No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THERESA ORTLOFF,
Petitioner,
v.

DAVE TRIMMER, STEVEN VONHEEDER,
ELIZABETH KOSA, LYNNE GRIFFITH, AND
AMY SCARTON,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Must the entire record, including motives, main thrust of the speech, and all instances of speech be reviewed under *Connick v. Myers*, 461 U.S. 138 (1983) to determine if there is a public interest associated with the speech under the First Amendment?

2. Does *Connick v. Myers*, 461 U.S. 138 (1983) require a public employee to protect a large class of persons to be protected under the First Amendment when the employee criticizes an illegal pay padding scheme and an inefficient record keeping system in an attempt to help junior employees?

3. Is criticism of an inefficient public employee record keeping system, such as paper notes kept by a dispatcher showing work assignments and availabilities, speech protected by the First Amendment?

4. Does placement of a public employee on a blacklist that violates state law, such as the Do Not Hire/Dispatch List, violate Procedural Due Process under the Fourteenth Amendment?

5. Does placement of a public employee on a blacklist that violates state law, after the employee criticizes shorting the pay of junior employees and inefficient recordkeeping systems, constitute retaliation under the First Amendment?

6. When an illegal blacklist subsequently causes an employee to not be dispatched after the employee is rehired under a collective bargaining agreement, does the constructive discharge constitute retaliation under the First Amendment and a violation of Substantive Due Process?

7. When a Federal Court interprets the meaning of a collective bargaining agreement phrase, such as a "bona fide" reason for termination, must it consider practice, usage, and custom of the term, and determine if it is vague under standard contract interpretation rules?

8. Does a collective bargaining agreement create a property right for purposes of due process under the Fourteenth Amendment where the state agency's employment specialist earlier rules unavailabilities and comments from supervisors limited the decision maker and could not form the basis for terminating the employee?

9. Is Procedural Due Process under the Fourteenth Amendment violated when a probationary employee with a property right in the job is sent a termination letter without notice or opportunity to respond to the disciplinary allegations?

10. Is Procedural Due Process under the Fourteenth Amendment violated when a probationary employee with a property right in the job is terminated without having any disciplinary charges brought from the written code of conduct and progressive disciplinary procedure?

11. Is the Fourteenth Amendment Substantive Due Process Clause violated when most of the alleged unavailabilities used for termination are shown to be false or double counted, and less in number than other similarly situated employees who were not terminated?

12. Does a government manager violate the Liberty Clause of the Fourteenth Amendment by maintaining and distributing a blacklist in violation of a state anti-blacklisting law, where the blacklist prevents a re-hired public employee from being dispatched and constructively discharged?

13. Does a government manager violate the Liberty Clause of the Fourteenth Amendment by sending an internal e-mail that is then leaked to the Press which makes adverse comments about the whistleblower in an attempt to deflect blame for Press criticism of unsupported raises for the managers?

14. Is a party required to first determine if e-mails are reasonably accessible under Federal Rule of Civil Procedure 26(b)(2)(B) before the party can limit discovery and production of the e-mails under Federal Rules of Civil Procedure 33(a)(1) and 34(a)(1)(A) with search terms?

15. Is the test for whether electronically stored information is "reasonably accessible" under Federal Rule of Civil Procedure 26(b)(2)(B) an objective test and if so, are e-mails that have been located, read, and collated "reasonable accessible"?

B. PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceedings below.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. APPENDICES TABLE OF CONTENTS

3. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, THERESA ORTLOFF, requests the Court issue a writ of certiorari to review the Order of the Ninth Circuit Court of Appeals entered in this case on July 18, 2019 (Appendix "App."-2), and the Order denying rehearing and rehearing en banc entered on August 23, 2019 (App.-1).

D. CITATION TO OPINION BELOW

Order Denying Petition for Rehearing and Rehearing En Banc, *Ortloff v. Trimmer, et al.*, 9th Cir. Case No. 18-35538, dkt. 36 (August 23, 2019). App-1. The mandate issued on September 3, 2019.

Opinion, *Ortloff v. Trimmer, et al.*, 9th Cir. Case No. 18-35538, dkt. 35 (July 18, 2019.), 773 Federal Appendix 903 (Mem). App.-2.

Judgment, *Ortloff v. Trimmer, et al.*, U.S. Dist. Ct. (W.D. Wash.) Case No. 2:16-cv-01257-RSL, dkt. No. ("Dist.Ct. dkt.") 76 (May 29, 2018). App.-6.

Opinion, *Ortloff v. Trimmer, et al.*, U.S. Dist. Ct. (W.D. Wash.) Case No. 2:16-cv-01257-RSL, dkt. 75 (May 29, 2018), 2018 WL 2411755. App.-7.

Order on Plaintiff's Motion for a Discovery Default or to Compel Discovery, *Ortloff v. Trimmer, et al.*, U.S. Dist. Ct. (W.D. Wash.) Case No. 2:16-cv-01257-RSL, dkt. No. 35 (May 29, 2018). App.-20.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

F. CONSTITUTIONAL PROVISIONS AND LEGAL PRINCIPLES INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech … or the right of the people peaceably to assemble ..." U.S. Const., amend. I.

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV.

The Federal Civil Rights Law states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State …, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action …" 42 U.S.C. § 1983, App.-24.

Washington State's Blacklisting Law, Section 49.44.010 prohibits blacklisting states blacklisting is established if there is an act to "… send or deliver … or publish or cause to be published any statement for the purpose of

preventing any other person from obtaining employment …" Wash.Rev.Code § 49.44.010, App.-26.

Washington State's Law authorizing a collective bargaining agreement and making it state law is Section 47.64.170. Wash.Rev.Code § 47.64.170. App.-25.

G. STATEMENT OF THE CASE

1. Relevant Facts

Theresa Ortloff was a probationary on-call oiler at the Washington State Ferries ("WSF") who was terminated in November, 2013. App.-50. In 2014, her union, the Marine Employees' Beneficial Association ("MEBA") concluded she was wrongfully terminated, she was rehired under the collective bargaining agreement ("CBA"), and her name was sent to the WSF Dispatcher to be dispatched. The management of the Washington State Ferries had a secret, illegal blacklist that Appellant was placed on which prevented her from being dispatched. App.-48. No notice or opportunity to be heard were given prior to the 2013 termination or the 2014 refusal to dispatch, raising Procedural Due Process issues under the Fourteenth Amendment. App.-82,84.

The case has important First Amendment issues, because throughout the case, each of the reasons for termination have been shown to be false or not rule violations. Appellees are now down to one incident where Staff Chief LaCroix attempted to short Appellant's pay under a wider pay padding scheme to short the pay of junior employees so the managers could pad the withheld pay as overtime.

The Appellant spent 18 months preparing to be an oiler at the Ferries. App.-76. She attended a two month school down in San Diego, California. *Id*. She attended classroom training, and she performed an internship working on several ferries. *Id*. Staff Chief Kavanaugh certified Theresa Ortloff

was qualified to work as an oiler under U.S. Coast Guard regulations 46 C.F.R. §§ 15.405 and 199.180(b)(1). App.-76,22,23. Ms. Ortloff was again certified under the U.S. Coast Guard regulations by another chief on August 8, 2013 by another chief. Dist.Ct. dkt. 49-2, p. 30.

The Washington State Ferries is the largest ferry system in the nation with 23 regular domestic ferry routes and one international run. Unfortunately, down in the depths of the engine rooms, a group of chiefs have a regular system of pay padding that has developed over the last 25 plus years. The pay padding schemes have partially resisted detection, because the senior "staff" chief on each ferry signs off on the hand written pay sheets, including his own, and sends them ashore to an accounting department.

During her deposition, Kosa (maiden name Nicoletti in some e-mails) admitted the average amount the chiefs add to their pay is $51,000 per year on a $99,000 base salary. Dist.Ct. dkt. 48, p. 75. Shortly after this case was filed in 2016, 50 chiefs and senior personnel attempted a 25% per year pay increase, which would have raised yearly compensation up to as much as $210,000, since many were padding at least $70,000, but the whistleblowers and the news media defeated the plan. App.-40.

The Appellant's boyfriend, Floyd McLaughlin is a Washington State Ferry chief who has been engaged in whistleblower activities at the WSF for at least 19 years. Dist.Ct. dkt. 26, p. 2. He has prevented wasteful spending that likely amounts to tens of millions of dollars, and maybe more depending on how future savings are calculated.

Mr. McLaughlin has testified in several administrative and federal court proceedings, including *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007) and he is generally known at the Ferries as a whistleblower. Dist.Ct. dkt. 26, pp. 2,3. Mr. McLaughlin has been regularly harassed and he was even harassed between two days of testimony in Federal Court, causing a U.S. District Court judge to order a defendant in that case to stay off the social media he was using to harass Mr. McLaughlin and damage his business plans. *Id*. at p. 3. The *Marable* case and the revelation the management had run up $1 billion in debt stopped several of the pay padding schemes 12 years ago, but it appears the pay padding has slowly percolated back into the engine rooms.

When Appellant reported for work on the Ferry Chelan in August, 2013, her supervisor Trimmer immediately created a hostile work environment. App.-77. He followed her around and while Appellant was hooking up a sewage connection, he came out from where he was hiding and yelled at her to go below to the engine room without explanation. *Id*.

That night Trimmer wrote a series of adverse e-mails regarding Appellant. App.-62. Kosa was a manager above Trimmer and requested Trimmer follow the written progressive disciplinary policy which starts with counseling. App.-61,33. Trimmer refused to follow the written progressive disciplinary policy. App.-59. Trimmer also did not bring Appellant up on any Code of Conduct charges. App.-59,33. In fact to this day, the Appellees admit Appellant violated no rules. Dist.Ct. dkt. 48, pp. 23,58-60.

While investigating the motive for Trimmer's adverse e-mails, Appellant discovered Trimmer had been involved in the Special Projects and when the *Marable* case largely shut them down with McLaughlin's testimony, Trimmer likely lost overtime. App.-71. Following the *Marable* verdict, the local NBC affiliate KING-5 News reporter Susannah Frame broadcast an award winning series called, "Waste on the Water," and public criticism helped shut many of the pay padding programs down. App.-41,42.

Appellant discovered Trimmer was engaged in shorting the pay of junior employees in violation of Washington State Law during the timeframe he harassed Appellant. App.-63-69, Dist.Ct. dkt. 62, pp. 1-2. The CBA has a provision for double time for junior employees for cleaning that is particularly dirty, called penalty time, but managers are forbidden to claim this double time on their chief's pay except in emergencies. App.-31, Dist.Ct. dkt. 62, p. 2. Trimmer was taking this time and doubling his chief's pay, so he paid himself $87 per hour to do basic cleaning on his off time. App.-63-69.

Trimmer refused to provide his W-2's during discovery, citing a privacy exception to Washington's Public Records Act, and many pay sheets he did provide showed signs of being amended. The pay sheets provided are not filed with the Federal Government and therefore could have been amended without detection. Nonetheless, after some documents were provided after the close of discovery, Appellant discovered Trimmer padded approximately $17,000 in pay in 2013 and violated Washington State Law by

shorting junior employees. App.-63-69, Dist.Ct. dkt. 62, pp.1-2.

In late 2013, Kosa suggested she heard "stirrings" in the fleet regarding Appellant's performance. App.-56. The "stirrings" included the Trimmer e-mails about Appellant that violated no rules. App.-62. The e-mails included to criticize Appellant included her complaint about the employee recordkeeping system that was allowing someone to go into the Dispatcher's office and throw away slips of paper that showed when Appellant was to be dispatched for work and when she was unavailable with advanced approval. App.-53,54,58.

Kosa requested an opinion from Manning, the employment specialist designated in the hiring letter to interpret the rules related to Appellant's employment. App.-56,70. Manning stated on November 7, 2013, all unavailabilities and all other issues did not support termination. App.-55. This only left alleged unavailabilities 20 and 21 (which are double counted since the watch goes past midnight) and are in response to the LaCroix harassment. App.-75,80.

Appellant was sent to the boat on which LaCroix was a manager. After Appellant filled out her pay sheet, LaCroix changed her pay rate to an incorrect lower pay. Ms. Ortloff opposed the incorrect pay (since she had heard about this pay padding method by the managers) and she was harassed. LaCroix sent an e-mail to Kosa claiming he felt harassed after he changed Appellant's pay to an incorrect amount. App-56. Appellant requested an unavailability according to the rules and there was no effect on the ferry since it was tied up at the

time. App.-80,81. To prevent other junior employees from having their pay shorted, Appellant made a spreadsheet to show the junior employees how to calculate their pay and explained the spreadsheet to fellow junior employees. App.-81, ¶ 31. It is believed the spreadsheet is still in use to this day. *Id.*

The Appellees, and Manning, the personnel specialist designated in the hiring letter to interpret the rules that apply to Appellant, admit the Appellant violated no Washington State Ferry rules. App.-55,70.

Appellant then received a letter of termination from Vonheeder without any notice or opportunity to be heard. App.-50. Appellant and her union representative requested a hearing to respond to the allegations, which have been shown to be unfounded, but the request was denied. After the MEBA union reviewed the case in 2014, it decided Ms. Ortloff had been wrongfully terminated and rehired her under the CBA. App.-83,84. Appellant's name was sent as an employee to be dispatched, but the management refused to dispatch Appellant. *Id.* Manning ultimately admitted to Appellant in late December, 2014 the management had blacklisted her in some way and she would never be hired. App.-84. See App.-48 for one of the blacklists.

The early months of this case demonstrate the atmosphere that has allowed the pay padding to creep back down into the engine rooms and take root. It appears some managers who had been scheming a pay increase realized the case would bring unwanted attention to the unfounded request, so they chose that moment to attempt the

pay increase. App.-40. It proposed the manager's current $99,000 base salary plus their average $51,000 in overtime and padding, be increased by another $70,000, making the compensation for some of these 50 managers up to $210,000. *Id*. Whistleblowers informed KING Channel 5 News of the unfounded proposed raise, KING-5 investigated the raise, and wrote a news story that was broadcast on television and published on their website.

Griffith argued she had a study that supported the raise. App.-36,46. KING-5 looked at the study and found it did not support the raise and in fact showed the managers were being overpaid compared to their peers. *Id.* Right before the second story aired, Griffith sent an internal e-mail to all WSF employees that blamed the criticism on "former disgruntled employees." App.-46. The e-mail was leaked to KING-5, and it formed the basis of another news story. *Id.* Griffith then announced her intention to resign two months later, on or about January 31, 2017.

2. Discovery Issues at the District Court

After the Appellees were served with the Complaint, Appellees admitted they located the e-mails related to Appellant's employment and the e-mails related to the six possible comparator probationary employees identified in the Complaint.

Appellees stated they were reading the e-mails related to the case, with several Assistant Attorneys General, and were not sure they could get them all read before in Initial Disclosures were

due. The Appellees then stated they did read all of the relevant e-mails prior to the due date of the Initial Disclosures in December, 2016. Dist.Ct. dkt. 23, pp. 57.

Appellant submitted a set of interrogatories and requests for production that were due a couple days before Griffith was scheduled to resign.

Griffith provided interrogatory answers but failed to provide most of the e-mails related to Appellant, that the Appellees had admitted they located and read a month earlier. Griffith also submitted a list of 21 unavailabilities for Appellant. In her detailed declaration Appellant showed at least 11 were either false statements through documentation or double counted. App.-76-80. Griffith then physically left the State of Washington, and claimed she wanted to spend more time with family.

Appellant requested all e-mails related to her that Appellees read. The Appellees stated they would only provide the e-mails if the Appellant provided "search terms." The Appellant reminded Appellees they previously read the e-mails and they were accessible. Appellant further did not know key information, such as the terms being used in Appellees' illegal blacklisting system. During a discovery conference, the Appellees cited statistics about Appellant's unavailabilities compared to the comparators from the e-mails, showing not only that they located and read the e-mails, but they had collated the information in the e-mails sufficiently to produce statistics. Dist.Ct. dkt. 23, pp. 57.

After the discovery conference Appellant filed a discovery motion to get the e-mails related to

the Appellant and comparator probationary employees for the five months they were on probation. The Appellees to not provide the e-mails, which suggested the content of some of e-mails was adverse. The motion was denied in part and required Appellant to provide 10 search terms for the e-mails related to the Appellant. App.-23.

