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FILED  
IN COUNTY CLERK'S OFFICE

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PIERCE COUNTY, WASHINGTON  
BOB SAN SOUZE, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

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 PHILIP ARREOLA,  
DAVID BRAME AND RAYMOND  
ROBERTS

NOTED FOR:  
December 13, 2002

ASSIGNED:  
Judge Katherine M. Stolz

DEFENDANTS' MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
TO DISMISS PHILIP ARREOLA, DAVID BRAME  
AND RAYMOND ROBERTS - 1

**ORIGINAL**

Tacoma City Attorney  
Civil Division  
747 Market Street, Room 1120  
Tacoma, Washington 98402-3767  
(253) 591-5885 / FAX 591-5755

1  
2 **I. FACTUAL BACKGROUND.**

3 Plaintiff, a police lieutenant, has sued the City of Tacoma and six  
4 individually named employees for age and disability discrimination under RCW  
5 49.60, and for retaliation for engaging in union activity under RCW 41.56. The  
6 core of plaintiff's claims surround his denial of two promotions and his inability  
7 to function as part of the management team. It is the defendants' contention  
8 that the lieutenant does not "work and play well with others", and his personality  
9 is the reason he is not well-liked in the Police Department, not any  
10 discriminatory animus.  
11

12 **II. ISSUE PRESENTED.**

13 Whether plaintiff's claims against Chief Arreola, Assistant Chief Brame  
14 and Assistant Chief Roberts must be dismissed as the acts attributed to these  
15 defendants by the plaintiff do not constitute discrimination, as a matter of law.  
16

17 **III. STANDARD ON MOTION FOR SUMMARY JUDGMENT.**

18 On a motion for summary judgment, the moving party bears the initial  
19 burden of showing the absence of a material issue of fact. Young v. Key  
20 Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A *defendant*  
21 can meet this burden in one of two ways. First, the defendant can set forth its  
22 version of the facts and allege that there is no material issue as to those facts.  
23 Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757  
24  
25

1 P.2d 507 (1988). In the alternative, the defendant can meet its burden by  
 2 showing that there is absence of evidence to support the nonmoving party's  
 3 case. Howell v. Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing  
 4 Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265  
 5 (1986)).

6 Under the latter method, the defendant is not required to support its  
 7 motion with affidavits or other materials *disproving* the plaintiff's case. Burnet v.  
 8 Spokane Ambulance, 54 Wn. App. 162, 166, 772 P.2d 1027 (1989). The  
 9 defendant need only "identify those portions of the record, together with the  
 10 affidavits, if any, which he or she believes demonstrate the absence of a  
 11 genuine issue of material fact." Guile v. Ballard Community Hosp., 70 Wn. App.  
 12 18, 22, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993).

14 After the defendant makes its required showing, the burden then shifts to  
 15 the plaintiff:

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

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

26 DEFENDANTS' MEMORANDUM IN SUPPORT OF  
 MOTION FOR PARTIAL SUMMARY JUDGMENT  
 TO DISMISS PHILIP ARREOLA, DAVID BRAME  
 AND RAYMOND ROBERTS - 3

Tacoma City Attorney  
 Civil Division  
 747 Market Street, Room 1120  
 Tacoma, Washington 98402-3767  
 (253) 591-5885 / FAX 591-5755

1 **IV. ANALYSIS.**

2 In all types of discrimination cases, the plaintiff must first state a prima  
 3 facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792,  
 4 36 L.Ed.2d 668, 93 S.Ct. 1817(1973). If he is successful, then the burden  
 5 shifts to the defendant to articulate nondiscriminatory reasons for the allegedly  
 6 discriminatory conduct. Id. Once the employer presents legitimate  
 7 nondiscriminatory reason for its actions, the burden shifts back to the plaintiff to  
 8 show that the employer's reason was merely a pretext for discrimination. Id.  
 9 When looking to the appropriate standards in cases such as this, state law is  
 10 certainly controlling; however, "[s]ince the Washington anti-discrimination law  
 11 substantially parallels Title VII of the United States Civil Rights Act of 1964, 42  
 12 U.S.C. §§ 2000e et seq., Washington courts look to interpretations of the federal  
 13 law when construing RCW 49.60." Hollingsworth v. Washington Mut. Sav.  
 14 Bank, 37 Wn. App. 386, 390, 681 P.2d 845 (1984). Thus, both state and  
 15 federal law will be discussed where appropriate.  
 16  
 17

18 To establish a prima facie case of disability discrimination the plaintiff  
 19 must prove: (1) An employment decision adverse to the plaintiff was made by  
 20 the employer; (2) the plaintiff was disabled and (3) the plaintiff's disability was a  
 21 substantial factor in the employer's adverse decision. Bass v. City of Tacoma,  
 22 90 Wn. App. 681, 953 P.2d 129 (1998).  
 23

24 Similarly, to establish a prima facie case of age discrimination, the  
 25 plaintiff must prove: (1) the plaintiff is in the statutorily protected age group; (2)

1 he applied for, and was, the most qualified candidate for an open position; and  
2 (3) he was denied the promotion under circumstances that create an inference  
3 of unlawful discrimination. O'Connor v. Consol. Coin Caterers Corp., 517 U.S.  
4 308, 310-11, 116 S. Ct. 1307, 134 L.Ed.2d 433 (1996).

