IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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| AL HUTTON and<br>DOUG WHORTON,<br><br>Plaintiffs,<br><br>vs.<br><br>CITY OF FAIRBANKS;<br>CHIEF DANIEL P. HOFFMAN; and<br>DEPUTY CHIEF BRAD JOHNSON,<br>each in his individual and<br>official capacity,<br><br>Defendants. | Case No. 4:08-cv-0029-RRB<br><br>**ORDER REGARDING MOTION FOR JUDGMENT AT DOCKET 7** |

This matter arises from a Complaint filed by Al Hutton and Doug Whorton, both police officers employed by the City of Fairbanks. Plaintiffs allege adverse employment actions taken against them by the Chief of Police and Deputy Chief, including a "disciplinary demotion" of Whorton, a psychological evaluation of Hutton as "retribution," lost wages and retirement benefits, and public humiliation. The underlying disputes involved Plaintiffs' discussions and complaints regarding officer safety, department morale, union issues, and nepotism. Both Hutton and Whorton are

currently employed as police officers with the Fairbanks Police Department, and at no point during the events in question was either Plaintiff discharged or otherwise terminated from their public employment.

Plaintiffs allege a Violation of their First Amendment Rights (Count 1), Violation of the State Whistleblower Act (Count 2), Violation of Public Policy (Count 3), Retaliation (Count 4), Violation of Covenant of Good Faith and Fair Dealing (Count 5), Defamation (Count 6), Violation of Right to Privacy under HIPAA (Count 7), and Violation of 42 U.S.C. § 1983, Due Process (Count 8). Plaintiffs seek lost past and future wages, benefits, and seniority, liquidated damages, special damages due to damage to Plaintiffs' reputations, non-economic damages and punitive damages, plus interest, attorney fees and costs.

Defendants filed a Motion for Judgment on the Pleadings as to the Third and Fourth Causes of Action in the Complaint at Dockets 7 and 8. The Third Cause of Action alleges that "[i]t is a violation of public policy to discipline, demote and require a police officer to suffer the indignities of a psychological exam in retribution for exercising his rights to Free Speech." Additionally, Plaintiffs allege that "[i]t is likewise a violation of public policy to harass, retaliate or threaten an employee for engaging in protected union activities." The Fourth Cause of

Action alleges that Plaintiffs have suffered, among other things, demotion, discipline, and an unnecessary psychological exam in retaliation for exercising their rights to free speech, for complaining to the Mayor about management decisions, and for engaging in protected union activities.

Defendants argue that absent allegations of employment *termination,* there is no independent cause of action in Alaska for "violation of public policy" or "retaliation." Although the Alaska Supreme Court has found that "[m]any states have held that the termination of an employee in violation of fundamental public policy principles gives rise to a tort remedy,"[1] it has never held that there exists a common law cause of action for any disciplinary action short of termination — i.e., for demotion, reassignment, threats, harassment, or requiring a medical examination. Defendants quip that there is no tort of "wrongful lateral assignment and psychological evaluation in violation of public policy." Similarly, although Alaska has recognized a common law cause of action for retaliatory discharge of an employee, the State has not expanded the cause of action to include retaliatory demotion or discipline. Thus, as a matter of State law argue Defendants, there is no cause of action for the tort of retaliatory

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[1] *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 438 fn. 39 (Alaska 2004).

demotion or discipline in Alaska and, accordingly, there are no allegations in Plaintiffs' Complaint that, if proven, would permit recovery under the third and fourth causes of action. They further argue that the counts are unnecessarily duplicative of alternate legal theories asserted in the Complaint and should be dismissed as surplusage.

Plaintiffs, in their Opposition at Docket 9, argue that Fed. R. Civ. P. 8(d) allows alternative causes of action based upon the same factual statements. Plaintiffs suggest that the Court should not start a case by throwing out claims before any discovery is taken and that it is, at best, premature for the Court to decide whether the claims are duplicative.

**CERTIFICATION OF QUESTIONS TO ALASKA SUPREME COURT**

Defendants, in their Reply at Docket 10, suggest that the Court certify these questions to the Alaska Supreme Court pursuant to Alaska Rule of Appellate Procedure 407(a). In response, Plaintiffs agree that there is no precedent in Alaska case law recognizing an employment tort for retaliation when the employee has not been terminated, but has been subjected to other forms of retaliation. Plaintiffs opine that the question is "still premature, but if the court decides to certify the question, it should do so without staying this case." Docket 15.

The Court finds that a clear answer from the Alaska Supreme Court on these issues would be beneficial. An order certifying the questions to the Alaska Supreme Court will enter accordingly. However, this matter is not stayed at this time. The parties may proceed with discovery while the Court awaits a response from the Alaska Supreme Court.

ENTERED this 13th day of November, 2008.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE