted first to a state or local agency is deemed to be filed with the EEOC upon "waiver of the 706 Agency's right to exclusively process the charge" 29 C.F.R. § 1601.13(b).

[74] *fn10 We need not reach, therefore, Green's alternative argument that the DFEH's waiver of the 60-day period through its correspondence was effective before the 300-day limitation period had expired.

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ANTHONY v. COUNTY OF SACRAMENTO, 845 F. Supp. 1396 (E.D.Cal. 03/15/1994)

- [1] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
- [2] 93-1974 LKK
- [3] 845 F. Supp. 1396, 1994.ECA.0000004<<http://www.versuslaw.com>>
- [4] March 15, 1994
- [5] **LINDA ANTHONY, Plaintiff,**
v.
COUNTY OF SACRAMENTO, SHERIFF'S DEPARTMENT; et al., Defendants.
- [6] For Plaintiff: GARY W. GORSKI, LAW OFFICES OF JOHN F. WHITFIELD, JR., Rancho Cordova, CA. , For Defendants: NANCY J. SHEEHAN, PORTER, SCOTT, WEIBERG & DELEHANT, Sacramento, CA.
- [7] KARLTON
- [8] The opinion of the court was delivered by: LAWRENCE K. KARLTON
- [9] ORDER
- [10] On March 7, 1994, the court heard oral argument on defendants' motion to dismiss. All issues presented by the motion, except the sufficiency of plaintiff's claim under 42 U.S.C. § 1983, were disposed of from the bench. That issue was taken under submission and is disposed of herein.
- [11] I
- [12] DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b)(6)
- [13] On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks International Ass'n v. Schermerhorn,

Appendix III

373 U.S. 746, 753 n.6, 10 L. Ed. 2d 678, 83 S. Ct. 1461 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *Id.* See also *Wheeldin v. Wheeler*, 373 U.S. 647, 648, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963) (inferring fact from allegations of complaint).

[14] In general, the complaint is construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors v. California State Council*, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).

[15] II

[16] THE ALLEGATIONS OF THE COMPLAINT

[17] Plaintiff Linda Anthony, an African-American woman, brings this employment discrimination action against the County of Sacramento, the County Sheriff's Department, and 14 individuals including the Sheriff, two deputies who were plaintiff's immediate supervisors, 10 deputies who were her co-workers, and a civilian jail employee. Plaintiff alleges that, over a five-year period, she was subjected to an ongoing campaign of sexual and racial harassment and retaliation for her defense of the rights of African-American inmates.

[18] Plaintiff was originally hired by the County Sheriff's Department as a dispatcher in 1987. She began training as a deputy sheriff in 1988, and after six months at the training academy was assigned to the Rio Consumnes Correctional Center. In January 1989, plaintiff was transferred to the main county jail. Plaintiff alleges that she was subjected to racist and sexist comments, discriminatory treatment, and harassment in these work and training environments.

[19] The complaint alleges numerous instances of racial epithets and conduct directed at African-American inmates, African-American law enforcement officers generally, and plaintiff in particular. Many of the comments and actions directed at plaintiff attacked her as a female, or combined insults to her race and gender. Plaintiff alleges that these factors created a hostile work environment in violation of her statutory and constitutional rights to be free from sex and race discrimination.