5 Finally, to prove a claim of retaliation the plaintiff must demonstrate: (1)  
6 that he engaged in protected activity; (2) there was an adverse employment  
7 action; (3) there is a causal link between the protected activity and the adverse  
8 employment action. Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

9  
10 The U.S. Supreme Court has long held that an adverse employment  
11 action is implicit in a plaintiff's prima facie case of discrimination. St. Mary's  
12 Honor Center v. Hicks, 509 U.S. 502, 523-24, 113 S.Ct. 2742, 125 L.Ed.2d 407  
13 (1993) ("Title VII award[s] damages ... only against employers who are proven  
14 to have taken adverse employment action by reason of (in the context of the  
15 present case) race.") Accordingly, the Ninth Circuit has held that an adverse  
16 employment action is necessary for a plaintiff's prima facie case. Wallis v. J.R.  
17 Simplot Co., 26 F.3d 885 (9th Cir. 1994) (after recognizing that a prima facie  
18 case of discrimination can be based on the McDonald Douglas factors or on  
19 direct evidence of discriminatory intent, the court stated that "[o]nce a  
20 production shifts to the defendant, who must offer evidence that the *adverse*  
21 *action* was taken for other than impermissibly discriminatory reasons.")  
22 (emphasis added); Lowe v. City of Monrovia, 775 F.2d 998, 1005, 1006-07 (9th  
23  
24  
25  
26

1 Cir. 1985) (stating that "in order to prevail, the plaintiff must demonstrate that  
 2 the employer's alleged reason for the *adverse employment decision* is a pretext  
 3 for another motive which is discriminatory" and then acknowledging that the  
 4 prima facie case can be established through the McDonnell Douglas framework  
 5 or direct evidence of discriminatory intent.) (emphasis added); see also Kers v.  
 6 Capital Graphics Inc. 178 F.3d 1011, 1016 (8th Cir. 1999) ("To establish a  
 7 prima facie case for discrimination, [plaintiff] had to present evidence showing  
 8 that she suffered an adverse employment action and some evidence of  
 9 discriminatory motive behind that action.).  
 10

11 The plaintiff in this case is attempting to assert actions against several  
 12 named defendants on an individual basis for alleged discrimination, as outlined  
 13 herein, plaintiff cannot put forth evidence to establish a prima facie case of  
 14 discrimination against these defendants. His claims fail due to lack of essential  
 15 evidence. Plaintiff's allegations against each of these defendants will be  
 16 addressed individually.  
 17

18 **1. Plaintiff's allegations against Assistant Chief Brame.**

19 The lack of factual basis for plaintiff's claims of discrimination against  
 20 Assistant Chief Brame (now Chief Brame) is conclusively demonstrated by  
 21 plaintiff's own deposition testimony.

22 Q: Okay. Let's talk about Assistant Chief Brame. What adverse  
 23 employment actions do you believe he has taken against you?  
 24  
 25

1 A: Again, I'm going to go back and reiterate the fact that a lot of the  
2 activities by the individual defendants -- and Chief Brame would  
3 be one of the individual named defendants -- merge together to  
4 form a pattern that results in, down the line, adverse actions like  
5 passovers and things. ...let's go to somebody else, and maybe  
6 we'll come back to that.

7 ...

8 Q: Let's go back to Assistant Chief Brame. Have you had a chance  
9 to think of any adverse employment actions taken against you by  
10 him?

11 A: I can't recall whether Assistant Chief Brame was on my first board  
12 or not. ...it's a little bit difficult to for me to evaluate whether or  
13 not Chief Brame made a -- an effort to participate in an adverse  
14 employment action against me. ...

15 Q: So you have no personal knowledge, I guess, is what you're  
16 telling me.

17 A: I have no personal knowledge at this point...

18 (See Exhibit 1, deposition excerpts of Joseph Kirby, Volume II, pages 8-  
19 9, 21-22.)

20 Without an adverse employment action, the inquiry ends, as the plaintiff  
21 cannot establish the elements of his prima facie case. Even if he is able to  
22 identify a legally cognizable adverse employment action on the part of Chief  
23 Brame, he is still required to produce evidence that the action was taken in  
24 substantial part due to his age or disability. Bass, supra. Failure of proof on an  
25 essential element of plaintiff's prima facie case mandates dismissal in favor of  
26 defendants. Cammack v. Port Angeles, 15 Wn. App. 188 (1976).

## 2. Plaintiff's allegations against Assistant Chief Roberts.

The plaintiff alleges that Assistant Chief Roberts wrote an unfounded  
probationary report during the plaintiff's temporary assignment to Captain, and

1 was on the interview board which recommended to the Chief of Police that  
2 another candidate be promoted to the position of Captain.

3 A: ...Assistant Chief Roberts basically wrote me a probation report --  
4 I think it was a page and a quarter -- when I was a temporary  
5 captain, that was totally unrealistic and actually off -- off center on  
6 exactly what happened in -- in the rated period. I believe it was a  
7 malicious report, and I believe that there was no factual basis for  
8 it, and I think that I pretty much stated that in the rebuttal that I  
9 submitted along with that report. ...I also believe that Roberts  
10 was on the Rule of Three that caused me to be passed over. I've  
11 had -- that's about it.

12 Q: Okay. And the probation report that you testified to, is that -- is  
13 that the issue involving the secretaries?

14 A: Yeah. That was the main theme of the probation report, the page  
15 and a quarter.

16 (See Exhibit 1, deposition excerpts of Joseph Kirby, Volume II, pages 9-  
17 10.)

18 Attached hereto as Exhibit 2, is the probationary report that the plaintiff is  
19 referring to. He indicates that he believes the report is unjustified. Interestingly  
20 though, he admits to engaging in the behavior described in the report. (See  
21 Exhibit 3, deposition excerpts of Joseph Kirby, Volume I, page 151-152; also  
22 see Exhibit 4, Joseph Kirby's rebuttal to the probationary report, page 2, "As for  
23 the impropriety of voicing my opinion in an open discussion MEA CULPA.  
24 ...my objection is his portrayal of my conduct...") What he objects to is the  
25 characterization that Chief Roberts ascribes to the conduct. That is a different  
26 matter and is not actionable. Adverse Employment actions are to be viewed  
objectively and "not everything that makes an employee unhappy is an

1 actionable adverse action." Smart v. Ball State, 89 F.3d 437, 441 (7th Cir.  
2 1996).

