

No. 35652-0-II

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

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**ALLAN PARMELEE,**

**Appellant,**

**v.**

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

**Respondents.**

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**REPLY BRIEF OF APPELLANT**

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**ORIGINAL**

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## **SUMMARY OF REPLY**

Contrary to the DOC Respondents' ("DOC's") assertion, Mr. Parmelee pled and briefed his First Amendment claims in the trial court proceedings. Even if he had not done so, his arguments raise manifest errors affecting his constitutional rights and therefore are reviewable on appeal pursuant to RAP 2.5(a)(3). DOC chose not to present any arguments defending the facial validity of Washington's criminal libel statute; therefore any arguments DOC may have on this issue should be deemed waived.

DOC also failed to present argument in response to Mr. Parmelee's substantive due process claim. Instead, DOC argued that Mr. Parmelee cannot challenge the procedural aspects of his disciplinary hearing because he did not suffer an atypical and significant hardship. Mr. Parmelee's is not pursuing a procedural due process claim in this appeal. His substantive due process claim does not require a showing that he suffered an atypical and significant hardship as a result of the infraction. DOC violated Mr. Parmelee's substantive due process rights by finding him guilty of

an infraction without any evidence to support a necessary element of the infraction.

Procunier v. Martinez, not Turner v. Safley, provides the standard for reviewing First Amendment challenges to prison restrictions on outgoing inmate correspondence, the type of communication at issue in this case. Nonetheless, Mr. Parmelee's cited legal authority, not distinguished by DOC, demonstrates that DOC's infraction against him violated the First Amendment under both standards, as Mr. Parmelee's letter to Secretary Clarke did not jeopardize prison safety.

Finally, Mr. Parmelee's complaint stated a valid claim for retaliation. The trial court erred in dismissing that claim on the pleadings.

## ARGUMENT

### **A. Appellant's First Amendment Claims are Properly Before This Court.**

DOC asks this Court not to consider the constitutionality of RCW 9.58.010, claiming that Mr. Parmelee failed to raise this claim at the trial court level. Br. of Resp't at 7-10. The Court should reject DOC's request because (1) Mr. Parmelee in fact did raise his

First Amendment claims in the trial court proceedings, and (2) this Court may consider constitutional claims even if they are asserted for the first time on appeal.

**1. Mr. Parmelee Presented His First Amendment Claims in His Pleadings and Briefing Below.**

DOC is incorrect when it asserts that Mr. Parmelee failed to raise his constitutional claims in the trial court proceedings. In fact, DOC acknowledged Mr. Parmelee's First Amendment claims in its own briefing below. See CP 96:5-6 ("The Plaintiff argues that the letter written to Secretary Clarke is protected by the First Amendment.") Mr. Parmelee asserted First Amendment claims in his complaint. See CP 692 ("the infraction is unconstitutional"); CP 694 ("Defendant's (collectively) actions, infractions, and findings have a chilling effect on protected constitutional communications."); CP 696-98 (asserting First Amendment claims). Mr. Parmelee also raised the constitutional issues in his briefing. See, e.g., CP 37-42 (asking the trial judge to revise the commissioner's order and asking the court to rule that RCW 9.58 is unconstitutional); CP 50-51 (moving for revision of commissioner's order, based in part on

constitutional grounds); CP 74-75 (arguing that Mr. Parmelee's statement was protected by the First Amendment).

To the extent DOC is arguing that Mr. Parmelee did not plead his constitutional claims with sufficient specificity, this argument is inconsistent with our state's liberal pleading standards. As stated by this Court, "Pleadings are to be construed liberally; if a complaint states facts entitling the plaintiff to some relief it is immaterial by what name the action is called." Simpson v. State, 26 Wn. App. 687, 691, 615 P.2d 1297 (1980). In Simpson, the plaintiffs argued on summary judgment that a state statute governing use taxes was unconstitutional. The trial court refused to consider the argument because the plaintiffs had not prayed for that specific relief in their complaint. Id. On appeal, this Court criticized the trial court's narrow construction of the pleadings and went on to address the plaintiffs' constitutional arguments. Id.

