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Court of Appeals Cause No. 35652-0-II

**FILED**  
SEP 17 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

**ALLAN PARMELEE,**

**Petitioner,**

**v.**

**ROBERT O'NEEL, et al.,**

**Respondents.**

2008 SEP -2 PM 1:49

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

**PETITION FOR REVIEW**

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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

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DIVISION II

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## **IDENTITY OF PETITIONER**

Petitioner Allan Parmelee asks this Court to accept review of the Court of Appeals decision terminating review designated below.

## **COURT OF APPEALS DECISION**

On June 19, 2008, the Washington Court of Appeals, Division 2, filed an opinion granting the Petitioner substantial relief on his constitutional claims under 42 U.S.C. § 1983, but denying, without explanation, Petitioner's request for attorney fees under 42 U.S.C. § 1988. The Court also limited Petitioner's ability to recover fees on remand, ruling, without explanation, that only one of his multiple civil rights claims, if successfully litigated, could entitle him to an attorney fee award. See Parmelee v. O'Neel, \_\_\_ Wn. App. \_\_\_, 186 P.3d 1094 (2008) (copy provided in appendix at A-1 through A-17).

Petitioner filed a motion for reconsideration of the attorney fee ruling, which the Court of Appeals denied on July 31, 2008 (copy of denial provided in appendix at A-18).

Petitioner asks the Supreme Court to review the Court of Appeals' ruling denying his attorney fees on appeal and limiting the availability of fees on remand.

## **ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals abuse its discretion in denying, without explanation, an award of attorney fees to the Petitioner, a civil rights plaintiff, when the Petitioner prevailed on a significant § 1983 claim on appeal, obtaining injunctive relief and a declaration that the state statute he challenged on appeal was unconstitutional?

2. Did the Court of Appeals err when it remanded Petitioner's First Amendment, retaliation, and substantive due process claims to the trial court for further proceedings, but ruled, without explanation, that the Petitioner could recover attorney fees under § 1988 only if, upon remand, he prevailed on the retaliation claim, precluding a fee award for any success Petitioner might achieve on his other constitutional claims?

## **STATEMENT OF THE CASE**

Petitioner Allan Parmelee is a Washington prisoner who regularly speaks out and writes about prison conditions and prisoner rights. Clerk's Papers ("CP") 689 (Verified Complaint ¶ 24). He describes himself as outspoken and politically active. CP 687. He has written prisoner self-help books, news articles and press releases, and has pursued litigation against state officials in order to help prisoners know and enforce their rights and to challenge official misconduct. CP 689-90. Mr. Parmelee's

speech is often critical of Department of Corrections (DOC) staff, policies, and operations. CP 687.

On July 20, 2005, Mr. Parmelee sent a letter to then-DOC Secretary Harold Clarke, complaining about programs and conditions at Clallam Bay Corrections Center (CBCC), including the treatment of prisoners there. CP 717-18. In the letter, Mr. Parmelee indicated that he had heard CBCC Superintendent Sandra Carter was “anti-male – a lesbian” and speculated that “[h]aving a man-hater lesbian as a superintendent is like throwing gas on [an] already smoldering fire.” Id.

Approximately three months later, DOC issued a serious infraction against Mr. Parmelee, claiming that his letter to Secretary Clarke “is considered to be libelous [sic] and slanders the character and reputation of Superintendent Sandra Carter.” CP 714-15. According to DOC, Mr. Parmelee’s letter violated Washington’s criminal libel statute, RCW 9.58.010, and therefore was punishable under WAC 137-25-030(517) (“Committing any act that would constitute a misdemeanor and that is not otherwise included in these [prison disciplinary] rules”). CP 714-15. A DOC hearing officer found Mr. Parmelee guilty of the infraction and sentenced him to 10 days of isolation and 10 days loss of privileges. CP 827.

Acting *pro se*, Mr. Parmelee filed a lawsuit in Clallam County Superior Court in December, 2005, challenging his infraction on First Amendment and other grounds and seeking monetary, injunctive, and declaratory relief. CP 684-827. He later filed a motion for judgment on the pleadings. CP 105-16. The DOC defendants opposed the motion and filed a cross-motion to dismiss the lawsuit. CP 91-103. The trial court denied Mr. Parmelee's motion for judgment on the pleadings and granted DOC's motion to dismiss. CP 19-32, 47, 86-87.

Mr. Parmelee eventually obtained counsel and appealed the trial court's dismissal of his claims, arguing, *inter alia*, that Washington's criminal libel statute was unconstitutional on its face, that DOC's actions were arbitrary and capricious, and that he had stated a cognizable claim for retaliation, which the trial court erred in dismissing. Further, since his claims were brought under 42 U.S.C. § 1983, Mr. Parmelee asked the Court of Appeals to award attorney fees pursuant to 42 U.S.C. § 1988.<sup>1</sup>

The Court of Appeals agreed with Mr. Parmelee that Washington's criminal libel statute violated the First Amendment to the United States Constitution. Parmelee, 186 P.3d at 1100 – 01. Accordingly, the Court

---

<sup>1</sup> 42 U.S.C. § 1988(b) provides: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

granted Mr. Parmelee the injunctive relief he sought and vacated his infraction. Id. at 1107. In addition, the Court of Appeals agreed that Mr. Parmelee had stated a claim for retaliation, and therefore reversed the trial court's dismissal of this claim (as well as the substantive due process claim) and remanded the case for further proceedings. Id. at 1106 – 07.

Despite the fact that Mr. Parmelee succeeded in having the state's criminal libel statute declared unconstitutional, obtained significant injunctive relief, and won a reversal of the trial court's dismissal of his case, and despite the fact that all of his claims were brought under 42 U.S.C. § 1983, the Court of Appeals, offering no explanation, refused to award any attorney fees for the appeal, ruling instead that Mr. Parmelee would be entitled to attorney fees only "if on remand, his attorney successfully litigates the retaliation claim under 42 U.S.C. § 1983." Id. at 1107.

### **ARGUMENT**

The purpose of § 1988 fee awards is to promote enforcement of the nation's civil rights laws by making it possible for individual plaintiffs to retain counsel to help them challenge civil rights violations. The Court of Appeals ruling in this case undermines the goal of civil rights enforcement and conflicts with Washington and United States Supreme Court authority favoring attorney fee awards for successful civil rights plaintiffs, including

on appeal. The Supreme Court should review the Court of Appeals ruling, pursuant to RAP 13.4(b)(1), (2), and (4) in order to protect the ability of all Washington citizens to retain counsel to help defend their civil rights.

**A. THE COURT OF APPEALS DECISION CONFLICTS WITH WELL-ESTABLISHED AUTHORITY FAVORING FEE AWARDS FOR SUCCESSFUL CIVIL RIGHTS PLAINTIFFS.**

The Court of Appeals' ruling regarding attorney fees was brief:

Parmelee is not entitled to attorney fees on appeal. He will only be entitled to attorney fees under 42 U.S.C. § 1988 if on remand, his attorney successfully litigates the retaliation claim under 42 U.S.C. § 1988.

Parmelee, 186 P.3d at 1107. This ruling is in conflict with decisions from the United States Supreme Court and the appellate courts of Washington. It also is contrary to Congress' express intent to encourage private citizens to enforce their civil rights with the assistance of counsel.

**1. Attorney Fees Under § 1988 Are Available to Parties who Prevail on Appeal.**

Contrary to the ruling below, successful civil rights plaintiffs may recover attorney fees under § 1988 when they lose at the trial court level but prevail on appeal. The United States Supreme Court affirmed this notion in a 1989 case where a group of teachers challenged school district policies regarding employee communications on First and Fourteenth Amendment grounds. Texas State Teachers Ass'n v. Garland Indep. Sch.

Dist., 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). The trial court dismissed the teachers' claims. However, the appellate court reversed the dismissal, at least in part, concluding that some of the district's policies were indeed unconstitutional. Having prevailed to a great extent on appeal, the plaintiffs moved for an award of attorney fees under § 1988. The district court denied the fee request and the Fifth Circuit affirmed, concluding that the plaintiffs were not the "prevailing parties" for fee purposes. A unanimous Supreme Court reversed that decision. In addition to clarifying the test for "prevailing party" status under § 1988, the Court discussed the availability of fees for parties who prevail on appeal:

Congress clearly contemplated that interim fee awards would be available where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. In discussing the availability of fees *pendente lite* under § 1988, we have indicated that such awards are proper where a party has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal.

