No. 309029-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Appellant.

BRIEF OF APPELLANT DEFENDANT CITY OF YAKIMA

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I. INTRODUCTION

This case involves reports and resulting internal investigations pursuant to established policies and procedures by the City of Yakima Police Department (hereafter "the YPD") of four separate reports of misconduct against one of its employees, Officer Michael Henne (hereafter "Plaintiff"), in connection with his official duties. Plaintiff asserts harassment and retaliation claims against the City arising out of these reports and resulting internal investigations.

Washington's anti-strategic lawsuits against public participation (hereafter "anti-SLAPP") statute, RCW 4.24.525, protects governmental entities, such as the City (a "legal entity"), from claims based upon actions involving "public participation and petition." RCW 4.24.525(f). That broad term is defined to include, for the purposes of this appeal, statements made (1) in an "executive . . . or other governmental proceeding authorized by law," (2) "in connection with an issue under consideration or review by a[n] . . . executive . . . or other governmental proceeding authorized by law" or, broadly, (3) to "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with

an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(a),(b),(e).

The City brought a Special Motion to Strike pursuant to the anti-SLAPP statute, seeking to strike Plaintiff's claims on the ground that the reporting and investigation activities were protected and non-actionable. Plaintiff submitted no factual opposition to the motion or legal argument that his claims had any actionable basis. The trial court denied the motion, reasoning that the statute only protects the "little guy" (*i.e.*, Plaintiff) from the "moneyed interests" (*i.e.*, the City). The City appeals.

The trial court's ruling should be reversed. The trial court erred in deciding that the provisions of the anti-SLAPP statute limit its protections to individual citizen complaints against or with governmental entities in the course of opposing "moneyed interests." The trial court's decision is based on an unreasonably and unjustifiably narrow interpretation of RCW 4.24.525 that contradicts the plain language of the statute and case law construing the statute. Furthermore, the trial court's decision is contrary to California case law applying a substantively identical anti-SLAPP statute to lawsuits

based upon the reporting and investigation of police misconduct. Washington's statute "mirrors" the California statute and California decisions are applied by analogy to interpret Washington's anti-SLAPP statute. See Aronson v. Dog Eat Dog Films, 738 F.Supp.2d 1104, 1110 (W.D. Wa. 2010).

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order of May 18, 2012, denying the City's Motion to Strike brought under RCW 4.24.525.

Issues Pertaining to Assignments of Error

1. Does RCW 4.24.525 apply to municipal corporations where the municipal corporation is being sued by an employed police officer for internal investigations into reports of the police officer's misconduct? (Assignment of Error 1).

2. Do the procedural protections of RCW 4.24.525 apply to reports of misconduct by a public employee and the resulting internal investigations? (Assignment of Error 1).

3. Does a municipal corporation constitute a "person" as defined by RCW 4.24.52(1)(e) in light of the decision of the Washington Supreme Court in Segaline v. State, 169 Wn.2d 467, 238 P.3d 1107 (2010), which construed the undefined term "person" as contained in RCW 4.24.510, an immunity statute? (Assignment of Error 1).

4. Do internal reports of police officer misconduct and the resulting internal investigations constitute conduct "in a[n]

executive . . . proceeding or other governmental proceeding authorized by law" within the meaning of RCW 4.24.525(2)(a) where such reporting is protected and required under local government whistleblower provisions enacted under RCW 42.41, as well as under local police department policies and procedures? (Assignment of Error 1).

5. Do internal reports of police officer misconduct and the resulting internal investigations constitute conduct "in connection with an issue under consideration or review in a[n] executive . . . proceeding or other governmental proceeding authorized by law" within the meaning of RCW 4.24.525(2)(b) where such reporting is protected and required under local government whistleblower provisions enacted under RCW 42.41, as well as under local police department policies and procedures? (Assignment of Error 1).

6. Do internal reports of police officer misconduct and the resulting internal investigations constitute "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition" within the meaning of RCW 4.24.525(2)(e)? (Assignment of Error 1).

7. Is a Special Motion to Strike brought pursuant to RCW 4.24.525 rendered moot by the attempted removal of the claims that are the subject of the motion by amendment? (Assignment of Error 1).

8. Are the protections of RCW 4.24.525 limited to private citizens? (Assignment of Error 1).

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III. STATEMENT OF THE CASE

1. Substantive Facts

The City of Yakima (hereafter the "City") is a Washington municipal corporation. (CP 80). The City Charter provides in Article I, Section 2: "All powers of the city, whether express or implied, shall be exercised in the manner prescribed by this charter, or if not prescribed herein, then in the manner provided by law, ordinance or resolution" of the City. (CP 81).

The City requires the reporting and investigation of allegations of misconduct against City employees. (CP 53-54). The City whistleblower policy states: "It is the policy of the City of Yakima (1) to require reporting by its employees of improper governmental action taken by City of Yakima officers or employees . . . ." (CP 53). The whistleblower policy defines improper governmental action as conduct that "(i) is in violation of any federal, state, or local law or rule, (ii) is an abuse of authority, [or] (iii) is of substantial and specific danger to the public health and safety . . . Such actions include but are not limited to . . . failure to report hazardous conditions or practices . . . ." (CP 53).

The City's General Rules and Regulations of the Yakima Civil Service Commission for Police and Fire (as amended 1989) (hereafter the "Rules")[1] provide investigation and disciplinary procedures applicable to police officers. (CP 46-52). The Rules provide that police officers may be removed or discharged for insubordination, incompetency, inattention, discourteous treatment of the public or fellow employees, dishonest conduct, and dereliction of duty, among others, or "any other act or failure to act . . . sufficient to show the offender to be an unsuitable or unfit person to be employed in the public service." (CP 49-50). The Rules contain detailed hearing procedures. (CP 51-52). Investigation procedures are also addressed by Article II of the various collective bargaining agreements between the City and the Yakima Police Patrolman's Association. (CP 58-79).

The YPD is an administrative department of the City administered under the direction of the Chief of Police. (CP 35). The YPD's Policy and Procedures Manual (hereafter the "YPD Policy Manual") provides that the YPD has an "affirmative responsibility to

[1] The Civil Service Commission is authorized to adopt civil service rules and regulations for the YPD. (CP 37).

investigate and respond to complaints regarding the actions of its members or the delivery of service." (CP 107). Section 8.00.00 requires the investigation of all claims of misconduct:

> Many mistaken or even deliberately false accusations are made against police employees. In some instances, the most conscientious and diligent employee becomes the subject of such reports. Unfortunately, there are occasions when misconduct does actually occur. In order to protect the integrity of the employee and the Department, the Yakima Police Department policy is to investigate all reports and accusation by establishing a system of internal investigations and procedures that will preserve both the obligation to the public and the rights of its employees.

(CP 107, 118) (emphasis added).

Section 7.07.00 of the YPD Policy Manual requires the immediate reporting of misconduct: "Misconduct by one employee reflects poorly on all. For this reason, officers will immediately report any violation of department orders, neglect of duty, or illegal conduct by any member of the department to their supervisors or superior officers." (CP 106) (emphasis added). YPD supervisors are required to report and document misconduct and failure to do so can result in discipline. (CP 117).

Under the YPD Policy Manual, officers are required to cooperate fully with internal investigations and provide complete and truthful information. (CP 109, 113-114). As with the City's policies and Rules, the YPD Policy Manual establishes guidelines for investigating disciplinary allegations and preserving employee rights. (CP 108-09, 119-120).

Plaintiff is a police officer with the YPD. (CP 3). Between January, 2008 and February, 2011, the YPD received four reports of potential misconduct by Plaintiff within the scope of his employment as an YPD officer. (CP 83-102). Pursuant to the City's Rules, YPD Policy Manual, and policies, the YPD internally investigated all four reports. (CP 85-102). All four internal investigations directly involved "public participation and petition" as defined in RCW 4.24.525(2)(a),(b),(e). The four reports and investigations were based on the following:

1. On January 4, 2008, Plaintiff interjected himself into a conversation between Union Gap Police Department Officer Sergeant ("Sgt.") Cobb and a fellow YPD Officer, Sgt. Seely, regarding the YPD's policy of allowing officers to take patrol

vehicles home. (CP 85-87). Plaintiff overheard the conversation, became enraged, and began yelling at Sgt. Cobb without provocation. (CP 85-87). This incident was witnessed by at least three police officers other than Sgt. Seely. (CP 85-86). The report of misconduct was received by Lieutenant ("Lt.") Nolan Wentz, who relayed it to his supervisor, Captain ("Capt.") Jeff Schneider, on January 6, 2008. (CP 85-87). Capt. Schneider assigned Lt. Steve Finch to internally investigate. (CP 87). A "Personnel Complaint" was prepared for "rude conduct/demeanor." (CP 87).

2. On December 8, 2007, Plaintiff responded to a call with Officer Jack Curtsinger. Plaintiff tased and arrested a suspect and reported that he used his taser because the subject assaulted him. (CP 88-89). Plaintiff completed a report and requested assault charges. (CP 88). Officer Curtsinger witnessed the incident and advised his supervisor, Sgt. Boyle, in early March 2008 that he was concerned Plaintiff's report did not accurately reflect what had occurred. (CP 88). Sgt. Boyle reported the incident to Lt. Mike Merryman on March 13, 2008, who initiated an internal investigation and assigned Lieutenant Finch to initiate an internal

investigation. (CP 88-89). A "Personnel Complaint" was prepared for "dishonesty." (CP 89).

3. On January 10, 2011, Plaintiff assisted several YPD officers responding to an assault call. (CP 90-96). During the search for the armed suspect, Plaintiff became aware of the suspect's location but failed to warn the other YPD officers, exposing them to risk of harm. (CP 90-96). Lt. Finch received the report from Sgt. Mike Costello and assigned Lt. Belles to investigate. (CP 92-93, 90-91). A "Personnel Complaint" was prepared for "rule violation/failure to broadcast emergency information." (CP 90).

4. Finally, in February, 2011, Plaintiff was involved in a traffic stop with several other YPD officers. (CP 97-102). Plaintiff conducted a search of the stopped vehicle without a warrant or consent and without advising the driver of his rights regarding the search of the vehicle. (CP 97-100). The incident was witnessed by other YPD officers. (CP 101). The reported misconduct was relayed to Lt. Finch for review and then to his supervisor, Capt. Schneider, on February 16, 2011. (CP 97). Capt. Schneider recommended the matter be assigned to Lt. Belles for investigation. (CP 97, 102). A

"Personnel Complaint" was prepared for "possible illegal search." (CP 101).

2. Procedural Facts

On November 4, 2011, Plaintiff filed a lawsuit against the City. (CP 3-14). The Complaint contains numerous allegations. For the purposes of the City's special motion to strike, and this appeal, the relevant claims and facts only relate to the four reports and resulting internal investigations of misconduct initiated between January, 2008 and February, 2011.

