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PIERCE COUNTY, WASHINGTON
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.
KIRBY, husband and wife,

Plaintiffs,

v.

THE CITY OF TACOMA, a municipal
corporation; RAY CORPUZ and "JANE
DOE" CORPUZ, husband and wife;
PHILIP ARREOLA and "JANE DOE"
ARREOLA, husband and wife; WILLIAM
WOODARD and CATHERINE
WOODARD, husband and wife;
RAYMOND ROBERTS and "JANE DOE"
ROBERTS, husband and wife; DAVID
BRAME and "JANE DOE" BRAME,
husband and wife; and JAMES
HAIRSTON and "JANE DOE"
HAIRSTON, husband and wife,

Defendants.

No. 99-2-13911-4

DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
TO DISMISS PLAINTIFF'S AGE
DISCRIMINATION CLAIM

NOTED FOR:
December 13, 2002

ASSIGNED:
Judge Katherine M. Stolz

DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY
JUDGMENT TO DISMISS PLAINTIFF'S AGE
DISCRIMINATION CLAIM - 1

ORIGINAL

Tacoma City Attorney
Civil Division
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1 **I. FACTS.**

2 In plaintiff's complaint, he alleges a general age discrimination claim¹.
 3 Second Amended Complaint for Personal Injuries and Damages in Tort,
 4 paragraph 5.3, on file herein. The plaintiff alleges that he was discriminated
 5 against on the basis of his age when he was disciplined by Chief Hairston (See
 6 Exhibit 1, deposition excerpts of Joseph Kirby, pages 33-34), removed from the
 7 clandestine lab team Id. at page 34), and he was not selected for a permanent
 8 captain's position Id. at page 35). He has no evidence that these actions were
 9 in any way related to his age.
 10

11 **II. STANDARD ON MOTION FOR SUMMARY JUDGMENT.**

12 On a motion for summary judgment, the moving party bears the initial
 13 burden of showing the absence of a material issue of fact. Young v. Key
 14 Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A *defendant*
 15 can meet this burden in one of two ways. First, the defendant can set forth its
 16 version of the facts and allege that there is no material issue as to those facts.
 17 Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757
 18 P.2d 507 (1988). In the alternative, the defendant can meet its burden by
 19 showing that there is absence of evidence to support the nonmoving party's
 20 case. Howell v. Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing
 21
 22
 23

24 ¹ The defendants are moving for summary judgment on all of the plaintiff's claims of age
 25 discrimination. Therefore, it is now incumbent upon plaintiff to come forward with any additional
 26 claims, theories or incidents upon which the plaintiff may be asserting age discrimination.

1 Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265
 2 (1986)).

3 Under the latter method, the defendant is not required to support its
 4 motion with affidavits or other materials *disproving* the plaintiff's case. Burnet v.
 5 Spokane Ambulance, 54 Wn. App. 162, 166, 772 P.2d 1027 (1989). The
 6 defendant need only "identify those portions of the record, together with the
 7 affidavits, if any, which he or she believes demonstrate the absence of a
 8 genuine issue of material fact." Guile v. Ballard Community Hosp., 70 Wn. App.
 9 18, 22, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993).

10 After the defendant makes its required showing, the burden then shifts to
 11 the plaintiff:
 12

13 If, at this point, the plaintiff [as nonmoving party] "fails to make a
 14 showing sufficient to establish the existence of an element
 15 essential to that party's case, and on which that party will bear the
 16 burden of proof at trial", then the trial court should grant the
 17 motion...."In such a situation, there can be 'no genuine issue as to
 18 any material fact,' since ***a complete failure of proof concerning
 19 an essential element of the nonmoving party's case
 20 necessarily renders all other facts immaterial.***"

21 (emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618
 22 (1992). Consequently, the plaintiff "must do more than express an opinion or
 23 make conclusory statements"; ***the plaintiff must set forth specific and
 24 material facts to support each element of his prima facie case.*** Id.
 25

Plaintiff has failed to show that he was discriminated against based on age.