The discovery deadline was looming, so the Appellant chose one of the comparators, Dave Hurtt, and deposed him in the last few days of discovery. He had approximately 13 unavailabilities, including 2 related to his girlfriend and he was not fired. App.-89-92. Appellant had between 7 and 10 unavailabilities and she was fired. App.-76-82. The Appellees' employee record keeping system is ineffective, and therefore Appellant's documentation proving it was between 7 and 10 is the best estimate. *Id*.

During one of the depositions at the end of discovery, Appellant was handed four e-mails the MEBA union had given the Washington State Attorney General's Office 30 days before. App.-48,49. Apparently the union was watching the proceedings and noticed the blacklists had not been discussed and introduced the blacklisting e-mails by providing them to the Appellees.

The e-mails are classic smoking gun e-mails that discuss one of the blacklists the management had been secretly keeping in violation of Washington State Law. App.-26. The e-mails show Kosa distributing the blacklist, which contains the Appellant's name. App.-48. They should have been provided five months earlier when the requests for production were due, because they are responsive to Interrogatory No. 1 and Request for Production

A. App-75 (indicating Appellees had 1,458 e-mails related to Appellant).

3. Summary Judgment at the District Court

The District Court suspended the case just before trial. Since the Appellees repeatedly stated the Appellant had not updated the Complaint to reflect the facts she discovered in the case, Appellant filed a Motion to Amend the Complaint, which was granted. After the Complaint was amended, the District Court dismissed the case by summary judgment. App.-7.

4. Appeal to the Ninth Circuit

The Appellant filed an appeal to the Ninth Circuit Court of Appeals. The basis of jurisdiction was 28 U.S.C. § 1291. The Ninth Circuit affirmed the District Court in an Order filed on July 18, 2019. App.-2. Appellant filed a Motion for Rehearing and Rehearing En Banc, which was denied on August 23, 2019. App.-1.

H. REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit misinterpreted *Connick v. Meyers* when ruling on Appellant's First Amendment Free Speech cause of action, creating a conflict with an important precedent of this Court, and the opinion differs with other circuits regarding what parts of the record must be considered.

The Appellant brought Cause of Action Three under the First Amendment Free Speech Clause, and like all of Appellant's causes of action, under 42 U.S.C. §§ 1983 and 1988. U.S. Const., amend. I, 42 U.S.C. §§ 1983, 1988.

The Ninth Circuit's opinion should be reviewed under Supreme Court Rule 10(c) since it decided an important issue of federal law that conflicts with an important precedent of this Court. S.Ct.R. 10(c).

The Ninth Circuit's opinion is brief, but it does not appear to consider all parts of the record that other circuits consider, making it also reviewable under Rule 10(a) for this reason. The Eleventh Circuit, for example, interprets the *Connick* "whole record" to include the "main thrust" of the speech, the motive of the speech, and who the speech is communicated to. *Mitchell v. Hillsborough County*, 468 F.3d 1276,1283 (2006).

The standard of review for a summary judgment order is de novo. The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the movant was entitled to judgment as a

matter of law. Fed.R.Civ.P. 56(a), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,249 (1986). The Court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Id.*

There are three examples of protected speech. Appellant caught LaCroix shorting her pay to support a pay padding scheme. App.-80,81. Appellant showed there is a pattern of this conduct when she showed Appellee Trimmer was involved in the same scheme. Trimmer took hours from junior personnel, just as LaCroix had attempted, and then padded that time up at his chief's rate of pay. App.-63-69.

The second example of speech and conduct protected by the First Amendment is the production and distribution of a spreadsheet with instructions to other junior personnel to prevent the managers from shorting their pay. App.-81.

Third, Appellant criticized the inefficient, ad hoc paper recordkeeping system which allowed junior employees to be harassed by removing the slips of paper from the Dispatcher's office that indicated work assignments and approved unavailabilities. App.-53,54.

There are two relevant time periods; the 2013 termination and the 2014 refusal to hire due to the blacklist after the union rehired Appellant and the management refused to dispatch her.

a. *Connick* requires an examination of the record as a whole for an effective determination of the public interest, and to balance the interest of the employer and employee.

The Ninth Circuit erred in interpreting *Connick v. Myers*, 461 U.S. 138, 146 (1983), because it did not consider the whole record. It stated even if there was a connection between helping other employees and her discharge, the First Amendment would not protect the actions. App.-4, n. 1. The Ninth Circuit went on to state there were no facts connecting the discharge to championing the rights of probationary employees generally. App.-4.

The Ninth Circuit did not consider all of Appellant's motives and actions, such as criticizing the recordkeeping for on-call oilers that allowed the paper slips containing the work assignments and unavailabilities of junior employees to be easily discarded. App.-53,54. The main thrust was clearly to improve the conditions that were causing inefficiency and enabling harassment. *Id.* Appellant could have focused only on her own interests by ignoring the pay padding and the inefficient record keeping system, but she chose to help others whose rights were being violated through respectful criticism.

In *Connick*, this Court stated, "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 148.

Content of the speech is the most important factor when examining the record as a whole. See

Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410,415-16 (1979).

b. Resisting a pay padding scheme involving shorting the pay of junior employees so the managers can pad their pay is protected by the First Amendment.

Placing this argument in context, this was right at the end of Appellant's five-month probationary period in late 2013. The WSF employment specialist Manning had just stated Appellant could not be fired for all unavailabilities and comments up to that time. App.-55. Appellant was therefore sent to the boat LaCroix worked on, and LaCroix immediately went to work violating Appellant's rights.

LaCroix attempted to short Appellant's pay and she respectfully challenged the action. Appellant had heard managers were changing the pay of junior employees to a lower amount and then padding that pay as overtime. Ms. Ortloff caught manager LaCroix attempting to illegally change her pay. In response, LaCroix harassed Ms. Ortloff and tried to suggest she was harassing him for making the request to stop shorting her pay and return the money improperly withheld, so she requested an unavailability according to the rules. App.-80,81. Ms. Ortloff then made a spreadsheet explaining the pay procedure and gave it to several junior employees so that the managers could not change the pay of junior employees and then use that withheld pay to pad their own overtime. App.-81. The spreadsheet is in use to this day. *Id.*

Appellant showed a pattern of managers shorting the pay of junior employees so they could pad their pay with double time. App.-63-69,31. Appellee Trimmer was a part of the scheme to short the pay of other junior personnel on his watches and pad his own pay with overtime. *Id*. This was a method of secretly padding pay that was difficult for the WSF accounting department or State Auditor to detect because it shifted the hours and double time to the chiefs without a new activity being generated (unlike the Special Projects *Marable* stopped, which created fictitious projects). The taxpayer was harmed because the pay and overtime for a chief is much higher, allowing the chiefs to claim $87 per hour for basic cleaning on their off time. This violated state law, including the law adopting the rules of the CBA, and the law prohibiting the unlawful withholding of the junior employees' pay when Trimmer took their hours. Rev. Code Wash. §§ 47.64.170(7), 49.52.050(2), App.-26,27,28,31.

By not interpreting *Connick* to require an examination of the whole record, the Ninth Circuit opinion also overlooks the actions of Trimmer who was involved in the scheme, his harassment of Appellant, and the adverse e-mails with no disciplinary charges. Appellant added instructions to her spreadsheet to stop the withholding of the pay of other junior employees so the managers could not pad the pay as overtime. Second, it overlooks the speech related to the system of poor record keeping that applied to all employees, but impacted the junior on-call employees the most.

c. *Connick* does not require a large class of persons to be protected, helping employees resist a pay padding scheme is protected, and the spreadsheet can be distinguished from the *Connick* memo.

The Ninth Circuit suggested *Connick* requires a large class of persons before an employee is protected under the First Amendment. App.-4, n. 1. It was suggested the handful of junior employees Appellant helped with their pay does not amount to the 15 people the *Connick* memo involved. Appellant stated she shared the spreadsheet with others and appears to be in use today. App.-81. The shorting Appellant proved after discovery by Trimmer will also likely prevent many junior employees from being shorted in the future. Additional junior employees were helped when Appellant criticized the Dispatcher's record keeping system. App.-63-69.

The Ninth Circuit drew other parallels to the *Connick* memo. Appellant's speech differs from the employee in *Connick*, because the speech is not a questionnaire distributed to challenge how an office is managed. It opposed illegal shorting of pay. The spreadsheet was not a questionnaire like in *Connick,* but a spreadsheet and explanation for calculating pay intended to prevent illegal conduct by state managers. Therefore, the <u>form and content</u> were very different from the *Connick* questionnaire discussing management methods.

Washington State Law prohibits the withholding of pay. Rev. Code Wash. §§ 49.52.050(2), 47.64.170, App.-28,31. LaCroix was clearly violating this standard and he eventually

admitted he was violating the CBA by returning the money. The MEBA union agreement stated probationary employees had to correct these issues themselves, because it states they do not have access to the grievance procedure. App.-32. When LaCroix harassed Appellant and she requested an unavailability, the ferry was tied up, so there was no effect on the boat in requesting a relief. App.-81.

LaCroix apparently sensed trouble and claimed he was being harassed. App.-57. Since Manning had said all unavailabilities and all issues she received notice of prior to November 7, 2013 did not meet the standard for termination, the Appellees terminated Appellant for the LaCroix-related unavailabilities. App.-55.

This is precisely the type of First Amendment speech we want to protect due to the history of corruption at the Washington State Ferries. In *Marble v. Nitchman*, the Appellant's boyfriend was an important witness who identified widespread pay padding that shows this problem has persisted for more than 20 years. *Marable,* 511 F.3d at 924.

In *Connick*, the Court noted, "The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of social changes desired by the people." *Connick*, 461 U.S. at 145 (citing *Roth v. U.S.*, 354 U.S. 484 (1957), *New York Times Co. v. Sullivan*, 376 U.S. 254,269 (1964)). The Court further stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64,74-5 (1964)).

The Appellees appear to have abandoned all of the unavailabilities and all other actions cited for termination except for this one related to LaCroix (because their employment specialist stated all action before the date of this unavailability did not warrant termination). App.-55. Vonheeder then used the LaCroix unavailability as a basis for firing Ortloff. App.-50. The e-mails make it clear Kosa assisted in the termination and the termination letter. App.-51,55,56,57,48,49. Griffith was also on notice of the ongoing violation of Constitutional rights through the telephone conference with Floyd McLaughlin. Dist.Ct. dkt. 45, p. 4 (McLaughlin discussing Griffith telephone call).

In 2014, Appellant's union determined she was wrongfully terminated in late 2013 and rehired her under the CBA. App.-83. Kosa participated in the blacklisting, and Griffith knew unconstitutional violations were occurring but failed to act. App.-48. The blacklisting violated Washington State Law and prevented Appellant from being dispatched, causing a constructive discharge. Rev. Code Wash. § 49.44.010, App.-26,48. Washington State Courts have ruled the blacklisting law applies to employment civil actions. *Moore v. Commercial Aircraft*, 278 P.3d 197,203 (Wash. Ct. App. Div. I), rev. denied, 291 P.3d 254 (Wash. 2012)(quoting R.C.W. § 49.44.010).

d. Criticizing an inefficient public employee record keeping is also protected by the First Amendment.

The third example of protected speech was criticism of the employee recordkeeping system

that tracked the work assignments and unavailabilities of junior employees in the Dispatcher's Office. As argued above, the Ninth Circuit overlooked these complaints. Appellant periodically requested unavailabilities just like the other probationary on-call oilers. Her requests were repeatedly lost. App.-53,54,58. This was another type of harassment, and the inefficient system prevents us from knowing who was discarding the notes containing Appellant's work assignments and unavailabilities.

Appellant brought this to the attention of the managers. App.-53,54. Appellant had experience in modern record keeping, because she worked at Physio-Control Corporation for almost 30 years. She therefore suggested a better system of record keeping, such as a computerized or e-mail system. *Id*. The managers immediately suggested she was committing misconduct by identifying the problem and suggesting the improvements. App.-52. Kosa submitted this suggestion by Appellant to Manning as another reason for termination (and once again, the Progressive Disciplinary System, the Appellees' written disciplinary system was not used). App.-56,33.

2. The Ninth Circuit's adoption of the District Court's dismissal of Appellant's retaliation claim violates *Pickering*.

The Ninth Circuit's opinion on Appellant's retaliation claim, appears to violate an important precedent of this Court. S.Ct.R. 10(c). To prove First Amendment retaliation, Appellant must prove she undertook a protected activity; the employer

subjected her to an adverse employment action; and a causal link between her protected activity and the adverse employment action. *Pickering v. Bd. of Education*, 391 U.S. 563,574 (1968), *McGinest v. GTE Serv. Corp*., 360 F.3d 1103,1124 (9th Cir. 2004).

To show retaliation protected by the First Amendment, Appellant must show protected activity was one of the reasons and but for that activity, she would not have been fired. *Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 1054,1064-65 (9th Cir. 2002). Causation can be proven with timing where the activity follows on the heels of protected activity. The Appellant must prove the Appellees knew of the protected activity. *Cohen v. Fred Meyer, Inc*., 686 F.2d 793,796 (9th Cir. 1982),

Here there are four examples of retaliation. Three occurred in 2013, and one occurred in 2014.

In 2013, it was suggested Appellant was committing misconduct by criticizing the poor record keeping system. App.-52. Appellant was sent to LaCroix's boat, likely to be harassed, and LaCroix attempted to short her pay which violated the CBA and State Law. CBA, § 29.08, Rev. Code Wash. §§ 47.64.170(7), 49.52.050(2), App.-25,28,31. Appellant resisted the illegal pay padding scheme of the managers who short the pay of junior employees, then pad that pay as overtime. Appellant showed Trimmer was also involved in this same scheme. In retaliation for criticizing their system of pay padding, LaCroix claimed he was being harassed, after he attempted to short Appellant's pay, and sent an adverse e-mail to Kosa. LaCroix harassed Appellant, so she requested an unavailability. App.-80,81.

Vonheeder then used the LaCroix unavailability as the basis for firing Appellant, after Manning indicated all previous unavailabilities did not satisfy the CBA's "bona fide reason(s) related to the business operation" requirement for termination. App.-51,75. This was retaliation, and but for her speech resisting the illegal shorting of her pay, she would not have been terminated.

It has been shown Appellant had 7-10 unavailabilities. App.-85. The Appellees refused to provide the information on the comparators. Appellant deposed comparator Dave Hurtt, who stated he had approximately 13 unavailabilites and he was not fired. App.-89-92. The LaCroix unavailability request followed the proper procedure and there was no effect on the ferry since it was tied up at the time. Appellant was also brought up on no Code of Conduct charges under the Appellees' Progressive Disciplinary Policy.

The third way Appellant was retaliated against was to be placed on the blacklist. App.-48. The blacklist violated Washington State Law. Rev. Code Wash. § 49.44.010, App.-26. The union provided their copies of some of the Appellees' withheld e-mails that show Kosa distributing the illegal blacklist. App.-48. It should be noted whistleblower Musselman is also on the blacklist.

In 2014, Appellant was rehired by the union under the CBA and sent over to the WSF to be dispatched. The WSF refused to dispatch Appellant because she had been placed on the blacklist. Appellant was therefore constructively discharged. Griffith was on notice of the Constitutional violations occurring but failed to act.

Dist.Ct. dkt. 45, p. 4 (McLaughlin discussing Griffith telephone call). In fact, after she later sent the 2016 memo criticizing the whistleblowers, Griffith resigned and left the State of Washington.

3. The Ninth Circuit misinterpreted *Roberts v. U.S. Jaycees* and *Pickering v. Board of Education* when ruling on Appellant's Association Claims.

The Ninth Circuit stated there was no protected association with Floyd McLaughlin, then assumed arguendo that even if other associations existed, those associations would not be protected. App.-4, n. 1. This conflicts with *Roberts v. U.S. Jaycees* and *Pickering v. Board of Education*. S.Ct.R. 10(c), *Roberts v. U.S. Jaycees*, 468 U.S. 609,618 (1984), *Pickering*, 391 U.S. at 574.

There are two types of association here. First there is Freedom of Association for expressive purposes under Cause of Action Two. Appellant must show she was a part of a group or identified as being a part of a group that engaged in a collective goal or action for expressive purposes, and membership or perceived membership in the group was a substantial motivating factor for the adverse action. *Roberts*, 468 U.S. at 618.

Appellant coordinated with other junior employees to prevent the managers from shorting their pay. LaCroix attempted to short Appellant's pay, she resisted the illegal act, was harassed, and requested an unavailability. Manning stated all unavailabilities up to then did not satisfy termination. Vonheeder then terminated Appellant for this availability (which is double counted as

number 20 and 21). App.-75,82. Appellant was placed on a blacklist and was not dispatched when she was rehired the next year. App.-48,84.

