



99-2-13911-4 17623069 MMS 11-21-02

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON

A.M. NOV 20 2002 P.M.

BOB SAN SOUCIE  
COUNTY CLERK  
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,

No. 99-2-13911-4

Plaintiffs,

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S  
CLAIM OF RETALIATION FOR  
PROTECTED UNION ACTIVITY

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,

NOTED FOR:  
December 20, 2002

ASSIGNED:  
Judge Katherine M. Stolz

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
FOR PROTECTED UNION ACTIVITY - 1

**ORIGINAL**

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

1       **I. STATEMENT OF THE CASE**

2               This employment discrimination action stems from numerous complaints  
3 the plaintiff has concerning his alleged treatment while employed by the City of  
4 Tacoma. Plaintiff has asserted a number of theories in support of this action,  
5 including a claim of retaliation for allegedly protected union activities. Plaintiff's  
6 union activity claim is the basis of the instant motion.

7  
8               In his complaint, plaintiff asserts that the defendants retaliated against  
9 him for exercising his rights under Chapter 49.60 RCW. See Second Amended  
10 Complaint for Personal Injuries and Damages in Tort (hereinafter "Second  
11 Amended Complaint"), p. 5, lines 12-14. Plaintiff has further alleged that he  
12 has been harassed and discriminated against because of his participation in  
13 protected union activities. Id. at p. 4, lines 22-24.

14  
15               In response to defendants' motion for partial summary judgment on  
16 plaintiff's RCW 49.60 claim, plaintiff changed his position and indicated that his  
17 retaliation and his protected union activity claims are, in fact, based on *RCW*  
18 *41.56* and not upon RCW 49.60. Exhibit 1 (Amended Answers to Defendant  
19 City's Interrogatories to Plaintiff), attached hereto at Tab 1. As demonstrated  
20 herein, plaintiff's RCW 41.56 claim is no more cognizable than was his RCW  
21 49.60 union activity claim.  
22  
23  
24  
25  
26

1           **II.     ISSUES PRESENTED**

- 2           1.     Whether plaintiff's claim under RCW 41.56 should be dismissed  
3           as RCW 41.56 does not create a cause of action of money  
4           damages.
- 5           2.     Whether plaintiff's claim under RCW 41.56 should be dismissed  
6           as plaintiff failed to comply with the applicable six-month statute of  
7           limitations and failed to exhaust his administrative remedies.
- 8           3.     Whether plaintiff's claim under RCW 41.56 should be dismissed  
9           as plaintiff cannot adduce evidence sufficient to establish a prima  
10          facie case.

11          **III.    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          Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265  
22          (1986)).

23          Under the latter method, the defendant is not required to support its  
24          motion with affidavits or other materials *disproving* the plaintiff's case. Burnet v.  
25          Spokane Ambulance, 54 Wn. App. 162, 166, 772 P.2d 1027 (1989). The

26          MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
FOR PROTECTED UNION ACTIVITY - 3

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

1 defendant need only "identify those portions of the record, together with the  
 2 affidavits, if any, which he or she believes demonstrate the absence of a  
 3 genuine issue of material fact." Guile v. Ballard Community Hosp., 70 Wn. App.  
 4 18, 22, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993).

5 After the defendant makes its required showing, the burden then shifts to  
 6 the plaintiff:

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

17 (emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618  
 18 (1992). Consequently, the plaintiff "must do more than express an opinion or  
 19 make conclusory statements"; ***the plaintiff must set forth specific and  
 20 material facts to support each element of his prima facie case.*** Id.

#### 21 IV. ANALYSIS

##### 22 A. **Plaintiff's claim under RCW 41.56 fails as a matter of law as 23 this statute does not create a cause of action for money 24 damages.**

25 As indicated in his supplemental interrogatory response, plaintiff has  
 26 predicated his retaliation claim on "the statutory protections contained in RCW  
 41.56, et seq.[.]" Exhibit 2, p. 2, lines 1-2. Plaintiff intimates that he is entitled

1 to money damages for an alleged violation of Chapter 41.56 and in support of  
 2 this assertion, relies upon Vancouver School District No. 37 v. Serv.  
 3 Employees, 79 Wn. App. 905, 906 P.2d 945 (1995). Plaintiff's reliance is  
 4 misplaced.

5 Vancouver School District No. 37 does not establish a personal cause of  
 6 action for money damages for an alleged violation of RCW 41.56. RCW 41.56,  
 7 the Public Employees' Collective Bargaining Act (PECBA), was enacted "to  
 8 promote the continued improvement of the relationship between public  
 9 employers and their employees by providing a uniform basis for implementing  
 10 the right of public employees *to join labor organizations* of their own choosing  
 11 *and to be represented by such organizations* in matters concerning their  
 12 employment relations with public employers." (emphasis added) RCW  
 13 41.56.010 (2002). In support of this goal, the statute guarantees public  
 14 employees the right to engage in collective bargaining and vests the Public  
 15 Employment Relations Commission (PERC) with the authority to declare unfair  
 16 labor practices (ULP's) and to order remedial measures. RCW 41.56.140<sup>1</sup>;

17  
 18  
 19  
 20  
 21  
 22  
 23 <sup>1</sup> RCW 41.56.140 provides that "[i]t shall be an unfair labor practice for a public employer: (1) to  
 24 interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by  
 25 this chapter; (2) to control, dominate or interfere with a bargaining representative; (3) to  
 discriminate against a public employee who has filed an unfair labor practice charge; (4) to  
 refuse to engage in collective bargaining."

1 RCW 41.56.160<sup>2</sup> (2002). See also Yakima v. Fire Fighters, 117 Wn.2d 655,  
 2 674-675, 818 P.2d 1076 (1991). Moreover, this chapter prohibits  
 3 discrimination, in any form, against employees who exercise their collective  
 4 bargaining rights. RCW 41.56.040 (2002)<sup>3</sup>. In short, this entire chapter is  
 5 designed to further and protect collective bargaining activities.

6 For the purpose of the Act, "collective bargaining" is defined as "the  
 7 performance of the mutual obligations of the public employer and the exclusive  
 8 bargaining representative to meet at reasonable times, to confer and negotiate  
 9 in good faith, and to execute a written agreement with respect to grievance  
 10 procedures and collective negotiations on personnel matters, including wages,  
 11 hours and working conditions[.]" RCW 41.56.030(4) (2002). In Vancouver  
 12 School, the court was called upon to determine only whether pursuing a  
 13 grievance fell within this definition and thus, constituted collective bargaining  
 14 activities protected by RCW 41.56.040. The Vancouver School court ultimately  
 15 concluded that collective bargaining did encompass the right to pursue a  
 16 grievance, including the right to investigate the facts of that grievance and to  
 17 interview witnesses. Vancouver School District No. 37, 79 Wn. App. at 918.

22 <sup>2</sup> RCW 41.56.160 provides, in pertinent part, that "[t]he commission is empowered and directed  
 23 to prevent any unfair labor practice and to issue appropriate remedial orders[.]" RCW  
 41.56.030(5) defines "commission" as the "public employment relations commission."

24 <sup>3</sup> RCW 41.56.040 provides that "[n]o public employer, or other person, shall directly or indirectly,  
 25 interfere with, restrain, coerce, or discriminate against any public employee ... in the free  
 exercise of their right to organize and designate representatives of their own choosing for the  
 purpose of collective bargaining, or in the free exercise of any other right under this chapter."