Garland, 489 U.S. at 790 (internal quotation marks and citations omitted). Consistent with this authority, Washington appellate courts have awarded attorney fees under § 1988 to civil rights plaintiffs who prevail on appeal. See, e.g., Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 972, 954 P.2d 250 (1998) (reversing trial court's dismissal of civil rights

claims, remanding for trial, and awarding plaintiff/appellant attorney fees and other costs for the appeal); State ex rel. Public Disclosure Comm'n v. 119 Vote No! Committee, 135 Wn.2d 618, 632, 957 P.2d 691 (1998) (declaring state statute unconstitutional and granting attorney fees to prevailing party on appeal); Lesley v. Dep't of Social and Health Services, 83 Wn. App. 263, 279, 921 P.2d 1066 (1996) (reversing summary judgment against civil rights plaintiff and awarding appellant attorney fees incurred on appeal); Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 128-29, 829 P.2d 746 (1992) (reversing summary judgment rulings, remanding, and granting appellant attorney fees on appeal).

Thus, to the extent the Court of Appeals' decision is based on a notion that attorney fees under § 1988 are not available at the appellate stage, that decision conflicts with United States Supreme Court and Washington Supreme Court authority and should be reviewed.

**2. The Court of Appeals Decision Conflicts with Authority Limiting Courts' Discretion to Deny Attorney Fees to Prevailing Civil Rights Plaintiffs.**

Although 42 U.S.C. § 1988 provides for judicial discretion in determining whether or not to award fees to prevailing civil rights plaintiffs, this discretion is "extremely narrow." Duranceau v. City of Tacoma, 37 Wn. App. 846, 849, 684 P.2d 1311 (1984) (holding that the trial court abused its discretion in denying plaintiff's request for attorney

fees when plaintiff prevailed on his § 1983 claim). In Duranceau, the Court of Appeals explained the scope of a court's discretion under § 1988 as follows:

In enacting the [attorney fee] amendment to section 1988, Congress sought to encourage the vindication of civil rights through the mechanism of private lawsuits. Congress specifically indicated that a successful plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”

Duranceau, 37 Wn. App. at 849-50 (citations omitted).

Accordingly, both Washington and federal courts have recognized a “presumption that successful section 1983 plaintiffs should recover a reasonable attorney’s fee absent such special circumstances.” Id. at 850 (citations omitted). “The Supreme Court has implicitly approved this presumption.” Id. (citing Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)); accord Blanchard v. Bergeron, 489 U.S. 87, 89 n.1, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989) (noting that judicial discretion under § 1988 is “not without limit”); Jacobsen v. City of Seattle, 98 Wn.2d 668, 675-76, 658 P.2d 653 (1983); Collins v. Chandler Unified Sch. Dist., 644 F.2d 759, 763 (9th Cir. 1981) (“Congress plainly intended that successful plaintiffs should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”) (internal quotation marks and citation omitted); Herrington v. County of Sonoma,

883 F.2d 739, 743 (9th Cir. 1989) (“[F]ee awards [under §1988] should be the rule rather than the exception.”); Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 293 (1st Cir. 2001) (“Although [the] fee-shifting provision [of § 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory.”) (citations omitted).

Neither the Respondents nor the Court of Appeals articulated any “special circumstances” that would make an award of fees in this case unjust. See Collins, 644 F.2d at 763 (“[A] court which denies an award of attorney’s fees must issue findings of fact and conclusions of law identifying the ‘special circumstances’ and explaining why they render an award unjust.”) (internal quotation marks and citation omitted). Indeed, In the absence of such special circumstances, the Court’s decision to deny fees in this case conflicts with the presumption, recognized by the United States Supreme Court and the appellate courts of this state, that prevailing civil rights plaintiffs should be awarded their attorney fees under § 1988.

**B. THIS PETITION PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.**

Supreme Court review is warranted in this case under RAP 13.4(b)(4) because the Court of Appeals decision undermines the important public interest in civil rights enforcement by making it more

risky for attorneys to accept meritorious civil rights cases, thereby making it more difficult for citizens to retain counsel in such cases. As discussed below, this result directly contravenes Congress' express purpose in enacting § 1988.

**1. There is a Strong Public Interest in Encouraging Individual Citizens to Challenge Civil Rights Violations by Providing a Means for Them to Retain Counsel.**

“The purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances. Accordingly, a prevailing plaintiff ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’” Hensley, 461 U.S. at 429 (citations omitted). Denying fees to a prevailing party, without explanation and without reference to any “special circumstances,” as the Court of Appeals did in this case, will make it significantly more difficult for individuals with modest or no resources to vindicate their constitutional rights, as Congress intended.

In recommending passage of the attorney fee provision of § 1988, the United States Senate Judiciary Committee emphasized the importance of attorney fee awards in removing the formidable obstacle of attorney costs that otherwise would prevent most individuals from enforcing their civil rights.

[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

...

[T]he Committee has found that fee awards are essential if the Federal statutes to which [§1988(b)] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.

...

If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011, at 2, 5-6 (1976), reprinted in 1976 U.S.C.C.A.N. 5910, 5913.

The Civil Rights Attorneys' Fees Awards Act, the legislation that authorized fee awards in § 1983 cases, was supported by the United States Department of Justice, the United States Civil Rights Commission, the American Bar Association Special Committee on Public Interest Law, and

the Council on Public Interest Law, among others. 122 Cong. Rec. 35125, 35126 (1976) (statement of Rep. Kastenmeier). The public interest in such fee awards is further reflected in statements made by members of the United States House of Representatives during floor debate on the Act:

Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people. The organizations who have helped them bring their cases are frequently not well financed. The Justice Department does not have the resources to bring suit for every civil rights violation. Thus, many people, deprived of their civil rights, may not as a practical matter be able to do anything about it. It is not right to deny people who cannot afford to pay attorneys' fees the availability of justice through our courts.

Id. at 35127 (statement of Rep. Holtzman).

Unless you can get adequate legal representation, the civil rights laws are just a lot of words. But if you can obtain a lawyer's services, those civil rights laws are the vehicle for you to fight illegal and unconstitutional discrimination. If you have a meaningful opportunity to use the civil rights laws to protect yourself, then they are among the most important laws in the entire United States Code.

Id. at 35128 (statement of Rep. Seiberling).

Of course, our nation's civil rights laws are not limited to protecting citizens from illegal discrimination. Comments supporting passage of the Civil Rights Attorneys' Fees Awards Act specifically note that without such fees awards, it would be very difficult for prisoners (like the Petitioner in this case) to challenge violations of their rights under the

First, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Id. at 35126 (statement of Rep. Fish).

In sum, civil rights attorney fee awards are “an important step in the direction of providing equal justice under the law.” Id. at 35126 (statement of Rep. Kastenmeier).

**2. The Court of Appeals Ruling Contravenes the Purpose of § 1988 and Encourages Protracted Litigation.**

As explained above, § 1988 is intended to make it easier for civil rights plaintiffs to retain counsel to help them enforce their constitutional and statutory civil rights. However, the Court of Appeals decision in this case will have the opposite effect. Knowing that they may never be paid for their work litigating a civil rights claim, even if they prevail and obtain significant injunctive and declaratory relief for their client, many attorneys in this state – particularly solo practitioners and members of small firms – will be forced to decline such cases, making it much more difficult for citizens to retain counsel to help them enforce their most important constitutional rights.<sup>2</sup> As a result, many more civil rights violations will

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<sup>2</sup> Most plaintiffs are represented by solo practitioners and “local, small-firm lawyer[s],” who must be able to obtain attorneys’ fees in order to take these cases. Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 767-69 (1988). See also Carl Tobias, Rule 11 & Civil Rights Litigation, 37 Buff. L. Rev. 485, 486 n.41 (1989) (“The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income.”).

go unchallenged, and in a case like this one, unconstitutional statutes will remain on the books, to be invoked against other citizens.

Another harmful effect of the Court of Appeals' ruling is that it encourages protracted litigation. The Court held that the Plaintiff would be entitled to attorney fees in this case only if, on remand, his attorney successfully litigated the Plaintiff's retaliation claim. Parmelee, 186 P.3d at 1107. The Plaintiff has already obtained much of the relief he is seeking in this litigation, i.e., the vacating of his prison infraction and a declaration that the state's criminal libel statute is unconstitutional. However, the Court's decision to deny fees for counsel's work in obtaining this relief makes it very difficult to settle the remaining claims for damages, as the Plaintiff must continue litigating the case at the trial court level in order to establish his entitlement to fees. Further, since the Court made an attorney fee award contingent upon successful litigation of the *retaliation* claim, the Plaintiff is forced to continue pursuing that particular claim on remand. Even though he has already established liability on his other First Amendment claim (the constitutionality of the criminal libel statute), and thus could simplify remand proceedings by limiting trial to the question of damages on that claim, under the Court of Appeals ruling, he must fully litigate the retaliation claim in order to recover any attorney fees. Thus, by denying fees on appeal and

conditioning later fees upon successful litigation of the retaliation claim, the Court is forcing the Plaintiff, the State Defendants, and the trial court to continue expending resources on this case that might otherwise be saved.

