

NO. 63599-9

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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ANTONIO ABEL, a single person, and KEITH A. FREEMAN, a single  
person, individuals

Appellants,

v.

CITY OF ALGONA, a Washington municipal corporation; STEVEN T.  
JEWELL and JANE DOE JEWELL, husband and wife; DAVID HILL  
and JANE DOE HILL, husband and wife; and JOSEPH SCHOLZ, a  
single person,

Respondents.

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BRIEF OF RESPONDENTS

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## **INTRODUCTION**

In October 2007, the City of Algona received a citizen complaint regarding alleged intimidation and harassment by two of its Police Officers, plaintiffs/appellants Keith Freeman and Antonio Abel (“the Officers”). The allegations against the Officers were serious, involving misuse of police power, violations of public trust, and contraventions of internal policy.

The City of Algona placed the Officers on paid administrative reassignment during the pendency of a criminal and subsequent administrative investigation. During the course of these investigations, and during the entire time they were on administrative reassignment, the Officers received their full salaries, and accrued all sick leave, vacation pay, and pension benefits.

Upon their return to work at the conclusion of the investigations, the Officers were provided with letters fully exonerating them from the allegations against them. No adverse employment action resulted to the Officers as a consequence of the allegations, the administrative reassignment, or the investigations. Both Officers voluntarily left the employment of the City of Algona a year or more after their return to work.

The Officers contend that the City of Algona's actions give rise to claims for negligent hiring and supervision of former Chief of Police Steven Jewell, the individual who initially placed the Officers on Administrative Reassignment. However, the Officers are wholly without evidence tending to demonstrate that Chief Jewell was unfit or unqualified for the position of Chief of Police at the time he was hired by the City of Algona, or that he was negligently supervised during his tenure with the City.

The Officers also claim that the City of Algona's actions amount to a breach of some employment agreement between the Officers and the City of Algona. This claim is precluded as a matter of law because the Officers failed to exhaust the CBA's grievance procedure before bringing the present lawsuit, fail to assert that their Union breached its duty of representation, and fail to specify any other agreement or provision that was allegedly breached.

The Officers' claims also fail because they are unable to demonstrate any compensable damage arising from their paid administrative reassignment, during which they accrued all sick leave, vacation pay and pension benefits, and during the pendency of investigations into allegations in regard to which the Officers were ultimately exonerated.

The Respondents respectfully request that this court affirm the King County Superior Court's summary judgment dismissal of the Officers' claims.

### **ISSUES FOR REVIEW**

1. Are the Respondents entitled to summary judgment dismissal of the Officers' **negligent hiring and supervision claims**, when the Officers are without any evidence to support their assertions that Chief Jewell was either unfit or unqualified for the position of Chief of Police when he was hired, or negligently supervised during his tenure with the City?
2. Are the Respondents entitled to summary judgment dismissal of the Officers' **breach of employment agreement** claim, when the Officers failed to exhaust the mandatory grievance procedures set forth in the CBA, failed to allege that their Union breached any duty, and when this claim is similarly without evidentiary support?
3. Are the Respondents entitled to summary judgment dismissal of the Officers' claims, when the Officers are **unable to demonstrate any compensable damage** arising from their paid administrative reassignment, during which they accrued all sick leave, vacation pay and

pension benefits, and during the pendency of investigation into allegations in regard to which the Officers were ultimately exonerated?

4. Did the trial Court err in **striking from the testimony and report of expert witness D.P. Van Blaricom**, when Mr. Van Blaricom's opinions articulate impermissible legal conclusions, are not based on Mr. Van Blaricom's purported area of expertise, and are otherwise unhelpful to the trier of fact?

#### **STATEMENT OF THE CASE**

Respondents dispute the truth, relevance and admissibility of several of the facts asserted in the Appellants' brief, but consider it unnecessary to engage in a point-by-point discussion of each of those facts for the purpose of this response. With the CR 56 summary judgment standard and this Court's standard of review in mind, the undisputed facts that give context to the present appeal are set forth below.

##### **A. Parties**

Plaintiffs/appellants Keith Freeman and Antonio Abel ("the Officers") are former Police Officers employed by Defendant/Respondent City of Algona for the Algona Police Department. CP 885, 942. Defendant Steven Jewell is the former Chief of Police of the City of Algona. CP 3. Defendant David Hill is the current Mayor of the City of

Algona. Id. Defendant Joseph Scholz is the former Mayor of the City of Algona. Id. The Defendants are collectively referred to throughout this brief as “City of Algona.”

### **B. Underlying Facts**

At times relevant to this case, non-party Dwain Beck was a member of the Algona City Council, and non-party Kim Carter was an Algona resident and Mr. Beck’s neighbor. CP 901.

During October of 2006, Mr. Beck and Ms. Carter were engaged in an ongoing dispute. *See* CP 548-551. Ms. Carter had obtained a civil judgment against Mr. Beck, arising from damage caused by Mr. Beck to Ms. Carter’s vehicle. CP 548-49, 902. According to Mr. Beck, Ms. Carter came to Mr. Beck’s home several times in October 2006 in unsuccessful efforts to collect on the civil judgment. CP 902. According to Ms. Carter, Mr. Beck threatened her by stating: “Watch your back the police work for me.” CP 549.

On October 21, 2006, Mr. Beck contacted Officer Freeman on his personal cell phone, and alleged that Ms. Carter had come onto his property and into his garage without his permission. CP 902. According to Mr. Beck, he asked Officer Freeman to tell Ms. Carter to “stay off” his property. Id.

Following Mr. Beck's phone call, Officers Freeman and Abel proceeded to Ms. Carter's residence. CP 948. Mr. Freeman was off-duty and not wearing a police uniform at the time. CP 887. The Officers issued Ms. Carter a verbal "no-trespass" warning. CP 887, 948. They did not generate paperwork on the incident, did not assign it a case number, and did not notify dispatch of their location. CP 540, 887, 948.