In his Complaint, Plaintiff alleges three causes of action based upon the internal investigation reports: (1) that he was unlawfully retaliated against by the City acting through its employees and agents; (2) that the City, "by and through its agents harassed and retaliated against Plaintiff by subjecting him to numerous unwarranted internal investigations;" and (3) that the City, through its employees, failed to investigate and discipline Lt. Wentz, Officer Curtsinger, Capt. Schneider, Sgt. Seely, and Lt. Finch for their unprofessional behavior. (CP 6 ¶¶ 3.9, 3.12; 7 ¶ 3.16; 9 ¶¶ 3.24-.25; 10 ¶¶ 3.27-.29, 3.31; 11-12 ¶¶ 4.2(d), 4.5, 4.6).

On December 30, 2011, the City filed a special motion to strike Plaintiff's claims relating to and derived from the four reports and resulting internal investigations pursuant to Washington's anti-SLAPP statute, RCW 4.24.525, on the ground that the reports and resulting internal investigations involved "public participation and petition," which the statute expressly protects. (CP 15-32). The City pointed out that Plaintiff specified no actionable legal basis for the alleged harassment and retaliation claims, and the City submitted legal authority showing the absence of a legal basis for the allegations. (CP 15-32).

Plaintiff merely attempted to avoid the motion by amending his Complaint to remove the allegations and by claiming he had never asserted claims of harassment and retaliation "by initiating and/or conducting internal investigations." (CP 126-131, 141-150). Plaintiff submitted no evidentiary materials opposing the motion or legal authority in support of his theories. (CP 126-131).

The City submitted a reply, pointing out that Plaintiff's harassment and retaliation claims via reports and internal investigations had clearly been alleged but were removed from the

proposed amended complaint, and that Plaintiff could not avoid the motion to strike through the artifice of amendment or dismissal. (CP 171-181).

The City's Special Motion to Strike was heard on March 9, 2012. (CP 363-381). The trial court denied the motion, manifestly basing its decision upon an unjustifiably narrow reading of the statute and upon a flawed understanding of the legislative intent. Contrary to the actual text of the statute and well-established rules of statutory construction, the trial court took the limited view that the anti-SLAPP statute only protects the petition and free-speech rights of individual citizens (*i.e.*, the "little guy"):

> I would like to start with kind of reviewing my understanding of how this process developed . . . . My recollection of how this whole process started was there were times when moneyed interests, like developers, were trying to get whatever the governmental agencies were that allowed the developments to grant them permits and so on. Citizens or groups of citizens would come forward and oppose those developers' plans.
>
> Then some cleaver [sic] lawyers for, again, some moneyed interest developed this process of suing the people who had petitioned the governmental bodies in opposition to what moneyed interests want . . . [so] the efforts of other people were chilled because they were afraid to come forward and oppose in their various

> governmental entities the proposals being made because they didn't want to get sued.
> So because of that, states adopted what are called anti SLAPP statutes which were designed to help protect the people who were petitioning the government and to discourage the moneyed interests from using their power to chill the petitioning process.
> . . . .
> So, again, my understanding is that this statute and other statutes like it were designed to prevent the chilling effect that SLAPP lawsuits have on people who are wishing to petition their governmental entities for redress.
> . . . .
> So the trouble I have with this is—again, my understanding being the way this developed was it was the little people who were being squashed by the people with money using the SLAPP lawsuits. So the anti SLAPP statutes were designed to protect the little people from the big powerful people.
> . . . .
> So the problem I have here is what you have filed, the way you're using the statute looks to me exactly like a SLAPP lawsuit. It's the moneyed interest trying to squash somebody who's seeking redress from the government.

(CP 364-365, 369-371) (emphasis added).

In essence, the trial court felt that large entities cannot avail themselves of the anti-SLAPP statute's protections and that the City's Special Motion to Strike was itself the type of action from which the statute was designed to provide protection. The trial court entered an order denying the motion on May 18, 2012, (CP 358-

362), and the City timely appealed. (CP 357). The trial court's ruling is unsupported by the text of the statute itself, canons of statutory construction, other case law, and should be reversed.

IV. ARGUMENT

A. STANDARD OF REVIEW

The issues before this Court are purely legal and thus are reviewed *de novo*. In re Elec. Lightwave, Inc., 123 Wn.2d 530, 536, 869 P.2d 1045 (1994). Statutory construction is reviewed *de novo*. State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). A trial court's ruling on a special motion to strike brought under an anti-SLAPP statute is subject to *de novo* review. Flatley v. Mauro, 39 Cal.4th 299, 325, 139 P.3d 2 (2006) (applying *de novo* review to a motion brought under substantively identical anti-SLAPP statute).

B. SUMMARY OF RCW 4.24.525, THE NEW ANTI-SLAPP PROCEDURAL STATUTE

The Legislature enacted RCW 4.24.525 in 2010. The statute allows a "person" (*i.e.*, "any . . . legal . . . entity") to file a special motion to strike any claims based on acts involving "public participation and petition." RCW 4.24.525(4)(a).

> A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party makes this burden, the court shall deny the motion.

RCW 4.24.525(4)(b) (emphasis added).

The anti-SLAPP statute applies to any claim "based on" action involving "public participation and petition." RCW 4.24.525(2). The statute defines the following "statements" made or "documents" submitted as constituting "action involving public participation and petition":

> (a) Any oral statement made, or written statement or other document submitted, in a[n] . . . executive . . . or other governmental proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a[n] . . . executive . . . or other governmental proceeding authorized by law;
>
> . . . .
>
> (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2)(a),(b),(e) (emphasis added).

"In making a determination . . . the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c). "A plaintiff cannot use an 11th hour amendment to plead around a motion to strike under the anti-SLAPP statute . . . . '[T]he anti-SLAPP statute makes no provision for amending the complaint once the court finds the requisite connection . . . .'" Navellier v. Sletten, 106 Cal.App.4th 763, 772, 131 Cal. Rptr.2d 201 (2003). A plaintiff cannot avoid an anti-SLAPP motion by voluntary dismissing his claims. Moore v. Liu, 69 Cal.App.4th 745, 751, 81 Cal.Rptr.2d 807 (1999).

Once it is demonstrated a claim "is based on an action involving public participation and petition," the burden shifts to the non-moving party to establish by "clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b); American Traffic Solutions Inc. v. City of Bellingham, 163 Wn. App. 427, 434, 260 P.3d 245 (2011). This means the non-moving party must produce evidence and legal authority in support of its

claims. See Santa Barbara County Coalition against Automobile Subsidies v. Santa Barbara County Association of Government, 167 Cal.App.4th 1229, 1238, 84 Cal. Rptr.3d 714 (2008) (once a defendant shows that the claim is based on an action involving public participation and petition "[t]he plaintiff must establish the unlawfulness of the activity as part of its burden of showing a probability of prevailing on its claim.").

California has enacted a substantially similar anti-SLAPP statute.[2] The 2010 Washington anti-SLAPP statute "mirrors the

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[2] The California statute provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

In language very similar to that found it RCW 4.24.525, it protects the following:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

California anti-SLAPP Act" and California decisions are applied by analogy in interpreting the 2010 act. Aronson, 738 F.Supp.2d at 1110. The anti-SLAPP statute "shall be applied and construed liberally." Chapter 118, §3, Laws of 2010. Providing more protection than the California statute, Washington's version requires a party resisting a special motion to strike to establish a "probability" of prevailing "by clear and convincing evidence." RCW 4.24.525(4)(b). Compare Cal.Code §425.16(b)(1) ("probability . . . will prevail on a claim.").

A defendant "who prevails, in part or in whole" "shall" be awarded costs and reasonable attorney's fees in connection with the motion and a mandatory penalty of $10,000 against the plaintiff. RCW 4.24.525(6)(a).

RCW 4.24.525(1)(e) defines the "person" entitled to bring a new anti-SLAPP statute motion as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity." RCW 4.24.525(1)(e). This broad definition clearly encompasses the

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Cal. Civ. Proc. Code § 425.16(e).

City of Yakima which is a municipal corporation, a recognized "legal entity." (CP 80).[3] The anti-SLAPP statute

> does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects

Vargas v. City of Salinas, 46 Cal.4th 1, 18, 92 Cal.Rtpr.3d 286 (2009).

C. THE TRIAL COURT'S DECISION CONTRADICTS THE PLAIN LANGUAGE OF THE ANTI-SLAPP STATUTE AND IS CONTRARY TO CASE LAW APPLYING THE STATUTE TO LARGE ENTITIES

The trial court took an overly narrow, restrictive interpretation of the statute as not being applicable to the

[3] Plaintiff will argue that RCW 4.24.525 does not apply to municipalities, citing Segaline v. State of Washington, 169 Wn.2d 467, 472-475, 238 P.3d 1107 (2010), which held that the undefined term "person" under an immunity statute, RCW 4.24.510, does not include government agencies. Segaline is inapposite. Segaline construed an entirely different statute, RCW 4.24.510, which is a statute that creates immunity. RCW 4.24.525, on the other hand, is a procedural device to quickly curtail any litigation targeted at entities lawfully communicating on matters of public or governmental concern. It is broader in scope than RCW 4.24.510 and provides an expansive definition of "person" (unlike RCW 4.24.510) that includes "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity . . . ." RCW 4.24.525(1)(e) (emphasis added). This clearly encompasses municipal corporations such as the City. Consequently, the protections of RCW 4.24.525 are available to the City.

circumstances presented that is not supported by a plain reading of the statute or by other case law.

RCW 4.24.525 is not limited to petitions brought by the "little guy" against "moneyed interests," as the trial court concluded. (CP 364-365, 369-371). "The Washington legislature has observed that strategic lawsuits against public participation (or SLAPP suits) are 'filed against individuals or organizations on a substantive issue of some public interest or social significance' . . . ." Aronson, 738 F. Supp.2d at 1109 (citing Laws of 2002, Ch. 232, § 1) (emphasis added). In its genesis, the statutory scheme was narrower: "As first enacted, the Washington Anti–SLAPP law provided that a person who communicates a complaint or information to any branch or agency of federal, state, or local government is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." Id. (citing RCW 4.24.510).

However, "[t]he 2010 amendments to the Washington Anti–SLAPP Act vastly expand[ed] the type of conduct protected by the Act. These amendments, patterned after California's Anti–SLAPP

Act, became effective on June 10, 2010." Id. (emphasis added). The newer, broader statute provides that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation . . . ." RCW 4.24.525(4)(a). The anti-SLAPP statute applies "to any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). This includes statements made or documents submitted in an "executive . . . or other governmental proceedings authorized by law" or "in connection with an issue under consideration or review by such entities," or "any lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." RCW 4.24.525(2)(a),(b),(e).

