

PART 3: FILING AND SETTLEMENT OF FESSER CASE

Filing of Notice of Claim and Subsequent Review of Reeves

The following is a review of the facts in the documentary record related to the filing of the notice of claim in this matter, the subsequent review of Sargant Reeves' actions and the CIS defense of the case.

On June 4, 2018 a notice of claim¹ letter from Mr. Fesser's attorney Paul Buchanan addressed to Chief Kruger was delivered to the West Linn Police Department. Chief Kruger emailed City Manager Eileen Stein asking for instruction on how to proceed.² The letter described facts substantially the same as later alleged in the Federal District Court Complaint filed on behalf of Mr. Fesser.³ The notice described multiple wrongful acts by West Linn police officers including:

- Acting on the basis of personal friendship, Chief Timeus ordered West Linn officers to undertake an unlawful surveillance operation into alleged employee theft purportedly occurring in Portland by a Portland resident at a Portland Business, followed by an unlawful arrest and detention.
- After the unlawful arrest, the West Linn officers detained and interrogated Mr. Fesser in Portland, seized his personal items, threatened to access his smartphone and incarcerated him in Portland.
- Acting on the basis of the Chief's personal friendship, West Linn officers purported to terminate Mr. Fesser from the job he held for more than 12 years.

¹ ORS 30.275 Notice of claim; time of notice; time of action. The statute provides the time permissible in which a notice of claim must be filed and details what is required in the notice.

² June 4, 2018 email, Terry Kruger to Eileen Stein.

³ Notice of Claim letter.

- Once Mr. Fesser’s employment was successfully terminated, the investigation ceased, until Mr. Fesser filed a lawsuit against the owner of the Portland business from which he was discharged.
- Mr. Fesser incurred substantial damages from the West Linn Police’s egregious abuse of power and violation of his civil rights.

The notice was also sent to Mayor Axelrod who received it on June 4, 2018 and transmitted it to the City Manager, copying the City Attorney.⁴ The notice was circulated to City Manager Eileen Stein, Chief Terry Kruger, Toni Tracy, Michael Boyd, Tony Reeves, Shane Boyle, Terry Timeus, and CIS representative Jon Stouffer.⁵ The notice was also forwarded by City Manager Eileen Stein to employment law counsel Kathy Peck and Dian Rubanoff, City Attorney Tim Ramis and copied to Chief Terry Kruger and Captain Neil Hennelly.⁶

On June 5, 2018 Rubanoff sent an email to Stein, Ramis, Kruger and Hennelly which included the suggestion of investigation of officers Reeves and Boyd by an outside investigator.⁷ On June 6, 2018 Ramis emailed Stein endorsing the suggestion of an outside investigator. Ramis also recommended formally notifying the City’s insurance carrier, CIS.⁸

On June 6, 2018 Chief Kruger emailed outside employment counsel Dian Rubanoff that Acting Lieutenant Oddis Rollins had been assigned “to conduct an initial review of the available information, in order to determine if criminal implications are apparent.” If so, the email said, the Department would request an outside law enforcement agency investigation. Rollins was to review the conduct of Sergeant Reeves. Detective Boyd was by then employed by the Molalla Police Department and no longer subject to West Linn Police management.⁹

⁴ June 4, 2018 email, Russ Axelrod to Eileen Stein.

⁵ June 4, 2018 email, Kathy Mollusky to group.

⁶ June 5, 2018 email, Eileen Stein to group.

⁷ June 5, 2018 email, Dian Rubanoff to Eileen Stein (*see* also June 6, 2018 email in FN 8).

⁸ June 6, 2018 email, Tim Ramis to Eileen Stein.

⁹ Hennelly email June 14, 2018.

Eight days later on June 14, 2018, Captain Neil Hennelly, who had been appointed to manage Acting Lieutenant Rollins' investigation of Sergeant Tony Reeves, sent a status update to Jon Stouffer, Tim Ramis, Kathy Peck and Dian Rubanoff, which reported: "Chief Kruger has recused himself from the investigation as he has a personal relationship with Mr. Benson."¹⁰ This is the first reference to recusal found to this point in the review of the documentary record.

The summary also includes, in part:

- The investigation had opened and would examine policy violations
- The investigation would cease and be referred to an outside agency if any criminal conduct by current or former employees is found
- There were no longer any text messages on Reeves phone to or from Benson

Acting Lieutenant Oddis Rollins (Rollins) reviewed all reports in the case, and interviewed Sergeant Reeves and Michael Boyd. He also reviewed text messages between Sergeant Reeves and Eric Benson. Rollins obtained approximately 80 pages of text messages from Jon Stouffer of CIS. Following the filing of the Notice of Claim, Mr. Fesser's attorney Paul Buchanan sent the text record to CIS in connection with a proposal to settle the matter for payment of three million dollars.¹¹ The report states that Rollins reviewed all submitted reports regarding the case, along with orphan documents, evidentiary documents, court documents, the tort claim filed by Mr. Fesser and approximately 80 pages of text messages between Sergeant Reeves and Mr. Benson.¹²

In the course of the investigation, Rollins interviewed Michael Boyd at the Molalla Police Station on July 16, 2018. Detective Boyd did not recall the case and its investigation and was only refreshed after reading a copy of the tort claim filed by Mr. Fesser. Detective

¹⁰ Hennelly email June 14, 2018 (same email as FN 9).

¹¹ Buchanan email June 25, 2018.

¹² Rollins Investigative Report pp 1, 5.

Boyd was asked if he considered himself one of the investigators in the case and said he considered himself a “cover officer.” He stated he did not perform any active investigation except for surveillance and assistance in Mr. Fesser’s arrest on February 25, 2017. When asked if during the investigation he heard Sergeant Reeves use any explicit racist, sexual, homophobic or otherwise discriminatory language either through text message or spoken word, he said he remembered Sergeant Reeves and Mr. Benson texting back and forth and some “off-hand” comments but not the specific words.¹³

Rollins interviewed Reeves who said he had never engaged in conversations or text messaging with Benson which included explicitly racist or homophobic remarks. He admitted to sending a text referencing female genitals, explaining that he was merely repeating a remark by Chief Timeus.¹⁴

Facts alleged in the Notice of Claim but not included in the report include: Timeus relationship with Benson, details of the initiation of the surveillance of Mr. Fesser, the racist content of the texts, and statements of intent to defeat Mr. Fesser’s charge of racialists in the workplace.

Rollins’s inquiry into the matter was restricted to the limited scope of possible WLPD Policy violations and not civil complaints raised within the tort claim.¹⁵

The policies applicable to the review included: 340 – Standards of Conduct – 340.5.1, 340.5.1 – Discrimination, Oppression or Favoritism, 340.5.7 – Conduct; 800 – Property Procedures, 800.3.1 – Property Booking Procedure, 800.6.4 – Release of Property.

Policies not specifically considered include: 800.3.4 Exceptional Handling. Hennelly was troubled with the manner in which Reeves handled cash. Reeves was not found in violation so it was not included with the discipline.

¹³ Rollins Investigative Report p 4.

¹⁴ Rollins Investigative Report p 4.

¹⁵ Rollins Investigative Report p 1.

On July 20, 2018, Rollins submitted his findings. Rollins did not sustain policy violations of Discrimination, Oppression or Favoritism policies. Rollins did sustain a violation of WLPD Policy 340.5.7(g): “Use of obscene, indecent, profane, or derogatory language while on duty, or in a uniform as a West Linn Police Officer.” Rollins also sustained violations of WLPD Policy 800: Property Procedures. Sergeant Reeves failed to receipt seized property and get supervisor approval to secure property on his desk.¹⁶

Captain Hennelly reviewed the evidence and report.¹⁷ Hennelly issued a written reprimand of Reeves for his failure to comply with established West Linn Police Department Policies.¹⁸

In Captain Hennelly’s written reprimand, he stated he was troubled by the cavalier manner in which Sergeant Reeves handled cash. Rollins did not find Sergeant Reeves in violation of their policy on handling cash so it was not included in the discipline, however, Captain Hennelly explained this could have been an opportunity for a person to claim cash was missing and that it was incumbent on Sergeant Reeves to count cash with a witness, in front of the person it is seized from, to protect against false accusations of theft or misappropriation of funds. The reprimand made no mention of any other violations.

Following the June 14, 2018 email in which Captain Hennelly reported that Chief Kruger had recused himself, the documentary record reflects that the matter was managed by Captain Hennelly. The July 24, 2018 written reprimand of Sergeant Reeves was issued by Captain Hennelly who indicated that he made the decision. We have not found written indication that Chief Kruger had a role in the management, investigation or disciplinary action taken as a result of the review of Reeves.

¹⁶ Hennelly Written Reprimand p 2

¹⁷ This is presumed because of an email of June 14, 2018 in which Hennelly states that he will review this evidence and conduct the internal investigation.

¹⁸ Hennelly Written Reprimand July 24, 2018

This conclusion should be tested and verified by an interview with those involved.

In the period from the completion of the Reeves internal review in July 2018 through the settlement of Mr. Fesser's case in February 2020, emails and other records indicate that Chief Kruger was involved in some aspects of the case but not others. Jon Stouffer, CIS adjuster and Andrew Campbell both said in interviews that Chief Kruger was not the point of contact for interaction on defense of Mr. Fesser's lawsuit. They identify City Manager Eileen Stein and Captain Hennelly, until he retired and then Acting Lieutenant Rollins, as the points of contact with the City. For example, for an important day long mediation between plaintiff and defendants, conducted by Judge Acosta on December 14, 2019, the City was represented by Acting Lieutenant Rollins and City Manager Stein. Andrew Campbell indicates that Chief Kruger did not participate in the preparation for the mediation and was not contacted during the mediation. On the other hand, Chief Kruger was present and participated actively in the September 4, 2018 and February 19, 2019 executive sessions, arguably the most detailed presentations given to the Council on the case. The email record also shows participation, heavily in an administrative role, in directing Department employees to thoroughly and completely respond to discovery requests from plaintiff's counsel and evidence requests from defense counsel.

We will update this information if additional facts come to light.

Knowledge Of The Content Of The Text Messages

The following reviews the facts in the documentary record regarding knowledge of the specific content of the Reeves-Benson texts.

The texts first came to light in a civil case filed by Michael Fesser. Sergeant Reeves deleted the text messages with Mr. Benson sometime before discovery began in Mr. Fesser's case against Mr. Benson.¹⁹ Benson, however, did not delete the texts and they were found during the discovery phase of the court case Mr. Fesser filed against Benson, his employer. At the time this

¹⁹ September 19, 2017 Complaint.

case was filed in September, 2017, the content of the texts was known to Reeves, the parties to that case and their counsel. What anyone employed by or representing the City knew is under review.²⁰ Review of the City emails during the pendency of the case against Benson shows the West Linn Police Department seeking advise on compliance with discovery requests only from City's in house legal counsel, Assistant City Attorney Megan Thornton, consistent with its practice at the time. The written communication does not refer specifically to the text messages. Following service of the notice of claim, Paul Buchanan, Mr. Fesser's counsel, sent copies of the texts to Jon Stouffer at CIS, in an early attempt at settlement of the case for \$3,000,000.²¹ Stouffer gave the texts to Acting Lieutenant Rollins at the outset of the internal review, and shortly thereafter to Andrew Campbell, a lawyer engaged by CIS to work on defense of the case.

According to both CIS adjustor Jon Stouffer and defense counsel Andrew Campbell, they did not provide the texts to the Police Chief because he was not the main point of contact between the City and CIS. After the retirement of Captain Hennelly, the key contacts were Acting Lieutenant Rollins and City Manager Stein. Early in the review of Reeves's conduct, Rollins knew of the texts which he reviewed for the internal investigation. Stouffer and Campbell confirm the City Manager was also aware of the content of the texts by December 14, 2019 when she represented the City in a day long mediation session where the content of the texts was discussed in great detail by the parties and the settlement judge. Stouffer and Campbell indicate that they did not include other City employees or representatives with detailed information on the texts because it is their practice to work with the City Manager who determines the level of information given to others.