The second type of association is for personal relationships under Cause of Action One. Appellant must show she was perceived to have a personal relationship and it was a substantial motivating factor in an adverse action. *Roberts*, 468 U.S. at 609. Appellant was the girlfriend of whistleblower McLaughlin. Kosa submitted the two unavailabilities related to McLaughlin as a reason to terminate Appellant and these were included in the Vonheeder list supporting termination. App.-74,79, Dist.Ct. dkt. 48, p. 78, dkt. 45, p. 4 (Kosa admitted to receiving e-mail referring to Floyd as Theresa's "other half", McLaughlin explained relationship and harassment to Griffith). The comparator was allowed to be unavailable for reasons related to his girlfriend but Appellant's similar unavailabilities were used to terminate her. App.-89-92. Appellant showed that once the false entries and double counting are removed from the list of 21, her 7 to 10 unavailabilities are less than the comparator's approximately 13 unavailabilities. App.-76-80.

4. This Court's rules governing the interpretation of collective bargaining agreements were misinterpreted, causing the Ninth Circuit to not find a property right in Appellant's job.

The Ninth Circuit ruled there was no property right under the Fourteenth Amendment because the CBA stated an employee can be

terminated for any "bona fide reason(s) related to the business operation". App.-4. The Ninth Circuit cited *Allen v. City of Beverly Hills*, 911 F.2d 367,371-72 (9th Cir. 1990).

Allen was a California case and that court stated, "in California … public employment is not held by contract but by statute ..." *Allen*, 911 F.2d at 373.

The present case is a Washington State case and in Washington, the Legislature authorized the MEBA union and the State of Washington to negotiate the terms of a collective bargain agreement and enter into an agreement. App.-25, Wash.Rev.Code § 47.64.170. Therefore, we need to look to the terms of the CBA to interpret the degree of the property right conferred.

By not analyzing the meaning of the phrase "bona fide" in the CBA phrase, "bona fide reason(s) related to the business operation", the Ninth Circuit ceded the interpretation to the government employer. The words "bona fide" created a definite limit on the employer that qualify as an expectation of entitlement and protected property interest. *Board of Regents v. Roth*, 408 U.S. 564,577 (1972).

The Ninth Circuit's opinion violates important precedent of this Court when interpreting collective bargaining agreements. S.Ct.R. 10(c). Collective bargaining agreements are generally governed by federal law and traditional rules of contract construction apply when not inconsistent with federal labor law. See *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157,160-61 (1966)(citation omitted), in which this Court stated;

> "In order to interpret such an agreement it is necessary to consider … the practice, usage and custom pertaining to such agreements. This is particularly true when the agreement is resorted to for the purpose of settling jurisdictional dispute over work assignments." *Id.*, 385 U.S. at 161.

Here the phrase, "bona fide reason(s) related to the business operation" is not defined in the CBA. We therefore turn to the practice, usage and custom pertaining to such agreements.

a. The Appellees' employment law specialist designated in the hiring letter to interpret the rules that applied to Appellant created a limit on the ability to terminate and a property right under the Fourteenth Amendment.

When Appellant received her hiring letter, Manning was designated in the letter to interpret the rules that applied to Appellant's employment. App.-70. At one point Kosa asked Manning to evaluate whether the Trimmer e-mails, all unavailabilities, and all other issues met the termination standard under the CBA. App.-56. Manning indicated the unavailabilities and all other issues did not meet this standard, "… right now you have nothing." App.-55. This shows the wording of the CBA placed a limit on the decision maker, and a property right.

Second, the Appellees refused to provide the unavailabilities of the comparators in discovery.

The Appellant therefore deposed one of the comparators who had approximately 13 unavailabilities with two associated with his girlfriend and he was not terminated. App.-89-92. Appellant had 7 to 10 unavailabilities, including two related to her boyfriend, and she was terminated. App.-82.

The comparator with more unavailabilities was not fired, which means the practice, usage, and custom of the phrase "bona fide reason(s) related to the business operation" placed a limit on the employer and was an expectation of entitlement and protected property interest.

b. The Ninth Circuit's interpretation of this Court's precedent gives an employee bringing a claim under the Fourteenth Amendment fewer rights than similar statutory enactments.

The inconsistency of the Ninth Circuit's interpretation can be seen in a comparative study of other statutes. In other employment statutes such as the Age Discrimination in Employment Act, the phrase "bona fide" is used in the phrases: bona fide occupational qualification, bona fide seniority system, and bona fide employee benefit plan but it is not defined. See 29 U.S.C. § 623(f). If we were to simply say the phrase "bona fide" is not defined in the statute, and therefore we have to defer to the employer, there would be no limits on the employer and it would frustrate the purpose of the statute.

Similarly, if one were to say the CBA's "bona fide" requirement means whatever the employer decides, then the phrase becomes meaningless. It

would ignore this Court's rules for interpreting collective bargaining agreements. Employees bringing a claim under this provision would have less protection under the Fourteenth Amendment than they would under statutory enactments using this phrase such as the Age Discrimination in Employment Act. *Id*.

c. The LaCroix unavailability was not a bona fide reason related the business operation and Appellant had fewer unavailabilites than other employees who were not terminated.

The LaCroix unavailability can be dealt with several ways. First, Manning effectively ruled 19 unavailabilities are not a bona fide reason related to the business operation. App.-55,74. Appellant later showed at least 11 of the 21 are false or double counted with documentation. App.-76-80.

The second reason the unavailability related to the LaCroix harassment is not dispositive is because the comparator had 13 unavailabilities and he was not terminated, and Appellant's 7-10 are less than 13. The Appellees withheld the comparator e-mails to the present day. As the non-moving party in summary judgment, Appellant is entitled to a presumption the other comparators had this number or more unavailabilities. *Anderson,* 477 U.S. at 249.

Third, the unavailability related to the LaCroix harassment (which is double counted) was needed because LaCroix tried to intimidate Appellant after she caught him shorting her pay in violation of the CBA and State Law. Appellant

showed how the shorting scheme worked by showing Appellee Trimmer was engaged in the same scheme in that he was shorting the time of junior employees then claiming that time himself. This allowed him to claim overtime on his chief's pay and "clean" on his off time at $87 per hour. Appellant received approval for the unavailability related to the LaCroix harassment, albeit on short notice due to harassment, and there was no effect on the ferry because it was tied up at the time. App.-81.

Finally, public policy does not support finding an unavailability related to resisting an illegal pay padding scheme, a bona fide reason related to the business operation.

5. Having found no property right in her job, the Ninth Circuit did not discuss Appellant's Procedural Due Process claims.

The Ninth Circuit opinion found no property interest, so it did not discuss Appellant's Procedural Due Process claims.

Public employees with a property right in their job are entitled to a termination hearing that must give the employee notice of the alleged disciplinary charges and a right to respond. U.S. Const., amend. XIV, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532,538-39 (1985). Appellant showed above she had a property right in her job.

Procedural Due Process requires a consideration of the private interest affected, the risk of an erroneous deprivation, and the probable

value of additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319,335 (1976).

Here there are two time periods. First, in late 2013, Appellant was terminated with no hearing. App.-82. The private interest was great because she spent 18 months preparing for the job, which included specialized schooling in another state and an internship.

The risk of erroneous deprivation was high because 15 days before, Manning stated on November 7, 2013 Appellant's unavailabilities did not meet the standard for termination, and more than half were shown to be false or double counted. App.-55,74. Appellant's 7-10 unavailabilites were less than other comparators. App.-89-92. Therefore Appellant should not have been terminated. This means the additional safeguards would have been valuable with almost no cost other than a short hearing.

The second Procedural Due Process violation was the placement of the Appellant on an illegal blacklist with no notice or opportunity to be heard. This action should be a prima facie violation of the Fourteenth Amendment, because it is illegal, and once on the list, Appellant was not able to get off the list when she showed her termination was wrongful. App.-26,48.

The third Procedural Due Process violation was the 2014 constructive discharge with no notice or opportunity to be heard. App.-84. The union decided Appellant had been wrongfully terminated in 2014, hired her under the CBA, and sent her name to be dispatched. Appellant was on the blacklist so she was not dispatched, so she was constructively discharged.

6. Appellant's Substantive Due Process rights were violated when the termination was based on false information, and after she was rehired, a blacklist caused a constructive discharge.

Substantive due process is violated when officials act in an arbitrary or capricious manner, or in a manner that shocks the conscience. U.S. Const., amend XIV, *County of Sacramento v. Lewis*, 523 U.S. 833,845-46 (1998), *Harrah Independent School District v. Martin*, 440 U.S. 194,198 (1979). This right includes a right to be "free from discharge for reasons that are arbitrary and capricious, or for reasons that are trivial or unsupported by a basis in fact. *Id*.

Appellant was terminated without any Code of Conduct charges being alleged. The unavailabilities also contained false statements. Appellant had fewer unavailabilities compared to other employees who were not fired, and the only unavailabilities after the employment specialist made her ruling related to the LaCroix harassment. App.-76-80,89-92.

Appellant was then put on a blacklist that violated state law and caused a constructive discharge the following year when her union rehired her. These facts are arbitrary and capricious and unsupported by a basis in fact. *County of Sacramento*, 523 U.S. at 845-46, *Harrah Independent School District*, 440 U.S. at 198. The blacklist also shocks the conscience.

7. The Ninth Circuit misinterpreted this Court's long line of cases that have defined the Liberty Interest under the Fourteenth Amendment.

The Ninth Circuit's opinion decides the Appellant's Fourteenth Amendment Liberty Interest claims in a way that conflicts with decisions of this Court. S.Ct.R. 10(c), U.S. Const., amend XIV.

This Court has ruled public employees have a Fourteenth Amendment liberty claim under 42 U.S.C. § 1983 against supervisors who make adverse statements about the employees. *Paul v. Davis*, 424 U.S. 963,701,708-10 (1976)(citing *Roth*, 408 U.S. at 577). The rule in *Paul* has come to be known as the "stigma plus" test for establishing deprivation of liberty based on governmental defamation and requires a stigmatizing statement, the accuracy of which is contested, plus the denial of some more tangible interest or the alteration of a right or status. *Paul,* 424 U.S. at 701,711.

a. The blacklist violated Appellant's Fourteenth Amendment Liberty Interest, because it prevented Appellant from being dispatched in 2014 after the union rehired her under the CBA.

The Ninth Circuit applied *Hyland v. Wonder,* 972 F.2d 1129 (9th Cir. 1992) and found the blacklist did not severely stigmatize appellant. App.-4. This misinterprets *Paul* and *Roth*, because it redefines a tangible interest or an alteration of a

right, since the blacklist caused the constructive discharge. *Paul,* 424 U.S. at 711.

After the Appellant was fired in 2013, she was put on a blacklist and therefore could never be hired. The blacklist violates state law. App.-26,48. Appellant's union reviewed her case in 2014 and ruled she had been wrongfully terminated and the union rehired her under the CBA and sent her name to the WSF management for dispatching. App.-83,84. Since Appellant was on a blacklist, and there was no known procedure for getting a name off the blacklist, she was not dispatched. *Id*.

Thus the blacklist prevented Appellant from being dispatched and caused a constructive discharge, economic harm, and emotional distress.

b. The Griffith e-mail leaked to the Press, was initially circulated internally to all WSF workers and labeled the whistleblowers "former disgruntled employees".

A few months after Appellant filed her case in the District Court, a group of 50 engine room chiefs plus a few others attempted an unsupported pay raise. App.-40. They wanted an unsupported pay raise as hight as $70,000. *Id*. The whistleblowers believe the WSF is sinking into debt so they blew the whistle to KING-5 News.

KING-5 News wrote and broadcast a story on the proposed raise, showing the pay padding at the WSF is still a matter of great public concern. Griffith stated she had a study that supported the requested pay raises. App.-46. Hours before the story was aired, Griffith sent an e-mail to all WSF employees and blamed the criticism on "former

disgruntled employees." *Id.* KING-5 then proved Griffith's study showed the managers were already being overpaid. App.-36.

The Griffith e-mail violated Appellant's Fourteenth Amendment Liberty interests in two ways. First, internally, it damaged her reputation and effectively made it impossible for her to get work with any person or company associated with those who received the e-mail, because it made her look like she was stabbing her fellow union members in the back after being fired.

Combined with the blacklist, the e-mail put a cloud over Appellant's loyalty to the union and any future employer. Externally, it damaged her reputation because it was leaked to the Press and made a part of the later story when Griffith resigned.

The oiler job Appellant trained for is part of a larger engine room team in a large engine room. These engine rooms exist on larger vessels such as ferries, cargo ships, and cruise ships. Appellant would have to move to another state to work on a similarly large ferry, or ship out to other ports on a larger vessel to use her training. Appellant would face some of the same union managers and former ferry managers who received the memo, and thus her ability to use her training is mostly destroyed.

8. The Ninth Circuit's opinion created an important federal question regarding when Electronically Stored Information, must be produced.

The Ninth Circuit affirmed the District Court rule that a party which has reasonably

accessible electronically stored information can limit the identification and production of the electronically stored information by requiring search terms. App.-5. This is an important federal question that has not been, but should be decided by this Court. Sup.Ct.R. 10(c).

Under the discovery rules, a Court has the authority to order discovery or grant a discovery default. Fed.R.Civ.P. 37(b)(2)(A)(vi), 37(c)(1)(C), *Fair Housing of Marin v. Combs*, 285 F.3d 899,905-06 (9th Cir.), cert. denied, 123 S.Ct. 536 (2002).

a. The standard of review for the legal interpretation of "reasonably accessible" for electronically stored information should be de novo.

Generally, the standard of review for an order denying a motion for a discovery default and denying in part a motion to compel discovery is abuse of discretion. *Fair Housing of Marin*, 285 F.3d at 905. Where discovery sanctions relate to the resolution of a legal issue, the review is de novo. *Palmer v. Pioneer Inn*, 338 F.3d 981,985 (9th Cir. 2003). The Ninth Circuit appears to have only applied the abuse of discretion standard. App.-5. The standard for interpreting the legal definition of "reasonably accessible" as it relates to electronically stored information under Federal Rules of Civil Procedure 26(b)(2)(B), 33(a)(1), and 34(a)(1)(A) should be de novo. *Palmer*, 338 F.3d at 985.

b. After a party locates and reads responsive e-mails, they are "reasonably accessible" for interrogatories and requests for production under an objective test, and the party can not limit or condition production on search terms.

The issue is whether a party can limit or condition the identification and production of e-mails under Rule 34(a)(1)(A), on the requesting party guessing what words are in the e-mails with search terms, where the party resisting production has shown the e-mails are reasonably accessible by locating, reading, and collating the e-mails.

Federal Rule of Civil Procedure 26(b)(1) states in part: "… Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case …" Fed.R.Civ.P. 26(b)(1).

The party resisting production has the burden to show the e-mails are not reasonably accessible because of undue burden or cost. Fed.R.Civ.P. 26(b)(2)(B). A party is not required to provide electronically stored information if the information is not reasonably accessible because of undue burden or cost. *Id*. This test should be an objective one. The 2006 Advisory Committee Notes on Rule 26(b)(2)(B) state a party, "should produce electronically stored information that is relevant, not privileged, and reasonably accessible." Fed.R.Civ.P. 26(b)(2)(B) advisory committee's note (2006).

Later in the notes, the Advisory Committee again states there is a precondition of finding information not reasonably accessible before a

party can limit the production of the information; "If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible …" *Id*. It is only after the electronic information is determined to be reasonably inaccessible that search terms are required. *Id*.

The Advisory Committee's approach is common sense, because requiring an Appellant to guess what words were in the Appellees' e-mails related to Appellant, which the Appellees already read and were using to prepare their defense would make the discovery rules largely meaningless. Since the Appellees read the e-mails, it would have taken 30 seconds to drag them onto a thumb drive. Dist.Ct. dkt. 23, p. 57.

Requiring the Appellees to provide the e-mails related to the Appellant they read and were using to prepare their case is consistent with the Chief Justice's commentary on proportionality and the needs of the case, and the purpose of the rules to be just, speedy, and inexpensive. Fed.R.Civ.P. 1, Chief Justice John Roberts, "2015 Year-End Report on the Federal Judiciary," December 31, 2015, p. 5.

After realizing they could not reasonably claim the e-mails they were using were inaccessible, Appellees stated they might want to redact the e-mails, without citing a valid privilege as required by the interrogatory instructions. App.73.