"The focus is on whether the plaintiff's cause of action itself is based on an act" as defined in the statute. Aronson, 738 F. Supp.2d at 1110.[4] "In other words, the act underlying the plaintiff's cause, or the act which forms the basis for the plaintiff's cause of action, must itself have been an act" as defined in the statute. Id.

[4] Here, Plaintiff is suing the City for internal reporting and investigation of alleged misconduct by one of its officers—Plaintiff himself.

"Thus, the Act now provides protection for conduct in the furtherance of the exercise of free speech in connection with an issue of public concern." Id. at 1109. The Washington Legislature has directed that the anti-SLAPP statute "is to be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Id. at 1110 (emphasis added). The statute does not limit its protections to private citizens.

That the trial court characterized the City as a large, powerful governmental entity (*i.e.*, a "moneyed interest") and Plaintiff as a private party (*i.e.*, a "little guy") "is of no import under the modern framework of the [anti-SLAPP] statute." Aronson, 738 F. Supp.2d at 1111.

> [N]othing in the Anti–SLAPP Act prohibits a powerful corporate defendant from employing the anti–SLAPP statute against individuals of lesser strength and means . . . .
>
> That Defendant may be considered a powerful business entity as compared with the private party Plaintiff is of no import under the modern framework of the statute.

Id. (emphasis added) (protections of Washington's anti-SLAPP statute apply to a large media corporation moving to strike a private plaintiff's copyright infringement claims; the relevant inquiry is the nature of the acts underlying the plaintiff's claims, not the relative status of the parties).

The provisions of the anti-SLAPP statute, then, manifestly do not limit its protections to citizen complaints against or with governmental entities in the course of opposing "moneyed interests," and Aronson makes it clear that corporate defendants such as the City are entitled to its protections. Accord, Vargas, 46 Cal.4th at 17 (city entitled to protections of anti-SLAPP statute); Bradbury v. Superior Court, 49 Cal.App.4th 1108, 1112-1113, 57 Cal.Rptr.2d 207 (1996) (anti-SLAPP statute applies to municipality held vicariously liable for the actions of its employees during official investigation).

The sole relevant inquiry is whether the plaintiff's claims are based upon public participation and petition as defined in the statute. As discussed below, that is clearly the case here. The moneyed

interest/little guy dichotomy upon which the trial court based its denial of the Special Motion to Strike is unsupportable.

D. THE REPORTS OF PLAINTIFF'S MISCONDUCT AND RESULTING INTERNAL INVESTIGATIONS FALL UNDER THE PROTECTIONS OF THE ANTI-SLAPP STATUTE

It is beyond dispute that the reports and resulting four internal investigations involve "public participation and petition." Washington law and clear legal precedent from California courts (whose anti-SLAPP statute is virtually identical to Washington's and to which Washington courts have looked for guidance in construing RCW 4.24.525, Aronson, 738 F.Supp.2d at 1110) demonstrate that the reports and resulting four internal investigations at issue are protected activity under the anti-SLAPP statute.

1. The Reports and Resulting Internal Investigations Arise Out of Protected Activity Because They Were Made "In" or "In Connection With an Issue Under Consideration or Review By . . . [an] . . . "Executive . . . or Other Governmental Proceeding Authorized By Law"

The reports and resulting four internal investigations initiated with respect to Plaintiff constitute speech made "in" or "in connection with an issue under consideration or review by a[n] . . .

executive . . . or other governmental proceeding authorized by law" and are protected activity under RCW 4.24.525(a)-(b). See Castello v. City of Seattle, WL 4857022 (W.D. Wash. Nov. 22, 2010) reconsideration denied, 2011 WL 219671 (W.D. Wash. Jan. 24, 2011) (coworker allegations of misconduct within the Seattle Fire Department and resulting internal investigations protected by RCW 4.24.525).[5]

The California anti-SLAPP statute applies to local government entities in the context of the government entity being held responsible for the statements of its employees acting within the scope of their employment during official investigations. "The anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers." Bradbury, 49 Cal.App.4th at 1117 (emphasis added). The statute "extends to public employees who issue reports and comment on issues of public interest relating to their official duties. Where, as here, a government entity and its representatives are sued as a result of written and

[5] Castello is cited to this Court pursuant to GR 14.1(b) and FRAP 32(a)(i-ii).

verbal comments, both may move to dismiss under [the SLAPP statute]." Id. at 1115.

Other cases have held that statements made by law enforcement as part of an investigation are within the scope of the anti-SLAPP statute. In Schaffer v. City & County of San Francisco, 168 Cal.App.4th 992, 85 Cal. Rptr.3d 880 (2008), a district attorney filed misdemeanor assault charges against the plaintiff based on a complaint that incorporated a sworn affidavit by a police officer. The officer "signed two affidavits asserting Schaffer [the plaintiff] committed crimes." Id. at 999. The affidavits formed the basis of the assault charges filed against the plaintiff. Id. at 996. The plaintiff sued the police officer and the City of San Francisco for negligence, outrage, and malicious prosecution, arguing the officer's "declarations supporting criminal charges against Schaffer . . . [were] not protected by the anti-SLAPP statute." Id. at 997.

The court held that the affidavits an officer wrote in support of prosecution were protected by the anti-SLAPP statute because they were "written statements made in connection with an issue under consideration or review by a legislative, executive, or judicial

body, or any other official proceeding authorized by law." Id. at 998. The court cited approvingly Salma v. Capon 161 Cal.App.4th 1275, 1286, 74 Cal.Rptr.3d 873 (2008) (communications with district attorney and police and attempts to press charges protected by section 425.16). Id. at 999. The court concluded "by demonstrating . . . [the officer's] alleged statements were in connection with an issue under consideration by the district attorney, respondents made a prima facie showing that the acts underlying Schaffer's causes of action are within the ambit of the anti-SLAPP statute." Id. at 1004.

In a similar vein, in Bradbury, cited *supra*, the Los Angeles Sheriff was accused of violating a defendant's civil rights when he forcibly entered a residence with a warrant. The district attorney conducted an investigation and filed a report exonerating the sheriff from criminal liability, but suggesting the sheriff's actions were motivated by a desire to forfeit the property to the government. Bradbury, 49 Cal.App.4th at 1112. The sheriff then sued for defamation. Id. The court dismissed the claim under the anti-SLAPP statute, finding that the district attorney's "findings and opinions were an inseparable part of the investigation even though no

criminal charges were then filed." Id. at 1116. The court explained, "The same First Amendment principle applies here because the investigation, the report, and the utterances made thereafter involved a matter of public interest." Id.

Moreover, Bradbury "confirmed that communications *among* law enforcement personnel are protected as well." Schaffer, 168 Cal.App.4th at 1003 (emphasis in original). The Bradbury court concluded that "[p]rivate conversations concerning the report were also protected under the anti-SLAPP statute." Bradbury, 49 Cal.App.4th at 1117.

Furthermore, internal reports and investigations are also protected by the anti-SLAPP statute. Reports of potential misconduct and potential criminal conduct (even if claimed to be false and malicious) which result in a formal internal investigation are "made in connection with an issue under consideration by an authorized official proceeding" within the meaning of the anti-SLAPP statute. Hansen v. California Department of Corrections and Rehabilitation, 171 Cal.App.4th 1537, 1544-45, 90 Cal. Rptr.3d 381 (2008) (coworker allegations of misconduct and criminal activity against

corrections officer resulting in formal internal investigation; California SLAPP statute protected statements made "in connection with an issue under consideration or review by [an] . . . executive . . . body, or any other official proceeding authorized by law.").[6]

As the Hansen court articulated, "communications preparatory to or in anticipation of the bringing of an official proceeding are within the protection" of the anti-SLAPP statute. Id. at 1544. "[T]he internal investigation itself [is] an official proceeding authorized by law." Id. See also Miller v. City of Los Angeles, 169 Cal.App.4th 1373, 1383, 87 Cal.Rptr.3d 510 (2008) (defamation and intentional infliction of emotional distress claims based upon city's investigation into employee's misconduct and determination covered by anti-SLAPP statute.).

The reports and resulting four internal investigations of Plaintiff fall under the protection of RCW 4.24.525(a). Plaintiff's allegations involving the reports/investigations arise from the YPD's investigation into his conduct in connection with his public

[6] The "made in connection with an issue under consideration or review by [an] . . . executive . . . body, or any other official proceeding authorized by law" language of the California anti-SLAPP statute is substantively identical to the "made... in connection with an issue under consideration or review by [an] . . . executive . . . or other governmental proceeding authorized by law" under RCW 4.24.525(2)(b).

employment and following reports from YPD officers that he had engaged in misconduct. Id. Per Hansen and Miller, the reports and resulting four internal investigations are official proceedings authorized by law.

Plaintiff's allegation that the internal investigations were unwarranted and based upon false reports is irrelevant to the coverage of the anti-SLAPP statute. "[C]onduct that would otherwise be protected by the anti-SLAPP statute does not lose its coverage simply because it is alleged to have been unlawful . . . If that were the test, the anti-SLAPP statute would be meaningless." Hansen, 171 Cal.App.4th at 1545 (emphasis in original).

2. The Reports and Resulting Internal Investigations Were "Conduct in Furtherance of the Exercise of the Constitutional Right of Free Speech in Connection with An Issue of Public Concern"

Plaintiff's allegations arising from the reports and resulting internal investigations involve free speech in connection with an issue of public concern and therefore fall under RCW 4.24.525(2)(e). Castello, 2010 WL 4857022 *5. Under the anti-SLAPP statute, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's

right of petition or free speech." City of Cotati v. Cashman, 29 Cal. 4th 69, 78, 52 P.3d 695 (2002) (emphasis in original). "In other words, the act underlying the plaintiff's cause, or the act which forms the basis for the plaintiff's cause of action, must itself have been an act in furtherance of the right of free speech." Aronson, 738 F.Supp.2d at 1110-1111.

Reporting misconduct in government institutions is a matter of public concern. White v. State, 131 Wn.2d 1, 11, 929 P.2d 396 (1997) (state nursing home employee's report of patient abuse to medical director of the facility "involves an issue of public concern," even if eventually found to be without merit.).

> As a matter of law, 'the competency of the police force is surely a matter of great public concern'. . . . Only speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'

Robinson v. York, 566 F.3d 817, 822 (9th Cir. 2009) (police officer's statements or filed reports about department corruption, discrimination and misconduct by other officers, including excessive force involved "matters of public concern").

Likewise, "[r]eports pertaining to others, even if they concern personnel matters including discriminatory conduct, can still be 'protected under the public concern test.'" Thomas v. City of Beaverton, 379 F.3d 802, 808 (9th Cir. 2004) (explaining that an employee's speech can be protected even though it "concerned a personnel matter" because "it did not pertain to her own job status").

