

FILED

No. 305147-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS
DIVISION III

JAY P. MEHRING, a single person,

Respondent,

vs.

CITY OF SPOKANE, a municipal corporation in and for the State of
Washington; ANNE KIRKPATRICK, a single person; DAVID
OVERHOFF, a married person; and TROY TEIGEN, a married person,

Appellants.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| A. ASSIGNMENTS OF ERROR | 1 |
| B. ISSUES | 5 |
| C. STATEMENT OF THE CASE | 6 |
| D. SUMMARY OF ARGUMENT | 19 |
| E. ARGUMENT | 20 |
| 1. The trial court applied the wrong standards to Detective Mehring's due process claim. | 20 |
| a. Procedural due process generally. | 20 |
| b. The trial court erred by determining that omission of a local procedure violated Detective Mehring's federal due process rights. | 21 |
| c. The trial court overlooked <u>Gilbert v. Homar</u> , holding that a police officer charged with a felony may be suspended without pay without any pre-suspension hearing. | 22 |
| d. Whatever delays were encountered in a post-suspension hearing were caused by Detective Mehring's own action and inaction. | 24 |
| e. Having ignored the civil service and collective bargaining grievance procedures available to him, Detective Mehring cannot now claim that he was deprived of due process of law. | 25 |

| | | |
|-----|---|----|
| f. | The trial court's due process errors were compounded by instructing the jury on the irrelevant <u>Garrity</u> case. | 28 |
| g. | There were not two separate violations of procedural due process; having ruled for Detective Mehring on due process, procedural due process should not have been submitted to the jury. | 31 |
| 2. | There was no actionable retaliation claim. | 33 |
| 3. | Chief Kirkpatrick is entitled to qualified immunity on Detective Mehring's retaliation claim. | 34 |
| a. | Chief Kirkpatrick did not violate any First Amendment right belonging to Detective Mehring. | 36 |
| (1) | Detective Mehring's speech was unprotected. | 36 |
| (2) | Detective Mehring was never disciplined, and did not lose a moment's pay; he did not prove an adverse employment action. | 38 |
| (3) | Detective Mehring fails to show his speech was a motivating factor. | 38 |
| (4) | Detective Mehring failed to show that his speech interests were greater than the employer's interest in effective and efficient fulfillment of public responsibilities. | 39 |
| b. | Chief Kirkpatrick violated no "clearly established" right of which a reasonable chief of police ought to be aware. | 40 |

| | |
|---|----|
| 4. There was no basis in fact or law for an award of punitive damages in this case. | 42 |
| 5. There was insufficient evidence presented to support the giving of an outrage instruction or an outrage award. | 44 |
| 6. No theory was properly pled in this case under which Detective Mehring’s “lost overtime” claim could have been awarded. | 49 |
| 7. The trial court erroneously awarded excessive attorney fees on unsegregated claims, on an unreasonable hourly rate, and an excessive multiplier. | 50 |
| a. Detective Mehring failed to properly segregate his request for attorney fees between successful claims and unsuccessful claims. | 50 |
| b. The trial court abused its discretion in finding that \$400 per hour was a reasonable rate for plaintiff’s lead counsel. | 56 |
| c. The trial court erred in applying a 1.25 multiplier to a fee award already based on a \$400 per hour rate. | 58 |
| F. CONCLUSION | 60 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGES</u> |
|---|----------------|
| <u>Absher Const. Co. v. Kent</u> , 79 Wn.App. 841, 917 P.2d 1086 (1995) | 56 |
| <u>Alba v. Ansonia Bd. of Educ.</u> , 999 F.Supp. 687 (D.Conn. 1998) | 26 |
| <u>Albright v. State, Department of Social and Health Services Division of Developmental Disabilities</u> , 65 Wn.App. 763, 829 P.2d 1114 (1992) | 47 |
| <u>Alvin v. Suzuki</u> , 227 F.3d 107 (3rd Cir. 2000) | 26, 28, 31, 32 |
| <u>Archie v. City of Racine</u> , 847 F.2d 1211 (7th Cir. 1988) | 21-22 |
| <u>Bank of New York v. Hooper</u> , 164 Wn.App. 295, 263 P.3d 1263 (2011) | 51 |
| <u>Blum v. Stenson</u> , 465 U.S. 886 (1984) | 56, 58 |
| <u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972) | 20 |
| <u>Bowers v. Transamerica Title Ins. Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983) | 58 |
| <u>Broton v. May</u> , 49 Wn.App. 654, 744 P.2d 1085 (1987) | 55 |
| <u>Citoli v. City of Seattle</u> , 115 Wn.App. 459, 61 P.3d 1165 (2002) | 46, 47 |
| <u>City of Burlington v. Dague</u> , 505 U.S. 557 (1992) | 57, 59 |

| | |
|--|----------------|
| <u>City of Newport v. Fact Concerts, Inc.</u> , 453 U.S. 247 (1981) | 42 |
| <u>Cleveland Bd. of Education v. Loudermill</u> , 470 U.S. 532 (1985) | 10, 21 |
| <u>Commonwealth Plaza Condominium Assoc. v. City of Chicago</u> , 693 F.3d 743(7th Cir. 2012) | 22 |
| <u>Community House, Inc. v. City of Boise, Idaho</u> , 623 F.3d 945 (9th Cir. 2010) | 34, 41 |
| <u>Conward v. Cambridge School Committee</u> , 171 F.3d 12 (1st Cir. 1999) | 26, 27, 28 |
| <u>Correa v. Nampa Sch. Dist.</u> , 645 F.2d 814 (9th Cir. 1981) | 26 |
| <u>Crooks v. Lynch</u> , 557 F.3d 846 (8th Cir. 2009) | 27 |
| <u>Dewey v. Tacoma Sch. Dist. No 10</u> , 95 Wn.App. 18, 974 P.2d 847 (1999) | 33 |
| <u>Dicomes v. State</u> , 113 Wn.2d 612, 782 P.2d 1002 (1989) | 45 |
| <u>Dieder v. Safeway Stores, Inc.</u> , 50 Wn.App. 67, 747 P.2d 1103 (1987) | 45, 46, 49 |
| <u>Dusanek v. Hannon</u> , 677 F.2d 538 (7th Cir. 1982) | 28 |
| <u>FDIC v. Mallen</u> , 486 U.S. 230 (1988) | 23, 24, 30, 31 |
| <u>Fisher Properties v. Arden-Mayfair, Inc.</u> , 106 Wn.2d 826, 726 P.2d 8 (1986) | 55 |

| | |
|---|----------------|
| <u>Foster v. City of St. Paul,</u> 837 F.Supp.2d 1024 (D.Minn. 2011) | 22 |
| <u>Garrity v. State of New Jersey,</u> 385 U.S. 493 (1967) | 28, 29, 30, 31 |
| <u>Gilbert v. Homar,</u> 520 U.S. 924 (1997) | 21-24, 32 |
| <u>Grimsby v. Samson,</u> 85 Wn.2d 52, 530 P.2d 291 (1975) | 45 |
| <u>Hale v. Fish,</u> 899 F.2d 390 (5 th Cir. 1990) | 43 |
| <u>Harrell v. Dept. of Social Health Services,</u> ___ Wn.App. ___, 285 P.3d 159 (Aug. 28, 2012) | <i>passim</i> |
| <u>Hennigh v. City of Shawnee,</u> 155 F.3d 1249 (10th Cir. 1998) | 22 |
| <u>Hensley v. Eckerhart,</u> 461 U.S. 424 (1983) | 55 |
| <u>Hernandez-Tirado v. Artau,</u> 874 F.2d 866 (1st Cir. 1989) | 43 |
| <u>Hume v. American Disposal Co.,</u> 124 Wn.2d 656, 880 P.2d 988 (1994) | 54-55 |
| <u>Hunter v. County of Sacramento,</u> 652 F.3d 1225 (9 th Cir. 2011) | 50 |
| <u>Kairo-Scibek v. Wyoming Valley West Sch. Dist. ,</u> ___ F.Supp.2d ___, 2012 WL 3027814 (M.D. Pa. July 24, 2012) (publication pending) | 23, 24 |
| <u>Kirkland v. St. Vrain Valley Sch. Dist.,</u> 464 F.3d 1182 (10th Cir. 2006) | 23 |

| | |
|---|--------|
| <u>Kloepfel v. Bokor,</u> 149 Wn.2d 192, 66 P.3d 630 (2003) | 44, 47 |
| <u>Krentz v. Robertson,</u> 228 F.3d 897 (8th Cir. 2000) | 27, 28 |
| <u>Lavicky v. Burnett,</u> 758 F.2d 468 (10th Cir. 1985) | 43 |
| <u>Loeffelholz v. C.L.E.A.N.,</u> 119 Wn.App. 665, 82 P.3d 1199 (2004) | 52 |
| <u>Love v. Navarro,</u> 262 F.Supp. 520 (C.D. Cal. 1967) | 21 |
| <u>Lovell v. Poway Unified School District,</u> 90 F.3d 367 (9th Cir. 1996) | 22 |
| <u>Mathews v. Eldridge,</u> 424 U.S. 319 (1976) | 21 |
| <u>Miles v. Sampson,</u> 675 F.2d 5 (1 st Cir. 1982) | 58 |
| <u>Melton v. City of Oklahoma City,</u> 879 F.2d 706 (10th Cir. 1989) | 43 |
| <u>Monell v. Department of Social Services,</u> 436 U.S. 658 (1978) | 50 |
| <u>Morrisey v. Brewer,</u> 408 U.S. 471 (1972) | 25 |
| <u>Narumanchi v. Board of Trustees,</u> 850 F.2d 70 (2nd Cir. 1988) | 27 |
| <u>New York St. Nat'l Org. for Women v. Pataki,</u> 261 F.3d 156 (2nd Cir. 2001), cert. denied, 534 U.S. 128 (2002) | 27, 28 |

| | |
|---|--------------------|
| <u>Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air,</u> 483 U.S. 711 (1987) | 57 |
| <u>Perdue v. Kenny A.,</u> 130 S.Ct. 1662 (2010) | 58 |
| <u>Pettis v. State,</u> 98 Wn.App. 553, 990 P.2d 453 (1999) | 46 |
| <u>Pham v. City of Seattle,</u> 159 Wn.2d 527, 151 P.3d 976 (2007) | 54, 59 |
| <u>Reid v. Pierce County,</u> 136 Wn.2d 195, 961 P.2d 333 (1998) | 44 |
| <u>Reilly v. City of Atlantic City,</u> 532 F.3d 216 (3rd Cir. 2008) | 26 |
| <u>Rendish v. City of Tacoma,</u> 123 F.3d 1216 (9 th Cir. 1997) | 39, 41 |
| <u>Rice v. Janovich,</u> 109 Wash.2d 48, 742 P.2d 1230 (1987) | 44 |
| <u>Robel v Roundup Corp.,</u> 148 Wn.2d 35, 59 P.3d 611 (2002) | 45 |
| <u>Samson v. City of Bainbridge Island,</u> 683 F.3d 1051 (9th Cir. 2012) | 21, 22 |
| <u>Seattle Police Officers' Union v. City of Seattle,</u> 80 Wn.2d 307, 494 P.2d 485 (1972) | 30 |
| <u>Smith v. Bates Technical College,</u> 139 Wn.2d 793, 991 P.2d 1135 (2000) | 33, 34, 37, 39, 40 |
| <u>Smith v. Behr Processing Corp.,</u> 113 Wn.App. 306, 54 P.3d 665 (2002) | 54 |

| | |
|--|------------|
| <u>Smith v. Wade,</u> 461 U.S. 30 (1983) | 42 |
| <u>Snowden v. Hughes,</u> 321 U.S. 1 (1944) | 21 |
| <u>Snyder v. Medical Service Corp. of Eastern Wash.,</u> 98 Wn.App. 315, 988 P.2d 1023 (1999) | 44 |
| <u>Spurrell v. Block,</u> 40 Wn.App. 854, 701 P.2d 529 (1985) | 45 |
| <u>Stillwell v. Lawrence,</u> 766 F.Supp.2d 1202 (N.D.Okla. 2011) | 22 |
| <u>Strong v. Terrell,</u> 147 Wn.App. 376, 195 P.3d 977 (2008) | 45 |
| <u>Suckle v. Madison Gen. Hosp.,</u> 499 F.2d 1364 (8th Cir. 1974) | 27, 28 |
| <u>Travis v. Washington Horse Breeders Ass', Inc.,</u> 111 Wn.2d 396, 759 P.2d 418 (1988) | 52, 54, 55 |
| <u>United States v. Timms,</u> 644 F.3d 436 (4th Cir. 2012) | 24 |
| <u>Vitek v. Jones,</u> 445 U.S. 480 (1980) | 21 |
| <u>Wax'N Works v. St. Paul,</u> 213 F.3d 1016 (8th Cir. 2000) | 27 |
| <u>White v. State,</u> 131 Wn.2d 1, 929 P.2d 396 (1997) | 40 |
| <u>Wilkinson v. Austin,</u> 545 U.S. 209 (2005) | 25 |
| <u>Wilson v. State,</u> 84 Wn.App. 332, 929 P.2d 448 (1996) | 37 |

| | |
|---|--------|
| <u>Wolf v. Wetzel,</u> 113 Wn.2d 665, 782 P.2d 203 (1989) | 44, 49 |
| <u>Womack v. Rardon,</u> 133 Wn.App. 254, 135 P.3d 542 (2006) | 47 |
| <u>Wulf v. City of Wichita,</u> 883 F.2d 842 (10 th Cir. 1989) | 42 |
| <u>Xieng v. Peoples National Bank of Washington,</u> 63 Wn.App. 572, 821 P.2d 520 (1991) | 59 |

STATUTES AND RULES

| | |
|-----------------|----------------|
| 42 U.S.C. §1983 | 22, 35, 42, 43 |
|-----------------|----------------|

OTHER

| | |
|--|----|
| Civil Service Rule XI | 25 |
| Restatement (Second) of Torts §46, comment (b) | 44 |
| Aitchison, The Rights of Police Officers at 169 (5th Ed. LRIS 2004) | 30 |

A. ASSIGNMENTS OF ERROR

1. The trial court erred by directing a verdict for Detective Mehring on procedural due process.

2. The trial court erred by not directing a verdict for the City on the procedural due process claim.

3. The trial court erred by allowing the jury, rather than the court, to find that Detective Mehring's due process rights were violated in unspecified ways.