During a discovery conference, the Appellees started citing statistics gleaned from the withheld e-mails, which shows they had read the e-mails in great detail and collated the information. Dist.Ct. dkt. 23, pp. 57.

c. The union copies of Appellees' smoking gun e-mails show the motive for the withholding, and the Appellees continue to withhold e-mails and other documents.

Smoking gun e-mails identify the motive for withholding e-mails in this case. The union was following this case and noticed key documents related to the blacklist, or blacklists, had not become a part of the case. Therefore, a few weeks before the end of discovery, the union provided their copies of some of Appellees' e-mails to the Appellees. One of the union officials who had copies of the e-mails was set to testify in Appellant's case. The Appellees then gave those e-mails to Appellant on or about the last day of discovery. App.-48,49. The e-mails show Kosa distributing one of the blacklists that contained Appellant's name. *Id*. Many other e-mails continue to be withheld.

I. CONCLUSION

The Appellant requests the Court grant the petition for a writ of certiorari. The Court should reverse the Ninth Circuit's decision upholding the District Court's Order granting Summary Judgment, reinstate Appellant's claims, and remand the case for trial. To the extent the Court addresses the discovery issues, the Court should order the production of the withheld discovery related to the Appellant and the comparators.

Dated this 19th day of November, 2019.

Respectfully Submitted,

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/s/ Shawn Hart

_____

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APPENDIX

FILED
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US COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THERESA ORTLOFF, former Employee of the Washington State Ferries and a single woman Plaintiff-Appellant, v. DAVE TRIMMER, Chief of the Washington State Ferries, et al., Defendants-Appellees.	No. 18-35538 D.C. No. 2:16-cv-01257-RSL Western District of Washington, Seattle ORDER

Before: BOGGS,* BERZON, and WATFORD, Circuit Judges.

Judge Berzon and Judge Watford have voted to deny the petition for rehearing en banc, and Judge Boggs has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

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* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

773 Fed.Appx. 903 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

Theresa **ORTLOFF**, former employee of the Washington State Ferries and a single woman, Plaintiff-Appellant,
v.
Dave **TRIMMER**, Chief of the Washington State Ferries; et al., Defendants-Appellees.

No. 18-35538
Submitted July 12, 2019* Seattle, Washington
FILED July 18, 2019

Attorneys and Law Firms

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Appeal from the United States District Court for the Western District of Washington, Robert S. Lasnik, District Judge, Presiding, D.C. No. 2:16-cv-01257-RSL

Before: BOGGS,** BERZON, and WATFORD, Circuit Judges.

MEMORANDUM***

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-6.

Theresa Ortloff sued several Washington State Ferries officials after she was discharged from her job as a probationary on-call oiler for the State Ferries. She alleges that she was discharged on account of First Amendment protected behavior and that her Fourteenth Amendment due-process rights were violated. The district court granted summary judgment to the State Ferries officials. We affirm.

1. The district court properly granted summary judgment on Ortloff's First Amendment claims. Ortloff did not submit evidence that would allow a reasonable juror to conclude that the asserted First Amendment protected activity was a substantial factor in her discharge. See *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009). First, nothing in the record indicates that Ortloff's discharge was connected to any expressive association with Floyd McLaughlin. Second, the record also does not contain any facts connecting

Ortloff's discharge to championing the rights of probationary employees generally.[1]

2. The district court also properly awarded summary judgment to the State Ferries officials on Ortloff's Fourteenth Amendment claims. Under the collective-bargaining agreement governing Ortloff's employment, the State Ferries could discharge ***904** her for any "bona fide reason(s) relating to the business operation." Employees who can be discharged for any bona fide reason lack a property interest in their employment. See *Allen v. City of Beverly Hills*, 911 F.2d 367, 371–72 (9th Cir. 1990).

Nor can Ortloff make out a Fourteenth Amendment claim based on either the State Ferries' decision to place her on a do-not-hire list, or the reference in a press release to certain "disgruntled former employees." Fourteenth Amendment due-process protections based on government defamation are triggered only when a person is "severely stigmatize[d]" by the government statement. *Hyland v. Wonder*, 972 F.2d 1129, 1141 (9th Cir. 1992). There is no evidence that Ortloff's inclusion on a single employer's do-not-hire list was "genuinely debilitating," as she could obtain jobs elsewhere. *Id*. Nor does the record, viewed favorably to Ortloff, support the conclusion that any member of the public would interpret the press release mentioning "disgruntled former employees" as

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[1] Even if there were such a connection, it is questionable whether the First Amendment would protect Ortloff from discharge on that account. See *Connick v. Myers*, 461 U.S. 138, 146 (1983).

referring to Ortloff, or that any such interpretation, if it occurred, would be severely stigmatizing.

3. The district court did not abuse its discretion in denying Ortloff's motion for default judgment, based on asserted misconduct by the State Ferries officials during discovery. The district court reasonably concluded that the discovery dispute between the parties was the product of unreasonable behavior on both sides, and that even though the defendants were in part to blame for the impasse, their conduct was not the type of "extreme circumstance[ ]" that would warrant issuing a default judgment. *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Const. Co.*, 857 F.2d 600, 603 (9th Cir. 1988).

AFFIRMED.

App. 6

United States District Court
WESTERN DISTRICT OF WASHINGTON

THERESA ORTLOFF,	JUDGMENT IN A CIVIL CASE
v.	
	CASE NUMBER:
DAVE TRIMMER	C16-1257RSL

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Judgment is entered in favor of defendants against plaintiff.

May 30, 2018

William M. McCool
Clerk

/s/ Kerry Simonds
By, Deputy Clerk

2018 WL 2411755

United States District Court, W.D. Washington,
at Seattle.

Theresa **ORTLOFF**, Plaintiff,
v.
Dave **TRIMMER**, et al., Defendants.

Case No. C16-1257RSL
Signed 05/29/2018

Attorneys and Law Firms
Shawn G. Hart, Seattle, WA, for Plaintiff.
Newell David Smith, Scott M. Barbara, Attorney General of Washington, Seattle, WA, for Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Robert S. Lasnik, United States District Judge

***1** This matter comes before the Court on "Defendants' Motion for Summary Judgment." Dkt. # 36. The Court has reviewed the parties' memoranda, declarations, exhibits, and the remainder of the record.[1] For the following reasons, the motion is GRANTED.

[1] The Court concludes the motion can be decided on the papers submitted. Plaintiff's request for oral argument is denied.

I. BACKGROUND

In this civil rights case, plaintiff Theresa Ortloff claims that her constitutional rights were violated when she was terminated from her job as an oiler with the Washington State Ferries (WSF).

Plaintiff started with WSF in July 2013, after being hired as an "on call" oiler under a probationary employment arrangement. Probationary employment is a way for employers to evaluate employees during a trial period in order to gauge the employee's job performance before permanent employment is granted. The terms of plaintiff's employment were governed by a Collective Bargaining Agreement (CBA), the relevant portion of which provides:

> Newly hired employees shall serve a probationary period of five (5) calendar months. The employee may be terminated during the probationary period or at the end of a probationary period for a bona fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

Dkt. # 38-1 at 3.

Plaintiff claims she was mistreated and eventually terminated because she advocated for probationary employees and because she was dating Floyd McLaughlin, a WSF engineer who previously testified in a widely publicized whistleblower case against the agency. She relies on a number of interactions and email conversations as evidence of mistreatment, abuse, and retaliation.

In August 2013, plaintiff had a negative interaction with defendant David Trimmer, the Chief Engineer aboard the ferry Chelan. Afterward, Trimmer wrote an email to the oiler dispatcher and to defendant Elizabeth Kosa, the Senior Port Engineer and one of plaintiff's supervisors. In it, he asked that plaintiff not be assigned to the Chelan again because she lacked "a basic level of understanding of ship board systems and operations." Dkt. # 38-1 at 6. He followed up in that email conversation by listing in detail plaintiff's shortcomings and the reasons he did not want her assigned to his vessel again. Dkt. # 38-1 at 5.

Plaintiff also had a dispute with Chief Staff Engineer Michael LaCroix, who is not a defendant, over the proper pay code for what appears to be one hour of work in November 2013. See Dkt. # 38-1 at 14–16 (Ortloff-LaCroix email exchange); Dkt. # 49-2 at 12 (timesheet). Days later, plaintiff called and cancelled her shift aboard the ferry Kennewick because LaCroix would also be working aboard. Her last-minute cancellation drew a complaint from the vessel's captain. Dkt. # 38-1 at 8–9.

Plaintiff had difficulties with other cancellations and unavailabilities, which were of concern because the on-call nature of her position required that she be available in case dispatch needed to bring her in. In particular, the dispatcher discussed with plaintiff that she called in as unavailable because she was driving McLaughlin to the airport. Dkt. # 37-1 at 30.

***2** Eventually, the complaints about plaintiff's work performance and unavailability during her probationary period led management to decide she should be terminated. Plaintiff was terminated in a letter dated November 22, 2013, and sent by defendant Steven Vonheeder, Director of Vessels. The letter read in relevant part:

> I have determined your performance and commitment to Washington State Ferries during your probation period does not meet expectations of an On-Call employee by being available for work at all times. On too many occasions you have been called to be dispatched and assignments have been refused or negotiated for a variety of reasons.

Dkt. # 41-1 at 2.

In 2014, plaintiff again sought to be hired as an oiler but was unsuccessful. Plaintiff later learned that her name appeared on a "Do Not Hire" list—a list of individuals management had decided not to hire again in the future. See Dkt. # 48 at 163.

Plaintiff filed a complaint under 42 U.S.C. § 1983, alleging that her negative interactions and eventual termination were done in retaliation for constitutionally protected conduct. In particular, she claims that she suffered mistreatment and termination because she was associated with and supported McLaughlin. She claims this engendered animus and hostility against her because of his role in the years-old whistleblower case, which upset

people within WSF. She also claims that her pay dispute with LaCroix amounted to advocacy for the rights of probationary employees, and that her mistreatment and termination were in retaliation for that advocacy. After discovery, defendants moved for summary judgment. Dkt. # 36.

II. DISCUSSION

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The Court will "view the evidence in the light most favorable to the nonmoving party ... and draw all reasonable inferences in that party's favor," *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013), but a "summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data," *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

A. First Amendment Claims

In causes of action one, two, three, and seven, plaintiff claims she was punished in retaliation for

conduct protected by the First Amendment. Her claims allege that she was terminated, harassed, and precluded from being rehired because she advocated on behalf of probationary oilers and because of her association with McLaughlin.

To prevail on her claims, she "must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the punishment." Settlegoode v. Portland Pub. Sch., 371 F.3d 503, 510 (9th Cir. 2004).

Assuming plaintiff's association with McLaughlin or her purported advocacy amounted to protected conduct,[2] the record does not support a reasonable inference that either was a substantial or motivating factor for punishment. She alleges she was punished in the form of harassment, false statements, termination of her probationary employment, and WSF's refusal to rehire her. For defendant Trimmer, she points to their interaction aboard the Chelan and to the emails asking that she not be assigned there in the future. Plaintiff's characterizations of the interaction and emails strain

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[2] The parties do not engage whether plaintiff can survive summary judgment on the element of protected conduct, but the Court has its own doubts. Plaintiff does not cite any cases, nor is the Court aware of any, that hold "association for expressive purposes," Dkt. # 68 at 16–18, can serve as the basis for a cognizable First Amendment claim. As for her advocacy, there is tenuous support in the record whether the grievances she raised with superiors were on a matter of public concern or expressed in her capacity as a private citizen. See *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).

reasonableness based on the record,[3]3 but even if the record supported her assertions that he harassed her, spied on her, or spread false statements about her, nothing in the record connects those alleged bad acts to protected conduct. She homes in on a portion of his email that says, "She should not have an Oilers endorsement. I know how she got it but she shouldn't have it." Dkt. # 49-1 at 9. Plaintiff argues that refers to her relationship with McLaughlin. Trimmer gave a different interpretation in his deposition,[4] but even plaintiff's interpretation does not reasonably give rise to an inference that McLaughlin's previous testimony or plaintiff's advocacy were substantial or motivating

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[3] For example, plaintiff states Trimmer was "spying" on her and "secretly observing" her while she worked, Dkt. # 2, 14, but the record cites supporting those characterizations—which refer to plaintiff's own affidavit—mention nothing of spying or secretive observation, see Dkt. # 49 ¶ 11. She describes Trimmer's email as "abusive," Dkt. # 44 at 2, when it mostly reads like a run-of-the-mill complaint about work performance, Dkt. # 49-1 at 9–10. Finally, she asserts that his email "associated the adjective 'stupid' with Ms. Ortloff," Dkt. # 44 at 2, when the email actually said, "Generally speaking, I do not believe she is a stupid person," Dkt. # 49-1 at 9 (emphasis added).

[4] In his deposition, Trimmer explained his statement as meaning "she got her credentialing, her oilers endorsement, by going to some short-term school for a month or two, and then serving a limited internship on a Washington State Ferry vessel." Dkt. # 48 at 31.

factors for her treatment. See *Settlegoode*, 371 F.3d at 510.

***3** Plaintiff also claims retaliation stemming from the pay dispute with LaCroix. The record does not support a reasonable inference that constitutionally protected conduct was a substantial or motivating factor of any retaliation that might be inferred from that dispute. *See id.*

Finally, plaintiff makes much of the number of times WSF recorded her as unavailable. One of defendants' interrogatory responses reflects twenty-one unavailabilities, but plaintiff makes the case that she was only unavailable ten times. She cites this as evidence that she was fired on pretext. Even were plaintiff correct about the unavailability discrepancy, the record does not suggest it would have made a difference. Instead, the issue with her unavailabilities was that she alerted dispatch at the eleventh hour and was at times unavailable for illegitimate reasons. The apparent discrepancy plaintiff emphasizes is not evidence of pretextual firing or retaliation.

The record simply does not support a reasonable inference that protected conduct was a motivating factor, much less a substantial one, for any of the alleged harassment, mistreatment, or decisions to terminate and not rehire her. Instead, the record suggests the defendants resolved that her performance was not adequate to be kept on after her probationary period and that her performance and interpersonal conflicts also made her unsuitable for hiring a second time. For these reasons, the Court concludes that summary judgment in favor of defendants is appropriate on causes of action one, two, three, and seven.

B. Due Process Claims

Plaintiff's remaining claims allege violations of plaintiff's rights to procedural and substantive due process. "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). Plaintiff claims she was deprived of both a property interest in continued probationary employment and a liberty interest in her reputation, business, and employment opportunities.

1. Property Interest

To make out a due process claim based on a constitutionally protected property interest, plaintiff must show she had a legitimate claim of entitlement to continued probationary employment and not merely "an abstract need or desire" or "unilateral expectation of it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "[T]he existence and dimensions of [claimed property interests] 'are defined by existing rules or understandings that stem from an independent source such as state law.' " *McGraw v. City of Huntington Beach*, 882 F.2d 384, 389 (9th Cir. 1989) (quoting *Roth*, 408 U.S. at 577).

Washington law generally provides that state employees serving under a probationary employment arrangement have no constitutionally protected property interest in continued employment. *State ex rel. Swartout v. Civil Serv. Comm'n of City of Spokane*, 25 Wn.App. 174, 182 (1980). That finds

support in the CBA's text, which explicitly provides that probationary employees may be terminated during the probationary period without recourse to any grievance procedures. See Dkt. # 38-1 at 3.

Plaintiff argues that the CBA creates a property interest because it provides that probationary employees may be terminated "for a bona fide reason(s) relating to the business operation." *Id.* Ninth Circuit precedent makes clear that where the only substantive restrictions on government decisionmaking are "reasonableness" or "good faith," it does not give rise to a constitutionally protected property interest. *Allen v. City of Beverly Hills*, 911 F.2d 367, 371 (9th Cir. 1990); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). Whatever constraints the CBA's "bona fide reason(s)" language places on the termination of probationary employees, it does not create for plaintiff a property interest sufficient to support a due process claim. *See id.* For that reason, the Court concludes summary judgment for the defendants is warranted on causes of action four and five.