1 Although the Vancouver School court did not speak to whether an  
2 employee could maintain a personal cause of action for money damages  
3 predicated on an alleged violation of RCW 41.56.040, the procedural history  
4 and posture of the case is instructive on the issue. This case stems from the  
5 events leading up to the termination of Robert Wilcox, a bus driver for the  
6 Vancouver School District. Mr. Wilcox was accused of grabbing a student by  
7 the neck and was suspended pending the investigation of the charges. Id. at  
8 909. While he was suspended, Mr. Wilcox approached the school district about  
9 the possibility of interviewing other students who had been on the bus at the  
10 time of the alleged incident. Id. at 910. The district advised Mr. Wilcox and his  
11 union representative that they would have to secure parental permission before  
12 contacting students. Id. at 911. Mr. Wilcox and his union representative  
13 ignored the District's instructions and instead, waited at the bus stop where  
14 they tried to speak to numerous children. Id. Following this, Mr. Wilcox was  
15 terminated, in part because of his attempts to interview children without first  
16 obtaining parental permission. Id. at 915.

19 On behalf of Mr. Wilcox, the *union* filed a ULP complaint, alleging that  
20 the School District had violated RCW 41.56.140 by terminating Mr. Wilcox for  
21 attempting to pursue an investigation in support of his grievance. Id. The  
22 complaint was originally heard by a PERC hearings examiner. The hearings  
23 examiner found for the District and the *union* then petitioned *PERC (an*  
24 *administrative agency)* for review of the hearings examiner's decision. Id.

26 MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
FOR PROTECTED UNION ACTIVITY - 7

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

1 PERC reversed the hearings examiner and found for the employee; the District  
2 subsequently sought judicial *appellate* review from the superior court under the  
3 Administrative Procedures Act. *Id.* at 916. Thus, at every stage of the process,  
4 the union's ULP complaint was subjected to an administrative, not judicial,  
5 process. Moreover, it is important to note that it was the *union*, and not the  
6 *employee*, who brought and pursued the ULP action. This is consistently the  
7 case in matters involving ULP complaints and alleged violations of RCW  
8 41.56.040, as the collective bargaining rights guaranteed by RCW 41.56 are  
9 exercised through union representation. *See, e.g., Fire Fighters v. Kelso*, 57  
10 Wn. App. 721, 790 P.2d 185 (1990); *Clallam County v. PERC*, 43 Wn. App.  
11 589, 719 P.2d 140 (1986).  
12

13 Contrary to plaintiff's assertions, RCW 41.56 does not create a private  
14 right of action for money damages. Further, it does not create an inviolate right  
15 to participate in just any activities associated with a union, no matter how  
16 tangential. It simply creates and protects public employees' right to engage in  
17 *collective bargaining activities, as that term is expressly defined*. And in fact,  
18 the *Vancouver School* court definitively stated that not *all* collective bargaining  
19 activities are protected. *Vancouver School District No. 37*, 79 Wn. App. at 920 -  
20 925.  
21

22 As demonstrated herein, plaintiff's reliance on this statute for his claim of  
23 money damages for alleged retaliation based on protected union activities is  
24 simply not cognizable, and must be dismissed.  
25

26 MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
FOR PROTECTED UNION ACTIVITY - 8

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

1           **B. Plaintiff's claim under RCW 41.56 is barred due to plaintiff's**  
 2           **failure to comply with the applicable six-month statute of**  
 3           **limitations and failure to exhaust his administrative**  
 4           **remedies.**

5           To the extent plaintiff relies upon RCW 41.56 for his retaliation/protected  
 6           union activities claim, he is required to comply with the statute of limitations  
 7           imposed by the statute and to exhaust his administrative remedies. Plaintiff  
 8           has done neither, and his claims are barred on these grounds as well.

9           RCW 41.56.160<sup>4</sup> imposes a six-month statute of limitations on ULP  
 10          claims. In this case, plaintiff asserts that the alleged retaliation occurred while  
 11          he served on the Local #6 Executive Board, between March 1997 and August  
 12          1998. Exhibit 2 (Excerpts from Plaintiff's Responses to Defendants'  
 13          Interrogatories), Interrogatory Response No. 4(b) and (c)(1). Plaintiff did not  
 14          initiate the instant action, however, until December 20, 1999, *more than a year*  
 15          *after the alleged incidents which form the basis of this claim.* Thus, even  
 16          assuming plaintiff can file suit in superior court for an alleged violation of RCW  
 17          41.56, his claim is barred by the applicable statute of limitations.

18          Similarly, as plaintiff initiated the instant action in superior court, rather  
 19          than pursuing a ULP as outlined in the statute, he has failed to exhaust the  
 20          required administrative remedies and his action is barred on this basis as well:  
 21

22  
 23  
 24  
 25          <sup>4</sup> RCW 41.56.160 states, in pertinent part: "a complaint shall not be process for any unfair labor  
 practice occurring more than six months before the filing of the complaint with the commission."

1 [A]dministrative remedies must be exhausted before  
 2 the courts will intervene: (1) "when a claim is  
 3 cognizable in the first instance by an agency alone";  
 4 (2) when the agency's authority "establishes clearly  
 5 defined machinery for the submission, evaluation and  
 6 resolution of complaints by aggrieved parties"; and (3)  
 7 when the "relief sought ... can be obtained by resort  
 8 to an exclusive or adequate administrative remedy."

9 Ryder v. Port of Seattle, 50 Wn. App. 144, 748 P.2d 243 (1987) (quoting State  
 10 v. Tacoma-Pierce Cy. Multiple Listing Serv., 95 Wn.2d 280, 284, 622 P.2d 1190  
 11 (1980)).

12 Plaintiff's claim satisfies each of these elements and therefore, plaintiff  
 13 was required to undertake and exhaust the available administrative remedies.  
 14 First, plaintiff's claim, that he has been retaliated against for activities  
 15 undertaken while a union executive board member, is cognizable in the first  
 16 instance by PERC. Vancouver School District No. 37, *supra* (ULP complaint  
 17 filed with PERC for alleged retaliatory discharge for employee engaging in  
 18 collective bargaining activities, such as pursuing a grievance); Fire Fighters v.  
 19 Kelso, *supra* (ULP complaint filed with PERC for alleged retaliatory discharge in  
 20 response to bargaining activities); Clallam County v. PERC, *supra* (ULP  
 21 complaint filed with PERC for alleged retaliatory discharge in response to  
 22 employee filing/pursuing numerous grievances). Second, RCW 41.56.160  
 23 through .190 "establish a clearly defined machinery for the submission,  
 24 evaluation and resolution of complaints by aggrieved parties." Ryder, 50 Wn.  
 25 App. at 151. Finally, the relief sought – cessation of the allegedly retaliatory

26 MEMORANDUM IN SUPPORT OF DEFENDANTS'  
 MOTION FOR PARTIAL SUMMARY JUDGMENT  
 REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
 FOR PROTECTED UNION ACTIVITY - 10

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

1 activities – was within PERC's authority to order. See Fire Fighters v. Kelso,  
 2 supra; Clallam County v. PERC, supra.

3 Plaintiff's failure to comply with the applicable statute of limitations and to  
 4 exhaust his administrative remedies mandates dismissal of this claim. Ryder v.  
 5 Port of Seattle, supra. Summary judgment must be entered for the defendants  
 6 on this claim.

