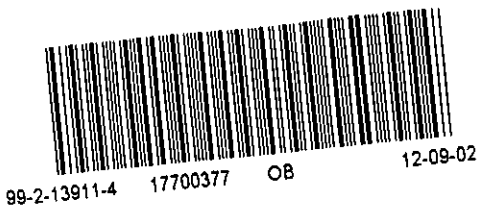

HON. KATHERINE M. STOLZ

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.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS

Note: A long brief is filed, rather than three separate briefs, opposing the three motions before the Court.

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I. STATEMENT OF THE CASE

The statement of facts is in support of Plaintiff's opposition to motion for partial summary judgment to dismiss: 1) Defendants Philip Arreola, David Brame, and Raymond Roberts; 2) Plaintiff's Age Discrimination Claim; 3) Plaintiff's claim of retaliation; 4) Plaintiff's Disability Discrimination Claim; and 5) Plaintiff's Tort of Outrage claim. **Note: #4 and #5 are set for hearing on January 3, 2003.**

In order to appreciate the gravity of the circumstances and egregiousness of the conduct inflicted on the plaintiff, Joseph Kirby, it is crucial to view the facts in their totality as opposed to viewing facts in isolation and out of context.

Joseph Kirby is a 55-year-old man working in the Tacoma Police Department (TPD) as a police lieutenant. *Declaration of Joseph Kirby*. Mr. Kirby has, throughout his years of service, received scores of awards, commendations, and "outstanding" evaluations. In addition, Mr. Kirby has recently received supervision and management certifications from the Washington State Criminal Justice Training Commission.

Although Mr. Kirby had placed #1 in the civil service captain's list and was temporary captain for 6 months, he was passed over for a promotion twice. In TPD history, prior to his promotion denials, there had never been a lieutenant passed over for a promotion who was #1 on the civil service captain's list. *Id.*

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In the TPD, all decisions affecting the officers are the responsibility of the command staff. *Id.* The command staff is comprised of the chief and three assistant chiefs. The command structure is such that where the chief is an ineffective or weak leader, greater responsibility and authority falls upon the assistant chiefs. Under Chief Arreola, authority was monopolized and often abused. Accordingly, the assistant chiefs did not take a significant role in the decisions. *Id.*

Under Hairston, who was regarded as being a weaker leader, the assistant chiefs had pivotal roles. *Id.* The assistant chiefs under Hairston included defendants Roberts and Brame. Thus, from 10-1-96, when Arreola started, through 1-14-02, when Hairston finished, the three pivotal figures with authority included the three named defendants, Arreola, Brame, and Roberts. *Id.*

Throughout this period, Joseph Kirby, the plaintiff herein, has been an active union advocate and an executive union officer for his fellow police officers. *Declaration of Joseph Kirby.* Mr. Kirby often criticized the TPD and spoke out against several TPD practices that affected his fellow officers and the public. The command staff of the TPD have on several occasions retaliated against Mr. Kirby for speaking out against TPD practices and in his role as a union officer. *Id.*

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The TPD command staff has retaliated against Mr. Kirby by applying disparate treatment. Captain Meinema commented on the disparate treatment, saying, "I've observed disparate treatment of Joe Kirby for the last four years." *Deposition of Charles Meinema* 43:11-12. Retaliation also took the form of unnecessary and repeated initiation of psychiatric examinations, initiation of internal affairs investigations, removal from leadership positions in special units, and two promotion denials. See *Declaration of Joseph Kirby.*

Most of the internal affairs investigations were initiated without any first hand knowledge and without any factual confirmation. *Deposition of Charles Meinema* 28:21-25 - 29:8 and 29:16-24. The psychiatric examinations were repeatedly initiated even though Mr. Kirby had, at the time, had a perfect evaluation from his own physician. *Id.*

Captain Charles Meinema, who had observed the various disciplinary processes and evaluations, regarded their initiation unjustified. *Meinema* at 19:13-23; 43:21-24; 45:10-12; 53:3-11. Captain Meinema was, for a substantial period of time prior to Arreola, a part of the command staff and thus intimately aware of the proper procedure in the department. *Declaration of Joseph Kirby; Deposition of Charles Meinema* 4:25 -5:1-8.

