



99-2-13911-4 17676180 MMS 12-04-02

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

v.

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

Defendants.

No. 99-2-13911-4

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
REGARDING PLAINTIFF'S CLAIM
OF INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS

NOTED FOR:
January 3, 2003

ASSIGNED:
Judge Katherine M. Stolz

Defendant's memorandum in support of motion for
Summary Judgment regarding Plaintiff's claim of
intentional infliction of emotional distress.

Page 1 of 1

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

Factual Background

1
2 Plaintiff's claims arise out of his relationship with his employer, the City of
3 Tacoma. He claims that he has been the victim of discriminatory treatment in
4 the workplace. (See Plaintiff's Second Amended Complaint) He claims that he
5 was not given a promotion to the position of Captain, when he clearly admits
6 he is not a good fit with the current management team. (See exhibit 1 -
7 deposition excerpts form the deposition of Joseph Kirby) He claims he was
8 threatened with termination, but admits no action was ever taken. Id. And
9 finally his probation reports reflected a need to improve performance for
10 incidents he admits happened. Id.; (See also exhibits 2 and 3) in his second
11 amended complaint he has pled Intentional infliction of emotional distress as a
12 cause of action (See Plaintiff's Second Amended Complaint p.6 para. X)
13 Plaintiff has no evidence to support such a claim and summary judgment is
14 appropriate.
15

Standard on Motion for Summary Judgment

16
17
18 On a motion for summary judgment, the moving party bears the initial burden
19 of showing the absence of a material issue of fact. Young v. Key
20 Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant
21 can meet this burden in one of two ways. First, the defendant can set forth its
22 version of the facts and allege that there is no material issue as to those facts.
23 Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757
24 P.2d 507 (1988). In the alternative, the defendant can meet its burden by
25

26 Defendant's memorandum in support of motion for
Summary Judgment regarding Plaintiff's claim of
intentional infliction of emotional distress.
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1 showing that there is absence of evidence to support the nonmoving party's
 2 case. Howell v. Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991)
 3 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d
 4 265 (1986)).

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

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

15 If, at this point, the plaintiff [as nonmoving party] "fails to make a
 16 showing sufficient to establish the existence of an element
 17 essential to that party's case, and on which that party will bear the
 18 burden of proof at trial", then the trial court should grant the
 19 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.***"

20
 21 (emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618
 22 (1992). Consequently, the plaintiff "must do more than express an opinion or
 23 make conclusory statements"; ***the plaintiff must set forth specific and***
 24 ***material facts to support each element of his prima facie case.*** Id.
 25

Analysis

1
2 To state a claim for intentional infliction of emotional distress a plaintiff must
3 prove the elements of the tort of outrage. The elements of intentional infliction
4 are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of
5 emotional distress; and (3) actual result to the plaintiff of severe emotional
6 distress. Snyder v. Med. Serv. Corp. 145 Wn2d 233,242, 35 P.3d 1158 (2001).

7 The conduct must be "so outrageous in character and so extreme in degree as
8 to go beyond all possible bounds of decency and to be regarded as atrocious
9 and utterly intolerable in a civilized community. Dicomes v. State, 113 Wn2d
10 612, 630, 782 P.2d 1002 (1989)(quoting Grimsby v. Samson, 85 Wn2d 52, 59,
11 530 P.2d 291,77 ALR3d 436(1975). Plaintiff has alleged no conduct that could
12 even arguably meet this standard.
13

14 Whether conduct is sufficiently extreme is generally a question of
15 fact; however, the court must initially decide as a matter of law whether
16 reasonable minds could differ on whether the conduct was extreme enough to
17 cause liability. Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

18 Furthermore, **the conduct needs to be more than mere insults, indignities,**
19 **threats, annoyances, petty oppressions or other trivialities.** Grimsby v.
20 Samson, 85 Wn.2d 52, 59, 503 P.2d 291 (1975). In determining whether
21 conduct is outrageous, it is not enough that the defendant's intent was tortious,
22 criminal, intended to inflict emotional distress or characterized by malice or a
23 degree of aggravation that would entitle a plaintiff to damages for another tort.

24 Birkliid v. Boeing Co., 127 Wn.2d at 868. **Liability will only be imposed**
25

26 Defendant's memorandum in support of motion for
Summary Judgment regarding Plaintiff's claim of
intentional infliction of emotional distress.
Page 4 of 4

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1 where the conduct is "so outrageous in character, and so extreme in
2 degree, as to go beyond all possible bounds of decency, and to be
3 regarded as atrocious, and utterly intolerable in a civilized community."

4 (emphasis added) Id. (citing Grimsby v. Samson, 85 Wn.2d at 59).

5 In order to recover for outrage, plaintiffs must show that the
6 emotional distress was inflicted intentionally or recklessly, not merely
7 negligently. Birkliid v. Boeing Co., 127 Wn.2d at 868. Where there is a
8 deliberate intent to injure, the court has found this element satisfied. In Birkliid
9 v. Boeing Co., employees-plaintiffs were exposed to toxic substances at work.
10 Id. at 857. The defendant knew in advance that the employees would become
11 ill from the substance. Id. The plaintiffs alleged that the defendant removed
12 labels on chemicals, denied employees access to safety data sheets, harassed
13 employees who requested protective equipment or availed themselves of
14 medical treatment, and altered workplace conditions during government safety
15 tests. Id. The Court found that the employees had stated a claim for outrage.
16 Id. at 868.

17
18 Plaintiff in this case makes no showing that the defendants' alleged
19 conduct was done intentionally or recklessly. Unlike Birkliid v. Boeing Co., the
20 plaintiff make no showing that the defendants preplanned their conduct, nor do
21 the defendants' actions rise to the same level as the defendant in Birkliid.

22 Taking all facts as true, the plaintiff has failed to satisfy the intent element of
23 this claim. The burden is now on the plaintiffs to establish this element of his
24 prima facie case.
25

1 **Outrage should only allow recovery in the absence of other**
 2 **tort remedies.**

3 The plaintiff's claim of outrage should be dismissed where the plaintiff
 4 alleges other tort remedies. Rice v. Janovich, 109 Wn.2d 48, 62, 742 P.2d
 5 1230 (1987). Outrage has only been recognized where it is a separate and
 6 distinct basis of tort liability, **without** the presence of elements necessary for
 7 any other tort. Id.; Restatement (Second) of Torts § 46, comment *b* at 72
 8 (1965). For example, the court has recognized damages for mental or
 9 emotional distress under the theory of assault or outrage but not both. Rice v.
 10 Janovich, 109 Wn.2d at 61; Bankhead v. Tacoma, 23 Wn. App. 631, 638, 597
 11 P.2d 920 (1979). Therefore, **outrage should only allow recovery in the**
 12 **absence of other tort remedies.** Rice v. Janovich, 109 Wn.2d at 62.
 13 Plaintiff's outrage claim arises out of situations involving other alleged torts.
 14 Plaintiff has brought claims under RCW 49.60. These claims sound in tort.
 15 Blair v. Wash. State Univ., 108 Wn.2d 558,575-76, 740 P.2d 1379 (1987) and
 16 therefore plaintiff's claim of intentional infliction of emotional distress should be
 17 dismissed.
 18

19 **Conclusion**


20 As outlined herein, plaintiffs have failed to plead or develop any facts in
 21 support of their claim of outrage. As a matter of law, reasonable minds could
 22 not differ on whether "the conduct" at issue was extreme enough to cause
 23 liability, because no particular conduct has been pointed to as outrageous.
 24
 25

1 Plaintiff must come forward with competent admissible evidence, that is
2 more than mere conclusion or speculation, to overcome defendants' motion for
3 summary judgment. The defendants respectfully request that this Court grant
4 defendants' motion and dismiss plaintiff's intentional infliction of emotional
5 distress claim, with prejudice.
6

7 DATED this 2 day of December, 2002.
8

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

11
12 By:


13 SHELLEY M. KERSLAKE
14 WSBA# 21820
15 Assistant City Attorney
16 Attorney for Defendants
17
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25

EXHIBIT

#1

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

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

October 23, 2001
Tacoma, Washington

BYERS & ANDERSON, INC.
COURT REPORTING & VIDEO
2208 North 30th Street One Union Square
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Fax: 253.383.4884 206.340.1316

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Court Reporters & Video

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

3 Q What do you think the reason is?

4 A What do I personally think the reason is?

5 Q Yes.

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

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

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

1 three of them are defendants in this case.

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

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

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

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

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

23 It's difficult getting the assistant chiefs to
24 sit on since I was in litigation with two of them.
25 The first board, my recollection was Darland and I

1 MR. SADLER: That wasn't the question.

2 Q (By Ms. Kerslake) What do you believe?

3 A I believe that the disparity is based on, again, my
4 age; I believe it's based on my prior union
5 activities; I believe it's based on the fact that
6 Roberts probably has some impression of my ability to
7 function in management in the police department that
8 is inconsistent with the stress and the recovery I
9 made from a disability.

10 Q Did he ever articulate those concerns to you?

11 A I don't have any recollection of that.

12 Q Did anyone else indicate that that's what was
13 motivating his action?

14 A I have no recollection of that.

15 Q When Dave Brame was your bureau commander, at some
16 point did you throw a notebook down a hallway because
17 you were unhappy?