- [20] The complaint alleges beginning in 1991, plaintiff became an outspoken critic of the verbal and physical abuse often visited on African-American inmates at both jails by law enforcement personnel. Her supervisors allegedly ignored her reports of these violations of the rights of inmates, and co-workers intensified their abusive behavior toward plaintiff. Plaintiff attributes the numerous incidents of racial and sexual harassment alleged to have occurred between 1991 and the filing of this action in 1993, both to ongoing racial and sexual animosity towards her and to retaliation for her defense of inmate rights.
- [21] Plaintiff's Fifth Cause of Action claims that the individual defendants are liable under 42 U.S.C. § 1983 for violation of her constitutional rights under color of law. Specifically, plaintiff alleges that racial and sexual harassment violated her rights under the 5th, 13th, 14th and 15th Amendments. The complaint's allegations of retaliation for speech additionally support a First Amendment basis for the section 1983 claim. ^{*fn1} Defendants move to dismiss the claim as barred by the statute of limitations. They also argue that the section 1983 claim is legally insufficient because the complaint does not allege acts which constitute conduct "under color of law.
- [22] III
- [23] ACTION "UNDER COLOR OF LAW"
- [24] To assert a claim under 42 U.S.C. § 1983, plaintiff must demonstrate that she was deprived of a constitutional right by a person acting under color of law. *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989), cert. denied, 493 U.S. 1056, 107 L. Ed. 2d 949, 110 S. Ct. 865 (1990). Plaintiff has alleged the deprivation of rights protected by the constitutional guarantees of equal protection and free speech. These claims are adequately supported by specific factual allegations. The question before the court is whether this alleged misconduct -- racial and sexual harassment and retaliation for the defense of inmate rights, perpetrated by co-workers and supervisors -- constitutes action taken under color of law.
- [25] A person acts under color of law for purposes of 42 U.S.C. § 1983 if he "exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)).
- [26] Employment by the state is relevant, but not conclusive, to the question of color of law. *Polk County v. Dodson*, 454 U.S. 312, 321, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981) (public defenders not acting under color of law when lawyering, because function performed serves interests of client rather than state). For that reason, the Ninth Circuit looks to the nature of the conduct involved, as well as the surrounding circumstances, and not simply to the defendant's official capacity. See, e.g., *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (looking to circumstances surrounding off-duty police officer's conduct for "indicia of state action"). Whether a state employee acts under color of law turns on the relationship

of the wrongful act to the performance of the defendant's state duties. *Dang Vang v. Vang Xiong X Toyed*, 944 F.2d 476, 479 (9th Cir. 1991). Accordingly, I must determine whether the retaliation and harassment alleged in this case were sufficiently "related to the duties and powers incidental to the job" of deputy sheriff to state a claim. *fn2" See *Dang Vang*, 944 F.2d at 480 (quoting *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464, 468 (N.D. Ill. 1986)).

[27] The job of deputy sheriff indisputably includes responsibility for the well-being of inmates, see *West*, 487 U.S. at 49-50, and thus encompasses response to complaints about their treatment. *Id.* For that reason, defendants abused the position and the responsibility given to them by the state in retaliating for speech protesting improper treatment of their charges. The allegations of retaliatory harassment accordingly support a viable claim under section 1983. See *Louisiana Pacific Corp. v. Beazer Materials*, 811 F. Supp. 1421 (E.D. Cal. 1994) ("The Government is prohibited from retaliating for the lawful exercise of constitutional rights.").

[28] Defendants argue that public employees may not be liable under section 1983 for harassment of a co-worker, because such harassment involves generic workplace power relationships which are independent of state-conferred authority. In *Dang Vang*, the Ninth Circuit found facts sufficient to establish action under color of law where a Washington State Employment Security office employee raped Hmong refugee women who had sought his official assistance. The court reasoned that the power which enabled the defendant to abuse the plaintiffs arose from his position as a government functionary, even though the assaults occurred outside the workplace. *Id.* 944 F.2d at 480. This nexus between the defendant's misconduct and his relationship to the state was contrasted to cases involving acts of co-worker harassment which occurred in a state-created workplace but were found to be independent of state roles and functions. *Id.* at 479-80.

[29] Contrary to defendants' characterization, *Dang Vang* does not establish a general rule of section 1983 non-liability for co-employee harassment. *fn3" While the paradigm section 1983 case involves the abuse of state law enforcement authority over civilians, see, e.g., *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 93 L. Ed. 2d 979, 107 S. Ct. 928 (1987), action under color of law is always identified by reference to the relationship between defendant's alleged misconduct and his state-created duties and powers, rather than the status of the parties. See *Polk County*, 454 U.S. at 321; *West*, 487 U.S. at 56. Defendants' suggestion that abusive behavior towards a co-worker can never implicate state power is unfounded in both logic and law. *fn4" A state official may be liable for co-worker harassment under section 1983 when the abuse is related to state-conferred authority or duties -- the same test that applies when the victim is not a state employee. See *Dang Vang*, 944 F.2d at 479; *Murphy*, 638 F. Supp. at 468.