Following the confrontation with Officers Freeman and Abel, Ms. Carter contacted Algona Police Chief Steven Jewell and informed him of the incident, of Mr. Beck's alleged statement ("Watch your back the police work for me"), and of her belief that Mr. Beck had improperly used his influence as a City Councilman to cause the Officers to "warn her off." CP 377.

On or about October 23, 2006, Chief Jewell issued a department memorandum stating that Mr. Beck was under criminal investigation (for an unrelated matter), and prohibiting department personnel from having contact with Mr. Beck without written permission. CP 553. Also on or about that day, Chief Jewell issued a "Notice of Investigation and Administrative Assignment" to both Officer Abel and Officer Freeman. CP 555-559. The notices provided that the Officers would be placed on "administrative reassignment with pay" pending investigation of them for suspected criminal conduct, failure to report misconduct, and association

with known offenders. Id. The notices expressly stated: “This administrative reassignment is not a disciplinary action.” Id.

Pursuant to the notices, the Officers were required to surrender their service equipment. Id. They were also instructed not to speak with other department members about the circumstances of the incident, and were prohibited from becoming involved in law enforcement activities. Id.

Included in the notices was the following directive:

You shall remain at your residence, available by telephone and able to respond to the department office within one-hour notice between the hours of 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m.

Id. The directive applied Monday through Friday, and excluded holidays. The Officers were also required to call Chief Jewell to check in once daily, Monday through Friday. Id. The Officers were permitted to take sick leave and vacation days, if pre-approved by Chief Jewell. Id.

While on administrative reassignment, the Officers would continue to receive full pay and benefits. Id.

On or about October 24, 2006, Chief Jewell requested that the Federal Way Police Department investigate Ms. Carter’s claims regarding Officers Freeman and Abel. CP 540. The Police Department conducted a criminal investigation during November 2006 and, on November 14, 2006,

informed Chief Jewell that the investigation had failed to establish that a crime had been committed. CP 544. The investigative report was then forwarded to the City of Lakewood Special Prosecutor for a charging decision. CP 561-63. On January 3, 2007, the Special Prosecutor concluded: "I do not believe there is sufficient evidence to charge either [Officer] with a crime." CP 562.

For reasons unrelated to this case, Chief Jewell resigned in October 2006 to take a position in Tacoma. While his resignation was effective that month, he stayed on until the end of November 2006. CP 1013.

On January 9, 2007, in keeping with a City Council vote of approval from which Mayor Hill abstained, the Mayor sent a formal request for an administrative investigation to the Washington State Patrol ("WSP"). CP 565-66. On February 2, 2007, the WSP approved the request. CP 567-68.

In February 2007, a new Chief of Police, A.W. McGehee, took over for Chief Jewell. Chief McGehee is not named in this lawsuit. On or about February 15, 2007, Chief McGehee informed the Officers that they were being returned to normal duties during the pendency of the administrative investigation. CP 587-88.

Upon their return to work, both Officers applied for a position of Sergeant that came open within the department. However, Officer Abel

withdrew his name from consideration for the position on May 30, 2007, and Officer Freeman withdrew his name from consideration for the position on June 20, 2007. CP 595-96.

On May 30, 2007, the WSP completed their administrative investigation, and forwarded to the city of Algona a report that contained a synopsis of the investigation. CP 570-85.

On June 25, 2007, Officers Freeman and Abel received letters fully exonerating them. CP 590-91.

Both Officers resigned their position with the City of Algona more than a year after their February 15, 2007 return to work. Mr. Abel's resignation was effective at some point in or around February 2008. Mr. Freeman's resignation was effective a year and a half later, on June 4, 2008. CP 1298, CP 1300-02.

### **C. Union Grievance**

The Collective Bargaining Agreement in place between the City of Algona and the Officers' Union during the Officers' employment with City of Algona contains a mandatory grievance procedure. CP 616-17. The mandatory grievance procedure applies with respect to disputes "Involving the... alleged violation of any provision of the Agreement." CP 616. The mandatory grievance procedure is a three-step process, requiring: (1) a written grievance from the employee to the employee's

Department Director; (2) a written grievance from the Union to the Mayor or designee; and, finally, (3) an appeal by the Union to a neutral arbiter.

Id. As the CBA provides, “in the event the grievant or union does not advance the grievance...any step in the procedure...the grievance shall be deemed withdrawn.” CP 617.

On January 18, 2007, plaintiffs’ attorney directed a letter to “Mayor Hill, Department Director and Chief Jewell,” stating that “this letter is to initiate a Grievance on behalf of Mr. Freeman and Mr. Abel. CP 635-39. The City of Algona confirmed the receipt of the grievance on January 31, 2007. CP 648-49. On February 1, 2007, Union representative Ron Harrell sent a letter to Mayor Hill regarding the grievance. CP 651. On February 6, 2007, Chief of Police McGehee responded to Plaintiffs’ attorney and Mr. Harrell, denying the Step One grievance. CP 654-55.

On May 11, 2007, Union representative Mr. Harrell sent another letter to Mayor Hill “advancing the Grievance to Step Two.” CP 657-58.

The Union requested the following relief:

REMEDY: The Union asks that the City of Algona end any ongoing investigations involving Freeman and Abel and remove any reference to the investigations in any personnel files the City maintain on the Officers.

CP 659.

Mayor Hill responded to the Grievance by letter dated July 2, 2007, informing Mr. Harrell that investigations conducted on behalf of the City of Algona regarding the Officers had previously ended, and that investigative materials would not be kept in either Officers' personnel files. CP 662-63.