2. Liberty Interest

***4** Plaintiff also brings a due process claim based on the deprivation of a constitutionally protected liberty interest. The liberty interest protected by the Fourteenth Amendment extends to a person's right to engage in the common occupations of life. *Hyland v. Wonder*, 972 F.2d 1129, 1141 (9th Cir. 1992). Termination of public employment may implicate that interest if the government "so severely stigmatize[s] the employee that she cannot avail herself of other employment opportunities." *Id.* The

stigma must be "severe and genuinely debilitating" so as to prevent her from taking advantage of other employment opportunities. *Id.* Assertions of general workplace "incompetence or inability to get along with others," however, do not implicate a protected liberty interest. *Wheaton v. Webb-Petett*, 931 F.2d 613, 617 (9th Cir. 1991). In addition, "[u]npublicized accusations do not infringe constitutional liberty interests," *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), and the lost business or employment prospects must extend beyond a specific employer, *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1128 (9th Cir. 2001), as amended (Mar. 14, 2001); *see id.* ("We have consistently held that people do not have liberty interests in a specific employer.").

Here, plaintiff cannot show the existence of a constitutionally protected liberty interest. None of the allegedly stigmatizing statements was made publicly.[5] See *Bollow*, 650 F.2d at 1101. The statements in plaintiff's termination letter were not "severe and debilitating," *Hyland*, 972 F.2d at 1141, and instead appear limited to statements of poor workplace performance, see *Wheaton*, 931 F.2d at 617. Any impairment of future employment prospects resulting from her termination or from the

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[5] Defendant Lynne Griffith's 2016 email addressing a media report about wasteful WSF spending, Dkt. # 49-2 at 39, could not even conceivably amount to a publicly stigmatizing statement. It was written years after this case's relevant events, it mentions "disgruntled former employees" with no suggestion that those employees include plaintiff, and it has no other plausible connection to plaintiff.

refusal to hire her again was limited to WSF. Plaintiff "remained free to obtain employment ... with any other employer," *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961), and WSF was not constitutionally obligated to consider hiring someone it had already terminated once.

The Court concludes that plaintiff has not sufficiently shown a liberty interest adequate to support a due process claim, and that summary judgment for the defendants is warranted on cause of action six.

III. CONCLUSION

For the foregoing reasons, [6] the Court concludes that viewing all the evidence in the light most favorable to plaintiff and drawing all reasonable inferences in her favor, there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment, Dkt. # 36, is GRANTED. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

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[6] Defendants additionally argue that they are entitled to qualified immunity, because plaintiff cannot show violations of a clearly established statutory or constitutional right. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Court need not address those arguments given the Court's conclusion that summary judgment is warranted on the underlying claims.

Not Reported in Fed. Supp., 2018 WL 2411755, 2018 IER Cases 189,541

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THERESA ORTLOFF, Plaintiff, v. DAVE TRIMMER, A Chief of the Washington State Ferries, et al., Defendants.	No. C16-1257RSL ORDER ON PLAINTIFF'S MOTION FOR DISCOVERY DEFAULT OR TO COMPEL DISCOVERY RESPONSES

This matter comes before the Court on plaintiff's "Motion for Discovery Default or to Compel Discovery." Dkt. # 22. Plaintiff seeks an order compelling defendants to produce several thousand emails that defendants mentioned in response to plaintiff's interrogatories. Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows.

In this lawsuit, plaintiff sues her former employer, the Washington State Ferries (WSF), as well as various other WSF employees, for several alleged violations of her constitutional rights, harassment, and retaliation. Plaintiff seeks an order requiring defendants to produce all emails in their possession "related to" plaintiff herself, as well as all

emails "related to" six comparator employees. Defendants have indicated that they are willing to produce emails generated by running searches for the seven names in question, but ask plaintiff to provide additional search terms so that they might limit the total number of responsive emails to those that are relevant to this case. Moreover, defendants have by now produced an additional batch of emails "related to" plaintiff herself. Dkt. # 28 at 7. Plaintiff still seeks production of the "comparator" emails, as well as emails "related to" plaintiff from the email accounts of other WSF employees, and argues that defendants' unwillingness to produce all responsive emails is evidence of bad faith.

> You don't need a weatherman To know which way the wind blows. Bob Dylan Subterranean Homesick Blues © Columbia Records 1965

The ill winds that have blown this discovery dispute into this courtroom are a product of an outrageous posture by plaintiff's lawyer (seeking a default judgment of $900,000 for a minor discovery dispute where the primary cause is his own failure to communicate with opposing counsel) and an overly restricted response perspective by the State's lawyer, who must have a better idea of what relevant documents plaintiff is entitled to even without the benefit of agreed "search terms." The Court is extremely disappointed in the fact that this motion was filed, and the parties must do a better job of meeting face-to-face and working through future problems related to discovery.

Under the Federal Rules of Civil Procedure, parties may generally obtain discovery regarding any

non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Information need not be admissible at trial to be discoverable. Fed. R. Civ. P. 26(b)(1). During discovery, parties must, without awaiting a discovery request, provide to the other parties a set of initial disclosures, including copies or descriptions of all documents, electronically stored information, and tangible things that the disclosing party has in its possession or control and that the disclosing party may use to support its claims or defenses, Fed. R. Civ. P. 26(a)(1)(A)(ii). Additionally, a party may request the production of certain documents in the other party's control; the party served with such requests for production must comply within 30 days. Fed. R. Civ. P. 34(b)(2)(A). The party seeking discovery may move for an order compelling disclosure or discovery after good-faith attempts to obtain compliance without court action have been unsuccessful. Fed. R. Civ. P. 37(a)(1).

Though plaintiff requests entry of default against the defendants as a discovery sanction, the Court concludes that default would be a disproportionately harsh penalty in the context of this relatively minor discovery dispute, where – contrary to plaintiff's hyperbolic assertions – there does not appear to be any evidence of willfulness or bad faith. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002) ("In the Ninth Circuit, [default] sanctions are appropriate only in 'extreme circumstances' and where the violation is 'due to willfulness, bad faith, or fault of the party.'" (citations omitted)).

Rather, the dispute here appears to result from the parties' failure to cooperate. Plaintiff's

attorney was wrong to resist defendants' good-faith effort to provide relevant discovery by refusing the request for additional search terms. Such resistance ultimately creates more work for everyone, including the Court. In addition, the State knows enough about the allegations here to figure out what plaintiff needs: any emails from or to any of the WSF defendants mentioning the plaintiff, plus anything mentioning the comparator employees in the context of their refusing work assignments or showing a lack of mechanical aptitude during their probationary periods.

For all of the foregoing reasons, plaintiffs' motion to compel discovery responses (Dkt. # 22) is GRANTED in part. The parties are directed to meet and confer to establish additional search terms that will assist defendants in narrowing the universe of responsive emails to those that are truly relevant to this litigation. This conference shall take place no later than seven days from the date of this order. Once additional search terms have been designated, defendants shall produce the narrowed batch of responsive emails no later than Friday, June 16, 2017. To the extent privacy concerns remain, the parties are encouraged to consider a stipulated protective order limiting the use of discovery materials to this litigation.

DATED this 5th day of June, 2017.

(Signed)

_____

Robert S. Lasnik
United States District Judge

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rev. Code Wash. § 47.64.170

Collective bargaining procedures

…
(2) A ferry employee organization or organizations and the governor may each designate any individual as its representative to engage in collective bargaining negotiations.
…
(7) It is the intent of this section that the collective bargaining agreement or arbitrator's award shall commence on July 1st of each odd-numbered year and shall terminate on June 30th of the next odd-numbered year … . After the expiration date of a collective bargaining agreement negotiated under this chapter, except to the extent provided in subsection (11) of this section and RCW 47.64.270(4), all of the terms and conditions specified in the collective bargaining agreement remain in effect until the effective date of a subsequently negotiated agreement, not to exceed one year from the expiration date stated in the agreement. Thereafter, the employer may unilaterally implement according to law.
…

Rev. Code Wash. § 49.44.010

Blacklisting - Penalty

Every person in this state who shall wilfully and maliciously, send or deliver, or make or cause to be made, for the purpose of being delivered or sent or part with the possession of any paper, letter or writing, with or without name signed thereto, or signed with a fictitious name, or with any letter, mark or other designation, or publish or cause to be published any statement for the purpose of preventing any other person from obtaining employment in this state or elsewhere, and every person who shall wilfully and maliciously "blacklist" or cause to be "blacklisted" any person or persons, by writing, printing or publishing, or causing the same to be done, the name, or mark, or designation representing the name of any person in any paper, pamphlet, circular or book, together with any statement concerning persons so named, or publish or cause to be published that any person is a member of any secret organization, for the purpose of preventing such person from securing employment, or who shall wilfully and maliciously make or issue any statement or paper that will tend to influence or prejudice the mind of any employer against the person of such person seeking employment, or any person who shall do any of the things mentioned in this section for the purpose of causing the discharge of any person employed by any railroad or other company, corporation, individual or individuals, shall, on conviction thereof, be adjudged guilty of misdemeanor and punished by a fine of not less than

one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than ninety days nor more than three hundred sixty-four days, or by both such fine and imprisonment.

Rev. Code Wash. § 49.52.050(2)

Rebates of wages - False Records - Penalty

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

…

(2) Willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

…

Shall be guilty of a misdemeanor.

46 C.F.R. § 15.405

Familiarity with vessel characteristics.

Each credentialed crewmember must become familiar with the relevant characteristics of the vessel appropriate to his or her duties and responsibilities prior to assuming those duties and responsibilities. As appropriate, these may include, but are not limited to, general arrangement of the vessel, maneuvering characteristics, proper operation of the installed navigation equipment, proper operation of firefighting and lifesaving equipment, stability and loading characteristics, emergency duties, and main propulsion and auxiliary machinery, including steering gear systems and controls.

46 C.F.R. § 199.180(b)(1)

199.180. Training and drills.

(1) Every crewmember with emergency duties assigned on the muster list must be familiar with their assigned duties before the voyage begins.

29.08 Licensed officers assigned to vessels in a licensed capacity shall not perform work normally assigned to unlicensed personnel except in case of emergency.

33.01 Newly hired employees shall serve a probationary period of five (5) calendar months. The employee may be terminated during the probationary period or at the end of a probationary period for a bona fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

(WSF Logo)
Washington State Ferries HRSM GENR 0030

Code of Conduct

Policy

WSF shall enforce rules of professional conduct for all WSF employees.

Objective

To maintain an effective, productive and professional work environment.

Responsibility

Upon acceptance of employment with WSF, each individual employee agrees to abide by these and other lawful rules and regulations.

WSF management is responsible for enforcement of Code of Conduct and will respect the civil rights, constitutional rights collective bargaining agreement rights and Merit System rights of employees and will not violate those rights in the execution of it disciplinary processes.

Procedure
Progressive Disciplinary Process

The progressive disciplinary process includes:

- Verbal counseling used to alert employee of violation(s), of rules, or below standard work performance.
- Written notices used to formally notify employees of rule violations(s), serves as a warning for future violations, and provides an action plan for corrective action.
- Suspension (may be the first step in progressive discipline for a more serious offense)
- Reduction in salary or demotion to a position of lower classification.
- Termination of employment occurs when a verbal or written warning, suspension, or reduction in salary or demotion is not effective in achieving the desired change of behavior.

If you are found to have violated rules 1 through 6, you may be immediately terminated from employment.

1. Insubordination

…

2. Alcohol or Illegal Drug Use

…

3. Theft

…

4. Neglect of Duties

…

5. Falsification of Documents or Disclosure of Confidential Records

…

6. Criminal (or Disorderly) Conduct

…

Note: Failure to abide by the following rules may lead to disciplinary action up to and including

immediate termination or, if less serious, to progressive discipline.

7. Unauthorized Possession of Weapons

…

8. Cash/Check Handling Procedures

…

9. Violation of Safety Rules

…

10. Dependability

Failure to report for work on time or repeated absences from duty.

11. Discrimination or Harassment

…

12. Unethical Conduct

…

13. Threats or Acts of Violence

…

14. Discourtesy to Others

…

15. Violations of Policies and Rules

…

16. Work Regulations

…

17. Abandoning Worksite

…

18. Off-Duty Conduct

…

19. Poor Work Performance

Repeated failure to perform duties at the level or standard required of your assigned position.

20. Testing positive for alcohol or drugs while at work, but not being under the influence.

…

State Ferries apologizes for misleading claims about pay raises

The Washington State Ferry system is correcting inaccurate information its director released in advance of a KING 5 Investigation last week.

Author: Susannah Frame
Published: 5:54 AM PST December 2, 2016

On Monday, November 21, the KING 5 Investigators reported on pay increases for some ferry workers recommended and supported by State Ferries management. While the average American will receive a 3% increase in 2017 and federal employees are set to see a 1% bump in pay, two groups of ferry employees are on tap to get 25% and 28% pay raises over the next two years. The groups are approximately 25 staff masters (also known as captains) and 25 staff chief engineers who oversee operations below deck in the engine room.

Minutes before the 10 p.m. broadcast on the November 21, a ferry worker forwarded an internal email to KING written by the top ferry executive, Asst. Secretary of Washington State Ferries Lynne Griffith. Griffith sent the communication to all ferry employees. In it she criticized the upcoming news report for disregarding data that supported the double-digit raises.

"The media report tonight is based, in part, on comments from disgruntled former employees and ignores the recruitment and retention study that

clearly demonstrates the gap in their compensation. I believe this type of media coverage does not accurately reflect how you are valued by our organization and the communities we all serve," wrote Griffith.

Griffith did not communicate to the approximately 1,600 employees that neither she nor any member of her executive team had shared any sort of recruitment and retention study with KING 5. The reporters met with Griffith and her top management for approximately one hour to discuss the raises and other new perks for ferry workers four days prior to the broadcast.

In the email to staff, Griffith pointed to the survey as the core reason behind the proposed wage hikes. "(The raises were) based on factual information from a comprehensive salary survey," wrote Griffith. State Ferries offered the survey as the basis for the increases in communications to the Governor's Office as well.

KING 5 has since analyzed the 128 page 2016 Marine Employees' Compensation Survey, compiled by the state's Office of Financial Management (OFM), the budget wing of the Office of the Governor. KING has found the survey does not support the proposed increases. In fact, staff chief engineers for Washington State Ferries make 20% more, not 25% less, than the comparable group cited in the study. State Ferries staff masters earn a base wage of 0.1% less than the comparable group, not 28% less.

After alerting State Ferries that the data didn't support the increases as outlined to the workforce and the Governor's Office, the agency's communications director said that was a "communications error."

"It was not fair of us to put that in the email," said Ian Sterling, Communications Director for State Ferries. "I apologize for that….it's erroneous to say the salary increases were based on the survey. It's not a useful document (in this context)."

Sterling said he'd done additional research to find better comparisons than those used by OFM, as the 2016 Marine Employees' Compensation Survey found only one comparable maritime entity to compare to WSF salaries – the Alaska Marine Highway System.

Asst. Secretary Griffith told KING that the raises were needed for several other reasons as well:

– The positions are critical for safe and efficient operations of the boats.
– Many of these employees are approaching retirement age, and a higher pay is needed to attract people to replace them.
– Some employees with less responsibility earn a base wage that's higher than the staff chief engineers and the staff masters

"So it's an equity issue and a fairness issue and it's the right thing to do," said Griffith, who came to State Ferries in 2014. "This is recommended by management and the reason it was, is because one, we have the best of the best. I want to keep them,

and I want to be sure we're attracting the best of the best in the future."

A staff chief annual base wage is about $99,000. But with overtime, travel time and other perks, these workers routinely take home much more. In 2015 the average take home pay was approximately $150,000 per year. One of the top earners collected $171,000 in total compensation. Assuming this staff chief continues earning overtime and other added payments, the 25% raise would increase his total compensation to $214,000 - more than double his base wage.

"Everybody was really blindsided by this (proposed increase)," said a current ferry employee who did not want to be identified. "Someone who is already making almost $200,000 a year and you're going to give them a 25% increase? That's a BMW every year. And that's a game changer when it comes to pensions."

The co-chair of the state's Joint Transportation Commission was surprised to learn of the proposed raises.

"How do you justify this in a system that is hurting for money?" asked Sen. Curtis King, R-Yakima. "It's a system that we've had to scrape and find money so that we can replace the boats and we can keep this system alive. This doesn't make any sense to me." The collective bargaining agreements have been agreed to by the unions representing State Ferries employees and management, but the legislature has the final say.

Whopping pay raises on deck for some ferry workers

Susannah Frame, KING 4:40 AM. PST November 22, 2016

About 50 Washington State Ferries employees could get huge pay increases next year if the contract negotiated between ferry system managers and the workers' unions is approved.

The raises would cost the state an additional $1.2 million a year and would come at a time when the ferry system continues to face budget challenges, and riders are being asked to pay more.

Without prompting from the workers' unions, ferry system managers suggested a pay hike of 28 percent for the approximately 25 staff masters (also known as captains) working in the fleet. A 25 percent raise was proposed for the fleet's staff chief engineers -- the approximately 25 workers who oversee operations below deck.

