



99-2-13911-4 17678150 MMS 12-04-02

1
2
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. DEC 8 - 2002 P.M.

BOB SAN SOUCIE
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

MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT REGARDING
PLAINTIFF'S DISABILITY
DISCRIMINATION CLAIM

NOTED FOR:
January 3, 2003

ASSIGNED:
Judge Katherine M. Stolz

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING PLAINTIFF'S DISABILITY
DISCRIMINATION CLAIM - 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 FACTS.**

2 In his complaint, Plaintiff, a Tacoma Police Lieutenant, alleges that he
3 was discriminated against on the basis of a disability. He was diagnosed with
4 Post Traumatic Stress Disorder as the result of his friend's death in the line of
5 duty on August 28, 1997. It is for this disability he claims he was discriminated
6 against.¹

7
8 Specifically, plaintiff alleges that he was removed from the Clandestine
9 Lab Team based on his disability. (Exhibit 1, excerpts of Joseph Kirby
10 deposition, p. 22.) However, he has no facts to support this contention. He
11 goes on to nebulously state that he was discriminated against when, "people
12 made decisions about Joe Kirby (plaintiff) based on their own particular
13 prejudices against officers that might be medically diagnosed with a valid stress
14 disorder that originated out of something that happened at work." Id. at p. 23.

15 His most specific complaint arises from an incident that occurred on
16 June 15, 1998. Plaintiff was at a staff meeting wherein a discussion was
17 occurring about a Domestic Violence allegation involving two TPD officers.
18 (See Affidavit of William Woodard.) Everyone at the meeting was sharing what
19 they knew about the situation. Id. If they had information, they were to write
20 administrative reports so that the command staff could evaluate the situation.
21 Id. It was shared that Lt. Kirby had received a phone call at home from one of
22

23
24 ¹ Defendants are moving for Summary Judgment on all of Plaintiff's claims of disability
25 discrimination; thus, it is incumbent upon plaintiff to respond with all theories or incidents upon
26 which plaintiff is basing this claim.

1 the officer's involved in the domestic violence. (See deposition excerpts of
 2 Joseph Kirby, page 97, lines 1-4.) Assistant Chief Woodard ordered him to
 3 write an administrative report about this conversation. Id. At this point, Lt.
 4 Kirby became extremely agitated and indicated that the conversation was
 5 private and he would not divulge the contents. (See Affidavit of William
 6 Woodard.) He became volatile, and forcefully stated words to the effect that
 7 "he was not going to generate a report that would be used by the ----- Chief to
 8 conduct another drawn out Internal Affairs investigation." Id. Assistant Chief
 9 Woodard reminded him that the Chief was not asking for the report, it was his
 10 Bureau Commander, asking him to prepare an administrative report that would
 11 be used to assist us in addressing a confidential employee matter which had a
 12 direct impact upon the work environment, and that he further expected he
 13 would do as he asked. Id. At this point, he left to his feet again, snapped a
 14 hand salute, and in a forceful loud and profane manner stated, "Fucking
 15 Airborne, you'll get your report, but you won't like what it says." Id. Lt. Kirby
 16 admits this behavior in the workplace occurred:
 17

18 Q What did you say to him in response to his order to write the
 19 report?

20 A First I said I'm not going to do it. And then I said, fine, I'll do it.
 21 You probably won't like it.

22 Q You used profanity in that statement?

23 A Absolutely. ...

24 Q And this is the same discipline we've been talking about where
 25 you were disciplined for insubordination?
 26

1 A Actually because I was disciplined for my initial refusal to do that,
2 what they chose to characterize it as insubordination.

3 (Deposition experts of Joseph Kirby, pages 98-99.)

4 Lt. Kirby was given an oral reprimand for insubordination for this incident.

5 (See exhibit 2) The disciplinary document remained in his file for only 28 days.

6 Pursuant to the Union Contract, disciplinary documents of this nature remain in

7 an officer's file for a period of one year and in this case, the Chief of Police

8 determined that since a lot of time had elapsed since the incident, he would

9 begin the one year running from the date of the incident, rather than the

10 customary date of the discipline. Id.

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

12 On a motion for summary judgment, the moving party bears the initial

13 burden of showing the absence of a material issue of fact. Young v. Key

14 Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant

15 can meet this burden in one of two ways. First, the defendant can set forth its

16 version of the facts and allege that there is no material issue as to those facts.

17 Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757

18 P.2d 507 (1988). In the alternative, the defendant can meet its burden by

19 showing that there is absence of evidence to support the nonmoving party's

20 case. Howell v. Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing

21 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.

1 Spokane Ambulance, 54 Wn. App. 162, 166, 772 P.2d 1027 (1989). The
 2 defendant need only "identify those portions of the record, together with the
 3 affidavits, if any, which he or she believes demonstrate the absence of a
 4 genuine issue of material fact." Guile v. Ballard Community Hosp., 70 Wn.
 5 App. 18, 22, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993).

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

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

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

18 III. Analysis

19 Under RCW 49.60.180(3), it is unlawful for an employer, "[t]o
 20 discriminate against any person in compensation or in other terms or conditions
 21 of employment because of ... disability." Hill v. BCTI Income Fund-I, 144
 22 Wn.2d 172, 179, 23 P.3d 440 (2001).

23 As in other discrimination cases, Washington courts have adopted the
 24 burden shifting analysis announced in McDonnell Douglas Corp. v. Green, 411
 25 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Hill at 180. As such, it is
 26

1 incumbent on the plaintiff to prove a prima facie case of disability
2 discrimination. Hill at 181. A failure by the plaintiff to meet the burden entitles
3 the defendant to judgment as a matter of law. Id. If the burden is met, the
4 burden shifts to the defendant to produce admissible evidence of a legitimate
5 nondiscriminatory reason for the adverse employment action sufficient to raise
6 a genuine issue of fact as to whether the defendant discriminated against the
7 plaintiff. Id. The burden is one of production, not persuasion. If the burden is
8 met, the presumption established by the plaintiff's prima facie evidence is
9 rebutted and the presumption drops out of the case. Id. Once the presumption
10 is removed, the evidentiary burden shifts back to the plaintiff to show that the
11 defendant's stated reason for the adverse action is a mere pretext. Id. A failure
12 by the plaintiff to meet this burden entitles the defendant to a judgment as a
13 matter of law. Id.

15 To establish a prima facie case of disability discrimination a plaintiff must
16 demonstrate: (1) the existence of a disability and (2) discrimination by the
17 employer because of that disability. RCW 49.60.180(2); Sommer v. DSHS, 104
18 Wn. App. 160, 15 P.3d 664 (2001) The "discrimination" element of disability
19 discrimination is met if the employee demonstrates that the employer took
20 action against the employee because of his or her condition (disparate
21 treatment) or failed to take steps reasonably necessary to accommodate the
22 employee's disability (failure to accommodate) Sommers at 172.

24 To the extent plaintiff is proceeding on a failure to accommodate theory,
25 he must show: (1) the employee had a sensory, mental, or physical

1 abnormality that substantially limited his ability to perform the job; (2) the
 2 employee was qualified to perform the essential functions of the job in question;
 3 (3) the employee gave the employer notice of the abnormality and its
 4 accompanying substantial limitations; and (4) upon notice, the employer failed
 5 to affirmatively adopt measures that were available to the employer and
 6 medically necessary to accommodate the abnormality. Hill v. BTCI, supra

7 Plaintiff can present no evidence in support of his contention that he was
 8 discriminated against on the basis of his disability. He has no competent,
 9 admissible evidence which demonstrates any improper motivation on the part
 10 of the defendants. Further, he admits that he never asked the City for an
 11 accommodation for the clinical aspects of his stress disorder. (See ex. 1
 12 deposition excerpts of Joseph Kirby pp. 29-30) Plaintiff's conclusory opinions
 13 will not suffice to overcome defendant's motion for Summary Judgment.
 14 Grimwood v. Puget Sound, 110 Wn.2d 355, 759 P.2d 517 (1988) Plaintiff must
 15 provide evidence on each and every element of his prima facie case. Failure to
 16 do so mandates dismissal in favor of the defendants. Hiatt v. Walker
 17 Chevrolet, 120 Wn.2d 57, 837 P.2d 517 (1988).