3 Even if the court does find that the negative probationary report does  
4 constitute an adverse employment action for purposes of this analysis, plaintiff  
5 cannot establish the other elements of his prima facie case. He has no  
6 evidence that the evaluation was motivated by animus targeted at age or  
7 disability. His mere conclusory allegations as to what his belief is, is not  
8 enough to overcome summary judgment. Grimwood v. Puget Sound, 110 Wn.  
9 2d 355, 753 P.2d 517(1988).

10  
11 Plaintiff's claims of discrimination based on Chief Roberts' participation  
12 in the interview process for Captain also fail as a matter of law. In the Tacoma  
13 Police Department, the promotional process is as follows: A written examination  
14 is taken by interested employees. See Affidavit of Mary Brown, Assistant  
15 Human Resources Director. An eligible list is prepared in order of score;  
16 however, everyone on that list is deemed to be qualified based on the  
17 successful passing of the written examination. Id. When there is a vacancy,  
18 the top three candidates are certified and interviewed. Id. The interview panel  
19 makes a recommendation to the Chief of Police, who then makes the ultimate  
20 promotional decision. The Chief can choose from any one of the three  
21 candidates. Id. In this instance, the panel did not recommend Lt. Kirby. (See  
22 Exhibit 5, deposition excerpts of Michael Darland.) Plaintiff has no evidence  
23 that this decision was motivated by any discriminatory intent. Further, plaintiff  
24  
25

1 admits that he was simply not the right match for the management team. In his  
2 deposition, plaintiff stated:

3 A: ...I also believe that Mike Darland made an accurate  
4 statement when he said in deposition that he did not select  
5 me because basically I was not a good fit for the current  
6 command structure. ...

7 (See Exhibit 3, deposition excerpts of Joseph Kirby, Volume I,  
8 pages 35-36.)

9 It is not discrimination simply because you are not well liked in the  
10 workplace. See, Kahn v. Salerno, 90 Wn. App. 110, 118, 981 P.2d 321 (1998)  
11 (laws against discrimination are "not directed against unpleasantness per se.").  
12 Thus, plaintiff cannot make his prima facie case against Assistant Chief  
13 Roberts and summary judgment dismissal is appropriate.

### 14 3. Plaintiff's allegations against Chief Arreola.

15 Plaintiff claims that Chief Arreola treated members of the police  
16 department very poorly while he was Chief, from 1996-1999, and threatened to  
17 terminate the plaintiff. When asked about adverse employment actions taken  
18 by the Chief, the plaintiff stated:

19 Q: ...What adverse employment actions did he take against you?

20 A: ...Chief Arreola? Where do I start? ...He accused us collectively  
21 of -- of being corrupt.

22 Q: Did he accuse you specifically?

23 A: No.

24 Q: Okay. Anything else?

1 A: He -- he treated us very poorly. He caused our reputation in the  
community to be diminished...

2 Q: You're speaking of the police department as a whole?

3 A: Yeah. And me, but I was a member of the police department  
4 during that time...

5 Q: What did he do to you specifically?

6 A: He threatened to fire my ass -- I think the words were "terminate."  
7 It would have been fire -- could have been fire. I'm not sure --  
8 over an incident that stemmed from questioning in the command  
staff.

9 ...

10 Q: Okay. Did Chief Arreola ever take steps to actually terminate your  
employment with the City?

11 ...

12 A: I have -- see, I have no direct knowledge of that.

13 A threat to terminate is not actionable unless it is carried out. See  
14 Breaux v. City of Garland, 205 F.3d 150 (5th Cir. 2000); citing Harington v.  
15 Harris, 118 F.3d 359 (5th Cir. 1997) (oral threats or abusive remarks, does not  
16 rise to the level of an adverse employment action); Click v. Copeland, 970 F.2d  
17 106, 110 (5th Cir. 1992) (a threat of discharge is itself is insufficient to establish  
18 an adverse employment action). Some benefit must be denied, or some  
19 negative consequences must impinge in the plaintiff's employment before a  
20 threat of discharge is actionable.

21 Thus, plaintiff cannot establish a prima facie case against Chief Arreola  
22 and he must be dismissed.  
23



# EXHIBIT

**#1**

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF PIERCE  
3

4 JOSEPH J. KIRBY and DEBORAH A. )  
KIRBY, husband and wife, )  
5 )  
Plaintiffs, )  
6 )

7 vs. )

No. 99 2 13911 4

8 THE CITY OF TACOMA, a municipal )  
corporation; RAY CORPUZ and "JANE )  
DOE" CORPUZ, husband and wife; )  
9 PHILIP ARREOLA and "JANE DOE" )  
ARREOLA, husband and wife; WILLIAM )  
10 WOODARD and CATHERINE WOODARD, )  
husband and wife; RAYMOND ROBERTS )  
11 and "JANE DOE" ROBERTS, husband and )  
wife; DAVID BRAME and "JANE DOE" )  
12 BRAME, husband and wife; and JAMES )  
HAIRSTON and "JANE DOE" HAIRSTON, )  
13 husband and wife, )  
14 Defendants. )  
15

16 DEPOSITION OF JOSEPH J. KIRBY  
17 VOLUME II  
18  
19

20 October 23, 2001  
Tacoma, Washington  
21

22 BYERS & ANDERSON, INC.  
COURT REPORTING & VIDEO  
23 2208 North 30th Street One Union Square  
Suite 202 600 University Street  
Tacoma, Washington 98403 Suite 2300  
24 253.627.6401 Seattle, WA 98101-4112  
Fax: 253.383.4884 206.340.1316  
25 1.800.649.2034  
www.byersanderson.com

1 of the defendants.

2 But I do need you to be able to tell me which  
3 actions relate to which defendant, and if there's more  
4 than one, you can certainly tell me that.