### CONCLUSION

The Court of Appeals decision denying attorney fees in this case conflicts with United States Supreme Court and Washington authority favoring attorney fee awards for prevailing civil rights plaintiffs, including on appeal. Further, the decision, if allowed to stand, will weaken civil rights enforcement in this state by making it more difficult for individual citizens to retain counsel to help them challenge civil rights violations. Thus, the Court's decision raises an issue of substantial public importance, warranting review by the Supreme Court.

Respectfully submitted this 2nd day of September, 2008.

PUBLIC INTEREST LAW GROUP, PLLC



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Attorney for Petitioner

# APPENDIX

**C**

Parmelee v. O'Neel  
Wash.App. Div. 2,2008.

Court of Appeals of Washington, Division 2.  
Allan PARMELEE, Appellant,

v.

Robert O'NEEL; Robert Monger; Harold Clarke,  
Eldon Vail; Lynn Delano, Kathryn Bail; Carroll  
Riddle; Sandra Carter; John Palmer; John Aldana;  
Sandra Diimel; Jerry McHaffie; Tina Adams; Nath-  
an Cornish; Michael Erlenmeyer; unknown others,  
and the community partners of each named Defend-  
ant, Respondents.

No. 35652-0-II.

June 19, 2008.

**Background:** Prisoner brought action against pris-  
on officials, challenging constitutionality of criminal  
libel statute that formed basis for infraction, and  
retaliation. The Superior Court, Clallam County,  
George Lamont Wood and William Knebes, JJ.,  
dismissed complaint for failure to state claims upon  
which relief could be granted, and prisoner ap-  
pealed.

**Holdings:** The Court of Appeals, Bridgewater, J.,  
held that:

- (1) criminal libel statutory scheme was unconstitu-  
tional on its face;
- (2) criminal libel statutory scheme was unconstitu-  
tionally overbroad;
- (3) criminal statutory scheme was unconstitution-  
ally vague;
- (4) prisoner stated sufficient claim for retaliation  
under § 1983; and
- (5) prisoner was not entitled to award of attorney  
fees on appeal.

Infraction vacated; reversed and remanded.

West Headnotes

[1] Pretrial Procedure 307A ↪624

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in Gen-  
eral

307Ak623 Clear and Certain Nature of  
Insufficiency

307Ak624 k. Availability of Relief  
Under Any State of Facts Provable. Most Cited  
Cases

Dismissal of a complaint for failure to state a claim  
on which relief can be granted is appropriate only if  
it is beyond doubt that the plaintiff cannot prove  
any set of facts to justify recovery. CR 12(b)(6).

[2] Pretrial Procedure 307A ↪681

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak681 k. Matters Considered in  
General. Most Cited Cases

Pretrial Procedure 307A ↪683

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak682 Evidence

307Ak683 k. Presumptions and  
Burden of Proof. Most Cited Cases

On a motion to dismiss for failure to state a claim  
on which relief can be granted, a trial court must  
presume that the plaintiff's allegations are true and  
may consider hypothetical facts that are not in-  
cluded in the record. CR 12(b)(6).

[3] Appeal and Error 30 ↪170(2)

30 Appeal and Error

30V Presentation and Reservation in Lower  
Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k170 Nature or Subject-Matter of Issues or Questions

30k170(2) k. Constitutional Questions.

Most Cited Cases

For purpose of determining whether matter involved manifest constitutional error which could be considered for the first time on appeal, an error is "manifest" if it has practical and identifiable consequences in the trial at issue.

**[4] Constitutional Law 92 ↪2176**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2176 k. Criminal Liability. Most Cited Cases

**Libel and Slander 237 ↪142**

237 Libel and Slander

237VI Criminal Responsibility

237VI(A) Offenses

237k142 k. Constitutional and Statutory Provisions. Most Cited Cases

Criminal libel statutory scheme that made it gross misdemeanor to expose any living person or memory of person to hatred, contempt, ridicule or obloquy, or injury to business relationship was unconstitutional on its face, where it permitted punishment for false statements made without actual malice and true statements not made with good motives or for justifiable ends. U.S.C.A. Const.Amend. 1; West's RWCA 9.58.010, 9.58.020.

**[5] Constitutional Law 92 ↪990**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited Cases

Washington courts presume statutes to be constitutional.

**[6] Constitutional Law 92 ↪1004**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1001 Doubt

92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases

**Constitutional Law 92 ↪1030**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1030 k. In General. Most Cited Cases

The party challenging a statute bears the burden of proving beyond a reasonable doubt that it does not satisfy constitutional standards.

**[7] Constitutional Law 92 ↪990**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited Cases

Wherever possible, it is the duty of the court to construe a statute so as to uphold its constitutionality.

**[8] Constitutional Law 92 ↪1025**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction  
as to Constitutionality

92k1024 Limitations of Rules and Special  
Circumstances Affecting Them

92k1025 k. In General. Most Cited

Cases

A court cannot press statutory construction to the  
point of disingenuous evasion even to avoid a constitutional  
question.

[9] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

A statute's plain reading must make the interpretation  
reasonable.

[10] Constitutional Law 92 ↪656

92 Constitutional Law

92V Construction and Operation of Constitutional  
Provisions

92V(F) Constitutionality of Statutory Provisions

92k656 k. Facial Invalidity. Most Cited

Cases

In considering a facial challenge to the constitutionality  
of a statute, the court analyzes the statutory language  
itself and does not rely on the facts of the case.

[11] Constitutional Law 92 ↪2176

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and  
Press

92XVIII(X) Defamation

92k2176 k. Criminal Liability. Most Cited

Cases

Libel and Slander 237 ↪142

237 Libel and Slander

237VI Criminal Responsibility

237VI(A) Offenses

237k142 k. Constitutional and Statutory  
Provisions. Most Cited Cases

Criminal libel statutory scheme that made it gross  
misdemeanor to expose any living person or  
memory of person to hatred, contempt, ridicule or  
obloquy, or injury to business relationship was  
unconstitutionally overbroad, where it permitted  
punishment of true speech and false statements made  
without actual malice. U.S.C.A. Const.Amend. 1;  
West's RWCA 9.58.010, 9.58.020.

[12] Constitutional Law 92 ↪4509(1)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)2 Nature and Elements of  
Crime

92k4502 Creation and Definition of  
Offense

92k4509 Particular Offenses

92k4509(1) k. In General. Most  
Cited Cases

Libel and Slander 237 ↪142

237 Libel and Slander

237VI Criminal Responsibility

237VI(A) Offenses

237k142 k. Constitutional and Statutory  
Provisions. Most Cited Cases

Criminal libel statutory scheme providing that  
publications having tendency or effect of exposing  
any living person or memory of person to hatred,  
contempt, ridicule or obloquy, or injuring business  
relationship would be deemed "malicious" unless  
justified or excused was unconstitutionally vague,  
in that it created confusion between common law  
"malice" and "actual malice" standard under  
*New York Times v. Sullivan*. U.S.C.A. Const.Amend. 14;  
West's RWCA 9.58.010, 9.58.020.

[13] Criminal Law 110 ↪13.1(1)

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 Certainty and Definiteness

110k13.1(1) k. In General. Most Cited

Cases

A statute is unconstitutionally vague if it does not (1) define the criminal offense with sufficient definiteness such that ordinary persons understand what conduct is proscribed or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement.

[14] Criminal Law 110 ↪13.1(1)

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 Certainty and Definiteness

110k13.1(1) k. In General. Most Cited

Cases

A statute is indefinite, and thus, unconstitutionally vague, if persons of common intelligence must necessarily guess at its meaning and differ as to its application.

[15] Criminal Law 110 ↪13.1(1)

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 Certainty and Definiteness

110k13.1(1) k. In General. Most Cited

Cases

When analyzing a statute for vagueness, a reviewing court examines the context of the enactment as a whole, giving the statutory language a sensible, meaningful, and practical interpretation to determine whether it gives fair warning of the proscribed conduct.

[16] Criminal Law 110 ↪13.1(1)

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 Certainty and Definiteness

110k13.1(1) k. In General. Most Cited

Cases

The fact that some terms in a statute are undefined does not necessarily render the statute unconstitutionally vague.

[17] Constitutional Law 92 ↪656

92 Constitutional Law

92V Construction and Operation of Constitutional Provisions

92V(F) Constitutionality of Statutory Provisions

92k656 k. Facial Invalidity. Most Cited

Cases

When a statute is facially unconstitutional, no set of circumstances exist in which the statute, as currently written, can be constitutionally applied.