18 A Yes.

19 Q Explain to me the circumstances of that.

20 A I walked out of his office, I threw a notebook down
21 the hallway.

22 Q What precipitated that event?

23 A A meeting we had where he assigned people basically
24 contrary to their wishes, not only affected me, but it
25 affected Darell Hughes and some other people. Dave

1 Brame had me meet him for lunch before I came back
2 from my disability leave and asked me where I thought
3 I would like to go when I came back as temporary
4 captain.

5 I told him what I wanted today do and he had
6 that meeting, and I was led to believe that other
7 people had done the same thing. And he had that
8 meeting and basically they were reverse of my list.
9 And I was frustrated and propelled the notebook down
10 the hallway after I left the meeting.

11 Q Was there anyone present when you did that?

12 A No. There wasn't anyone in the hallway, maybe
13 somebody saw it. There wasn't anybody present.

14 Q Did Assistant Chief Brame come and talk to you about
15 that incident?

16 A I think he talked to other people about it.

17 Q Were you investigated by internal affairs for that?

18 A I don't think internal affairs. It was a big internal
19 investigation. I had to write a statement.

20 Q Were you ever disciplined for that?

21 A No.

22 Q And you don't recall whether Brame talked to you about
23 it?

24 A I don't think he talked to me about the notebook
25 incident. I think that --

EXHIBIT

#2

PROBATIONARY REVIEW RECORD - EVALUATION OF EMPLOYEE SERVING PROBATIONARY PERIOD

EMPLOYEE'S NAME KIRBY, JOSEPH	DIVISION OPS	DEPARTMENT POLICE	DATE EMPLOYED 5-10-99
EMPLOYEE'S POSITION POLICE CAPTAIN, TEMPORARY	CLASSIFICATION CODE NUMBER		

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

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

ADDITIONAL COMMENTS: *NECESSARY IN CASES OF FAILING & FURTHER

See attached narrative.

RATER <i>Dabrane</i>	DATE 9-13-99	SUPERVISOR <i>Dabrane</i>	DATE 9-13-99
TITLE ASST. CHIEF D. A. BRAME, OPERATIONS	DATE	TITLE ASST. CHIEF D. A. BRAME, OPERATIONS	DATE
APPOINTING AUTHORITY (OR ALTERNATE) <i>Hairston</i>	DATE 9-13-99	THIS REPORT HAS BEEN DISCUSSED WITH ME. MY SIGNATURE DOES NOT NECESSARILY MEAN I AGREE WITH RATING.	
TITLE CHIEF JAMES O. HAIRSTON	DATE	EMPLOYEE'S SIGNATURE <i>DECLINED</i>	DATE 9-13-99

HE WILL SUBMIT ATTACHMENT.

Dabrane

Captain Kirby has completed his 4th month of probation on September 10, 1999. He has remained in his current assignment as Operations South Division Commander for the duration of his probation. He has perfect attendance and he keeps me informed of issues that may take him away from the job. He continues to follow instructions and he attempts to complete projects in a timely fashion. He was given a project regarding equipment inventory control as outlined in his last month's probation report. While the report was turned in on time, it had 8 coordinating factors to be resolved. Captain Kirby needs to provide his method of resolution to me and provide a more complete document. While I appreciate his effort, I am giving him the next month to provide to me a more complete end product. For example, he suggests that I might want to include Local 6 in discussions. Captain Kirby needs to be proactive and bring the president/vice president into discussions. He points out the need to establish protocols for this project, and he is correct. However, as a Division Commander, he needs to provide a draft to me outlining his resolution of these issues. This portion of the report will serve to provide him further direction. I will also meet and discuss this issue for clarification. I am optimistic that a complete product will be submitted by October 1, 1999.

Captain Kirby does provide a concerted effort in his current assignment. He strives to monitor the work schedule and staffing issues. He has been working on a Bureau-level EEO issue. He has maintained what appears to be complete and accurate notes on the issue. He has participated/conducted several interviews of our employees in my presence. This is a learning experience for Captain Kirby, as he is able to watch my approach to these interviews and be exposed to utilizing different interview approaches. In this area, I believe that we have worked well. Also, Captain Kirby handled a recent EOD situation involving old safes. Although not a technical expert in these matters, Captain Kirby provided oversight during the entire calls.