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The retaliation was also in response to Mr. Kirby's disability and age. Both Captain Meinema and Joseph Kirby's testimony suggest that the command staff had a policy of removing older officers, referring to them as the "old guard." *Declaration of Joseph Kirby; Deposition of Charles Meinema* 62:12-18. Moreover, Arreola was heard saying, "Now if I can just get some of these grey-haired old captains to leave..." *Id.* Both Captain Meinema and Joseph Kirby's testimony substantiate that the proceedings and disciplinary action taken against Mr. Kirby were motivated by his union activity, his disability, and his age. At the very least, a jury could make such a reasonable inference. Furthermore, due to the extensive factual overlap, the precise extent to which proceedings and disciplinary action was motivated by his speaking out in his union role, his disability, and his age, must be determined by a jury.

II. ISSUES PRESENTED

1. Must the Court deny defendants' motion for partial summary judgment to dismiss when genuine issues of material fact exist as to whether the defendants wrongfully retaliated against the plaintiff for asserting his First Amendment rights?

2. Must the Court deny defendants' motion for partial summary judgment to dismiss when genuine issues of material

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fact exist as to whether the defendants discriminated against the plaintiff because of his disability?

3. Must the Court deny defendants' motion for partial summary judgment to dismiss when genuine issues of material fact exist as to whether the defendant's conduct was a tortious infliction of emotional distress?

4. Must the Court deny defendants' motion for partial summary judgment to dismiss Philip Arreola, David Brame, and Raymond Roberts when genuine issues of material fact exist as to whether each are responsible for Plaintiff's claims?

III. EVIDENCE RELIED UPON

1. Declaration of John L. Messina;
2. Defendant's Motion for Summary Judgment;
3. Deposition of Captain Charles Meinema;
4. Deposition of Joseph Kirby;
5. Declaration of Joseph Kirby;
6. Declaration of Philip G. Lindsay, M.D.;
7. Declaration of D. P. Van Blaricom; and
8. Supplemental Declaration of John L. Messina.

IV. LAW AND ARGUMENT

A. Law of Summary Judgment

Summary judgment is designed to do away with useless trials on formal issues which can not be factually supported,

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or, if factually supported, could not in law lead to a result favorable to the opposing party. **It may not be used to displace a trial on the facts where there is a genuine issue of fact.** *Fahn v. Cowlitz County*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980), *appeal after remand*, 95 Wn.2d 679, 628 P.2d 813 (1981) (emphasis added). On a motion for summary judgment the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980).

All facts and reasonable inferences must be construed in favor of the non-moving party in summary judgment. *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985). Summary judgment should not be used to deprive the litigants of their right to a full hearing and must be temperately and cautiously used. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 929 P.2d 1260 (1997). An affidavit containing expert opinion on an ultimate issue of fact is sufficient to preclude summary judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412-413, 553 P.2d 106 (1976).

The cause in fact is a question generally left to the jury, and such questions of fact are not appropriately determined on summary judgment unless but one reasonable

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conclusion is possible. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

This Court should deny the Defendant's Motion for Partial Summary Judgment to dismiss because there exist genuine issues of material fact as to whether the Defendants are liable.

B. There Exist Genuine Issues of Material Fact as to the Violation of Plaintiff's First Amendment Rights.

1. Constitutional claims under the first amendment are not subject to the jurisdiction of PERC.

Although Washington generally requires that a party exhaust all available administrative remedies prior to suit in Superior Court, some claims do not necessitate an initial administrative proceeding. *Smith v. Bates Technical College, et al*, 139 Wn.2d 793, 991 P.2d 1135 (2002).

The court in *Smith* noted that PERC "is simply empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders." *Smith* at 810. PERC's authority is limited to RCW 41.56. RCW 41.56. Accordingly, the plaintiff in *Smith*, who had asserted a Constitutional claim, was not subject to the exhaustion requirement. *Smith* at 811-816. Similarly, in the case at hand, the Plaintiff's constitutional claim under § 1983 is not subject to administrative exhaustion.

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2. Summary Judgment is not appropriate as there are genuine issues of material fact as to whether the defendants wrongfully retaliated and harassed in violation of Plaintiff's First Amendment rights.

Under 42 U.S.C. § 1983, a public employee may state a cause of action for discharge or other discipline resulting from exercise of rights guaranteed under the First Amendment. *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000). The employee must show that 1) the conduct that triggered the discipline was protected under the First Amendment, and 2) the protected conduct was a substantial or motivating factor in the adverse employment decision. *Id.* The expressive conduct constituting the speech, must involve a matter of public concern rather than of personal interest. *Id.* If the speech involves a matter of public concern, the court then must balance the employee's interest in exercising his or her rights to freedom of speech against the interest of the state.