Another instructive case is Avocados Plus Inc. v. Johanns, 421 F. Supp. 2d 45 (D.D.C. 2006).<sup>1</sup> In that case, the defendants urged the court to dismiss the plaintiffs' as-applied constitutional

challenge to the federal Avocado Act because the plaintiffs' complaint did not specifically articulate both a facial and an as-applied theory for relief. Id. at 56. The court rejected that argument, noting the liberal notice pleading standard and reasoning as follows:

The Complaint describes, at some length, the facts underlying Plaintiffs' claim that the Act violates their First Amendment right to freedom of speech. It thus gives Defendants "fair notice" of Plaintiffs' claims and "the grounds upon which [they] rest." [Federal] Rule [of Civil Procedure] 8 requires nothing more. Contrary to Defendants' suggestions, Plaintiffs were not obligated to separately plead their facial and as-applied challenges, which both arise from the same broad set of facts. To require such specificity would violate both the letter of Rule 8 and the spirit of notice pleading.

Id. (citation omitted).

Here, Mr. Parmelee filed a detailed pro se complaint that included multiple references to his First Amendment claims. See, e.g., CP 684 (Complaint introduction); CP 694 (Complaint ¶ 38); CP 696-98 ("Speech Related Constitutional Claims"). The fact that he did not explicitly distinguish his First Amendment claims as "facial"

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<sup>1</sup> Washington courts use federal cases construing similar rules of procedure as persuasive authority. Tinker v. Kent Gypsum Supply, Inc., 95 Wn. App. 761, 766 n.5, 977 P.2d 627 (1999).

or “as applied” is – as this Court ruled in Simpson – immaterial.

Simpson, 26 Wn. App. at 691.

**2. Mr. Parmelee’s Constitutional Claims are Reviewable in this Appeal Regardless of Whether or Not He Raised Them Below.**

Even if Mr. Parmelee had not raised his constitutional claims below, it still would be proper for this Court to consider them on appeal. See, e.g., State v. Ruff, 122 Wn.2d 731, 733 n.1, 861 P.2d 1063 (1993) (“The unconstitutionality of the statute under which the defendant was convicted is a manifest error affecting a constitutional right and may, therefore, be raised initially on appeal.”) (citing RAP 2.5(a)(3)). The appellate rule allowing parties to raise constitutional issues for the first time on appeal “makes no distinction between civil and criminal cases.” State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257 (1999) (overturning Court of Appeals’ refusal to consider appellant’s constitutional claims, raised for the first time on appeal). See also Degel ex rel. Estate of Perisho v. Buty, 108 Wn. App. 126, 29 P.3d 768 (2001) (considering appellant’s claim that Washington’s medical informed consent statute was unconstitutional even though the claim was raised for the first time on appeal);

Haueter v. Cowles Publ'g Co., 61 Wn. App. 572, 811 P.2d 231 (1991) (appellant's claim that jury instruction regarding the burden of proof in a defamation case was unconstitutional affected the appellant's First Amendment rights and would be considered for the first time on appeal).

Since Mr. Parmelee raised his constitutional claims in his pleadings and briefs below, and since RAP 2.5(a)(3) would allow him to raise these claims for the first time on appeal even if he had not presented them earlier, these claims are properly before this Court for review.

**3. DOC Has Waived Argument on Mr. Parmelee's Facial Challenge to the Criminal Libel Statute.**

Mr. Parmelee demonstrated in his opening brief why Washington's criminal libel statute, RCW 9.58.010, is unconstitutional on its face. Br. of Appellant at 8-14. The statute fails to provide a complete defense for truthful statements and allows the government to punish a person for making a false statement without requiring proof that the speaker acted with knowledge of or reckless disregard for the statement's falsity. These features directly violate the minimum requirements for a constitutionally valid

defamation statute set forth by the United States Supreme Court in Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

Resting on its position that this Court should not consider Mr. Parmelee's constitutional claims on appeal, DOC chose not to make any argument to defend the facial constitutionality of RCW 9.58.010. DOC elected this strategy even though this Court granted it an extension of time to file its response brief (see Clerk's letter ruling dated September 24, 2007) and even though its response brief was only 24 pages, leaving it plenty of room to argue the constitutional issue. DOC offers this Court no reasonable excuse for withholding substantive argument on one of the central issues in this appeal. Therefore, this Court should find that DOC has waived argument on this issue.