As part of submitting the internal investigation report, Acting Lieutenant Rollins provided the texts to Captain Hennelly. We infer that Hennelly read the texts because they were included

²⁰ As described on page 4 of Rollins Investigative Report. Detective Boyd denied knowledge of the content of the texts at the time they were exchanged.

²¹ Buchanan email June 25, 2018.

with the report from Rollins and Hennelly reviewed the report as the basis for his reprimand of Reeves, (and terminology of the texts were quoted in Hennelly’s reprimand of Reeves.²²).

Whether Rollins or Hennelly shared the contents of the texts with others remains under review.

The City Council conducted executive sessions to hear reports on the status of the cases.²³ Transcripts of the meetings reveal that the true nature of the content of the texts was not discussed with the Council. Most of the reports described the procedural status of the case and the timing of efforts at settlement. The most detailed discussion of the facts of the case were presented on September 4, 2018 and February 19, 2019. Details of the racist nature of the texts was not disclosed. In the executive sessions communication about the texts referred to the content euphemistically, obscuring the racist content. Phrases like “off color,” and “inappropriate,” were used.

In the City’s written record the content was not described as racist, racially insensitive or homophobic until Multnomah County Deputy District Attorney Christopher Shull sent an email to Hennelly, with copy to Jon Stouffer, which stated, in part:

“The bottom line is that the victim was going to have some credibility problems based on some racially charged text messages he sent the detective, in relation to the investigation of the defendant.”²⁴

This reference to racially charged messages was forwarded to Chief Kruger on July 20, 2018. He acknowledged receipt of the messages without comment.²⁵

²² Hennelly Written Reprimand July 24, 2018, “In text messaging with Mr. Benson, your use of the term ‘PUSSY’ and the expression ‘TEA BAGGING’ both are inappropriate. You were speaking to a crime victim, during the course of your official duties as a West Linn Police Officer.

²³ July 2, 2018, September 4, 2018, February 19, 2019, December 5, 2019 and February 10, 2020.

²⁴ July 20, 2018 email Shull to Hennelly.

²⁵ Email Hennelly to Chief Kruger.

The documentary record and interviews with Mr. Stouffer and Mr. Campbell, confirm that Reeves, Hennelly, Kruger and Stein had notice of the racially charged nature of the text messages at some point in the process of settling the case. The matter remains under review to confirm the timeframe of this notice.

We will update this information if additional facts come to light.

DRAFT

30.275 Notice of claim; time of notice; time of action. (1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(a) For wrongful death, within one year after the alleged loss or injury.

(b) For all other claims, within 180 days after the alleged loss or injury.

(3) Notice of claim required by this section is satisfied by:

(a) Formal notice of claim as provided in subsections (4) and (5) of this section;

(b) Actual notice of claim as provided in subsection (6) of this section;

(c) Commencement of an action on the claim by or on behalf of the claimant within the applicable period of time provided in subsection (2) of this section; or

(d) Payment of all or any part of the claim by or on behalf of the public body at any time.

(4) Formal notice of claim is a written communication from a claimant or representative of a claimant containing:

(a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;

(b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and

(c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

(5) Formal notice of claim shall be given by mail or personal delivery:

(a) If the claim is against the state or an officer, employee or agent thereof, to the office of the Director of the Oregon Department of Administrative Services.

(b) If the claim is against a local public body or an officer, employee or agent thereof, to the public body at its principal administrative office, to any member of the governing body of the public body, or to an attorney designated by the governing body as its general counsel.

(6) Actual notice of claim is any communication by which any individual to whom notice may be given as provided in subsection (5) of this section or any person responsible for administering tort claims on behalf of the public body acquires actual knowledge of the time, place and circumstances giving rise to the claim, where the communication is such that a reasonable person would conclude that a particular person intends to assert a claim against the public body or an officer, employee or agent of the public body. A person responsible for administering tort claims on behalf of a public body is a person who, acting within the scope of the person's responsibility, as an officer, employee or agent of a public body or as an employee or agent of an insurance carrier insuring the public body for risks within the scope of ORS 30.260 to 30.300, engages in investigation, negotiation, adjustment or defense of claims within the scope of ORS 30.260 to 30.300, or in furnishing or accepting forms for claimants to provide claim information, or in supervising any of those activities.

(7) In an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300, the plaintiff has the burden of proving that notice of claim was given as required by this section.

(8) The requirement that a notice of claim be given under subsections (1) to (7) of this section does not apply if:

(a)(A) The claimant was under the age of 18 years when the acts or omissions giving rise to a claim occurred;

(B) The claim is against the Department of Human Services or the Oregon Youth Authority; and

(C) The claimant was in the custody of the Department of Human Services pursuant to an order of a juvenile court under ORS 419B.150, 419B.185, 419B.337 or 419B.527, or was in the custody of the Oregon Youth Authority under the provisions of ORS 419C.478, 420.011 or 420A.040, when the acts or omissions giving rise to a claim occurred.

(b) The claim is against a private, nonprofit organization that provides public transportation services described under ORS 30.260 (4)(d).

(9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury. [1967 c.627 §5; 1969 c.429 §3; 1975 c.604 §1a; 1975 c.609 §14; 1977 c.823 §3; 1979 c.284 §64; 1981 c.350 §1; 1993 c.500 §4; 1993 c.515 §1; 2001 c.601 §1; 2001 c.621 §89; 2005 c.684 §2; 2009 c.67 §18]

From: [Kruger, Terry](#)
Sent: Monday, June 4, 2018 2:56 PM
To: [Stein, Eileen](#)
Subject: FW: Tort Claim Notice - Michael Fesser / West Linn Police Department, et al.
Attachments: Tort Claim Notice 6-4-18.pdf

Eileen,

I received this tort claim notification today. How would you like me to proceed?

Respectfully,

Terry

From: Morgan Hentrup [mailto:morgan@baaslaw.com]
Sent: Monday, June 4, 2018 11:35 AM
To: Kruger, Terry <TKruger@westlinnoregon.gov>
Cc: Axelrod, Russell <RAxelrod@westlinnoregon.gov>; Paul Buchanan <paul@baaslaw.com>; Alysa Castro <alysa@baaslaw.com>
Subject: Tort Claim Notice - Michael Fesser / West Linn Police Department, et al.

Dear Chief Kruger:

Please see the attached Tort Claim Notice from attorney Paul Buchanan on behalf of his client, Mr. Fesser. A hard copy of this letter is also being hand-delivered to your office today.

Sincerely,

Morgan



Morgan Hentrup
Paralegal
Buchanan Angeli Altschul & Sullivan LLP
921 SW Washington Street, Suite 516 | Portland, OR 97205
Direct: 503-974-5017 | www.baasemploymentlaw.com

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June 4, 2018

**VIA EMAIL (tkruger@westlinnoregon.gov)
AND OFFICE DELIVERY**

Chief Terry Kruger
West Linn Police Department
1800 8th Avenue
West Linn, OR 97068

**Re: Michael Fesser / West Linn Police Department, Terry Timeus, Tony Reeves,
Mike Boyd - TORT CLAIM NOTICE PURSUANT TO ORS 30.275**

Dear Chief Kruger:

We represent Michael Fesser, an African-American resident of Portland, in the prosecution of civil claims against the West Linn Police Department (“WLPD”), former West Linn Police Chief Terry Timeus, and Sergeants Tony Reeves (fka Detective Tony Poitras) and Mike Boyd (these four parties are collectively referred to in this notice as the “West Linn Defendants”). As described below, the West Linn Defendants’ conduct in this matter constitutes a flagrant abuse of police power, a major infringement upon Mr. Fesser’s federally protected civil rights, as well as tortious conduct under Oregon law.

This correspondence is directed to you pursuant to ORS 30.275(5) and is intended to constitute formal notice as required by that statute that our client intends to litigate state law claims against a governmental entity (the WLPD) and its agents. As set forth below, we are also pursuing claims for violation of Mr. Fesser’s civil rights under federal law. Any future communications or correspondence with our client should be directed to me at the address above.

I. FACTUAL BACKGROUND

A. Acting on the Basis of a Personal Friendship, Chief Timeus Ordered West Linn Officers to Undertake an Unlawful Surveillance Operation into Alleged Employee Theft Purportedly Occurring in Portland by a Portland Resident at a Portland Business, Followed by an Unlawful Arrest and Detention.

For many years, Chief Timeus has had a close personal friendship with the owner of a business located entirely in Portland, well outside the boundaries of West Linn. Chief Timeus has taken fishing trips and participated in social activities with the business owner. In early 2017, this friendship was instrumental in causing the West Linn Police Chief to instruct his subordinates to undertake an unlawful surveillance operation at an East Portland location where

Mr. Fesser was employed at Chief Timeus' friend's business. At that time, Mr. Fesser was raising concerns about racial discrimination in his Portland workplace.

Acting at the behest of Chief Timeus, Sgt. Reeves undertook the surveillance operation with the assistance of Sgt. Boyd and several civilians. Sgt. Reeves and Sgt. Boyd conducted the operation without any warrant and without probable cause during an auction that Mr. Fesser was conducting at the Portland business for his employer on February 25, 2017. The surveillance did not result in any evidence of wrongdoing, as Mr. Fesser was not engaged in any improper conduct. Nevertheless, immediately following the auction, Sgt. Reeves and Sgt. Boyd proceeded to unlawfully arrest, interrogate and detain Mr. Fesser in Portland without probable cause.

Of course, any purported concern about employee theft alleged to be committed by a Portland resident at a Portland business should have been the sole province of the Portland Police. Nevertheless, the West Linn Defendants conspired to attempt to build a pretextual, false and unfounded case against Mr. Fesser outside their jurisdiction, even though no criminal activity was even alleged to have been committed in West Linn.

The unlawful nature of the West Linn Defendants' conduct was revealed to Mr. Fesser in January 2018 when, in the course of civil litigation, information was produced and testimony was given that revealed the racist, unauthorized, unwarranted, extra-jurisdictional and personally motivated nature of the West Linn Defendants' activities related to Mr. Fesser. This evidence reveals that the motivation behind the investigation was not law enforcement. Rather, the WLPD undertook its investigation into alleged employee theft at a Portland business due to Chief Timeus' personal relationship with the Portland business owner, and as a result of racial prejudice.

The newly discovered evidence shows Sgt. Reeves actively urging termination of Mr. Fesser's employment. It also reveals Sgt. Reeves happily engaged in explicitly racist, sexual, homophobic and highly unprofessional banter in text messages in the course of his unlawful surveillance and investigation of Mr. Fesser. The racial animus underlying the investigation and arrest is made plain in these documented exchanges that took place during the unwarranted surveillance effort.

This evidence also shows Sgt. Reeves expressly advising that the arrest should happen swiftly so that it would occur before Mr. Fesser could more formally complain of race discrimination at work. For example, Sgt. Reeves asserted in the midst of the unlawful surveillance operation in Portland: "It's better that we arrest him before he [formally] makes the complaint [of race discrimination]. Then it can't be retaliation." Sgt. Reeves further opined (without any knowledge of the basis for Mr. Fesser's concerns about racial discrimination) that what he called Mr. Fesser's effort to "play the race card" would not work. And he sought to provide reassurance that any legal claim of race discrimination Mr. Fesser might make would most likely be covered by insurance.

While the place of business where the surveillance took place included warning notices that video surveillance cameras were in use, testimony will show that there were no notices posted indicating that audio surveillance was conducted on those premises. Nevertheless, using

an app known as “Swann View” Sgt. Reeves, assisted by civilian personnel, ensured that conversations occurring at the Portland business were surreptitiously monitored and recorded. Sgt. Reeves received real-time updates on the unlawful audio surveillance as it took place.

The unlawful surveillance operation followed close on the heels of Sgt. Reeves’ effort to obtain witness statements earlier that same month from witnesses who are expressly acknowledged in recently obtained communications with both Sgt. Reeves and Chief Timeus to be, in the words of those communications, “dirty.”