5 A Bill Woodard? Bill Woodard compelled me to divulge a  
6 statement that should have been protected by privacy,  
7 that should have been protected by a body of law in the  
8 RCW that said, as a union advocate and as a union  
9 officer, I could communicate with constituency without  
10 having to divulge statements.

11 Subsequently, Bill Woodard told me he would have  
12 -- had I not given him that statement, had I not  
13 divulged that information, he would have sought my  
14 termination from the department.

15 Q Did he, in fact, seek your termination?

16 A Unknown to me.

17 Q Anything else related to Bill Woodard?

18 Any other adverse employment actions?

19 A I -- I have no knowledge or understanding of what  
20 Bill -- how Bill might have interacted with any of the  
21 other defendants in subsequent activities or actions  
22 that they were involved in.

23 Q Okay. Let's talk about Assistant Chief Brame.

24 What adverse employment actions do you believe he  
25 has taken against you?

1 A Again, I'm going to go back and reiterate the fact that  
2 a lot of the activities by the individual defendants --  
3 and Chief Brame would be one of the individual named  
4 defendants -- merged together to form a pattern that  
5 results in, down the line, adverse actions like  
6 passovers and things.

7 Let me think here. Was Chief --

8 THE WITNESS: -- let me ask you --  
9 and I don't know if this is permitted, but were you on  
10 my boards for my Rule of Threes for captains?

11 Q (By Ms. Kerlake) You need to answer the question to  
12 the best of your knowledge.

13 A Well, I'm trying to figure out whether he was -- the --  
14 answer that question to the best of my --

15 Q Recollection.

16 A I -- let's go to somebody else, and maybe we'll come  
17 back to that.

18 Q Sure. We can do that.

19 Assistant Chief Roberts.

20 A Assistant Chief Roberts? Assistant Chief Roberts  
21 basically wrote me a probation report -- I think it was  
22 a page and a quarter -- when I was a temporary captain,  
23 that was totally unrealistic and actually off -- off  
24 center on exactly what happened in -- in the rated  
25 period.

1 I believe it was a malicious report, and I believe  
2 that there was no factual basis for it, and I think that  
3 I pretty much stated that in the rebuttal that I  
4 submitted along with that report.

5 I also believe that Roberts was on the Rule of  
6 Three that caused me to be passed over. I've had --  
7 that's about it.

8 Q Okay. And the probation report that you testified to,  
9 is that -- is that the issue involving the secretaries?

10 A Yeah. That was the main theme of the probation report,  
11 the page and a quarter.

12 Q Okay. And do you know who else sat on the Rule of Three  
13 board with Assistant Chief Roberts?

14 A Yeah. I think -- oddly enough, I believe that Captain  
15 Meeks did, which was the first time in my recollection  
16 that they had sat a captain on a captains -- on a  
17 captains Rule of Three board. I think it was usually  
18 the assistant chiefs that were on there.

19 Q Do you know why Captain Meeks sat on that particular  
20 board?

21 A No. I was surprised when I saw him there.

22 Q Okay. What about Chief Hairston?

23 What adverse employment actions has he taken  
24 against you?

25 A Well, let's see. Chief Hairston terminated my

1 Q Such as?

2 A Well, such as assaulting an officer. I -- comes to  
3 mind. Would have been Lieutenant Meeks at the time.  
4 Such as portraying the police department as corrupt.

5 Such as threatening to fire me when I was in  
6 exercise of my RCW-protected rights as an executive  
7 board member advocating on behalf of Local 6.

8 Q Any other adverse employment actions that Ray Corpuz has  
9 taken against you as an individual?

10 A You know, again, I'd have to tell you that every --  
11 every -- he's responsible for -- he's responsible  
12 basically for his agencies, and his agencies consist of  
13 the chiefs of police, the deputy chiefs, and all the  
14 rest of the people that are named in this suit.

15 Q Let's go back to Assistant Chief Brame.

16 Have you had a chance to think of any adverse  
17 employment actions taken against you by him?

18 A I can't recall whether Assistant Chief Brame was on my  
19 first board or not.

20 I really don't recall, and as I am not privileged  
21 to communications, either in writing or verbally,  
22 between the assistant chiefs or what might come up at  
23 those meetings, it's a little bit difficult for me to  
24 evaluate whether or not Chief Brame made a -- an effort  
25 to participate in an adverse employment action against

1 me.

2 He very well may have, could have on a daily  
3 basis, but he didn't come up to me and -- with a great  
4 amount of flourish and fanfare and say, I'm going to  
5 participate in an adverse employment action against you  
6 today. Watch this, so --

7 Q So you have no personal knowledge, I guess, is what  
8 you're telling me.

9 A I have no personal knowledge at this point -- well, let  
10 me qualify that. I -- I -- I might, upon reflection, be  
11 able to piece together some logical, you know,  
12 perspective of -- of maybe what I think that Dave  
13 Brame's participation in this whole affair might be, but  
14 at this particular point in time today, on the 23rd,  
15 I'm -- I'm -- I'm not able to do that.

16 Q Okay. Now, in the first part of your dep, you -- you  
17 told me that there had been some treatment that you  
18 received prior to Arreola's arrival that you thought was  
19 adverse to you, but you didn't explain what that was.

20 Do you --

21 A I'm not sure. Could you read me --

22 Q Yeah. Let me --

23 A Could you read me the leading questions and then perhaps  
24 my response?

25 Q Sure.

# EXHIBIT

#2

## CITY OF TACOMA

GENERAL GOVERNMENT &amp; DEPARTMENT OF PUBLIC UTILITIES

## PROBATIONARY REVIEW RECORD - EVALUATION OF EMPLOYEE SERVING PROBATIONARY PERIOD

EMPLOYEE'S NAME <b>KIRBY, JOSEPH</b>	DIVISION <b>CID</b>	DEPARTMENT <b>POLICE</b>	DATE EMPLOYED <b>5-10-99</b>
EMPLOYEE'S POSITION <b>POLICE CAPTAIN, TEMPORARY</b>	CLASSIFICATION CODE NUMBER		

INSTRUCTIONS: Employee's evaluation should be expressed in numerical terms and based on definitions of ratings shown hereunder. See Personnel Management Policy #604 for definition of factors rated and rating values.