**B. DOC Fails to Address Mr. Parmelee's Substantive Due Process Claim.**

DOC argues that the trial court properly dismissed Mr. Parmelee's due process claim based on the procedures he received at his disciplinary hearing. Br. of Resp't at 11-13. DOC cites Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293 (1995), to assert that

such a claim is precluded because Mr. Parmelee did not suffer an “atypical and significant hardship” as a result of his infraction. Br. of Resp’t at 12. However, Mr. Parmelee is not asserting a procedural due process claim in this appeal. Rather, his due process claim is based on the requirements of *substantive* due process (see Br. of Appellant at 24-26), which is not subject to the “atypical and significant hardship” requirement of Sandin v. Conner.

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Amunrud v. Board of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006) (citing Halverson v. Skagit County, 42 F.2d 1257, 1261 (9th Cir. 1994)).

A court may consider a prisoner’s substantive due process claim even if a procedural due process claim would be barred under Sandin. See, e.g., In re Dyer, 143 Wn.2d 384, 20 P.3d 907 (2001) (considering whether prison officials acted arbitrarily and capriciously in denying extended family visits even though the prisoner’s claim did not implicate an “atypical and significant

hardship”); Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999) (affirming due process ruling against prison officials for imposing a disciplinary infraction with no supporting evidence, even though the infraction did not implicate an “atypical and significant hardship”). In Burnsworth, the Ninth Circuit held, “In this case, plaintiff’s due process rights are violated even if plaintiff has demonstrated no cognizable liberty interest.” Burnsworth, 179 F.3d at 775.<sup>2</sup>

A prison official acts arbitrarily and capriciously if s/he finds an inmate guilty of a disciplinary infraction without any evidence to support that finding. In re Reismiller, 101 Wn.2d 291, 295-97, 678 P.2d 323 (1984). As Mr. Parmelee argued in his opening brief, DOC found him guilty of committing criminal libel even though the disciplinary record contained no evidence that his letter to Secretary Clarke satisfied all elements of the criminal libel statute. Br. of Appellant at 24-26. DOC has not disputed this assertion; it has not pointed to one piece of evidence that Mr. Parmelee’s statement

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<sup>2</sup> Contrary to the Washington Supreme Court in Amunrud, the Ninth Circuit characterized the claim of arbitrary and capricious government action as a procedural, rather than substantive, due process claim. Burnsworth, 179 F.3d at 775. Regardless of how the issue is characterized, the essential principal is the same: Due process protects citizens from arbitrary and capricious government decisions, even when the citizen cannot challenge the government’s procedures.

regarding Superintendent Carter exposed her to hatred, contempt, ridicule or obloquy, deprived her of the benefit of public confidence or social intercourse, or injured her in her business or occupation, as required by the criminal libel statute. Thus, since DOC found Mr. Parmelee guilty of the criminal libel infraction without a shred of evidence pertaining to these essential elements of the crime, the infraction ruling was arbitrary and capricious and should be reversed.

**C. Prison Officials Violate the First Amendment When They Punish Inmates for Making Offensive Comments in Outgoing Correspondence Where the Comments Do Not Threaten the Security of the Institution.**

DOC relies on Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to support its contention that the First Amendment allows government officials to punish a prisoner with isolation for referring to a prison superintendent as a “man-hating lesbian.” Br. of Resp’t at 13-20. However, Turner is not the controlling authority for this case. As Mr. Parmelee noted in his opening brief, prison regulations that restrict the content of a prisoner’s outgoing mail are analyzed not under the Turner standard, but under the rule set forth in Procunier v. Martinez, 416 U.S. 396,

413, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). Br. of Appellant at 14-16. In Martinez, the Supreme Court struck down rules that allowed prison staff to censor outgoing prisoner mail that “unduly complained,” “magnified grievances,” or contained “inflammatory political, racial, religious or other views” or matter deemed “*defamatory*” or otherwise inappropriate.” Id., 416 U.S. at 415 (emphasis added). It is undisputed that Mr. Parmelee’s letter to Secretary Clarke was intended as outgoing correspondence. See Br. of Resp’t at 3 (“Mr. Parmelee attempted to mail a letter to the Secretary of DOC . . . . This letter was not permitted to be sent out of the institution . . . .”). Thus, the Court should analyze Mr. Parmelee’s First Amendment claim under Martinez, not Turner.<sup>3</sup>