7  
 8 **C. Plaintiff's claim under RCW 41.56 must be dismissed as there**  
 9 **is insufficient evidence to establish plaintiff's prima facie**  
 10 **case.**

11 In the event the court addresses the merits of plaintiff's RCW 41.56  
 12 claim, the court will find that the plaintiff is unable to adduce evidence in  
 13 support of each and every element of his prima facie case. Under the  
 14 standards articulated in Celotex and adopted by the Washington Supreme  
 15 Court, plaintiff's failure to make a prima facie case in response to the instant  
 16 motion will mandate dismissal of this claim.

17 Under RCW 41.56, "[p]ublic employees and their unions have the right to  
 18 collectively bargain." Vancouver School District No. 37, 79 Wn. App. at 917  
 19 (citing RCW 41.56.040). When an employer interferes with this right in any  
 20 way, it commits an unfair labor practice. RCW 41.56.140. In order to maintain  
 21 an ULP action under RCW 41.56.140, "the union must prove (1) that the  
 22 employee's conduct constituted protected union activity; and (2) that retaliation  
 23 for such activity was a substantial or motivating factor in the employer's  
 24 decision to discharge." (enumeration added) Vancouver School, 79 Wn. App.

25  
 26 MEMORANDUM IN SUPPORT OF DEFENDANTS'  
 MOTION FOR PARTIAL SUMMARY JUDGMENT  
 REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
 FOR PROTECTED UNION ACTIVITY - 11

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

1 at 916. Once the union<sup>5</sup> makes a prima facie case, the burden shifts to the  
 2 employer to demonstrate "that it would have discharged the employee even if  
 3 the protected activity had not taken place." *Id.* at 917. In sum, the plaintiff must  
 4 prove 1) that he was engaged in a protected activity; 2) that he suffered an  
 5 adverse employment action; and 3) that there is a causal nexus between his  
 6 protected activity and the allegedly adverse employment action. In the instant  
 7 case, the plaintiff's claims fails on each of these elements.

8 As outlined above, RCW 41.56 grants and protects the right to  
 9 collectively bargain. Thus, in order to establish that the employee's conduct  
 10 was protected by this chapter, the plaintiff has the burden of establishing that  
 11 the conduct in question constituted collective bargaining. Under the statute,  
 12 collective bargaining is expressly defined as the obligations of the employer  
 13 and the bargaining representative *to meet, to confer, to negotiate in good faith*  
 14 *and to execute a collective bargaining agreement.* RCW 41.56.030(4). The  
 15 courts have construed this definition to also include acts undertaken by an  
 16 employee in pursuit of a grievance. Vancouver School, *supra*. In response to  
 17 interrogatories, plaintiff identifies the protected union activity as "representation  
 18 and advocacy for members of Local #6." Exhibit 2, Interrogatory Response No.  
 19 4(b). However, as outlined above, RCW 41.56 does not protect just any union  
 20 activity – it protects the act of collective bargaining. Plaintiff does not aver that  
 21  
 22  
 23

24  
 25 <sup>5</sup> As outlined in Section IV.A *supra*, it is always the *union*, and not the affected employee, who  
 26 pursues the ULP complaint.

1 he was a member of the negotiation team or that he was directly involved in the  
2 bargaining process in any way. Nor does plaintiff allege that any of the  
3 allegedly protected activities were undertaken in support of a grievance he was  
4 pursuing. He simply states – in a bald and conclusory fashion – that he was  
5 “an advocate.” While that may or may not be true, it is simply not sufficient to  
6 bring his activities within the ambit of the statute.

7  
8 Second, plaintiff has failed to identify a sufficient adverse employment  
9 action. He was not terminated - he was not suspended. He simply alleges that  
10 former-Chief Arreola made a nasty comment about him:

11 The nature of this particular claim revolves around the fact that on  
12 16 September 1997, I asked questions of Chief Arreola at a staff  
13 meeting. The particular questions dealt with the inordinate  
14 amount of time the department was taking in completing  
15 investigations into alleged misconduct of union members. Chief  
16 Arreola responded to these questions by stating, “I’ll suspend his  
17 ass (Kirby) if he thinks he can challenge my authority in a general  
18 staff meeting” or words to that effect.

19 Exhibit 2, Interrogatory Response No. 4(c)(1). In fact, during his deposition the  
20 plaintiff acknowledged that he had no facts to suggest that Chief Arreola did, in  
21 fact, ever try to fire him. Exhibit 4 (Excerpts from the deposition of Joseph  
22 Kirby, Vol. II, p. 18-19. Moreover, the other “adverse employment actions” the  
23 plaintiff alleges fair no better at establishing this element of his prima facie  
24 case. For example, plaintiff alleges that, on one occasion, Chief Arreola asked  
25 him if he “still worked here.” On another occasion, the Chief made comments  
26 to the local newspaper that plaintiff found offensive, although plaintiff did admit  
that these comments were not made about him specifically, but referred more

MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
FOR PROTECTED UNION ACTIVITY - 13

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

1 globally to the police department as a whole. Exhibit 4, p. 17, lines 19-20. In  
 2 short, plaintiff fails to allege any act sufficient to establish the requisite adverse  
 3 employment action, particularly as other Washington cases construing  
 4 comparable claims involve nothing short of termination. Vancouver School,  
 5 supra; Fire Fighters v. Kelso, supra; Clallam County v. PERC, supra.

6 Third, and finally, plaintiff has absolutely no evidence that any of the  
 7 "adverse employment actions" he alleges were motivated, in whole or in part,  
 8 by his alleged protected union activities. This dearth of evidence was made  
 9 painfully clear during plaintiff's deposition, when he had nothing to offer other  
 10 than his own unsupported opinions:  
 11

12 Q But you believe that Chief Arreola seized your email  
 13 because of your union activity?

14 A I believe that Chief Arreola seized my email because of a  
 15 number of instances that preceded that, the exchange,  
 16 where he threatened to, quote, "fire my ass."

17 Subsequent exchanges we had, it was an  
 18 opportunity for him to go on a fishing expedition. I believe  
 19 that – that's my belief.

20 Q Do you have any evidence that was his motivation?

21 A Again, and I would caution you that it's difficult, and I'm not  
 22 going to tell you what people's motivation is, because I'm  
 23 not clairvoyant and I'm not able to tell you what they were  
 24 thinking at the time. I think that activity was consistent with  
 25 the totality of my treatment of Arreola.

26 ...

Q ...What evidence do you have that your being passed over  
 for captain related in any way to your union advocacy?

...

1 A I think that basically that again it's a whole sequence of  
2 events that culminated most recently in those two pass  
3 overs, that I don't believe can be sustained in the  
4 alternative by my recording being that much more deficient  
5 than the two people they decided to select.

6 Q My question was bad. Is that your belief or do you have  
7 any evidence independent of your belief to support that?

8 A I think it's looking in retrospect at a series of events that  
9 were so radically different to what you would normally  
10 expect as far as treatment internally, that it would beg a  
11 conclusion from a reasonable person that they were  
12 related.

13 Exhibit 3, p. 54, lines 24-25; p. 55, lines 1-14; p. 60, lines 10-25; p. 61, lines 1-  
14 3. Plaintiff's jumbled, somewhat rambling, answers to very direct question  
15 reveals that he has no evidence to establish the causal nexus. All he can really  
16 say is that he thinks he was treated badly by Chief Arreola. He cannot say –  
17 and he has no evidence to prove – that anything Chief Arreola (or anyone else,  
18 for that matter) did was motivated by plaintiff's union activities. Plaintiff's  
19 opinions and speculation is simply not sufficient to establish his prima facie  
20 case.