Neither the Union, Officers Freeman and Abel, nor their attorney appealed from the decision of Mayor Hill or attempted in any other respect to advance the grievance to Step Three of the CBA's grievance procedure. At his deposition, Union representative Mr. Harrell acknowledged that the Union had elected to withdraw the grievance because it had received the remedy sought. As he testified:

Ultimately [the grievances on behalf of each of the Officers] were withdrawn, primarily because we achieved the objective we were looking for, which was to get them back to work without any loss of pay, benefits, seniority, all the rest of that stuff. That would have been ultimately the remedy we were looking for, and we got that. At that point there was no need to pursue them further.

CP 1324.

#### **D. Procedural History**

A recitation of the procedural history of this case is helpful in clarifying the claims properly before the Court pursuant to this appeal.

On May 18, 2007, the Officers filed suit in King County Superior Court, alleging that their placement on paid administrative reassignment

constituted violations of their rights to equal protection and due process of law under the United States constitution; discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3; discrimination in violation of the Washington Law Against Discrimination (“WLAD”), RCW 49.60.210; the tort of negligent supervision in regard to the City of Algona’s supervision of Chief Jewell; and breach of employment agreement. CP 3-11. The City of Algona removed the case to the U.S. District Court for the Western District of Washington on June 19, 2007. CP 12-14.

On April 2, 2008, the Officers filed their First Amended Complaint, eliminating their discrimination claims under both Title VII and the WLAD, but adding a claim for alleged negligent hiring of Chief Jewell. CP 602-11. On July 9, 2008, the City of Algona moved for summary judgment on each of the Officers’ remaining claims. The District Court partially granted the motion, dismissing all of plaintiffs’ federal claims brought pursuant to 42 U.S.C. §1983 (*i.e.* equal protection and due process of law).<sup>1</sup> CP 665-88.

The District Court declined to exercise jurisdiction over the remaining state law claims (*i.e.* negligent hiring/supervision of Chief

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<sup>1</sup> The Order granting summary judgment on the federal claims was affirmed by the 9<sup>th</sup> Circuit Court of Appeals on October 13, 2009.

Jewell and breach of employment agreement), and remanded the case to King County Superior Court for further proceedings with respect to those claims. CP 690-93.

On April 10, 2009, the City of Algona moved for summary judgment on the remaining negligent hiring/supervision and breach of employment agreement claims. CP 513-27. In response to the motion, plaintiffs attached a report and deposition testimony of an asserted expert witness, D.P. Van Blaricom. CP 1131-1200. The City of Algona subsequently moved to strike Mr. Van Blaricom's deposition testimony and report from the record. CP 1330-48.

On May 13, 2009, the Court entered orders granting City of Algona's motion for summary judgment dismissal of the Officers' remaining negligent hiring/supervision and breach of employment agreement claims, and granted City of Algona's Motion to strike the testimony and report of Mr. Van Blaricom. CP 1368-1374.

On May 29, 2009, the Officers filed their notice of appeal to this court, appealing from both the Order on Summary Judgment and the Order striking the testimony and report of Mr. Van Blaricom. CP 1375-76.

## ARGUMENT

### A. Standard of Review

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court, applying a *de novo* standard of review. Hisle v. Todd Pac. Shipyards Corp, 151 Wn.2d 853, 860, 93 P.3d (2004).

A moving party is entitled to summary judgment when “ there is no genuine issue of material fact and... the moving party is entitled to judgment as a matter of law.” CR 56(c). Once a moving party sustains its initial burden of demonstrating it is entitled to judgment as a matter of law, the burden shifts to the non-moving party to demonstrate the existence of material issues of fact for trial. CR 56(e); Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A material issue of fact is one upon which all or part of the outcome of the litigation depends. Hill v. Cox, 110 Wn. App. 394, 402, 41 P.3d 495 (2002). If the non-moving party is unable to sustain his burden of demonstrating the existence of genuine issues for trial, summary judgment must be entered against him. CR 56(e).

The party resisting summary judgment must direct the Court to specific evidence that creates a material issue for trial, not on the court to intuit such facts from several pages of conclusory and unsupported

allegations. See Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9<sup>th</sup> Cir. 2001) (“The . . . court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found”); Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7<sup>th</sup> Cir. 1999) (“judges need not paw over the files without the assistance of the parties.”)

The non-moving party is entitled to have the evidence viewed in the light most favorable to him. Herron v. Tribune Publ’g Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987). That party, however, may not rely on speculation or argumentative assertions that unresolved factual issues remain, and is not entitled to have its affidavits considered at face value. Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). In other words, conclusory statements in an affidavit are insufficient to overcome a motion for summary judgment; the plaintiff must actually demonstrate the basis for his or her assertions. CR 56(e); See also Herron, 108 Wn.2d at 170. Statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Finally, a party may not rely on inadmissible evidence to overcome a summary judgment motion, Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 308-09, 151 P.3d 201 (2006), and a court may not consider inadmissible evidence when ruling on the motion. Jonas v. State, 140 Wn. App. 476, 494-95, 166 P.3d 1219 (2007).

The Officers have failed to demonstrate the existence of a genuine issue for trial in regard to any of the claims now before this court.

**B. The majority of the Facts alleged by the Officers are irrelevant to the claims before this court**

As an initial matter, it is important to recognize the narrow scope of the Officers' claims now before this Court. Plaintiffs' remaining claims in this matter are: (1) that the City negligently hired and/or supervised Chief Jewell in regard to the Officers' placement on administrative reassignment; and (2) that the City of Algona breached the CBA or some other "employment agreement" in regard to the Officers' placement on administrative reassignment.

As discussed above, Chief Jewell was hired by the City in the spring of 2005 and left in November of 2006. Accordingly, any alleged occurrences outside this window of time are irrelevant to plaintiffs' claims for the alleged negligent hiring and supervision of Chief Jewell. Likewise, plaintiffs were placed on administrative reassignment on October 23,

2006, returned to duty on February 15, 2007, and ultimately exonerated on June 25, 2007. Any alleged occurrences outside that window of time are simply irrelevant to plaintiffs' claims for alleged breach of the CBA.