18 Furthermore, any attempt by the plaintiff to base his claim upon
 19 discipline he received for inappropriate behavior should be dismissed. Maes v.
 20 Henderson, 33 F.Supp.2d 1281 (NV. 1999); Breiland v. Advance Circuits, Inc.,
 21 979 F. Supp. 858 (D. Minn. 1997) (Americans with Disabilities Act does not
 22 obligate an employer to ignore plaintiff's misconduct). In Maes, the plaintiff
 23 alleged that his disability of diagnosed Dysthymic Depression caused his
 24
 25
 26

1 inappropriate behavior. Therefore, plaintiff argued that his discipline was
2 discriminatory. However, the court rejected his argument holding that an
3 employer can discipline an employee for misconduct, regardless of whether the
4 misconduct is directly attributed to the employee's disability (although the
5 plaintiff was claiming a violation of the Rehabilitation Act the court incorporated
6 the same standards as the Americans with Disabilities Act). Id. citing Newland
7 v. Dalton, 81 F.3d 904, 906, (9th Cir. 1996); See Collings v. Longview Fibre
8 Company, 63 F.3d 828 (9th Cir. 1995) (Interpreting Washington law, no
9 disability discrimination when an employee is discharged for violation of a
10 workplace rules); Klein v. Boeing, 847 F. Supp 838, 843 (W.D. Wash. 1994)(the
11 discharge of an employee for violation of a workplace rule does not constitute
12 discrimination based on an employee's alleged disability); Leary v. Dalton, 58
13 F.3d 748,753 (1st Cir. 1995)(Rehab act does not protect employees from
14 consequences of their own misconduct even if caused by disability); Tyndall v.
15 National Educ Ctrs, 31 F.3d 209, 214-215 (4th Cir. 1994)(No ADA violation
16 where employer fires employee for misconduct related to disability).

17
18 The clear purpose of laws against disability discrimination is to protect
19 individuals from being treated differently on the basis of their disability. It
20 cannot be used as a sword to allow disabled employees to engage in behavior
21 that would justify discipline or discharge of any other employee. See e.g.
22 Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047,1052 (5th Cir.
23 1998) Thus, any attempt to base a claim of disability discrimination on his
24 admitted insubordinate conduct would be misplaced and not legally cognizable.
25
26

1
2 **IV. Conclusion**

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

13
14
15 DATED this 1 day of December, 2002.

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

18
19 By: 

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

EXHIBIT

#1

1 I did that. And I think they acted out of what their
2 prejudice was against anyone that might have been
3 placed in a disability status due to any kind of a
4 stress related injury.

5 Q You talk about other decisions you believe were made
6 based on your disability. What decisions are you
7 talking about?

8 A They removed me from the clandestine lab team where I
9 served for six or seven years, where I was completely
10 qualified. I was a lieutenant, they removed me. I
11 was actually the team commander.

12 And they told me the removal was because I was a
13 lieutenant and I was not in SID. Subsequent to that,
14 they allowed Lieutenant Ramsdell to remain affiliated
15 with the team as a lieutenant while not assigned to
16 SID.

17 So as I look at what they did to me and the
18 contradiction in Lieutenant Ramsdell's continued
19 affiliation with the team, it was apparent to me there
20 were two standards there. They were applying a
21 different standard to me. I would also say nothing in
22 my meth team career would merit the removal from that
23 team.

24 Q What do you base your belief on that was related to
25 your disability in any way?

1 A I think what I just articulated, that people made
2 decisions about Joe Kirby based on their own
3 particular prejudices against officers that might be
4 medically diagnosed with a valid stress disorder that
5 originated out of something that happened at work.

6 There's an interesting interpersonal dynamic
7 that police officers want to think they're invincible.
8 Having been an infantry officer and special forces
9 officer, I came to an early conclusion in my military
10 career, not only were we not invincible, we very
11 vulnerable for many stresses.

12 I don't think that is shared a lot by a lot of
13 police officers who will tell you they're not scared,
14 who really are and they see that as some kind of a
15 human frailty. When someone falls out of the fold
16 with a diagnosed stress disorder, they're not worthy
17 to continue in these positions.