(a) Genuine issues of material fact as to whether Mr. Kirby's speech was of public concern and entitled to First amendment protection.

Mr. Kirby is an executive board officer of the police officers union in the TPD. *Deposition of Joseph Kirby* 41:22 - 42:4. The position entails advocacy for the rights of 400 officers. *Id.* Mr. Kirby would address the issues and problems

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of his fellow officers and would bring them to the full board. *Id.* Joseph Kirby's only fault was that he was a good cop, concerned for his fellow officers.

There is substantial evidence of the "public" nature of Mr. Kirby's protected speech. In *Smith*, where the court upheld the dismissal of the plaintiff's First Amendment claims, the speech involved only "purely private matters." *Smith* at 813. On the other hand, in our case, Joseph Kirby's speech was a criticism of the Tacoma Police Department's inappropriate use of police authority and power in relation to his fellow officers and the public. Joseph Kirby's freedom of association in union activity and outspoken criticism sought to protect the interests of *all* officers and not just his own interests. Additionally, Joseph Kirby had wanted to provide information to the public concerning Chief Arreola's abuses of power. Matters that involve the public or other officers are not "purely private." Joseph Kirby's speech clearly involves a matter of "public concern" since as Captain Charles Meinema noted, "[Joseph Kirby] is concerned with what he does. He is very, very concerned for the sake of his troops. And where he has erred in the past, its usually been on behalf of his troops, I mean, going to their defense." *Deposition of Charles Meinema* 82:11-16.

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Viewed in a light most favorable to the nonmoving party, a jury could draw a reasonable inference that the speech involved a matter of public concern.

(b) Genuine issues of material fact as to whether Mr. Kirby's speech was a substantial or motivating factor in the adverse employment decisions.

In Mr. Kirby's deposition, he details how his criticism of TPD and union advocacy were motivating factors in the various adverse employment decisions taken against him. *Deposition of Joseph Kirby* at 45:1-19. "...in my union advocacy role...I inquired in an open forum -- which at the time we were permitted to do -- that there was a great concern in Local 6 about not only the disparity of discipline but the length of time that it took to administer the discipline...I brought up that question in a staff meeting ...and that degenerated; he [Arreola] told me to stand down and threatened to terminate my employment because I had the audacity to challenge him...after that my relationship with Arreola deteriorated..." *Kirby* at 45:1 - 46:3.

On another occasion, Mr. Kirby brought up an issue of officer safety with regard to warrant service and potential TPD liability issues. *Declaration of Joseph Kirby*. In response, Phillip Arreola seized Mr. Kirby's email account and initiated

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a warrantless search of his emails, which is prohibited by TPD policy. *Id.*

Another time, Mr. Kirby brought up the issue of disparate treatment and discipline and the length of time it took to administer the discipline at a staff meeting. *Id.* Arreola then threatened to terminate Mr. Kirby's employment because he had the audacity to challenge him. *Id.*

On yet another occasion, Mr. Kirby came forward with information regarding a TPD officer named James Walker, who was allegedly bribing a complaining citizen with Seakawk tickets in exchange for her silence regarding a stalking charge against a fellow officer. *Id.* After doing so, Mr. Kirby was subjected to investigation proceedings and counseling. *Id.*

The immediate negative response from the command staff to Mr. Kirby's exercise of free speech and freedom of association establishes, and at the very least creates a reasonable inference that, the adverse employment decisions and disparate treatment were substantially motivated by his outspoken criticism of the TPD.

In Captain Meinema's deposition, he states, "I think a lot of decisions about Joe Kirby have been involved with his advocacy work or his work as a member of the executive board." *Meinema* at 54:17-19.

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The plaintiffs have provided substantial evidence of adverse employment decisions and disparate treatment resulting from Mr. Kirby's exercise of free speech, association, and union advocacy. See *Declaration of Joseph Kirby*. A jury could draw the reasonable inference that Mr. Kirby's exercise of such rights was the motivating factor behind all the adverse employment decisions.

(c) Genuine issues of material fact as to whether Mr. Kirby's freedom of speech outweighs any State interest.