As noted above, the surveillance operation revealed nothing in the way of evidence of wrongdoing. Nevertheless, immediately after the failed February 25, 2017 surveillance effort, Sgt. Reeves and Sgt. Boyd coordinated and participated in an arrest of Mr. Fesser in public on a city street in Portland as Mr. Fesser left work for the day. Sgt. Reeves and Sgt. Boyd arranged for some of Sgt. Reeves’ former co-workers from the Portland Police to help effectuate Mr. Fesser’s arrest. Portland Police records show that the Portland Police officers accepted (apparently without question) the West Linn officers’ assertion that they had probable cause to arrest Mr. Fesser. As he was being handcuffed, one of the Portland Police officers who knows Mr. Fesser from Mr. Fesser’s years doing ministry work in local prisons expressed his discomfort, stating: “Mike, this is not my call. I don’t want to be here. I’m just assisting West Linn.”

B. After the Unlawful Arrest, the West Linn Officers Detained and Interrogated Mr. Fesser in Portland, Seized his Personal Items, Threatened to Access his Smartphone, and Incarcerated Him in Portland.

After arresting Mr. Fesser without probable cause in Portland, Sgt. Reeves and Sgt. Boyd proceeded to seize Mr. Fesser’s personal items, including his attorney-client privileged communications with his lawyer regarding his race discrimination complaint against his employer. Sgt. Reeves interrogated Mr. Fesser in Portland at the 106th and Stark Portland Police precinct and attempted to coerce Mr. Fesser into disclosing the password to his smartphone. When Mr. Fesser declined to do so, the West Linn officers stated that they would get into his smartphone without the password, and they kept possession of the device.

Following the interrogation, the officers transported Mr. Fesser to the Justice Center in Downtown Portland where he was incarcerated. After being wrongfully arrested, detained and interrogated by the West Linn officers and imprisoned in a jail cell in Portland for a total of approximately eight hours, Mr. Fesser was released on his own recognizance around midnight with only his wallet and information regarding a court arraignment the following Monday, February 27, 2017.

C. Acting on the Basis of the Chief’s Personal Friendship, The West Linn Police Purported to Fire Mr. Fesser from the Job He had Held for More than 12 Years.

On that Monday, February 27, 2017, Sgt. Reeves called Mr. Fesser (who had purchased a new phone following the West Linn Police’s unlawful seizure of his other phone) and told him he could come out to the West Linn Police Department to retrieve his belongings. Mr. Fesser had to

travel to West Linn – a town to which he has no connection – to retrieve his personal possessions.

At the West Linn Police Department, Sgt. Reeves and Sgt. Boyd informed Mr. Fesser that his employment at the Portland company where he had worked for twelve years was terminated. Mr. Fesser thought it was bizarre that West Linn police officers were somehow empowered to summon him to West Linn and fire him from his job. The West Linn officers further instructed Mr. Fesser that he was not permitted to have any contact with his employer and not to return to the business at any time. Sgt. Boyd made harassing commentary to Mr. Fesser and gave him back his smartphone along with some, but not all, of his personal items. The officers did not return Mr. Fesser's attorney-client privileged correspondence with his attorney.

D. Once Mr. Fesser's Employment Was Successfully Terminated the Investigation Ceased, Until Mr. Fesser Filed a Lawsuit Against the Owner of the Portland Business from Which He Was Discharged.

On that same Monday, February 27, 2017, Mr. Fesser went to Multnomah County Circuit Court at the time designated in the papers he had received upon discharge from the jail. When he checked in, a court clerk informed him that no charges were being pursued against him. The clerk gave Mr. Fesser instructions on how to handle what the clerk referred to as a "no complaint" case, along with a number to call to determine if any complaint was being pursued by any alleged "victim." For several months Mr. Fesser regularly called in to the Multnomah County Circuit Court to see if the baseless criminal case was being pursued. Each time he called in, the clerk informed him that the matter still was considered a "no complaint" case.

Approximately seven months later, on September 19, 2017, Mr. Fesser filed a lawsuit in Multnomah County Circuit Court against his former employer based on the termination of his employment and on the issues and concerns that were referenced in the attorney-client privileged communications that the West Linn officers had seized from him. The lawsuit was served on September 22, 2017.

Notably, in the months following Mr. Fesser's arrest, it appears that the West Linn Defendants conducted no further investigation into any alleged criminal activity. Nevertheless, once Mr. Fesser's lawsuit was filed, it is evident that the West Linn Police almost immediately reactivated their file. We believe that shortly after the filing of the civil litigation referenced above, the West Linn Police sought to prevail upon the Multnomah County District Attorney to bring criminal charges against Mr. Fesser – and that this effort finally bore fruit in November 2017 when criminal charges were initiated. Just a few months later, however, on March 23, 2018, the District Attorney dismissed the criminal case without taking any sustained action on the case and without any plea or conviction.

The apparent lack of activity by the West Linn Police and all other law enforcement personnel following Mr. Fesser's arrest, coupled with the apparent sudden renewed interest in the case following Mr. Fesser's filing of a lawsuit regarding the termination of his employment, underscores that the West Linn Defendants were acting on the basis of personal motivations in their efforts against Mr. Fesser, and not based on any legitimate law enforcement concern. Indeed, the West Linn Defendants' actions as described above had no connection whatsoever to

any concern about unlawful activity in West Linn and, as noted above, no such unlawful activity has ever even been alleged.

The West Linn Defendants' arrest, incarceration and interrogation of Mr. Fesser without probable cause and their pursuit of baseless criminal charges against Mr. Fesser were racially motivated, extra-jurisdictional and an egregious abuse of power. We intend to prove that these actions were a direct outgrowth of a racially discriminatory "old boys" mentality that caused the Chief of the West Linn Police and his subordinates to act more like a personal posse than as officers of the law.

E. Mr. Fesser Has Incurred Substantial Damages from the West Linn Police's Egregious Abuse of Power and Violation of His Civil Rights.

As a result of the West Linn Defendants' violation of Mr. Fesser's civil rights, Mr. Fesser has suffered serious reputational injury, emotional distress and economic damages.

Mr. Fesser lost his job as a direct result of the West Linn Defendants' actions. In addition, as a result of his arrest and threatened criminal prosecution, Mr. Fesser was prevented (until the bogus criminal case was dismissed) from performing his volunteer ministry work in the local prisons, where he provides spiritual and personal support to inmates who are attempting to become productive citizens. The West Linn Defendants' false and baseless criminal charges had a serious impact on Mr. Fesser's reputation within the communities in which he is known, including among the prison officials and Portland Police officers with whom he works in his ministry work, and in the retail business in which he continues to earn a living. The ordeal inflicted severe emotional distress, as well as legal costs upon Mr. Fesser.

We believe that the West Linn Defendants' discriminatory and unlawful conduct under the pretense of law enforcement warrants imposition of punitive damages under federal law to deter and prevent such abuses of state power in the future.

II. LEGAL CLAIMS

Based on the course of conduct summarized above, Mr. Fesser has multiple claims against the West Linn Defendants arising under federal law, pursuant to 42 U.S.C. Sections 1981 and 1983, and state law, including under ORS 30.265.

1. The West Linn Defendants Violated Mr. Fesser's Federally Protected Rights Under Section 1981.

The West Linn Defendants violated Mr. Fesser's right "to make and enforce contracts" under 42 U.S.C § 1981 ("Section 1981"), as amended by the Civil Rights Act of 1991 (clarifying that "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"). The West Linn Defendants also acted on the basis of Mr. Fesser's race to deprive him of the "full and equal benefit of the law" in violation of Section 1981.

The evidence is unusually stark in this case that the West Linn Defendants impaired Mr. Fesser's "ability to make and enforce contracts." For example, as noted above, Sgt. Reeves expressly advised in writing in the context of the unlawful surveillance effort that it would be best that he and Sgt. Boyd arrest Mr. Fesser quickly – before Mr. Fesser might more formally complain of race discrimination – because, "that way it can't be retaliation." The West Linn Defendants also took it upon themselves to tell Mr. Fesser that he was fired from the job he had held for over a decade. And throughout the surveillance activities, Sgt. Reeves pushed for termination of Mr. Fesser's employment, despite concerns about the likelihood of a race discrimination lawsuit – concerns Sgt. Reeves sought to alleviate, noting the likelihood that insurance would pay for any such liability, among other reassurances.

The West Linn Defendants further violated Section 1981 by transgressing Mr. Fesser's Fourth Amendment rights in wrongfully surveilling, arresting and detaining him and discriminating against him on the basis of his race, thereby depriving Mr. Fesser of the "full and equal benefit of the law." Sgt. Reeves' actions were accompanied by casual, jovial racist banter that serves to make the racial animus especially clear. Consequently, Mr. Fesser has strong claims under both the "make and enforce contracts" and the "full and equal benefit" provisions of Section 1981.

Moreover, given the clear abuse of the authority with which law enforcement is entrusted, the facts here plainly meet and exceed the standard for punitive damages under Section 1981. We can readily demonstrate that the West Linn Defendants "almost certainly knew that what [they] were doing was wrongful and subject to punishment." *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998).

2. The West Linn Defendants Violated Mr. Fesser's Federally Protected Rights Under Section 1983.

The West Linn Defendants also violated Mr. Fesser's rights under 42 U.S.C. § 1983 ("Section 1983"). Section 1983 is a "vehicle by which plaintiffs can bring federal constitutional and statutory challenges to actions by state and local officials." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). The statute provides:

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. 42 U.S.C. § 1983.

To state a claim under Section 1983, "a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). It is well established that an individual acts under color of law when the individual "abuses the position given to him by the State." *Id.* at 50.

This is generally shown when a state employee wrongs an individual “while acting in his official capacity or while exercising his responsibilities pursuant to state law.” *Naffe v. Frey*, 789 F.3d 1030, 1036 (quoting *West v. Atkins*, 487 U.S. at 50).

In contriving to assert false criminal charges against Mr. Fesser and acting outside their jurisdiction and under a false claim of probable cause to surveil, arrest, detain and interrogate Mr. Fesser, the West Linn Defendants deprived Mr. Fesser of his rights under the United States Constitution, as well as under other federal and state laws. The West Linn Defendants subjected Mr. Fesser to unlawful audio surveillance, false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation and racial discrimination in violation of state and federal law.

The West Linn Defendants trampled Mr. Fesser’s rights to equal protection and due process of law while clothed in the power of the state, along with his right to be free from warrantless surveillance and arrest pursuant to the Fourth Amendment of the U.S. Constitution.

As noted above, documentary evidence in our possession reveals the West Linn Defendants’ ready embrace of a racially discriminatory and retaliatory animus – to say nothing of a shocking lack of professionalism. We believe the evidence will also show that, under Chief Timeus’ leadership, there was a policy or practice at the WLPD to racially target African Americans in particular. In this case, that practice caused the West Linn Defendants to operate far outside their jurisdiction. The WLPD officers involved in this matter acted, at a minimum, with reckless and callous indifference to Mr. Fesser’s rights. Thus, liability for each of the West Linn Defendants under Section 1983, with attendant punitive damages against the individual defendants, is easily established on these facts.

3. The West Linn Defendants Caused Mr. Fesser to Be Unlawfully Arrested and Imprisoned Without a Warrant and Without Probable Cause.

Under Oregon law, claims of false arrest and false imprisonment have the same four elements: (1) the defendant must confine the plaintiff; (2) the defendant must intend the act that causes the confinement; (3) the plaintiff must be aware of the confinement; and (4) the confinement must be unlawful. *Miller v. Columbia County*, 282 Or. App. 348, 352-53, 385 P.3d 1214, 1220 (2016).

These elements are easily proven here. The West Linn Defendants caused Mr. Fesser to be arrested and detained at the Justice Center in Portland for hours without a warrant and without probable cause. *U.S. v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.”). The West Linn Defendants failed to provide the Portland Police with any information indicating that Mr. Fesser was involved in any criminal activity; rather, the officers misrepresented that they had probable cause and the Portland Police accepted that representation without question. On that basis, the West Linn Defendants had Mr. Fesser arrested outside their jurisdiction and without probable cause.

Recently discovered evidence reveals that the West Linn Defendants engaged in unlawful surveillance and that they had no sound basis for their arrest and detention of Mr. Fesser – and that they knew this was the case at the time.¹ Mr. Fesser is entitled to both compensatory and punitive damages based on his false arrest and imprisonment in Portland at the hands of the West Linn Police acting without probable cause.