4. The trial court erred by submitting the procedural due process issue to the jury after also awarding a directed verdict to plaintiff on procedural due process.

5. The trial court erred by allowing the retaliation claim to go to the jury

6. The trial court erred by not ruling that Chief Kirkpatrick was entitled to qualified immunity on the retaliation claim.

7. The trial court erred by allowing the issue of punitive damages to go to the jury and by its subsequent judgment that included punitive damages.

8. The trial court erred in allowing the tort of outrage claim to go to the jury and by its subsequent judgment that included outrage damages.

9. The trial court erred by including damages for the "lost overtime" claim.

10. The trial court erred by awarding attorney fees without a segregation of fees expended between recoverable theories and non-fee bearing or unsuccessful theories.

11. The trial court erred in awarding attorney fees based on \$400 per hour for plaintiff's lead counsel.

12. The trial court erred in applying a 1.25 multiplier to a fee award already based on a \$400 per hour rate.

13. The trial court erred in giving Instruction No. 17 which provides:

Garrity is a protection afforded to law enforcement officers against the use of coerced statements in subsequent criminal proceedings obtained under threat of dismissal for refusal to answer questions.

(CP 2689)

14. The trial court erred in giving Instruction No. 22 that provides:

A person who intentionally or recklessly causes emotional distress to another by extreme and outrageous conduct is liable for severe emotional distress resulting from such conduct.

(CP 2695)

15. The trial court erred in giving Instruction No. 23 that provides:

On plaintiff's outrage claim, Jay Mehring has the burden of proving each of the following propositions:

- (1) That the Defendant Anne Kirkpatrick engaged in extreme and outrageous conduct;
- (2) That the Defendant Anne Kirkpatrick caused severe emotional distress to Jay Mehring;
- (3) That the Defendant Anne Kirkpatrick intentionally or recklessly caused the emotional distress; and
- (4) That Jay Mehring was a direct recipient of the extreme and outrageous conduct.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff on the outrage claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the Defendant on this claim.

(CP 2696)

16. The trial court erred in giving Instruction No. 24 that provides:

A person intentionally or recklessly causes emotional distress if the person:

- (1) Acts with the intent to cause emotional distress; or
- (2) Knows that emotional distress is certain or substantially certain to result from his or her conduct; or
- (3) Is aware that there is a high degree of probability that his or her conduct will cause emotional distress and proceeds in deliberate disregard of it.

(CP 2697)

17. The trial court erred in giving Instruction No. 25 that provides:

Conduct may be considered extreme and outrageous only when the conduct is so extreme in degree and outrageous in character as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

In deciding whether Defendants [sic] conduct was extreme and outrageous, you should consider all the evidence bearing on the question and you may consider, among others, the relationship between the parties.

(CP 2698)

18. The trial court erred in giving Instruction No. 26 that provides:

Severe emotional distress is emotional distress so extreme that no reasonable person could be expected to endure it. It must be reasonable and justified under the circumstances, not exaggerated and unreasonable, unless it results from a peculiar susceptibility of the plaintiff of which the defendant had knowledge. Mere annoyance, inconvenience, or the embarrassment that normally occurs in a confrontation between parties is not enough. A showing of bodily harm or objective symptoms is not necessary to prove severe emotional distress, although bodily harm or objective symptoms may be considered as evidence of severe emotional distress.

(CP 2699)

19. The trial court erred in giving Instruction No. 19 that provides:

As previously explained, the plaintiff has the burden to prove that the acts of the Defendants deprived the plaintiff of particular rights under the Unites States Constitution. In this case, the plaintiff alleges the Defendants deprived him of his rights under the First Amendment to the Constitution when Defendants allegedly retaliated against Plaintiff for filing a civil

lawsuit seeking redress for Defendants' violation of his right to procedural due process.

Under the First Amendment, a public employee has a qualified right to speak on matters of public concern. In order to prove the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff spoke as a citizen and not as part of his official duties;
2. the speech was on a matter of public concern;
3. the defendant took an adverse employment action against the plaintiff; and
4. the plaintiff's speech was a substantial or motivating factor for the adverse employment action.

An action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable worker from engaging in protected activity.

A substantial or motivating factor is a significant factor.

(CP 2692)

20. The trial court erred in giving Instruction No. 20 that provides:

On plaintiff's retaliation claim, the defendants are not liable for any adverse employment actions it would have taken, whether or not plaintiff filed this lawsuit.

The defendants have the burden of proving that the same adverse action would have taken place in the absence of the protected conduct.

If you find that the defendants would have taken the adverse employment action, even if plaintiff did not file this lawsuit, your verdict should be for the defendants on plaintiff's retaliation claim.

(CP 2693)

21. The trial court erred in giving Instruction No. 28 that provides:

If you find for Plaintiff Mehring on the retaliation claim, and if you award compensatory or nominal damages, you may award punitive damages against Defendant Kirkpatrick. You are not required to do so. The purpose of punitive damages are not to compensate a plaintiff but rather to

punish a defendant and to deter a defendants and others from committing similar acts in the future.

Plaintiff Mehring has the burden of proving that punitive damages should be awarded. You may award punitive damages only if you find that Defendant Chief Kirkpatrick's conduct (1) was motivated by evil motive or intent, or (2) involved reckless or callous indifference to the rights of others.

Plaintiff Mehring also has the burden of proving the amount of punitive damages that should be awarded. If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill the purpose stated above, but should not reflect bias, prejudice, or sympathy toward any party. The amount of any punitive damages should also bear a reasonable relationship to any injury or harm actually or potentially suffered by Plaintiff Mehring.

Punitive damages may not be awarded against Defendant City of Spokane. You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.

(CP 2703)

B. ISSUES

1. Whether the trial court erred by directing a verdict for Detective Mehring on his procedural due process claim.
2. Whether the trial court erred by not directing a verdict for the City on the procedural due process claim.
3. Whether the trial court erred by allowing the jury, rather than the court, to find that Detective Mehring's due process rights were violated in unspecified ways.
4. Whether it is proper for the trial court to divide one employer action, a suspension without pay until felony charges are resolved, into two due process components, and allow a jury to decide that plaintiff Mehring experienced two due process deprivations in the same employer action?

5. Whether the trial court erred in allowing the retaliation claim to go to the jury.

6. Whether Chief Kirkpatrick was entitled to qualified immunity on the retaliation claim.

7. Whether the trial court erred in allowing the punitive damages issue to go to the jury.

8. Whether the trial court erred in allowing the tort of outrage to go to the jury.

9. Whether the trial court erred by allowing Detective Mehring to recover on his "lost overtime" claim.

10. Whether the trial court erred in awarding attorney fees when the plaintiff failed to properly segregate his fees.

11. Whether the trial court erred in awarding attorney fees based on \$400 per hour for plaintiff's lead counsel.

12. Whether the trial court erred in applying a 1.25 multiplier to a fee award already based on a \$400 per hour rate.

C. STATEMENT OF THE CASE

This case involves very few disputed facts. On Monday, March 26, 2007, plaintiff Jay Mehring (Detective Mehring) was employed as a police detective by the Spokane City Police Department (SPD). (RP 981) Over the next several days, he was investigated and charged with a felony by Spokane County, its Sheriff's Department undertaking the investigation and its Deputy Prosecuting Attorney charging Detective Mehring with a felony involving threats to kill his wife.

During the spring of 2007, Detective Mehring and his wife, Lisa Mehring, were in the midst of a divorce. (RP 1040) On the weekend of March 24, 2007, the Mehrings had an explosive public argument at their son's wrestling match. (RP 992-94) Detective Mehring became furious and began screaming obscenities and accusations towards his wife. (RP 992-94)

After the wrestling match, Lisa Mehring left with her young sons. (RP 995) The couple continued arguing by text message and phone calls. (RP 995) Later that evening, Lisa Mehring talked with a family friend, SPD Sergeant Troy Teigen. (Ex. 503) Lisa said that she had gotten into an argument with her husband, that Detective Mehring had threatened to "destroy" her and said that he would "burn down my home." (Ex. 503)

On March 26, 2007, another family friend, SPD Sergeant David Overhoff, ran into Detective Mehring and his sons at a gym. (Ex. 503; RP 1153)

Both Sergeant Overhoff and Sergeant Teigen documented their contacts with the Mehrings in separate memos to their superiors. (RP 1353) Based on these reports, SPD Administration opened an Internal Affairs investigation into the situation, and Detective Mehring was temporarily reassigned from his normal duty in the Regional Drug Task Force. (RP 999)

On March 28, 2007, two SPD investigators went to talk to Lisa Mehring to determine if the matter involved potential criminal conduct. (RP 1147, 1355) Lisa Mehring stated that she was in fear for the safety of herself and her sons, and had therefore gone to see an attorney to seek a restraining order. (Ex. 503)

Later that day, SPD turned the entire case over to the County to investigate because the alleged threats had occurred in the County and SPD wanted an outside agency to handle the investigation to preserve the impartiality of the process. (RP 1727)

On the same day, Lisa Mehring filed for a restraining order in Spokane County Superior Court which contained the statements: "Jay is making repeated death threats to me. He has told me he will destroy me, burn down my home with me in it...has begun to verbally abuse me in front of the children and other people...I am especially frightened for the children...the most painful strike at me would be harming the children. I truly believe that he is a threat to them." (Ex. 503; RP 1152) Lisa Mehring's Declaration was made under penalty of perjury. (RP 1015, 1150; Ex. 503)

Spokane County Sheriff's Detective Khris Thompson handled the criminal investigation from March 28, 2007 forward. (RP 1778) The Sheriff's Office determined there was probable cause to arrest Detective Mehring for Felony Harassment. (RP 857) An Affidavit of Probable Cause was submitted to the Spokane County Prosecutor. (RP 1778) The case was reviewed by Spokane County Deputy Prosecuting Attorney Mark Lindsey who determined there was sufficient evidence to prove the elements of the charged crime beyond a reasonable doubt. (RP 1779)

On Friday, March 30, 2007, Detective Mehring was summoned to Chief Kirkpatrick's office, and placed on leave without pay pending resolution of the criminal charges against him. (RP 1020) Detective Mehring's attorney and Union representative were present. (CP 488) Neither complained at this time, nor at any time, of the action taken by Chief Kirkpatrick. (RP 573, 1109, 1117)

Detective Mehring was arrested by Detective Thompson and charged with Felony Harassment. (RP 1021)

At the time of his arrest, Chief Kirkpatrick informed Detective Mehring that he was being charged with a felony, that he was being arrested, and that Chief Kirkpatrick intended to terminate his employment. (RP 489, 1020) Spokane County was responsible for arresting Detective Mehring. (RP 938, 1098) Spokane County prosecuted Detective Mehring. (RP 938, 1098) The City had no involvement whatsoever with Detective Mehring's arrest or prosecution. (RP 938)

When Detective Mehring was arrested, the City placed him on unpaid layoff status pursuant to the Civil Service rules. (RP 472) At that time, all parties were operating under Civil Service Rule IX, Section 6(d) which provides:

Any employee who has been formally charged with a felony may be laid off without pay pending court trial determination. In this instance normal layoff and reinstatement procedures will not apply, however, the appointing officer shall notify the employee and process the necessary records and forms. If the employee is found not guilty of the charge, the employee shall be immediately restored to duty and shall be entitled to all back salary, and benefits due.

(Ex. 6, p. 35)

Shortly after Detective Mehring was placed on unpaid leave, SPD opened an Internal Affairs ("IA") file based on the Felony Harassment incident. (RP 1349) The allegation in the Internal Affairs investigation was that Detective Mehring had engaged in conduct unbecoming an officer. (Ex. 33) Chief Kirkpatrick set up a Loudermill¹ hearing and offered Detective Mehring an opportunity to provide a voluntary statement. (Ex. 16;

¹ A Loudermill hearing is a pre-disciplinary hearing that is offered to public employees. It is conducted by the Chief of Police or her designee prior to a final discipline decision. (RP 494) See, Cleveland Bd. of Education v. Loudermill, infra.