[30] As explained above, plaintiff's allegations of retaliatory harassment support a section 1983 claim because response to complaints regarding the treatment of inmates is directly related to the duties and powers of law enforcement personnel. *fn5" The allegations of harassment predating plaintiff's defense of inmate rights are also related to the performance of the defendants' duties as deputy sheriffs. *fn6" The complaint depicts a work

environment made racially and sexually hostile by related attacks on plaintiff individually, *fn7" on the abilities of African-American law enforcement personnel generally, *fn8" and on inmates of color. *fn9" The consistent theme linking these forms of abuse is that of African-American inferiority and criminality, in the context of law enforcement effectiveness. *fn10"

[31] Such harassment is not independent of the powers and duties conferred on defendants by the state. Rather, the alleged pattern of harassment directly involves the discriminatory assertion of law enforcement authority. The connection between the specific acts of harassment alleged and the law enforcement duties and functions of defendants is accordingly sufficient to state a claim of constitutional violations "under color of law." *fn11"

[32] IV

[33] STATUTE OF LIMITATIONS

[34] The statute of limitations for a claim under 42 U.S.C. § 1983 is determined by the applicable state statute of limitations for personal injuries actions. Wilson v Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). In California, this is one year. Cal. Civ. Proc. Code § 340. Plaintiff alleges incidents of harassment from 1987 to 1993. Those events which took place more than one year prior to December 16, 1993, when the complaint was filed, would thus ordinarily be barred; however, they may form the basis of plaintiff's complaint if they are part of a continuing violation sufficient to toll the statute. See Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1478 (1989).

[35] A continuing violation of section 1983 can be established by pleading and proving related serial violations or a pattern of discrimination against an individual that enters the limitations period. *Id.* The inquiry for application of the doctrine is whether the alleged discriminatory acts are closely enough related to constitute a continuing violation. *Id.* Here, plaintiff alleges acts of harassment and discrimination which were motivated by endemic racial and sexual animus and retaliation for particular forms of speech. As explained above, these acts are related by common motive, theme, target, and function in the workplace. Plaintiff's allegations, if proven, would therefore establish a continuous violation sufficient to toll the statute.

[36] An ongoing campaign of related harassment, like an ongoing policy of discrimination, constitutes a civil rights violation that continues rather than concludes with any individual act. *fn12" The last alleged act of harassment occurred in February 1993, within one year of the commencement of this action. Accordingly, the complaint pleads a continuing violation which entered the limitations period, and plaintiff's claim is not time-barred.

[37] V

[38] ORDER

[39] For all the reasons stated above, the motion to dismiss plaintiff's Fifth Cause of Action under 42 U.S.C. § 1983 is DENIED.

[40] IT IS SO ORDERED.

[41] DATED: March 15, 1994.

[42] LAWRENCE K. KARLTON

[43] CHIEF JUDGE EMERITUS

[44] UNITED STATES DISTRICT

Opinion Footnotes

[45] *fn1 It is well established that if the facts alleged make out a claim under section 1983, a failure to specifically advert to the constitutional right implicated is immaterial. *Keniston v. Roberts*, 717 F.2d 1295, 1299 (9th Cir. 1983).

[46] *fn2 Defendant John Czekaj was a civilian cook employed in the jail kitchen. A private person is a proper section 1983 defendant when he is alleged to have been a willful participant in joint activity with state actors. *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1341-42 (9th Cir. 1977). The complaint in this case alleges that the individual defendants acted in concert. Accordingly, the claim against Czekaj is sufficient if the co-defendant deputies acted under color of law.

[47] *fn3 *Dang Vang* was not a co-worker case, and the issue of section 1983 liability for treatment of co-workers was not before the court. The court's discussion of *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986), and *Hughes v. Halifax County School Board*, 855 F.2d 183 (4th Cir. 1988), cert. denied, 488 U.S. 1042, 102 L. Ed. 2d 991, 109 S. Ct. 867 (1989), both of which dealt with on-the-job harassment and concluded, under the particular circumstances of each case, that there was no action under color of state law are dicta, and cannot constitute adoption of a per se rule barring such

claims. Moreover, as I explain, none of these cases purport to establish a per se rule. See footnote 4, *infra*.