A = Acceptable

N/I = Needs Improvement

U = Unacceptable

PERFORMANCE RATING 5 <sup>TH</sup> MONTH
--

		PERFORMANCE RATING 5 <sup>TH</sup> MONTH
1. ATTENDANCE	Is employee ever absent without good cause?	A
2. INITIATIVE	Is employee a self-starter? Does he/she keep busy?	A
3. COOPERATION	Does employee work well with others?	U
4. ABILITY TO LEARN	Does employee follow instructions and remember well?	A
5. ADAPTABILITY	Can employee satisfactorily handle assignments and accept working conditions?	N/I
6. APPEARANCE	Does employee dress appropriately for the job and maintain well-groomed appearance at all times, consistent with occupation?	A
7. DEPENDABILITY	Can employee be relied upon to do the job assigned?	N/I
8. JOB KNOWLEDGE	Is employee well qualified for the job?	N/I
9. ATTITUDE	Is employee happy with his/her work; does he/she accept City policies?	U
10. QUALITY OF WORK	Is employee neat and accurate in his/her work?	N/I
11. QUANTITY OF WORK	Is the amount produced consistent with the standards established for the nature of the work?	A

ADDITIONAL COMMENTS:  
(NECESSARY IN CASES OF FAILING & POOR)

SEE NARRATIVE ATTACHED

RATER <i>Ray Roberts</i> DATE 2-17-00	SUPERVISOR <i>Ray Roberts</i> DATE 2-17-00
TITLE Assistant Chief Ray Roberts, Criminal Investigations Bureau Chief	TITLE Assistant Chief Ray Roberts, Criminal Investigations Bureau Chief
APPOINTING AUTHORITY (OR ALTERNATE) <i>James O. Hairston</i> DATE 2-17-00	THIS REPORT HAS BEEN DISCUSSED WITH ME. MY SIGNATURE DOES NOT NECESSARILY MEAN I AGREE WITH RATINGS.
TITLE Chief James O. Hairston	EMPLOYEE'S SIGNATURE <i>Refused</i> DATE 2-17-2000

5<sup>TH</sup> Month Probation Report  
 Temporary Captain Joseph Kirby

Temporary Captain Kirby was assigned to the Criminal Investigations Division on September 20, 1999, ten days after the start of this month's probationary period. My observations of Temporary Captain Kirby were further reduced by my attendance at various scheduled seminars and conferences for six days during the remainder of this evaluation period. On September 21, 1999, I met with him and gave him a document explaining those performance expectations I have for Captains assigned to the Investigations Bureau. I read these expectations aloud and we discussed in some detail various aspects of those expectations. Temporary Captain Kirby signed a copy of that document, acknowledging he had received a copy of it.

During this discussion, I informed him that as a high-ranking official of the Tacoma Police Department he was expected to display "public support for the goals and policies of the City of Tacoma and the Tacoma Police Department..." During this discussion of leadership, he was encouraged to offer suggestions on issues that have an effect on the Department and community. He was also told that leadership "involves supporting the policies of the City and Police Department administrations and the decisions made to enable those policies. *Once a decision is made, you are expected to publicly support that decision and to do your best to make it work.*" (Emphasis added).

On October 6, 1999, Captain Kirby met with the CID secretaries. These meetings were started by his predecessor in an effort to develop a more cohesive and harmonious working relationship within this vital group of employees. During the first meeting a discussion arose as to when they would begin cross training with the secretary in SID. His response was to tell them he would not have made this decision and did not support it. He stated he would discuss this with me, but he did not do so.

His demonstrated lack of support for a decision made by me had several potential and real effects. First, he demoralized a valued group of employees who were starting to develop a cooperative and caring working relationship. Rather than build on that foundation, his actions could have destroyed a great deal of effort on the part of these employees and other Command Officers.

Secondly, should he have succeeded in stopping implementation of this decision, my word to the secretaries' labor representative would have been broken, damaging a cooperative and respectful working relationship between a labor union and Tacoma Police Department Administration.

Finally, his displayed non-support of my directions undermines my ability to manage and support a major Bureau within the Tacoma Police Department. This has direct implications not to just the men and women within this organization who depend on us to direct and support their efforts, but also on the community we serve.

If he had concerns about my decision on secretarial assignments and training, he should have approached me directly with them. I appreciate diverse ideas and suggestions. This would have also provided me an opportunity to explain to him why the decisions were made. He should not have expressed his displeasure of management decisions directly to employees.

Temporary Captain Kirby has demonstrated that he is quick to take charge and unafraid to make decisions. An example of this was when we found it necessary to place a lieutenant and a sergeant on administrative leave. Although Captain Kirby had no part in a decision that affected his ability to control a significant portion of his Division, he quickly determine that he needed to make an acting sergeant and made the correct selection as to who should fill that position.

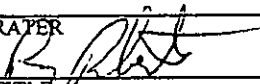
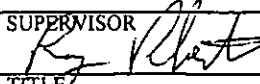
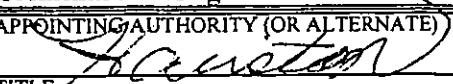
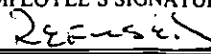
Captain Kirby was also quick to act when Forensics Manager Walker brought a problem to his attention. An officer assigned to the Operations Bureau had photographed a crime scene with his personal digital camera. Forensics is unable to process this type of technology. Captain Kirby notified Captain Woodard in Operations of the problem and offered a suggestion on how the immediate problem might be rectified. He also properly suggested that Operations Bureau personnel be reminded of the policy on crime scene photography.