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<sup>3</sup> In Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989), the Supreme Court ruled that the Martinez standard was not sufficiently deferential to prison officials when it came to reviewing most prison regulations that infringe upon prisoners’ First Amendment rights. Hence, the Court limited the Martinez standard to cases involving outgoing inmate correspondence and explicitly adopted the more deferential standard set forth in Turner v. Safley for reviewing regulations affecting other types of speech in prisons. Thornburgh, 490 U.S. at 413. The Court based its distinction on the notion that “[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials.” Id. Since Thornburgh, courts have continued to rely on Martinez for cases dealing with outgoing prisoner correspondence. See, e.g., Nasir v. Morgan, 350 F.3d 366 (3rd Cir. 2003) (applying Turner test to review ban on certain incoming correspondence and Martinez test to review ban on certain outgoing correspondence); Martyr v. Bachik, 770 F. Supp. 1414, 1416 n.1 (D. Or. 1991) (affirming validity of Martinez test for cases reviewing censorship of outgoing prisoner mail).

This case is virtually identical to Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993), a case decided after Turner. The prisoner in Loggins attempted to mail a letter to his brother, which stated in part, “There’s a beetled eye’d bit-- back here who enjoys reading people’s mail.” Id. at 365. The letter went on to state that the “bit--” was a “dyke” and “[wa]s hoping to read a letter someone wrote to their wife talking dirty sh--, so she could go in the bathroom and masturbate.” Id. The prison mailroom officer who read the outgoing letter filed a conduct violation report, accusing Loggins of violating the prison rule prohibiting inmates from “using abusive or obscene language . . . or making a written statement, intended to annoy, offend or threaten.” Id. Like Mr. Parmelee, Loggins was found guilty of the rule violation and was sentenced to ten days of disciplinary segregation. Id. The district court granted summary judgment for the prisoner on his § 1983 claim and the Eighth Circuit affirmed, holding that “as a matter of law because the language in Loggins’ letter to his brother did not implicate security concerns, the disciplinary action violated Martinez.” Id. at 367.

Another instructive case is McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979), cert denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980). In that case, an inmate tried to send a letter to his girlfriend, referring to the prison mailroom officer as a “pervert” and a “dung-hole” and accusing the officer of masturbating while reading prisoner mail and having sex with a cat. Id. at 623 n.2. Prison officials refused to mail the letter and threatened the inmate with discipline if he attempted to send a similar letter in the future. Id. The district court ruled against the prison officials and the Fifth Circuit affirmed based on Martinez. Id. at 623-24. The court rejected the prison officials’ contention that allowing letters like the one at issue would result in “a total breakdown in prison security and discipline.” Id. at 624. As the court explained,

No one wants to be the target of insulting remarks like those in McNamara’s letter. But coarse and offensive remarks are not inherently breaches of discipline and security, nor is there any showing that they will necessarily lead to the breaking down of security or discipline.

Id. “Martinez . . . emphatically states that mere complaints and disrespectful comments cannot be grounds for refusing to send or deliver a letter. Censorship for violation of prison disciplinary rules

is properly limited to communications that relate to more concrete violations such as escape plans, plans for disruption of the prison system or work routine, or plans for the importation of contraband.” Id. (internal quotation marks and citations omitted).

The court also rejected the prison officials’ argument that McNamara’s letter was libelous, stating, “Even if it is libelous, Martinez indicates that letters may not be suppressed simply because they are ‘defamatory’.” Id. (citation omitted).

DOC ignores Martinez in its response brief and does not offer any argument as to why that case should not control the outcome of this appeal. DOC also fails to distinguish Wolfel v. Bates, 707 F.2d 932, 933-34 (6th Cir. 1983) (holding that prison officials violate the First Amendment by punishing inmates for complaints about staff without first finding that the statements in the complaint are false and malicious), and Hancock v. Thalacker, 933 F. Supp. 1449, 1489 (N.D. Iowa 1996) (“imposing disciplinary sanctions merely for false or defamatory statements would violate a prisoner’s constitutional right of petition”). These cases, cited in Appellant’s Opening Brief,

directly contradict DOC's position that its actions toward Mr. Parmelee were constitutional.