[18] Appeal and Error 30 ↪671(1)

30 Appeal and Error

30X Record

30X(M) Questions Presented for Review

30k671 Limitation by Scope of Record in General

30k671(1) k. In General. Most Cited

Cases

Although an appellate court may address constitutional claims of manifest error not raised below, if the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest, and review is not warranted.

[19] Prisons 310 ↪4(1)

310 Prisons

310k4 Regulation and Supervision

310k4(1) k. In General. Most Cited Cases

Whether a prison regulation is reasonable turns on four factors: (1) the rational relationship between the right and the limitation, (2) the reasonableness of the limitation, (3) the impact accommodation would have on the prison environment, and (4) the

absence of readily available alternatives.

**[20] Civil Rights 78 ↪1092**

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1089 Prisons

78k1092 k. Discipline and Classification; Grievances. Most Cited Cases

Prisoner's allegations that language used in his grievance regarding prison superintendent was not libelous, that prison officials retaliated against him by issuing infraction for making statements critical of prison staff and policy, that prison employee's actions did not advance legitimate penological goals, that prison officials' actions did not comply with internal policy regarding censorship of letters, and that prison officials retaliated against him by issuing infraction when prisoner was pursuing litigation against officials, stated cognizable claim for retaliation under § 1983. 42 U.S.C.A. § 1983.

**[21] Constitutional Law 92 ↪1196**

92 Constitutional Law

92X First Amendment in General

92X(B) Particular Issues and Applications

92k1193 Prisons

92k1196 k. Retaliation. Most Cited

Cases

**Prisons 310 ↪4(6)**

310 Prisons

310k4 Regulation and Supervision

310k4(6) k. Communications, Visitors, Privacy, and Censorship in General. Most Cited Cases  
Prisoner was not required to show atypical and significant hardship as result of infraction that issued after prisoner submitted letter to secretary for Department of Corrections that contained derogatory references to prison superintendent, in order to support retaliation claim against prison officials under First Amendment. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

**[22] Constitutional Law 92 ↪1196**

92 Constitutional Law

92X First Amendment in General

92X(B) Particular Issues and Applications

92k1193 Prisons

92k1196 k. Retaliation. Most Cited

Cases

In order for a prisoner to prevail on a retaliation claim under § 1983, the prisoner carries the burden to establish that the defendant retaliated against him for exercising his constitutional rights; that the retaliatory action chilled the exercise of his First Amendment rights; and that the retaliatory action failed to advance legitimate penological goals, such as preserving institutional order and discipline. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

**[23] Civil Rights 78 ↪1492**

78 Civil Rights

78III Federal Remedies in General

78k1492 k. Costs and Fees on Appeal. Most

Cited Cases

Prisoner was not entitled to award of attorney fees on appeal from dismissal of civil rights suit against Department of Corrections officials unless and until he prevails on retaliation claim on remand. 42 U.S.C.A. § 1988.

\*1096 Hank L. Balson, Public Interest Law Group, Seattle, WA, for Appellant.

Amanda Marie Migchelbrink, Attorney at Law, Daniel John Judge, Attorney General's Office, Olympia, WA, for Respondents.

Eric Stahl, Davis Wright Tremaine LLP, Seattle, WA, Aaron Hugh Caplan, Los Angeles, CA, Sarah A. Dunne, ACLU, Kristina Silja Bennard, Davis Wright Tremaine LLP, Seattle, WA, Amicus Curiae on behalf of American Civil Liberties Union of Washington Foundation.

BRIDGEWATER, J.

¶ 1 Allen <sup>FNI</sup> Parmelee, a Department of Corrections (DOC) inmate, appeals from the dismissal of his suit for damages and for an injunction against

DOC for violating his First Amendment rights, and his due process rights, and retaliating against him for exercising his First Amendment rights. We hold that when DOC infringed Parmelee for referring to Sandra Carter, the superintendent of Clallam Bay Correctional Center, as "anti-male-a lesbian" in a letter to DOC Secretary, it based the infraction on the criminal libel statute under RCW 9.58.010. We hold that the criminal libel statute is facially unconstitutional for overbreadth and vagueness. Because DOC based Parmelee's infraction on an unconstitutional statute, we vacate the infraction.

FN1. We note the appellant uses two different spellings of his first name: "Allan" appears in the captions and body of the pleadings but when he signs his name, he spells it "Allen." We will use the spelling "Allen" in this opinion.

¶ 2 We further hold that the trial court erred when it dismissed Parmelee's retaliation\*1097 claim under CR 12(b)(6) because, based on his pleadings, Parmelee may be able to prove a set of facts that would justify recovery: Parmelee was in litigation against DOC officials, he made critical statements against DOC staff and policy, and DOC did not issue the infraction until three months after he had attempted to send his critical letter to the DOC secretary. We reverse the trial court's dismissal under CR 12(b)(6) and remand to the superior court, where Parmelee may assert his claims for damages against DOC for violating his substantive due process rights, for violating his First Amendment rights, and for retaliating against him for exercising his rights.

#### FACTS

¶ 3 Parmelee is a Washington State inmate in the custody of DOC. He describes himself as outspoken and politically active. He has written prisoner self-help books, news articles, and press releases regarding prisoner rights. Parmelee is often critical of DOC staff, policies, and operations.

¶ 4 On July 20, 2005, Parmelee tried to send a letter to DOC Secretary Harold Clarke, complaining about the conditions and programs at Clallam Bay Corrections Center (CBCC). In the letter, Parmelee stated that CBCC Superintendent Sandra Carter was "anti-male-a lesbian."<sup>FN2</sup> CP at 717. He also speculated that "[h]aving a man-hater lesbian as a superintendent is like throwing gas on [an] already smoldering fire." CP at 718. DOC intercepted the letter, preventing it from leaving the institution.

FN2. The subject of the letter was: "RE: A Lesbian as a Superintendent Is A Solution For Disaster." CP at 717.

¶ 5 Three months later, on October 14, 2005, DOC issued a serious infraction against Parmelee under former WAC 137-28-260(1)(517) (2005),<sup>FN3</sup> for "[c]ommitting any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules." Prison officials infringed Parmelee under this disciplinary rule for violating Washington's criminal libel statute, RCW 9.58.010. Specifically, DOC claimed that his letter to Secretary Clarke "IS CONSIDERED TO BE LIBLOUS [sic] AND SLANDERS THE CHARACTER AND REPUTATION OF SUPERINTENDENT SANDRA CARTER." CP at 714.

FN3. The State has since promulgated new prison disciplinary rules, effective May 1, 2006. See WAC 137-25-030 (listing serious infractions).

¶ 6 DOC afforded Parmelee a hearing in front of a hearing officer to address the infraction. At the hearing, Parmelee tried to enter a written statement that explained his position on the infraction filed against him. He also submitted a request for DOC employees to respond to written questions, including questions regarding Carter's sexual orientation. The hearing officer refused to permit the questions because " 'they [were] designed to question the integrity of staff and not addressing the guilt or innocents [sic] of the offender.' " Br. of Resp't at 4 (citing CP at 722-36).<sup>FN4</sup> The hearing officer

found Parmelee guilty of the infraction, punishing him with 10 days of disciplinary isolation and 10 days without privileges. Parmelee's punishment did not affect or extend his current sentence.

FN4. The record does not include minutes or verbatim report of proceedings from the administrative proceedings.

¶ 7 On December 27, 2005, Parmelee filed a complaint for libel, slander, due process violations, First Amendment violations, malicious prosecution, and retaliation<sup>FN5</sup> against several DOC employees.<sup>FN6</sup> He sought monetary, declaratory, and injunctive relief.<sup>FN7</sup> After\*1098 DOC employees answered the complaint, Parmelee filed a motion for judgment on the pleadings. DOC employees opposed the motion and filed a cross-motion to dismiss the lawsuit. The superior court commissioner considered the motions without oral argument and entered a memorandum opinion on October 3, 2006, granting DOC employees' motion while denying Parmelee's.

FN5. In his original complaint, Parmelee also alleged libel and slander against the defendants, under chapter 9.58 RCW. He later withdrew his claims for libel and slander, arguing instead that chapter 9.58 RCW was superceded.

FN6. The named defendants include: Robert O'Neel, Richard Monger, Harold Clarke, Eldon Vail, Lynn DeLano, Kathryn Bail, Carroll Riddle, Sandra Carter, John Palmer, John Aldana, Sandra Diimmel, Jerry McHaffie, Tina Adams, Nathan Cornish, Michael Erlenmeyer, "Unknown Others" and the community partners of each.