RP 828, 1032) Detective Mehring was not ordered or directed to provide any statement to the IA investigation. (Ex. 16)

In response to Chief Kirkpatrick's offer to Detective Mehring to provide a voluntary statement, his attorney, Chris Bugbee, submitted a seven-page document to her. (CP 1883) In that letter, attorney Bugbee thanked the Chief for providing Detective Mehring with the opportunity to present his side of the story. (CP 1883)

This letter by Chief Kirkpatrick was treated by all as a Loudermill letter. (RP 615) The Union objected to holding a Loudermill hearing prior to resolution of the criminal charges. (RP 575) The Union also threatened Chief Kirkpatrick with an unfair labor practice if she went forward with the Loudermill hearing. (RP 506) In response to this threat, Chief Kirkpatrick agreed to the Union's demands and placed the Loudermill hearing on hold. (RP 590)

In April and May, 2007, Chief Kirkpatrick took steps toward completing the disciplinary action against Detective Mehring. (RP 1366) Chief Kirkpatrick did not agree that Detective Mehring could testify under a grant of immunity, which meant that she could not discharge him for insubordination for refusing to answer questions related to the criminal charges. (RP 1366) The Union protested this, because Detective Mehring did not want to have to testify in a hearing while criminal charges against him were pending. (RP 575, 1365) The Union, acting on Detective Mehring's behalf, offered Chief Kirkpatrick a statement for her consideration from Detective Mehring's attorney, which she did consider. (CP 1883; RP 1365) But, ultimately, Chief Kirkpatrick agreed to back off and allow the criminal charges to be resolved before taking any disciplinary action against him. (RP 590)

As of March 30, 2007, the Union was fully satisfied that Human Resources and Chief Kirkpatrick had complied with Civil Rule Service XI. (RP 574, 597)

Detective Mehring's criminal charges did not go to trial until October 2008, about a year and a half after he was charged. (RP 576) Shortly after Detective Mehring's arraignment, Lisa Mehring attempted to recant her accusations. (RP 1030) Despite this, the County Prosecutor decided to proceed to trial with a reluctant domestic violence victim.² (RP 1373, 1811)

On October 17, 2008, after two weeks of testimony, and his wife recanting her allegations, a jury acquitted Detective Mehring of Felony Harassment. (RP 1041, 1788) He was promptly refunded all of his back pay, with interest, an amount in excess of \$120,000.00. (RP 1042) He received all lost pay and benefits within 10 days of his acquittal. (RP 1042) Detective Mehring received all benefits he would have received during that 18-month period. He was made whole. (RP 1116) He was reinstated and placed on paid administrative leave until the internal charges could be resolved.³ (RP 588)

Following the acquittal, pursuant to Union agreement and Spokane policies, the internal disciplinary charges were presented to an Administrative Review Panel ("ARP"). (RP 524) The ARP consists of officers in the SPD, and that Panel (by law) provides only

² Even with Lisa Mehring recanting, there still remained her clear declaration under penalty of perjury, the statements from the two Sergeants, a child confirming the threats to kill, and a prosecutor willing to go forward. (RP 1373)

³ Even though Detective Mehring had been found not guilty of a crime, there were still SPD policies and procedures that may have been violated. (RP 511)

a recommended decision to Chief Kirkpatrick.⁴ (RP 522, 580) Any disciplinary action was hers alone to decide. (RP 1374, 580)

The ARP inexplicably believed that it could not consider evidence presented in the criminal trial, which was, of course, all of the evidence against Detective Mehring. (RP 1376) As a result, the ARP recommended that Detective Mehring be found not to have committed the infraction of "conduct unbecoming" a police officer. (RP 524, 757) Chief Kirkpatrick disagreed; she very much believed that Detective Mehring did exactly what he was charged with, but rather than swim upstream against her officers, she concluded that there was "insufficient evidence" to discipline Detective Mehring for conduct unbecoming a Spokane police officer. (RP 1377)

During all this time, Detective Mehring was never "disciplined." (RP 1380) When Detective Mehring was paid for his time on unpaid leave status, he was "made whole." (RP 1042, 1166) All Civil Service procedures were followed to the letter. (RP 574) Detective Mehring was at all times represented by both his private attorney and by the Union. (RP 488) The Union's lawyer, indeed, wrote Chief Kirkpatrick in the spring of 2007 over its vehement disagreement with the Chief's effort to bring a disciplinary hearing on in early 2007. (RP 589-90)

At some point after Detective Mehring was placed on unpaid leave, it was discovered that a little-known (to the Union or to Human Resources) City policy (Administrative Code 0620-06-34) required an "ad hoc committee" to be convened

⁴ The Administrative Review Panel is made up of five high ranking officers who review the Internal Affairs materials and make a determination of whether they believe the allegation is founded or unfounded. (RP 522)

before a person could be placed on unpaid leave. (RP 493, 869) The Union President had no idea this policy existed. (RP 617) The Administrative Policy provided:

5.0 POLICY

5.1 It is the policy of the City of Spokane that an employee who has been formally charged with a felony will be laid off pending court trial determination only if the alleged crime is so heinous as to offend the sensibilities of a reasonable person, there is a job connection, the City's public relations would be adversely affected by retaining the employee on the job or the employee's presence on the job would be a disruptive factor in the work force.

6.0 PROCEDURE

6.1 When it comes to the City's attention that an employee has been formally charged with a felony, the Human Resources Department shall verify that charge with the appropriate prosecutor's office.

6.2 If the charge is verified, the Human Resources Department shall convene an ad-hoc committee composed of the employee's department head or designee, one person from the Human Resources Department, and (if the employee is in a bargaining unit) one person from the bargaining unit. The ad-hoc committee shall review the charge and determine whether it would be a violation of this policy to retain the employee in the job pending court trial determination. The employee, if not incarcerated, may make a presentation at the meeting of the ad-hoc committee if the employee desires. The committee shall reduce its recommendation in writing and submit them to the Human Resources Director, Deputy Mayor and the affected employee.

6.3 The Human Resources Director shall provide information on the charge and the ad-hoc committee's recommendations to the Deputy Mayor who will make the decision as to whether to lay the employee off pending court trial determination.

6.4 The Human Resources Director and Deputy Mayor may temporarily reassign an employee to other duties if it would be in the best interest of the City pending court trial determination.

(Ex. 4)

The upshot was that Detective Mehring, pursuant to this procedure, could have presented his case for paid leave to the Deputy Mayor, who then could have decided whether City policies were best served by paid or unpaid leave under the circumstances. (RP 1696) It is undisputed that the City (whose Chief of Police was new to the job and whose acting Human Resources Director was new to that role), and the Union simply overlooked the procedure. (RP 617) The Deputy Mayor testified that he believed that he would have determined that unpaid leave was proper for an employee charged by an independent prosecutorial agency with a felony. (RP 875)

The Police Union was the exclusive bargaining agent on behalf of Detective Mehring. (RP 581) The Union was unaware of Administrative Policy 0620-06-34. (RP 496) At no time did the Union or Detective Mehring file a complaint or grievance as to any perceived procedural defects. (RP 597) In fact, the President of the Union testified that he became aware of the Administrative Policy during June of 2007 and that he missed the 10-day deadline to appeal such grievance. (RP 493, 1110)

While the City did not comply with the procedures set forth in the Administrative Policy, it did follow the policy. (RP 871) In other words, had the City complied with Administrative Policy 0620-06-34, it would not have made a difference in this case. (RP 875) There was no evidence presented to the contrary.⁵

At the time Detective Mehring was charged with the felony, he had been assigned to work on the Regional Drug Task Force. (RP 932) This was a temporary rotating

⁵On January 7, 2013, Commissioner Wasson directed counsel to provide citations to a number of objections made by Detective Mehring's counsel. Counsel has complied with that directive. However, some of the objections were to propositions that there is nothing in the record. As it is impossible to prove a negative, some citations, such as here, have not been made.

assignment which Detective Mehring had held for four years.⁶ (RP 971, 981, 894-95, 906, 1731) Detective Mehring did not have any contractual right to be on the Drug Task Force. (RP 592, 928)

Once Detective Mehring went back to work, he wanted to return to the Regional Drug Task Force. (RP 576) Detective Mehring had worked for several years as a part of a Regional Drug Task Force, in which he gained experience helpful to the SPD. (RP 1634-35) However, it was decided that he would serve the SPD in its Targeted Crimes unit. (RP 576) This was not a demotion, nor was it a disciplinary action of any kind; the decision was not made by Chief Kirkpatrick, and it was fully explained to the jury. (RP 1383)

Detective Mehring did not return to the Drug Task Force because his position had been filled by a patrol officer. (RP 919) Admittedly, there was no contract guaranteeing that any officer would remain assigned to the Drug Task Force. (RP 928)

While Detective Mehring desired to return to the Drug Task Force, this was clearly a discretionary assignment that had now been limited to patrol officers, neither Detective Mehring nor the Union filed any grievance concerning that decision. (RP 528, 583, 592)

Detective Mehring was a detective in early 2007. (RP 566) When he returned to work, he was still a detective with the same Civil Service job classification. (RP 567) That classification never changed. (RP 581)

⁶ At the time he was originally appointed to the Drug Task Force, Detective Mehring was a patrol officer. (RP 932, 1050) Six months into the assignment, he was promoted by the City to a detective position. (RP 932) Despite that this position had traditionally been filled by a patrol officer, due to his relatively short amount of time with the Drug Task Force, SPD agreed to keep him in the Drug Task Force despite the fact that he had been promoted to detective. (RP 932)

In December 2009, Detective Mehring filed the present lawsuit. (CP 9) His principal allegation was that Chief Kirkpatrick and two of Detective Mehring's fellow officers (named as defendants in the lawsuit), vindictively targeted him out of personal animosity and for their own self-serving reasons. (CP 9) Detective Mehring testified that he thought that Sergeant Teigen, a named defendant previously dismissed from the case by the trial court, was having an affair with his now ex-wife. (RP 1004, 1229)

On December 15, 2009, Detective Mehring filed a Complaint against the City, Chief Kirkpatrick, Sergeant Overhoff, and Sergeant Teigen. (CP 9, RP 1058) In his Complaint, Detective Mehring alleged that the four defendants conspired to violate his rights. He alleged 11 causes of action: (1) violation of the Fourth and Fourteenth Amendments based on procedural and substantive due process (these were chiefly false arrest claims); (2) conspiracy to violate civil rights; (3) false arrest/imprisonment; (4) invasion of privacy/false light disclosure; (5) vicarious liability; (6) infliction of emotional distress; (7) defamation; (8) negligence/gross negligence; (9) outrage cause of action; (10) tortious interference with contractual relations; and (11) wrongful withholding of wages. (CP 9) By the time of trial, the majority of these causes of action were dismissed except for the procedural due process and outrage claims. (RP 132, 136, 138, 140, 234; CP 865, 2420)

No discipline was meted out to Detective Mehring as a result of the cancelled Loudermill hearing. (RP 588) A detective is a Civil Service classification. (CP 566) Detective Mehring was a detective in early 2007. (RP 581) As of trial, he was still a detective on paid leave. (RP 566) His title has never changed. (RP 567) Detective Mehring was not disciplined for asking to return to the Regional Drug Task Force.

(RP 588) Detective Mehring was not disciplined for the original Internal Affairs charges arising out of the original alleged death threats. (RP 588)

The Union is responsible for the filing of grievances on behalf of its members. (RP 458) The Union did not grieve the temporary duty assignment following the criminal complaint but before Detective Mehring was formally charged. (RP 588) The Union did not file a Civil Service complaint. (RP 588) No grievance or Civil Service procedure was started as a result of the October 2008 paid administrative leave. (RP 590) No discipline was imposed as a result of the Administrative Review Panel. (RP 591) He was never disciplined for anything. (RP 1380)

Detective Mehring received full back pay including estimated overtime, with interest. (RP 591) No grievance was ever filed over the fact that Detective Mehring got back pay or estimated overtime. (RP 591) He was also paid for his floating holidays. (RP 591)

As discovery proceeded in this lawsuit, the deposition of Chief Kirkpatrick was set for September 9, 2009 to be taken by Detective Mehring's counsel. (RP 1064) Just prior to the deposition, Chief Kirkpatrick had reviewed interrogatory answers recently prepared by Detective Mehring setting forth his current mental state. (RP 1389) These answers set forth Detective Mehring's current mental state as:

...to the point where I have felt as if liquid pain was running through my veins, stemming from the center of my chest to the ends of my extremities, the pain makes it very difficult for me to breathe, impossible to sleep and difficult to think and/or concentrate.