21 Thus, even if the court considers the merits of plaintiff's  
22 retaliation/protected union activity claim, it must dismiss this claim due to  
23 plaintiff's inability to establish a prima facie case.

## 24 **V. CONCLUSION**

25 As outlined herein, plaintiff's retaliation/protected union activity claim fails  
26 as a matter of law, on numerous grounds. First, this chapter does not create a

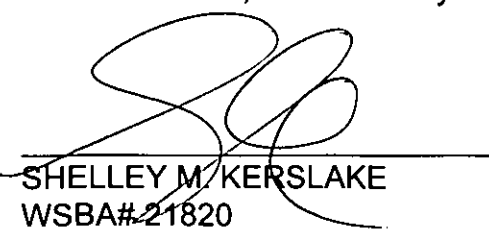
1 private right of action for money damages for an alleged violation of RCW  
 2 41.56.040 or .140. Plaintiff's argument to the contrary, premised on Vancouver  
 3 School District No. 37, is simply without merit. Second, even if there were such  
 4 a cause of action, plaintiff's claim is barred due to plaintiff's failure to comply  
 5 with the applicable statute of limitations and failure to exhaust his administrative  
 6 remedies. Finally, plaintiff is wholly unable to adduce evidence sufficient to  
 7 establish a prima facie case. Plaintiff's failure to produce such evidence, in  
 8 response to this motion, will mandate dismissal because, as stated by the  
 9 Supreme Court, "*a complete failure of proof concerning an essential element of*  
 10 *the nonmoving party's case necessarily renders all other facts immaterial.*"  
 11 (emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618  
 12 (1992).  
 13

14 For the foregoing reasons, the defendants respectfully request that the  
 15 court dismiss plaintiff's RCW 41.56 claim of retaliation, in its entirety and with  
 16 prejudice.  
 17

18 DATED this 20 day of November, 2002.

19 ROBIN S. JENKINSON, City Attorney  
 20 ELIZABETH A. PAULI, Ch. Asst. City Atty.

21  
 22 By:

  
 23 SHELLEY M. KERSLAKE  
 24 WSBA# 21820  
 25 Assistant City Attorney  
 26 Attorney for Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS'  
 MOTION FOR PARTIAL SUMMARY JUDGMENT  
 REGARDING PLAINTIFF'S CLAIM OF RETALIATION  
 FOR PROTECTED UNION ACTIVITY - 16

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

# EXHIBIT

**#1**

1  
2 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

3 IN AND FOR THE COUNTY OF PIERCE

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

6 Plaintiffs,

7 v.

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

21 Defendants.

No. 99-2-13911-4

DEFENDANTS' FIRST  
INTERROGATORIES TO  
PLAINTIFF AND REQUESTS  
FOR PRODUCTION

18 TO : JOSEPH J. KIRBY and DEBORAH A. KIRBY, plaintiffs;  
19 AND TO : JEFFREY SADLER, their attorney.

20 **INTERROGATORY INSTRUCTIONS**

21 **A. Interrogatories.** You are required to answer the following interrogatories  
22 separately and fully, under oath, within 30 days of receipt thereof, in  
23 accordance with CR 26, 33, and 34. These interrogatories are continuing in  
24 nature so as to require the filing of supplementary answers to the extent called  
25 for by CR 26(e). Your answers should include any non-privileged information  
26 and documents in the possession of your employees and agents, including your  
attorneys, consultants and any persons who have acted or are now acting on  
your behalf.

COPY

1 INTERROGATORY NO. 5: Please state, with particularity, all facts  
2 upon which you base your allegation that you were retaliated against for  
3 exercising your rights under RCW 49.60. Include the following in your  
4 response:

- 5 (a) What opposition activity were you engaged in;
- 6 (b) The inclusive dates you were involved in this activity;
- 7 (c) What adverse employment action do you claim was taken against  
8 you as a result of this activity; and
- 9 (d) Facts which you believe demonstrate that the protected activity  
10 was a factor in the employment action.

11 ANSWER:

12  
13  
14  
15  
16  
17 INTERROGATORY NO. 6: Please state the personal injuries (both  
18 physical and mental) that you claim to have suffered as a result of the  
19 allegations contained in your Complaint.

20 ANSWER:

1 RECEIVED

HON. FRANKLIN D. BURGESS

2 FEB 06 2001  
3 VIP  
4 PDU  
5 1:45  
6 PM

TACOMA CITY ATTORNEY  
CIVIL DIVISION

5

6

7

8

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

9

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

No. C00-5332FDB

12

vs. )

AMENDED ANSWERS TO  
DEFENDANT CITY'S  
INTERROGATORIES TO  
PLAINTIFF

13

THE CITY OF TACOMA, a municipal )  
corporation; RAY CORPUZ and )  
14 "JANE DOE" CORPUZ, husband and )  
15 wife; PHILIP ARREOLA and "JANE )  
16 DOE" ARREOLA, husband and )  
17 wife; WILLIAM WOODARD and )  
18 CATHERINE WOODARD, husband and )  
19 wife; RAYMOND ROBERTS and "JANE )  
DOE" ROBERTS, husband and wife; )  
DAVID BRAME and "JANE DOE" )  
20 BRAME, husband and wife; and )  
21 JAMES HAIRSTON and "JANE DOE" )  
22 HAIRSTON, husband and wife, )

20

Defendants. )

21

22

INTERROGATORY #5:

23

24

Plaintiffs' initial response to Interrogatory #5  
contained a clerical error. Plaintiffs supplement and amend  
the answer in the following particulars.

25

MESSINA • BULZOMI

5316 Orchard St. W.  
Tacoma, WA 98467-3633  
(253) 472-6000


1 The retaliation claim against the City of Tacoma stems  
2 from the statutory protections contained in RCW 41.56, et  
3 seq., as interpreted in the case of *Vancouver Sch. v. Serv.*  
4 *Employees*, 79 Wn.App. 905 (1995), based on Mr. Kirby's  
5 protected union activity and the retaliation and disparate  
6 treatment arising therefrom.

7 In addition, plaintiffs refer defendants to the  
8 particulars set forth in the original answers to Interroga-  
9 tory #5.

10 Further, plaintiffs assert that the claims arising out  
11 of RCW 49.60 are based on age discrimination as detailed in  
12 answers to interrogatories and supported by the depositions  
13 taken thus far, including, but not limited to the Mienema  
14 deposition.

15 DATED this 6<sup>th</sup> day of February 2001.

16 MESSINA BULZOMI

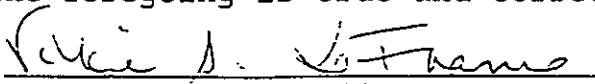
17 By   
18 JEFFREY H. SADLER 27136  
19 Attorneys for Plaintiff

20 CERTIFICATE OF SERVICE

21 I, VICKIE A. LO FRANCO, certify that on this day I  
22 caused to be served by ABC Legal Messenger copies of the  
23 document to which this certificate is attached on counsel of  
24 record as follows:

25 Shelley M. Kerslake  
Tacoma City Attorney  
Civil Division  
747 Market St., Rm. 1120  
Tacoma, WA 98402-3767

I declare under penalty of perjury of the laws of the  
State of Washington that the foregoing is true and correct.