FN7. According to DOC, Parmelee did not serve the complaint on the first DOC employee until June 15, 2006. Subsequent to that service, other DOC employees were either personally served or waived service.

To date, according to DOC, Clarke, Vail, DeLano, Bail, Diimmel, and Erlenmeyer have not been served. Both parties have filed a plethora of motions regarding DOC staff and service.

¶ 8 Parmelee filed a motion to revise the commissioner's ruling, which the trial court denied.<sup>FN8</sup> He then filed a notice of appeal on November 27, 2006. Although there is no evidence in the record showing that Parmelee served notice of his appeal to DOC employees, they timely filed a response with this court. In addition, we permitted the American Civil Liberties Union of Washington (ACLU) to file an amicus curiae brief, addressing the facial validity of Washington's criminal libel statute, RCW 9.58.010 and .020. DOC employees chose not to address the constitutionality of RCW 9.58.010 or .020.

FN8. The State contends and there is no evidence in the record that Parmelee ever served DOC employees with the motions to revise or the motion for reconsideration.

## ANALYSIS

### I. Standard of Review

[1][2] ¶ 9 Parmelee filed a motion for judgment on the pleadings under CR 12(c), and DOC employees filed a motion to dismiss for failure to state a claim upon which relief may be granted under CR 12(b)(6). We review a trial court's dismissal of a claim under either CR 12(b)(6) or CR 12(c) de novo. *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005); *Suleiman v. Lasher*, 48 Wash.App. 373, 376, 739 P.2d 712 (a motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues), *review denied*, 109 Wash.2d 1005 (1987). Dismissal under CR 12 is appropriate only if it is beyond doubt that the

plaintiff cannot prove any set of facts to justify recovery. *Burton*, 153 Wash.2d at 422, 103 P.3d 1230; *Suleiman*, 48 Wash.App. at 376, 739 P.2d 712. In making this determination, a trial court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. *Burton*, 153 Wash.2d at 422, 103 P.3d 1230. It is under this standard that we must review the issues raised on appeal.

## II. Constitutionality of Washington's Criminal Libel Statute On Its Face

¶ 10 Parmelee first challenges the constitutionality of Washington's criminal libel statutory scheme, RCW 9.58.010 and .020, under which DOC punished him for the language in his letter to Superintendent Clarke. He alleges that the statute is facially unconstitutional under *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Therefore, Parmelee contends that the superior court erred when it dismissed his claims under CR 12(b)(6) and found that DOC may rightly rely on chapter RCW 9.58 as basis for its actions against him.

[3] ¶ 11 Although Parmelee did not challenge the constitutionality of RCW 9.58.010 and .020 below, we may consider manifest constitutional errors for the first time on appeal. RAP 2.5(a)(3). An error is manifest if it has practical and identifiable consequences in the trial at issue. *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999). We believe that the constitutionality of Washington's criminal libel statutory scheme has practical and identifiable consequences in this case, particularly in light of the long-standing United States Supreme Court precedent declaring criminal libel statutes unconstitutional under its First Amendment jurisprudence. See, e.g., *Garrison*, 379 U.S. 64, 85 S.Ct. 209. We are therefore compelled to address whether Washington's criminal libel statutory scheme is unconstitutional under United States Supreme Court precedent.

## \*1099 A. Criminal Libel and First Amendment Jurisprudence

¶ 12 In order to properly analyze the constitutionality of Washington's criminal libel statutory scheme, a brief review of defamation law in the context of First Amendment jurisprudence is necessary. To begin, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was a turning point for defamation law in the United States. There, the Supreme Court held that civil sanctions could not be imposed based on defamatory statements made about a public official unless such statements were false and made with "actual malice." *New York Times*, 376 U.S. at 279, 84 S.Ct. 710. It defined "actual malice" as making a statement "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710. The Supreme Court reasoned that "debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270, 84 S.Ct. 710.

¶ 13 In the same year, the Supreme Court decided *Garrison*, wherein it extended principles set forth in *New York Times* to the criminal context. In *Garrison*, the State convicted a district attorney under Louisiana's criminal libel statute for issuing a disparaging statement concerning the judicial conduct of eight judges. *Garrison*, 379 U.S. at 65, 85 S.Ct. 209. The Louisiana Supreme Court affirmed the conviction, rejecting the defendant's contention that the statute unconstitutionally breached his freedom of expression. *Garrison*, 379 U.S. at 67, 85 S.Ct. 209. But the United States Supreme Court reversed, finding Louisiana's criminal libel statute infringed, on protected speech. *Garrison*, 379 U.S. at 77, 85 S.Ct. 209.

¶ 14 Specifically, the *Garrison* Court held that Louisiana's criminal libel statute did not meet constitutional muster because it punished false statements concerning public officials made without

“actual malice.” *Garrison*, 379 U.S. at 78, 85 S.Ct. 209. It further held that a statute is manifestly unconstitutional if it fails to provide truth as an absolute defense to criminal liability:

Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ...“erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive’ ...,” only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government.

*Garrison*, 379 U.S. at 74-75, 85 S.Ct. 209 (quoting *New York Times*, 376 U.S. at 271-72, 84 S.Ct. 710).

¶ 15 Following *Garrison*, several courts have declared various criminal libel statutes unconstitutional for failing to limit criminal liability to statements made regarding public officials with actual malice.

See, e.g., *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir.2003) (holding Puerto Rico's criminal libel statute facially unconstitutional because it did not require the *New York Times* and *Garrison* standard of actual malice be proven in order for a statement disparaging a public figure to be successfully prosecuted); *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002) (holding Utah's criminal libel statute infringed on a substantial amount of constitutionally protected speech by punishing false statements regarding public figures made *without* knowledge or recklessness and true statements regarding public figures); *Ivey v. State*, 821 So.2d 937, 949 (Ala.2001) (holding Alabama's criminal libel statute unconstitutional because it did not conform to the *New York Times* and *Garrison* “actual malice” requirement), *overruled on other grounds by Ex parte Bell*, 978 So.2d 33 (Ala.2007).<sup>FN9</sup> Until\*1100 now, Washington courts have not addressed the constitutionality of its criminal libel statute under *Garrison*.

FN9. A few courts have struck down criminal libel statutes insofar as they pertain to public officials, public figures, or matters of public concern, without deciding whether those statutes were unconstitutional as applied to private individuals and/or private matters. *Mangual*, 317 F.3d at 66-67; *People v. Ryan*, 806 P.2d 935, 940 (Colo.) (holding the statute unconstitutional only as applied to constitutionally protected statements about public officials, public figures, or matters of public concern), *cert. denied*, 502 U.S. 860, 112 S.Ct. 177, 116 L.Ed.2d 140 (1991). Yet Washington's criminal libel statute does not distinguish between public and private individuals or issues and there seems to be no way to construe the statutory language to do so. Consequently, we must either wholly uphold the statute or wholly invalidate it as facially unconstitutional. See, e.g., *Tollett v. United States*, 485 F.2d 1087, 1097-98 (8th Cir.1973).

#### B. Constitutionality of Washington's Criminal Libel Statute Under *Garrison*

[4][5][6][7][8][9][10] ¶ 16 Washington courts presume statutes to be constitutional. *State v. Thorne*, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996). The party challenging a statute bears the burden of proving beyond a reasonable doubt that it does not satisfy constitutional standards. *Thorne*, 129 Wash.2d at 769-70, 921 P.2d 514. “Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.” *State v. Reyes*, 104 Wash.2d 35, 41, 700 P.2d 1155 (1985). Nevertheless, we “cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” *Miller v. French*, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (quoting *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985)). A statute's plain reading must make the interpretation reasonable. *Soundgarden v. Eikenberry*, 123

Wash.2d 750, 757, 871 P.2d 1050, cert. denied, *Soundgarden v. Gregoire*, 513 U.S. 1056, 115 S.Ct. 663, 130 L.Ed.2d 598 (1994). And finally, in considering a facial challenge, we analyze the statutory language itself and do not rely on the facts of the case. *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

¶ 17 RCW 9.58.010<sup>FN10</sup> defines criminal libel. Under that provision, exposure of any living person or the memory of the dead to hatred, contempt, ridicule or obloquy, or injury to a business relationship is a gross misdemeanor. RCW 9.58.010; see also 16A WASHINGTON PRACTICE: TORT LAW AND PRACTICE, § 19.1, at 2-3 (3d ed.2006). RCW 9.58.020 establishes a presumption that statements falling into the RCW 9.58.010 classifications are malicious. It states:

FN10. RCW 9.58.010 provides:

Every malicious publication by writing, printing, picture, effigy, sign [,] radio broadcasting or which shall in any other manner transmit the human voice or reproduce the same from records or other appliances or means, which shall tend:-

- (1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or
- (2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or
- (3) To injure any person, corporation or association of persons in his or their business or occupation, shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor.