The double-digit raises for the two groups still need to be approved by the legislature. In the meantime, most other ferry employees are set to receive pay increases of between 4 percent and 8 percent in the next biennium.

The system's top executive, Assistant Secretary of Washington State Ferries Lynne Griffith, said the proposed boosts in pay are reasonable because the positions are critical for safe and efficient operations of the boats. She also said the current base pay isn't competitive with private industry, and since many of these employees are

approaching retirement age, higher pay is needed to attract people to replace them.

Griffith also justified the raises by noting that some other ferry workers with less responsibility earn higher base pay.

"So it's an equity issue and a fairness issue, and it's the right thing to do," said Griffith, who came to State Ferries in 2014. "This is recommended by management and the reason it was, is because one, we have the best of the best. I want to keep them, and I want to be sure we're attracting the best of the best in the future."

A staff chief annual base wage is about $99,000. But with overtime, travel time and other perks, these workers routinely take home much more. In 2015 the average take home pay was approximately $150,000 per year. One of the top earners collected $171,000 in total compensation. Assuming this staff chief continues earning overtime and other added payments, the 25 percent raise would increase his total compensation to $214,000 - more than double his base wage.

The co-chair of the state's Joint Transportation Commission was surprised to learn of the proposed raises.

"How do you justify this in a system that is hurting for money?" asked Sen. Curtis King, R-Yakima. "It's a system that we've had to scrape and find money so that we can replace the boats, and we can keep this system alive. This doesn't make any sense to me."

The KING 5 Investigators found that the ferry system has changed compensation practices in the five years since reforms were put in place in response to KING 5's investigative series, Waste on the Water.

That series, which aired in 2010 and 2011, revealed millions of tax dollars wasted for years by management providing extra pay to workers, much of which was not part of collective bargaining agreements.

For example, some relief (fill in) workers were able to double their salaries by choosing to work routes far from their home and getting paid travel time and mileage for the long commutes. The investigation also found employees getting paid thousands of dollars a year to drive to and from work for "special assignments" that, despite the short-term implied by their name, lasted for some workers as long as 10, 12 and 15 years.

Staff chief engineers, who run operations below deck, were found to be assigning themselves hundreds of hours of overtime and in some cases gaming the system to earn triple time.

Asked if it seemed reasonable, given the history, to reward staff chief engineers with a 25 percent pay raise, WSF's Griffith said they deserve "every penny that they get."

"Have they had to correct their ways and are there better controls in place? Absolutely. And I'm not going to withhold from them or any other staff chief or staff master because of something that happened in the past that we have since remedied. It doesn't seem fair," said Griffith. "(The problems uncovered in) Waste on the Water (have) been corrected. The management team in place is due diligence. That can't repeat. (The practices) can't repeat. So move on."

But KING 5 found the ferry system agreed to reverse the pay reforms made after Waste on the Water by adding different paths for compensation.

In 2011, WSF quit paying relief workers' travel time to drive to and from work. To make up for the lost travel money, they started to receive "assignment pay" instead. Assignment pay is an additional 20 percent pay bump for every day worked. This premium is paid to all relief workers, whether they drive five or 50 miles to work.

"The Washington State Ferry negotiating team felt we had a good opportunity after Waste on the Water to cut some costs and take care of the travel time abuses taking place," said former WSF Operations Director Steve Rogers, who served on the collective bargaining team for 16 years.

"But it backfired because the Labor Relations Office (LRO) wasn't concerned with eliminating the cost factor as much as eliminating the public perception," Rogers said.

The LRO negotiates master agreements on behalf of the governor with union-represented employees.

"The governor's negotiators were willing to appease the unions without taking anything away from them and changing the perception at the same time. I told them the perception ruse wasn't going to last long," said Rogers.

A representative from Gov. Inslee's office told KING they couldn't address the allegations made by Rogers.

"We can't speak to previous negotiations. Regardless of comments from former employees, the data demonstrates there is a market gap. There are 46 individuals in these classifications who are central to managing safety for all passengers and crew," wrote Tara Lee, Deputy Communications Director, Office of Governor Jay Inslee.

The contract for years 2017 and 2018 includes assignment pay enhancements. Now the relief workers are scheduled to receive the premium pay meant to make up for lost travel compensation, even when they're not driving anywhere. The 20 percent extra will be added to their checks when the employees are sick, on vacation or using comp time.

"That usurped everything we thought we may have gained. Now you're getting an hour-and-half equivalent of travel time pay even if you're sitting in Hawaii," said Rogers.

WSF's Griffith said she didn't know why the employees are set to receive the money meant to make up for travel time but that she would look into it. The perk is expected to cost State Ferries more than $400,000 per biennium.

Waste on the Water also prompted the legislature to reduce overtime pay rates from double time to time-and-a-half. The goal was to bring the compensation in line with other state employees. But in the years since that change was made, WSF agreed to "call back pay" -- when ferry workers are called in on a day off they receive time-and-a-half for all hours worked, plus an additional four hours of straight time pay. The addition essentially brings the overtime rate back to double time. (Employees working overtime hours on a regularly scheduled day do not receive the call back pay.)

"They're right back to where they started. They're at double time for eight hours," said former WSF manager Pete Williams. Williams negotiated collective bargaining agreements for the ferry system for 11 years.

"They took a temporary reduction over the years, but they gained back equal to or in some cases more than they had before," he said. "It's ridiculous."

Sponsor of the legislation that reduced overtime pay to time-and-a-half, Rep. Judy Clibborn, D-Mercer Island, wasn't aware of the reorganized pay structure until contacted Monday by KING. She said she's not disappointed in the change.

"If we were still seeing a system with missing runs and people gaming the system like you exposed in Waste on the Water then I would be upset. I'm not upset because we have a well-run, well-oiled ferry system," said Clibborn, who is co-chair of the Joint Transportation Committee. "I'm feeling so good about the way the ferry system is being run today."

Current management is new, and officials said they can't speak to leadership's motivation for adding the new forms of compensation in the years after 2011. But Griffith stands by the jumbo pay raises for some along with other add-ons agreed to by her staff in the most recent rounds at the bargaining table.

"These are highly skilled, technically sound individuals who are responsible for thousands of passengers safety every single trip," said Griffith.

The legislature could ask for changes.

"As we go through the budget process (in the upcoming legislative session) we will start working on the transportation budget and we will see what the justification was (for the raises) and will decide whether or not we want to authorize it," said Sen. King.

From: Griffith, Lynne
Sent: Monday, November 21, 2016 4:01 PM
To: WSDOT WSF All Staff
Subject: Media Coverage

Hello fellow ferry employees.

I am so proud of our system and the hard work you perform every single day. I've had the pleasure of being your Assistant Secretary since September 2014. We've cut the number of missed sailings due to crewing by more than half and made management more responsive and accountable to the needs of the fleet.

We expect media coverage to air on King 5 tonight at 11:00p.m. <https://remotemail.wsdot.wa.gov/OWA/UrlBlockedError.aspx> that focuses on the tentative salary increases negotiated for our Staff Masters and Staff Chiefs. I wanted to touch base with you before the segment airs.

As many of you know, we have a significant recruitment and retention problem looming in these and other positions. These positions play critical safety and leadership roles in our fleet. With so many of these skilled mariners nearing retirement age, strategic decisions are needed to prepare.

Even with the proposed increase in pay, the people who fill these positions will still not earn what their counterparts in the private sector make. It gets us closer to market rates, but still below what other

organizations can offer for salary. See the 2016 Marine Employees" Compensation Survey here <http://www.ofm.wa.gov/reports/Marine_Employees_Compensation_Survey_and_Appendix_2016.pdf>.

The media report tonight is based, in part, on comments from disgruntled former employees and ignores the recruitment and retention study that clearly demonstrates the gap in their compensation. I believe this type of media coverage does not accurately reflect how you are valued by our organization and the communities we all serve.

Your management team stands behind this decision and you. It was based on factual information from a comprehensive salary survey.

I'm asking you to stay positive and focused on your important work.

WSF employs amazing people and together we will continue to operate one of the safest and largest ferry systems in the world.

Thank you for all you do.

Lynne

Lynne Griffith
Assistant Secretary
WSDOT, Ferries Division

Jeff Duncan

From: Kosa, Elizabeth <KosaE@wsdot.wa.gov>
Sent: Thursday, January 22, 2015 3:18 PM
To: Jeff Duncan; Bill Knowlton; Chad Scott
Subject: FW: Do not re-hire

As requested from our MEBA monthly today

Regards,

Elizabeth Kosa
Washington State Ferries
Senior Port Engineer
Office: (206) 515-3827
cell: (206) 375-5612
KosaE@wsdot.wa.gov

From: Manning, Linda
Sent: Thursday, January 22, 2015 3:17 PM
To: Kosa, Elizabeth
Cc: Ragsdale, Stacey
Subject: Do not re-hire

This is our current do not re-hire list
Crystal Connor
Lance Musselman
Lyle Sloan
Theresa Ortloff

Linda Manning, Supervisor
Human Resources Consultant
WSDOT/WSF
Desk: (206) 515-3790 / Fax: (206) 515-3489
manningl@wsdot.wa.gov

From: Jeff Duncan (mailto:jduncan@mebaunion.org)
Sent: Wednesday, January 7, 2015 12:53
To: Capacci, George
Cc: Kosa, Elizabeth; Chad Scott; Knowlton, Bill
Subject: Do not hire

George,

We spent fifteen (15) minutes in our files and pulled a couple of examples of "Do Not Hire/Dispatch" letters for you. As you can see in the most recent letter it refers to a "list" maintained by WSF. Please provide the Union with the most current form of the Do Not Hire/Dispatch list.

Best Regards,

Jeff Duncan
Seattle Branch Agent
(Logo)
Marine Engineers' Beneficial Association
Founded 1875
…

(Logo)
Washington State Department of Transportation
…
November 22, 2013

Theresa Ortloff
5524 148th PL SW
Edmonds, WA 98026

Dear Ms. Ortloff,

This is to inform you of termination of your probationary appointment as an On-Call Oiler employee with the Washington State Department of Transportation, Ferries Division (WSF), and effective November 26, 2013. Please return all WSF property in your possession to: your Supervisor or the Washington State Ferries, 2901 3rd Ave, Suite 500, Seattle, WA 98121-1012, ATTN: Security.

This action is taken pursuant to Rule 33.01 of the Collective Bargaining Agreement by and between Washington State Ferries and the Marine Beneficial Association (MEBA) that specifically states:

> "Newly hired employees shall serve a probationary period of five (5) calendar months. The employee may be terminated during the probationary period or at the end of a probationary period for a bona fide reason(s) relating to the business operation and said employee shall not have recourse through the grievance procedure.

I have determined your performance and commitment to the Washington State Ferries during your probation period does not meet expectations of an On-Call employee by being available for work at all times. On too many occasions you have been called to be dispatched and assignments have been refused or negotiated for a variety of reasons.

Based upon the language of the referenced agreement between MEBA and WSF, I find it necessary to terminate your employment effective immediately. It is most unfortunate that this action is necessary, and we wish you well in your future endeavors.

Sincerely,

(Signature)

Steven Vonheeder, P.E.
Director of Vessels
Washington State Ferries

cc: Personnel File
Bill Knowlton, MEBA Business Agent
Elizabeth Nicoletti, Senior Port Engineer

From: Williams, Pete
Sent: Tuesday, November 12, 2013 11:53 AM
To: Nicoletti, Elizabeth
Cc: Rodgers, Steve; Vonheeder, Steve; Capacci, George A; Wharton, Donna
Subject: FW: Dispatch

Elizabeth,
I am forwarding you an e-mail from Theresa Ortloff. Initially it seems like she is trying to be proactive. A closer look and read reveals she somewhat thinks dispatch is required to work around her availability. It is my understanding she is an on-call oiler. The suggestion that she does her best to notify dispatch of when she is available and expects dispatch to work with her availability would and is setting a new level of on-call status. Of course she can call in if she is sick or can schedule an occasional day off but the idea she can provide a list of availability days is not something on-calls are allowed to do.

In addition she has used unavailable status to take her significant other to or pick up from the airport. Yesterday, she called in 1.25 hours before work stating work on the Kennewick for a boiler watch, stating she has a disagreement with the Chief about pay. The avenue for pay issues lies in the CBA utilizing the grievance procedure. …

From: Ortloff, Theresa
Sent: Monday, October 07, 2013 10:18 PM
To: Morrison, Rachel
Subject: Dispatch

Rachel,

I just wanted to say a few things about our conversation the other day on the phone. I want to work with Dispatch as a TEAM, communication is the most important key to understanding on both ends to make sure we're both on the SAME PAGE!!!

…

I suggested emailing you all the pertinent info. needed for Appt.'s etc... & letting you know days I can work Nights or Days around the Appt.s & you said not a good idea, I didn't agree with your answer so I mentioned from now on I'll document everything needed on my end & also have Dispatch reiterate to make sure we're both on the same page before we get off the phone. I'm sure being a Dispatch employee is not an easy job & I understand that but if we try harder to communicate & are on the same page hopefully we'll have less issues.

Examples of things the past few months with Dispatch: I understand some of these items listed below will change if you get calls from other boats etc... needing or not needing On-Calls.
1.) They'd schedule a day for me to work & then they would call back & cancel & give it to someone else &

also when I worked a few days at 1 location & not letting me finish the last day I was to be scheduled to work the same boat the few days prior, this has happened a few times.
2.) Say I was to work a different day than they first told me.
3.) Saying they needed an Oiler the first phone call & calling back & said they needed a Chief instead.
4.) Appt.s' confusion etc..., mix-up could be on either end- I might of thought I told Dispatch correctly but didn't or maybe Dispatch misunderstood etc... not sure but hopefully we can improve on the communication & again make it all work together as a Team effort. I am willing to try & work with Dispatch, let me know of any suggestions you may have to improve the process.

From: Manning, Linda
To: Nicoletti, Elizabeth
Cc: Kelly, Shane
Subject: RE: Theresa Ortloff issues
Date: Thursday, November 07, 2013 10:23:44 AM

Is there reason for her not make probation. If so, please provide because right now you have nothing. Linda

Linda Manning
WSDOT/Ferries Division
Human Resource Consultant
manninl@wsdot.wa.gov
206/515/3790 Desk
206/515/3489 Fax

From: Nicoletti, Elizabeth
Sent: Tuesday, November 05, 2013 8:35 AM
To: Manning, Linda
Cc: Kelly, Shane
Subject: Theresa Ortloff issues

Please read these. Ms. Ortloff is currently on probation. I have also has stirrings that there are issues in the fleet with her performance. Let me know what you think and we can discuss.

Regards,
Elizabeth Nicoletti
Washington State Ferries
Seattle, WA 98121-3014
…

From: LaCroix, Mike
Sent: Tuesday, November 05, 2013 7:53 AM
To: Ortloff, Theresa
Cc: Kelly, Shane; Nicoletti, Elizabeth
Subject: FW: Kennewick time sheet incorrect code S/B 465 for YARD OILER

Theresa,

In my e-mail from yesterday copied below I stated that your pay would be submitted as Pay Code 450, provided you with detailed references regarding why I considered that to be the correct pay code, and asked nicely that if you had any more questions to please contact a Port Engineer or Union Representative. Since then you have called at least one of the Oilers working aboard Kennewick, called the Kennewick engine room phone, and then emailed me three separate times.

I have no interest in, nor time for debating whether or not sweeping the deck constitutes duties above and beyond a security watch.

Please stop calling and emailing me as it is approaching a level of harassment.

Mike LaCroix
SCE Kennewick

From: Grabecki, Thomas
Sent: Saturday, October 05, 2013 1:53 PM
To: Morrison, Rachel
Subject: Theresa Ortloff relief 10/7?

She called in saying she called in ahead of time to schedule a doctor for 10/7. There's no record of that. She said she put it in 3 weeks ago and is very frustrated that there's no record of this. She is not canceling any of her future work days currently scheduled. I told her I would tell you and she may be calling tomorrow to talk to you. She wanted you to know she's very frustrated. I just said I'd pass the message.

Thomas

From: Trimmer, David (Dave)
To: Nicoletti, Elizabeth
Subject: RE: Theresa Ortloff
Date: Tuesday, August 13, 2013 7:10:05 AM

Senior P/E Nicoletti,

Negative on the documentation/counseling directly with Ms. Ortloff. It would have been pointless. I will make a list of her deficiencies. You might give John Settles a call and get his impression of her performance. She was there the two nights previous to being here. In a nutshell, they "mustered up the patience to go step by step through stuff with her". That quote is from an email correspondence I had with John.