4. The West Linn Defendants Instituted Criminal Proceedings Against Mr. Fesser for the Purpose of Assisting a Personal Friend of the Chief.

To state a claim of malicious prosecution a plaintiff must show: “(1) the institution or continuation of the original criminal proceedings; (2) by or at the insistence of the defendant; (3) termination of such proceedings in the plaintiff’s favor; (4) malice in instituting the proceedings; (5) lack of probable cause for the proceeding; and (6) injury or damage because of the prosecution.” *Rose v. Whitbeck*, 277 Or. 791, 795, 562 P.2d 188, 190 (Or. 1977). For the purposes of malicious prosecution, malice is defined as “any primary purpose other than to bring a person to justice.” *Singh v. McLaughlin*, 255 Or. App. 340, 353, 297 P.3d 514, 523 (2013) (citing *Ledford v. Gutoski*, 319 Or. 397, 404, 877 P.2d 80 (1994)). “Evidence that a defendant initiated an arrest without probable cause is, standing alone, generally sufficient to give rise to an inference of malice.” *Id.* at 354.

In this case, not only did the West Linn Defendants lack probable cause when they caused Mr. Fesser to be arrested, detained and charged with theft, they also falsified and omitted evidence in their efforts to justify their actions. These actions were motivated by Chief Timeus’ personal interests and not any legitimate law enforcement interest, as well as by documented racially discriminatory animus. The absence of any legitimate motivation for the West Linn Defendants’ actions is underscored by the fact that no crime was ever even alleged to have occurred in West Linn. The West Linn Defendants subjected Mr. Fesser to criminal charges based on evidence that was deliberately manipulated and fabricated. For example, in Sgt. Reeves’ and Chief Timeus’ communications regarding the investigation, it was openly acknowledged that the witnesses upon which the WLPD was purporting to rely “are dirty.”

The criminal case was never pursued in earnest and was ultimately dismissed as it was baseless. Indeed, as discussed above, it appears that the criminal case was not pursued at all following Mr. Fesser’s arrest and the termination of his employment; it was not until Mr. Fesser filed his race discrimination lawsuit that the WLPD’s file appears to have been almost immediately reopened. Now that the charges against Mr. Fesser have been dismissed, the malicious prosecution tort is ripe and timely.

¹ Mr. Fesser first became aware of the unlawful and discriminatory nature of the West Linn Defendants’ conduct on January 17, 2018 when he obtained initial discovery in civil litigation. Further evidence of the illegal nature of the West Linn Defendants’ conduct was revealed in a January 23, 2018 deposition in the civil litigation. Under the discovery rule, “[T]he notice period and two-year statute of limitations applicable [under ORS 30.275] do not begin to run until a plaintiff knows or reasonably should know of the facts giving rise to his claim.” *Doe v. Lake Oswego School District*, 242 Or. App. 605, 613, 259 P.3d 27, *rev. denied*, 351 Or. 254, 264 P.3d 1285 (2011). Thus, Mr. Fesser’s state law claims are timely. Mr. Fesser’s federal law claims are unaffected by the notice requirement of ORS 30.275 and are also well within the applicable statutory limitations period.

5. The West Linn Defendants Engaged in Egregious Action that Subjected Mr. Fesser to Emotional Distress.

A claim for intentional infliction of emotional distress (“IIED”) requires a showing of three elements: “(1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant’s acts were the cause of plaintiff’s severe emotional distress, and (3) the defendant’s acts constituted an extraordinary transgression of the bounds of socially tolerable conduct.” *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000 (1989); *see also Child v. City of Portland*, 547 F.Supp.2d 1611 (D. Or. 2008).

It need not be belabored that the actions detailed above easily satisfy the standard for imposition of IIED liability. When the police abuse the power vested in them to deprive another of his liberty on the basis of personal friendship rather than probable cause, and when the police rely upon witnesses understood and expressly acknowledged to be “dirty,” participate in unlawful surveillance and act outside their jurisdiction, the egregious and tortious nature of the conduct is clear. Further, the West Linn Defendants’ extraordinary actions in purporting to fire plaintiff from a job in Portland that he had held for more than a decade, and in taking his personal belongings including his privileged correspondence with his attorney and his smartphone, also plainly demonstrate an extraordinary transgression of the bounds of socially tolerable conduct.

6. The West Linn Defendants Defamed Plaintiff.

The West Linn Defendants made false and defamatory statements about plaintiff that caused him serious harm. For example, Sgt. Reeves made the following false statements about Mr. Fesser in writing:

- “He is robbing you blind.”
- “Today his reign of terror ends.”
- “Like he hasn’t been in your pocket for years.”

We believe Sgt. Reeves made multiple other such comments to the witnesses he attempted to enlist in his manufactured case against Mr. Fesser. Assertions like these by the West Linn Defendants that assert or imply that Mr. Fesser engaged in theft and embezzlement at work constitute defamation per se. *L & D of Oregon v. Am. States Insurance Co.*, 171 Or. App. 689 (2014).

7. The West Linn Defendants Violated 18 U.S.C. § 2511, ORS 133.724 and Committed the Tort of Invasion of Privacy.

The federal wiretapping statute, 18 U.S.C. § 2511 *et seq.*, prohibits the interception and use of oral communications on any business premises. In addition, ORS 133.739 prohibits a law enforcement officer from intercepting or directing others to intercept an oral communication without obtaining an order authorizing such interception under ORS 133.724. These statutes help establish an individual’s reasonable expectation of privacy. Oregon tort law recognizes an action for invasion of privacy under the “intrusion on seclusion” theory that is applicable where a

party intrudes on another's reasonable expectation of privacy. *See Mauri v. Smith*, 324 Or. 476, 482-83 (1996); *see also, Perez-Denison v. Kaiser Foundation Health Plan of the Northwest*, 868 F.Supp.2d 1065, 1090 (D. Or. 2012).

In participating in an unlawful surveillance operation without a warrant and outside their jurisdiction, taking Mr. Fesser's smartphone and threatening to hack into it, and taking his confidential attorney-client privileged communications, the West Linn Defendants violated Mr. Fesser's reasonable expectations of privacy in a highly offensive manner and further violated the state and federal wiretapping statutes referenced above.

III. NOTICE TO PRESERVE

This letter is also intended to serve as notice of the West Linn Defendants' obligation to preserve electronic files and data related to the investigation, arrest, incarceration and attempted prosecution of Mr. Fesser and all files, documents and records related to Mr. Fesser's claims described above. The West Linn Defendants must not destroy, conceal or alter any papers, electronic files or any other electronic data generated by and/or stored on computers and storage media, including hard disks, thumb drives, back-up drives, etc. that may contain information related to this dispute.

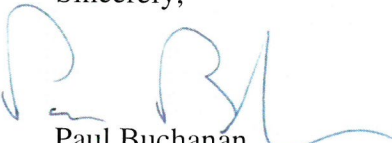
Chief Timeus, Sgt. Reeves, Sgt. Boyd, and other former and current WLPD employees who were involved in the investigation, arrest and incarceration of Mr. Fesser are on notice to preserve all text messages, voicemails, instant message conversation logs, emails, video conferencing logs, and cell phone records related to Mr. Fesser, and to advise the WLPD's current and former officers and employees of their obligations under the law. **While we have obtained some of Chief Timeus and Sgt. Reeves' text messages, all of the text messages related to this matter must be preserved from intentional or inadvertent destruction, including without limitation any such messages in the possession of Sgt. Boyd.**

As you may know, failure to comply with this Notice to Preserve may result in court-imposed sanctions, including sanctions for spoliation of evidence or potential evidence.

IV. LITIGATION

If I do not hear from you or your counsel by June 22, 2018, we will proceed with litigation.

Sincerely,



Paul Buchanan

cc: Mayor Russ Axelrod

Kelly Burgess

From: Axelrod, Russell <RAxelrod@westlinnoregon.gov>
Sent: Monday, June 4, 2018 2:25 PM
To: Stein, Eileen
Cc: Tim Ramis
Subject: Fw: Tort Claim Notice - Michael Fesser / West Linn Police Department, et al.
Attachments: Tort Claim Notice 6-4-18.pdf

Eileen,

Just received this email re tort claim/allegations against former chief Timeus and others in WLPD. Why are you not on the distribution and I am? This is very concerning. Copying Tim Ramus as well.

Russ

From: Morgan Hentrup <morgan@baaslaw.com>
Sent: Monday, June 4, 2018 11:34 AM
To: Kruger, Terry
Cc: Axelrod, Russell; Paul Buchanan; Alysa Castro
Subject: Tort Claim Notice - Michael Fesser / West Linn Police Department, et al.

Dear Chief Kruger:

Please see the attached Tort Claim Notice from attorney Paul Buchanan on behalf of his client, Mr. Fesser. A hard copy of this letter is also being hand-delivered to your office today.

Sincerely,

Morgan



Morgan Hentrup

Paralegal

Buchanan Angeli Altschul & Sullivan LLP

921 SW Washington Street, Suite 516 | Portland, OR 97205

Direct: 503-974-5017 | www.baasemploymentlaw.com

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Please consider the environment before printing this email.

Russell Axelrod

Mayor

City Council

22500 Salamo Rd
West Linn, OR 97068
RAxelrod@westlinnoregon.gov
westlinnoregon.gov
503-742-6002



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Darlene Ferretti

From: Mollusky, Kathy

Sent: Monday, June 4, 2018 3:27 PM

To: 'mboyd@molallapoliice.com' <mboyd@molallapoliice.com>; Reeves, Tony <treeves@westlinnoregon.gov>; Kruger, Terry <TKruger@westlinnoregon.gov>; Tracy, Toni <ttracy@westlinnoregon.gov>; Boyle, Shane <sboyle@westlinnoregon.gov>; Stein, Eileen <estein@westlinnoregon.gov>; Terry Timeus <timeust@gmail.com>

Cc: Jon Stouffer <jstouffer@cisoregon.org>; 'claimspl@cisoregon.org' <claimspl@cisoregon.org>

Subject: Tort Claim

Hello,

Attached is a copy of a Tort Claim Notice received by our office today.

As per the notice, **please preserve all text messages, voicemails, instant message conversation logs, emails, video conferencing logs, cell phone records, etc. related to Mr. Fesser.**

Jon Stouffer (copied on this email) is our CIS representative. His phone number is 1-503-763-3876.

Thank you for your assistance.

Kathy

Kathy Mollusky

City Recorder

Administration

[#6013](#)



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Darlene Ferretti

From: Stein, Eileen <estein@westlinnoregon.gov>
Sent: Tuesday, June 5, 2018 5:21 PM
To: Tim Ramis; 'Kathy Peck'; 'Dian Rubanoff'
Cc: Kruger, Terry; Hennelly, Neil
Subject: FW: Tort Claim Notice re Timeus/Boyd/Reeves
Attachments: 2018-06-04 Fesser, Michael Tort Claim.pdf

Tim,

Per the message I just sent to Council, here is the Tort Claim Notice. At the end of the notice it says if they do not receive a response by June 22, 2018, they will proceed with litigation. Doesn't say what they want, but I imagine a payout?

Seems weird this is filed on Terry Kruger's first day on the job and it relates to racial discrimination? Any chance this plays into the Newberry case at all? Who responds on our behalf by June 22? I would think this would be handled by Kathy Peck's firm?

On the internal side of things, Terry and Neil, reported the Sgt. Rollins is doing a cursory look into the matter to determine if an internal investigation into Sgt. Reeves' actions is warranted.

What else should we be doing?

Eileen

Darlene Ferretti

From: Dian Rubanoff <drubanoff@prhlaborlaw.com>
Sent: Tuesday, June 5, 2018 6:43 PM
To: Stein, Eileen; Tim Ramis
Cc: Kruger, Terry; Hennelly, Neil; Kathy Peck
Subject: Re: Tort Claim Notice re Timeus/Boyd/Reeves

Probably by then, but if not, Tamara Jones and Kirk Mylander should be brought into the loop. They are CIS attorneys. In any event, it's probably best for the City to ask for more time to evaluate the case, and maybe agree to a tolling agreement if the plaintiff is worried about the statute of limitations. A tolling agreement just freezes the claim to buy time so that the plaintiff does not need to file in court. You probably need to know the outcome of any investigation interviews with Reeves and Boyd in order to evaluate the risks of going forward.