The reports of suspected misconduct (including possible criminal activity) on the part of Plaintiff made by Plaintiff's fellow YPD officers and the related internal investigations are protected as involving free speech regarding matters of "public concern." The trial court should have stricken the claims arising from those reports and resulting investigations as protected activity.

E. PLAINTIFF'S CLAIMS BASED ON THE REPORTS AND RESULTING FOUR INTERNAL INVESTIGATIONS HAVE NO TENABLE FACTUAL OR LEGAL BASIS

Because the City established the threshold that the reports and resulting internal investigations constituted actions "involving public participation and petition" as defined under RCW 4.24.525(2), Plaintiff had the burden of showing a probability of prevailing on his claims by "clear and convincing evidence." As discussed *infra*,

Plaintiff provided no evidence or authority in support of his legal theories for the four claims, and he therefore failed to establish a "probability of prevailing" by "clear and convincing evidence." The City did provide authority showing the absence of any legal basis for Plaintiff's claims. (CP 15-32, 180). The trial court also questioned whether there was any viable legal basis for Plaintiff's claims. (CP 346-350).

1. Plaintiff Has No Claims for Harassment, Hostile Work Environment, or Retaliation Related to the Reports and Resulting Internal Investigations and Provided No Evidence or Authority Showing A Probability of Prevailing

There is no general common law right to be free from actions which the employee regards as intimidating, harassing, threatening, accusatory, unfair, punitive or arbitrary. Edgar v. State, 92 Wn.2d 217, 226-227, 595 P.2d 534 (1979); Castello, 2010 WL 4857022 *4 ("[T]here is no general civil harassment claim in Washington law."). "'Embarrassment, humiliation or mental anguish arising from non-discriminatory harassment'" is not actionable. Crownover v. State, 165 Wn. App. 131, 146-47, 265 P.3d 971 (2011) ("crude" comments

and "objectionable treatment" not actionable when not because of protected status such as sex). In Washington

> [t]o establish that offensive conduct constituted [illegal] discrimination, [a plaintiff] must show that the conduct was (a) directed at [a protected class] and (b) motivated by animus toward the [protected class] . . . . That Title VII is not a "general civility code" applies with equal force to the discrimination element of a hostile environment. It is not sufficient to show that the employee suffered embarrassment, humiliation or mental anguish arising from non-discriminatory harassment.

Adams v. Abel, 114 Wn. App. 291, 297-298, 57 P.3d 280 (2002). See also Payne v. Children's Home Society, 77 Wn. App. 507, 514-515, 892 P.2d 1102 (1995) (abusive, demeaning and degrading outbursts unactionable when no showing that they were due to sex.).

Plaintiff failed to allege or otherwise identify any state or federal authority which might form the basis for a harassment, hostile work environment, or retaliation claim based on the reports and investigations. Accordingly, he failed to establish any factual or legal basis for probably prevailing on any such claim by "clear and convincing evidence."

2. Plaintiff Has No Claim for Wrongful Retaliation or Discipline in Violation of Public Policy Related to the Reports and Resulting Internal Investigations and Provided No Evidence or Authority Showing A Probability of Prevailing

Plaintiff has no common law claim for wrongful retaliation or disciplinary action in violation of any public policy because he was not discharged and public policy requires an actual discharge. White v. State, 131 Wn.2d at 19-20; Korslund v. DynCorp, 121 Wn. App. 295, 316-317, 88 P.3d 295 (2004), affirmed, 156 Wn.2d 168 (2005). Similarly, *a fortiori*, Plaintiff has no common law cause of action based upon public policy for any failure to take disciplinary action against others involved in the reports and resulting investigations. He failed to provide any evidence or authority in support of that claim at the trial court level and thus failed to establish a probability of prevailing on any such claim by "clear and convincing evidence."

3. Plaintiff Has No Claim for Negligent Investigation or Failure to Discipline in Connection With the Reports and Resulting Internal Investigations and Provided No Evidence or Authority Showing A Probability of Prevailing

Plaintiff also has no common law action for improper investigation of his (or others) activities based on the internal

investigations. To establish a prima facie case of negligence, a party must "show a duty, breach, proximate causation and resulting injury." Gurno v. Town of LaConner, 65 Wn. App. 218, 228-29, 828 P.2d 49 (1992). "In all negligence actions the plaintiff must prove the defendant owed the plaintiff a duty of care." Rodriguez v. Perez, 99 Wn. App. 439, 443, 994 P.2d 874 (2000). It is well settled that "[a] claim for negligent investigation is not cognizable under Washington law." Fondren v. Klickitat County, 79 Wn. App. 850, 862, 905 P.2d 928 (1995). In Rodriguez, the court recognized a negligent investigation claim only under RCW 26.44 as a duty owed to a specific class of persons, *i.e.*, children and parents and stated:

> Thus, in general, a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons. In the area of law enforcement investigation, the duty owed is typically owed to the public. For example, the duty of police officers to investigate crimes is a duty owed to the public at large and is therefore not a proper basis for an individual's negligence claim.

Rodriguez, 99 Wn. App. at 443 (emphasis added).

Because Plaintiff failed to provide any evidence or authority in support of a negligent investigation claim at the trial court level,

he therefore failed to establish any factual or legal basis for probably prevailing on any such claim by "clear and convincing evidence."

4. Plaintiff Has No Claim for Negligent Infliction of Emotional Distress against the City Arising from Workplace Disputes (Including Reports, Internal Investigation and Discipline Issues) and Provided No Evidence or Authority Showing A Probability of Prevailing

"A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid inadvertent infliction of emotional distress when responding to workplace disputes." Snyder v. MSC, 145 Wn.2d 233, 244, 35 P.3d 1158 (2001) (internal citation omitted).

> The utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result. The employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free workplace.

Id. at 245-246 (employer not liable for negligent infliction of emotional distress where supervisor had an imposing, physically intimidating, belligerent/authoritarian presence and who mocked the

plaintiff in front of coworkers and later confronted the plaintiff, poking her in the chest and accusing her of being insubordinate, as conduct "encompassed a workplace dispute or personality difference").

In Francom v. Costco, 98 Wn. App. 845, 849-851, 864, 991 P.2d 1182 (2000), the court held the adequacy of the employer's investigation and response to reports of sexual comments and inappropriate touching by a coworker not to be actionable under a negligent infliction of emotional distress theory. In Bishop v. State, 77 Wn. App. 228, 229-231, 233-235, 889 P.2d 959 (1995), the court held a supervisor's hostile attitude, which included screaming, hollering, slamming the phone, commenting upon work clothing, and singling out for criticism did not provide an actionable negligent infliction of emotional claim.

Further, in Johnson v. DSHS, 80 Wn. App. 212, 230, 907 P.2d 1223 (1996), the court held that extensive investigation of allegations made by coworkers against the plaintiff, coupled with four months on paid administrative leave during the investigation, followed by reinstatement, followed by a formal investigation

resulting in an initial demotion and eventual final reinstatement after appeal to the Personal Appeals Board, could not support a claim for negligent infliction of emotional distress against the employer.

Moreover, Plaintiff cannot establish a negligent infliction of emotional distress claim because he did not establish presence at the time of the alleged reports. Negligent infliction of emotional distress requires that the plaintiff have been "present when, or shortly thereafter, the negligent conduct occurred." Miles v. State, 102 Wn. App. 142, 147, 156-157, 6 P.3d 112 (2000) (plaintiff could not sue CPS investigator for negligent infliction of emotional distress based upon derogatory and disparaging remarks made to plaintiff's mother because plaintiff was not present at the time the remarks were made) (citing Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333 (1998)).

Plaintiff submitted no evidence identifying any conduct which occurred in his presence related to the reports and resulting internal investigations and he failed to provide any authority in support of a negligent infliction of emotional distress claim. Accordingly, he failed to establish any factual or legal basis for

probably prevailing on any such claim by "clear and convincing evidence."

5. Plaintiff Has No Claim for Defamation against the City and Provided No Evidence or Authority Showing A Probability of Prevailing

Plaintiff's Complaint makes passing reference to claim of defamation by Officer Curtsinger concerning Curtsinger's report of Plaintiff's use of excessive force in 2007. (CP 10 ¶ 3.27). To the extent this allegation is based upon the internal investigation generated by Officer Curtsinger's report, Plaintiff has no claim for defamation because (1) intra-departmental reports and communications are not "publications" for purposes of defamation liability, and (2) Officer Curtsinger's discussions concerning the investigation are cloaked by privilege.

As a police officer, Plaintiff is a public official for purposes of defamation analysis. Richmond v. Thompson, 130 Wn.2d 368, 376-378, 922 P.2d 1343 (1996) (state trooper was public official). A *prima facie* defamation case involving a public official requires a showing of (1) publication, (2) that the defendant's statement was false, (3) that it was unprivileged, (4) actual malice (*i.e.* knowledge

of falsity or reckless disregard of the truth or falsity), and (5) that the statement proximately caused damage. Moe v. Wise, 97 Wn. App. 950, 957, 989 P.2d 1148 (1999). Plaintiff must prove malice by "clear and convincing evidence." Id. He must also establish the absence of a privilege "by clear and convincing evidence." Id.

Officer Curtsinger's intra-departmental reporting of Plaintiff's alleged misconduct in the performance of his duties (which was required by City and YPD rules and policies) and the resulting conversations within the YPD pursuant to the internal investigation process do not constitute defamatory "publications." Prins v. Holland-North America Mortgage Company, 107 Wash. 206, 208, 181 P. 680 (1919); Doe v. Gonzaga University, 143 Wn.2d 687, 701-702, 24 P.3d 390 (2001) (intra-corporate communications are not "published" for purposes of defamation). Plaintiff failed to provide any evidence or authority that Officer Curtsinger's statements were defamatory.

Moreover, the initial report and any subsequent statements made by Officer Curtsinger in connection with the investigation were absolutely or qualifiedly privileged. Statements made during

internal investigations are absolutely privileged as part of a "quasijudicial proceeding." Castello, 2010 WL 4857022 *9. "The existence of the privilege is a matter of law for the court to decide." Moe, 97 Wn. App. at 957. Reports and complaints made to a police department concerning alleged misconduct of a police officer are absolutely privileged. Gray v. Rodriguez, 481 So.2d 1298, 1300, 11 Fla. L. Weekly 289 (Fla.App. 1986) (citing other similar authorities); Putter v. Anderson, 601 S.W.2d 73, 76-77 (Tex.App. 1980); Campo v. Rega, 79 A.D.2d 626, 433 N.Y.S.2d 630 (N.Y.App. 1980); Richmond, 130 Wn.2d at 384 (discussing the foregoing authorities without deciding the issue).

Even if not absolutely privileged, the statements are qualifiedly privileged. "[C]ommunications to a public officer who is authorized or privileged to act on the matter communicated are qualifiedly privileged." Gilman v. MacDonald, 74 Wn. App. 733, 738, 875 P.2d 697 (1994). "A common interest privilege applies when the declarant and the recipient have a common interest in the subject matter of the communication." Moe, 97 Wn. App. at 957-958 (common interest privilege has been extended to interdepartmental

communications within organizations, as well as to outside individuals who have an interest in the subject matter in question, including persons who have divergent interests, such as opponents in litigation). "An occasion makes a publication conditionally privileged if an inferior administrative officer of the state or any of its subdivisions who is not entitled to an absolute privilege makes a defamatory communication required or permitted in the performance of his official duties." Wood v. Battle Ground School District, 107 Wn. App. 550, 569, 27 P.3d 1208 (2001) (school board president's statement to newspaper implying job performance was "lacking"). Here, City and YPD rules and policies required Officer Curtsinger to report his observations of alleged misconduct by Plaintiff.

Plaintiff failed to provide any evidence or authority in support of a defamation claim and failed to show abuse of the qualified privilege (knowledge or reckless disregard of falsity) by "clear and convincing evidence." Gilman, 74 Wn. App. at 738; RCW 4.24.525(4)(h). Accordingly, Plaintiff failed to establish a basis for probably prevailing by "clear and convincing evidence."

F. PLAINTIFF DID NOT ESCAPE THE EFFECT OF THE ANTI-SLAPP STATUTE BY AMENDING HIS COMPLAINT

Plaintiff attempted to avoid the impact of the anti-SLAPP statute by amending his Complaint to remove the claims arising from the reports and resulting internal investigations. (CP 126-131, 141-150). The City pointed out the amended complaint was removing the allegations and claims pertaining to the four reports and resulting internal investigations contained in the original complaint. (CP 171-181, 182-293). This is not permitted. California decisions construing the analogous California anti-SLAPP statute emphasize that the purpose of the anti-SLAPP statute is to protect defendants by providing a quick determination whether SLAPP claims have been alleged and that this right cannot be defeated by amendment or voluntary dismissal:

> Plaintiffs contend that they should be given leave to amend their complaint to add a cause of action for malicious prosecution, which would not be barred by the privilege, but a plaintiff cannot use an eleventh hour amendment to plead around a motion to strike under the anti-SLAPP statute.

> Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend . . . . This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.

Navellier, 106 Cal.App.4th at 772-73 (emphasis added).

Similar legislative intent is contained in the legislative findings accompanying RCW 4.24.525:

> (1) The legislature finds and declares that:
>
> (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;
>
> (b) Such lawsuits, called 'Strategic Lawsuits Against Public Participation' or 'SLAPPs,' are typically dismissed as

groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

Chapter 118 §1, Laws of 2010.

For the same reasons, a plaintiff cannot avoid the effect of the

anti-SLAPP statute by seeking to dismiss his claims. Moore, 69 Cal.App.4th at 751.

V. CONCLUSION AND REQUEST FOR COSTS AND ATTORNEY'S FEES

This case is about a local governmental entity taking reasonable and appropriate steps to implement its established rules and policies to maintain the integrity of its police force. Local municipal police forces and their officers must be free to report and investigate potential misconduct by law enforcement officers without threat of retaliatory lawsuits by those who are the subjects of the reports and investigations. The City initiated internal investigations following four separate reports of misconduct by Plaintiff within the scope of his employment as an YPD officer. These investigations were initiated and conducted pursuant to established City and YPD rules and policies, which expressly require internal investigation of all claims of misconduct whatever the source. The allegations of misconduct against Plaintiff fall within the sort of conduct potentially subject to disciplinary action.

The allegations in Plaintiff's Complaint arising from the four reports of misconduct and the resulting internal investigations

clearly involve "public participation and petition" within the meaning of RCW 4.24.525 and are therefore protected activities. As such, Plaintiff was required "to establish by clear and convincing evidence a probability of prevailing on the claim[s]," which he failed (or even attempted) to accomplish. RCW 4.24.525(4)(b). Therefore, the trial court should have stricken them and awarded the City its costs, reasonable attorney's fees, and the statutory $10,000 penalty.

The trial court's ruling that the protections of the anti-SLAPP statute are limited to claims brought by the "little guy" against the "moneyed interests" is not supported by any legal authority and contradicts the plain meaning of the anti-SLAPP statute and case law interpreting the statute. The protections of the anti-SLAPP statute clearly apply to the four reports and resulting internal investigations at issue. Accordingly, the trial court erred in denying the City's Special Motion to Strike.

This Court should reverse the decision of the trial court and hold that the City's Special Motion to Strike should have been granted. This Court should further remand this matter to the trial court to award the City its costs, reasonable attorney's fees, and the

statutory $10,000 penalty. This Court should also specifically award the City its costs and attorney's fees on this appeal. RCW 4.24.525(6)(a); RAP 18.1.

Respectfully submitted this 11 day of October, 2012.

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APPENDIX

1. Castello v. City of Seattle, WL 4857022 (W.D. Wash. Nov. 22, 2010), reconsideration denied, 2011 WL 219671 (W.D. Wash. Jan. 24 2011);

2. Cal.Civ.Proc.Code § 425.16;

3. RCW 4.24.510;

4. RCW 4.24.525.

APPENDIX 1

2010 WL 4857022
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Steven CASTELLO, Plaintiff,
v.
CITY OF SEATTLE, et al., Defendants.

No. C10–1457MJP. | Nov. 22, 2010.

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Opinion

ORDER ON SPECIAL MOTION TO STRIKE PURSUANT TO WASHINGTON ANTI–SLAPP ACT & FRCP 12(C) MOTION TO DISMISS

MARSHA J. PECHMAN, District Judge.

***1** The above-entitled Court, having received and reviewed

1. Defendants Shea and Simmons's Special Motion to Strike Pursuant to the Washington Act Limiting Strategic Lawsuits Against Public Participation (AntiSLAPP Act) & Fed.R.Civ.P. 12(c) Motion to Dismiss (Dkt. No. 11)

2. Plaintiff's Response to Special Motion to Strike and Motion to Dismiss (Dkt. No. 19)

3. Defendants Shea and Simmons's Reply in Support of Special Motion to Strike and Motion to Dismiss (Dkt. No. 23)

and all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that Plaintiff's claims against Defendants Shea and Simmons for defamation, defamation by implication and false light are STRICKEN pursuant to RCW 4.24.525 (the Washington Anti–SLAPP statute).

IT IS FURTHER ORDERED, pursuant to RCW 4.24.525(6)(a), that Defendants Shea and Simmons are each awarded their costs of litigation and reasonable attorneys' fees incurred in connection with this motion and additionally are awarded the mandatory statutory penalty of $10,000 each. Defendants' counsel shall submit their requests for costs and reasonable attorneys' fees within 7 days of this order; Plaintiff shall submit any response to those requests within 7 days of the filing of the requests.

IT IS FURTHER ORDERED that, pursuant to Plaintiff's motion at oral argument, the claim for wrongful interference with business expectancy is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' FRCP 12(c) motion for judgment on the pleadings is GRANTED for the civil harassment claim; the Court further finds that leave to amend would be futile and orders this claim DISMISSED with prejudice. The Court notes that Plaintiff's defamation claims are subject to dismissal under FRCP 12(c) for their lack of specificity, and that amendment of the complaint would be futile based on the Court's decision to strike those claims pursuant to RCW 4.24.525.

Background

Plaintiff Castello and Defendants Shea and Simmons (Defendants) are all employed as paramedic/firefighters for the Seattle Fire Department (SFD). Defendants are among the parties named in a state court lawsuit initiated by Plaintiff which was removed to federal court (on federal question grounds) in October 2010. The causes of action alleged against Defendants include claims for defamation, defamation by implication, false light, civil harassment and wrongful interference with business expectancy [1]. Complaint ¶¶ 10.3, 11.7, 12.7.

According to the parties' briefing, the origins of this litigation stretch back to August 2008, when Defendants submitted a written complaint to Deputy Chief Duggins communicating their concerns about a letter Plaintiff had circulated in the workplace. Simmons Decl., Ex. B. The complaint was investigated and resulted in an Official Reprimand for disorderly conduct against Plaintiff in November 2008. *Id.*, Ex. D, p. 2. Further activity by Plaintiff (the mailing of a

survey to the homes of his co-workers, including Defendants) resulted in the submission of another written complaint by Defendant Simmons (*Id.,* Ex. E) and a phone call by Defendant Shea to the Fire Chief (Shea Decl., ¶ 6). When Plaintiff continued to solicit co-workers regarding the survey despite being ordered by the Chief to desist (*see* Simmons Decl., Ex. N, p. 1), Defendant Simmons filed an e-mail complaint with her superiors (*Id .,* Ex. F) and Defendant Shea communicated her concern to the Deputy Chief (Shea Decl., ¶ 7). These complaints were investigated by the City of Seattle Equal Employment Opportunity Office, which concluded in separate reports that, while Plaintiff's actions did not constitute harassment or retaliation (Simmons Decl., Ex. D), they did constitute misconduct. *Id.,* Ex. N. No disciplinary action was taken concerning Plaintiff in the wake of these reports. Simmons Decl., ¶ 11.

***2** In June 2009, Defendant Shea sent an e-mail to the Deputy Chief outlining her concerns for her personal safety and the morale of the battalion based on her observations of Plaintiff's behavior. Shea Decl., Ex. B. The Deputy Chief, citing reports of "harassment" and "disruption" regarding Plaintiff, communicated his concerns to the Chief several days later. Simmons Decl., Ex. H. The following day Defendant Simmons submitted an "Urgent Safety Complaint" concerning Plaintiff to the Deputy Chief. *Id.,* ¶¶ 16–17. The Chief responded by agreeing to investigate the Safety Complaint (*Id.,* Ex. I) and placing Plaintiff on paid administrative leave pending a fit-for-duty evaluation. *Id.,* Ex. L, p. 5. The following month, Plaintiff was declared to be psychiatrically fit for duty; Luhn Decl., Ex. 3.

On June 17, 2009, the day after Plaintiff was placed on administrative leave, he appeared at his workplace. Despite being informed that he was restricted from entering the work environment, Plaintiff remained onsite and the situation escalated to the point where the police were contacted. Simmons Decl. Ex. L, ¶¶ 25–28. These events (which were later incorporated into Defendant Simmons's Urgent Safety Complaint; Simmons Decl., ¶ 20) culminated in a disciplinary action against Plaintiff which he appealed to the City of Seattle Public Safety Commission (PSCSC). Following a hearing on the appeal, the PSCSC issued its decision upholding the disciplinary action (and referring to Plaintiff's behavior as "unacceptable, totally inappropriate, insubordinate" and "inexcusable;" Simmons Decl., Ex. L, ¶¶ 68–69). In the meantime, the investigation into the Urgent Safety Complaint concluded with a December 2009 report which substantiated the factual allegations made by Defendant Simmons, but (with the exception of the June 17 workplace incident) did not find that Plaintiff's actions constituted any violations of the Seattle Municipal Code. *Id.,* Ex. K.