(RP 1389) Detective Mehring also stated that "death would be a relief." (RP 1389) At the start of the deposition, Chief Kirkpatrick was concerned for her safety and afraid of

Detective Mehring. (RP 626) An agreement had been reached between the lawyers that no weapons would be brought to the deposition. (RP 627, 1392)

The deposition was halted shortly after it started when it was discovered that Detective Mehring had worn his gun to the deposition. (RP 625) That same day, Detective Mehring was put on administrative leave by Human Resources. (RP 638, 1067)

In placing Detective Mehring on administrative leave, Human Resources and Chief Kirkpatrick relied on the Interrogatory Answers and also on Detective Mehring's pre-employment psychological interview.⁷ (RP 662, 664) Chief Kirkpatrick was concerned with Detective Mehring's stated mental stability and viewed his actions in showing up at the deposition with a gun as a direct challenge to her. (RP 638, 673)

Trial commenced on October 19, 2011. (RP 400) On November 7, 2011, the jury returned a verdict that awarded economic damages of \$45,675.00, non-economic damages of \$427,000.00, nominal damages of \$1.00, and punitive damages of \$250,000.00. (CP 2707)

On February 8, 2012, an Amended Judgment was entered in the principal amount of \$722,676.00, attorney fees of \$821,775.47, and costs of \$34,799.61. The total judgment was \$1,579,251.08. (CP 3421)

A timely Notice of Appeal was filed on December 21, 2011. (CP 2970)

⁷ During the pre-employment psychological evaluation, Detective Mehring was given a "risk" rating. Detective Mehring's risk rating was "moderate risk." Chief Kirkpatrick testified that meant you would be hiring a person with certain risks that would need to be weighed. SPD would not hire someone today with a moderate risk rating. (RP 862)

Detective Mehring filed a Notice of Cross Appeal on January 4, 2012.

D. SUMMARY OF ARGUMENT

Detective Mehring threatened to kill his wife. He was arrested, charged, tried and acquitted by Spokane County. This took a long time because Detective Mehring kept waiving his speedy trial rights.

Upon his acquittal, Detective Mehring was made whole. He was never disciplined. Despite this, a jury was allowed to award him \$722,676.00 in damages and \$856,575.08 in attorney fees and costs, all premised on a series of erroneous legal rulings.

Detective Mehring's procedural due process claim should have only gone to the jury if, and only if, the trial court determined that the process that was actually provided when he was placed on administrative leave failed to meet **federal** minimum standards. Here, the trial court erroneously relied on a local procedure to determine there had been a "per se" procedural due process violation. Well-established law provides that such local procedures are irrelevant to whether the federal threshold was met.

Detective Mehring also had a plethora of relief avenues through his Union and the Civil Service Commission. His failure to pursue any of these remedies precludes the finding of a due process violation.

The trial court also allowed the jury to consider a First Amendment retaliation claim against Chief Kirkpatrick, who was entitled to qualified immunity. Detective Mehring failed to present sufficient evidence to establish the necessary elements of his retaliation claim.

The jury awarded \$250,000.00 in punitive damages based upon an insufficient showing that Chief Kirkpatrick showed an evil motive and callous disregard for Detective Mehring's federally protected rights.

The trial court also erroneously allowed the jury to consider an outrage instruction and make an outrage award, in spite of insufficient evidence. The jury was also allowed to award Detective Mehring damages on a "lost overtime" claim that was never pled nor supportable under any theory of recovery.

Finally, the trial court abused its discretion in awarding \$821,775.47 in attorney fees based on an unsegregated claim that was built on an hourly rate of \$400 per hour, and a 1.25 multiplier made without a finding that the lodestar fee would not have attracted competent counsel, and other relevant factors.

E. ARGUMENT

1. The trial court applied the wrong standards to Detective Mehring's due process claim.

a. Procedural due process generally.

Procedural due process is not particularly complicated. A court must decide two separate questions. First, the court must decide whether the Due Process Clause of the Fourteenth Amendment is implicated by the facts. This is typically a matter of state law. The person claiming a due process violation must show that he or she had a property or a liberty interest in whatever it was that was impacted—here, employment rights are a matter of “property.” Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

If, and only if, the claimant has a property interest in that which was impacted, then the court decides the second question. That is, whether the process actually provided to the plaintiff met **federal** minimum standards for the protection of such

interests. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 541 (1985) (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)) (“minimum procedural requirements are a matter of federal law”).

The procedures required by federal due process law are determined by the court, not a jury, on a case by case, ad hoc basis, by balancing (1) the private interests, (2) the public interests, and (3) the risks of error presented by the procedures actually used and the value of additional procedures. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Loudermill, *supra*, 470 U.S. at 543-46; Gilbert v. Homar, 520 U.S. 924, 929-930 (1997). Due process is flexible and calls for such procedural protections as the particular situation demands. Homar, 520 U.S. at 929-931.

b. The trial court erred by determining that omission of a local procedure violated Detective Mehring’s federal due process rights.

It is hornbook law that "A right to have state (or city) laws obeyed is a state, not a federal right" and that “[m]ere violation of a state statute does not infringe the federal Constitution.” Snowden v. Hughes, 321 U.S. 1, 11 (1944), paraphrased in Love v. Navarro, 262 F.Supp. 520, 523 (C.D. Cal. 1967); *see also*, Samson v. City of Bainbridge Island, 683 F.3d 1051 (9th Cir. 2012):

It is axiomatic, however, that **not every violation of state law amounts to an infringement of constitutional rights**. *See Paul v. Davis*, 424 U.S. 693, 700 (1976). ‘**Unless there is a breach of constitutional rights, ... § 1983 does not provide redress in federal court for violations of state law.**’ *Schlette v. Burdick*, 633 F.2d 920, 922 n. 3 (9th Cir.1980); *see also Couf v. DeBlaker*, 652 F.2d 585, 590 n. 11 (5th Cir.1981) (‘The plaintiffs seem to urge that the defendants’ violation of Florida [zoning] law provides a predicate for §1983 recovery. The state court litigation established such a violation, but *not every infraction of state law constitutes interference with a constitutionally protected interest.*’’)).

Id. at 1060 (emphasis supplied); *see generally Archie v. City of Racine*, 847 F.2d 1211

(7th Cir. 1988). State law is irrelevant to this issue.⁸ Archie, 847 F.2d at 1216-17 (“A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law”).⁹

The civil rights statute at issue here, 42 U.S.C. §1983, does not provide a remedy for violation of state-created rights. Samson v. City of Bainbridge Island, 683 F.3d 1051, 1060 (9th Cir. 2012); Commonwealth Plaza Condominium Assoc. v. City of Chicago, 693 F.3d 743, 749 (7th Cir. 2012). But the trial court directed a verdict for Mehring on procedural due process because a local law, the ad hoc committee procedure, was missed by both the City and the Union.¹⁰ This was reversible error.

c. **The trial court overlooked Gilbert v. Homar, holding that a police officer charged with a felony may be suspended without pay without any pre-suspension hearing.**

As discussed above, it was error for the trial court to confuse state and federal law and hold that violation of a local procedure "per se" violated due process. Cf. Lovell v. Poway Unified School District, 90 F.3d 367, 370 (9th Cir. 1996) (recognizing that violation of state law that results in deprivation of constitutional right may form basis of

⁸ Stillwell v. Lawrence, 766 F.Supp.2d 1202, 1209 (N.D.Okla. 2011) (“Although [a local law] is the source of plaintiff’s property interest, **the procedural requirements of that statute are not relevant** when considering whether plaintiff received procedural due process as a matter of federal law. Hennigh v. City of Shawnee, 155 F.3d 1249, 1256 (10th Cir. 1998)” (emphasis supplied)).

⁹ See also Foster v. City of St. Paul, 837 F.Supp.2d 1024 (D.Minn. 2011). In that case, the plaintiff, a city employee, was suspended without pay when indicted for murder. He brought suit after he was acquitted, claiming his state created rights (including the right to be deemed innocent until proven guilty), were violated by the employer’s action. The court dismissed the case on summary judgment, holding that **42 U.S.C. §1983 does not provide a remedy for violation of state-created rights**. If Detective Mehring had a **right** to have an ad hoc committee convened, that right was created by local law, not by the federal constitution. 42 U.S.C. §1983 was not implicated by this omission at all.

¹⁰ It was undisputed that both acting human resources director Chris Cavanaugh and Union President Wuthridge missed the ad hoc committee procedure. They simply were not aware of the procedure. (RP 617, 1531)

1983 action). Under applicable federal law, there was no due process requirement that a police officer, charged with a felony, be provided a pre-suspension hearing. Homar, 520 U.S. at 929-30; FDIC v. Mallen, 486 U.S. 230, 240-41 (1988); Kirkland v. St. Vrain Valley Sch. Dist., 464 F.3d 1182, 1193 (10th Cir. 2006); Kairo-Scibek v. Wyoming Valley West Sch. Dist., ___ F.Supp.2d ___, 2012 WL 3027814 (M.D. Pa. July 24, 2012) (publication pending).

In Gilbert, the Court held that pre-suspension procedures were not required before a university police officer could be suspended without pay following arrest on felony drug charges. 520 U.S. at 933-34. Because independent third parties (a prosecutor and a magistrate) found that probable cause existed, a pre-suspension hearing would be needless and redundant. Id. at 934. The arrest and felony charges provided an independent determination that the suspension was not arbitrary and served "to assure that the state employer's decision [was] not baseless or unwarranted." Id.

The present case is indistinguishable from Gilbert. Detective Mehring was arrested by **Spokane County** Deputy Sheriffs. (RP 1098) He was charged with Felony Harassment (threats to kill) by a **Spokane County** Deputy Prosecutor. (RP 1099, 1779) These were more than adequate assurances that Detective Mehring's suspension was not "baseless or unwarranted." As in Gilbert, given the violent nature of the felony charged and Detective Mehring's position as a police officer, the need for immediate action was obvious.

Detective Mehring could have **immediately** filed a union grievance or a Civil Service claim, but he never did. (RP 590, 1531, 1117) Indeed, Chief Kirkpatrick's

efforts to hold a hearing shortly after the suspension were thwarted by Detective Mehring's Union agents, acting on his behalf. (RP 1365)

Gilbert and its progeny teach that, in a case exactly like this one, no pre-termination process is due, other than verification that felony charges were filed against a Detective Mehring. No one disputes that Chief Kirkpatrick did that. (See fn. 5)

d. Whatever delays were encountered in a post-suspension hearing were caused by Detective Mehring's own action and inaction.

Gilbert holds that post-suspension procedures satisfy due process when exigencies prevent hearings prior to suspension. Although post-suspension procedures should be "reasonably prompt," timing issues cannot be considered in a vacuum. Mallen, 486 U.S. at 242; United States v. Timms, 664 F.3d 436, 449-50 (4th Cir. 2012) (thirty-one month delay did not violate due process under circumstances); Kairo-Scibek, 2012 WL 3027814, at *11 (plaintiff cannot fail to bring immediately-available grievance and then complain of delays in post-suspension process).

Here, there was in fact a prompt hearing of sorts, after the suspension, when Chief Kirkpatrick consented to review the seven-page statement filed by Detective Mehring's attorney. (CP 1883) The statement was submitted; Chief Kirkpatrick *did* consider it. (RP 1365)

Although too long a delay without good reason after the suspension can violate due process, it is not the delay itself but the **reason for the delay** in post-suspension process that determines whether due process is violated. Mallen, 486 U.S. at 242 ("it is appropriate to examine the...justification for the delay"). [Quoted in Timms, 664 F.3d at 451.] The Supreme Court repeatedly admonishes that "the requirements of due process

are flexible and call for such procedural protections as the particular situation demands." Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

In this case, the post-deprivation hearing was held **exactly when Detective Mehring demanded it** – after his criminal trial was concluded.¹¹ (RP 507-510) It is disingenuous to demand that an employer hold off on a post-suspension hearing and then, later, seek damages for an alleged due process violation when the employer agrees.

But that is exactly what happened here. Detective Mehring's due process rights were not violated.

- e. **Having ignored the civil service and collective bargaining grievance procedures available to him, Detective Mehring cannot now claim that he was deprived of due process of law.**

Detective Mehring's job was as protected as possible in the public sector. He had union grievance rights; he had Civil Service Commission rights. He was made whole after being acquitted,¹² provided by Civil Service Rule XI(8)(c), which included reinstatement, pay, leave, pension and other remedies, and included interest on the pay he did not receive while waiving his right to a speedy trial.¹³ (RP 1042)

¹¹ Given Detective Mehring's speedy trial rights, that trial could have been held as early as June 2007 – but Detective Mehring kept waiving his speedy trial rights. While Appellants do not blame Detective Mehring for waiving his speedy trial rights, it is critical to note that Detective Mehring never once suggested, during that entire waiver time, through his Union, his lawyer, or the Union's lawyer, or otherwise, that he had changed his mind and now wanted a prompt post-suspension hearing. (See fn. 5)

¹² Mehring's standing to allege a due process violation is far from clear. He **was** made whole. He did **not** lose a minute's pay. (RP 591) He was even paid interest and given floating holidays. (RP 591) This was consistent with Civil Service Rule XI.