  
VICKIE A. LO FRANCO  
Legal Assistant

2/6, 2001  
Tacoma, Washington

**MESSINA • BULZOMI**

5316 Orchard St. W.  
Tacoma, WA 98467-3633  
(253) 472-6000

# EXHIBIT

## #2

RECEIVED  
MAR 08 2000  
TACOMA CITY ATTORNEY  
CIVIL DIVISION

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' FIRST INTERROGATORIES TO PLAINTIFF AND REQUESTS FOR PRODUCTION

AND ANSWERS THERETO

CERTIFICATION  
I hereby certify that on 3/7/00 I deposited in the mails of the United States of America and/or placed with Legal Messengers and/or faxed a copy of the document to which this certificate is attached, for delivery to all counsel of record.  
V. De Franco  
Messina Law Firm

TO : JOSEPH J. KIRBY and DEBORAH A. KIRBY, plaintiffs;  
AND TO : JEFFREY SADLER, their attorney.

**INTERROGATORY INSTRUCTIONS**

**A. Interrogatories.** You are required to answer the following interrogatories separately and fully, under oath, within 30 days of receipt thereof, in accordance with CR 26, 33, and 34. These interrogatories are continuing in nature so as to require the filing of supplementary answers to the extent called for by CR 26(e). Your answers should include any non-privileged information and documents in the possession of your employees and agents, including your attorneys, consultants and any persons who have acted or are now acting on your behalf.

**In compliance with CR 26(i), a telephone conference is scheduled on March 3, 2000 at 9:00 a.m. This conference will be stricken upon the timely receipt of answers to interrogatories and responses to requests.**

ANSWER:

See answers to interrogatories 3, 4, 5, 9, and 13. Also, plaintiff was repeatedly discriminated against due to his sage because of disparate treatment between him and other officers many years his junior. In particular, Mr. Kirby was passed over for a captain's position on two occasions, despite being #1 on the chief's list, and younger officers were given the position on both occasions.

Plaintiffs reserve the right to supplement as discovery continues.

INTERROGATORY NO. 3: Please state, in detail, all facts upon which you base your claim for disability discrimination/harassment, include in your answer the names of people you claim participated in said action and the date(s) of said action.

ANSWER:

Objection, repetitive. Without waiving objection, see answer to Interrogatory #1. In addition, see answers to interrogatories 3, 4, 5, 9 and 13. Plaintiffs reserve the right to supplement.

INTERROGATORY NO. 4: In your Complaint, you state that you were harassed or discriminated against because of your participation in protected union activity. Please state the following, as it relates to that claim.

- (a) What union activity were you engaged in, which you claim led to harassment/discrimination;
- (b) The date(s) of said activity; and
- (c) Describe, in detail, the harassment/discrimination you claim to have been subjected to.

ANSWER:

(a) Advocacy and representation of individual members of Tacoma Police Union Local #6, as an elected member of the Local #6 Executive Board.

(b) I served on Local #6 Executive Board from 4 March 97 to 18 August 98 as a trustee. During this time period, I was involved on a daily basis in representation and advocacy for members of Local #6.

(c) (1) The Tacoma Police Dept. and more specifically, Chief Philip Arreola, directly threatened retaliatory action against me as a result of the lawful exercise of my rights as an elected member and representative of Tacoma Police Union #6 and as a member of the Local #6 Executive Board.

The nature of this particular claim revolves around the fact that on 16 September 1997, I asked questions of Chief Arreola at a staff meeting. The particular questions asked dealt with the inordinate amount of time the department was taking in completing investigations into alleged misconduct of union members. Chief Arreola responded to these questions by stating, "I'll suspend his ass (Kirby) if he thinks he can challenge my authority in a general staff meeting" or words to that effect.

(2) The Department through Chief Arreola, and the actions he took in addressing the local media, as well as his daily administration of the Police Department, created a hostile work environment, specifically:

a. The constant harassment and beratement by Chief Arreola of me and other members of the Chief's Staff regarding our respective abilities at a training class in the presence of all department lieutenants, captains and assistant chiefs. Chief Arreola while speaking from the podium asked me, "Do you still work here?"

b. By seizing my electronic mail account in order to investigate what was being discussed in the "all-in-one" system, then reviewing privileged communications to members of Local #6 on whose behalf I was advocating.

c. By making statements to the Tacoma News Tribune alleging that as an employee of the Tacoma Police Department, I was engaged in "covering up" the misconduct of other TPD officers by honoring the "Blue Code."

d. By making statements to the Tacoma News Tribune alleging that I failed to show "courtesy, professionalism and responsibility" in the execution of my duties as a police lieutenant with the Tacoma Police Department.

(3) The Department and defendants have collectively infringed upon my constitutional rights by compelling me to give numerous recorded statements without consent or permission, in direct conflict with RCW 9.73 *et seq.*

(4) That on 15 June 1998, I was compelled by Assistant Chief William Woodard to write a statement detailing the contents of a private conversation I had as an elected officer of the Tacoma Police Union #6 with another member of Local #6. This conversation occurred at my residence, outside the City of Tacoma and during a period when I was not being compensated by the Tacoma Police Department. It was clearly outside the "narrowly defined scope of my duties as a police officer." I objected to being compelled to disclose private conversations occurring in my home but was ordered by Assistant Chief Woodard to disclose the content of this

conversation. I provided the compelled statement on 15 June 1998, approximately 1 hour after being ordered to do so. On 30 July 1998, Assistant Chief Woodard advised me in the presence of Cpt. Paul Mielbrecht that he intended to discipline me for asserting my privacy rights as well as my RCW protected union activities. Further, he stated that had I not complied with his orders, he would have recommended the termination of my employment.

(5) That Assistant Chief William Woodard retaliated against me for my union activities when he provided false information in an attempt to prejudice a fair and impartial fitness for duty examination I participated in on 9 September 1998. Further, that Assistant Chief William Woodard released a copy of an unadjudicated internal report of disciplinary findings and recommendations to Dr. Gary Hendricksen relative to the 9 September 1998 fitness for duty exam. These documents were internal working papers and their release in their existing form violated my due process rights as the matters contained therein were under review by Chief Philip Areola and had not been adjudicated law existing management-labor contracts.

The Tacoma Police Department, through agents William Woodard and Chief Arreola, and the City of Tacoma, through Agent Ray Corpuz, demonstrated a well documented pattern of harassment and intimidation for my union advocacy of members of Local #6. Further defendants have engaged in a malicious, ongoing effort to sanction me for my union activities. I believe defendants have violated my conceptional guarantees of privacy, provisions of the Bill of Rights and the Civil Rights Act as well as the RCW prohibiting retaliation against collective bargaining unit members.

Plaintiffs reserve the right to supplement as discovery progresses.

INTERROGATORY NO. 5: Please state, with particularity, all facts upon which you base your allegation that you were retaliated against for exercising your rights under RCW 49.60. Include the following in your response:

- (a) What opposition activity were you engaged in;
- (b) The inclusive dates you were involved in this activity;
- (c) What adverse employment action do you claim was taken against you as a result of this activity; and
- (d) Facts which you believe demonstrate that the protected activity was a factor in the employment action.

ANSWER:

- (a) Advocacy of individual members of Tacoma Police Union Local #6 as well as for union-wide issues involving union positions and controversies with Chief of Police Philip Arreola.

(b) As an elected Executive Board officer of Tacoma Police Union #6, from 4 March 1997 to 18 August 1998, during which time period I was involved on a daily basis in representation and advocacy for members of Local #6.

(c) (1) I was investigated for alleged misconduct on several occasions. The investigations were not in accordance with the existing Labor-Management Contract. The investigations were not closed out in a timely fashion but held over me resulting in increased stress and anxiety.