The following year, a local television news program (KOMO News) began looking into issues of unrest and low morale throughout SFD. A number of SFD workers, including Defendants, were interviewed. The investigation culminated in the broadcast of a story entitled "Whistle blowers fear Seattle Fire Department in trouble." A transcript of the broadcast was included as an exhibit to Defendants' briefing. Simmons Decl., Ex. M. Although the focus of the story concerned allegations about the SFD Chief, mention was made of the complaints regarding Plaintiff and the June 17 incident and portions of the Shea and Simmons interviews were played. Notably, Plaintiff was never mentioned by name in the broadcast. *Id.*

In August 2010, Plaintiff commenced this lawsuit. The portions targeting Defendants allude to two categories of communications: (1) their complaints to the investigators and command personnel of SFD and (2) their statements to KOMO News. It is Plaintiff's allegation that Defendants' speech in these circumstances constituted harassment (Complaint, ¶ 10.3), as well as defamation, defamation by implication and false light (*Id.,* ¶ 11.7). Defendants have brought a dual-purpose motion, requesting that the claims against them be stricken in accordance with RCW 4.24.525 (the Washington Anti–SLAPP statute) and seeking judgment on the pleadings pursuant to FRCP 12(c).

Discussion

RCW 4.24.510 and 4.24.525 (Anti–SLAPP Statutes)

***3** For many years, Washington has had in effect a statute intended to curb strategic lawsuits against public participation; i.e., lawsuits which are targeted at communication intended to influence government action. This "Anti–SLAPP" statute had a fairly specific focus:

> A person who communicates a complaint or information to any branch or agency of federal, state or local government ... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510.

In 2010, the Washington legislature enacted another AntiSLAPP statute that not only broadened the scope of protected communication, but created a procedural device to swiftly curtail any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern. The types of speech protected by this wider-ranging version of the Anti–SLAPP were expanded into five categories:

a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceedings or other governmental proceeding authorized by law;

d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2). An activity qualifying under any of these categories is, by statutory definition, "an action involving public participation and petition" protected by this law. *Id.*

Additionally, the newer Anti–SLAPP statute created a right to bring a "special motion to strike any claim that is based on an action involving public participation and petition," an expedited procedure intended to expeditiously cut off any litigation found to be targeting this protected activity. RCW 4.24.525(4)(b). This provision assigns a moving party the initial burden of demonstrating by a preponderance of the evidence that the claim or claims concern an action involving public participation and petition. *Id.* Once that burden is met, the burden shifts to the Plaintiff to establish by clear and convincing evidence a probability of proving the claim or claims. *Id.* The statute permits a court to consider not only the pleadings, but supporting and opposing affidavits stating the facts on which the liability or defense is based. RCW 4.24.525(4)(c).

***4** Both the older and the more recent anti-SLAPP statutes [2] provide that a moving party who prevails is entitled to a mandatory award of costs and reasonable attorney fees and a further mandatory penalty of $10,000. RCW 4.24.525(6)(a); RCW 4.24.510. (RCW 4.24.510 conditions this on a finding of "good faith" on the part of the moving party, a requirement which is absent from RCW 4.24.525.) The newer statute expands the fee and penalty awards to include a prevailing plaintiff if the court finds the motion to strike was frivolous or dilatory. RCW 4.24.525(6)(b).

Defendants' Statements

Based on Plaintiff's voluntary dismissal of his wrongful interference claim and the Court's finding that there is no general civil harassment claim in Washington law, the special motion to strike claims will be addressed to the causes of action sounding in defamation. As mentioned *supra,* Plaintiff's defamation claims fall into two general categories: (1) Defendants' statements to SFD investigators, co-workers and command personnel; and (2) Defendants' statements to KOMO News which were aired in the broadcast. The Court first analyzes whether Defendants have carried their burden of establishing by a preponderance of the evidence that these two categories of communications occurred in the course of "an action involving public participation and petition."

Turning to the first category of statements, RCW 4.24.525 defines "governmental proceeding authorized by law" as a proceeding conducted by any agency or other entity created by local statute or rule that has been delegated authority by a local government agency and is subject to oversight by the delegating agency. RCW 4.24.525(1)(d). The Court finds that SFD is an "agency" of the City of Seattle (Complaint, ¶ 3.2) and, having been established by Article X of the City of Seattle Charter, is likewise an "entity" created by local statute or rule. Section 2 of that charter empowers the Mayor to appoint the Fire Chief and Section 3 delegates the authority to manage SFD to the Chief. Seattle Municipal Code (SMC) Chapter 3.16 delegates further authority from the Seattle City Council to SFD. The Fire Department is thus an agency or entity created by local statute or rule that has been delegated

authority by a local government agency and is subject to oversight by the delegating entity.

The only issue remaining on this aspect of Defendants' proof is the question of whether Defendants' statements were made either "in" a governmental proceeding or "in connection with an issue under consideration or review in such a proceeding." RCW 4.24.525 is of such recent vintage that there have been few cases construing it in the months since it was enacted. The parties, in fact, cite only one, a case out of this district entitled *Aronson v. Dog Eat Dog Films,* Inc., 738 F.Supp.2d 1104, 2010 WL 3489590 (W.D.Wash.2010). *Aronson* cites extensively to California precedent on the grounds that the California Anti–SLAPP Act (Cal.Civ.Pro. § 425.16) mirrors Washington's new statute. *Id.* at *3. This Court likewise looks to California precedent as persuasive authority concerning the new Anti–SLAPP statute.

***5** Defendants' statements within the Department were made in two contexts: allegations of misconduct which lead to departmental investigations and statements related to disciplinary proceedings. California courts have deemed investigations of misconduct by public agencies to be "proceedings" within the meaning of the Anti–SLAPP statute. The California Court of Appeals has held that statements made by co-workers pursuant to an internal investigation of misconduct concerned "an official proceeding authorized by law" and thus constituted communications "in connection with" that proceeding. *Hansen v. Cal. Dep't of Corrections and Rehab.,* 171 Cal.App.4th 1537, 1541, 90 Cal.Rptr.3d 381 (Cal.Ct.App.2008). Furthermore, "communications preparatory to or in anticipation of the bringing of an official proceeding" likewise fell within the protections of the California Anti–SLAPP Act. *Id.* at 1547, 90 Cal.Rptr.3d 381. Defendants' statements in 2008 thus qualify as statements in connection with a proceeding because they resulted in the Deputy Chief's investigation of Plaintiff and ultimately to disciplinary action.

The Court has no difficulty in finding that the disciplinary proceedings (including the investigation of allegations, the presentation of charges, pre-disciplinary meetings and the appeals process) conducted by SFD and the City of Seattle Public Safety Civil Service Commission (PSCSC) constitute "proceedings" within the purview of the RCW 4.24.525. The PSCSC, which heard Plaintiff's appeal from his departmental disciplinary review, embodies the Washington legislative mandate of a civil service system of personnel management for city firefighters. RCW 41.08. The department's disciplinary regulations, the firefighters' right to appeal to the PSCSC and the judicial review accorded that appeal process all qualify as "governmental proceedings authorized by law," and Defendants' statements (including the Urgent Safety Complaint) in June 2009 which lead to an investigation, a fit-for-duty evaluation, administrative leave and ultimately disciplinary sanctions against Plaintiff also qualify as actions involving public participation and petition. [3]

Finally, in regard to communications made by Defendants within the Department, the Court notes that all such communications fall within the general "catch all" provision of RCW 4.24.525(2)(e) as "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." Plaintiff's counsel made much at oral argument of the fact that at least one of the e-mail communications by Defendants were copied to a co-worker who was not in a management role or connected with disciplinary proceedings within the unit. The Court is of the opinion that the emotional and psychological stability of an emergency medical worker is "an issue of public concern," and the fact that one or more of Defendants' communications were directed to an individual who was not "up the ladder" in the SFD chain of command will not disqualify those statements from protection under the Anti–SLAPP statute. RCW 4.24.525(2)(e).

***6** Turning to Defendants' statements to KOMO News, the Court finds that a major television network's local news broadcast constitutes a "public forum" within the meaning of 4.24.525(2)(d). Support for this position can be found in California courts which have addressed similar issues. See *Nyard, Inc. v. Uusi–Kerttula,* 159 Cal.App.4th 1027, 1038–39, 72 Cal.Rptr.3d 210 (Cal.App. 2 Dist., 2008); *Annette F. v. Sharon S.,* 119 Cal.App.4th 1146, 1161, 15 Cal.Rptr.3d 100 (Cal.App. 4 Dist., 2004) ("[A] news publication is a 'public forum' within the meaning of the anti-SLAPP statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested community.") Although the California cases concerned print media (magazines and newspapers), the Court sees no meaningful distinction between print and broadcast journalism in the context of this statutory scheme.

As previously found, the question of a paramedic's emotional and psychological stability is "an issue of public concern" and Defendants' statements to KOMO News were thus made " 'in connection' with an issue of public interest that potentially affected a large number of [people] beyond the

direct participants." *Annette F.,* 119 Cal.App.4th at 1161, 15 Cal.Rptr.3d 100.

And again, as in their statements to the Department, the Court finds that Defendants' communications to KOMO News also fall within the definition of RCW 4.24.525(2)(e) as "the exercise of the constitutional right of free speech in connection with an issue of public concern." In the case of the television news broadcast, that "issue of public concern" went beyond Defendants' personal concerns about Plaintiff's return to his paramedic duties to the issue which was the true focus of the news story: the responsiveness of the SFD Fire Chief to the problems, concerns and morale issues within his department.

The Court finds that all of the statements identified as potentially being the basis for Plaintiff's allegations of defamation against these Defendants have been shown by a preponderance of the evidence to fall under the protection of RCW 4.24.525 as "action[s] involving public participation and petition" defined in the Anti–SLAPP statute. That finding shifts the burden to Plaintiff to demonstrate, by "clear and convincing evidence," a probability of prevailing on his claims against these parties. RCW 4.24.525(4)(b).

Plaintiff's Proof of Defamation

A Plaintiff claiming defamation of any sort must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault and (4) damages. *Mohr v. Grant,* 153 Wash.2d 812, 822, 108 P.3d 768 (2005). The Court examines Plaintiff's proof on each of these elements under the "clear and convincing" standard.

(1) *Falsity*

Statements of opinion are generally held not to be "provably false" and thereby entitled to First Amendment protection. See *Corbally v. Kennewick Sch. Dist.,* 94 Wash.App. 736, 741, 973 P.2d 1074 (1999); *Robel v. Roundup Corp.,* 148 Wash.2d 35, 55, 59 P.3d 611 (2002). Plaintiff points out that a statement of opinion implying existence of facts which (if communicated in a direct statement) would be defamatory is itself defamatory. *Henderson v. Pennwalt Corp.,* 41 Wash.App. 547, 557, 704 P.2d 1256 (1985).