Generally speaking, I do not believe she is a stupid person. Just completely out of her element. She works from lists. A list for going on shore power, a list for pumping sewage (poorly executed), etc. She is following the lists but I do not believe she understands what she is doing. I have standing directives for the Oiler on my watch and I present this to all new Oilers who show up as Reliefs. It lets them know what I expect of them and how to fill out the Oiler Reading's chart, etc. It ensures that we are operating on the same page. It is about three pages long, of a larger font, and covers things like when to check main engine lube oil level and how to enter it on the chart, to maintain consistency between watches. Pretty basic. The second evening here she happened to leave it laying on her desk. It was heavily annotated, highlighted and underlined to the point of being comedic. Under the section 'Main

Engine Lube Oil: Ideally checked when the engine is at idle…' above this was written and circled 'dipstick'. I was tempted to make a copy of it but felt it would have been an invasion of her privacy.

A question she had, while taking on water the second night, was 'Should both the tanks (flush/potable) be full before shutting off the water?'. She was not kidding.

Catching her before she disconnected a full sewage hose, on the second night. She should not have an Oilers endorsement. I know how she got it but she shouldn't have it. She might be all right if she were to have a year or two as a wiper but I doubt there are many that are willing to watch over her for that long. It's only a matter of time before she hurts herself or destroys a piece of machinery.

I've been here for 15 years and this is the first time that I have notified dispatch not to send someone back to my watch. I would suggest you keep an eye on Ms. Ortloff. Six months and then WSF owns her.

Have a good day,
Dave

From: Nicoletti, Elizabeth
Sent: Monday, August 12, 2013 9:28 AM
To: Trimmer, David (Dave); Morrison, Rachel
Cc: Wilson, Paul
Subject: RE: Theresa Ortloff

David,

Were you able to fill out any performance documentation/counseling (formal or informal) with Ms. Ortloff directly. I would like to document your conversations with her and keep them on record. Give me a call on my Cell 206 375 5612

Regards,
Elizabeth Nicoletti
Washington State Ferries
Senior Port Engineer
Office: (206) 515-3827
cell: (206) 375-5612
NicoleE@wsdot.wa.gov

From: Trimmer, David (Dave)
Sent: Sunday, August 11, 2013 6:56 AM
To: Morrison, Rachel
Cc: Nicoletti, Elizabeth
Subject: Theresa Ortloff

Good morning Rachel.
I hope you had pleasant and relaxing days off.

I realize that you have a shortage of Oilers and have difficulty filling positions of employees who are sick or on vacation. Having said that, in the future, the services of Ms. Ortloff will not be required on this watch. Please do not dispatch her to the Chelan, C-Watch. Her level of knowledge regarding the maritime industry is zero. We do not have the time to train someone from the bottom up and I can't have my Assistant following her around and showing her everything, repeatedly. When a new Oiler is sent to this vessel, they need to have a basic level of understanding of ship board systems and operations. Ms. Ortloff does not possess this. Any instruction given to a new Oiler, on our part, is supplemental and vessel specific. I am really quite surprised that she has an Oiler's endorsement. Her further employment with WSF will need to be addressed by the Port Engineers office.

Thank you for your attention to this matter and I hope it does not work a hardship on you in filling the C-Watch Oiler position on the Chelan. If you have any questions feel free to call me.

Have a good day,
Dave

…

2. I received a copy of some WSF timesheets of Dave Trimmer from 2010 to 2013. I can't determine if these are the original timesheets or if they have been amended, in part because the defendants have not provided the bi-weekly pay stubs and the end of the year IRS W-2 Forms. The bi-weekly pay stubs show overtime and other amounts a worker received. Timesheets are filled out by a manager like Trimmer, and his supervisor is supposed to review and initial them and sign them. Bi-weekly pay reports are then issued which detail overtime and other pay the person received. At the end of the year, W-2's or 1099's are then issued based on the bi-weekly pay reports. Some of the timesheets did not have proper initials and signatures. Other timesheets were resubmitted more than once because I found a few multiple copies for the same two week period.

3. Attached as Exhibit A is a true and correct copy of some of the 2013 relevant Trimmer timesheets received from the Defendants. After reviewing the Trimmer timesheets for the years 2011, 2012, and 2013, it has become obvious Trimmer was adding penalty pay for penalty time. "Penalty pay" is a category of extra pay, usually double time, for certain dirty jobs, such as going below the deck plates to inspect and clean the bilges. Attached as Exhibit B is Section 29.08 of the 2011-2013 Unlicensed MEBA contract which states penalty time should be given to unlicensed employees, which means oilers or wipers (who have a lower rate of pay), unless it is an emergency. Exhibit B, p. 3, § 29.08. Trimmer was not an oiler or wiper, and instead a chief. In Exhibit A, Page 1 line 6, page 2 line 3, page 3, line 5, page 4 line 5, and page 5 line 5

show Trimmer was routinely claiming penalty time for what appear to be routine cleaning operations for approximately $87 per hour. Trimmer added approximately 83 hours of penalty time in 2011, approximately 72 hours of penalty time in 2012, and approximately 42 hours of penalty time in 2013.

(Logo) Washington State
Department of Transportation
Ferries Vessel Engine Time Sheet

…

Employee ID	Employee Name	Department
565335	Trimmer David E.	Engine

Pay Cycle	
Start Date	End Date
07/01/2013	07/31/2013

Work Order	Watch	Class Worked	Pay Paid	Reason Code	Code	…	Work Days Mo
…							
5) 858305	C	405	405	07	HP		3
…							

(Logo) Washington State
Department of Transportation
Ferries Vessel Engine Time Sheet

…

Employee ID	Employee Name	Department
565335	Trimmer David E.	Engine

Pay Cycle	
Start Date	End Date
06/01/2013	06/30/2013

Work Order	Watch	Class Worked	Pay Paid	Reason Code	…	Work Days Code	…	Mo
…								
5) 858305	C	405	405	07		HP		2
…								

(Logo) Washington State
Department of Transportation
Ferries Vessel Engine Time Sheet

…

Employee ID	Employee Name	Department
565335	Trimmer David E.	Engine

Pay Cycle	
Start Date	End Date
05/16/2013	05/31/2013

Work Order	Watch	Class Worked	Pay Paid	Reason Code	Code	…	Work Days Mo
…							
5) 858305	C	410	410	07	HP		3
…							

(Logo) Washington State
Department of Transportation
Ferries Vessel Engine Time Sheet

…

Employee ID	Employee Name	Department
565335	Trimmer David E.	Engine

Pay Cycle	
Start Date	End Date
04/01/2013	04/15/2013

Work Order	Watch	Class Worked	Pay Paid	Reason Code	…	Work Days Tu
…						
3) 858305	C	410	410	07	HP	4
…						

(Logo) Washington State
Department of Transportation
Ferries Vessel Engine Time Sheet

…

Employee ID	Employee Name	Department
565335	Trimmer David E.	Engine

Pay Cycle	
Start Date	End Date
03/16/2013	03/31/2013

Work Order	Watch	Class Worked	Pay Paid	Reason Code	…	Work Days Su
…						
6) 858305	A	410	410	07 71		1
…						

(Logo)
Washington State
Department of Transportation
…
March 6, 2013

Theresa Ortloff
5524 148th PL SW
Edmonds, WA 98026

Dear Ms. Ortloff:

Congratulations! This letter is to confirm your probationary appointment with the Washington State Department of Transportation, Ferries Division to the position of on-call Oiler effective March 11, 2013. …
…
If you have questions regarding your employment, please contact your Human Resources representative, Linda Manning, at (206) 515-3790.

Welcome Aboard!

Sincerely,

(Signature)	(Signature)
David H. Moseley	Steven R. Vonheeder
Assistant Secretary	Director of Vessel
Washington State	Maintenance
Ferries	Preservation &
	Engineering
	Washington State Ferries

cc: Office of Human Resources
Bill Knowlton, MEBA Business Agent

…
14-Nov-00 TRIMMER, JR. DAVID E … 20 $724.40
…

PRIVILEGE

Should the Defendant refuse to produce any document requested herein on the grounds of privilege, state for each such document:

(1) The basis for the claim of privilege;
(2) The type of document (e.g., letter, memorandum, contract, etc.), the date of the document and the subject matter of the document;
(3) The name, address and position of the author of the document and of any person who assisted in its preparation;
(4) The name, address and position of each addressee or recipient of the document or any copies of it; and
(5) The present location of the document and the name, address and position of the person having custody of it.

INTERROGATORIES AND REQUESTS FOR PRODUCTION

INTERROGATORY NO. 1: Identify all documents related to Theresa Ortloff.

ANSWER: Objection. This request is overly broad, unduly burdensome, and vague as to what is sought. As such, it is not reasonably calculated to lead to the discovery of admissible evidence in that it is not limited in time, scope or subject matter. Defendant has no personal knowledge of this case and does not personally possess any documents relating to Theresa Ortloff. Subject to and without waiving objections, as an accommodation to these

interrogatories, Defendant's counsel is investigating Washington State Ferries' knowledge of the allegations in the case and further identifying relevant documents. Most documents have already been provided in the initial lay down. As to emails relating to Theresa Ortloff, it would be unduly burdensome for Washington State Ferries to produce all emails, it would take approximately 90 hours to review and redact the 1,458 emails plus attachments. Therefore, it is requested that Plaintiff identify specific "search terms" so as to limit the scope of the search.

REQUEST FOR PRODUCTION A: Produce all documents related to the previous interrogatory.

RESPONSE: See response to Interrogatory No. 1.

INTERROGATORY NO. 4: Identify each and every instance referred to in the termination letter dated November 22, 2013, which is attached to these interrogatories as document P3, that Ms. Ortloff was "called to be dispatched and assignments have been refused or negotiated for a variety of reasons".

ANSWER: This Defendant has no personal knowledge of any instances referred to in the termination letter dated November 22, 2013. As an accommodation, Washington State Ferries has identified the following:

1. 08-08-13 (evening)
2. 08-09-13 (morning)
3. 08-11-13 (evening)
4. 08-12-13 (morning and evening)
5. 08-13-13 (morning)
6. 09-05-13 (day shift)
7. 09-25-13 (evening)
8. 09-26-13 (morning)
9. 10-04-13 (evening)
10. 10-05-13 (morning and day shift)
11. 10-07-13 (day shift and evening)
12. 10-08-13 (morning)
13. 10-14-13 (evening)
14. 10-15-13 — Ortloff later changed her mind and asked for work on this date.
15. 10-16-13 (day shift)
16. 10-17-13
17. 10-31-13 — Ortloff may have reported late, or not at all, for a watch this date.
18. 11-04-13 (day shift)
19. 11-05-13

20. 11-10-13 (evening) — Ortloff cancelled her participation on this watch 75 minutes prior to watch starting.
21. 11-11-13 (morning) — Ortloff cancelled her participation on this watch 75 minutes prior to watch starting.

Theresa Ortloff was eligible to potentially work during 104 different calendar days. She removed herself from all or part of 21 of those days.

REQUEST FOR PRODUCTION D: Produce all documents related to the previous interrogatory.

RESPONSE: See Attachment 1, Bates No. 70010001 70010016.

3. … Attached as Exhibit AH is a true and correct copy of the progressive disciplinary policy I received when I went through new employee indoctrination at
the Washington State Ferries. I was never brought up on any Code of Conduct for violating any code of conduct for any unavailability. …

4. In 2012, I decided to train to become an oiler at the Washington State Ferries after working approximately 30 years at Physio-Control Corporation. In support of my plan to become a WSF oiler, I paid for and attended the TRL Maritime School in San Diego, California from about February to March, 2012.

5. I decided to participate in an internship program at the Washington State Ferries and worked on the Ferry MV Spokane with assistant engineer Maureen McGarrity, from about May, 2012 to September, 2012.

6. On September 8, 2012, Staff Chief Dennis Kavanagh certified I was qualified under U.S. Coast Guard regulations 46 C.F.R. §§ 15.405 and 199.180(b)(1) to work as an oiler at the Washington State Ferries. See Break-In record Exhibit AV.

7. On July 8, 2013, I signed up on the Oiler list to get hired at the MEBA Union and paid $35 to MEBA. On July 9, 2013, I went to the MEBA Union Hall and was hired as an on-call oiler and paid 3 months of $50 monthly MEBA union dues, which totaled $150.

8. During the July, 2013 timeframe, I attended orientation/new hire training at the Washington State Ferries that lasted approximately one month.

9. Griffith in her interrogatories claims I was unavailable 21 times. The following paragraphs with a "#" symbol respond to each of the Griffith's

numbered alleged unavailabilities: #1 & 2) On August 8 , 2013 my first Watch started & it ended the next morning of August 9, 2013, they count 1 Watch as 2 days. I served as an on-call oiler on a Washington State Ferry for the first time, and observed various oiler duties. Exhibit AI.

10. #3, 4 & 5) I do not think Dispatch called me to work evening of 08-11-13, morning & evening of 08-12-13 and morning of 08-13-13. I wouldn't have turned work down because it was my first week as a new Oiler. Those would have been 2 Watches start work in the evening & ended next mornings & they count 1 Watch as 2 days.

11. On August 10 and 11, 2013 I served as an oiler on the Washington State Ferry Chelan. Chief Trimmer was my supervisor. Chief Trimmer immediately established a hostile work environment. I was attempting to pump sewage and Chief Trimmer approached me and claimed I was thinking about disconnecting sewage hoses, he yelled at me, and told me to go back down below to the Engineering Operating Station. I was observing the pumping process in the correct manner. Trimmer did not ask me what I was doing, and he did not offer to help or instruct me.

12. Trimmer stated he did not have time to train me and he would not allow his assistant to instruct me.

13. My public Records Act request identified above included the August 11, 2013 Trimmer e-mail to dispatcher Rachel Morrison in which he told her not to send me back to his boat. Exhibit C.

14. On August 13, 2013, Trimmer sent an e-mail to Nicoletti (Kosa) in which he criticized my abilities

and in my Complaint I allege Trimmer made a reference to Floyd McLaughlin by stating, "She should not have an Oiler's endorsement. I know how she got it but she shouldn't have it." Exhibit D.

15. #6) On September 5, 2013 Dispatch called to ask about the doctor appointment on the 6th & wanted to know if I was still going to work evening of September 6th & I said yes, which I did work that evening & they made an error in their records & counted that as an unavailability. Exhibits AJ, AO, p. 4, 4th entry, AQ.

16. #7 & 8) On September 25, 2013 I was going to work that evening until Dispatch called & said they were putting Chris Sutton in my place because he had seniority. This is two mistaken unavailabilities because they count 1 Watch as 2 days for evening of September 25, 2013 /morning of September 26, 2013. Exhibits F, AO, p. 3, 1st entry.

17. #9) On evening of October 4, 2013Rachel Morrison approved me not working that evening because I had to take Floyd McLaughlin to the Airport that next morning of October 5, 2013. Everything related to taking & picking Floyd up from the Airport were all approved ahead & in fact Rachel asked Floyd to take vacation at that time because a Relief Chief needed work. Exhibit H, McLaughlin Declaration, ¶ 6.

18. In addition to the monthly $ 50 MEBA union dues, a MEBA union member is also required to pay a $4,000 initiation fee within the first two years of being a union member. On October 3, 2013, I paid $500 toward the $4,000 union initiation fee, and I paid 3 months of the $50 monthly union fees which totaled $650.

19. #10) On morning of October 5, 2013 I took Floyd McLaughlin to the Airport approved ahead by Rachel Morrison. I also worked that night. Exhibit AK, Airline Itinerary attached to the Declaration of Floyd Mclaughlin. McLaughlin Decl., Ex. C.

20. #11 & 12) On the morning of October 7, 2013, I got off work that morning from a night watch the night before and I also had a doctor appointment this same day. I don't recall being called to work the evening of October 7, 2013 which would have ended the morning of October 8, 2013, again they count 1 Watch as 2 days. Exhibits G, AK, AR.

21. #13) On the evening of October 14, 2013 Rachel Morrison approved my not working that evening because I had to pick Floyd McLaughlin up from the Airport that next morning of October 15, 2013. Everything related to taking & picking Floyd up from the Airport were all approved ahead & in fact Rachel asked Floyd to take vacation at that time because a Relief Chief needed work. Exhibit H.