- [48] *fn4 Dang Vang, Murphy, and Hughes do not assert that a section 1983 claim cannot lie where all parties are state employees. The three cases are consistent in requiring a particularized analysis of whether the alleged abusive conduct "bears some similarity to the nature of the powers and duties assigned to the defendants." Murphy, 638 F. Supp. at 468. See also Hughes, 855 F.2d at 186-87 (actions are taken under color of law if "committed while the defendants were purporting to act under the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment"). It is this nexus between the alleged misconduct and state authority, rather than the relative employment status of the parties, which determines the viability of a section 1983 claim. *Polk County v. Dodson*, 454 U.S. at 321.
- [49] *fn5 This is true whether or not the individual defendants acted in a supervisory capacity vis-a-vis the plaintiff. The individual deputies were all under a state-conferred duty to protect inmate rights and respond appropriately to related complaints. They were in a unique position as deputies, not just as co-workers, to retaliate for such complaints. Accordingly, such retaliation is conduct under color of law, actionable under section 1983. Supervisors may potentially be liable for the conduct of their subordinates as well as for their own acts of harassment and retaliation. See *Woodward v. Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992), cert. denied, 113 S. Ct. 3038 (1993) (supervisors liable for constitutional violations of subordinates where there are allegations of personal direction or actual knowledge and acquiescence). The allegations of the complaint are sufficient to state a claim for supervisory liability.
- [50] *fn6 It is not entirely clear from the complaint whether plaintiff's complaints regarding inmate abuse began prior to 1991. To the extent that plaintiff alleges sexual and racial harassment preceding and/or independent of retaliation for such speech, the above analysis applies.
- [51] *fn7 Such acts include references to plaintiff as a "black bitch," and a flyer placed in her mailbox which read, "Warning: I can go from 0 to Bitch in 1.1 seconds."
- [52] *fn8 Such acts include racist locker room graffiti regarding African-American deputies, and the comment that the department was so "desperate" that it was recruiting in Del Paso Heights (a largely African-American neighborhood).
- [53] *fn9 Such acts include the regular use of the epithets "nigger," "nappy heads," and "baboons," racially-motivated beatings, and other physical abuse.
- [54] *fn10 Other examples of this connection between the harassment and the performance of law enforcement deputies include newspaper articles about local criminal matters annotated

with racist commentary, and an article left on plaintiff's desk titled "Why Cops Hate You."

[55] *fn11 As sworn peace officers, the defendant deputies were under a state law duty to enforce state law -- including that prohibiting retaliation and discrimination. See Pasadena Police Officers Ass'n v. City of Pasadena, 51 Cal. 3d 564, 571, 273 Cal. Rptr. 584, 797 P.2d 608 (1990) (performance of law enforcement duties requires conduct consistent with state law and public policy).

[56] *fn12 Discrete acts such as termination, on the other hand, independently trigger the statute of limitations. See Grimes v. City and County of San Francisco, 951 F.2d 236, 238 (9th Cir. 1991). In her opposition to this motion, plaintiff argues that she was constructively terminated from her position as a result of the harassment. The complaint refers obliquely to this termination, but does not provide dates or other supporting facts and does not assert the alleged termination as the basis for any of the claims. Because the harassment which forms the basis for plaintiff's claims is an ongoing phenomenon rather than a discrete act, and is alleged to have entered the statutory period, the pleading of constructive termination is not relevant to the continuing violation analysis. For the same reason, plaintiff's discussion of Grimes, supra, and the "resuscitation" of expired claims by allegations of continued discrimination, is not relevant. Because the violation alleged here continued into the limitations period, plaintiff's claims do not require resuscitation.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent,

vs.

MICHAEL SEGLAINE

Appellant.

THURSTON COUNTY SUPERIOR
COURT NUMBER

No. 05-2-01554-1

APPEALS COURT NUMBER
429454-II

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the following documents:
Brief of Appellant
And this certificate of service

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COURT REPORTERS
DIVISION II

DATED this 14th day of March, 2012


Jean Schiedler-Brown, WSBA #7753
Attorney for Plaintiff/Appellant