¹³ **“(c) An employee, when reinstated after appeal of an order of suspension, reduction in rank or discharge shall be entitled to back salary from the date of such order to the date of reinstatement and to all other employee rights and benefits which will make the employee whole.”** (Ex. 6, p. 42, emphasis supplied)

In order to claim a failure to grant due process, the "plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

In Reilly v. City of Atlantic City, 532 F.3d 216, 235 (3rd Cir. 2008), the court held:

In *Alvin v. Suzuki*, 227 F. 3d 107, 110 (3d Cir. 2000), Alvin, a tenured professor at the University of Pittsburgh, brought a civil rights action alleging that the university's administrators denied him the rights inhering in his tenure. We rejected Alvin's procedural due process claims on the ground that he failed to follow the grievance procedures set forth in the faculty handbook. *Id.* at 111. We explained, "[i]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Id.* at 116. We carefully distinguished this requirement from exhaustion, explaining that taking advantage of available processes is not a procedural hurdle, but is akin to an element of the claim because "a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies." (Emphasis added)

As another court held, "[h]aving waived this golden opportunity to exercise his due process rights ['to furnish his version of relevant events at a pre-termination hearing'], [the plaintiff] cannot now be heard to decry their deprivation." Conward v. Cambridge School Committee, 171 F.3d 12, 24 (1999).

As many courts have held, all due process requires is an opportunity to be heard. When an agency like the City makes procedures available to remedy the problem, the plaintiff cannot be heard to say that he was deprived of due process. Correa v. Nampa Sch. Dist., 645 F.2d 814, 817 (9th Cir. 1981); see also, Alba v. Ansonia Bd. of Educ., 999 F. Supp. 687, 692 (D. Conn. 1998) (non-renewal of public school teacher's contract; teacher's failure to submit to union grievance procedures precluded assertion of procedural due process claim; plaintiff did not allege "how the grievance procedures set

forth in the Collective Bargaining Agreement were inadequate"). Detective Mehring has never shown that a Union arbitration would have been inadequate. (See fn. 5)

There are literally scores of these cases, and they are to the same effect. The Spokane Civil Service Commission rules, which allow for a hearing when an employee is aggrieved by a personnel action like layoff or suspension, and the Police Union Collective Bargaining Agreement grievance procedures, provide for an opportunity to be heard, must be used. See, Conward, 171 F.3d at 23-24; New York St. Nat'l Org. for Women v. Pataki, 261 F.3d 156, 169 (2d Cir. 2001). cert. denied, 534 U.S. 128 (2002) ("a procedural due process violation **cannot have occurred** when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies"); Narumanchi v. Board of Trustees, 850 F.2d 70, 72 (2d Cir. 1988) (plaintiff's failure to submit to grievance procedures precluded consideration of fairness of those procedures in practice); Crooks v. Lynch, 557 F.3d 846, 848-49 (8th Cir. 2009) (terminated public employee's procedural due process claim was not ripe because he failed to attempt state remedies; plaintiff's "stigma plus" claim was rejected because he failed to request a name-clearing hearing); Krentz v. Robertson, 228 F.3d 897, 904 (8th Cir. 2000) ("an employee waives a procedural due process claim by refusing to participate in post-termination administrative grievance procedures made available by the state"); Wax'N Works v. St. Paul, 213 F.3d 1016, 1019-20 (8th Cir. 2000) (claimants cannot complain about a violation of procedural due process when they "have made no attempt to avail themselves of existing state procedures"); Suckle v. Madison Gen. Hosp., 499 F.2d 1364, 1367 (8th Cir. 1974).

Detective Mehring cannot claim that he was deprived of due process after he failed to make use of available procedures. Detective Mehring had a "golden opportunity" to be heard, and simply did not avail himself of that opportunity.

In Alvin the court held that "a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." 227 F.3d at 116 (quoting Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir. 1982)). The court added that "if there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants." Id. Here, there were two processes on the books—Civil Service claims and Union grievance arbitrations. Of course, Detective Mehring used neither process. (See fn. 5; RP 1117)

Detective Mehring had ample opportunity to grieve the unpaid suspension, but did not. (RP 1531) As taught by Alvin, Conward, Pataki, Suckle, Krentz, and the other cases cited herein, there is no violation of due process where the plaintiff does not take advantage of available procedures. Detective Mehring did not take advantage of union grievance and Civil Service appeal rights, which were plainly adequate, and his claim must fail accordingly.

f. The trial court's due process errors were compounded by instructing the jury on the irrelevant Garrity case.

Detective Mehring had Union and Civil Service rights, and had a lawyer and a Union representative when Chief Kirkpatrick tried to schedule a Loudermill hearing (or before that through a Union grievance). (RP 488) In hindsight, Detective Mehring perhaps wishes that he had exercised some of those rights. But he did not, and he benefited from the procedures used. (RP 488)

At trial, Detective Mehring tried to get around the obvious – that there was no substantial delay between his suspension and the hearing Chief Kirkpatrick scheduled – by claiming that Chief Kirkpatrick's efforts to hold a prompt post-suspension hearing were flawed and should not be counted. (RP 575) The flaw, Detective Mehring claimed, was that Chief Kirkpatrick did not offer Detective Mehring Garrity immunity, which, he argued below, invalidated the hearing as if it were never offered. (RP 507-510) Detective Mehring's arguments do not withstand scrutiny.

Garrity v. State of New Jersey holds that a police department cannot fire an officer charged with a crime for refusing to answer questions in an internal investigation. 385 U.S. 493, 500 (1967). If the department wants the officer to answer internal affairs questions about a matter with which the officer is charged, the department must give the officer immunity. But Garrity only applies when a police officer is charged with insubordination for refusing to answer questions about pending charges against him. As Chief Kirkpatrick explained, she never demanded that he answer questions about the charges against him. (CP 1366) She did not charge him with insubordination. (Ex. 33) Rather, the charge was "conduct unbecoming" a police officer. (CP 1366)

Garrity is thus irrelevant. Even on its merits, the Garrity issue Detective Mehring raised and on which the trial court instructed is essentially frivolous. But to claim, as Detective Mehring does, that he did not get post-suspension procedures, because a procedure offered somehow violated Garrity, is unprecedented and novel.

The claim is also wrong as a matter of law, and should not have gone to the jury. The leading commentator on Garrity rights is Will Aitchison of Aitchison & Vick, the

Union lawyers representing Detective Mehring. (RP 573) This is what Mr. Aitchison tells us about Garrity:

An employer has the right to refuse to compel an employee to make any statements in the disciplinary process, and to merely allow the employee to make voluntary statements if the employee chooses to do so. This interplay between the *Garrity* rule and principles of due process means that an employee facing a pre-disciplinary hearing may be faced with the choice of making no statement whatsoever at the hearing, or making a statement which could be used against the employee in a subsequent criminal proceeding. **Such a choice does not violate the employee's rights.**

Aitchison, *The Rights of Police Officers* at 169 (5th Ed. LRIS 2004) (emphasis added).

Thus, Detective Mehring's effort to excuse **his** role in the delay before his post-suspension hearing was held, claiming that the hearing offered would have violated Garrity, is meritless.¹⁴

Further, Chief Kirkpatrick **did** allow Detective Mehring's lawyer to file a statement and she considered that statement. (RP 1883) This procedure itself comported with due process. Due process is flexible and does not demand any kind of hearing with rigorous exactitude. A claim that a "flawed" hearing is the same as no post-suspension process at all has been rejected by the Supreme Court.

In FDIC v. Mallen, the Court rejected an argument that the post-suspension procedure provided by statute in that case was flawed because the hearing officer had discretion to exclude live testimony altogether. See, 486 U.S. at 247-48 (Mallen never made an offer of proof as to what oral evidence he could have brought to the hearing

¹⁴ Washington law holds that Garrity does not prohibit police departments from firing police officers who refuse to answer questions, so long as the questions are specifically tailored to the job. Seattle Police Officers' Union v. City of Seattle, 80 Wn.2d 307, 494 P.2d 485 (1972). Thus Washington law is even *more* contrary to Mehring's position than Garrity itself.

officer's attention; due process does not per se forbid written hearings). Of critical importance in Mallen was that the employee did not attend the hearing, and made no offer of proof. Id. at 247. Here, by contrast, Detective Mehring did not simply skip the hearing (as the employee did in Mallen)—he demanded that the hearing not be held until he was ready. (RP 507-510) The City cannot be blamed for acceding to his demand.

Of course, Garrity cannot explain why Detective Mehring, whose Union representative and lawyer were with him at the time of his suspension, never grieved the suspension. Detective Mehring's failure to grieve the treatment of which he now complains entirely precludes his claim under the due process clause. All of these cases were briefed to the trial court, which inexplicably declined to follow them. (CP 1943,1953, 2030, 2037, 2091, 2130, 2241)

This Court should reverse the jury award and the trial court's procedural due process determinations, and remand with instructions to dismiss Detective Mehring's due process claims.

- g. There were not two separate violations of procedural due process; having ruled for Detective Mehring on due process, procedural due process should not have been submitted to the jury.**

In Alvin, 227 F.3d at 116, the court held that:

[A] state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir.1982); *see also Bohn v. County of Dakota*, 772 F.2d 1433, 1441 (8th Cir.1985). **A due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process."** *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. *See McDaniels v. Flick*, 59 F.3d 446, 460 (3d

Cir.1995); *Dwyer v. Regan*, 777 F.2d 825, 834-35 (2d Cir.1985), *modified on other grounds*, 793 F.2d 457 (2d Cir.1986); *Riggins v. Board of Regents*, 790 F.2d 707, 711-12 (8th Cir.1986). (Emphasis supplied.)

In this case, the procedures Detective Mehring received were: (1) Chief Kirkpatrick verified the felony charge and handed Detective Mehring the suspension letter; (2) Chief Kirkpatrick tried to convene a Loudermill hearing, but was warned off by the Union, which threatened unfair labor practice charges against her if she did not wait until the felony charge was resolved; (3) after Detective Mehring's acquittal he was promptly made whole, placed on leave with pay, and the Administrative Review Panel hearing was scheduled; and (4) the Administrative Review Panel hearing was conducted. At no time was Detective Mehring punished.

Gilbert v. Homar and other cases make clear that an agency employee has **one** right to procedural due process. Indeed, Alvin teaches that "a due process violation is not complete when the deprivation occurs" but is only complete if (overall) "the State fails to provide due process." 227 F.3d at 116.

This means that, when considering whether the City violated Detective Mehring's due process rights, a court must consider the entire process—pre-suspension, post-suspension, and available hearings in between. Here, Detective Mehring **did** have available remedies between March 2007 and October 2008. He **was** made whole.

The trial court erroneously granted a directed verdict on the pre-suspension process given Detective Mehring, overlooking Gilbert and misapplying state law. The trial court compounded this error by dividing Detective Mehring's due process rights into severable components, which were (apparently) mutually exclusive. This was also reversible error.

Once the trial court directed a verdict in Detective Mehring's favor on due process, the jury should not have been instructed on due process at all. The jury should not have been allowed to find that post-suspension procedures **also** violated due process.

2. There was no actionable retaliation claim.

Detective Mehring claimed that a variety of personnel actions, none of which amounted to actual discipline, that took place after he filed this lawsuit in December 2009 amounted to retaliation in violation of his First Amendment rights. His original 2009 lawsuit asserted various personal claims against the City, two fellow officers Detective Mehring claimed had personal reasons to "get" him, and his Chief of Police, whom he falsely claimed arrested and charged him.

"In order to present a prima facie case of retaliation in employment based upon an exercise of First Amendment rights, [the] public employee must demonstrate: (1) ... speech deals with a matter of public concern; (2) the ... free speech interest is greater than the employer's interest in promoting efficiency in public services provided; (3) the speech was a substantial or motivating factor in a personnel decision adverse to the employee; and (4) in the absence of the protected speech, the employer would not have made the same personnel decisions." Dewey v. Tacoma Sch. Dist No. 10, 95 Wn.App. 18, 24, 974 P.2d 847 (1999); Harrell v. Dept. of Social Health Services, ___ Wn.App. ___, 285 P.3d 159, 170 (Aug. 28, 2012); Smith v. Bates Technical College, 139 Wn.2d 793, 812, 991 P.2d 1135 (2000).

Detective Mehring established none of these elements. These elements are discussed more fully in the next section, dealing with qualified immunity. Qualified immunity is available to Chief Kirkpatrick where, as here, there is no actionable right

(and also where—as here—the right was not “clearly established” at the time of the complained-of conduct). Harrell, 285 P.3d at 170.

Because in this case, as in Harrell and Smith, the employee was motivated by personal concerns, and did not speak (in this case, file a lawsuit) to benefit the public generally, there can be no actionable First Amendment claim. This element **alone** is sufficient to warrant reversal and dismissal of the retaliation claim.

The remaining elements are discussed in the next section.