Even if Turner were applicable here, Mr. Parmelee's infraction would still be unconstitutional. Turner requires that prison regulations that infringe upon an inmate's constitutional rights be "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. In Hancock, where the prisoner accused a corrections officer of being a racist and a member of the K.K.K. (arguably much more inflammatory than calling someone a lesbian), the court held that even under the Turner standard, disciplining the prisoner for this statement, albeit false and defamatory, would violate the First Amendment. Hancock, 933 F. Supp. at 1489.

Prison officials do not have a legitimate interest in enforcing a defamation statute like Washington's that punishes truthful speech. Prison officials also do not have a legitimate interest in punishing inmates for offensive speech that does not undermine prison security. See, e.g., Cook v. Bd. of County Comm'rs of County of Wyandotte, 966 F. Supp. 1049 (D. Kan. 1997). In Cook, a federal civil rights action, the plaintiff alleged that a police officer violated

his First Amendment rights when the officer arrested him for flipping the officer off. The court wrote:

As irritating or insulting as plaintiff's conduct may have been, government officials may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Moreover, the Supreme Court has recognized that "a properly trained [police] officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"

Id. at 1052 n.2 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (J. Powell, concurring)). Similarly, while prison officials may get annoyed by offensive, insulting comments by inmates, they may not invoke the power of their positions to punish inmates for such speech, particularly when there is no evidence that the speech threatens prison security.

DOC alleges in its brief that its enforcement of the criminal libel rule in this instance is necessary to maintain prison safety. Br. of Resp't at 22. Prison safety is a legitimate penological interest, of course. But with no evidence in the record to support DOC's conclusory statements, it would be error for the Court to conclude

that DOC's conduct was valid, even under Turner. See Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990) ("Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point.").

DOC cited a number of cases to support its position that the First Amendment does not protect prisoner speech of the type at issue in this case. See Br. of Resp't at 13-20 (sec. V.C.). However, every single one of these cases involves discipline for an inmate's *internal* prison communications.<sup>4</sup> As discussed above, courts ascribe greater risk to prisoner communications within the prison

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<sup>4</sup> One of the cases cited by DOC, Leonard v. Nix, 55 F.3d 370 (8th Cir. 1995), involved disciplinary action against a prisoner who deposited a letter in the prison's outgoing mail system that contained a vicious, racist diatribe against the prison warden. The court, however, found that the prisoner's use of the outgoing mail system was just a ruse, that he actually intended his message to be conveyed internally, directly to the warden, not to the purported addressee. Id. at 375. It was on this basis that the Eighth Circuit distinguished Leonard from other cases where courts struck down prison officials' attempts to discipline inmates for making insulting, derogatory comments about staff in outgoing correspondence. Id. There is no evidence in this case that Mr. Parmelee truly intended his letter to go directly to Superintendent Carter, rather than Secretary Clarke.

walls, and therefore afford such communications less protection under the First Amendment. Thornburgh, 490 U.S. at 413. The cases cited by DOC therefore have minimal persuasive value for purposes of this appeal.

DOC punished Mr. Parmelee for making a derogatory comment about a government official in his outgoing correspondence, a comment that in no way threatened the security of the institution. This court should follow Martinez and the other cases discussed above and hold that DOC's actions against Mr. Parmelee violated the First Amendment.

**D. The Allegations in Mr. Parmelee's Complaint State a Claim for Retaliation.**

In response to Mr. Parmelee's claim that the trial court erred in dismissing his retaliation claim under CR 12(c), DOC argues the claim was properly dismissed because (1) Mr. Parmelee has not shown that his conduct (i.e., sending a letter to the DOC secretary with an offensive remark about the prison superintendent) is protected activity (Br. of Resp't at 12), (2) DOC had a legitimate penological interest in preventing Mr. Parmelee from calling the prison superintendent a man-hating lesbian (id.) and (3) Mr.