The vast majority of the alleged facts asserted by plaintiffs are outside these timeframes and otherwise outside the scope of the Officers' remaining claims. For example, the Officers' allegations as to the pre-existing intent by city officials to "claim house" bear no discernable relevance to the issue of whether the City negligently hired or supervised Chief Jewell in regard to the Officers' placement on administrative reassignment, or to the issue of whether the City breached the CBA by placing the plaintiffs on administrative reassignment. As another example, plaintiffs' allegations as to the allegedly "intolerable" working conditions at the time of their resignation, long after Chief Jewell left the employment of the City and several months after they returned to work from the administrative reassignment, are similarly irrelevant to either of their claims.

In addition, plaintiffs assert several facts in regard to alleged wrongful acts by the City of Algona toward Dwain Beck and Adena Gustafson. These claims are not a part of this action, and the Officers' assertions as to the City's alleged actions or intentions as to Mr. Beck and Ms. Gustafson have no bearing whatsoever on whether the Officers'

placement on paid administrative reassignment gives rise to either a claim for negligent hiring/supervision of Chief Jewell, or a breach of the CBA.

Finally, the Officers' appear to rely on alleged wrongful acts of Chief McGehee and/or other unnamed "policy makers, employees and police chiefs" in support of their alleged negligent hiring/supervision claims. As pleaded in their amended complaint, plaintiffs' negligent hiring and supervision claims relate solely to Chief Jewell, not to the other un-named individuals to whom the Officers vaguely refer.<sup>2</sup>

The only facts alleged by plaintiffs which bear any conceivable relevance to the present claims are those in regard to the only event truly at issue in this case – the Officers' placement on paid administrative reassignment during which they lost no pay or benefits, and relating to allegations in regard to which they were ultimately exonerated.

As a matter of law, the Officers' paid administrative reassignment does not support either their claim for negligent hire/supervision of Chief Jewell, or their claim for breach of the CBA.

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<sup>2</sup> In regard to the negligent hiring and supervision claims, plaintiffs' complaint alleges as follows: "*Jewell* in his capacity of Chief of Police of the City presented a risk of harm to Abel and Freeman."; "As *Jewell's* employer the City knew, or though the exercise of reasonable care, should have known that *Jewell* presented a risk of harm."; "The City's failure to investigate *Jewell* before hiring, and adequately supervise *Jewell* after hiring, we the proximate cause of Abel's and Freeman's injuries." CP 608 (emphases added).

**C. Plaintiffs have no evidence sufficient to create an issue of material fact with regard to their Negligent Hiring and Supervision Claims**

Plaintiffs first assert that their paid administrative reassignment gives rise to claims for the alleged negligent hiring and supervision of Chief Jewell, the Chief of Police who made the initial decision to place the Officers on Administrative Reassignment. These claims fail as a matter of law.

**1. The Officers' negligent hiring claim fails as a matter of law**

The Officers have failed to demonstrate the existence of any evidence sufficient to create a material issue for trial as to their negligent hiring claims. Consequently, this claim fails as a matter of law.

In order to prevail on a negligent hiring claim, a plaintiff must demonstrate that: (1) the employee was unfit at the time he was hired; (2) the employer knew or, in the exercise of ordinary care, should have known of the employee's unfitness at the time he was hired; and (3) the employee proximately caused the plaintiff's injuries. Carlsen v. Wackenhut Corp., 73 Wn. App. 247, 252-53, 868 P.2d 882 (1994). The Officers have proffered no evidence to demonstrate the existence of an issue of material fact as to any of these elements.

Initially, the Officers have produced no evidence to suggest that Chief Jewell was unfit at the time he was hired. In support of their

negligent hiring claim, the Officers allege that the City of Algona did not take particular actions prior to Chief Jewell's hire, such as investigating whether Jewell had engaged in "wrongful or illegal employment practices" prior to his hiring, or subject him to "psychological testing." However, the Officers do not support these assertions with any legal authority imposing on the City of Algona a duty to take such measures. Moreover, the Officers have proffered no evidence that any alleged unfitness of Chief Jewell would have become apparent to the City had it subjected Chief Jewell to more stringent testing. There is no evidence of anything whatsoever in Mr. Jewell's past that would have put the City on notice of his alleged unfitness, even if the City had undergone all of the measures that the Officers think necessary.

Furthermore, because Mr. Jewell was not unfit at the time of hire, there is no evidence to suggest that the City of Algona knew or should have known of any such alleged unfitness. In support of their claim that the City of Algona was somehow on notice of Chief Jewell's alleged unfitness, the Officers appear to rely solely on the allegation that Mr. Beck advised the City Council that it should not hire Chief Jewell. However, as is apparent from Mr. Beck's own declaration, his advice against hiring Chief Jewell was not based on any actual evidence of unfitness. As Mr. Beck acknowledges in his declaration, his alleged misgivings about

Chief Jewell were based merely on the following factors: (1) he “googled Steven Jewell’s name and nothing came up”; (2) he could not understand why someone from the WSP would want to work for the City of Algona; and (3) his unsupported suspicion that Mr. Jewell had to leave the WSP for “unstated reasons.” CP 894-95.

Mr. Beck’s vague and speculative assertions about Mr. Jewell’s past are not sufficient to demonstrate any unfitness of Chief Jewell at the time of hire, or to put any reasonable City official on notice of any such unfitness. They are also insufficient to overcome the present motion for summary judgment. See Seven Gables Corp, 106 Wn.2d at 13 (a party resisting summary judgment may not rely on speculation or argumentative assertions that unresolved factual issues remain, and is not entitled to have its affidavits considered at face value).

Finally, there is no evidence to support the Officers’ assertion that they were injured by Chief Jewell’s alleged unfitness by virtue of the Officers’ placement on paid administrative reassignment, during which they continued to receive all pay and benefits, and on charges in regard to which they were ultimately exonerated. The Officers assert that they were damaged because the City’s actions ultimately “culminated in its constructive termination of Freeman and Abel.” Brief of Appellants at 22-23. However, the Officers’ contentions as to alleged constructive

termination are insufficient to support their damages claim, for the following several reasons.

First, while the phrase “constructive discharge” is passingly referred to in the damages portion of plaintiffs’ complaint, it is not raised as a separate cause of action and, thus, is not properly before either the trial court or this Court on review.

Second, the District Court already considered, and rejected, the Officers’ claims as to alleged constructive discharge. As such, the Officers are collaterally estopped from raising such claims here. The doctrine of collateral estoppel precludes further litigation of an issue when: (1) the same issue was previously adjudicated in the merits; (2) the adjudication resulted in a final judgment; (3) the party against who preclusion is being asserted was a party (or in privity with a party) to the prior litigation; and (4) preclusion will not work an injustice. Northwest Independent Forest Manufacturers v. Dep’t of L&I, 78 Wn. App. 707, 714, 899 P.2d 6 (1995). These requirements are satisfied here. The Federal District Court already determined that any constructive discharge claim of the Officers’ fails as a matter of law, not only because plaintiffs failed to include constructive discharge as a cause of action in their complaint, but also because plaintiffs’ evidence:

Fails to demonstrate that intolerable conditions existed at the time of their resignations such that a reasonable person would have been forced to resign, because they were no longer restricted to remain at home, and had been reinstated and assumed full duties as police officers.

CP 678-680. The Officers already had a full and fair opportunity to litigate their constructive discharge claim before the federal court, and are collaterally estopped from resurrecting that claim here.

Third, even if the Court determined that the constructive discharge claim was validly raised here, the claim nonetheless fails because the Officers have proffered no evidence sufficient to support it. A plaintiff asserting a constructive discharge claim must demonstrate that they reasonably felt forced to quit because of intolerable conditions that existed at the time of the plaintiff's resignation. See Washington v. Boeing Company, 105 Wn. App. 1, 15-16, 19 P.3d 1041 (2001). A resignation is presumed to be voluntary, and a plaintiff must introduce evidence to rebut that presumption. Id. Here, plaintiffs resigned their employment with the City a year or more after they returned from their administrative reassignment, and have offered no evidence that a reasonable person in their position would have felt forced to quit at the time of their resignations. As the District Court found, the Officers' general speculative statements, such as that contention that their workplace was "riddled with innuendo," are not sufficient to survive summary judgment.

See Seven Gables Corp, 106 Wn.2d at 13 (speculative assertions of fact are insufficient to overcome a motion for summary judgment).

For the above reasons, the Officers' negligent hiring claim fails as a matter of law.

**2. The Officers' negligent supervision claim fails as a matter of law**

The Officers have failed to demonstrate the existence of any evidence sufficient to create a material issue for trial as to their negligent supervision claim. Consequently, this claim similarly fails as a matter of law.

In order to prevail in a negligent supervision claim, a plaintiff must demonstrate that: (1) the employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) the employer's failure to supervise was the proximate cause of injuries to the plaintiff. Briggs v. Nova Services, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006), citing to Niece v. Elmview Group Home, 131 Wn.2d 39, 48-49, 51, 929 P.2d 420 (1997). Here, plaintiffs have not proffered evidence sufficient to create an issue of material fact as to any of these elements.

First, there is no evidence that Chief Jewell acted outside the scope of his authority in placing the Officers on administrative reassignment. In fact, even when the facts relevant to the administrative reassignment are viewed in the light most favorable to the Officers, the actions taken by Mr. Jewell were within his authority as a matter of law. The broad discretion of Police Departments in relation to their employees has been recognized by: (1) case law; (2) the federal court who considered the Officers' administrative reassignment here at issue; (3) the language of the CBA.

Initially, the broad discretion of municipalities and police departments, as it relates to personnel actions, has been recognized by several courts. As a general principle, a local government is afforded "wide latitude" in regard to the "dispatch of its own internal affairs." Kelley v. Johnson, 425 U.S. 238, 247, 96 S. Ct. 1440 (1976). As the Supreme Court recently noted, "We have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." Enquist v. Oregon Dept. of Agriculture, 128 S.Ct. 2146, 2151 (2008). A local government is afforded even greater discretion in regard to the regulation of its police officers. As the Eight Circuit has noted:

The police department, as a paramilitary organization, must be given considerably more latitude in its decisions regarding discipline and personnel regulations than the ordinary government employer.

Crain v. Board of Police Com'rs of Metropolitan Police Dept. of City of St. Louis, 920 F.2d 1402, 1409 (8th Cir. 1990).

Furthermore, the federal court in this case, considering the same facts and evidence here at issue, concluded that it was appropriate to defer to the City of Algona with respect to the personnel actions taken by Chief Jewell. As the court determined:

Whatever the wisdom in restricting Plaintiffs to their homes during working hours for four months, the Court defers to the decision of the Algona Police Department to impose such a restriction pending the outcome of the criminal and administrative investigations into Plaintiffs' conduct. The Court concludes that the reassignment was rationally related to the police department's interest in ensuring that their officers were in compliance with regulations and the law.

CP 682 (emphasis added).

Finally, Article 2 of the CBA contains the following provisions, which further confirm the broad discretion granted to the City of Algona and Police Chief in regard to personnel matters:

2.1 DIRECTION OF WORKFORCE – The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its lawful mandate... This shall include, but not be limited to the rights to (a) direct employees; (b) hire, promote, transfer, assign and retain employees...

2.2 EMPLOYER RULES AND REGULATIONS – The Employer shall have the right to make such reasonable direction, rules and regulations as may be necessary by the Employer for the conduct and the management of the affairs of the Employer...