22. #14) I changed my mind about working the evening of October 15, 2013 because Floyd called me on or around October 14, 2013 & said he made a mistake must of looked at his Itinerary wrong & now I don't have to pick him up from the Airport until morning of October 16, 2013. So I called Dispatch right away & said I can now work evening of October 15, 2013 & I did. Exhibits H, AL.

23. #15) On October 16, 2013 I got off work that morning from a Night Watch night before & then later that morning I went to the Airport & picked up Floyd McLaughlin & also worked that same evening again. Exhibits H, AL.

24. #16) On October 17, 2013 I got off work that morning from a Night Watch night beforeExhibit AL.

25. #17) On or about October 31, 2013, I worked on the Ferry Kennewick and submitted my timesheet to my supervisor Mike La Croix. After I received my pay sheet back, I realized my pay was incorrect, to a lower pay rate. I informed La Croix he had misclassified my pay to a classification that had a lower pay rate. I called La Croix on the telephone and informed him of the mistake. La Croix eventually agreed that he had misclassified my pay and changed it to the correct pay rate. Around that same time La Croix wrote an e-mail to Elizabeth Nicoletti (Kosa) and stated he felt harassed by my attempt to clarify the pay issues of a probationary employee. See timesheet Exhibit AN and La Croix email to me stating level of harassment, which he turned me in for harassment in that email. Exhibit I.

26. #18) On November 4, 2013 I had a dentist appointment approved ahead by Rachel Morrison & I also worked that night. Exhibits AS, AM.

27. #19) On November 5, 2013 I got off work that morning from a night watch the night before. See Exhibits AS, AM, same Watch as #27.

28. On November 5, 2013, Nicoletti (Kosa) sent an e-mail to Linda Manning, my personnel manager, asking about my status and Ms. Manning responded on November 7, 2013 and stated Nicoletti (Kosa) had no reason to prevent me from changing from a probationary employee to a full-time employee ("you have nothing"). Exhibit P.

29. #20 & 21) November 10 & 11th, 2013 are the same Watch, I would have started in the evening & got off the next morning. I turned down the Watch because I felt it would of been a

hostile work environment to go back to La Croix's boat after the timesheet issue on November 1, 2013

which he turned me in for harassment just for asking for the correct pay while the boat was in the Yard. Exhibits I, J, O.

30. The Defendants claim that calling in 75 minutes before a watch for a relief affects a boat on the run. The boat I was going to was tied up. I turned it down because I felt it would be a hostile work environment because of the timesheet issue I had with La Croix on November 1, 2013, he turned me in for harassment & I felt threatened & harassed. Exhibits I, J & O.

31. I observed how probationary employees were treated and, with my 30 years of experience at Physio-Control, decided to make a spreadsheet describing the pay and procedures of a probationary on-call Oiler. A few WSF employees saw my spreadsheet and wanted a copy. I have heard reports that my spreadsheet is used to this day by one or more persons at WSF.

32. On or about November 11, 2013, I called Rachel Morrison regarding being dispatched and she stated there was no problem with my performance on the WSF Dispatcher end.

33. On November 5, 2013, Nicoletti (Kosa) sent an e-mail to Linda Manning, my personnel manager, asking about my status and Ms. Manning responded on November 7, 2013 and stated Nicoletti (Kosa) had no reason to prevent me from changing from a probationary employee to a full-time employee. Exhibit. P.

34. The e-mails from my Public Records Act request show Kosa sent Manning two e-mails on November 21, 2013 regarding the Trimmer e-mails and my unavailabilities for bringing Floyd McLaughlin to the airport. Exhibits W, X.

35. In a letter dated November 22, 2013 WSF Director of Vessels Vonheeder stated, "I have determined your performance and commitment to Washington State Ferries during your probation period does not meet expectations of an On-Call employee by being available for work at all times. On too many occasions you have been called to be dispatched and assignments have been refused or negotiated for a variety of reasons." Exhibit Y.

36. Attached as Exhibit AG is a true and correct copy of the front page and pages 46 and 47 of the Collective Bargaining Agreement between the State of Washington and District No. 1 – PCD of MEBA (Unlicensed Engine Room Employees) dated July 1, 2013 ("CBA"). Rule 33.01 of the CBA states newly hired employees shall serve a probationary period of 5 months during which the employee may be terminated for a bona fide reason relating to the business operation, and the employee shall not have recourse through the grievance procedure.

37. I received no notice or opportunity to respond to the disciplinary charges before the termination letter was sent.

38. I observed and it was common knowledge that probationary employees were routinely allowed to negotiate what days they would work.

39. I had to request a couple unavailability days for routine medical, dental check-ups and taking & picking Floyd McLaughlin up from the Airport. Also an unavailability for the instance when Staff Chief La Croix gave me incorrect pay and he was threatening to turn me in for harassment if I continued my complaints and he effectively did turn me in for harassment.

40. I witnessed Jesse Sutton get thrown out of indoctrination class for showing up late, falling asleep in training class, and talking on his cell phone during class. On subsequent WSF Crew Lists I noticed Jesse Sutton is listed full time. In my 2014 Public Records Act Request I, see that he was added to the new hired list of fulltime employees.

41. I was generally liked and complimented on my abilities by many if not all of the crew members I worked with. Several also wrote letters of recommendation including Carol Porth, Maureen McGarrity, Jesse Duncan, and Jim Sturgul. True and correct copies of the letters are attached as Exhibit AW.

42. In December, 2013 I met with a private lawyer and had a telephone conference with Bill Knowlton, MEBA Union representative and formulated a plan to attempt to meet with the WSF management. I was informed the WSF refused to meet with me, my lawyer and the union representative concerning my employment.

43. I was suffering from emotional distress from the firing and decided the best thing to do was to obtain other temporary employment while attempting to regain my position at the WSF. I have worked several temporary jobs from January, 2014 to the present.

44. In mid-2014 I asked Bill Knowlton if I could sign up for a new (WSF) oiler position and Bill Knowlton stated I could. I watched for new oiler positions at the union hall and signed up again. On October 16, 2014 I added my name to the Oiler List to get hired and paid a $40 fee.

45. On or about the end September 2014, MEBA Union Representative Bill Knowlton stated

everything was fine with my performance and that I should be hired. Mr. Knowlton said he checked what the WSF called the Do Not Hire List. On December 11, 2014, I was hired at the MEBA Union Hall and paid 3 months of the $50 monthly union dues, which totaled $150. Bill Knowlton that I would be rehired and start working at the WSF on January 6, 2015.

46. On December 31, 2014, Linda Manning called me and stated the management had made an "executive decision" to not hire me.

47. For a second time, I was not given notice and opportunity to respond to the disciplinary charges and the WSF refused to hire me.

48. The 2013 firing, the 2014 refusal to hire, Trimmer's e-mails, Lacroix's e-mails, Kosa's distribution of the e-mails, and the blacklisting me with the Do Not Hire List which was distributed on the State of Washington e-mail system and my MEBA union e-mail system caused severe emotional distress and economic loss including wage loss and retirement benefit loss, and damage to my reputation and business opportunities at the WashingtonState Ferries, at my MEBA union, in the maritime field and in the community.

49. In early 2015, the Washington State Ferries stated they wanted to give me a test as some kind of settlement offer. As I understood the offer, even if I passed the test, I would not become a full time employee. I therefore decided not to accept the offer. Other considerations are that Kosa would give the test and it appeared Kosa had not been checked out on any ferry under the WSF policy and U.S. Coast Guard regulations, and I it appeared to me Kosa had a bias against me since she was involved in the process of firing me. I strongly believe that the

settlement offer was an attempt to come up with a new reason for not hiring me and that it was an admission on the part of the management of the WSF that I was terminated in violation of my Constitutional rights.

50. As stated in the Complaint, apart from the 3 days off I had to take for a couple medical and dental appointments, I had to take a day off when a Staff Chief Mike Lacroix harassed me after I spoke up about my pay being changed to an incorrect amount. The Defendants count this day as three days. LaCroix eventually admitted it was wrong for him to change my pay to the wrong amount and he changed it back to the correct amount. Attached as Exhibit X is a true and correct copy of an e-mail I obtained in my Public Records Act request in which Elizabeth Nicoletti Kosa learned about my request for that day off while I was being harassed for speaking up about my pay being decreased in violation of the CBA and state law governing pay for Ferry employees. LaCroix tried to turn it around and allege I was harassing him when I used my First Amendment rights to stand up for the rights of probationary employees.

51. The Griffith's answers to my interrogatories to Griffith are not accurate with regard to the number of my unavailabilities. Hart Declaration, Ex. E. The Defendants also attempt to confuse with statistics in their numbers of my unavailabilities by counting one watch as two days. The way watches worked when I was working at the Ferries was on-call oilers were called and asked if they are available until one was found. When an on-call oiler was available, that person was assigned. The big picture is I requested three for medical and dental appointments, two to take Floyd to and from the airport (which the

Defendants count as five), and one when Staff Chief LaCroix was harassing me (which the Defendants count as three). There are four unavailabilities which I do not recall requesting. This means the actual number – assuming the four unknowns are accurate and are included – is ten unavailabilities. Some of the unavailabilities the Defendants mistakenly include another person's watch in the morning or afternoon after I was unavailable for a medical appointment, a dental appointment, a preapproved reason, or another reason (such as being harassed when I noticed my pay was being improperly decreased in violation of the CBA and state law). The Defendants have included as unavailabilities their administrative errors. The Defendants include what they term 4 instances of unavailability when another person had seniority and took the watch. Exhibits AO, p. 1, AO, p. 2, AP, G, and AJ are true and correct copies of documents I obtained in my 2014 Public Records Act request. Exhibit AO, p. 1 is a communication record dated September 24, 2013 and the first entry states I should be pulled off a watch on September 25, 2013 because Chris Sutton has seniority, yet the Defendants use Exhibit AO, p. 1 (first telephone call on page) as "proof" I was unavailable. It appears the Defendants are also counting these two watches I was pulled off the watch based on union seniority as four of the unavailabilities. Another error happened with Exhibit AO, p. 2 (fourth telephone call on page). The Defendants called on September 5, 2013 and confirmed I was available on September 6, 2013, and I did work September 6, 2013, yet they misinterpret this entry as an unavailability for September 6, 2013. Exhibit AJ is a true and correct copy of one of my

timesheets and shows I worked on September 6, 2013 – the staff members must have forgotten that when a person works a night shift (September 6th), it shows up on a timesheet (Exhibit AJ) as (September 7th). The time sheets are records regularly kept in the course of business. Another error happened with Exhibit AP (third listing). The Defendants claim I did not work on August 8, 2013 to August 9,2013, but I worked what the Defendants mistakenly count as two missed watches. See Exhibit AI, which is a true and correct copy of my timesheet for August 8, 2013 and August 9, 2013. Exhibit AN is a true and correct copy of my timesheet for a watch I stood October 31, 2013. The Defendants have again claimed I was not available for this watch but the timesheet proves their statement is not accurate. The Defendants also include unavailabilities that were approved by Rachel Morrison, and the unavailabilities that resulted from the Dispatch not getting my requests for the dates for medical appointments correct. Exhibit G documents one of these instances in which my three week advance notification did not get to the Dispatcher. I had to state an unavailability in the instance when I was being harassed by LaCroix after I stood up for proper pay for probationary employees. Other than that instance I believed all of the other instances did not violate any rule, and even the one instance of a short term notice appears to have been protected by the First Amendment since I felt I was standing up for the rights of probationary employees. This would have all come out if I and my union representative would have been allowed to present my response to any allegation before I was terminated by a letter sent through the mail that contained allegations I had never seen before. I have

reviewed the Deposition Transcript of Dave Hurtt. It appears he had a similar amount or more unavailabilities than I did as a probationary on-call oiler and he was hired as a fulltime employee. This is evidence the Defendants' claim of excessive unavailabilities was not valid, they violated my Fourteenth Amendment Substantive and Procedural rights, and they violated my First Amendment rights of Free Speech, Free Association, and were Retaliatory after I attempted to stand up for my First and Fourteenth Amendment rights.

52. On November 21, 2016, KING Channel 5 News aired a story about senior managers at the WSF who are attempting to get a $70,000 per year pay raise. I read the December 2, 2016 King 5 Television online story, "State Ferries apologizes for misleading claims about pay raises" and watched the video report in the story in the December 2, 2016 timeframe and confirmed it was still on the website as of July, 2017, and followed the link to the Griffith e-mail in which she blames media coverage of a large pay increase proposal for senior managers at the WSF on "disgruntled former employees". I believe she was referring to me when she criticized whistleblowers as "disgruntled former employees". Attached as Exhibit AY is a true and correct copy of the Griffith e-mail.

Could you state your full name for the record.
A. David J. Hurt.
Q. Have you ever been deposed before?
A. No.
Q. Where do you currently work?
A. Washington State Ferries.
Q. And when did you start?
A. January 6, 2015.
Q. And what was your status when you first started at the Washington State Ferries?
A. On-call oiler.
Q. Did you have some sort of training before you became an on-call oiler?
A. Yes, we had on-call intern orientation.
Q. And could you generally describe what that orientation involved.
A. Basically it was explained to us what we'd be dealing on the vessels.
Q. Thank you. Would a dispatcher -- strike that. Could you describe what an on-call oiler is?
A. We fill in for permanent employees when they're sick or have other commitments and can't work.
Q. And how would you know when you were going to work?
A. Dispatch would call and we'd say "Yes" or "No."
Q. And in those situations where you said "No," what was that called?
A. I'm not sure what they call it.
Q. Was it called an unavailability?
A. There you go, yeah.
Q. Thank you. To the best of your recollection were you ever unavailable?
A. There was a few times, and I cleared it with

dispatch.
Q. Could you describe some of those times you were unavailable?
A. Twice I had cataract surgery for my eyes, so I was unavailable for two days per each eye. I think it was two weeks apart. Another time was I had to have a radiation treatment on my brain. That was two days, I believe. There was a couple times where I was physically sick and could not work. One time, too, I had a really bad toothache and I had to have a tooth pulled.
Q. And was there any fallout for you being unavailable?
A. No.
Q. Were you ever required to provide evidence for the reason that you stated you were unavailable?
A. No.
Q. Were you ever brought up on any kind of charges for being unavailable?
A. No.
MR. HART: I think that's it for this witness. Do you have any questions?
MR. SMITH: Yes.
BY MR. SMITH:
Q. When you called in for your unavailability for your surgeries, did you explain that you were not available because you were having to have surgeries?
A. Yes. I spoke to dispatch well in advance of these procedures, and let her know that I wasn't – or asked her if I could be unavailable basically.
Q. And on those couple of occasions when you were sick, did you explain that you were sick?
A. Yes.
Q. And you were genuinely sick and could not serve?

A. Yes.
Q. Did you ever state that you were unavailable because you had to give a friend or relative a ride to the airport?
A. No.
Q. Did you ever state that you were unavailable for any reason of your personal convenience?
A. Person convenience meaning like sports game or something like that?
Q. Yes.
A. No.
Q. Did you ever state that you are unavailable because you wanted to do something for a friend?
A. No.
Q. Did you ever state you were unavailable because you had a disagreement with a fellow crew member?
A. No.
Q. Would you ever have called up 75 minutes before your assigned watch and said you were unavailable for a personal reason?
A. No.
Q. Why not?
A. It wouldn't give them enough time to find somebody to replace me.
Q. What problem would that cause?
A. The boat being stopped.
Q. So the boat would not be able to sail?
A. Well, it might be able to sail, but the guy that's on watch currently would have to do at least one extra round trip.
Q. And of the times that you were called for duty, approximately what percentage of those were you not available?
A. Oh, jeez.

Q. One percent, two percent?
A. If that, yeah. Probably half a percent.
MR. SMITH: No further questions.
MR. HART: I've got some follow-up.
E X A M I N A T I O N
BY MR. HART:
Q. Did you ever -- were you ever unavailable based on any requirement of a girlfriend?
A. What do you mean "requirement"?
Q. Did a girlfriend ever have a medical issue where you needed to take some time?
A. One time I had to take her to the ER. One time I had to take her to Swedish in Ballard to get a knee replacement.
E X A M I N A T I O N
BY MR. SMITH:
Q. On those two days were you called and you were not available?
A. No, I don't believe they called to dispatch me. I've always given them a heads-up with stuff like that, except for the emergency room one; but they didn't call me to work that day.
MR. SMITH: No further questions.
MR. HART: No further questions.
CHANGE SHEET
…
PAGE LINE CORRECTION AND REASON
4 4 LAST NAME IS HURTT
…