Not only do Joseph Kirby's speech and union association involve a matter of public concern, it also outweighs any state interest in promoting efficiency. The dysfunction and mistreatment in the department was egregious and directly affected an important public service. Although the state has an interest in promoting efficiency of the public service it performs, this interest is outweighed by Joseph Kirby's interest in freedom of speech and association since the systematic dysfunction and abuses in the Department affect a vast portion of the population and the efficiency of the public service itself. It would be counterintuitive to conclude that speech which unveils an inefficiency of a Department is outweighed by the state interest in promoting the efficiency of that Department.

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In opposing summary judgment, the plaintiffs need only establish that a reasonable inference could be derived from the facts. The abundance of evidence, both from Captain Meinema and Mr. Kirby, could permit a jury to draw a reasonable inference that the defendants retaliated in response to Mr. Kirby's protected speech and that any State interest is substantially outweighed.

C. Plaintiffs Have Established a Prima Facie Case of Discrimination.

For a claim of disability discrimination, the plaintiffs must establish a prima facie case of discrimination with evidence of the following: 1) that an adverse employment decision was made by the employer; 2) that the plaintiff is disabled; and 3) that the disability was a substantial factor in the adverse employment decision. *Bass v. City of Tacoma*, 90 Wn. App. 681, 953 P.2d 129 (1998). To establish a prima facie case of age discrimination, the plaintiff must show that: 1) plaintiff was in a protected age group (over 40 years); 2) plaintiff was qualified for the position sought; 3) plaintiff was not promoted and 4) individuals substantially younger were promoted. *See Cory v. Smithkline Beckman Corp.*, 585 F.Supp. 871, 874 (Pa.D. 1984); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 310-311 (1996); *Corp. v. Green*, 411 U.S. 492, 802 (1973); *See Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406,

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1409 (9th Cir. 1996); *See Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988). The facts, viewed in a light most favorable to the plaintiffs, establishes a prima facie case of liability for disability discrimination.

Moreover, the Ninth Circuit Court of Appeals in *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406 (9th Cir. 1996) set a high standard for the granting of summary judgment in employment discrimination cases. That court explained, "**we require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a 'searching inquiry'** - one that is most appropriately conducted by the factfinder, upon a full record." *Id.* (*citing Lam v. University of Hawaii* 40 F.3d 1551, 1563 (9th Cir. 1994) (emphasis added).

1. Disability discrimination

(a) Summary judgment is not appropriate as there are genuine issues of material fact as to whether an employment decision adverse to the plaintiff was made by Philip Arreola, David Brame and Raymond Roberts.

Although Joseph Kirby has not been discharged, for the purposes of establishing an adverse employment decision it is not necessary to show that employment has been terminated. *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (2002). Proof that the Plaintiff has been passed over for a

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promotion is sufficient to establish an adverse employment decision. *Kuest* at 44.

Woodward and Langford were appointed to Captain even though Mr. Kirby placed first on the civil service captain's list. No other officer who had placed first has ever been passed over for a promotion. *Deposition of Charles Meinema* 5:25 - 6:20, 7:8-13. Mr. Kirby has been passed over for promotion twice. *Declaration of Joseph Kirby*. Mr. Kirby has received numerous awards, commendations, and certifications by the TPD and the State of Washington. *Id.* Moreover, Captain Charles Meinema testified in his deposition that Mr. Kirby exceeded the competency of Woodward and Langford. *Deposition of Charles Meinema*, 7:14-8:12; 21:12-25. Captain Meinema's deposition provides evidence of Mr. Kirby's denied promotion. At the very least, a reasonable jury could draw the inference that appointing less competent officers where Mr. Kirby had placed No. 1 on the civil service captain's list suggests that Mr. Kirby was passed over for a promotion.

Additionally, Arreola, Brame, and Roberts each unjustifiably decided to initiate Internal Affairs (IA) Investigations against Kirby. *Meinema* at 26:8-27:3. An individual who is sent to IA typically has committed a substantial infraction since the discipline may involve economic sanctions. Captain Meinema

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testified that issues which do not rise to the level of economic sanction are generally handled within the bureau. *Deposition of Charles Meinema* at 25:3-17. Mr. Kirby was subjected to IA investigations repeatedly and in some cases the investigations would drag on indefinitely. *Id* at 24:1-25:2. "...it seems that whenever Joe Kirby has any kind of disagreement with a superior, the matter gets referred to IA..." *Id* at 25:18-20.