Under RCW 49.60.180(3), it is unlawful for an employer, "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of age." The legislature has mandated that this language be liberally construed. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179, 23 P.3d 440 (2001). And although employers deserve protection from frivolous lawsuits, courts must carefully consider all allegations of unlawful discrimination. Id.

To establish a prima facie case of age discrimination for the promotion claim, the plaintiff must show (1) he was a member of the protected class; (2) he applied for an open position; (3) he was the most qualified for the position; and (4) he was denied the promotion under circumstances that create an inference of unlawful discrimination. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-311, 116 S. Ct. 1307, 137 L.Ed.2d 433 (1996). To make out this prima facie case, plaintiff must present evidence indicating that age was a substantial factor in the adverse employment decision affecting him. See, Hill v. BCTI Income Fund-1, supra.

To establish a prima facie case of age discrimination for workplace harassment based on age, a plaintiff must show: (1) the employee is 40 years or older; (2) the employee was subjected to harassment, either through words or actions based on age; (3) the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively

1 intimidating, hostile or offensive work environment; and (4) the existence of
2 some liability on the part of the employer. Crawford v. Medina Gen. Hosp., 96
3 F.3d 830, 834-35 (6th Cir. 1996). With respect to the third element, the court
4 has stated that while a plaintiff must also subjectively feel that an environment
5 is hostile, "[c]onduct that is not severe or pervasive enough to create an
6 objectively hostile or abusive environment - an environment that a reasonable
7 person would find hostile or abusive" is beyond the purview of discrimination
8 laws. Harris v. Forklift Sys. Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 126 L.Ed.2d
9 295 (1993). Furthermore, the Supreme Court has now reiterated that "offhand
10 comments and isolated incidents will not amount to discriminatory charges in
11 the terms and conditions of employment." Faragher v. City of Boca Raton,
12 524 U.S. 775, 118 S. Ct. 2275, 2283, 141 L.Ed.2d 662 (1998) and "conduct
13 must be extreme to amount to a charge in the terms and conditions of
14 employment." Id. at 2284.

15
16 The burden is on the plaintiff to establish the above elements. Glasgow
17 v. Georgia - Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985). In
18 analyzing the plaintiff's response, the court should take into consideration that
19 the laws against discrimination are, "not directed against unpleasantness *per*
20 *se.*" Kahn v. Salerno, 90 Wn. App. 110, 118, 951 P.2d 321 (1998) (internal
21 citations omitted). The courts have held that simple vulgarity does not give rise
22 to a cause of action. Id. Rather, only discrimination that is based on sex or in
23 this instance, age, is actionable. Id. Therefore, it is incumbent on the plaintiff
24
25


1 to individually establish that the conduct he complains of was based on age.
2 Plaintiff's failure to do so establishes that his age discrimination claim is
3 unsupported; and therefore, his claim should be dismissed.

4 **III. CONCLUSION.**

5 The plaintiff bears the burden of proof on this claim at trial. Therefore,
6 as outlined above, under the standard articulated in Celotex and adopted by
7 the Washington Supreme Court, plaintiff now bears the burden of producing
8 competent, admissible evidence in support of his prima facie case of age
9 discrimination under RCW 49.60. His failure to carry this burden will mandate
10 dismissal of this claim as failure of proof on an essential element surrenders all
11 other facts immaterial. Thus, the defendants respectfully ask this court to
12 dismiss plaintiff's claims of age discrimination in their entirety, and with
13 prejudice.
14

15 DATED this 13 day of November, 2002.

16
17 ROBIN S. JENKINSON, City Attorney
ELIZABETH A. PAULI, Ch. Asst. City Atty.

18
19 By: 
20 _____
SHELLEY M. KERSLAKE
21 WSBA# 21820
Assistant City Attorney
22 Attorney for Defendant
23
24
25

EXHIBIT

#1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.)
KIRBY, husband and wife,)
)
Plaintiffs,)

vs.)