3. Chief Kirkpatrick is entitled to qualified immunity on Detective Mehring's retaliation claim.

Qualified immunity is a question of law, which can be raised by the appellate court sua sponte. Community House, Inc. v. City of Boise, Idaho, 623 F.3d 945, 968 (9th Cir. 2010). Qualified immunity is proper when the defendant did not violate a “clearly established” right belonging to the plaintiff. Id. In Harrell v. Dept. of Social Health Services, supra, ___ Wn.App. at ___, 285 P.3d at 170, the court stated:

In evaluating whether an individual enjoys qualified immunity, we apply the two-part *Saucier* test where, first, we decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, if the plaintiff satisfied the first part, we decide whether the right at issue was “clearly established” at the time of the defendant's alleged misconduct. *Saucier*, 533 U.S. at 201. Since *Saucier*, the Supreme Court has held that a reviewing court may apply *Saucier's* two-part test in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Pearson*, 555 U.S. at 232. And, in fact, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Thus, Detective Mehring had the burden of proving that the rights he claimed to have been violated were “clearly established” at the time of the conduct in question. Indeed,

he had the burden of proving that there was a constitutional right at issue at all. Id. He did not do so.

The actions Detective Mehring claims violated his First Amendment rights were:

1. Chief Kirkpatrick did not allow Detective Mehring "equal time" on the City's email system to "tell his side of the story" (no discipline of any kind) (RP 842);
2. Captain Braun (not Chief Kirkpatrick) noted on a personnel evaluation form (which gave Detective Mehring high marks) that Detective Mehring had failed to deal with parking tickets like everyone else (no discipline) (RP 1710);
3. Human Resources put Detective Mehring on paid leave for counseling after Detective Mehring submitted interrogatory answers calling his mental stability into question (not a disciplinary action) (RP 1390); and
4. Chief Kirkpatrick believed (correctly) that Detective Mehring violated the order regarding paid leave when he did not check in with the top staff before taking a vacation (no disciplinary action) (RP 1396).¹⁵

None of these actions violated any right of Detective Mehring's. All were explained to the jury. There was no evidence that any of these actions was undertaken to "get" Mehring for suing the City and its police chief. Indeed, none of these actions involved "punishment" at all. Detective Mehring was never disciplined.

¹⁵ It is anticipated that Detective Mehring's counsel will raise the false dispute about Dr. Danette Palmer, who was worried, for no reason ultimately, that her City contract would not be renewed; but this Court should be aware that Dr. Palmer herself testified that Chief Kirkpatrick did nothing wrong with regard to this issue. (CP 2359, 2458) This issue cannot, logically, be the basis for punitive damages, for punitive damages cannot be awarded against a municipality under §1983, and the Palmer issue cannot be laid at Chief Kirkpatrick's doorstep.

a. **Chief Kirkpatrick did not violate any First Amendment right belonging to Detective Mehring.**

To establish a retaliation claim, Detective Mehring had the burden of proving that his speech was constitutionally protected as a matter of public concern, as opposed to speech for private motives, and that his speech was a motivating factor resulting in an adverse employment action against him. Harrell, 285 P.3d at 170. Detective Mehring did not meet these elements.

(1) **Detective Mehring's speech was unprotected.**

As the court stated in Harrell, on the subject of protected speech, an employee's speech is only protected if it is made as a citizen on a matter of public concern, which is a question of law for the court, as opposed to unprotected speech "simply intended to further a private interest." Id. The court stated:

To qualify for First Amendment protection, an employee must show that his questionable speech is actually entitled to constitutional protection. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). If a public employee speaks as a citizen on a matter of public concern, then the speech may be protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). **If the speech is not a matter of public concern, but rather private concern, then the employee's speech has no First Amendment protections.** *Garcetti*, 547 U.S. at 418.

Whether speech relates to an issue of public concern is an issue for the trial court to determine as a matter of law. *Wilson v. Washington*, 84 Wn.App. 332, 341, 929 P.2d 448 (1996), *review denied*, 131 Wn.2d 1022, 937 P.2d 1103, *cert. denied*, 522 U.S. 949. **The content, form, and context of the speech, as revealed by the full record, bear on the court's decision about whether the speech touches on a public concern.** *Wilson*, 84 Wn.App. at 342, 929 P.2d 448. **Also, the court should consider the speaker's intent and whether the speaker intended to raise an issue of public concern or simply intended to further a personal interest.** *Wilson*, 84 Wn.App. at 342, 929 P.2d 448.

We must determine whether a plaintiff employee's speech touches on a matter of public concern. *See, Connick v. Myers*, 461 U.S. 138, 147–48 (1983). If a plaintiff establishes that her speech was a matter of public concern, then she must prove that such protected speech was a substantial or motivating factor resulting in an adverse employment action taken against her. *See, Doyle*, 429 U.S. at 287. **Individual personnel disputes do not amount to matters of public concern.** *See, Desrochers v. City of San Bernardino*, 572 F.3d 703, 710 (9th Cir. 2009). (Emphasis added)

Id. See also Wilson v. State, 84 Wn.App. 332, 340-41, 929 P.2d 448 (1996); Smith v. Bates Technical College, 139 Wn.2d at 815-816 (union grievances are not a matter of public concern, and therefore unprotected).

It is not possible to read the December 2009 Complaint without concluding that Detective Mehring did **not** file the lawsuit out of concern for the public. (CP 9) His motivation was personal gain, as stated in claim after claim, filled with invective, personal attack, and claims of personal animus by fellow officers and former friends.

Detective Mehring claimed a conspiracy between other police officers (defendants Tiegen and Overhoff) to make a false claim against him (frivolous allegations in light of the fact that the **County** sheriff and **County** prosecutors were solely responsible for investigating and charging him with a felony). Detective Mehring claimed that he should be compensated for this conspiracy to falsely accuse and arrest him, and falsely to defame him and interfere with his job security. This was no more an effort to protect the public than the plaintiff's claim in Harrell or Smith.

In Harrell, the court held that plaintiff's complaints about lighting at a community center were motivated by his desire for an accommodation for his own night blindness, **not** out of concern for the public. 285 P.3d at 171. As in Harrell, Detective Mehring was motivated by personal gain—and thus he was not entitled to First Amendment protections. As Harrell notes, this is a question of law for the courts. Id. at 170.

(2) Detective Mehring was never disciplined, and did not lose a moment's pay; he did not prove an adverse employment action.

Detective Mehring cannot show how filing his lawsuit resulted in adverse employment action. In fact, Detective Mehring did not endure **any** adverse employment actions once his lawsuit was filed in December 2009. He was never once disciplined. (RP 1380)

The conduct of which Detective Mehring complained was either trivial (e.g., his wish to use the City's email system to notify his fellow officers of the nature of his case against other officers and his Chief of Police, or the file notation about his failure to clear up parking tickets) or based on concerns other than the fact that he sued his employer (e.g., interrogatory answers suggesting compromised mental health or the violation of the order placing him on administrative leave)—which, again, did not result in any punishment of any kind. (RP 866, 1710, 1389, 1391)

Harrell requires the employee to prove an adverse employment action as a part of his prima facie case. Detective Mehring did not do so, and the First Amendment retaliation claim and the claim for punitive damages based solely thereon, must fail.¹⁶

(3) Detective Mehring fails to show his speech was a motivating factor.

Every one of the alleged instances of retaliatory conduct were explained. In no case was the explanation controverted. For example, Captain Braun did not note

¹⁶ That the jury could award punitive damages for such actions as noting Detective Mehring's admitted failure to do his job and take care of parking tickets, like every other employee/police officer has to do, is an example of the passion and prejudice that permeated the trial, encouraged by counsel's repeated misstatements along the lines of "Mehring was terminated" and "Mehring never got to tell his side of the story," both of which statements were plainly false. (RP 412, 415, 417, 1024, 1025, 1034, 2041)

Detective Mehring's parking tickets (on an otherwise fine evaluation) not out of hostility because Detective Mehring filed a lawsuit. (RP 1711) There was no retaliatory animus.¹⁷

There is no evidence in the record that retaliation for filing the 2009 lawsuit was a motivating factor in any of Chief Kirkpatrick's actions.

(4) Detective Mehring failed to show that his speech interests were greater than the employer's interest in effective and efficient fulfillment of public responsibilities.

In Rendish v. City of Tacoma, 123 F.3d 1216, 1226 (9th Cir. 1997), cited with approval by our Supreme Court in Smith, 139 Wn.2d at 815, the court affirmed the denial of a preliminary injunction to an assistant city attorney who sued for retaliatory discharge after he was fired for suing the employer in state court. The Rendish court held that the city's interest in effective and efficient fulfillment of its public responsibilities outweighed the attorney's interest in suing the employer. 123 F.3d at 1226.

In Harrell the court held that this element is a part of the employee's burden of proof. 285 P.3d at 170. In this case, each of the actions Detective Mehring claimed to be "retaliatory" was explained to the court. For example, Captain Braun explained that he directed that it be noted on Detective Mehring's personnel review (which was otherwise quite good) that Detective Mehring did not take appropriate administrative action to deal with parking tickets. (RP 1710) Certainly, Chief Kirkpatrick's testimony about the interrogatory answers indicated grave concerns about risk to the City and the public

¹⁷ As Chief Kirkpatrick explained, she **did** believe Detective Mehring committed the crime with which he was charged, but she fully abided by the jury's decision, and Detective Mehring was reinstated and made fully whole, under applicable Civil Service rules of which Detective Mehring did not take advantage while on unpaid suspension status. (RP 1378)

welfare of its citizens; these were no less significant than Detective Mehring's interest.
(RP 1394)

As in White v. State, 131 Wn.2d 1, 12, 929 P.2d 396 (1997), "the court is generally not the appropriate forum for reviewing the wisdom of a personnel decision taken by the public employer in response to the employee's speech or behavior." See also id. at 20 ("Subjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit and the employee's right to job security").

None of the complained-of actions involved employee discipline. All were explained by City witnesses.¹⁸ None was retaliatory. The retaliation claims should have been dismissed, and Chief Kirkpatrick entitled to qualified immunity.

b. Chief Kirkpatrick violated no "clearly established" right of which a reasonable chief of police ought to be aware.

As in Harrell, if there is no First Amendment right at all (where, for example, the speech is made for private interest), there can be no "clearly established" constitutional right of which a reasonable chief of police ought to have known. None of the actions of which Chief Kirkpatrick was accused were in clear violation of the First Amendment.

¹⁸ Chief Kirkpatrick testified about the concerns raised by Detective Mehring's interrogatory answers. (RP 1389-90) The concerns place the employer's action, putting Detective Mehring on paid leave for counseling and, later, evaluation, squarely within the holding of Smith v. Bates College, supra. (RP 1389-90) In that case, the court held that a plaintiff has the burden of proving that his interests outweighed the employer's need for efficiency in the workplace. Chief Kirkpatrick was alarmed by Detective Mehring's interrogatory answers, which presented her with the very real likelihood that a psychologically compromised officer might be in her employ. (RP 1394) Detective Mehring put on no evidence tending to dismiss those concerns. (See fn. 5) Detective Mehring had no clearly established right not to be placed on administrative leave after telling his Chief of Police that he suffered from grave psychological issues.

Filing a lawsuit does not grant a police officer special immunity from ordinary employer actions. See, Rendish, supra.

There is no case law of which Appellants are aware making it illegal to take the actions complained of, like putting a police officer who states, in interrogatory answers, that his mental health has been compromised, on administrative leave for counseling. As stated recently by the Ninth Circuit in a qualified immunity case, Community House, Inc. v. City of Boise, Idaho, supra, 623 F.3d 945, 964-965 (9th Cir. 2010):

In § 1983 actions, the doctrine of qualified immunity protects city officials from personal liability in their *individual* capacities for their official conduct so long as that conduct is objectively reasonable and does not violate clearly-established federal rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). Qualified immunity is necessary to “protect[] the public from unwarranted timidity on the part of public officials” and to avoid “dampen[ing] the ardour of all but the most resolute, or the most irresponsible.” *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) (citation and internal quotation marks omitted). True to these purposes, the qualified immunity standard “ ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’ ” *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986)). (Emphasis added)

Chief Kirkpatrick was neither plainly incompetent nor a knowing violator of the law; no evidence at trial showed otherwise. Qualified immunity is a pure question of law. Id.

Accordingly, qualified immunity should be recognized, and the retaliation claim and punitive damages award against Chief Kirkpatrick should be overturned. This Court is respectfully requested to reverse the jury verdict and the trial court’s order denying Appellants’ motion for judgment as a matter of law, and remand with instructions to dismiss the retaliation claims against both defendants, and to dismiss the punitive damages award, which was solely based on the retaliation claim.

4. There was no basis in fact or law for an award of punitive damages in this case.

As this Court is aware, punitive damages may not be awarded against a municipality under 42 U.S.C. §1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Under Smith v. Wade, 461 U.S. 30, 56 (1983), civil rights actions can only give rise to punitive damages when the individual defendant's conduct is "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." None of Chief Kirkpatrick's post-December 2009 actions (the only actions relevant to Detective Mehring's retaliation claim) met this high standard.