(2) My electronic mail was seized without a search warrant pursuant to one of these investigations which was "administrative" in nature and not a criminal investigation. This was a violation of the Department's MRP 2.09.01 (XI-F) - Search of Locker or Storage Space - "absent an employee's consent or exigent circumstances, assigned storage space shall not be searched relative to an internal investigation without a search warrant having first been issued."

(3) I was compelled under threat of termination to divulge the contents of a private conversation I had in the privacy of my own home, off duty with another member of Local #6 while acting in an advocacy relationship by William Woodard. This is a violation of my civil rights and privacy.

(4) I was subsequently disciplined for my initial refusal to provide this information by Chief James Hairston in violation of RCW 49.60.

(5) I was compelled under threat of termination to submit to taped statements in spite of RCW prohibitions and contrary legal opinions.

(6) I was passed over for the Civil Service position of Police Captain twice, in spite of my standing of #1 on the Civil Service Captain's List in large measure, I believe, for my union advocacy and my assertion of rights and privileges under Department MRP 2.09.001 (Complaints and Discipline) which states in Section XIB: Exercise of Rights: Administrative Appeal: "Employees may not be subjected to formal discipline, denied promotion, or threatened with such treatment, because of the exercise of the rights granted under this MRP."

(d) Philip Arreola directly threatened retaliatory action against me as a result of exercising my rights as a recognized member of the Executive Board of Tacoma Police Union Local #6 when I asked advocacy questions involving the length of disciplinary investigations at a general staff meeting of 16 September 1997.

Plaintiffs reserve the right to supplement upon further discovery.

INTERROGATORY NO. 13: Please indicate every fact upon which you base your claim that you were subjected to a hostile work environment, specifically include:

- (a) What protected status you are claiming as it relates to this cause of action;
- (b) How any actions taken were related to your protected status;
- (c) What actions were taken which lead you to believe you suffered verbal or physical abuse;
- (d) All facts that demonstrate the conduct was unwelcome; and
- (e) How this conduct altered your conditions of employment.

ANSWER:

See answers to Interrogatory Nos. 1, 2, 3 and 4.

In addition, after I filed a claim for damages against the City on 18 December 1997, and asserted my RCW rights as a union advocate, I was transferred from my position as Narcotics Lieutenant to an "unspecified" patrol assignment during a period I was undergoing treatment for a job-related stress injury. I was also removed as Commander of the Department's Clandestine Lab Team. I was advised only a lieutenant assigned to SID (Special Investigations Division) could be affiliated with the team in spite of the fact that I had been a member of this elite specialized team since 1991. Sgt. Donald Ramsdell was at that time a team member assigned to SID. He was promoted to Lieutenant and transferred to Operations but was allowed to remain with the team in spite of the fact he was not assigned to SID (the very reason the Dept. has terminated my affiliation). I later protested this disparate treatment to Captain Charles Meinema who forwarded my grievance. I applied for the team when vacancies were announced but was informed by Assistant Chief Brame that I would not be considered. Assistant Chief Brame then attempted to discipline Captain Meinema for allowing me to participate in team oral boards during the selection process.

On or about 1 June 1999, I received notification from the City of Tacoma Human Resources Dept. that I was ranked #1 on the Police Captain Employment List which became effective 1 June 1999. I subsequently received two passovers for permanent captain, and the positions were given to candidates who placed #2 and #3 on the Captain's Employment List. I am unaware of any lieutenant standing #1 on the Captain's List who was passed over in the 17 years I have been on the Tacoma Police Department.

The City also engages in disparate promotion practices between unions as the Fire Dept. as well as a heavy equipment operations unit has a "rule of one" promotional policy versus a "rule of three" as present in the police department.

On 19 May 1999, I received a written reprimand from Chief Hairston for insubordination arising out of my initial refusal to divulge contents of a privileged union contact with a member of Local #6 at a time when I was an elected official of Tacoma Police Union Local #6 on 15 June 1998. This was one of a series of incidents which precipitated a fitness for duty evaluation on me which resulted in a medical finding of stress disorder.

I was therefore punished by Chief Hairston for exhibiting symptoms wholly consistent with a diagnosed stress disorder.

When I made defendants aware of Lt. Fisk's conduct and his demeaning behavior toward me as outlined in referenced letter, no action was taken against Lt. Fisk. By not dealing with Lt. Fisk's conduct, the defendants have given that approval for conduct that is clearly harassing and demeaning. Chief Hairston and Assistant Chief Brame had an obligation to suppress this harassing behavior, but in the alternative chose to allow it.

For my efforts in bringing allegations of police misconduct and bribery to light in the Marco Rahn stalking case and the subsequent Lt. James Walker I/A bribery complaint, I received greater discipline than the officers involved in the wrongful conduct.

To my knowledge, I was the only major participant in the aftermath of Bill Lowry's death who was not provided CISM (Critical Incident Stress Management) which is standard procedure to reduce incidence of post-traumatic stress.

In the aftermath of Bill Lowry's death, I received a written commendation which was never placed into my permanent department personnel file as is accepted practice & policy.

INTERROGATORY NO. 14: Withdrawn.

DATED this \_\_\_\_\_ day of January, 2000.

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

By:

\_\_\_\_\_  
SHELLEY M. KERSLAKE  
WSBA# 21820  
Assistant City Attorney  
Of Attorneys for Defendants

# 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

2208 North 30th Street	One Union Square
Suite 202	600 University Street
Tacoma, Washington 98403	Suite 2300
(253) 627-6401	Seattle, Wa 98101-4112
FAX: (253) 383-4884	(206) 340-1316

1-800-649-2034

1 A Yes. Typically you would hope in a perfect world you  
2 would be able to -- I wouldn't -- although I did  
3 because I was on some committees, the safety committee  
4 and uniform committee. You would actually go to  
5 people like division commanders and say, I'm wearing  
6 my union hat as a part of the union safety committee  
7 and we have concerns about this. And you could work  
8 with individuals and get things done. It wasn't such  
9 a formal structure.

10 When Arreola came in, it broke down. We were  
11 not able to do that. And we basically, everything  
12 became so formalized it just froze the whole process  
13 of how we did business prior to the Arreola years.

14 Q When you say it became "more formalized," can you  
15 explain that to me?

16 A Arreola only wanted to talk to the president of the  
17 union and he pretty much, despite a contrary, large  
18 library of case law, basically said I don't want you  
19 to do any union stuff on my dollar.

20 Q In your complaint you alleged that you were retaliated  
21 against for participating in some specific union  
22 activity.

23 What activity did you participate that you feel  
24 precipitated that retaliation?

25 A I think an initial instance of that when I asked at a

1 staff meeting -- I inquired -- in my union advocacy  
2 role, I was a lieutenant but I had union advocacy role  
3 and I inquired in an open forum -- which at the time  
4 we were permitted to do -- that there was a great  
5 concern in Local 6 about not only the disparity of  
6 discipline but the length of time that it took to  
7 administer the discipline, and in fact some discipline  
8 cases had gone on for years and been unresolved.

9 That was causing a great unsettling effect among  
10 members of -- as you can imagine it would. And I  
11 brought that question up in a staff meeting and he  
12 said you need to refer that to internal affairs. And  
13 I countered, internal affairs is your detail. It  
14 comes under you, so they do what you mandate to be  
15 done.

16 And that degenerated, he told me to stand down  
17 and threatened to terminate my employment because I  
18 had the audacity to challenge him in an open forum  
19 like that.