CP 615.

The plaintiffs have offered no evidence to demonstrate that Chief Jewell acted outside the broad authority conferred on him pursuant to case law, the CBA, and the federal court's ruling. In other words, plaintiffs have failed to demonstrate that Chief Jewell did anything wrong, a threshold requirement of their negligent supervision claim.

Second, as discussed above in relation to the Officers' negligent hiring claim, the plaintiffs are without evidence sufficient for a reasonable person to conclude that Chief Jewell presented any risk of harm to the Officers, that the City of Algona knew, or should have known in the exercise of reasonable care that Chief Jewell posed a risk of harm to the Officers, or that the alleged failure to supervise Chief Jewell caused any actual harm. The Officers' negligent supervision claim fails for these reasons as well.

**D. The Officers' Breach of Employment Agreement Claim fails as a matter of law**

The Officers' breach of employment agreement claim fails as a matter of law because the Officers have failed to exhaust the CBA's

grievance procedure, failed to allege any wrongful conduct by their Union, and is entirely without evidence to support this claim.

In order to prevail on a breach of employment agreement claim, a plaintiff must demonstrate that the defendant: (a) owed him a duty pursuant to an agreement; (b) breached that duty; and (c) the breach was a proximate cause of the plaintiff's injuries. Northwest Indep. Forest Mfrs 78 Wn. App. at 712. The Officers are unable to demonstrate the existence of a genuine issue for trial in regard to any of these elements.

As an initial matter, the Officers allege that "implied and express employment agreements" were breached by the City of Algona, and cite to case law in support of the proposition that employment manuals may be considered binding contracts under some circumstances. See, e.g., Bulman v. Safeway Inc., 144 Wn.2d 337, 344, 27 P.3d 1172 (2001). However, the plaintiffs fail to indicate the employment manual or other provision that they claim gives rise to a contractual right, or apply any such provision to the facts at hand. The Officers also did not provide the Court with any such employment manual or other provision in response to the City of Algona's motion for summary judgment. Accordingly, they cannot sustain their burden of demonstrating that the City of Algona owed the Officers any duty pursuant to any such alleged agreement.

The only actual contractual provision relied upon by the Officers appears to be the “Application of Discipline” provision of the CBA. However, the Officers’ contention that this provision was breached by the City of Algona fails for several reasons. First, the Officers’ claim is barred by their failure to exhaust the mandatory grievance procedure of the CBA. Second, the Officers’ claim is barred because they fail to allege that their Union breached its own duty of fair representation to the Officers, a required element of a claim for a CBA breach. Third, as a matter of law, the Officers’ paid administrative reassignment does not constitute a breach of CBA provision upon which they rely. Finally, the Officers cannot demonstrate that they were damaged by the breach alleged.

First, the Officers’ claim for breach of the CBA is barred by their failure to exhaust the CBA’s mandatory grievance procedure.

It is well-established that, “where a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee must exhaust those procedures before resorting to judicial remedies.” Lew v. Seattle School Dist. No. 1, 47 Wn. App. 575, 577, 736 P.2d 690 (1987); See also Hansen v. City of Seattle, 45 Wn. App. 214, 218, 724 P.2d 371 (1986) (“Where an agreement provides for a method of resolving disputes between parties, that method must be pursued before a party can resort to the courts for

relief.”). Washington courts apply a strong presumption in favor of arbitration of disputes. Peninsula School Dist. No. 401 v. Public School Employees of Peninsula, 130 Wn.2d 401, 415, 924 P.2d 13 (1996) (holding that the meaning of the term “discharge” in a CBA should be determined by an arbitrator pursuant to the grievance procedure set forth in the applicable CBA).

As discussed above, the CBA in this case mandates the use of a three-step grievance procedure for any dispute involving the interpretation, application or alleged violation of any of its provisions. Here, the Officers allege that their paid administrative reassignment constituted a violation of the disciplinary provisions of the CBA. Accordingly, the mandatory grievance procedure applies.

Viewing the fact of this case in the light most favorable to the Officers, they arguably complied with Steps One and Two of the mandatory grievance process. However, they failed to advance the grievance to the Step Three arbitration. Accordingly, the grievance was withdrawn, and the failure to exhaust the grievance process precludes the officers attempt to resort to the courts for relief.

In an attempt to overcome their failure to comply with the CBA grievance process, the Officers contend that their lack of compliance would have been futile. The case relied upon by the Officers in support of

this contention, Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 769 P.2d 298 (1989), holds that the futility exception to a mandatory grievance procedure applies only when the plaintiff can proffer admissible evidence of “bias” on the part of the decision-maker. However, plaintiffs have not offered any evidence of actual bias on the part of decision-makers Chief McGehee, Mayor Hill or any arbiter who would have heard Step Three of the grievance had it been pursued. In contrast, plaintiffs’ Union Representative Ron Harrell testified that the grievance was not advanced because the Union itself withdrew it, not because the City prevented it from going forward. Plaintiffs’ speculative and unsupported assertions as to alleged bias are inadmissible and inadequate to overcome a motion for summary judgment. See Seven Gables Corp., 106 Wn.2d at 13 (speculative assertions of fact are insufficient to overcome a motion for summary judgment). The Officers’ failure to exhaust the CBA’s mandatory grievance procedure bars their breach of CBA claim.

Second, the Officers’ breach of CBA claim also fails as a matter of law because they fail to allege, or proffer facts sufficient to demonstrate, that the Union breached its duty of representation by failing to advance the Officers’ grievance.

A CBA is a contract between an employer and a union, and it is the province of the union to represent an employee's interest with respect to the CBA. Accordingly, as this court has held:

Where a grievance procedure has not been exhausted due to the union's refusal to press the matter on to arbitration, a prerequisite to maintaining a lawsuit against [the employer] is an allegation that the union acted arbitrarily, discriminatorily or in bad faith in failing to exhaust the contractual procedures for settling disputes.