It is axiomatic that "not every intentional violation of a plaintiff's constitutional rights subjects a defendant to punitive damages." Wulf v. City of Wichita, 883 F.2d 842, 867 (10th Cir. 1989). As that court stated, in vacating an award of punitive damages in a retaliation case brought under §1983:

We have concluded that LaMunyon did indeed violate Wulf's constitutional rights because he recommended Wulf's termination on the basis of Wulf's protected speech. Yet not every intentional violation of a plaintiff's constitutional rights subjects a defendant to punitive damages. See Melton, 879 F.2d at 733 ("Just because public officials make mistakes in judgment in the performance of their duties sufficient to subject them to liability for actual damages does not automatically create a basis for a punitive award."). There was evidence that LaMunyon may have thought it was legitimate for him to terminate Wulf because of concerns that Wulf was undermining the efficiency of the police department's operations. It does not matter that we have concluded that his perception of disruption was objectively unreasonable, because an award of punitive damages requires an assessment of his subjective state of mind. We accordingly find that insufficient evidence supports the district court's award of punitive damages against LaMunyon. LaMunyon's personal liability for Wulf's compensatory damages serves as an adequate pecuniary punishment as well as a deterrent to future misconduct. (Emphasis added)

Id. (quoting Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989)). In Melton, the court affirmed a trial court order vacating a punitive damages award because "there was no malice, ill will or reckless disregard," even though an intentional violation was found. 879 F.2d at 733.

In Lavicky v. Burnett, a case on which the Melton court relied, the court held that "[s]imple ignorance of the applicable legal rules, even arrogant ignorance, does not by itself indicate callous indifference to federally protected rights." 758 F.2d 468, 477 (10th Cir. 1985). See also Hernandez-Tirado v. Artau, 874 F.2d 866, 868 69 (1st Cir. 1989) (listing cases holding that even intentional violations of federally-protected rights do not automatically carry with them an entitlement to punitive damages).¹⁹

In this case, this Court need not deal with the heightened standard applicable in §1983 cases for punitive damages. The fact that Chief Kirkpatrick is entitled to qualified immunity, ipso facto, establishes that she lacked the necessary evil motive or intent required for punitive damages. But even if this Court declines to reverse the retaliation decisions made below, punitive damages have no business in this case. There was no evidence that Chief Kirkpatrick acted with the kind of "malice, wantonness or oppressiveness to justify punitive damages," as Melton and other courts, all supra, have required to support a jury verdict awarding punitive damages.

There was no evidence at trial showing evil motive and callous disregard for Detective Mehring's federally-protected rights. Indeed, Chief Kirkpatrick and others explained the reasonable basis for every action taken related to Detective Mehring—

¹⁹ Punitive damages are not automatic, even when the appropriate culpability standard is met. Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990).

some of which, like the parking ticket issue and the administrative leave issue, were not even her decisions. (Ex. 91; RP 864, 1711)

This is simply not a punitive damages case. The jury award of punitive damages cannot stand.

5. There was insufficient evidence presented to support the giving of an outrage instruction or an outrage award.

The jury found that the City and Chief Kirkpatrick committed the tort of outrage and awarded economic damages of \$45,675 and non-economic damages of \$427,000. (CP 2708-9) This was reversible error because Detective Mehring failed to present sufficient evidence to allow the outrage question to go to the jury.

An outrage claim²⁰ is supported if the alleged conduct goes beyond all possible bounds of decency, and is regarded as atrocious and utterly intolerable in a civilized community. Wolf v. Wetzel, 113 Wn.2d 665, 677, 782 P.2d 203 (1989). The claim's elements are (1) extreme and outrageous conduct, and (2) that intentionally or recklessly inflicts severe emotional distress on the plaintiff. Kloepfel v. Bokor, 149 Wn.2d 192, 195, 66 P.3d 630 (2003), abrogated on other grounds by Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991)).

Outrageous conduct is conduct that "to an average member of the community would arouse his resentment against the actor and leave him to exclaim 'outrageous'." Reid v. Pierce County, 136 Wn.2d 195, 201-202, 961 P.2d 333. While the question of whether certain conduct is sufficiently outrageous is often for the jury, it is initially for

²⁰ The torts of outrage and intentional and reckless infliction of emotional distress are the same. Snyder v. Medical Service Corp. of Eastern Washington, 98 Wn.App. 315, 321, 988 P.2d 1023 (1999); Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts, §46, comment (b). Here, the parties stipulated they would be combined and treated the same. (12/16/11 hearing, RP 31)

the trial court to determine whether reasonable minds could differ on “whether the conduct was sufficiently extreme to result in liability.” Robel v Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002) (internal quotation marks and citation omitted); Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); Spurrell v. Block, 40 Wn.App. 854, 862, 701 P.2d 529 (1985).

Detective Mehring failed to present sufficient facts of atrocious and utterly intolerable conduct in a civilized community to justify the jury being instructed on the tort of outrage. The trial court erred in allowing the jury to consider this claim.

To support an outrage award, the conduct must exceed all possible bounds of decency measured against an objective standard of reasonableness. Strong v. Terrell, 147 Wn.App. 376, 385, 195 P.3d 977 (2008).

The resulting emotional distress cannot merely be embarrassment or humiliation. Dicomes, 113 Wn.2d at 630. Bad faith or malice is not enough to prove an outrage claim. See, id., at 631. Liability in the tort of outrage “does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.” Strong, 147 Wn.App. at 385. A plaintiff “must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

In Dieder v. Safeway Stores, Inc., several medical examiners evaluated the plaintiff and determined that his injuries rendered him partially permanently disabled to the extent that he could not realistically be expected to work again. 50 Wn.Ap. 67, 68-71, 747 P.2d 1103 (1987). Safeway was a self-insured employer that had hired a third-party claims administrator. Id. at 68-69. The administrator initially paid time loss benefits but

stopped the benefits upon receiving one doctor's opinion that the plaintiff could work. The administrator advised Safeway to create a "light duty job" for the plaintiff to avoid paying him a lifetime pension. Id. at 71. When a claims manager realized that the plaintiff would be entitled to a permanent disability pension, the administrator's vice president responded that under no circumstances would the company award the plaintiff a pension; instead, Safeway needed to find a job for him. Id. at 71. Thereafter, the administrator sought to close the claim with no pension, despite numerous medical opinions that Dieder had a permanent disability. The court held that, although arguably egregious and irresponsible, the conduct was not sufficiently outrageous to support an outrage claim. Id. at 77.

In the present case, Detective Mehring failed to produce any evidence that would support a finding that Chief Kirkpatrick engaged in sufficiently outrageous conduct to support an outrage claim.

In Pettis v. State, the plaintiff, a child care worker, sought outrage damages from DSHS based upon an investigation that was allegedly negligently performed. 98 Wn.App. 553, 557, 990 P.2d 453 (1999). That claim was summarily dismissed because the allegations did "...not rise to the level of atrocity or intolerability in civilized society to justify a cause for outrage." Id. at 564.

In Citoli v. City of Seattle, the plaintiff sought outrage damages against a public utility and a city for the termination of gas and electrical service in the building where his business was located. 115 Wn.App. 459, 495, 61 P.3d 1165 (2002). The trial court dismissed this claim, as a matter of law, because reasonable minds could not differ on

whether the alleged conduct was sufficiently extreme and outrageous to result in liability. Id. The Court of Appeals affirmed this dismissal. Id. at 495.

An example of conduct sufficient to support an outrage award can be found in Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003). There, under a no-contact order, the defendant threatened to kill his former girlfriend, threatened to kill the man she was dating, watched her house, called her home 640 times, called her at work 100 times, and called the homes of men she knew numerous times. Id. at 194-95. Those facts supported the giving of an outrage instruction and damage award. Id. at 203.

On the other hand, in Womack v. Rardon, three juveniles took the plaintiff's cat from her front porch to a nearby school and, using gasoline, set the cat on fire. 133 Wn.App. 254, 257, 135 P.3d 542 (2006). The cat suffered first, second, and third degree burns and was soon euthanized. Id. This court held that what happened to the cat was "deplorable, but the record does not sufficiently establish the required intent or the necessary severity" to prove the tort of outrage. Id. at 261.

Likewise, in Albright v. State, Department of Social and Health Services Division of Developmental Disabilities, a school district's conduct in requiring a counselor to undergo a psychiatric evaluation in order to verify the severity of his alleged hypertensive disorder for which he was seeking accommodation was not outrageous as to give rise to an outrage claim. 65 Wn.App. 763, 770, 829 P.2d 1114 (1992).

In the present case, Detective Mehring's outrage claim was based on his allegations that Chief Kirkpatrick:

- Held a press conference after placing him on administrative leave to staunch the rumor mill and control the information released in a serious public event brought on by Detective Mehring. (RP 2038-39, 2047)
- Determined that there was insufficient evidence in the Administrative Review Panel hearing on Detective Mehring's death threats against his wife. (RP 2056; 12/16/11 RP 32)
- Rotated Detective Mehring back from the Regional Drug Task Force to the Targeted Crimes Department. (RP 2040, 2049)
- Notation from Captain Braun on his evaluation that Detective Mehring had ignored parking tickets. (RP 1710-11)
- Detective Mehring was placed on administrative leave to obtain counseling and a fitness for duty evaluation after he answered interrogatories setting forth significant emotional stability issues. (RP 2046, 2111)
- Did not allow Detective Mehring to further use the Spokane Police Department email system to argue his personal case to the entire department. (RP 1189)
- Investigated whether Detective Mehring was insubordinate for not checking in with Captain Braun, as specifically ordered, before taking a vacation. (RP 2047)

- Did not immediately renew his counselor's contract, which Dr. Palmer testified was not Chief Kirkpatrick's fault, but which reflected her own conflict of interest, where the contract was on the desk of an overworked Assistant City Attorney, where Dr. Palmer was in fact being hired, and where she, not the defendants, sought revisions to the contract. (RP 2044-45, 2106-07)

While each of the allegations was disputed at trial and refuted by both the City and Chief Kirkpatrick, none of them, nor the totality of all of them, meet the test of Dieder and Wolf.²¹

6. No theory was properly pled in this case under which Detective Mehring's "lost overtime" claim could have been awarded.

During closing argument, Detective Mehring's counsel requested recovery of economic damages on three bases. The first was for COBRA payments for his wife's medical insurance in the agreed amount of \$1,740. (RP 2050) The second was the money spent for psychotherapy sessions with Dr. Palmer, again with an undisputed amount of \$1,200. (RP 2050)

The third category was the payment of overtime wages had Detective Mehring been returned to the Regional Drug Task Force. Counsel argued that Detective Mehring was entitled to five years of overtime at \$10,735 per year. (RP 2049)

The jury awarded \$45,675 in economic damages. (CP 2709) After deduction of the COBRA payments and payments to Dr. Palmer, this results in an award of

²¹ Additionally, the trial court erred in instructing the jury on the torts of outrage and intentional infliction of severe emotional distress and Instruction Nos. 22, 23, 24, 25, and 26. These challenged instructions are set forth verbatim in Assignments of Error 14 through 18.

approximately \$42,735 for "lost overtime."

No theory was properly pled in this case under which Detective Mehring's "lost overtime" claim could have been awarded.

7. The trial court erroneously awarded excessive attorney fees on unsegregated claims, on an unreasonable hourly rate, and an excessive multiplier.

a. Detective Mehring failed to properly segregate his request for attorney fees between successful claims and unsuccessful claims.

On December 15, 2009, Detective Mehring filed his lawsuit against Troy Teigen, David Overhoff, Anne Kirkpatrick and the City of Spokane. In that lawsuit, he sought damages for an alleged Fourth Amendment violation (First Cause of Action), and alleged conspiracy to violate his civil rights (Second Cause of Action), false arrest (Third Cause of Action), invasion of privacy/false light (Fourth Cause of Action), vicarious liability for the actions of Troy Teigen and David Overhoff (Fifth Cause of Action),²² defamation (Seventh Cause of Action), negligence and gross negligence in the investigation (Eighth Cause of Action),²³ tortious interference with contractual relations (Tenth Cause of Action), and wrongful withholding of wages (Eleventh Cause of Action). (CP 9)

On August 8, 2011, just nine weeks prior to trial and after approximately 20 months of discovery on the original Complaint, Detective Mehring filed an Amended Complaint, which added additional claims for retaliation (Twelfth Cause of Action) and for a hostile work environment (Thirteenth Cause of Action). (CP 1840)

²² Vicarious liability is not permitted under the civil rights laws in any event. See, Hunter v. County of Sacramento, 652 F.3d 1225, 1232 (9th Cir. 2011), citing Monell v. Department of Social Services, 436 U.S. 658 (1978). This is not a new rule.

²³ There is no recognized cause of action for negligent investigation.

The majority of the remaining claims were not successful. Most would not have been fee-producing, even if Detective Mehring had prevailed on them. However, because Detective Mehring submitted an unsegregated fee petition, plaintiff's counsel was able to obtain an attorney fee award, which included compensation for time spent advancing multiple unsuccessful and non-fee bearing theories.

Washington follows the "American rule" regarding attorney fees. Such fees are not recoverable absent a statutory basis for such recovery. Bank of New York v. Hooper, 164 Wn.App. 295, 303-04, 263 P.3d 1263 (2011). Despite this, Detective Mehring was able to obtain an award of unsegregated fees that allowed recovery for and rewarded unsuccessful and non-fee bearing theories of recovery.