20 Q That was at a staff meeting?

21 A It was at a staff meeting and Dave Brame had to  
22 physically get involved with him and say, that may not  
23 be the way you do things in Milwaukee, but it is in  
24 Tacoma. These guys have the right to do, so that  
25 would be ill advised for you to take any action. But

1 concerns that half of which were for my SID and half  
2 of which were for my union board.

3 How could you separate those two? On the one  
4 hand, I was responsible for 30 people in tactical  
5 entries. I had personal responsibility they went home  
6 every night and they were safe. And over and above  
7 that, I had responsibility that all the people where  
8 we kicked in a door were also safe and we didn't  
9 violate their constitutional rights or freedoms.

10 And on the other hand, I had responsibilities in  
11 my union advocacy for making sure that we were doing  
12 things safe. I also had -- as I fall back on the city  
13 side as my lieutenantcy required me to do, I had to  
14 make sure that the department was not going to be  
15 liable for something, a protocol we should have known  
16 and should have applied.

17 So again there's so much of what I did in my  
18 union advocacy was so intertwined with what I did on a  
19 day-to-day basis as a narcotics lieutenant, it's  
20 difficult to say -- and they also were asking me,  
21 which hat were you wearing? My response to you today  
22 as it was then is, I'm not sure that I can  
23 differentiate.

24 Q But you believe that Chief Arreola seized your email  
25 because of your union activity?

1 A I believe that Chief Arreola seized my email because  
2 of a number of instances that preceded that, the  
3 exchange, where he threatened to, quote, "fire my  
4 ass."

5 Subsequent exchanges we had, it was an  
6 opportunity for him to go on a fishing expedition. I  
7 believe that -- that's my belief.

8 Q Do you have any evidence that that was his motivation?

9 A Again, and I would caution you that it's difficult,  
10 and I'm not going to tell you what people's motivation  
11 is, because I'm not a clairvoyant and I'm not able to  
12 tell you what they were thinking at the time. I think  
13 that activity was consistent with the totality of my  
14 treatment by Arreola.

15 Q We talked about your next answer which is you were  
16 compelled under threat of termination to divulge the  
17 contents of a private conversation. And that you  
18 contend was in relationship to your union advocacy; is  
19 that right?

20 A That's right. And I might add that while that  
21 happened, Dave Brame, one of the defendants in this  
22 case, also brought up the matter of the union advocacy  
23 in that meeting with William Woodard who ordered me to  
24 divulge that.

25 Q Were you present when Brame spoke to Woodard?

1 issue, whether that take the form of a grievance or  
2 unfair labor practice, or actually a lawsuit.

3 Q Next answer was that you were passed over for the  
4 civil service position of police captain twice in  
5 spite if standing No. 1 on the civil service captains  
6 list. "In large measure, I believe for my union  
7 advocacy and my assertion rights and privileges under  
8 MRP 2.09.001." And I know we talked about that  
9 before.

10 What evidence do you have that your being passed  
11 over for captain related in any way to your union  
12 advocacy?

13 MR. SADLER: Objection, I think it's  
14 been asked and answered.

15 WITNESS: I think that basically that  
16 again it's a whole sequence of events that culminated  
17 most recently in those two pass overs, that I don't  
18 believe can be sustained in the alternative by my  
19 record being that much more deficient than the two  
20 people they decided to select.

21 Q (By Ms. Kerslake) My question was bad. Is that your  
22 belief or do you have any evidence independent of your  
23 belief to support that?

24 A I think it's looking in retrospect at a series of  
25 events that were so radically different to what you

1 would normally expect as far as treatment internally,  
2 that it would beg a conclusion from a reasonable  
3 person that they were related.

4 Q You also indicate that "Phil Arreola directly  
5 threatened retaliatory action against you as a result  
6 of exercising your rights as a recognized member of  
7 the executive board of Local 6 when you asked advocacy  
8 questions along the line of disciplinary  
9 investigations." And that is the staff meeting we  
10 discussed previously?

11 A Yes, it is.

12 Q Did he ever follow through with his threat of action  
13 against you?

14 A I think he followed through when he seized my email.  
15 I think he followed through when he had me  
16 investigated for whatever he had me investigated for,  
17 insubordination, I insubordinate in bringing that  
18 question which is an interesting concept if you think  
19 about it. I think he followed through all the way up  
20 to the end basically.

21 Q So to your knowledge, did he take any steps to have  
22 you terminated?

23 A I am not aware of any conversations he may or may not  
24 have had with Ray Corpuz or anybody else about that.

25 I know he chose to disregard advice of the senior

1 commanders on a number of occasions where it concerned  
2 me, that he pursued investigations against me that he  
3 was advised were witch hunts, inappropriate.

4 Q In answers to Interrogatory No. 4, which discuss your  
5 participation in protected union activity, I asked you  
6 to describe the harassment or discrimination you were  
7 subjected to. We've talked about some of those, so  
8 I'm going to highlight the ones we haven't already  
9 talked about.

10 You indicate that the department through Arreola  
11 and in addressing the local media as well his daily  
12 administration of the police department created a  
13 hostile work environment and specifically you indicate  
14 he related you and other members of the chief's staff  
15 regarding your abilities. Can you explain the  
16 circumstances?

17 A There's two explanations. The first is we were at a  
18 meeting of the Quality Meal Expeditors on Martin  
19 Luther King Street, where he looked down at me in  
20 front of my peers and captains and lieutenants and  
21 said, Do you still work here? You are you still  
22 working here? Or something of that nature. Which  
23 people came up to me, and one of the people was a  
24 defendant in this case, Bill Woodard said, I hope you  
25 write that in the notebook. That was clearly an

1 inappropriate comment.

2 I believe Charley Meinema said something to me.  
3 Chuck Howard he said "Jesus, what did you do to  
4 deserve that?" That was demeaning. A number of  
5 people -- I just thought that's the way he is. He was  
6 a bad guy. Other people thought that was pretty bad.  
7 That was demeaning. It was embarrassing.

8 In relation to what 167 members of the Local  
9 Police Union 6 felt when they attended a counsel  
10 meeting. They felt demeaned by his statements in the  
11 press about the blue code and the fact we were a  
12 corrupt organization. And here's somebody that came  
13 from another jurisdiction with a midwest mentality  
14 came to Tacoma and had it firmly in his mind we were  
15 some kind of a substandard police organization. And  
16 prior to his arrival, we were cutting edge police  
17 organization. People would come to us and say check  
18 with Tacoma and see how they're doing it.

19 This was a general feeling among the people I  
20 represented in my advocacy role, this guy was saying  
21 some things that were inappropriate about the  
22 department, that were tarnishing the reputation of our  
23 officers, our city as a whole and they had no factual  
24 basis for that, and he was playing some political  
25 agenda on his own.

1 Q You also indicated in your answer you were not the  
2 only one that he said demeaning things to. Were there  
3 other people that he treated in a similar manner?

4 A I'm certain there were. I had occasion to witness in  
5 one of the initial staff meetings, three people -- he  
6 would solicit comments. He would tell you, please  
7 gentleman, feel free to comment. I witnessed three  
8 people comment and got their legs cut out. And then  
9 the general rule was I better not say anything more.

10 After that it was just basically what I  
11 witnessed was directed at me because of that  
12 isolationist type of thing.

13 Q Who were the three people that had made comments at  
14 the staff meeting?

15 A I don't know. I believe one might have been Paul  
16 Mielbrecht and I think Chief Darland. And a third  
17 one, and there might have been Woodard or Bill Meeks  
18 or someone.

19 Q And he responded in a similar fashion, not listening  
20 to them, or describe that for me.

21 A My recollection it was an inappropriate response where  
22 people present felt like, I don't think I'm ever going  
23 to say anything. You have to ask them what they  
24 considered inappropriate.