Unfortunately, this month Captain Kirby is rated as "Unacceptable" for the category of Cooperation. This is due to a recent issue that occurred on August 29, 1999. On that date Capt. Kirby received notification that there was a potential serious situation involving Internal Affairs personnel. This situation brought to light potential conflicts of interest and MRP violations. The concerns were severe enough that Capt. Kirby responded from home to work to direct a preliminary investigation. Capt. Kirby decided, as Command Duty Officer, to not notify the Chief of Police. Capt. Kirby maintained that he did not have a finished work product and he decided not to notify the Chief at that time. By the time he had the completed work project, which included his report and recommendations, he then notified me about the incident. When he notified me about the incident he was no longer CDO. Chief Hairston was extremely upset when he was not notified by CDO Captain Kirby. Clearly this was a situation where the Chief of Police should have been notified. Capt. Kirby has been formally counseled in an IDM from me to him dated September 13, 1999.

I further rated him as N/I in the category of Attitude. During my counseling session with Captain Kirby, he attempted to shift blame for his improper action in neglecting to notify the Chief. Not only did he openly and blatantly state that he did not trust the Chief to make the correct decision, he also tried to convince me that I was not in his chain of command while he was CDO. He attempted a defense based on occasions when I did not return his pages. Last month, I did not return his page when he was very upset over the offer of \$20.00 to the first officer who arrests a certain wanted individual - outlined in last month's probation report. This was an issue that I chose to wait until the next day. I was disappointed that Captain Kirby chose to bring these pages up as some sort of defense for his own lack of judgement in neglecting his notification duties.

These issues greatly concern me regarding Captain Kirby. I will remain optimistic that he will clearly see his errors in judgement, and that he will work purposefully and diligently in the direction of self-reflection and self-correction. However, marked improvement must be displayed in these categories.

RATER <i>Dabrone</i>	9-13-99	SUPERVISOR <i>Dabrone</i>	9-13-99
TITLE ASST. CHIEF D.A. BRAME, OPERATIONS	DATE	TITLE ASST. CHIEF D.A. BRAME, OPERATIONS	DATE
APPOINTING AUTHORITY (OR ALTERNATE) <i>Hairston</i>	9-13-99	THIS REPORT HAS BEEN DISCUSSED WITH ME. MY SIGNATURE DOES NOT NECESSARILY MEAN I AGREE WITH RATINGS	
TITLE CHIEF JAMES O. HAIRSTON	DATE	EMPLOYEE'S SIGNATURE <i>DECLINED</i>	DATE 9-13-99

HE WILL SUBMIT ATTACHMENT.

Dabrone

CITY OF TACOMA

GENERAL GOVERNMENT & DEPARTMENT OF PUBLIC UTILITIES

PROBATIONARY REVIEW RECORD - EVALUATION OF EMPLOYEE SERVING PROBATIONARY PERIOD

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

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

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

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

SEE NARRATIVE ATTACHED

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

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

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

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

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

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

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

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

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

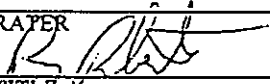
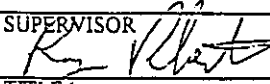
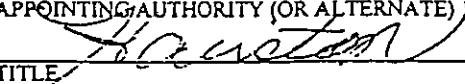
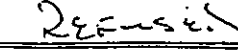
Captain Kirby was also quick to act when Forensics Manager Walker brought a problem to his attention. An officer assigned to the Operations Bureau had photographed a crime scene with his personal digital camera. Forensics is unable to process this type of technology. Captain Kirby notified Captain Woodard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

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

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

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

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

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

EXHIBIT

#3

CERTIFICATION

I hereby certify that on 3/13/00 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

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 REQUESTS FOR ADMISSION TO PLAINTIFF AND RESPONSES

RECEIVED
FEB 25 2000
MESSINA LAW FIRM

REQUESTS FOR ADMISSION INSTRUCTIONS

A. Requests for Admission. You are required to answer the following Request for Admission separately and fully, under oath, within 30 days of receipt thereof, in accordance with CR 36. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall detail the reasons why the answering party cannot truthfully admit or deny the matter.

ORIGINAL

1 REQUEST FOR ADMISSION NO. 22: Please admit or deny that on
2 Friday, August 20, 1999, you learned of a situation involving Seahawks tickets
3 and Internal Affairs personnel.

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11 RESPONSE: **Admit.**

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17 REQUEST FOR ADMISSION NO. 23: Please admit or deny that you did
18 not immediately inform the Chief of Police of the situation involving Seahawks
19 tickets and Internal Affairs Personnel.

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26 RESPONSE: **Objection. Vague, ambiguous. Without waiving said
objection, Plaintiff admits that he did not "immediately" inform the
Chief of Police of the situation.**

27 REQUEST FOR ADMISSION NO. 24: Please admit or deny that you did
28 not inform Assistant Chief Brame about the incident until Monday, August 23,
29 1999.

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36 RESPONSE: **Admit.**