Although Temporary Captain Kirby seems to be able to accomplish well some of the perfunctory tasks associated with the rank of Captain, I have concerns as to whether he supports the administration and policies of the Tacoma Police Department. His non-support of my decision concerning secretaries assigned to the Investigations Bureau continues to demonstrate Captain Kirby's non-support as documented in his 4<sup>th</sup> month probation report written by Assistant Chief Brame. In that report, Assistant Chief Brame stated that Temporary Captain Kirby did not report an incident to the Chief of Police because Temporary Captain Kirby did not trust how the Chief of Police might handle the incident. Captain Kirby

needs to understand that no organization can survive if its employees do not support that organization. This is especially true when those who are charged with leading the organization display publicly that they do not support the organization.

Temporary Captain Kirby should reassess his approach to management. I strongly recommend that he study MRP 14.01.003, which describes the duties of a Police Captain. Further, I strongly recommend that he examine more closely the document I provided to him on September 21, 1999 which outlined those expectations I have for a Captain working within the Investigations Bureau. Combined, these are the standards by which he must operate if he desires to succeed. Temporary Captain Kirby is bright and articulate and should approach me, or other superior officers, with his ideas and suggestions for increased efficiency and betterment of the working conditions of our employees and service to the public. However, Temporary Captain Kirby must display support for the decisions made by superior officers and do his best to implement those decisions and assure their success.

The unsatisfactory behavior demonstrated during this rating period would be unacceptable for a lieutenant. It is much more unacceptable when displayed by a captain and will result in my strongest recommendation that Joseph Kirby not continue in the position of Temporary Captain if his behavior and performance do not dramatically improve.

RATER 	2-17-00	SUPERVISOR 	2-17-00
TITLE Assistant Chief Ray Roberts, Criminal Investigations Bureau Chief	DATE	TITLE Assistant Chief Ray Roberts, Criminal Investigations Bureau Chief	DATE
APPOINTING AUTHORITY (OR ALTERNATE) 	2-17-00	THIS REPORT HAS BEEN DISCUSSED WITH ME. MY SIGNATURE DOES NOT NECESSARILY MEAN I AGREE WITH RATINGS.	
TITLE Chief James O. Hairston	DATE	EMPLOYEE'S SIGNATURE 	DATE 2-17-00

# EXHIBIT

#3

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.

COURT REPORTING & VIDEO

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600 University Street  
Suite 2300  
Seattle, Wa 98101-4112  
(206) 340-1316

1-800-649-2034

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

1 three of them are defendants in this case.

2 But I think that if you were to look beyond that  
3 and you would put the records on the desk, you were to  
4 ask yourself what do we value in a field leader, in a  
5 leader of police? I would rise above those other two  
6 candidates.

7 I also believe that the only, at lease to my  
8 knowledge, I'm the only lieutenant standing number one  
9 on a captains list at the police department that has  
10 ever been passed over. Not to say that people have  
11 not been passed over, but not at that level.

12 And I would posit further that you can't sustain  
13 or support a legitimate reason for that passover  
14 unless you simply choose to devalue leadership in  
15 field activities.

16 Q I understand that Mike Darland was on both oral board  
17 panels. Who else was involved in those panels?

18 A The second oral board was, my recollection was Mike  
19 Darland and Bill Meeks, which was interesting because  
20 they had a Captain Bill Meeks at the time sitting on  
21 another's captain's board, which is something you  
22 never had done at the department before.

23 It's difficult getting the assistant chiefs to  
24 sit on since I was in litigation with two of them.

25 The first board, my recollection was Darland and I

1 is that my objection is his portrayal of my conduct in  
2 these regards is borderline on insurrection and  
3 revolutionary, I believe that a reasonable man of  
4 standing would apply to his ability to effectively  
5 manage a large bureau in the Tacoma Police Department  
6 certainly can't be impaired by the fact I was trying  
7 to facilitate a dialogue by four secretaries in a  
8 meeting and I was only there basically to facilitate  
9 their inability to get along.

10 Q So you disagree with Chief Roberts' assertion that not  
11 supporting his decision undermined his authority in  
12 any way?

13 A Interesting you should ask that, and that's part of my  
14 disparate treatment. Under Arreola, Chief Roberts was  
15 probably the biggest detractor, was constantly  
16 speaking evil about this man who was Philip Arreola.

17 Q Who was he speaking to?

18 A Anyone who would listen to him. He spoke evil about  
19 Arreola every time I was in presence. I'm sure you  
20 could ask the same question to any of the witnesses on  
21 our list.

22 And so an interesting concept that on the one  
23 hand he engaged in the identical behavior that he is  
24 basically sanctioning me for, but mine was certainly  
25 the proverbial 26 miles in a 25 mile an hour zone, and

1 for that he wants to revoke my driver's license.

2 I'm not saying that had I known he was the one  
3 responsible for dropping SID down to one secretary, at  
4 that point, had I come equipped with that knowledge,  
5 that conversation would have occurred. I did not know  
6 that.

7 And I'd like to put on for the record that it's  
8 still a bad decision. It doesn't change my belief.  
9 The difference is, had I known going into that  
10 meeting, I wouldn't have articulated that.

11 Q So when you indicate in your rebuttal that this  
12 "discrimination and disparate treatment," you're  
13 referring to the fact that Roberts said things about  
14 Arreola?

15 A I'm referring to the fact that I have been severely  
16 sanctioned in my probation reports which are permanent  
17 parts of my record, in a counseling statement by  
18 Roberts for engaging in conduct that was nowhere in  
19 comparison to the conduct that he had a reputation of  
20 engaging in during the Arreola years.

21 What I'm saying is, if -- he was reckless  
22 driving. I was 26 in a 25. They want to revoke my  
23 license again. You see? There's a disparity there.