Chief and Neil, are there criminal implications to the investigation of Reeves and Boyd that should be turned over to another law enforcement agency?

We may also want an administrative investigation of Reeves and Boyd to be conducted by an outside investigator and covered by privilege, considering there is threatened litigation. If so, the investigator should be carefully selected. Another issue to discuss with the attorneys at CIS.

Our office is ready to help in any way you see fit.

Dian "Dee" Rubanoff
PECK RUBANOFF & HATFIELD
5285 Meadows Road, Suite 140
Lake Oswego, OR 97035
(503) 303-7240 (main)
(503) 303-7236 (direct)
(503) 998-1366 (cell)
Email: drubanoff@prhlaborlaw.com
Website: <http://prhlaborlaw.com>

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Darlene Ferretti

From: Tim Ramis
Sent: Wednesday, June 6, 2018 6:14 AM
To: Stein, Eileen
Cc: Kathy Peck; Dian Rubanoff; Kruger, Terry; Hennelly, Neil
Subject: Re: Tort Claim Notice re Timeus/Boyd/Reeves

Eileen,

Let's get a call with CIS counsel scheduled as soon as we can. As Dee suggests, we need to coordinate with CIS as we engage an outside investigator, which appears likely based on the face of the allegations.

Tim

Sent from my iPhone

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From: "Hennelly, Neil" <nhennelly@westlinnoregon.gov>
Date: Thursday, June 14, 2018 at 6:36 PM
To: "'jstouffer@cisoregon.org'" <jstouffer@cisoregon.org>, "Timothy V. Ramis" <Tim.Ramis@jordanramis.com>, Kathy Peck <kpeck@prhlaborlaw.com>, Dian Rubanoff <drubanoff@prhlaborlaw.com>
Subject: Fesser Update

Good Afternoon Everyone,

Here is the latest on the Fesser investigation:

- Chief Kruger has recused himself from the investigation as he has a personal relationship with Mr. Benson.
- We have opened an internal investigation to look at potential policy violations, if we find criminal conduct by our current or former employees, we will cease and request an outside agency to conduct a criminal investigation.
- There are no longer any text messages on Reeves phone from/to Benson.
- There are seven emails to Reeves from Benson, with 4 replies by Reeves, I have not read these, however Acting Lt. Rollins told me they are not of concern, I will review them next week.
- I will be interviewing Reeves within the week to ask about the cell phone that was not receipted into property/evidence, and subsequently returned to Mr. Fesser, a potential policy violation.
 - There is no video of Mr. Fesser retrieving his phone, front counter video is only kept for 30 days.
- PPB contacts vaguely remember conversation with Stradley, but at the time the case did not meet their minimum loss threshold, and the Detective who would have worked it was leaving for an extended trip out of the country.
- There was one voicemail from Benson to Reeves that was in October 2017, that was just an inquiry of some records, and non-consequential to the tort notice.
- I will be conducting the internal investigation, and will keep you updated at least weekly.

I would appreciate some guidance on how to proceed relative to former Det. Boyd, now with Molalla PD, and Retired Chief Timeus. Since they are no longer employees, we cannot hold them accountable for policy violations.

If you have any questions, please let me know. I will be out of the office tomorrow, but will be available to answer emails.

Best,
Neil

Neil Hennelly
Police Captain
Police

1800 8th Avenue

Kelly Burgess

From: Tim Ramis
Sent: Monday, July 2, 2018 12:53 PM
To: Tim Ramis
Subject: Fwd: Fesser v. West Linn, Reeves & Boyd

Sent from my iPhone

Begin forwarded message:

From: "Stein, Eileen" <estein@westlinnoregon.gov>
Date: June 25, 2018 at 10:28:43 AM PDT
To: 'Tim Ramis' <Tim.Ramis@jordanramis.com>
Subject: FW: Fesser v. West Linn, Reeves & Boyd

Tim, FYI.... Looks like an Exec Session is needed. Eileen

From: Jon Stouffer [<mailto:jstouffer@cisoregon.org>]
Sent: Monday, June 25, 2018 9:46 AM
To: Jim McWilliams <jmcwilliams@cisoregon.org>; Stein, Eileen <estein@westlinnoregon.gov>; Hennelly, Neil <nhennelly@westlinnoregon.gov>
Subject: FW: Fesser v. West Linn, Reeves & Boyd

All,

Here is the demand on the new Fesser case. Based on the demand it looks like this will end up in litigation.

At this point I still need to speak with Reaves and Timeus.

Thanks,

Jon Stouffer

CIS

From: Paul Buchanan <paul@baaslaw.com>
Sent: Friday, June 22, 2018 8:33 AM
To: Jon Stouffer <jstouffer@cisoregon.org>
Cc: Alysa Castro <alysa@baaslaw.com>; Morgan Hentrup <morgan@baaslaw.com>
Subject: Fesser v. West Linn, Reeves & Boyd

Hi Jon,

I've had a chance to confer with our client and can confirm that we would be willing to participate in a mediation with a mutually agreeable mediator if the West Linn Defendants will enter into a mutually acceptable form of tolling agreement, given the July 16, 2018 statute of limitations on some of our state law claims. Our pre-filing settlement demand is three million dollars. Of course, if we are required to litigate the case and, as we obtain further discovery during litigation, I am confident we will conclude that our opening demand must be higher.

If I haven't heard from you by June 29, 2018, I will conclude that you are declining to participate in a pre-filing mediation.

Also, in regards to any litigation hold, please be aware that we have reason to believe that Officer Mike Stradley has relevant text messages and other documents relating to the illegal and extra-jurisdictional investigation into and arrest of our client. All such materials – including but not limited to his text messages with Officer Poitras/Reeves, Boyd and Chief Timeus – must be preserved to avoid spoliation

and other potentially applicable sanctions. The West Linn Defendants' efforts to preserve documents and electronically stored information will be a significant area of discovery in the litigation.

Thank you for your attention to this matter. -Paul
Paul Buchanan

Buchanan Angeli Altschul & Sullivan LLP

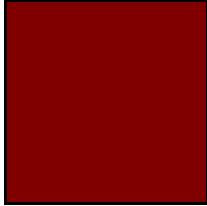
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Jon Stouffer | P/L Senior Claims Consultant
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p 503-763-3876 | 800-922-2684 x3876 | f 503-763-3900
www.cisoregon.org

We've created an engaging new podcast series called Kammersations! Our Pre-Loss Attorney Katie Kammer hosts them and provides good tips for employment-related issues. Find them at <http://cisoregon.org/podcasts>

Eileen Stein
City Manager
Administration

22500 Salamo Rd.

West Linn, Oregon 97068

estein@westlinnoregon.gov

westlinnoregon.gov

503-742-6025



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CITY OF
West Linn

MEMORANDUM

To: Captain Neil Hennelly

From: Acting Lieutenant Oddis Rollins

Re: Investigative Report

Date: 07/20/2018

During the month of June 2018, I was advised of West Linn Police Department case #17-270, an embezzlement case in which Michael Lawrence Fesser was the suspect. According to the information I received and read, West Linn Police Sergeant Tony Reeves was the lead investigator in the case in which the victim was the business of A&B Towing, Eric Benson being the owner. At the time of this investigation, Sgt. Reeves' title was officially that of Detective and Sgt. Reeves was still using the last name of "Poitras". For consistency and clarity, I will address Tony Reeves as "Sgt. Reeves" for the duration of this memorandum.

I was able to obtain and read all submitted reports regarding this case, along with all submitted orphan documents, evidentiary documents and court documents. I was also provided with a copy of a tort claim, filed by Michael Fesser and his representation, against the West Linn Police Department and other named subjects, in which Fesser makes claims of actions taken against him that may in part, or in whole, be violations of West Linn Police Policy. My inquiry into this matter was restricted to the limited scope of possible West Linn Police Department Policy violations, and not civil complaints raised within the body of the tort claim.

Among the allegations made by Fesser within the body of the tort claim, Fesser claimed that *"Sgt. Reeves happily engaged in explicitly racist, sexual, homophobic and highly unprofessional banter in text messages in the course of his unlawful surveillance and investigation of Mr. Fesser. The racial animus underlying the investigation and arrest is made plain in these documented exchanges that took place during the unwarranted surveillance effort."*

"Sgt. Reeves' actions were accompanied by casual, jovial racist banter that serves to make the racial animus especially clear."

Fesser also claimed that upon his arrest on February 25, 2017, Sgt. Reeves seized and kept physical possession of his cellphone after being questioned at the Portland Police Bureau East Precinct. Fesser further claimed that he was forced to purchase a new cellphone between the time he was released from jail around midnight on February 26, 2017 and the time when he was given back possession of his original cellphone on February 27, 2017. Fesser stated that he was called by Sgt. Reeves on February 27, 2017 and told to come to the West Linn Police Department to retrieve his

belongings. When he arrived at the West Linn Police Department later that same day, Fesser claimed that his cellphone was returned to him *"along with some, but not all, of his personal items."*

I reviewed the two West Linn Police reports written in this case, both written by Sgt. Reeves. Sgt. Reeves wrote that after Fesser's arrest, he did collect and seize *"several items that appeared to have evidentiary value to this case. This included the auction list, a title to a vehicle sold at the auction with \$500.00 attached to it and several other documents labeled with A&B Towing."*

Sgt. Reeves then continued in his report to describe the interview that was conducted on Fesser at the Portland Police Bureau East Precinct. According to Sgt. Reeves' report, Fesser declined to answer any questions at the time of the interview. Sgt. Reeves wrote in his report that upon returning to the West Linn Police Station, he *"noticed the paperwork with the \$500.00 attached to it was a title for a vehicle. The title had Fesser's dealership as the owner. There was also paperwork belonging to his dealership and communications between Fesser and a law firm. I sealed all of these items in a large envelope. I contacted Fesser and told him he could retrieve the items from me."*

Sgt. Reeves does make reference to returning Fesser's belongings to him at the West Linn Police Department meeting. At no point in his report does Sgt. Reeves reference a cellphone owned by Fesser. Sgt. Reeves does not write that any cellphone was found in Fesser's possession upon his arrest. Sgt. Reeves does not write that any cellphone was seized from Fesser. Sgt. Reeves does not write that he returned any cellphone to Fesser.

When I reviewed the Property in Custody form for the case, I observed that the case number was listed as #17-270 and the suspect name listed was MICHAEL FESSER. The form listed two items, both under the description of "BOX OF FINANCIAL RECORDS". Sgt. Reeves wrote on the form that he was the seizing officer of the above described items. The items were also given a "Bar Code" number, 195834, which would have been recorded by the West Linn Police Department Evidence and Property Technician, indicating the items were submitted for secure storage in the evidence room. There is no entry of a cellphone on the Property in Custody form for this case number.

There was also a report written by Portland Police Officer Patrick Murphy, detailing his involvement in assisting West Linn Police with the arrest of Fesser on February 25, 2017. There is no mention of a cellphone in Officer Murphy's report.

After reading through all the material in this case, including the tort claim, I determined there were four specific West Linn Police Department policies that may have been violated during the investigation of this case. Those policies are:

West Linn Police Department Policy 340- Standards of Conduct

340.5.1- DISCRIMINATION, OPPRESSION OR FAVORITISM

Discriminating against, oppressing or providing favoritism to any person because of age, race, color, creed, religion, sex, sexual orientation, gender identity or expression, national origin, ancestry, marital status, physical or mental disability, medical condition or other classification protected by law, or intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power or immunity, knowing the conduct is unlawful.

340.5.7- CONDUCT

(Applicable subsections):

(f) Discourteous, disrespectful, or discriminatory treatment of any member of the public or any member of this department or the City.

(g) Use of obscene, indecent, profane or derogatory language while on-duty or in uniform..

West Linn Police Department Policy 800- Property Procedures

800.3.1- PROPERTY BOOKING PROCEDURE

All property must be booked prior to the employee going off-duty unless otherwise approved by a supervisor. Employees booking property shall observe the following guidelines:

(Applicable subsections):

(a) Complete the property in custody form describing each item of property separately, listing all serial numbers, owner's name, finder's name, and other identifying information or markings.