The instigation of the IA disciplinary process is an employment decision adverse to the plaintiff since the discipline itself, which may result in economic sanctions, is adverse to Mr. Kirby. *Deposition of Charles Meinema* 25:9-13. At the very least, a jury could draw a reasonable inference that being repeatedly subjected to unjustified disciplinary processes is adverse to the plaintiff and that the disciplinary processes resulted from an employment decision.

Mr. Kirby was also unjustifiably removed as team commander from the clandestine lab team (CLT). Although Brame was notified of the removal and advised that Mr. Kirby was removed for his affiliation with another unit and that Lieutenant Ramsdell was kept on the CLT with the same affiliation, the removal was sustained. *Meinema* at 46:18-47:21. Removal from the CLT was an employment decision which was adverse to the plaintiff. At the very least, a jury could draw the reasonable

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inference that the unjustified removal of Mr. Kirby as team commander from CLT was adverse to the plaintiff and that the removal resulted from an employment decision.

Mr. Kirby was also unjustifiably disciplined and counseled for telling a secretary who had been transferred that he (Kirby), "wouldn't have made that move." *Meinema* at 27:18-28:11. Roberts compelled Mr. Kirby to attend counseling even though Roberts had taken no witness statements to confirm the allegations, a procedure which was promised to Mr. Kirby and a part of departmental policy. *Id* at 28:21-29:8 and 30:7-10. Subjecting Mr. Kirby to unjustified counseling sessions are adverse employment decisions. At the very least, a jury could draw a reasonable inference that the employment decision to submit Mr. Kirby to counseling is adverse to the plaintiff since it is a compelled process and is not a favorable recommendation.

Furthermore, Mr. Kirby has been subjected to countless psychiatric examinations for petty, inappropriate, and unjustified reasons. Captain Meinema stated in his deposition that these examinations were "unpleasant and unnecessary." *Meinema* at 44:3-45:12. The employment decision to subject Mr. Kirby to numerous unpleasant psychiatric examinations is clearly adverse to the plaintiff. At the very least, a jury could draw

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the reasonable inference that the employment decision to compel unnecessary psychiatric examinations was adverse to the plaintiff.

There is also evidence the Arreola initiated a warrantless search of Mr. Kirby's e-mail in response to Mr. Kirby's inquiry as to the warrant process for the Special Investigations Division, which deals with narcotics. Mr. Kirby made the inquiry since he "thought the department might suffer liability or...lose another officer." In doing that, Mr. Kirby "fell out of favor with Phil [Arreola] and he decided to fish around in my electronic messages..." *Deposition of Joseph Kirby* at 51:18:52:21. Arreola's decision to search Mr. Kirby's e-mail, without a warrant, was an invasion of his rights and adverse to the Plaintiff. At the very least, a jury could draw a reasonable inference that the warrantless search was an adverse employment decision.

In opposing summary judgment, plaintiffs need only establish that in a light most favorable to the nonmoving party, a jury could draw a reasonable inference of an adverse employment decision. The pattern of unjustified disciplinary proceedings could lead a jury to infer the employment decisions were adverse. Moreover, the plaintiffs have provided proof of

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Mr. Kirby's denied promotion. This evidence undoubtedly establishes an adverse employment decision. *Kuest* at 44.

(b) Summary Judgment is not appropriate as there are genuine issues of material fact as to whether the plaintiff was disabled.

Although the defendants have not contested that Mr. Kirby is disabled, there is substantial documented evidence of Mr. Kirby's disability. In *Bass*, the court defined the definition of "disability" as an "abnormal condition." *Bass* at 688 (FN 24). To establish a disability, the abnormal condition must be "medically cognizable" and "diagnosable." *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993). Mr. Kirby has been medically diagnosed with stress disorder. *Deposition of Joseph Kirby* 19:23 - 20:1-22. There is no dispute as to this fact. Although the evidence conclusively establishes a disability, the plaintiffs need only establish that a jury could draw the reasonable inference of a disability.

(c) Summary judgment is not appropriate as there are genuine issues of material fact as to whether the plaintiff's disability was a substantial factor in the employer's adverse decision.

"Direct, 'smoking gun' evidence of discriminatory animus is rare, since there will seldom be eyewitness testimony as to the employer's mental processes and employers infrequently announce their bad motives orally or in writing. Consequently,

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it would be improper to require every plaintiff to produce direct evidence of discriminatory intent." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2001). Accordingly, the Supreme Court has stressed that "circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden." *Hill* at 180. (Emphasis added) Whether plaintiff's disability was a substantial factor in discrimination is a question of fact. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618 (1996).