24 Q What do you believe that disparity is based on?

25 A You'd have to ask him.

# EXHIBIT

#4



# TACOMA POLICE DEPARTMENT

## Intra-Departmental Memorandum

TO: James O. Hairston  
Chief of Police

SSD 00-004

FROM: Joseph J. Kirby *JJK*  
Training Lieutenant

DATE: Feb. 28, 2000

THROUGH: Michael J. Darland  
Deputy Chief

SUBJECT: FIFTH MONTH PROBATION REPORT

The rebuttal to my Fifth Month Temporary Captain probation report is forwarded to you as an attachment to this IDM.

JJK:st

Attachment

EXHIBIT

*KIRBY 3*  
*2-15-01*

SUBJECT: 5<sup>th</sup> MONTH TEMPORARY CAPTAIN PROBATION REPORT - REBUTTAL

On 17 February 2000 at approximately 1017 hours Deputy Chief Michael Darland called me into his office so that Assistant Chief Ray Roberts could present me with several documents. Upon entering the office I was handed a 5<sup>th</sup> month probation report. I read the report. Roberts asked me if I wished to comment. I declined to comment except to advise that I did not elect to sign this report and that I would be submitting a rebuttal.

The report as written consists of 12 paragraphs. For the purpose of indexing, I will refer to paragraph numbers.

## Paragraph #3:

My recollection is that I did not meet with the secretaries on 6 October 1999 as A/C Roberts has stated. I believe the referenced meeting took place on 5 October 1999.

A/C Roberts states: "These meetings were started by his predecessor in an effort to develop a more cohesive and harmonious working relationship (emphasis added) within this vital group of employees." To set the record straight, the existing relationship between the secretaries present upon my arrival in CID was anything but 'cohesive and harmonious.' This is a fact recognized not only by my predecessor but also by a long lineage of CID captains who preceded me in this assignment. Several of these secretaries have been transferred between various work units in the Department as a result of serious personality conflicts as well as having been involved as plaintiffs in civil actions against the City and their co-workers.

## Paragraph #4:

For A/C Roberts to suggest in paragraph #4 that I "demoralized a valued group of employees who were starting to develop a cooperative and caring working relationship" is preposterous and completely contradicted by a well-documented history of dissention and turmoil in this work group.

## Paragraph #5:

A/C Roberts states: "Should he have succeeded in stopping implementation of this decision, my word to the secretaries labor representative would have been broken, damaging a cooperative and respectful working relationship between a labor union and TPD administration,"

First, I should like to state that at the time of this meeting I did not have any knowledge of any agreement between TPD admin and the secretaries union. Further, no one present at the meeting advised of this. Neither did I have any knowledge that A/C Roberts was responsible for the decision to permanently remove one of the two secretaries assigned to SID. Had I been aware of these factors it would not have altered my belief that the original decision was flawed, but I would not have voiced my feelings in this meeting.

Apparently, I was not the only person present who did not possess an understanding of these negotiations or arrangements, because, in a subsequent secretaries meeting that occurred 2 November, 1999 which was also attended by Sergeant Peter Cribbin, my personal notes reflect the following entry:

"Only outstanding issue - cross training for Jody's position. Mary Eby voiced strong desire not to be involved, Sandy and Patti feel need to support Jody, Angela neutral - all cordial but Patti states cannot begin to formulate plan to help until someone with knowledge of how we got to this point briefs, then there are numerous unanswered questions in Patti's mind concerning negotiations with the Union etc. that only RR (Ray Roberts) knows of. Also want to include Jody in solution and PM (Paul Mielbrecht)."

In regards to comments I made in the secretaries meeting, it should be noted that no one present informed me of the history of these events or arrangements, because it is my belief that no one present had any knowledge. No one at any time informed me that A/C Roberts was responsible for the decision to remove a secretary from SID. The secretaries themselves were unaware of the history of these negotiations as evidenced by secretary Petersen's comments in the 2 November meeting.

## Paragraph #6:

A/C Roberts states; "His display of non-support of my directions undermines my ability to manage and support a major bureau within TPD." This presumes I had some knowledge of his 'directions', which I did not.

## Paragraph #7:

A/C Roberts states: "If he had concerns about my decision on secretarial assignments and training, he should have approached me directly with them. I appreciate diverse ideas and suggestions." These two statements are contradictory. First of all I did not know these decisions were his, nor do I believe did any of the secretaries, so it is incongruous to suggest that I should have approached him. Secondly, this whole episode demonstrates quite clearly that the core issue is not that I questioned or disagreed with a past decision, but that he perceived my comments as a personal affront against his decisions. A/C Roberts believes that any dissent undermines his ability to manage. Perhaps there is a degree of truth in his perspective, but it remains discordant with his statement that he 'appreciates diverse ideas and suggestions'

## Paragraph #9:

This paragraph contains material inaccuracies. I first became aware of the situation when A/C Roberts walked into my office (One of only three times I can recall that he initiated personal contact with me in spite of the fact that we had adjoining offices) and announced: I am contemplating recommending disciplinary action against Sergeant Bass for allowing PPO Maule to utilize his personal camera to process a crime scene". Or words to that effect. This statement struck me as so outrageous that at first I believed that A/C Roberts was baiting me for a reaction. I felt it was ridiculous to suggest disciplining employees who were proactively managing solutions to equipment deficiencies by providing their own investigative resources. I was therefore non-responsive to A/C Robert's comments and he then departed my office. After a period of time that I would estimate to be approximately five minutes, A/C Roberts reappeared in my office and announced: " I've reconsidered my earlier inclination to discipline Sergeant Bass as I've discovered that the conduct preceded the recent written guidance on camera usage that I issued." Again, it is my belief that the core issue was not that Sergeant Bass violated a written directive, but that it was A/C Robert's written directive. This is yet another demonstration that any transgressive behavior concerning any of A/C Robert's rules and orders is considered a personal affront and is characterized as purposeful and malicious non-support of administrative decisions, when, consistently, the offending party's conduct was clearly never intended to be disruptive or disrespectful.