25 Q You also indicate "By making statements to the News

1 Tribune alleging as an employee at the Tacoma Police  
2 Department, I was engaged in covering up a misconduct  
3 of other TPD officers by honoring the blue code." Did  
4 Arreola speak of you in particular?

5 A As a member of Local 6, every one in the department  
6 except the chiefs, when he made those comments, I  
7 still stood behind that badge at the Tacoma Police  
8 Department, so yes, in my mind and lot of citizens'  
9 minds, I'm sure he did speak about Joe Kirby.

10 Q Did he mention your name specifically?

11 A In the paper?

12 Q Yes.

13 A I don't think on that occasion.

14 Q Were there other occasions where he did?

15 A I would have to review my clippings file. There was a  
16 grand period where we didn't quite get along.

17 Q You also indicate that "By making statements to the  
18 News Tribune alleging that you failed to show  
19 courtesy, professionalism, and responsibility in the  
20 execution of your duties as a police lieutenant with  
21 the Tacoma Police Department."

22 Is this the general statement about the  
23 department as a whole or you in particular?

24 A I think everyone took that personally, everyone in  
25 Local 6, which at the time included lieutenants and

1 captains, took that as a personal affront and personal  
2 condemnation in front of the press. I know I  
3 certainly did.

4 Q When you were both a lieutenant and an executive board  
5 member, did you ever attempt to make it clear to  
6 people which role you were in? I know you've  
7 indicated it was difficult. Were there any techniques  
8 you used to say "I'm in my union role now"?

9 A Usually the purpose of the contact would have made it  
10 clear. Where it become muddy was in instances like I  
11 was ordered to do something which slopped over into  
12 one of my union roles, which certainly they were  
13 paying guys like Woodard a lot more money than me to  
14 understand what the nuances of the contract were.

15 I was charged with understanding what the RCWs  
16 were and make a bold assumption here, the assistant  
17 chief would certainly know what they were and what his  
18 rights were in regards to questioning me about  
19 protected union activities.

20 Q Let's talk about your "negligent hiring retention and  
21 supervision claim."

22 Are you alleging this cause of action for all of  
23 the named defendants?

24 A I'm alleging it for Chief Arreola.

25 Q Is he the only one?

# EXHIBIT

#4

Byers & Anderson, Inc.  
Court Reporters & Video

Page 1

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF PIERCE  
34 JOSEPH J. KIRBY and DEBORAH A. )  
KIRBY, husband and wife, )5 )  
6 Plaintiffs, )

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. )  
1516 DEPOSITION OF JOSEPH J. KIRBY  
17 VOLUME II  
1819  
20 October 23, 2001  
Tacoma, Washington  
2122 BYERS & ANDERSON, INC.  
COURT REPORTING & VIDEO23 2208 North 30th Street  
Suite 202  
Tacoma, Washington 98403One Union Square  
600 University Street  
Suite 2300  
Seattle, WA 98101-4112  
206.340.131624 253.627.6401  
Fax: 253.383.4884

25 1.800.649.2034

www.byersanderson.com

Byers & Anderson, Inc.  
Court Reporters & Video

Page 17

1 Q Okay. Anything else related to Chief Hairston?

2 A Chief Hairston was the one basically that could have  
3 stopped any of this and -- right on the spot, and he --  
4 and he elected not to do so.

5 Q Okay. And what about Chief Arreola?

6 What adverse employment actions did he take  
7 against you?

8 A Chief Arreola --

9 THE WITNESS: Where's that file?

10 MR. SADLER: (Indicating.)

11 THE WITNESS: (Examining documents.)

12 Chief Arreola? Where do I start? These are the  
13 -- TNT's articles over the two years that he was here.  
14 The adverse actions that he took over -- that he did to  
15 me were -- were the same actions and activities that  
16 basically got his tenure shortened from whatever it was  
17 supposed to be to two years.

18 He accused us collectively of -- of being corrupt.

19 Q (By Ms. Kerslake) Did he accuse you specifically?

20 A No.

21 Q Okay. Anything else?

22 A He -- he treated us very poorly. He caused our  
23 reputation in the community to be diminished, some of  
24 the same things the person to your left can testify to  
25 because he was the vice-president of the union at that

Byers & Anderson, Inc.  
Court Reporters & Video

Page 18

1 time.

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  
4 department during that time. I was a member of the  
5 department, and then I had duties and responsibilities  
6 as an executive board member in Local 6.

7 Q What did he do to you specifically?

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

12 Q And that's the incident at the staff meeting where you  
13 talked about the length of IA investigations?

14 A Yes, I did. And then -- that's -- that's the exact  
15 incident, and some of the defendants, including Dave  
16 Brame, were present at that and actually made an  
17 intercession on my behalf during that -- during that  
18 thing because Chief Brame was the vice-president of the  
19 union at that time, and those were questions that  
20 were -- that were legitimate.

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

23 A Now, that I can't tell you because I don't know what his  
24 conversations were with City legal, with his own legal  
25 at the time. I think Cheryl Carlson might have been the

Byers & Anderson, Inc.  
Court Reporters & Video

Page 19

1 legal -- I can't remember -- or what his conversations  
2 were with his boss, Ray Corpuz.

3 Q Okay. To your knowledge, did he -- did he come to you  
4 and say, Listen, I want to initiate termination  
5 proceedings against you?

6 A No. Actually he didn't say that to me. Basically he  
7 said it to -- to Chief Brame and I think the president  
8 of the union at the time.

9 Q Okay. To your knowledge, did he ever follow through  
10 with that threat?

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

12 Q Okay. Did he take any --

13 A He caused -- he caused me to be in fear for losing my  
14 job for a significant amount of time, caused extreme  
15 anxiety on my part, made it difficult for me to function  
16 properly as an executive board member sanctioned by  
17 various rules and regulations that come out of the RCW,  
18 made a very repressive environment.

19 I don't think anyone would dispute that. Perhaps  
20 I felt it more because of my responsibility to my  
21 constituency; in other words, I had to be -- my advocate  
22 role in Local 6.

23 Q Any other adverse employment actions taken against you,  
24 as an individual, by Chief Arreola?

25 A I'm sure that I could -- probably have to sit down and

Byers & Anderson, Inc.  
Court Reporters & Video

Page 20

1 think, but I probably suppress a lot of this stuff.

2 I -- at this point, I'm --

3 Q Okay. What about Ray Corpuz?

4 A Ray Corpuz runs the whole show. So actually I suppose I  
5 should recant a portion of my other statement, which was  
6 that Jim Hairston could have stopped it at any point in  
7 time, and apply that to Ray Corpuz.

8 Being the City Manager, having run the police  
9 department for a number of years, he was responsible for  
10 a lot of what happened. He -- he -- he brought Arreola  
11 in. He basically left him past his time, when it was  
12 clear that -- that he was abusing people, that he was  
13 basically disrupting our department.

14 Ray Corpuz appointed Hairston, so that if we  
15 applied the dictum that he's responsible for everything  
16 that occurs or does not occur in the police department,  
17 then that's how it comes back to Ray Corpuz.

18 He's the overall guy that's responsible for, as a  
19 matter of fact, every one of those defendants, those  
20 named defendants.

21 Q Okay. And when you said he could have stopped it, what  
22 are you referring to?

23 What could he have stopped?

24 A I -- I think he could have stopped a lot of the activity  
25 that Arreola was engaging in.