Lew, 47 Wn. App. at 578 (holding that the employee appellant's action was barred because the employee "nowhere argued or alleged... that the [Union] had breached any duty") (internal quotations and citations omitted).

Here, the Officers have entirely failed to allege that the Union breached any duty owed to the Officers, or to proffer any evidence of such breach. In fact, the evidence before the court demonstrates that the Union acted entirely reasonably. It withdrew the grievance after it received what it asked for – plaintiffs' return to work with no loss of pay or benefits. The Officers' breach of CBA claim fails on this basis as well.

Third, even assuming that the Officers' claims for breach of the CBA were not barred as a matter of law, the claim nonetheless fails because the Officers fail to point to any provision that prohibits their placement on paid administrative reassignment.

The Officers rely only on Article 17 of the CBA, which applies only in the regard to “discipline.” The Officers were not disciplined by virtue of their placement on paid administrative reassignment during which they accrued all sick leave, vacation time and pension benefits, and during the pendency of investigations in regard to which they were ultimately exonerated. In fact, the Officers’ own Union representative conceded as much in an email to Officer Abel. CP 593 (“The thing you have to understand is... while you are under an administrative suspension related to an investigation, so long as you continue to receive full pay and benefits it cannot be considered disciplinary action – no arbitrator under the sun would rule that it is.”). No reasonable fact-finder could otherwise conclude, and the plaintiffs’ breach of CBA claim fails on this basis as well.

Finally, as discussed above in connection with the Officers’ negligent hiring/supervision claims, the Officers are wholly without evidence to demonstrate that their placement on paid administrative leave caused them any actual harm. The Officers’ breach of CBA claim fails on this basis as well.

**E. The Trial Court properly entered an order striking the Van Blaricom testimony and report from the record**

The Officers also appeal from the trial court's order striking from the record the declaration and testimony of Mr. Van Blaricom.

This Court has variously applied a *de novo* or abuse of discretion standard of review when reviewing a trial court's evidentiary rulings made in conjunction with a summary judgment motion. Compare Warner v. Regent Assisted Living, 132 Wn. App. 126, 135-36, 130 P.3d 865 (2006) (applying *de novo* standard of review) to Am States Ins. Co. v. Rancho San Marcos Props., LLC, 123 Wn. App. 205, 214, 97 P.3d 775 (2004) (applying abuse of discretion standard of review). Under either standard of review, the trial court properly ordered the deposition transcript and report of Mr. Van Blaricom stricken from the record.

The admission of expert testimony generally is governed by Washington Rule of Evidence 702, which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

The rule requires a two-step inquiry: (1) whether the witness qualifies as an expert; and (2) whether the expert testimony will be helpful to the trier of fact. Rees v. Stroh, 128 Wn.2d 300, 305-06, 907 P.2d 282

(1995); State v. Russell, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). The admissibility of an expert's opinion pursuant to ER 702 is a matter within the trial court's discretion. In Re Twining, 77 Wn. App. 882, 891, 894 P.2d 1331 (1994). In ruling on the admissibility of expert testimony under the rule, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the "aura of an expert." Davidson v. Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986).

Mr. Van Blaricom's opinions were properly excluded from the record because: (1) the opinions are not helpful to understanding the evidence or determining any fact at issue; (2) the opinions embrace impermissible legal conclusions; and (3) the opinions are not based on Mr. Van Blaricom's specialized knowledge of and/or experience in police matters.

First, Mr. Van Blaricom's opinions are not helpful in understanding evidence or determining a fact at issue. Experts are permitted to testify only as to subjects that are not within the understanding of the average person. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Additionally, the credibility or state of mind of witnesses is not a proper subject of expert testimony, as fact-finders are capable of assessing credibility and state-of-mind without the

aid of expert testimony. Fettig v. Dep't of Social and Health Services, 49 Wn. App. 466, 477, 744 P.2d 349 (1987) (“the expert may not usurp the factfinder’s function by determining the credibility of the witness”); State v. Farr-Lenzini, 93 Wn. App. 453, 464, 970 P.2d 313 (1999) (expert testimony as to witness’s state of mind was not helpful to the jury; lay jury, relying on its common experience, was capable of determining the witness’s state of mind).

Here, the report of Mr. Van Blaricom recounts the “facts” as he understands them, without citation to a specific source or record. CP 1343-45. The testimony does not help the jury to understand any fact in issue; instead, it tells them what the facts are. In addition, Mr. Van Blaricom's substantive opinions contain impermissible conclusions as to the credibility and state of mind of witnesses. For example, Mr. Van Blaricom opines that the action taken by city of Algona in regard to the Officers was motivated by a “climate of acrimony.” CP 1345. It is the jury’s province to determine whether or not acrimony motivated defendants’ actions. Mr. Van Blaricom’s opinions regarding the alleged state of mind of City officials are improper.

Second, Mr. Van Blaricom impermissibly opines on ultimate issues of law, many of which are irrelevant to the Officers’ remaining claims for negligent supervision/hiring and breach of the CBA.

Testimony in the form of a legal conclusion is improper and should always be excluded; experts may not testify that a party conduct was in violation of the law. State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002); See also Washington State Physician Ins. Exch. & Assoc. v. Fisons, Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (“[l]egal opinions on the ultimate legal issue before the court are not properly considered under the guise of expert testimony.”) Here, Mr. Van Blaricom’ opinions embrace legal conclusions, several of which are not conceivably relevant to the remaining claims in this case (e.g. “it is my considered opinion that Detective Freeman was more probably than not a victim of retaliation...”). CP 1346.

