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A.M. DEC 9 - 2002 P.M.
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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 SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS OF NEGLIGENT RETENTION AND SUPERVISION

NOTED FOR: January 3, 2003
ASSIGNED:
Judge Katherine M. Stolz

/

ORIGINAL

Tacoma City Attorney
Civil Division
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I. STATEMENT OF THE CASE

Philip Arreola was hired by the City of Tacoma to be its police chief in 1996 and served until 1998. Plaintiff claims to have received poor treatment by the Chief during his tenure with the Department. Specifically he claims that the Chief made disparaging remarks to the media about the department as a whole and generally managed the department by methods that the plaintiff did not agree with. (See exhibit 1 deposition excerpts of Joseph Kirby). It is from these facts that the plaintiff alleges that the City negligently retained and supervised Chief Arreola[1].

II. STANDARD ON MOTION FOR SUMMARY JUDGMENT

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

[1] It is important to note that the defendants are moving for summary judgment on these causes of action as a whole. Therefore, it is incumbent upon plaintiff – in response to the instant motion – to bring forward *any facts*, *under any theory*, that he claims supports these causes of action.

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

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

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

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

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

III. ANALYSIS

In Washington, the elements of a negligent hiring and a negligent retention claims are identical with the exception of when the wrongful act

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allegedly occurs. Peck v. Siau, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992). In a negligent hiring claim, the employer's negligence occurs at the time of hiring; with a negligent retention claim, it occurs in the course of employment. Id. The theory of negligent hiring and retention is generally that employers have a limited duty to exercise reasonable care in the selection and retention of their employees for the benefit of third parties:

> [A]n employer may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. Such negligence usually consists of hiring or retaining the employee with knowledge or his unfitness, or of failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. It is, of course, necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired.

Id.

Thus, in order to maintain an action for negligent hiring or retention, the plaintiff must establish: 1) that the employee committed a wrongful act which injures or damages the plaintiff; 2) that the employer hired or retained the employee with knowledge of the employee's unfitness or that the employer failed to use reasonable care to discover the employee's unfitness before hiring or retaining him; and 3) that the employer's negligence was the proximate cause of the plaintiff's injuries. Id.

The theory of negligent supervision, on the other hand, "creates a limited duty to control an employee for the protection of third parties, even when the

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employee is acting outside the scope of employment." Niece v. Elmview Group Home, 131 Wn.2d 39, 51, 929 P.2d 420 (1997).

> A master is under a duty to exercise reasonable care so [as] to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control. ***Washington cases have generally interpreted the knowledge element to require a showing of knowledge of the dangerous tendencies of the particular employee.***

(emphasis added; internal citations omitted) Id. at 51-52.

In the instant case, plaintiff has asserted no facts in support of any of these claims. In his complaint, he chose not to allege any facts specific to these claims. Moreover, during his deposition, plaintiff was able to offer nothing other than his dissatisfaction about comments Chief Arreola made to the newspaper, *comments that were not even directed specifically to the plaintiff.* As Celotex and its progeny make clear, that is simply not enough to withstand summary judgment.

In order to preserve these claims and survive summary judgment, plaintiff must now present specific and significant evidence in support of these claims. Plaintiff will first have to identify the specific employees whose conduct serves as the basis for these claims. Plaintiff will then have to adduce evidence to establish that, prior to hiring these employees or during the course of their employment, the City knew or should have known of these employees'

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dangerous tendencies and failed to take appropriate measures. Moreover, plaintiff will need to offer more than his own, unsupported conclusions and allegations. Finally, plaintiff will have to prove that the City's retention or supervision of these employees proximately caused damage or injury to him. Failure to establish each of these essential elements will mandate dismissal of these claims[2].

IV. CONCLUSION

As outlined above, plaintiff has offered no evidence in support of his negligent retention or supervision claims against the defendants. It is anticipated he will be unable to offer competent, admissible evidence in support of these claims as he has failed, during discovery, to develop facts sufficient to establish these claims.

Therefore, the defendants respectfully request that this Court enter an order dismissing plaintiff's negligent retention and supervision claims, in their entirety and with prejudice.

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[2] In its answers to plaintiff's numerous complaints, the defendant City of Tacoma has asserted the public duty doctrine and discretionary immunity as defenses. It is possible that the acts attributable to the City and upon which the plaintiffs attempt to premise these claims implicate either traditional governmental functions or high level discretionary policy decisions for which the City is afforded discretionary immunity. Thus, the City reserves the right to assert and analyze these defense in reply to plaintiffs' response to the instant motion.

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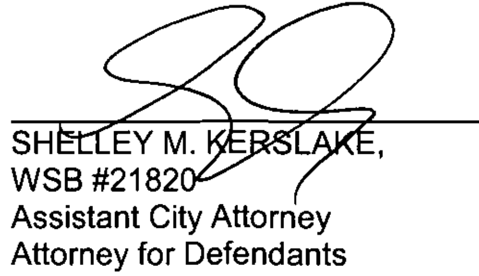
LEG 008 (07/01)

DATED this 3 day of December, 2002.

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



By: ______________________
SHELLEY M. KERSLAKE,
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Assistant City Attorney
Attorney for Defendants

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EXHIBIT

#1

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 1        IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 2                 IN AND FOR THE COUNTY OF PIERCE
 3
 4   JOSEPH J. KIRBY and DEBORAH A.        )
     KIRBY, husband and wife,              )
 5                                         )
                          Plaintiffs,      )
 6                                         )
               vs.                         ) No. 99 2 13911 4
 7                                         )
     THE CITY OF TACOMA, a municipal       )
 8   corporation; RAY CORPUZ and "JANE     )
     DOE" CORPUZ, husband and wife;        )
 9   PHILIP ARREOLA and "JANE DOE"         )
     ARREOLA, husband and wife; WILLIAM    )
10   WOODARD and CATHERINE WOODARD,        )
     husband and wife; RAYMOND ROBERTS     )
11   and "JANE DOE" ROBERTS, husband and )
     wife; DAVID BRAME and "JANE DOE"      )
12   BRAME, husband and wife; and JAMES    )
     HAIRSTON and "JANE DOE" HAIRSTON,     )
13   husband and wife,                     )
                                           )
14                        Defendants.      )
15
16                DEPOSITION OF JOSEPH J. KIRBY
17                          VOLUME II
18
19
                        October 23, 2001
20                     Tacoma, Washington
21
                      BYERS & ANDERSON, INC.
22                    COURT REPORTING & VIDEO
     2208 North 30th Street             One Union Square
23         Suite 202                  600 University Street
     Tacoma, Washington 98403             Suite 2300
24       253.627.6401                 Seattle, WA  98101-4112
       Fax: 253.383.4884                  206.340.1316
25                      1.800.649.2034
                     www.byersanderson.com
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4 APPEARANCES
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11 For the Defendants:
12 Shelley M. Kerslake
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15
16 Also Present:
17 David Brame
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21 <<<<<< >>>>>>
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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

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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

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

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.