***7** Plaintiff appears to confine this argument to Defendants' statements after Plaintiff was adjudged fit for duty in July 2009. Response, p. 13. Certainly prior to that date Defendants' concerns regarding Plaintiff's instability and volatility and their opinions concerning the impropriety of some of his actions in the workplace were in fact validated by the Department's actions (misconduct citation, paid administrative leave pending a fitness evaluation, transfer out of paramedic duties) and Plaintiff's own behavior.

Both Plaintiff's complaint and his responsive pleadings have been noteworthy for their failure to identify with specificity any statements to SFD superiors, co-workers or investigators which are "provably false."[4] His response to Defendants' motion refers to "inaccuracy, error, [ ] false statement" (*Id.,* p. 5, 704 P.2d 1256) and "baseless allegations" (*Id.,* p. 7, 704 P.2d 1256), but (with the exception of his "fit for duty" evaluation; *see infra*) produces nothing by way of "clear and convincing evidence" of the falsity of which he complains. Indeed, at one point Plaintiff's briefing asserts that "[i]t would be pointless, and consume far too much of this response to detail every inaccuracy ..." (*Id.,* p. 5, 704 P.2d 1256), but in fact that is exactly what was required of Plaintiff. The absence of such details leaves him without clear and convincing evidence of provable falsehood, the cornerstone of his claims, regarding Defendants' statements within the Department.

Such claims of falsehood as he does make are directed at those portions of Defendants' speech which were broadcast as part of the KOMO News story in the spring of 2010. The Court has reviewed those statements and reproduces them here in their entirety:

Defendant Shea:

- "I honestly did not know what the hell was going on."
- "It felt to me like anything was possible and he would have the potential to harm anyone."
- "It's scary, what the hell is going to happen when he comes back?"

Defendant Simmons:

- "He had no boundaries and that's what I kept telling the fire chief."
- "And [Deputy Chief Duggins'] response to me was, 'Chief Dean doesn't want to antagonize the union during the mayor's election bid because he sees it as a thousand votes.' "

Simmons Decl., Ex. M.

Plaintiff's position that these statements are "provably false" rests on two premises: (1) that this speech represents "statements of fact" that he was unfit for duty (Response, p. 13) and (2) that his July 2009 "fit for duty" evaluation "rendered [all of the statements to the effect that Castello presented a risk of harm] provably false. [5] Response, p. 13.

As a preliminary matter, the Court questions whether these statements—which never identified Plaintiff by name and were part of a broadcast which never named the Plaintiff—can form the basis for a claim of defamation. Plaintiff presented no legal authority for the proposition that the publication of speech which does not identify its subject can satisfy the legal definition of defamation.

***8** Turning to the merits of Plaintiff's proof, the Court finds that Defendant Shea's statement that "I honestly did not know what the hell was going on" was presented in the context of a comment in the news story that Chief Dean was not responsive to concerns that "trouble [was] brewing within the department" (Simmons Decl., Ex. M) and cannot reasonably be interpreted as speech concerning Plaintiff. Shea's observation that "[i]t felt to me like anything was possible and he would have the potential to harm anyone" was (1) a description of her state of mind at a prior time (before Plaintiff was adjudged fit for duty) and (2) is "pure opinion" which speaks to a feeling that Shea had and does not imply the existence of any defamatory facts. Similarly, her statement of present concern ("It's scary ...") also expresses nothing more than a fearful state of mind and an opinion that "he" represented a potential threat.

Defendant Simmons's quoted comments within the story cannot form the basis for Plaintiff's defamation claim. Her statement that "[h]e had no boundaries" is an expression of opinion (an opinion of a *prior* state of affairs—Simmons did not say "he *has* no boundaries"), and not one that implied the existence of defamatory facts (the facts which were implied—Simmons's prior experiences with Plaintiff—formed the basis for a disciplinary action against Plaintiff which was upheld on appeal). Her other comment regarding Deputy Chief Duggins's response about Chief Dean has nothing whatsoever to do with Plaintiff and clearly cannot be evidence of his defamation claims.

In addition to rejecting Plaintiff's argument that any of Defendants' statements in the KOMO News broadcast constituted "statements of fact" that Plaintiff was unfit for duty, the Court is also not persuaded that Plaintiff's July 2009 "fit for duty" evaluation renders Defendants' opinions regarding the risk of harm represent by Plaintiff provably false and thus actionable as defamation. The Court considers it highly significant that there is no mention in the psychiatrist's report which determined Plaintiff's fitness for duty of any of the details which formed the basis for the disciplinary actions against him. The report reflects that the following information was provided to the psychiatrist prior to making his assessment:

> Mr. Castello indicates that indeed over the past several years he has been involved in a variety of disputes with the department, which include what appear to be some whistle blower type complaints, and he also indicates he has been charged with harassment. *We did not go into high detail on these issues since my task is fairly circumscribed to that of performing a psychiatric evaluation. No personnel files were provided.*

Luhn Decl., Ex. 3, pp. 1–2 (emphasis supplied). Since the report did not address any of the incidents or concerns which lead to the disciplinary actions (including the referral to a "fit for duty" evaluation) of which Defendants' statements formed a part, it cannot be said as a matter of law that the evaluation renders any of those statements "provably false."

***9** The Court finds that Plaintiff has not established the probability of proving this element of his defamation claim by clear and convincing evidence.

(2) *Unprivileged communication*

Defendants present argument that their statements qualify for protection under a number of privileges. First is the absolute privilege accorded statements made in the context of a quasijudicial proceeding. This privilege applies to statements made during the investigative phase of such proceeding and in "situations in which authorities have the power to discipline." *Story v. Shelter Bay Co.*, 52 Wash.App. 334, 338–41, 760 P.2d 368 (1988) (applying the privilege to unsolicited complaints to governmental agencies). The Court finds that the SFD investigations and disciplinary actions, with their accompanying rights of appeal and judicial review, constitute "quasi-judicial proceedings."

Also entitled to privilege status are communications to a public officer who is authorized or privileged to act on

the matter communicated on. *Gilman v. MacDonald,* 74 Wash.App. 733, 738, 875 P.2d 697 (1994). Defendants' statements to their superiors within the Department (and to the investigators delegated by those superiors) fall within this category.

Furthermore, the original Anti–SLAPP statute creates absolute immunity for

> A person who communicates a complaint or information to any branch or agency of federal, state or local government ... regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510. For all the reasons cited in the analysis of the Anti–SLAPP statutes *supra,* the Court finds that Defendants were persons communicating information to an agency of local government concerning a matter reasonably of concern to that agency.

Plaintiff argues, based upon a Massachusetts state court case, that this Anti–SLAPP statute applies only to parties petitioning the government "in their status as citizens," (*Kobrin v. Gastfriend,* 443 Mass. 327, 332, 821 N.E.2d 60 (2005)) and therefore its protections do not extend to governmental employees expressing concerns about their conditions of employment. This case is factually inapposite. The defendant in *Kobrin* was an investigator hired by a government agency whose actionable statements were made in that capacity, while here even Plaintiff concedes that Defendants here were acting in their own behalf. The case is legally inapposite: there is no showing (such as the one made in *Aronson*) that the Massachusetts statute mirrors RCW 4.24.510. In fact, it appears that the Massachusetts statute was more narrowly tailored to protect a "party's exercise of its right of petition under the constitution of the United States or of the commonwealth ..." M.G.L.A. 231 § 59H. The Court does not find Plaintiff's Massachusetts authority to be of even persuasive value.

Plaintiff makes no arguments concerning the applicability of the other forms of privilege asserted by Defendants, and the Court finds that, in addition to the immunity provided by RCW 4.24.510, Defendants are protected by the privileges accorded statements made in quasi-judicial proceedings and to public officers authorized to act on the matter communicated on. These privileges only extend to the statements made to the officers and investigators of the SFD.

***10** Concerning the remainder of their statements, Defendants also invoke the conditional or qualified privilege which applies to statements between persons sharing a common interest and statements made on matters of public interest. *Corbally,* 94 Wash.App. at 742, 973 P.2d 1074; see also *Masserly v. Asamera Minerals, (U.S.) Inc.,* 55 Wash.App. 811, 817–18, 780 P.2d 1327 (1989). The Court finds that the "common interest" privilege applies to Defendants to the extent that any of their interdepartmental communications were received by co-workers who shared their interest in workplace safety and the reputation of their department. And, having already found Defendants' statements (both within the Department and to KOMO News) to touch on "matters of public interest," the Court finds their statements broadcast on the local news to be entitled to a privileged status as well.

Plaintiff does raise the defense of "abuse of privilege," arguing that Defendants are not entitled to claim privilege if it can be shown that it was abused. However, as the case Plaintiff cites (*Bender v. City of Seattle,* 99 Wash.2d 582, 664 P.2d 492 (1983)) makes clear, abuse of privilege only applies to a *qualified* privilege (*Id.* at 600, 664 P.2d 492), leaving Defendants' arguments of absolute immunity for their departmental statements uncontested.

In any event, having raised the issue of abuse of privilege concerning conditional immunity and acknowledged that his proof of abuse must meet a heightened "clear and convincing" standard, (*Id.* at 601, 664 P.2d 492), Plaintiff then abandons his proof with the observation that "we are not yet at that point." Response, p. 14. On the contrary, this case is precisely at that juncture where it is mandatory for Plaintiff to come forward with clear and convincing evidence of every element of his claim. Instead, Plaintiff rests on the citation of an inapposite case[6] and on conclusory labels such as "false statements," and "allegations of provably false misconduct and/or malicious expressions of opinion." Response, p. 14. This is no substitute for the proof which the Anti–SLAPP statute demands. The Court finds that Plaintiff has failed to establish by clear and convincing evidence the probability of proving that Defendants' communications were unprivileged.

(3) *Fault*

If Plaintiff were a private party suing for defamation, the degree of fault he would be required to establish is that of negligence; if Plaintiff is a public figure or official, the proof of fault requires evidence of actual malice. *Corbally,* 94 Wn.

App.. at 741, 973 P.2d 1074. Plaintiff appears to maintain that he is a private individual for purposes of this lawsuit; the case law indicates otherwise. "[Plaintiff's] conduct was that of a public official because it involved the manner in which he performed his [ ] duties pursuant to a public contract." *Id.* At oral argument, Plaintiff cited *Corey v. Pierce County,* a defamation case brought by a county prosecuting attorney against her employer; the Washington Court of Appeals held in that case that "as a public figure, Corey must prove that the Defendant made the defamatory statements with actual malice." 154 Wash.App. at 762, 225 P.3d 367.