As listed above, several adverse employment decisions have been made against Mr. Kirby, *supra*. Moreover, Captain Meinema has testified in his deposition that Mr. Kirby has been singled out and has had action taken against him which was in deviation from departmental policy or tradition. *Deposition of Charles Meinema* 5:25 - 6:1; 19:13-23; 43:21-24; 45:10-12; 53:3-11. Mr. Kirby has testified as to the reasons for the adverse employment decisions. *Deposition of Joseph Kirby* 21:8-19.

> "...a lot of decisions were made on the basis of those defendants with either an ignorance or an improper appreciation for what that disability actually entailed ...I think in retrospect when I review in my mind the way I was treated, I believe that a lot of folks thought that the police culture was that if you were disabled at all for any kind of a stress injury or mental injury, you were damaged goods." *Id.*
>
> "[Question] You talk about other decisions you believe were made based on your disability. What decisions are you talking about?
>
> [Answer] They removed me from the clandestine lab team where I served for six or seven years, where I

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> was completely qualified. I was a lieutenant, they removed me. I was actually the team commander. And they told me the removal was because I was a lieutenant and I was not on the SID. Subsequent to that, they allowed Lieutenant Ramsdell to remain affiliated with the team as a lieutenant while not assigned to SID....they were applying different standards to me." *Deposition of Joseph Kirby* 22:5-21. *** "...there's a general pattern of treatment ...[which became] more pronounced after I was diagnosed with a stress disability." *Deposition of Joseph Kirby* 25:16-20. (Emphasis added)

The fact that Mr. Kirby was both singled out and subjected to unjustified adverse employment decisions and disparate treatment, treatment that increased after being diagnosed with the disability, substantiates that the adverse employment decisions substantially motivated by his disability. *Id.* Viewed in a light most favorably to the plaintiff, a jury could draw a reasonable inference that the disability was a substantial factor in the adverse employment decisions.

2. Age discrimination

In *Cory v. Smithkline Beckman Corp.*, 585 F.Supp. 871, 874 (Pa.D. 1984), plaintiff had presented evidence that at least twice within the statutory period, and after she turned 40 years of age, she applied for a promotion to a position for which she was qualified; in each case she was rejected.

Although the only evidence plaintiff presented to support her discrimination claim stemmed from her own testimony, the Pennsylvania district court held that such evidence was

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admissible since it was within her realm of knowledge. *Cory*, 585 F.Supp. at 874.

Similar to Cory, plaintiff Kirby was also passed over for the captain's promotion twice in favor of Officers Langford and Woodward, who were both at least seven years younger than him. There is a reasonable inference of age discrimination since Kirby was passed over even though he placed number one on the civil service exam, which reveals that he was qualified for that position.

Although the Tacoma Police Department (TPD) has now made it a practice to pass over candidates who place first on the captain's exam - before plaintiff Kirby, such a practice was unheard of. Plaintiff Kirby was, if not the first, within a very small minority of TPD lieutenants who placed number one on the captain's list and was nevertheless denied a promotion.

One difference between *Cory v. Smithkline Beckman Corp.* and plaintiff Kirby's discrimination claim is that plaintiff Kirby's claim stems from both his own testimony, and the testimony of Captain Meinema, which creates a stronger prima facie case of discrimination than in *Cory (which relied on Cory's testimony alone to support her discrimination claim)*.

Accordingly, plaintiff Kirby has satisfied all the factors as set forth in *Cory* to establish a prima facie case of discrimination: (1) plaintiff Kirby was in a protected age group

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(over 40 years) when he sought the promotion; (2) plaintiff was qualified for the captain's position since he placed first on the civil service captain's exam; (3) plaintiff was not promoted to captain and (4) individuals significantly younger, officers Langford and Woodard, were promoted. *Cory* at 874; See Also *Hill v. BTCI Income Fund-I*, 144 Wn.2d 172 (2001).

Since plaintiff Kirby has carried his burden in making out a prima facie case of discrimination, defendant's summary judgment motion must be denied.