Finally, Mr. Van Blaricom offers opinions that are not based on any area of specialized knowledge and/or expertise in police matters, the purported area of his expertise. An expert opinion is inadmissible unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion. See Sehlin v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 38 Wn. App. 125, 132-33, 686 P.2d 492 (1984). Inherent in this requirement is that the area of the witness’s expertise must be that upon which the opinion is offered. State v. Farr-Lenzini, 93 Wn. App. at 461 (“The expert testimony of an otherwise qualified witness is not admissible if the issue at hand

likes outside of the witness' area of expertise."); See, e.g. Germaine v. Pullman Baptist Church, 96 Wn. App. 826, 838, 980 P.2d 809 (1999) (psychologist unqualified to express an opinion regarding the duties of a pastoral counselor); State v. Swagerty, 60 Wn. App. 830, 835-36, 810 P.2d 1 (1991) (counselor with degree in sociology unqualified to express an opinion regarding the effects of alcohol on the defendant).

Mr. Van Blaricom's opinions, as reflected in his report, do not satisfy the foregoing standard. For example, Mr. Van Blaricom states that "Abel and... Freeman were victims of conscienceless abuse of power and authority by the City of Algona.. that was more probably than not personally motivated by a climate of acrimony between competing interests." CP 1346. It is not apparent how Mr. Van Blaricom's opinions or knowledge of police matters informs the conclusion that a "conscienceless abuse of power" occurred or that a "climate of acrimony" existed. Mr. Van Blaricom's opinions are improper on this basis as well.

The trial court properly struck Mr. Van Blaricom's testimony and report from the record.<sup>3</sup>

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<sup>3</sup> A number of other courts have called Van Blaricom's opinions into question for the reasons discussed herein. *See, e.g., Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002); Ogden v. County of Maui, 554 F.Supp.2d 1141, 1145 n. 7 (D. Haw. 2008); Kanae v. Hodson, 294 F. Supp.2d 1179, 1188 (D. Haw. 2003); Keates v. City of Vancouver, 73 Wash. App. 257, 265 (1994).

It is worth noting that the trial court also stated in its order granting City of Algona's motion for summary judgment as follows:

The Court granted Defendants' motion to exclude the testimony and reports of D.P. Van Blaricom, had the court ruled otherwise, it would not have changed the court's ruling [on summary judgment].

CP 1374.

Even if this Court finds that the trial court erred in excluding Mr. Van Blaricom's opinions, those opinions are nonetheless insufficient to demonstrate the existence of any material facts for trial. Mr. Van Blaricom's opinions are simply insufficient to overcome the strong presumption in favor of a City's broad discretion in regard to the governance of the internal affairs of its police department. Such opinions also do not demonstrate that Mr. Jewell acted outside the scope of his authority in ordering the administrative reassignment and investigation. For example, while Mr. Van Blaricom asserts that it would have been "appropriate" for Chief Jewell to conclude that Ms. Carter's complaint was based on a misunderstanding, he does not assert that Chief Jewell acted outside the scope of the authority conferred on him as Chief of Police by instead ordering the paid administrative reassignment.

## **MOTION TO DISMISS**

City of Algona moves to dismiss this appeal pursuant to RAP

18.9(c). That rule provides, in relevant part:

The appellate court will, on motion of a party, dismiss review of a case... if the application for review is frivolous...

A motion to dismiss pursuant to RAP 18.9(c) may be included in the respondents' brief on the merits. RAP 17.4(d).

An appeal is frivolous pursuant to RAP 18.9(c) "if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Green River Community College Dist. No. 10 v. Higher Education Personnel Board, 107 Wn.2d 427, 443, 730 P.2d 653 (1986).

As discussed in this brief, the present appeal is totally devoid of merit. First, the Officers raise claims and assert facts not conceivably relevant to the claims properly before this Court. Second, the Claims properly before this Court, for negligent hire/supervision and breach of employment agreement, have no reasonable basis in fact or law.

City of Algona respectfully requests that this Court find that the present appeal is frivolous and dismiss the appeal on that basis.

## **REQUEST FOR ATTORNEY FEES**

The City of Algona requests an award of reasonable attorney fees and expenses incurred in defendant against the present appeal, pursuant to RAP 18.1, RAP 18.9(a) and RCW 4.84.185.

RAP 18.1 provides that a party entitled to an award of attorney fees and expenses must request the fees or expenses in a section of its opening brief. The City of Algona seeks an award of fees pursuant to RAP 18.9(a) and RCW 4.84.185. RAP 18.9(a) provides, in relevant part:

The appellate court on its own initiative or on motion of a party may order a party or counsel...who...files a frivolous appeal...to pay terms or compensatory damages to any other party who has been harmed...

RCW 4.84.185 provides, in relevant part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action...was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such an action...

The purpose of these rules is to “discourage frivolous lawsuits and to compensate the targets of frivolous lawsuits for their fees and costs incurred in defending against meritless cases.” Timson v. Pierce County Fire Dis. No. 15, 136 Wn. App. 376, 386, 149 P.3d 427 (2006).

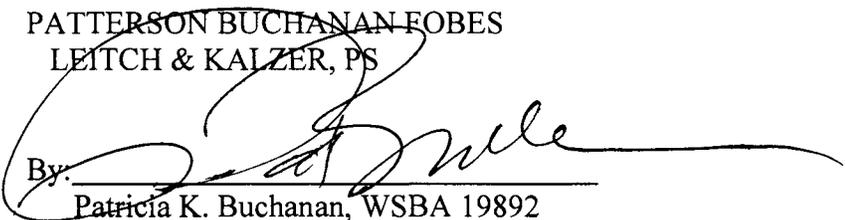
Respondents respectfully request an award of attorney fees pursuant to the above rules.

**CONCLUSION**

Defendants/Respondents respectfully request that the Court affirm the trial court's orders granting summary judgment dismissal of each of plaintiff's claims, and striking/excluding the testimony and report of D.P. Van Blaricom.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of November, 2009.

PATTERSON BUCHANAN FOBES  
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