***11** As a paramedic/firefighter under public contract to the City of Seattle, Plaintiff is in an identical situation to the teacher in *Corbally* and the prosecutor in *Corey.* The Court finds that he is a public official for purposes of his defamation claim and thus required to present clear and convincing evidence of actual malice on the part of Defendants. It goes without saying that, having characterized himself as a private person in this litigation, Plaintiff presented no evidence of actual malice by Defendants. Indeed, his proof of negligence is similarly non-existent—his responsive pleadings merely observe that "negligence is established by a preponderance of the evidence." Response, p. 12 (citation omitted).

The Court finds that Plaintiff has failed to present clear and convincing evidence of the probability of proving the fault element of his defamation claims.

(4) ***Damages***

Plaintiff's pleading does not even address the issue of damages, much less provide clear and convincing evidence of the probability of proving them. There are allegations of damages in his complaint (§ XV, ¶¶ 15.1–15.3), but the Anti–SLAPP statute is unequivocal in its requirement that Plaintiff bears the burden of establishing his claim by clear and convincing evidence once Defendants have met their burden on a special motion to strike. The Court finds that Plaintiff has failed to provide the requisite proof of damages.

To summarize: the Court finds, pursuant to RCW 4.24.525, that Defendants have established by a preponderance of the evidence that the statements at issue in this litigation were made in the course of actions involving public participation and petition. The Court further finds that Plaintiff has not satisfied his burden of proving, by clear and convincing evidence, the likelihood of prevailing on his defamation claims. On that basis, the Court grants Defendants' special motion to strike Plaintiff's defamation claims.

Attorneys' fees and penalties

RCW 4.25.525(6) provides that "[t]he court *shall* award to a moving party who prevails, in part or in whole, on a special motion to strike" (1) the costs of litigation and any reasonable attorneys' fees incurred in connection with the motion and (2) $10,000 above and beyond fees and costs. (Emphasis supplied.)

The Court orders counsel for Defendants to submit, within 7 days of this order, requests for the costs and reasonable attorneys' fees associated with this motion, accompanied by the appropriate supporting declarations and exhibits. Plaintiff will have 7 days thereafter to submit any objections to those requests.

The Court further orders that Plaintiff shall pay Defendants Shea and Simmons $10,000 each as required by the Anti–SLAPP statute. The Court is satisfied that the language of the statute (which calls for the court to award "a moving party" the statutory damages) requires the assessment of the penalty as to each defendant. The Court also notes that this assessment is supported by a similar award ordered by Judge Zilly of this district in *Eklund v. City of Seattle,* No. C06–181TSZ, 2009 WL 1884402, at *3 (W.D.Wash. June 30, 2009).

Motion to strike

***12** Plaintiff moves in his response to "strike or disregard all incompetent evidence submitted with defendants' motion," followed by a list of exhibits described as "unsworn statements" and "non-binding findings." Response, pp. 7–8. This request is unsupported by any statutory or legal authority and, without knowing the legal basis upon which Plaintiff makes his request, the Court denies it.

FRCP 12(c)

The Court analyzes an FRCP 12(c) motion for judgment on the pleadings utilizing the same standard as a motion to dismiss for failure to state a claim upon which relief can be granted (FRCP 12(b)(6)). *McGlinchy v. Shull Chem. Co.,* 845 F.2d 802, 810 (9th Cir.1988). A Plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Defendants seek dismissal of Plaintiff's claims of harassment, defamation by implication and false light on the grounds that these causes of actions are not recognized in the state of Washington. The attack on Plaintiff's harassment

claim is well-founded—the Complaint cites no statute, regulation or other legal authority for a cause of action for "harassment." Washington law recognizes no tort of general harassment, only a tort of "malicious harassment" (RCW 9A.36.080–.083) which is related to felony hate crimes and which requires allegations of bodily injury (or the threat thereof) that are totally missing from this Complaint. Plaintiff's harassment cause of action fails to state a claim for which relief can be granted. [7] Since the claim is a non-existent tort in the state of Washington and amendment of the complaint would thus be futile, the Court dismisses the civil harassment claim with prejudice.

Defendants' claims that the torts of defamation by implication and false light are nonexistent in Washington (Motion, pp. 19–20) do not appear to be well-founded. In fact, Plaintiff produced at oral argument a recent Washington Court of Appeals decision which clearly recognizes the existence of both of these torts. *Corey v. Pierce County,* 154 Wash.App. 752, 761–62, 225 P.3d 367 (2010). This represents something of a hollow victory for Plaintiff.

Because of the potential chilling effect on the exercise of First Amendment rights of free speech, allegations of defamation require a heightened level of specificity—a pleading of defamation will not be found adequate absent "the precise statements alleged to be defamatory, who made them and when." *Flowers v. Carville,* 310 F.3d 1118, 1130 (9th Cir.2002). This Court has previously dismissed similar claims because a Plaintiff failed to identify the specific statements alleged to be false. *Harris v. City of Seattle,* 315 F.Supp.2d 1112, 1123 (W.D.Wash.2004).

Plaintiffs' claims fail to adequately specify the allegedly defamatory statements, who made them and when. Rather than identify what exactly was said, by whom and when, the Complaint rests on assertions of "false complaints" (Complaint ¶ 4.7); "numerous, repeated and false allegations" (*Id.,* ¶ 10) and claims that Defendants' "statements to reporters, investigators, and others" were "false." *Id.,* ¶ 11.2. There is not a single specific statement which Plaintiff cites as false to be found anywhere in the document. These inadequacies affect not only Plaintiff's pleading of simple defamation, but his related claims of defamation by implication and false light.

***13** In the interests of a thorough analysis of Defendants' motion and the legal issues it presents, the Court has examined Plaintiff's defamation claims through the lens of FRCP 12(c). Plaintiff requests leave of the Court to amend his Complaint "to incorporate additional, more specific statements set forth in this response." Response, p. 2. Were there no other motion than a 12(c) motion for judgment on the pleadings, the Court would customarily permit the Plaintiff an opportunity to amend absent any proof that such amendment would be futile.

In this case, however, the Court finds that the FRCP 12(c) motion to dismiss is superseded by the dictates of the Anti–SLAPP statute's special motion to strike. In effect, granting Defendants' motion to strike the defamation claims under RCW 4.24.525 has rendered futile any further amendment of Plaintiff's complaint in this regard.

Conclusion

Pursuant to RCW 4.24.525, Defendants have established by a preponderance of the evidence that the statements at issue in this litigation were made in the course of actions involving public participation and petition. Plaintiff has not satisfied his burden of proving, by clear and convincing evidence, the likelihood of prevailing on his defamation claims. On that basis, the Court GRANTS Defendants' special motion to strike Plaintiff's defamation claims, and orders that Plaintiff pay Defendants' costs and reasonable attorneys' fees and $10,000 each to Defendants Shea and Simmons.

Defendants' FRCP 12(c) motion for judgment on the pleadings is GRANTED as to Plaintiff's cause of action for civil harassment, which is DISMISSED with prejudice. Plaintiff's motion to dismiss his claim for wrongful interference with a business expectancy is GRANTED. The FRCP 12(c) motion for judgment on the pleadings concerning the defamation claims is also granted; based on the granting of Defendants' motion to strike, the Court finds that further amendment of the defamation claims in the Complaint would be futile.

The clerk is ordered to provide copies of this order to all counsel.

Parallel Citations

39 Media L. Rep. 1591

Footnotes

1 The wrongful interference claim was orally dismissed with prejudice by Plaintiff's counsel at the hearing on this motion.

2 The Court notes that there is nothing in the language of RCW 4.24.525 to indicate that it supersedes RCW 4.24.510; the later statute is supplementary.

3 Plaintiff attempted, during briefing and oral argument, to create an issue out of his belief that Defendants, far from being motivated by a concern for public safety or departmental integrity, were solely interested in achieving his termination from SFD. The Court notes, first of all, that termination is a possible (although not inevitable) outcome of the kinds of concerns that were being investigated by SFD in regard to Plaintiff. Secondly, if the issues raised by Defendants (for whatever reason) were also issues of concern to the Department as a whole (which turned out to be the case), Defendants' motivation for communicating those concerns to the Department is irrelevant. Plaintiff has cited no authority that a speaker's motivation can render an otherwise non-defamatory statement actionable.

4 Plaintiff does refer at one point to a piece of "folklore" contained in statements by Defendants (a story he is alleged to have related about an incident where he let the air out of someone's tires in retaliation for taking a parking space) which he denies (Response, p. 7). Perhaps he intends this as proof of the falsity of the allegation, but his denial is rendered less than clear and convincing by the report of the independent investigator hired by SFD in the wake of Defendant Simmons's "Urgent Safety Complaint," which contains a finding that "Castello told this story more than once." Simmons Decl., Ex. K, p. 5.

5 To the extent that Plaintiff argues that his "fit for duty" evaluation *retroactively* renders any statements of Defendants regarding risk of harm prior to July 2009 "provably false," the Court rejects this as clear and convincing evidence of this element of his claim. As previously stated, the disciplinary actions of the Department regarding Plaintiff and the 9–1–1 call made in response to his unauthorized appearance at the fire station lend weight to Defendants' concerns and undermine any attempt to characterize them as "provably false."

6 *Valdez–Zontek v. Eastmont Sch. Dist.*, 154 Wash.App. 147, 225 P.3d 339 (2010) concerned (1) the dissemination of dmittedly false information which (2) lost its claim to privilege when it was communicated to numerous individuals outside "the agency or organization" (*Id.*. at 167, 225 P.3d 339), elements which have not been established in this case.

7 The Court also notes that Plaintiff made no responsive argument in his briefing or at the hearing concerning this aspect of Defendants' motion.

End of Document

APPENDIX 2

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.C.C.P. § 425.16

§ 425.16. Anti-SLAPP motion

Effective: January 1, 2011
Currentness

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5 [1].

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum

in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and " defendant" includes "cross-defendant" and " respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Credits

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34.)

Notes of Decisions (2813)

Footnotes

1 So in enrolled bill. Probably should be "54960.5".

West's Ann. Cal. C.C.P. § 425.16, CA CIV PRO § 425.16

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

End of Document

APPENDIX 3

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.510

4.24.510. Communication to government agency or self-regulatory organization--Immunity from civil liability

Currentness

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

Credits
[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

Notes of Decisions (68)

West's RCWA 4.24.510, WA ST 4.24.510
Current with all 2012 Legislation

End of Document

APPENDIX 4

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.525

4.24.525. Public participation lawsuits--Special motion to strike claim--Damages, costs, attorneys' fees, other relief--Definitions

Currentness

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

Credits
[2010 c 118 § 2, eff. June 10, 2010.]

Notes of Decisions (1)

West's RCWA 4.24.525, WA ST 4.24.525
Current with all 2012 Legislation

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