Every publication having the tendency or effect mentioned in RCW 9.58.010 shall be deemed malicious unless justified or excused. Such publica-

tion is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation.

RCW 9.58.020.

¶ 18 A plain reading of RCW 9.58.020 reveals that Washington's criminal libel statutory scheme does not meet minimum constitutional standards under *Garrison*. Specifically, RCW 9.58.020 is unconstitutional because it does not justify excuse from prosecution (1) false statements made without actual malice or (2) true statements made without good motive or intent. See *Garrison*, 379 U.S. at 78, 85 S.Ct. 209.

¶ 19 Again, in *Garrison*, the Supreme Court explicitly held that the First and Fourteenth\*1101 Amendments prohibit criminal punishment for false speech under statutes that do not require a showing of actual malice. *Garrison*, 379 U.S. at 67, 85 S.Ct. 209. This is precisely what Washington's criminal libel statute does: it permits punishment for false statements not made with actual malice. See *Garrison*, 379 U.S. at 67, 85 S.Ct. 209. A speaker may face prosecution under Washington's statute if she makes a false statement unless it was "honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation." RCW 9.58.020. This standard in no way comports with the "actual malice" standard set forth in *Garrison*. *Garrison*, 379 U.S. at 67, 85 S.Ct. 209; *New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710.

¶ 20 Likewise, the *Garrison* Court explicitly held that the First and Fourteenth Amendments absolutely prohibit punishment of truthful criticism

where discussion of public affairs is concerned. *Garrison*, 379 U.S. at 74, 85 S.Ct. 209. Contrary to this absolute rule, RCW 9.58.020 justifies true statements when a person publishes them with "good motives and for justifiable ends." Thus, because RCW 9.58.020 permits punishment of true statements *not* made with good motives or for justifiable ends, it does not survive constitutional scrutiny. See *Garrison*, 379 U.S. at 67, 73-74, 85 S.Ct. 209. In fact, the *Garrison* Court cited Washington's criminal libel law as an example of the type of statute that failed constitutional scrutiny. *Garrison*, 379 U.S. at 70 n. 7, 85 S.Ct. 209.

¶ 21 It is clear, therefore, that Washington's criminal libel statutory scheme does not meet the constitutional standards demanded under *Garrison* because it permits prosecution of persons for making false statements without actual malice and/or making true statements without good motive or intent. See *Garrison*, 379 U.S. at 73-74, 85 S.Ct. 209.

¶ 22 Neither party addressed whether either the statute or the application of *Garrison* was limited to public figures. But because *Garrison* spoke only in terms of public figures being prosecuted, we also address an alternative basis for holding the statute unconstitutional as it pertains to private citizens. We examine both overbreadth and vagueness. We do this even in light of DOC and the attorney general refusing to address the constitutionality of the statute in either their briefing or at oral argument.

#### C. Overbreadth of Washington's Criminal Libel Statutory Scheme

[11] ¶ 23 The Washington State Supreme Court has previously summarized Washington's overbreadth doctrine:

A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. The First Amendment overbreadth doctrine may invalidate a law on its face only if the law is "substantially overbroad." In determining over-

breadth, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."

*City of Seattle v. Huff*, 111 Wash.2d 923, 925, 767 P.2d 572 (1989) (internal citations omitted) (quoting *City of Houston v. Hill*, 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *appeal dismissed & cert. denied*, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987)).

¶ 24 As noted above, Washington's criminal libel statutory scheme, RCW 9.58.010 and .020, is facially unconstitutional because it prohibits true speech and false speech made without actual malice. For these same reasons, Washington's criminal libel statutory scheme is alternatively unconstitutional for overbreadth. Case law in several state and federal jurisdictions support this result.

¶ 25 For example, in *Tollett v. United States*, 485 F.2d 1087 (8th Cir.1973), the Eighth Circuit held that 18 U.S.C. § 1718 was unconstitutional, reasoning that it punished protected speech. Specifically, the Eighth Circuit reasoned that, among other things, the statute did not include an "actual malice" requirement. *Tollett*, 485 F.2d at 1097-98. Further, it found that the statute failed to distinguish between libel relating to private figures and libel relating to public figures. *Tollett*, 485 F.2d at 1097. Therefore,\*1102 the Eighth Circuit held that 18 U.S.C. § 1718 was facially overbroad and thus unconstitutional. *Tollett*, 485 F.2d at 1097-98.

¶ 26 Similarly, in *Fitts v. Kolb*, 779 F.Supp. 1502 (D.S.C.1991), the district court held that South Carolina's criminal libel statute was facially overbroad. There, the criminal libel statute made reference to malice, but only in the context of "malicious intent." *Fitts*, 779 F.Supp. at 1515. The district court found that "malicious intent" was not synonymous with the "actual malice" standard from *New York Times*. *Fitts*, 779 F.Supp. at 1515. It reasoned that absent the "actual malice" requirement, the statute permitted punishment for the publication of protected speech. *Fitts*, 779 F.Supp. at 1515. Thus, the

district court held that South Carolina's criminal libel statute was facially overbroad and thus unconstitutional. *Fitts*, 779 F.Supp. at 1516.

¶ 27 Likewise, in *I.M.L. v. State*, 61 P.3d 1038, the Utah Supreme Court held that Utah's criminal libel statute infringed on a substantial amount of constitutionally protected speech because it punished false statements concerning public figures made without regard for truth of the statements or whether the speaker made them knowingly or recklessly. Therefore, the Utah Supreme Court held that the statute was overbroad based on its plain language, and, thus was unconstitutional. *I.M.L.*, 61 P.3d at 1048.

¶ 28 In addition, the Alaska Supreme Court declared that Alaska's criminal libel statute was facially overbroad in *Gottschalk v. State*, 575 P.2d 289 (1978). Under Alaska's statute, truth was not an absolute defense. Rather, true statements concerning public officials or public figures were protected only if the speaker made such statements with good intent. *Gottschalk*, 575 P.2d at 296. Thus, Alaska's criminal libel statute punished protected speech. *Gottschalk*, 575 P.2d at 296. Accordingly, the state supreme court held that the statute was facially overbroad. *Gottschalk*, 575 P.2d at 296.

¶ 29 Several other jurisdictions have declared criminal libel statutes unconstitutional on the basis of overbreadth for the same reasons. *See, e.g., United States v. Handler*, 383 F.Supp. 1267, 1280 (D.Md.1974) (holding a defamation statute unconstitutionally overbroad because it failed to immunize truthful speech or include an actual malice requirement); *State v. Helfrich*, 277 Mont. 452, 457, 922 P.2d 1159 (1996) (holding Montana's criminal libel statute facially overbroad because it "impermissibly require[d] the defendant to prove that the material, even if true, was communicated in good faith and for justifiable ends.").

¶ 30 Although decisions from other jurisdictions do not bind us, such decisions nevertheless provide well-reasoned guidance in determining whether

Washington's criminal libel statutory scheme is facially overbroad. Similar to the aforementioned statutes, RCW 9.58.010 and .020 punish true speech and false statements made without actual malice. Therefore, we choose to follow the guidance of other jurisdictions and deem the statutory scheme facially overbroad and, thus, unconstitutional.<sup>FN11</sup>

FN11. A minority of courts have upheld criminal libel statutes in circumstances distinguishable from those here. *See People v. Heinrich*, 104 Ill.2d 137, 150-51, 83 Ill.Dec. 546, 470 N.E.2d 966, 972 (1984) (upholding criminal libel state that was aimed at fighting words and neither a public plaintiff nor a public issue was involved); *see also Phelps v. Hamilton*, 59 F.3d 1058, 1072, 1073 (10th Cir.1995) (applying Kansas law and finding the statute ambiguous, but interpreting the statute to include an "actual malice" requirement based on the assumption that the state legislature "only intend[ed] to criminalize unprotected speech."). It also should be noted that while *Phelps* was pending, the Kansas legislature amended its statute to require "actual malice." KAN. STAT. ANN. § 21-4004.