Parmelee did not point to any evidence that would lead one to conclude that retaliation had occurred (id. at 23). These arguments fail to support the trial court's dismissal of Mr. Parmelee's retaliation claim.

First, whether or not Mr. Parmelee's letter to Secretary Clarke was protected speech under the First Amendment is not relevant to his retaliation claim. Mr. Parmelee alleges that DOC retaliated against him for pursuing litigation against state officials and making statements or complaints critical of DOC staff or policies. See CP 692, 698 (Verified Complaint ¶¶ 30, 49). It is indisputable that prisoner grievances and litigation are constitutionally protected activities. In re Addleman, 139 Wn.2d 751, 991 P.2d 1123 (2000) (holding that Indeterminate Sentence Review Board illegally retaliated against prisoner by considering his history of litigation and grievances in denying his request for parole). Thus, Mr. Parmelee properly alleged that DOC's adverse action was based on a protected activity.

Next, DOC claims that "[I]mposing Mr. Parmelee's ability to send letters calling the Superintendent a 'man-hating lesbian'

maintains the safety and security of the institution. Allowing otherwise would cause a safety risk to other inmates and the staff because there would be little ability to maintain order.” While maintaining prison security is certainly a legitimate penological goal, DOC’s conclusory statements regarding the alleged security risks posed by Mr. Parmelee’s letter, without any evidence to support the statements, are insufficient to warrant dismissal of Mr. Parmelee’s retaliation claim based on the pleadings. See McNamara, 606 F.2d at 624 (“[C]oarse and offensive remarks are not inherently breaches of discipline and security, nor is there any showing that they will necessarily lead to the breaking down of security or discipline.”)

Finally, DOC applies the wrong legal standard when it argues that Mr. Parmelee “has not pointed to any evidence that would lead one to conclude that retaliation has occurred.” Br. of Resp’t at 23. As DOC acknowledges, “[w]hen considering motions to dismiss, the court[] assumes the allegations in the complaint are true.” Id. at 6 (citation omitted). Unlike a summary judgment motion, a motion to dismiss does not require Mr. Parmelee to put forth evidence in order to defeat the motion. The allegations in Mr. Parmelee’s complaint,

taken as true for purposes of them motion to dismiss, sufficiently state a claim for retaliation. Therefore, the trial court's order dismissing that claim should be reversed.

**E. Mr. Parmelee is Entitled to Attorney Fees on Appeal Pursuant to 42 U.S.C. § 1988.**

DOC asserts, without citing any authority, that [i]f Mr. Parmelee is the prevailing party in this appeal, he may only request costs and statutory attorney's fees pursuant to state law." Br. of Resp't at 23. Since Mr. Parmelee's claims are based on 42 U.S.C. § 1983, if he prevails on appeal he will be entitled to recover his attorney fees pursuant to 42 U.S.C. § 1988. See Democratic Party of Washington State v. Reed, 388 F.3d 1281 (9th Cir. 2004) (granting attorney fees to prevailing parties in civil rights appeal).

**CONCLUSION**

For the reasons set forth above and in Appellant's Opening Brief, Mr. Parmelee asks this Court to reverse the trial court's rulings dismissing his claims and denying his motion for judgment on the pleadings. He asks the Court to declare RCW 9.58.010 to be unconstitutional – on its face and as applied to him in the prison disciplinary process – and to find that DOC violated his substantive

due process rights by finding him guilty of a prison infraction without any evidence to support an essential element of the infraction. Finally, he requests that the Court award him his attorney fees and costs for this appeal and remand the case for further proceedings.

Respectfully submitted this 9th day of November, 2007.

PUBLIC INTEREST LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Hank Balson", is written over a horizontal line.

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COURT OF APPEALS  
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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, postage pre-paid, copies of (1) Reply Brief of Appellant, (2) Appellant's Motion and Declaration for Extension of Time, and (4) this Certificate of Service to:

Amanda Migchelbrink  
Assistant Attorney General  
Criminal Justice Division  
P.O. Box 40116  
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Dated this 9th day of November, 2007

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A handwritten signature in cursive script, appearing to read "Hank Balson", is written over a horizontal line.

HANK BALSON  
Attorney for Appellant