No. 99-2-13911-4

THE CITY OF TACOMA, a municipal)
corporation; RAY CORPUZ, and "JANE)
DOE" CORPUZ, husband and wife;)
PHILIP ARREOLA and "JANE DOE")
ARREOLA, husband and wife; WILLIAM)
WOODARD and CATHERINE WOODARD,)
husband and wife; RAYMOND ROBERTS)
and "JANE DOE" ROBERTS, husband and)
wife; DAVID BRAME and "JANE DOE")
BRAME, husband and wife; and JAMES)
HAIRSTON and "JANE DOE" HAIRSTON,)
husband and wife,)

Defendants.)

DEPOSITION OF JOSEPH J. KIRBY

February 15, 2001
Tacoma, Washington

BYERS & ANDERSON, INC.

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1 A David Brame told me that the chief would like to talk
2 to you. I'll go up with you. I asked David Brame if
3 I needed a union advocate? Was this a disciplinary
4 matter or not? David Brame told me no, not to worry.
5 Chief was trying to put some closure on some things
6 that were pending against you prior to your being off
7 on disability.

8 David Brame knew perfectly well what the chief
9 intended to do, basically lied to me --

10 Q How do you know?

11 A -- we went forward to the chief -- I know that because
12 the chief didn't decide to do that on his own. He did
13 it at the request of David Brame.

14 Q How do you know that?

15 A That's my feeling.

16 Q Let's move on to your claim of age discrimination. In
17 what way do you believe you've been discriminated
18 against based on your age?

19 A For all the same examples that I gave you previously
20 when you tried to narrow it in on the disability
21 portion of my claims.

22 Q So do you believe that the discipline you received
23 from James Hairston with respect to the Ramirez matter
24 also involves your age?

25 A Yes, where it factors into the fact that Dave Brame I

1 think was the initiator of that.

2 Q The initiator of the discipline?

3 A Yes.

4 Q How do you know that?

5 A Don't know anything. It's my belief.

6 Q And your removal from the clandestine lab team, do you
7 believe that was based in part or total on your age?

8 A I think it's difficult to separate my union advocacy
9 and my age because those activities were consistent
10 with what I saw happened to Olsen, Wiegand, Howard,
11 Meinema, and my medical condition that preceded that.
12 I think they're all so intertwined as to make -- as to
13 make an analysis -- to pull them apart and make a
14 critical analysis to each independent element
15 impossible.

16 Q Is there anything we haven't already talked about that
17 you believe is based on your age, any action that was
18 taken against you?

19 MR. SADLER: For the sake of the record,
20 object to the form.

21 WITNESS: At this point I have to think
22 about that for a while.

23 Q (By Ms. Kerslake) Is it your position that you
24 weren't chosen for the permanent captain's position
25 based on your age?

1 A I think it's part of it. I don't think that's the
2 entire reason.

3 Q What do you think the reason is?

4 A What do I personally think the reason is?

5 Q Yes.

6 A I personally think the reason is that I have filed
7 suit against two of the defendants that are pivotal in
8 determining who becomes a captain, that would be
9 Roberts and Brame. I personally think another person
10 pivotal would be Mike Darland, D-A-R-L-N-A-D, who's
11 not a defendant in this suit, made some decisions
12 based on not necessarily positioning himself for being
13 a forerunner as the next chief as much as perhaps not
14 wishing to make any waves in that whole process.

15 I believe that when you look at my record
16 overall as compared to the records of both people that
17 were chosen instead of me, you will find that most of
18 my commendations and most of my activity was directed
19 from the field.

20 I also believe that Mike Darland made an
21 accurate statement when he said in deposition that he
22 did not select me because basically I was not a good
23 fit for the current command structure. If you think
24 about who the current command structure is, you will
25 come to the conclusion that two of them -- actually