## Paragraph #10:

A/C Roberts has incorporated prior reference to my previous 4<sup>th</sup> month probation report yet has chosen to purposely omit the rebuttal material I submitted and which by regulation is inseparable from the probation report. A/C Roberts states: "In that report, A/C Brame stated that Temporary Captain Kirby did not report an incident to the Chief of Police because Temporary Captain Kirby did not trust how the Chief of Police might handle the incident." A/C Roberts has an obligation to include the rebuttal material, which I submitted to these comments. A/C Roberts had full knowledge of the rebuttal refutations I submitted concerning this statement as DM 99-024 my 4<sup>th</sup> month probation report rebuttal was submitted through him on 21 September 1999. Since A/C Roberts has chosen to disregard the inseparability of the rebuttal as an attachment to the probation report I am appending the entire rebuttal to this document as Tab A with particular reference to pages 5 and 6.

A/C Roberts knew or should have known that he cannot reference a prior probation report as a 'stand alone document' without including the rebuttal refutation. This behavior is however consistent with A/C Robert's propensity to rely on hearsay accounts to quote me out of context.

A/C Roberts has managed to produce a lengthy documentary which when analyzed, is at its core, that I disagreed with him when I expressed an opinion in a conversation that took place in a meeting with four division secretaries on 5 October 1999. As for the impropriety of voicing my opinion in an open discussion  
- MEA CULPA.

My objection is his portrayal of my conduct in these regards as borderline insurrection and revolutionary.

Pursuant to an oral reprimand I received on matters referred to in this probation report on 3 November 1999, which was attended by D/C Darland and Captain Charles Meinema, I inquired of A/C Roberts if he had interviewed all the secretaries present at the meeting, or as had been his past practice, if he simply relied on an incomplete account of events in making his decision to discipline me over my comments. I felt this question was reasonable, as the information he was relying on was clearly hearsay and he had an obligation to complete the record by interviewing all personnel who were present at this meeting. A/C Roberts informed me in the presence of D/C Darland and Captain Meinema that he had not yet solicited statements from all present, but would in fact do this before proceeding. It has now come to my attention that A/C Roberts did not solicit reports from all present as he had stated he would. He has chosen in the alternative to proceed against me with full knowledge that the record is incomplete and may well in fact prove to exonerate my conduct. This is a serious integrity violation and displays a wanton disregard for fair and impartial treatment of his subordinate commanders.

For the record I would like to state that it is my belief that the morale and efficiency of the secretarial staff under A/C Roberts had, prior to my arrival in CID, deteriorated to such an abysmal state that their interrelationships were dysfunctional. As proof of this I submit the fact that on 2 November 1999, one of the secretaries, Mary Eby entered my office in tears and requested a transfer due to a hostile work environment, which she advised was caused by treatment she had received by A/C Roberts and secretary Patti Petersen. It would appear that the deplorable state of morale that existed in this work group was well established prior to my arrival and was attributed by at least one secretary to an environment fostered by A/C Roberts.

Not only has A/C Roberts distorted the truth to suit his own agenda in this probation report, he has denied my minimal due process rights to properly defend my actions by excluding statements which could reasonably be foreseen to have disproved or mitigated his assertions of non-support of his policies.

In summary, A/C Roberts has based the entire content of this probation report on an isolated, out of context hearsay account. He has purposely chosen not to seek out the accounts and explanations of others present who could provide potentially conflicting testimony which would be favorable to a proper accounting of my actions, in spite of the fact that in front of witnesses he assured me that he would solicit and consider this material. Roberts has chosen instead to portray one isolated comment during a 30-day probationary period as promoting anarchy and discontent by undermining his authority by non-support of department policies. To put it in perspective, if, in a 30 day rating period while acting in the capacity of a division commander, my primary performance deficiency is predicated on an isolated hearsay comment, as a result of a deliberately incomplete investigation, then I must respectfully submit the only outrageous conduct is that of the rater A/C Roberts. It is because of this discriminating and disparate treatment that A/C Roberts is now a defendant in a civil suit I have filed against him. This lawsuit was filed in December 1999, nearly two months prior to my receiving the probation report that I now find necessary to rebut. Clearly, this probation report is a reprisal for exercising my right to seek redress for A/C Robert's actions against me in a civil court. A/C Roberts conduct in these regards is as transparent as the content of this probation report. Although I hold out little faith in correcting this retaliatory behavior through this rebuttal, and do not believe that it will adequately correct the record, I do feel strongly that this conduct on the part of a senior administrator of the Tacoma Police Department will be ultimately repudiated in the civil trial scheduled for December 2000.

# EXHIBIT

#5





1 looking at, you know, the total package for the person.  
2 It's within the department, so of course we have  
3 knowledge of the candidates.

4 At the time that the promotional opportunities  
5 came up, it was my opinion that the other candidates  
6 were a better fit for the management team on the  
7 experience level and ability to work with the rest of  
8 the management team.

9 Q Did the fact that there were outstanding or unresolved  
10 internal investigations against Lieutenant Kirby at  
11 that time have any impact on your decision?

12 A No. The fact that there were allegations or  
13 outstanding issues didn't. What it did was, is  
14 Lieutenant Kirby's ability to work with the management  
15 team -- there was some obvious conflict between him and  
16 members of staff.

17 Q Did some of that conflict arise from the fact that this  
18 lawsuit was filed?

19 A Well, I think that certainly the lawsuit probably  
20 involves some of those situations.

21 Q Did that have any impact on your decision?

22 A The lawsuit didn't, no.

23 Q Is it true that after the selection process was made  
24 and Lieutenant Kirby was passed over, that he could  
25 have requested a written explanation of the reasons why