18 I think there's a whole body of legislation for
19 that Americans with Disability Act and some recent
20 court decisions. Our society's kind of swung around
21 on that.

22 Q Did anyone tell you that the decision to remove you
23 from the clandestine lab team was based on your
24 disability?

25 A No.

1 (Question on Page 25, Lines 11 to 12
2 read by the reporter.)
3

4 A And I believe it was only partly. I believe that in
5 addition to that, it was based on the fact that I had
6 assumed such an active union advocacy role in a number
7 of cases that put me basically in conflict with senior
8 members of the department.

9 I believe it was as a result of some
10 investigations that were conducted against me which I
11 believe were improper that came out and did not
12 reflect very well on the department. I believe that
13 it was a whole bunch of series of events, some
14 embarrassing to the department.

15 Q So your perception is based on the totality of the
16 events that you just talked to me about?

17 A Yes, it is. And these are pretty complex questions.
18 So I would imagine that on reflection, I could think
19 of a lot more things. It's just that -- and I may be
20 able to expand on those later as we go along.

21 Q If at any time during the course of the deposition you
22 do think of something else, certainly let me know. We
23 can do that.

24 Did you at any time ask for an accommodation due
25 to your stress disorder?

1 A The only -- I'm not sure how to answer that question
2 in the way it was asked. Again, let me point out that
3 I asked for what I considered to be reasonable
4 accommodations before, during, and after the stress
5 disorder which were things like a level playing field.
6 I want to be treated the way every one was.

7 In that respect, that's an accommodation I
8 asked. If you're asking me whether I asked for an
9 accommodation based on some clinical aspects of my
10 diagnosed disorder, I would have to say no, if an
11 accommodation means if I -- if I have a back disorder
12 I need a special chair or something.

13 Q Did you ever discuss your stress disorder with any of
14 the named defendants?

15 A The clinical aspects of my stress disorder?

16 Q Yes.

17 A I don't have a recollection. I'm sure we discussed
18 issues surrounding that, but I would probably answer
19 that question by saying yes, but to what degree and
20 how clinically, I don't have an instant recollection.

21 Q And do you recall who you may have had those
22 conversations with?

23 A I know for sure that when Jim Hairston decided to
24 discipline me in the presence of David Brame, that I
25 posited that I think he was about to discipline for a

1 untrue is getting bantered about this table and I have
2 reason to believe that not only is that inappropriate,
3 but that the information is not true." To which point
4 Bill Woodard said, "I want to you write me everything
5 you know." And I said "I'm not going to do that."

6 Q Did you tell him why you were refusing?

7 A That's about the time when Dave Brame jumped in and
8 said this could be like an advocacy issue. So Dave
9 Brame, who outranked me, put it on the table that we
10 could have a problem here. I think at that point if
11 you want to know the truth, Dave Brame was throwing me
12 a bit of a lifeline there. And then it disintegrated
13 from there.

14 Q Did you ever tell Captain Woodard that Rameriz had
15 asked you to be her advocate?

16 A Later on in the conversation, sometime between the
17 time I was ordered at that table and rendered that
18 report, we had some conversation. And it's my
19 recollection that I said this is inappropriate.

20 Q My question is, did you invoke the conversation that
21 you had with her wherein she asked you to be an
22 advocate?

23 A My recollection was I told Bill Woodard that this was
24 inappropriate conduct because I had advocacy rights,
25 that the conversation did not occur in the city of

1 Tacoma, it occurred on my phone off duty in as much as
2 the city wasn't compensating me for that, they had no
3 right to require me to divulge that.

4 I also told them those type of activities are
5 protected under the revised code of Washington. And I
6 thought he was making a very serious mistake. That's
7 my recollection.

8 And I don't believe that happened in that forum.
9 I believe that happened subsequent to that meeting,
10 and prior to the delivery of my written statement.

11 Q So he asked you to write an administrative report?

12 A No, he ordered me to do it.

13 Q Am I right he was a captain at the time?

14 A I think he was a bureau commander, assistant chief,
15 and I think I was there as a lieutenant. And we had
16 division commanders there from investigations and also
17 from special investigations.