#### D. Vagueness of Washington's Criminal Libel Statutory Scheme

[12][13][14][15][16] ¶ 31 "A statute is unconstitutionally vague if [it] does not (1) define the criminal offense with sufficient definiteness such that ordinary persons understand what conduct is proscribed or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Stevenson*, 128 Wash.App. 179, 188, 114 P.3d 699 (2005). A statute is indefinite "if persons of common intelligence must necessarily guess at its meaning and differ as to its application." \*1103 *State v. Glas*, 147 Wash.2d 410, 421, 54 P.3d 147 (2002). When analyzing a statute for vagueness, a reviewing court examines the context of the

enactment as a whole, giving the statutory language a “sensible, meaningful, and practical interpretation” to determine whether it gives fair warning of the proscribed conduct. *City of Spokane v. Douglass*, 115 Wash.2d 171, 180, 795 P.2d 693 (1990). The fact that some terms in the statute are undefined does not necessarily render the statute unconstitutionally vague. *Douglass*, 115 Wash.2d at 180, 795 P.2d 693. “For clarification, citizens may resort to the statements of law contained in both statutes and in court rulings, which are ‘[p]resumptively available to all citizens.’” *Douglass*, 115 Wash.2d at 180, 795 P.2d 693 (quoting *State v. Smith*, 111 Wash.2d 1, 7, 759 P.2d 372 (1988) (alteration in original)).

¶ 32 Amicus contends that RCW 9.58.020 is vague because speech is excused from prosecution under the statute if it consists of *fair comments*. While RCW 9.58.020 may be unconstitutionally vague insofar as it includes the phrase, “consists of fair comments,” we need not decide vagueness on these grounds. Rather, RCW 9.58.020 is void for vagueness because of its use of the term “malicious.” See *Fitts*, 779 F.Supp. at 1515-16. We find this is an alternative basis for holding Washington’s criminal libel statutory scheme unconstitutional.

¶ 33 In *Fitts*, the South Carolina District Court relied on *New York Times* when it held that South Carolina’s criminal libel statute was overbroad and vague in violation of the First and Fourteenth Amendments. *Fitts*, 779 F.Supp. at 1518. The South Carolina criminal libel statute stated:

[a]ny person who shall with malicious intent originate, utter, circulate or publish any false statement or matter concerning another the effect of which shall tend to injure such person in his character or reputation shall be guilty of a misdemeanor....

*Fitts*, 779 F.Supp. at 1508.

¶ 34 The *Fitts* court reasoned that the statute’s use of the term “malicious” could create confusion with

the term “malice” as used in *New York Times*. *Fitts*, 779 F.Supp. at 1515. In other words, “malicious intent” as used in South Carolina’s statute could be confused with the *New York Times*’ “actual malice” standard, which denotes knowledge of the defamatory falsity or reckless disregard for whether the statement was true or false. *Fitts*, 779 F.Supp. at 1514-15, accord *New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710. Thus, the statute was inherently vague because it created a potential confusion between the common law “malice” standard and the *New York Times* “actual malice” standard. *Fitts*, 779 F.Supp., at 1515-16, accord *I.M.L.*, 61 P.3d at 1044 (stating that the “common law definition of ‘malice’ is quite different from the ‘actual malice’ contemplated by the United States Supreme Court”).

¶ 35 Again, we find the *Fitts* reasoning persuasive. RCW 9.58.020 is void for vagueness because it includes the term “malicious” without reference to “actual malice” as required under *New York Times*. See *Fitts*, 779 F.Supp. at 1515-16. A person of common intelligence may guess that “malicious” in RCW 9.58.020 refers to the common law meaning of malice as opposed to the *New York Times* “actual malice” standard. See *Fitts*, 779 F.Supp. at 1515-16. Thus, RCW 9.58.020 is unconstitutionally vague.

### III. Constitutionality of Washington’s Criminal Libel Statute As Applied to Parmelee.

[17] ¶ 36 Parmelee also argues that Washington’s criminal libel statutory scheme is constitutionally invalid insofar as it purports to allow the state to punish prisoners for statements made in outgoing grievances to prison officials. But when a statute is facially unconstitutional, it follows that no set of circumstances exist in which the statute, as currently written, can be constitutionally applied. *City of Redmond v. Moore*, 151 Wash.2d 664, 669, 91 P.3d 875 (2004), accord *City of Houston v. Hill*, 482 U.S. 451, 459, 107 S.Ct. 2502, 96 L.Ed.2d 398 (“Criminal statutes must be scrutinized with partic-

ular care ... those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” (Internal citations omitted), *appeal dismissed & cert. \*1104 denied*, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987).

[18] ¶ 37 In any event, the record is insufficient for us to determine whether RCW 9.58.010 and .020 were unconstitutionally applied to Parmelee. He did not challenge the constitutionality of the statutory scheme in the trial court below. Aside from actual infraction and letter, the record contains no evidence or testimony surrounding the circumstances of Parmelee's infraction. Although we may address constitutional claims of manifest error not raised below, if the “record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted.” *WWJ Corp.*, 138 Wash.2d at 602, 980 P.2d 1257.

¶ 38 Nevertheless, DOC employees seem to argue that Parmelee's infraction referencing RCW 9.58.010 was proper because Parmelee was in DOC custody when the hearing examiner infringed him. They rely on *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987), to support this argument.<sup>FN12</sup>

FN12. Although we find *Turner* inapposite, we briefly address it because DOC employees relied so heavily on *Turner* in their briefing and oral argument.

[19] ¶ 39 In *Turner*, the United States Supreme Court articulated the standard for reviewing the constitutionality of prison regulations. It stated that a regulation is constitutional when it is “reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89, 107 S.Ct. 2254. Whether a prison regulation is reasonable turns on four factors: (1) the rational relationship between the right and the limitation, (2) the reasonableness of the limitation, (3) the impact accommodation would have on the prison environment, and (4) the absence of readily

available alternatives. *Turner*, 482 U.S. at 89-90, 107 S.Ct. 2254.

¶ 40 Division One of this court applied the *Turner* test in a similar matter involving Parmelee. In *In re Parmelee*, 115 Wash.App. 273, 284, 63 P.3d 800 (2003), *review denied*, 151 Wash.2d 1017, 92 P.3d 779 (2004), Parmelee submitted multiple grievances wherein he used vulgar language and threatened the prison staff.<sup>FN13</sup> *Parmelee*, 115 Wash.App. at 277-280, 63 P.3d 800. After a disciplinary hearing, the hearing officer found Parmelee guilty of a G-301 infraction for defiance/insolence/abuse. *Parmelee*, 115 Wash.App. at 277-78, 63 P.3d 800.<sup>FN14</sup> G-301 was defined in the Inmate Information Handbook as “[m]aking flagrant, public statements which are degrading, ridiculing, abusive, insolent, defiant, obscene, and/or which promote disorder.” *Parmelee*, 115 Wash.App. at 277, 63 P.3d 800. Parmelee appealed to the administrative hearing examiner, who affirmed the hearing officer. *Parmelee*, 115 Wash.App. at 280, 63 P.3d 800. He was punished with 10 days in disciplinary segregation for each infraction, totaling 20 days in segregation. *Parmelee*, 115 Wash.App. at 280, 281, 63 P.3d 800.

FN13. Specifically, Parmelee referred to a corrections officer in one grievance as a “piss-ant officer,” and “an asshole.” He also requested that DOC “[f]ire this asshole before someone reacts to his attempt to provoke violently.” *Parmelee*, 115 Wash.App. at 276-77, 63 P.3d 800. In another grievance, Parmelee stated, “fire this prick because shithheads like him shouldn't be around prisoners.” *Parmelee*, 115 Wash.App. at 279, 63 P.3d 800. In that second grievance, he also warned that the officer should be fired “before his attitude gets him fucked up.” *Parmelee*, 115 Wash.App. at 279, 63 P.3d 800.

FN14. The hearing examiner also found Parmelee guilty of making a threat, in violation of S-207. *Parmelee*, 115 Wash.App.

at 279, 63 P.3d 800.

¶ 41 In his appeal, Parmelee argued that his First Amendment right to free speech was violated when he was punished for making insolent, abusive, and threatening comments about staff in an administrative grievance. *Parmelee*, 115 Wash.App. at 280, 63 P.3d 800. Applying *Turner*, Division One held that there was a legitimate reason for requiring all inmates to behave respectfully toward prison staff and limiting tension between guards and residents. *Parmelee*, 115 Wash.App. at 287, 63 P.3d 800. It also noted that there were other avenues available to Parmelee, namely that he could have used other words to properly address the problems he was attempting to address in his grievances. \*1105 *Parmelee*, 115 Wash.App. at 287, 63 P.3d 800. Division One concluded that the purpose of the grievance procedure was to bring issues to the attention of prison officials and not a forum to make disparaging, degrading, and abusive comments to staff. *Parmelee*, 115 Wash.App. at 287, 63 P.3d 800. Therefore, Division One held that G-301 complied with the *Turner* test. Under the facts of the case, the application of G-301 to Parmelee did not infringe on his constitutional right to free speech. *Parmelee*, 115 Wash.App. at 288-89, 63 P.3d 800.