800.6.4- RELEASE OF PROPERTY

Property may be released to a verified owner at the discretion of the property and evidence technician without further authorization. A property and evidence technician shall release the property upon proper identification being presented by the owner for which an authorized release has been received. A signature of the person receiving the property shall be recorded on the property release form. After release of all property entered on the property release form, the form shall be forwarded to the Records Division for filing with the case.

Interview with Detective Mike Boyd

On July 13, 2018, I contacted Molalla Police Department Lieutenant Frank Schoenfeld and Molalla Police Detective Mike Boyd and informed them that I was interested in performing an interview with Detective Boyd regarding possible West Linn Police policy violations that occurred during the investigation of this case. Both agreed to the interview and I scheduled a meeting with Detective Boyd at the Molalla Police Station on July 16, 2018 at 9:30 am.

On July 16, 2018, I conducted an interview with Detective Boyd at the Molalla Police Station. I used my department issued cellphone to record the interview. I began the interview by summarizing the dates of the investigation covered under West Linn Police case number #17-270, along with the names of the involved individuals, and asked Detective Boyd if he had any independent recollection of the case and its investigation.

Detective Boyd stated that he did not and was only refreshed to the outline of the investigation after reading a copy of the tort claim filed by Fesser. Detective Boyd had already been provided a copy of the tort claim and had read it prior to my initial contact of him.

I asked Detective Boyd if he considered himself one of the investigators in this case and he said that he only considered himself a "cover officer". Detective Boyd stated the case belonged to Sgt. Reeves and he did not perform any active investigation during the case, save for the surveillance and assistance in Fesser's arrest on February 25, 2017. Detective Boyd stated he did not write any reports regarding this case.

Detective Boyd only recalled the arrest of Fesser after reading the tort claim filed by Fesser. Detective Boyd did not have any independent recollection as to whether or not Fesser was in possession of a cellphone when he was arrested or if a cellphone was ever seized from Fesser during the investigation. Detective Boyd said his only knowledge of a cellphone being seized from Fesser came from the tort claim. Detective Boyd also had no independent recollection of the cellphone being returned to Fesser and was only familiar with those details based on what he read in the tort claim.

I asked Detective Boyd if he ever heard, at any point during this investigation, Sgt. Reeves use any explicit racist, sexual, homophobic or otherwise discriminatory language, either through text message or spoken word, about Fesser, or to Benson. Detective Boyd replied that he remembered Sgt. Reeves and Benson texting back and forth during the surveillance mission that occurred on the same day Fesser was arrested and thought Sgt. Reeves made some "off-hand" comments about the texts but couldn't remember the specific words Sgt. Reeves used. Detective Boyd stated he did not physically see any inappropriate text messages from Sgt. Reeves.

Interview with Sergeant Tony Reeves

On July 16, 2018, I presented Sgt. Reeves with a Notice of Investigatory Interview so he could familiarize himself with the potential areas of policy violation in this investigation. The interview was initially scheduled for July 17, 2018 at 2000 hours but upon reading and signing the notice, Sgt. Reeves said he was prepared to complete the interview immediately. I was also prepared to complete the interview, so I performed the interview with Sgt. Reeves on July 16, 2018 at 1623 hours.

I began the interview by summarizing the dates of the investigation covered under West Linn Police case number #17-270, along with the names of the involved individuals, and asked Sgt. Reeves if he had any independent recollection of the case and its investigation. Sgt. Reeves said, "Yes."

I asked Sgt. Reeves if he was the lead investigator in this case and he said, "Yes."

Sgt. Reeves stated that during the investigation, he communicated with the victim, Eric Benson, through text messaging, telephone conversations and face to face conversations. I asked Sgt. Reeves if during any of those communicative events, he ever used explicitly racist, homophobic or sexual language or content. Sgt. Reeves stated that, at no time, did he ever send any text message or have any conversation with Benson, via telephone or in person, which was explicitly racist or homophobic in nature or content. Sgt. Reeves did state that on one occasion, he sent a text message to Benson that contained the word "pussy" in it. Sgt. Reeves described the context of that text message as such: During the live surveillance mission that Sgt. Reeves and Detective Boyd conducted on Fesser on February 25, 2017, Benson told Sgt. Reeves that he was becoming apprehensive about having Fesser arrested. Sgt. Reeves said he relayed Benson's apprehension to then-West Linn Police Chief Terry Timeus and Timeus replied to Sgt. Reeves something to the effect of, "Tell him to quit being a pussy." Sgt. Reeves said he sent Benson a text message that basically parroted Timeus's words, telling Benson to

“not be a pussy” and continue with the investigation and imminent arrest of Fesser. Sgt. Reeves explained that he did not use the word “pussy” in a sexual manner or context but rather to relay the sentiments of Timeus to Benson.

I asked Sgt. Reeves several questions about the eventual arrest and questioning of Fesser on February 25, 2017. Sgt. Reeves said he did remember the arrest of Fesser and Sgt. Reeves recalled that Fesser did have a cellphone in his possession upon his arrest. Sgt. Reeves further remembered seizing and taking possession of Fesser’s cellphone that same day. Sgt. Reeves explained that his initial intention was to hold the phone for the purposes of writing a search warrant affidavit with the goal of being able to search the cellphone and its contents for evidence.

Sgt. Reeves also remembered seizing other items from Fesser upon his arrest including folders with car auction information, documents that pertained to Fesser’s personal business, and a legal document addressed to Benson.

I asked Sgt. Reeves if he completed a Property in Custody form for the seized items, including the cellphone and he said, “I didn’t.” Sgt. Reeves acknowledged that he did not complete a Property in Custody form for any of the items that were seized from Fesser and then returned on February 27, 2018, including the cellphone and other paperwork that he determined had no evidentiary value to the case. Sgt. Reeves said he only later completed a Property in Custody form for the items that had been seized and kept as evidence.

I asked Sgt. Reeves if the seized cellphone was secured within the West Linn Police Evidence Division and he said it was not. I asked Sgt. Reeves where the cellphone was maintained during the time it was in his possession and he stated the cellphone was kept in the Detectives office area of the West Linn Police Department, behind a locked door. Sgt. Reeves said that according to the information he knew at the time, the only people who had access to that locked Detectives office area were himself, Detective Mike Boyd, and the command staff of the West Linn Police Department. Sgt. Reeves stated that he had been trained that maintaining property in the Detectives office area, specifically cellphones that could be the subject of future search warrants, was acceptable.

Sgt. Reeves said he did not receive authorization from any West Linn supervisor to maintain the cellphone in the Detectives office area and not in the secure Evidence Division.

Sgt. Reeves did remember returning the cellphone to Fesser by handing it to him. Sgt. Reeves said he did not receive a signature from Fesser on a Property Release Form and obviously no signed Property Release Form was forwarded to the West Linn Police Records Division for filing with the case.

On 07/18/18, I was directed to meet with CIS Senior Claims Consultant Jon Stouffer to retrieve a file that contained a large number of text message communications between Benson and Sgt. Reeves. Stouffer provided me with a thumb drive that contained these text messages. In total, I discovered there were 80 pages of text messages between Benson and Sgt. Reeves contained on the thumb drive.

Later that same day, I read through all 80 pages of text messages between Benson and Sgt. Reeves and observed multiple text messages from Sgt. Reeves to Benson that could easily be considered lewd, obscene, inappropriate and unprofessional given that Sgt. Reeves was on-duty, acting in the capacity of a West Linn Police Detective at the time the text messages were written and sent.

The following is an excerpt from the text message string that is recorded at 11:02 a.m.:

Benson: *"These worthless fucks"*

Sgt. Reeves: *"They still talking shit??"*

Benson: *"Ya"*

Sgt. Reeves: *"That's funny cuz I'm talking shit about you as well."*

Benson: {sends an emoji of a middle finger sticking up}

Benson: *"Funny cause your boss is in my family room looking at your posts on grinder"*

Sgt. Reeves: {sends 2 emojis of a winking, kissing, face}

Benson: *U sick bastard*

The following is an excerpt from the text message string that is recorded at 11:03 a.m.:

Benson: *"He is confiding in the guy with the weird coat."*

Sgt. Reeves: *"He needs to hurry up already"*

Benson: *"No shit"*

Sgt. Reeves: *"I'm impressed how well you text while being t-bagged by the chief!"*

Benson: *"Funny he is telling me how u got promoted to detective. I guess u took good care of him."*

Sgt. Reeves also used the "FUCK", or a derivation there of, 12 separate times during the text message conversation between he and Benson that began at 10:59 a.m. and ended at 11:09 a.m.

Findings

Based on the information above, I do not find that Sgt. Reeves violated the following West Linn Police policies:

West Linn Police Department Policy 340- Standards of Conduct

340.5.1- DISCRIMINATION, OPPRESSION OR FAVORITISM

Discriminating against, oppressing or providing favoritism to any person because of age, race, color, creed, religion, sex, sexual orientation, gender identity or expression, national origin, ancestry, marital status, physical or mental disability, medical condition or other classification protected by law, or intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power or immunity, knowing the conduct is unlawful.

Based on the information above, I do find that Sgt. Reeves violated the following West Linn Police policies:

West Linn Police Department Policy 340- Standards of Conduct

340.5.7- CONDUCT

(Applicable subsections):

(g) Use of obscene, indecent, profane or derogatory language while on-duty or in uniform.

West Linn Police Department Policy 800- Property Procedures

800.3.1- PROPERTY BOOKING PROCEDURE

All property must be booked prior to the employee going off-duty unless otherwise approved by a supervisor. Employees booking property shall observe the following guidelines:

(Applicable subsections):


(a) Complete the property in custody form describing each item of property separately, listing all serial numbers, owner's name, finder's name, and other identifying information or markings.

800.6.4- RELEASE OF PROPERTY

Property may be released to a verified owner at the discretion of the property and evidence technician without further authorization. A property and evidence technician shall release the property upon proper identification being presented by the owner for which an authorized release has been received. A signature of the person receiving the property shall be recorded on the property release form. After release of all property entered on the property release form, the form shall be forwarded to the Records Division for filing with the case.



MEMORANDUM

To: Sergeant Tony Reeves
From: Captain Neil Hennelly 
Re: Investigative findings/**WRITTEN REPRIMAND**
Date: July 24, 2018

On June 4, 2018, the City of West Linn received a Tort notice regarding West Linn Police Case 17-0270, a case you investigated. I was assigned by Chief Kruger to manage an internal investigation for policy violations of our handling of this case. This internal was assigned to Acting Lieutenant Oddis Rollins (AL Rollins).

During the time this case was active, you were a WLPD Detective, and went by the last name of Poitras. For clarity he will be referred to as Reeves in this memorandum.

AL Rollins reviewed all the reports in this case, and spoke to Reeves, and Detective Michael Boyd who assisted in the case. Additionally, he reviewed text messages between Reeves and Eric Benson, the victim/business owner in this case.

At the conclusion of Rollins' investigation he did **NOT SUSTAIN** findings of policy violations relative to WLPD Policy 340.5.1: ***Discrimination, Oppression, or Favoritism.***

AL Rollins did **SUSTAIN** a violation of WLPD Policy 340.5.7(g): ***Use of obscene, indecent, profane, or derogatory language while on duty, or in uniform.***

In text messaging with Mr. Benson, your use of the term "PUSSY" and the expression "TEA BAGGING" both are inappropriate. You were speaking to a crime victim, during the course of your official duties as a West Linn Police Officer.

For clarity, I have included the sections of the supporting policies relative to this sustained violation:

Standards of Conduct

340.1 PURPOSE AND SCOPE

This policy establishes standards of conduct that are consistent with the values and mission of the West Linn Police Department and are expected of all department members. The standards contained in this policy are not intended to be an exhaustive list of requirements and prohibitions but they do identify many of the important matters concerning conduct. In addition to the provisions of this policy, members are subject to all other provisions contained in this manual, as well as any additional guidance on conduct that may be disseminated by this department or a member's supervisors.