18 I think he would have been the bureau commander.
19 He was subsequently demoted and somebody else, Ray
20 Roberts took his job or something.

21 Q And you initially refused?

22 A Yes. And there was some discussion about whether I
23 could refuse or not and they recommend termination.
24 They said you can refuse all you want, but we can
25 terminate you.

1 Q Who said that?

2 A I believe Woodard.

3 Q How did you respond to that?

4 A On what level? Emotionally I thought it was pretty
5 distressing. I was asserting my RCW rights guaranteed
6 to me under revised code of Washington for union
7 advocacy and he was telling he was going to disregard
8 that and fire me anyway.

9 He was an assistant chief and there was no doubt
10 in my mind -- you asked an earlier question about the
11 chain of command -- he wouldn't influence the decision
12 made by the chief to terminate my affiliation with the
13 Tacoma Police Department on a number of levels.

14 Crystal clear to me that would have been the
15 outcome had I refused to do that. I was faced with
16 the dilemma to determine what am I going to? I'm
17 going to stand up? Am I going refuse?

18 Q What did you say to him in response to his order to
19 write the report?

20 A First I said I'm not going to do it. And then I said,
21 fine, I'll do it. You probably won't like it.

22 Q You used profanity in that statement?

23 A Absolutely. I was to say, the least, pretty torqued
24 that somebody would violate my rights like that, that
25 would force me into a corner.

1 Q And this is the same discipline we've been talking
2 about where you were disciplined for insubordination?

3 A Actually because I was disciplined for my initial
4 refusal to do that, what they chose to characterize it
5 as was insubordination.

6 Q So you believed that you were disciplined for
7 exercising your advocacy rights; am I characterizing
8 that correctly?

9 A I think that was the initial reason I was disciplined.
10 They can characterize it any way they want. That's a
11 pretty subjective deal. It went to Arreola after
12 that.

13 Q What went to Arreola?

14 A That whole discipline issue.

15 Q And what did he do with it, if you know?

16 A I know exactly what he did. He called me into his
17 office and he said "Joe, I really need you to become
18 part my management team. What I have here is this
19 incident between you and Woodard." You know, and he
20 leaned over and opened the bottom of his drawer, and
21 said "I'll just put it this in the bottom of my
22 drawer, and this will just go away if you can fold
23 into my management team, if you can see it clear to
24 become part of my team. I'll just make it go away."

25 Q Did you say anything to him in response to that?

EXHIBIT

#2

TACOMA POLICE DEPARTMENT
Intra-Departmental Memorandum



TO: Temporary Captain Joseph Kirby
Operations Bureau
Hairston
FROM: James O. Hairston
Chief of Police
SUBJECT: ORAL REPRIMAND

DATE: May 19, 1999

During an Investigations Bureau Staff Meeting on June 15, 1998, you were requested to prepare an administrative report reflecting information which you had shared with staff relative to a work related personnel matter. Your subsequent refusal to comply with this request, your language and demeanor, and your improper dissemination of the report prior to submittal were inappropriate and inconsistent with Department Rules and Regulations.

Your actions on this occasion are in violation of the following section of the Tacoma Police Manual of Rules and Procedures:

12.01.005 INSUBORDINATION:

All personnel shall promptly obey any lawful order of a superior officer, whether operational or administrative in nature. This will include orders relayed from a superior officer by an officer of the same or lesser rank.

At all times, all personnel shall show proper respect toward superiors. Behavior which is demeaning personally, or which detracts from the authority of a superior, shall be considered insubordinate. Such behavior may be conveyed by language or action. Verbal insubordination may be conveyed by rude, offensive, or abusive remarks. Non-verbal insubordination may be conveyed by indifference, insolence, rude gestures, or failure to follow an order to completion.

Due to your Administrative Leave, considerable time has elapsed since the date of the incident, June 15, 1998. This diminishes the requirement to impose more severe discipline. However, your actions were serious and should not be forgiven.

The Oral Reprimand will commence from the date of offense June 15, 1998, until June 15, 1999, at which time it will be removed from your divisional file.

You are hereby served an oral reprimand for this incident and further warned that, if similar incidents occur in the future, you may receive more severe discipline.

JOH:jb

JK 000689

1/10/99