¶ 42 But the facts and circumstances of *In re Parmelee* and this case are distinguishable. Namely, in the former, Parmelee challenged G-301, a prison regulation, as unconstitutional. Here, Parmelee is challenging RCW 9.58.010, as applied through former WAC 137-28-260(1)(517). The distinction is critical. If Parmelee were challenging former WAC 137-28-260(1)(517), *Turner* would apply. See *Parmelee*, 115 Wash.App. at 283-84, 63 P.3d 800 (recognizing that *Turner* is the appropriate test to apply, as opposed to the less stringent standard set forth by the Ninth Circuit in *Bradley v. Hall*, 64 F.3d 1276 (9th Cir.1995)).

¶ 43 Here, Parmelee is not challenging the validity of the prison regulation set forth in former WAC 137-28-360(1)(517); he is challenging the underlying

ing criminal statute, RCW 9.58.010 and .020. As discussed above, Washington's criminal libel statutory scheme is facially unconstitutional. That it was applied through a prison regulation does not render it constitutional in the prison setting. Contrary to DOC employees' contention, *Turner* is inapposite under these circumstances.

¶ 44 This is not to say that an inmate's use of insolent, abusive, or scurrilous language in grievances and/or toward prison staff is not punishable. In *In re Parmelee*, for example, Division One upheld a prison regulation prohibiting such language. See *In re Parmelee*, 115 Wash.App. at 288, 63 P.3d 800. Many other courts have upheld prison regulations prohibiting libelous language in grievances. See, e.g., *Hale v. Scott*, 371 F.3d 917, 919-20 (7th Cir.2004) (holding that language that is otherwise punishable is not shielded from disciplinary action merely because it appears in a grievance); *Gibbs v. King*, 779 F.2d 1040, 1045 (5th Cir.1986) (holding that the prison regulation furthered legitimate interests, as the clear purpose of the rule was "to prevent the escalation of tension that can arise from gratuitous exchanges between inmates and guards and to enable employees to maintain order without suffering verbal challenges to their authority"), cert. denied, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986); *Hadden v. Howard*, 713 F.2d 1003, 1005 (3rd Cir.1983) (upholding a disciplinary sanction under a prison regulation for a prison inmate who wrote "unfounded, slanderous and derogatory statements" about prison staff in a grievance).

¶ 45 For example, had DOC employees in this case issued Parmelee a general infraction under WAC 137-28-220(1)(202) for "[a]busive language, harassment [sic] or other offensive behavior directed to or in the presence of staff, visitors, inmates, or other persons or groups," then perhaps the regulation would be constitutionally sound under *Turner*. But these are not the facts before us now.

¶ 46 Parmelee was issued a serious infraction under former WAC 137-28-260(1)(517) for "[c]ommitting

any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules” and DOC chose RCW 9.58.010. As discussed above, RCW 9.58.010 and .020 fail constitutional scrutiny and thus cannot be the basis for an infraction under former WAC 137-28-260(l)(517). Therefore, we hold that DOC employees' reliance on *Turner* is unconvincing.

¶ 47 In conclusion, we need not determine whether Washington's statutory scheme is unconstitutional as applied to Parmelee because the statutory scheme is facially unconstitutional. Moreover, even if we wanted to address whether the statutes are unconstitutional as applied to Parmelee, the record is insufficient to properly decide this issue. Thus, we cannot address whether Washington's criminal libel statutory scheme is unconstitutional as applied to Parmelee in this case. Likewise, we cannot address whether \*1106 Parmelee's freedom of speech or substantive due process rights were violated because the record is insufficient to make those determinations. *WWJ Corp.*, 138 Wash.2d at 602, 980 P.2d 1257. Nor do we address whether procedural due process was violated because Parmelee abandoned that claim at oral argument.

#### IV. Retaliation Claim

[20][21] ¶ 48 Finally, Parmelee contends that he stated a cognizable retaliation claim and thus the trial court erred in dismissing it under CR 12(b)(6). The trial court refused to address Parmelee's retaliation claim, stating that he failed to establish the requisite requirement that he suffered “atypical and significant hardship.” CP at 87.

¶ 49 To begin, Parmelee is correct that he was not required to establish an “atypical and significant hardship” as a result of the infraction to establish a retaliation claim under the First Amendment. *See, e.g., Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.2005); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir.1995). Thus, the trial court erred when it reasoned that Parmelee had to establish an “atypical

and significant hardship” to go forward with his retaliation claim. *See Rhodes*, 408 F.3d at 567.

[22] ¶ 50 To prevail on a retaliation claim under 42 U.S.C. § 1983, Parmelee carries the burden to establish that DOC employees retaliated against him for exercising his constitutional rights; that the retaliatory action chilled the exercise of his First Amendment rights; and that the retaliatory action failed to advance legitimate penological goals, such as preserving institutional order and discipline. *Rhodes*, 408 F.3d at 567-68. In addition, a court evaluates a retaliation claim in light of the deference afforded to prison officials. *Pratt*, 65 F.3d at 807.

¶ 51 Notwithstanding the unconstitutionality of Washington's criminal libel statutory scheme, Parmelee established a cognizable retaliation claim in his pleadings. Although he did not cite to § 1983 or case law supporting such a claim, he refers to the “retaliatory intent” of DOC employees repeatedly. *See, e.g., CP* at 698; *see also CP* at 694, 695, 703. Specifically, Parmelee alleged in his complaint:

49. Defendants acted in bad faith, evil motive, maliciousness and with retaliatory intent to chill, stop and prevent Parmelee from now or ever in the future, make [sic] statements or complaints critical of DOC staff or policy.

CP at 698. This language constitutes a claim for retaliation. Parmelee pleaded facts sufficient to state a claim for which relief may be granted. Dismissal is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery. *See CR* 12(b)(6); CR 12(c). Here, based on his pleadings, Parmelee could prove facts that would justify recovery.

¶ 52 First, Parmelee alleged that the language used in his grievance was not libelous and was therefore protected by the First Amendment. He alleged that DOC retaliated against him for pursuing litigation against DOC officials and making statements critical of DOC staff and policy. He also alleged that

DOC employees' actions failed to advance legitimate penological goals. In addition, he alleged that DOC's actions did not comply with its internal policy that "[n]o letter is to be censored to eliminate opinions critical of Department policy or Department employees." CP at 695. Finally, Parmelee alleged that DOC retaliated against him because it did not issue his infraction until nearly three months after he attempted to send the letter to DOC Secretary Clarke, around the time he was actively pursuing litigation against prison officials. Although timing does not establish a prima facie case of retaliation, in some circumstances it may suggest retaliatory actions. *See Pratt*, 65 F.3d at 808.

¶ 53 When taken together, and assuming that Parmelee's allegations are true, dismissal was inappropriate. We hold that the trial court erred when it dismissed this claim. *See \*1107Burton*, 153 Wash.2d at 422, 103 P.3d 1230; *Suleiman*, 48 Wash.App. at 376, 739 P.2d 712.

#### V. ATTORNEY FEES

[23] ¶ 54 Parmelee seeks attorney fees for the first time on appeal, under 42 U.S.C. § 1988,<sup>FN15</sup> which authorizes an award of attorney fees to the prevailing party in proceedings in vindication of civil rights. Parmelee is not entitled to attorney fees on appeal. He will only be entitled to attorney fees under 42 U.S.C. § 1988 if on remand, his attorney successfully litigates the retaliation claim under 42 U.S.C. § 1983.

FN15. 42 U.S.C. § 1988(b) provides: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ..., the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs."

¶ 55 We hold that Washington's criminal libel statute is facially unconstitutional and is likewise unconstitutional for overbreadth and vagueness. We

vacate the infraction based on the unconstitutional statute. We reverse the trial court's dismissal under CR 12(b)(6) and remand for further proceedings at which Parmelee may raise his claims for damages against DOC for violating his First Amendment rights, violating substantive due process, and retaliating against him.

We concur: VAN DEREN, C.J., and ARMSTRONG, J.

Wash.App. Div. 2,2008.

Parmelee v. O'Neel

186 P.3d 1094, 36 Media L. Rep. 1865

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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DIVISION II

AUG 01 2008

ALLAN PARMELEE,

Appellant,

v.

ROBERT O'NEEL, ET AL,

Respondents.

No. 35652-0-II

ORDER DENYING MOTION TO RECONSIDER

APPELLANT moves for reconsideration of the Court's decision terminating review, filed June 19, 2008. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Armstrong, Van Deren

DATED this 31<sup>st</sup> day of July, 2008.

FOR THE COURT:

*Van Deren, C.J.*  
CHIEF JUDGE

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Appellant,

vs.

ROBERT O'NEEL, et al.,

Respondents.

CERTIFICATE OF SERVICE

I certify that on this date I caused to be mailed by first class mail,  
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