340.2 POLICY

The continued employment or appointment of every member of the West Linn Police Department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure to meet the guidelines set forth in this policy, whether on- or off-duty, may be cause for disciplinary action.

340.5 CAUSES FOR DISCIPLINE

The following are illustrative of causes for disciplinary action. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for violation of other rules, standards, ethics and specific action or inaction that is detrimental to efficient department service.

340.5

340.5 CAUSES FOR DISCIPLINE

The following are illustrative of causes for disciplinary action. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for violation of other rules, standards, ethics and specific action or inaction that is detrimental to efficient department service.

AL Rollins additionally **SUSTAINED** violations of WLPD Policy 800: **Property Procedures**. Your failure to receipt seized property, get supervisor approval to secure property on your desk is in violation.

800.3.1 PROPERTY BOOKING PROCEDURE

All property must be booked prior to the employee going off-duty unless otherwise approved by a supervisor. Employees booking property shall observe the following guidelines:

(a) Complete the property in custody form describing each item of property separately, listing all serial numbers, owner's name, finder's name, and other identifying information or markings.

800.6.4 RELEASE OF PROPERTY

Property may be released to a verified owner at the discretion of the property and evidence Technician without further authorization. A property and evidence technician shall release the property upon proper identification being presented by the owner for which an authorized release has been received. A signature of the person receiving the property shall be recorded on the property release form. After release of all property entered on the property release form, the form shall be forwarded to the Records Division for filing with the case. If some items of property have not been released, the property release form will remain with the property division. Upon release, the proper entry shall be documented in the computer evidence tracking system.

I am also troubled by the cavalier manner in which you handled cash. Rollins did not find you in violation of our policy on handling cash (800.3.4(d)), so it is not included with the discipline. I do find it troubling that it was not treated with more care. This is an opportunity for a person to claim that cash was missing, and it is incumbent on you to count the cash with a witness, in front of the person it is seized from. This would protect both you, others on the call and the WLPD from false accusations of theft, or misappropriation of an individual's funds.

800.3.4 EXCEPTIONAL HANDLING

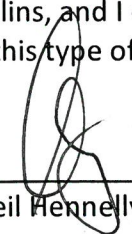
Certain property items require a separate process. The following items shall be processed in the described manner:

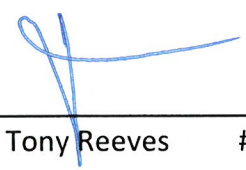
d) All cash shall be counted in the presence of a supervisor or officer and the envelope initialed by the both present. The Patrol Sergeant shall be contacted for cash in excess of \$1,000 for special handling procedures

Based on the aforementioned policy violations, I am issuing this written reprimand for your failure to comply with established WLPD Policies.

Moving forward the expectation is that you follow these and all WLPD Policies, failure to do so will result in further discipline, which COULD include, reduction in pay, suspension, demotion or termination.

This discipline could have been more severe had it not been for your openness and honesty with Rollins, and I during the investigation. Please take this as an opportunity to grow, and ensure this type of behavior does not continue.


_____/072518
Capt. Neil Henneley #16798


_____/072518
Sgt. Tony Reeves #44804

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MICHAEL FESSER,

Plaintiff,

v.

ERIC BENSON, LLC, a domestic limited liability company, dba A & B TOWING AND RECOVERY, HRESSENTIALS INC., an Oregon corporation, and ERIC BENSON, an individual,

Defendants.

Case No. _____

COMPLAINT

(Race Discrimination – ORS 659A.030(1)(a)-(b); Retaliation – ORS 659A.030(1)(f); Whistleblower Violation – ORS 659A.199; Aiding and Abetting Discrimination and Retaliation – ORS 659A.030(a)(g); Defamation; Conversion)

DEMAND FOR A JURY TRIAL

NOT SUBJECT TO MANDATORY ARBITRATION

Prayer Amount: \$515,000; Filing Fee \$531 (ORS 21.160(1)(c))

INTRODUCTION

1. This is an action for monetary, declaratory and injunctive relief, including punitive damages and attorneys’ fees and costs, to redress unlawful employment practices to which defendants subjected plaintiff, in violation of plaintiff’s statutory rights.

JURISDICTION

2. This court has jurisdiction over plaintiff’s claims for monetary and other relief under Article VII, section 9 of the Oregon Constitution.

VENUE

3. Venue is proper in Multnomah County under ORS 14.080 because defendant Eric Benson, LLC dba A & B Towing and Recovery has its principal place of business in Multnomah

1 County and because it conducts and conducted regular, sustained business activities in this
2 county, including the employment of plaintiff.

3 **PARTIES**

4 4. Plaintiff Michael Fesser (“Mr. Fesser” or “plaintiff”) is an African-American
5 male who was at all material times an employee of defendants, and worked in Multnomah
6 County.

7 5. Defendant Eric Benson, LLC is and was at all material times a domestic limited
8 liability company registered to do business in Oregon with its principal place of business in
9 Multnomah County. Defendant A & B Towing and Recovery (“A&B”) is and was at all material
10 times an assumed business name of Eric Benson, LLC.

11 6. Defendant HREssentials Inc. (“HREssentials”) is and was at all material times a
12 corporation registered to do business in Oregon with its principal place of business in
13 Multnomah County.

14 7. Defendant Eric Benson (“Mr. Benson”), an individual, was at all material times
15 the owner and president of A&B and was Mr. Fesser’s direct supervisor.

16 **GENERAL ALLEGATIONS**

17 8. Mr. Fesser began working for A&B in Portland, Oregon in or around 2004. Upon
18 information and belief Mr. Fesser was jointly employed by A&B, HREssentials and Mr. Benson
19 (collectively, “defendants”) during the time leading up to his unlawful termination.

20 9. Mr. Fesser worked his way up to the role of Sales Manager after years of
21 generating positive feedback, including from key customers.

22 10. During the course of his employment, Mr. Fesser was subjected to racial
23 harassment by his co-workers and subordinates. Between December 2014 and April 2016,
24 plaintiff was subjected to repeated use of racial epithets including references to him as a
25 “nigger,” and a “coon.”

26 11. During the spring of 2016, one of Mr. Fesser’s co-workers, Shane Truby,

1 repeatedly brought his pickup truck onto A&B property, upon which he prominently displayed a
2 Confederate flag and upon which he also displayed a Confederate flag sticker. Truby
3 intentionally parked his truck in prominent view and asked Mr. Fesser how he liked it.

4 12. In April 2016, another A&B employee, John Busby, referred to Mr. Fesser as a
5 “nigger” in the presence of another co-worker. In or around April 2016, in the presence of Mr.
6 Fesser and in response to his directive, Busby stated: “I’m not towing cars for no nigger” while
7 failing and refusing to cooperate with Fesser in seeking to do his job.

8 13. Mr. Fesser repeatedly reported these incidents and raised his concerns to Mr.
9 Benson and others regarding the discriminatory and hostile work environment to which he was
10 subjected at A&B. Mr. Benson and other members of A&B management failed to take prompt
11 and effective remedial action. Mr. Benson informed Mr. Fesser that there was nothing he could
12 do.

13 14. Mr. Fesser also complained to Mr. Benson about illegal payroll practices and
14 other unlawful activities. Mr. Fesser expressed concern that employees were being misclassified
15 as independent contractors. In addition, Mr. Fesser expressed concerns that Mr. Benson was
16 engaging in unlawful payroll practices.

17 15. In February 2017 Mr. Fesser increasingly believed that, in response to his recent
18 complaints, A&B and Mr. Benson were trying to find a way to fire him based on falsehoods and
19 pretext. Mr. Fesser consulted with an attorney due to concerns that he was being subjected to
20 retaliation, discrimination and a potential pretextual termination.

21 16. Upon information and belief, Mr. Benson used his personal friendships with
22 members of the West Linn Police Department to have two officers attend an auction Mr. Fesser
23 was conducting at A&B in Portland on February 25, 2017. Upon information and belief, these
24 police officers were acting as agents of defendants in taking actions outside their jurisdiction.

25 17. During the auction on February 25, 2017, Mr. Fesser noticed that an A&B tow
26 truck driver was recording parts of the auction on his phone.

1 18. As Mr. Fesser was leaving the A&B auction that evening, he was followed by
2 multiple Portland police cars and a blue Chevy Monte Carlo occupied by the two West Linn
3 police officers Mr. Fesser had seen at the auction. The police officers pulled Mr. Fesser over in
4 his vehicle. Mr. Fesser was arrested by Portland Police, who claimed to be assisting West Linn
5 officers.

6 19. As Mr. Fesser was being handcuffed and directed into the back of a police car,
7 Officer Poitras of West Linn police force seized Mr. Fesser's personal belongings from the car,
8 including Mr. Fesser's confidential attorney-client privileged communications with his attorney
9 regarding his concerns about retaliation and discrimination and Mr. Fesser's smartphone.

10 20. Officer Poitras told Mr. Fesser that a person by the name of Neal said Mr. Fesser
11 was selling all the cars to his friend Mo, giving discounts to his friends. Those allegations are
12 false and defamatory.

13 21. The officers took Mr. Fesser to an interrogation room at the Stark Precinct located
14 on 106th and Stark in Portland where he was questioned by West Linn police officers. After the
15 questioning at the Stark precinct Mr. Fesser was taken to the Justice Center in Downtown
16 Portland. After being detained for eight hours in a jail cell, Mr. Fesser was released on his own
17 recognizance sometime after midnight with only his wallet and information regarding a court
18 arraignment.

19 22. The following Tuesday, February 28, 2017, Officer Poitras called Mr. Fesser to
20 tell him that he could pick up his belongings from the West Linn Police Station.

21 23. Mr. Fesser went to the West Linn Police Department on February 28, 2017 and
22 Officer Poitras returned some of Mr. Fesser's belongings. Office Poitras told Mr. Fesser that he
23 was fired from A&B Towing and that he was not to set foot on any A&B property. Officer
24 Poitras further stated that Mr. Fesser was not to contact Mr. Benson or any of his family
25 members and was not to go near the property of his family's home. Upon information and
26 belief, Officer Poitras was acting outside his jurisdiction and as the agent of defendants.

1 24. That afternoon, Mr. Fesser went to court for his arraignment and was informed by
2 the court that there was no complaint and that no charges would be brought against him at that
3 time.

4 25. That same day, Mr. Fesser received a phone call from HREssentials, who again
5 informed him that he was fired and that he was not to contact Mr. Benson or go near him and any
6 property that he owns including his home.

7 26. On February 28, 2017 Mr. Fesser received a letter from HREssentials stating in
8 pertinent part that “your employment with HREssentials has been terminated due to serious
9 misconduct that violates the standards that the company expects of its employees.” The letter
10 indicated that HREssentials would challenge any claim for unemployment benefits Mr. Fesser
11 made. The letter failed to specify what “misconduct” Mr. Fesser had allegedly engaged in.

12 27. On information and belief, HREssentials conducted no investigation prior to
13 terminating plaintiff’s employment. HREssentials did not even attempt to speak to Mr. Fesser
14 about the defamatory allegations that Benson was making about him to seek to determine
15 whether the allegations were true.

16 28. Defendants’ contention that Mr. Fesser engaged in theft or embezzlement is false.
17 Defendants have no evidence that Mr. Fesser engaged in such conduct. Defendants have a
18 pattern and practice of terminating African-American employees based on false allegations of
19 theft.

20 29. Shortly after Mr. Fesser was terminated, Mr. Benson called a friend of Mr.
21 Fesser’s and a former employee of A&B. During that phone call, Mr. Benson stated that Mr.
22 Fesser had been falsifying A&B auction records by recording the amount of the sales as less than
23 the amount he actually received for the car. This allegation was and is false. Mr. Benson stated
24 that Mr. Fesser “stole thousands and thousands and thousands” of dollars from A&B “for years.”
25 This allegation was and is false. Mr. Benson stated that he had “twenty witnesses” to Mr.
26 Fesser’s alleged misconduct. This allegation was and is false. Mr. Benson further stated that he

1 had “solid one-hundred percent proof” that Mr. Fesser had stolen or embezzled large sums of
2 money. This allegation was and is false. Mr. Benson also falsely stated that Mr. Fesser had
3 spent the whole weekend in jail.