Detective Mehring was successful with three theories at trial:

1. **Procedural Due Process.** He claimed the City of Spokane did not convene an ad hoc committee at the time he was placed on felony layoff status and the City failed to make a recommendation to the Deputy Mayor and there was no hearing until after Detective Mehring was acquitted on felony charges. This fact was never factually disputed.²⁴

2. **Outrage.** This claim is discussed in the preceding section of this brief.

3. **First Amendment Retaliation.** This claim was first filed with the Amended Complaint in August of 2011. All fees incurred prior to that time, while plaintiff was pursuing other theories of recovery, cannot be reasonably attributed to this theory. There were no depositions taken by plaintiff on this theory.

²⁴ The decision of whether this conduct legally constituted a procedural due process violation was vigorously contested. However, no discovery was required on this issue.

Detective Mehring is entitled to the reasonable time of his attorneys spent to achieve the successful result on the theories where he was actually successful.

Washington law is well established that (a) the segregation of unsuccessful claims and non-fee producing legal theories is required; (b) segregation is the responsibility of the party seeking fees; and (c) segregation must be undertaken on the record so that an appellate court may determine why and how the trial court arrived at the fee award involved. Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 411, 759 P.2d 418 (1988); Loeffelholz v. C.L.E.A.N., 119 Wn.App. 665, 691, 82 P.3d 1199 (2004).

Segregation was clearly possible in this case. However, for a number of reasons, Detective Mehring did not segregate his fee petition, and the trial court countenanced this failure by application of an arbitrary percentage.

Detective Mehring is not entitled to recover for unsuccessful theories on which fees are not recoverable. He is not entitled to recover time on unsuccessful efforts such as dismissal causes of action and time pursuing other defendants dismissed from the case before trial. There was no basis under Washington law to recover fees for the tort of outrage.

The original Complaint alleged 11 causes of action set forth in 79 numbered paragraphs. (CP 9) These allegations ranged from defamation to civil conspiracy, and the gravamen of the Complaint is that Chief Kirkpatrick, along with other individual defendants Teigen and Overhoff, concocted a conspiracy to charge Detective Mehring with a felony for nefarious reasons. (CP 9) Almost all of these allegations were false

and/or without any factual or legal support. (RP 132, 136, 138, 140, 234; CP 865, 2420)

The trial court dismissed most of the causes of action on summary judgment. (CP 865)

Only due process and outrage went to trial in October 2011. Further, outrage is not fee-bearing. The only allegation on which the jury could have awarded punitive damages (retaliation) was not even in the case until ten weeks before trial.

In July of 2011, when Detective Mehring pled for the first time his First Amendment retaliation claim, the only survivor from the 2009 Complaint was plaintiff's wage and hour claim, wherein Detective Mehring claimed the City owed him double damages for the time he had been on unpaid leave. This claim failed also. (RP 1896)

Detective Mehring prevailed at trial on three theories of recovery: (1) outrage (not fee-bearing); (2) procedural due process (fee-bearing but based on undisputed facts); and (3) retaliation for filing the December 2009 lawsuit (claim raised ten weeks prior to trial).

Detective Mehring originally submitted a fee application for \$638,801.56. (CP 3403) On December 16, 2011, the trial court ordered Detective Mehring to segregate his fee claim. (12/16/2011 RP 53)

On December 30, 2011, Detective Mehring filed a revised fee petition, this time asking for \$658,063.28, including \$51,560.50 in post-trial fees. (CP 3412) In response to the trial court's order to segregate the fees, counsel responded that "...it was not possible to discern with a degree of specificity the exact amount of time spent on matters that were ultimately dismissed." (CP 3408) Claiming that their fee records did not allow them to identify with sufficient specificity the time spent on multiple, unsuccessful claims (conspiracy to violate civil rights) and non-fee bearing claims (defamation and

tortious interference), or both, Detective Mehring selected a handful of time entries from 2009 to September 2011 and reduced them by an apparently arbitrary percentage (in some cases 50%, in some cases 25%). (CP 3410)

Detective Mehring claimed that the segregation was wasteful and duplicative time did not occur because the facts and the law in this case were "intertwined." This excuse is frequently given when a party fails to segregate. In Smith v. Behr Processing Corp., 113 Wn.App. 306, 344-45, 54 P.3d 665 (2002), the Court of Appeals gave short shrift to such an excuse for failing to segregate: "Regardless of the difficulty involved in segregation, the Travis court made it clear that the trial court has to undertake the task."

A party cannot recover for unsuccessful activities associated with an otherwise successful theory on which fees may be awarded. In Pham, the Supreme Court upheld the trial court's decision to exclude time spent on an unsuccessful cross-motion summary judgment, settlement discussions, a complaint never filed, media relations, and unsuccessful actions on appeal including a motion on the merits.

Rather than segregating his fee claim as ordered by the court, Detective Mehring merely took a 7% reduction in fees claimed. This across the board reduction was apparently intended to account for the fact that the first two years' worth of fees were almost entirely unrelated to the fee-bearing portion of the result.

The law is well-established that where attorney fees are authorized for only some claims, the attorney fee award must be segregated to properly reflect time spent on issues for which attorney fees are authorized from time spent on other issues. Hume v. American Disposal Co., 124 Wn.2d 656, 672, 880 P.2d 988 (1994) (citations omitted). The Hume court stated:

The court must separate the time spent on those theories essential to the cause of action for which attorneys' fees are properly awarded and the time spent on legal theories relating to other causes of action...this must include, on the record, a segregation of the time allowed for the separate legal theories...

Id. at 673 (quoting Travis v. Washington Horse Breeders Ass'n., Inc., 111 Wn.2d 396, 410-411, 759 P.2d 418 (1988)).

The party seeking an award of attorney fees has the burden of establishing entitlement to an award and documenting the appropriate hours expended and the hourly rates. This includes maintaining billing records in a manner that will enable the reviewing court to identify distinct claims. Hensley v. Eckerhart, 461 U.S. 424 (1983); Fisher Properties v. Arden-Mayfair, Inc., 106 Wn.2d 826, 850, 726 P.2d 8 (1986); Brotten v. May, 49 Wn.App. 564, 744 P.2d 1085 (1987).

Both federal and state law require segregation of fee-bearing and non-fee bearing claims and the successful and unsuccessful claims. See, Eckerhart at 451-52.

The conspiracy, defamation, tortious interference, Fourth Amendment seizure (claiming the City was responsible for Detective Mehring's arrest) and other unsuccessful claims were all extremely fact intensive. By contrast, the procedural due process claim and the retaliation claim were based on undisputed facts.

The trial court acknowledged the half-hearted attempt to segregate the work on the dismissed claims. However, it ruled that:

Additional segregation was not required, as the case involved two core sets of facts, those supporting Plaintiff's claims and those supporting Defendants' defenses and the claims that proceeded to trial were based upon one or both of these core sets of facts.

(CP 3229)

The trial court ultimately concluded that: "[A]ny attempt to segregate would be impossible." (CP 3230) This ruling flies in the face of well-established law that requires segregation.

Detective Mehring did not comply with the trial court's Order on December 16, 2011 to segregate his fees. He did, however, acknowledge that 7% of the time could be attributed to the unsuccessful claims that were dismissed by the trial court. Detective Mehring also claimed that the time spent on the unsuccessful claims could not be segregated, evidently believing that due process and retaliation issues are so intertwined with all of the claims alleged in 79 paragraphs of the initial Complaint that segregation is not feasible.

The burden of demonstrating that a fee is reasonable always remains on the fee applicant. Absher Const. Co. v. Kent, 79 Wn.App. 841, 847, 917 P.2d 1086 (1995).

In July 2011, Detective Mehring for the first time pled the First Amendment retaliation claim. Even the Amended Complaint, however, asserted multiple erroneous causes of action, persisted in the fiction that Detective Mehring had been "terminated," and that the City and Chief Kirkpatrick were somehow related to the prosecution of Detective Mehring by the County Prosecutor. Another survivor from the 2009 Complaint was Detective Mehring's wage and hour claim. Detective Mehring claimed the City owed him double damages for the time he had been on unpaid leave. This claim also failed.

b. The trial court abused its discretion in finding that \$400 per hour was a reasonable rate for plaintiff's lead counsel.

Blum v. Stenson, 465 U.S. 886 (1984) contains a detailed discussion of what constitutes a reasonable rate. The key point is that the hourly rate that goes into the

lodestar is not necessarily plaintiff's counsel's rate; the analysis is not personalistic in that sense. The question ultimately is the rate an attorney of similar ability and experience would charge, in the relevant community, to make sure that civil rights are vindicated, without creating a windfall to the attorney involved. See, City of Burlington v. Dague, 505 U.S. 557, 561 (1992); Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, 483 U.S. 711, 727 (1987).

The trial court found that Robert Dunn's hourly rate of \$400 per hour was reasonable. (CP 3228)

In setting Mr. Dunn's reasonable hourly rate at \$400, the trial court ruled that his rate was consistent with rates of other comparable attorneys in the Spokane area. (CP 3227)

The trial court noted that Mr. Dunn's rate was "on the high end of Spokane." (1/23/12 RP 137) She also noted that the next highest rate in Spokane was \$325 per hour. (1/22/12 RP 138) The trial court added that Spokane rates were generally in the range of \$280, "maybe up to \$350". (1/22/12 RP 138) Despite this, the trial court found that \$400 per hour was reasonable. (1/22/12 RP 139)

This rate was excessive and not supported by the record. That same rate was also used as the foundation for the multiplier which resulted in Mr. Dunn being awarded \$500 per hour.²⁵ That rate is unprecedented in the Spokane area, and its award was an abuse of discretion.

²⁵ After finding that Mr. Dunn's \$400 per hour rate was reasonable, the trial court determined that the rates charges by the other 11 attorneys were dependent on Mr. Dunn's rate. If Mr. Dunn's rate is determined to be not reasonable, the other rates will need to be revisited.

c. The trial court erred in applying a 1.25 multiplier to a fee award already based on a \$400 per hour rate.

After spending two years on theories that were incompatible with existing law, Detective Mehring ultimately recovered a damages award. Again, Detective Mehring had the burden of proving an entitlement to a multiplier. Perdue v. Kenny A., 130 S.Ct. 1662, 1673-74 (2010) (reversing an enhancement for quality of representation and describing them as "rare" and "exceptional" and requiring specific evidence that the lodestar fee would not have been adequate to attract competent counsel); Blum at 898.

Washington courts have explained the method to determine a reasonable attorney fee, stating:

...there are two principal steps to computing an award of fees. First, a "lodestar" fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Second, the "lodestar" is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not *already* been taken into account in computing the "lodestar" and which are shown to warrant the adjustment by the party proposing it.

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593-594, 675 P.2d 193 (1983) (emphasis in original) (quoting Miles v. Sampson, 675 F.2d 5, 8 (1st Cir. 1982)). To calculate the lodestar, the attorney must provide reasonable documentation of the work performed. These hours are then multiplied by a reasonable hourly rate. "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." Id. at 597.

After the lodestar has been calculated, the court may consider whether it is necessary to adjust it. "The burden of justifying any deviation from the lodestar rests on the party proposing the deviation." Id. at 598. Washington courts hold that "a

presumption exists that the lodestar amount represents a 'reasonable fee' ... enhancements 'should be reserved for exceptional cases where the need and justification...are readily apparent.'" Xieng v. Peoples National Bank of Washington, 63 Wn.App. 572, 587, 821 P.2d 520 (1991) (citations omitted).

Lodestar figures should only be adjusted in rare and exceptional circumstances. One of the factors to be considered is whether the fee is fixed or contingent. Since the lodestar assumes the lawyer is properly compensated, awarding an additional factor for contingent risk is limited under Washington law to truly extraordinary situations. Pham v. City of Seattle, 159 Wn.2d 527, 543, 151 P.3d 976 (2007). Federal law generally prohibits a contingent risk multiplier. City of Burlington v. Dague, 505 U.S. 557, 559 (1992).

The trial court based its ruling of a 1.25 multiplier on a number of factors: undesirability of the case, the impact of the case on the attorney's practice, the nature of the case subject matter, the fact that plaintiff was proceeding against a well-represented government entity with substantial resources, the highly contested nature of the case, the fact that there was no assurance of a recovery, the complexity of the case, the high quality of representation, the exceptional result obtained, and the substantial time commitment expended by the attorneys. (CP 3231) The trial court applied a multiplier of 1.25 to all fees through the date of the jury's verdict. (CP 3232)

The application of this multiplier resulted in Mr. Dunn receiving \$500 per hour, which was excessive and an abuse of discretion.

F. CONCLUSION

The City and Chief Kirkpatrick ask this Court to reverse the jury verdict, vacate the rulings of the Superior Court and grant judgment on their behalf.

DATED this 17th day of January, 2013.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on January 17, 2013, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manner(s) noted below:

| | | |
|---------------------------|-------------------------|-------------------------------------|
| Susan C. Nelson | VIA REGULAR MAIL | <input type="checkbox"/> |
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