4 30. Upon information and belief, Mr. Benson has published this false information
5 about Mr. Fesser to other individuals as well, including but not limited to current and former
6 A&B employees.

7 31. Following Mr. Fesser’s unlawful termination, defendants A&B and Benson
8 converted and improperly sold cars that were Mr. Fesser’s personal property.

9
10 **FIRST CLAIM FOR RELIEF**
11 **Violation of ORS 659A.030(1)(a)-(b) – Race Discrimination**
12 **Against all Defendants**

13 32. Plaintiff incorporates by reference the allegations set forth in paragraphs 1
14 through 31.

15 33. ORS 659A.030(1)(a) provides that it is an unlawful practice for an employer to
16 discharge an employee because of his or her race.

17 34. ORS 659A.030(1)(b) provides that it is an unlawful practice for an employer to
18 discriminate against an employee because of his or her race in compensation or in terms,
19 conditions, or privileges of employment.

20 35. Mr. Fesser was subjected to a racially hostile work environment in one or more of
21 the following ways:

- 22 a. He was repeatedly subjected to racial epithets which included references
23 to him as a “nigger” and a “coon.”
- 24 b. He was subjected to racist imagery on the premises of A&B;
- 25 c. Employees failed to heed his directives based on his race; and
- 26 d. He was terminated based on false and defamatory allegations.

36. Defendants A&B, HREssentials and Mr. Benson knew that plaintiff was being

1 subjected to repeated instances of racial discrimination while working at A&B in part due to
2 plaintiff's complaints. Defendants failed to take immediate and appropriate corrective action to
3 stop the discriminatory and harassing conduct.

4 37. Defendants' agents who are employed at the West Linn Police Department acted
5 outside their jurisdiction and beyond their authority and improperly seized plaintiff's personal
6 belongings from him in Portland, including his smartphone and his confidential attorney-client
7 communications.

8 38. Defendants terminated plaintiff's employment due to his race and relied on false,
9 pretextual reasons for the termination. Defendant HREssentials accepted Benson's defamatory
10 assertions that plaintiff had stolen money and fired plaintiff with no investigation.

11 39. As a direct and proximate result of defendants' conduct, plaintiff has suffered and
12 will continue to suffer economic damages in an amount to be proven at trial, but which are
13 estimated to be in excess of \$200,000.

14 40. As a direct and proximate result of defendants' conduct, plaintiff has suffered
15 severe emotional distress, anxiety, humiliation and embarrassment for which plaintiff seeks
16 noneconomic damages in an amount to be proven at trial, but which are estimated to be
17 \$300,000.

18 41. Plaintiff is entitled to his reasonable attorneys' fees and costs incurred, including
19 expert witness fees, pursuant to ORS 659A.885 and ORS 20.107.

20 42. Plaintiff reserves the right to and anticipates amending this Complaint pursuant to
21 ORS 31.725 to assert claims for punitive damages. Plaintiff is also entitled to recover his
22 reasonable attorneys' fees, expert fees and costs pursuant to ORS 20.107 and ORS 659A.885(1).

23 **SECOND CLAIM FOR RELIEF**
24 **Violation of ORS 659A.030(1)(f) – Retaliation for Opposing Unlawful Practices**
25 **Against all Defendants**

26 43. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
through 42.

1 44. Plaintiff engaged in protected activity by reporting and resisting race
2 discrimination in the workplace and by objecting to discriminatory treatment based on race.

3 45. Defendants terminated plaintiff based on false and defamatory allegations.
4 Defendants' actions were intentional and constituted unlawful retaliation in violation of ORS
5 659A.030(1)(f).

6 46. Defendants Benson and A&B continue to retaliate against plaintiff following his
7 termination by publishing false and defamatory statements about plaintiff.

8 47. As a direct and proximate result of defendants' conduct, plaintiff has suffered and
9 will continue to suffer economic damages in an amount to be proven at trial, but which are
10 estimated to be in excess of \$200,000.

11 48. As a direct and proximate result of defendants' conduct, plaintiff has suffered
12 severe emotional distress, anxiety, humiliation and embarrassment for which plaintiff seeks
13 noneconomic damages in an amount to be proven at trial, but which are estimated to be
14 \$300,000.

15 49. Plaintiff is entitled to his reasonable attorneys' fees and costs incurred, including
16 expert witness fees, pursuant to ORS 659A.885 and ORS 20.107.

17 50. Plaintiff reserves the right to and anticipates amending this Complaint pursuant to
18 ORS 31.725 to assert claims for punitive damages. Plaintiff is also entitled to recover his
19 reasonable attorneys' fees, expert fees and costs pursuant to ORS 20.107 and ORS 659A.885(1).

20 **THIRD CLAIM FOR RELIEF**
21 **Violation of 659A.199 – Whistleblower Retaliation**
22 **Against all Defendants**

23 51. Plaintiff incorporates by reference the allegations set forth in paragraphs 1
24 through 50.

25 52. Plaintiff reported conduct that he in good faith believed constituted a violation of
26 the law, including unlawful race discrimination and unlawful employee payroll and tax practices,
as alleged above.

1 53. As a result of said conduct, defendants retaliated against plaintiff as alleged
2 above, by terminating his employment on false and defamatory grounds.

3 54. As a direct and proximate result of defendants' conduct, plaintiff has suffered and
4 will continue to suffer economic damages in an amount to be proven at trial, but which are
5 estimated to be in excess of \$200,000.

6 55. As a direct and proximate result of defendants' conduct, plaintiff has suffered
7 severe emotional distress, anxiety, humiliation and embarrassment for which plaintiff seeks
8 noneconomic damages in an amount to be proven at trial, but which are estimated to be
9 \$300,000.

10 56. Plaintiff is entitled to his reasonable attorneys' fees and costs incurred, including
11 expert witness fees, pursuant to ORS 659A.885 and ORS 20.107.

12 57. Plaintiff reserves the right to and anticipates amending this Complaint pursuant to
13 ORS 31.725 to assert claims for punitive damages. Plaintiff is also entitled to recover his
14 reasonable attorneys' fees, expert fees and costs pursuant to ORS 20.107 and ORS 659A.885(1).

15 **FOURTH CLAIM FOR RELIEF**

16 **Violation of ORS 659A.030(1)(g) – Aiding and Abetting Race Discrimination
17 Against A&B and Benson**

18 58. Plaintiff incorporates by reference the allegations set forth in paragraphs 1
19 through 57.

20 59. Through his conduct, defendant Mr. Benson participated in, condoned, aided,
21 abetted, incited, compelled and/or coerced unlawful race discrimination and retaliation in
22 violation of ORS 659A.030(1)(g).

23 60. As a direct and proximate result of defendants A&B and Benson's conduct,
24 plaintiff has suffered and will continue to suffer economic damages in an amount to be proven at
25 trial, but which are estimated to be in excess of \$200,000.

26 61. As a direct and proximate result of A&B and Benson's conduct, plaintiff has
suffered severe emotional distress, anxiety, humiliation and embarrassment for which plaintiff

1 seeks noneconomic damages in an amount to be proven at trial, but which are estimated to be
2 \$300,000.

3 62. Plaintiff is entitled to his reasonable attorneys' fees and costs incurred, including
4 expert witness fees, pursuant to ORS 659A.885 and ORS 20.107.

5 63. Plaintiff reserves the right to and anticipates amending this Complaint pursuant to
6 ORS 31.725 to assert claims for punitive damages. Plaintiff is also entitled to recover his
7 reasonable attorneys' fees, expert fees and costs pursuant to ORS 20.107 and ORS 659A.885(1).

8 **FIFTH CLAIM FOR RELIEF**
9 **Defamation**
10 **Against A&B and Benson**

11 64. Plaintiff incorporates by reference the allegations set forth in paragraphs 1
12 through 63.

13 65. Mr. Benson, acting as an owner, officer, employee and/or agent of A&B, made
14 multiple false statements about plaintiff as alleged in this Complaint that reflected on his
15 character and his professional competence, and which constitutes defamation per se.

16 66. Mr. Benson, acting as an officer, employee and/or agent of A&B, published these
17 statements to third parties.

18 67. As a direct and proximate cause of Mr. Benson's false statements, plaintiff has
19 suffered economic losses including, but not limited to, lost income from future employment and
20 impairment of future earning capacity, plus prejudgment interest, for which plaintiff seeks
21 compensation in an amount to be proven at trial.

22 68. As a direct and proximate cause of Mr. Benson's conduct, plaintiff has suffered
23 and will continue to suffer noneconomic damages in the form of injury to his reputation,
24 emotional distress, anxiety, humiliation and embarrassment, and is entitled to an award of
25 compensatory damages in the amount of \$300,000.

26 ///

///

1 **SIXTH CLAIM FOR RELIEF**
2 **Conversion**
3 **Against A&B and Benson**

4 69. Plaintiff incorporates by reference the allegations set forth in paragraphs 1
5 through 68.

6 70. Defendants A&B and Benson intentionally exercised dominion and control over
7 vehicles that were plaintiff's personal property and deprived him of the right to access and
8 remove his personal property from A&B premises.

9 71. As a direct and proximate cause of A&B and Benson's conversion, plaintiff has
10 incurred inconvenience and expense.

11 72. As a direct and proximate cause of A&B and Benson's conversion, plaintiff has
12 suffered and will continue to suffer economic damages and is entitled to an award of
13 compensatory damages in the amount of \$15,000.

14 WHEREFORE, plaintiff prays for judgment against defendants for economic, non-
15 economic and reputational damages and for any further or alternative relief in that the court
16 deems appropriate. Plaintiff demands a jury trial.

17
18 Dated this 19th day of September, 2017.

BUCHANAN ANGELI ALTSCHUL
& SULLIVAN LLP

19
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23 Attorneys for Plaintiff
24
25
26

From: [Kruger, Terry](#)
Sent: Saturday, July 21, 2018 8:12 AM
To: [Hennelly, Neil](#)
Subject: RE: Questions RE Michael FESSER case

Neil,

I appreciate your follow-up and this email. Hope you are having a great escape!

Kruger

From: Hennelly, Neil
Sent: Friday, July 20, 2018 5:54 PM
To: Kruger, Terry <TKruger@westlinnoregon.gov>
Subject: Fwd: Questions RE Michael FESSER case

Here is an email I got from the DA he squarely puts the issue on Benson. We still have work through Reeves stuff but overall good news.

Sent from my iPhone

Begin forwarded message:

From: SHULL Christopher <christopher.shull@mcda.us>
Date: July 20, 2018 at 17:14:24 PDT
To: "'Hennelly, Neil'" <nhennelly@westlinnoregon.gov>
Cc: 'Jon Stouffer' <jstouffer@cisoregon.org>
Subject: RE: Questions RE Michael FESSER case

I'm happy to chat. I had a long discussion about this tricky case yesterday with Jon Stouffer from your insurance company. I'm copying him on this e-mail.

The bottom line is that the victim was going to have some credibility problems based on some racially charged text messages he sent the detective, in relation to the investigation of the defendant. I had plenty of reason to believe the defendant embezzled funds from the victim, but the text messages were going to make the victim very unsympathetic to a jury.

I'm going to be out of town on military leave through 8/5, but you can reach me by cell at 503-504-7816.

Sincerely,

Christopher Shull
Deputy District Attorney
Multnomah County District Attorney
Unit A
503-988-3135

From: Hennelly, Neil [<mailto:nhennelly@westlinnoregon.gov>]
Sent: Friday, July 20, 2018 1:05 PM
To: SHULL Christopher <christopher.shull@mcda.us>
Subject: Questions RE Michael FESSER case

Good Afternoon Sir,

I have a few questions for you regarding the Michael FESER case where our detectives investigated and subsequently arrested him for an embezzlement caper through A&B Towing.

I have been tasked with identifying why the Fesser case was civilly compromised, and if there were any issues with the WLPD investigation that lead to your decision. As I am sure you are aware Mr. Fesser, through his attorneys are suing the City and several of our prior and current members.

Thank you for any assistance you can provide,

Neil
503.572.5570 (Cell)

Neil Hennelly
Police Captain
Police

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503-742-6125