Additionally, Captain Meinema and Joseph Kirby's testimony suggests that the command staff had a policy of removing older officers, referring to them as the "old guard." *Declaration of Joseph Kirby; Deposition of Charles Meinema* 62:12-18. Arreola was heard saying "Now if I can just get some of these grey-haired old captains to leave..." *Id.* This evidence, in conjunction with Mr. Kirby having been passed over for a promotion for younger applicants, presents issues of fact since a jury could make the reasonable inference that the Plaintiff's age was the basis for the denied promotions.

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D. Once the Plaintiff Establishes a Prima Facie Case, the Burden Shifts to the Defendants to Provide Evidence of a Legitimate Nondiscriminatory Reason for the Adverse Employment Decision.

1. The defendants have failed to articulate a legitimate nondiscriminatory reason as a matter of law.

Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). If the defendant fails to meet the burden, the plaintiff is entitled to an order establishing liability as a matter of law. *Hill v. BTCI Income Fund-I*, 144 Wn.2d 172, 181 (2001). The defendant has not presented any evidence of a "legitimate, nondiscriminatory reason" for the adverse employment decisions. Due to the complete failure of proof on this issue, the defendant has not satisfied the burden of proof as a matter of law.

2. Assuming there was a proffered reason, such reasons are a mere pretext.

If this court were to draw an inference of a "legitimate nondiscriminatory reason," even though the inference alone cannot provide a basis to grant summary judgment, the Plaintiffs may show that these reasons are mere pretext. *Lowe*

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v. City of Monroe, 775 F.2d 998 (1985); *C.P.L. LLC v. Conley*, 110 Wn. App. 786 (2002).

There can be no doubt that the alleged reasons for initiation of each proceeding and action against Mr. Kirby is a mere pretext since the totality of the facts shows that these proceedings were grossly disproportionate to the alleged infraction. The imbalance between the alleged infraction and the punishment permits a reasonable inference of pretext.

More importantly, it is not necessary for the plaintiffs to establish that the adverse actions taken against Mr. Kirby were solely based on a discriminatory purpose. *See* WPI 330.01. Although the defendants may allege that Mr. Kirby had in fact committed the alleged infraction, this does not explain the disproportionate disciplinary and investigatory proceedings that were initiated. Additionally, the disparate treatment, hitherto discussed, further establishes that the proceedings against Mr. Kirby were a mere pretext since others similarly situated had no actions taken against them. At the very least, the disproportionate nature of the actions taken against Mr. Kirby and the disparate treatment of Mr. Kirby, raises factual issues that must be addressed by a jury since a reasonable inference of pretext can be drawn.

Furthermore, there is clear and conclusive evidence of pretext. As to Age Discrimination, there is evidence that the

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command staff was trying to get rid of what was called the "old guard." *Declaration of Joseph Kirby.* In fact, Arreola was heard saying, "Now if I can just get some of these grey-haired old captains to leave..." *Id; Deposition of Charles Meinema* 62:12-14.

As to disability discrimination, there is also clear and conclusive evidence of pretext. In an administrative report, addressed to Captain Charles Meinema, there is specific mention of Mr. Kirby disability leave having been the reason for Mr. Kirby's removal from the Clandestine Lab Team (CLT). In reference to the command's decision to remove Mr. Kirby from the CLT, and Captain Meinema's decision to allow Mr. Kirby an opportunity to get back on the CLT, the command writes, "[t]his issue [referring Mr. Kirby's disability] calls into question your decision in allowing Lt. Kirby to report for duty for the Meth Team interview." *Deposition of Charles Meinema,* Exhibit 2, attached to the Supplemental Declaration of John L. Messina. Any legitimate and nondiscriminatory reasons given for Mr. Kirby's removal from the CLT, in light of this evidence, is pretext. Moreover, Mr. Kirby's deposition states that the disparate treatment and harassment increased after he was diagnosed with a disability.

At the very least, reasonable inferences of pretext can be drawn from the facts. Where more than one inference can

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be drawn, the questions of fact cannot be determined on summary judgment.

E. Tort of Outrage.

1. The plaintiffs may recover under a claim of Outrage in addition to claims of discrimination and First Amendment violations.

The defendant correctly notes that damages for mental or emotional distress are recognized under the theory of assault or outrage but not both. *Rice v. Janovich*, 109 Wn.2d 48 (1987). However, the plaintiffs do not assert a claim of assault nor do the plaintiffs assert any similar claim. The reason for not permitting recovery under both assault and the tort of outrage is that an assault claim encompasses a claim for Outrage. *Bankhead v. Tacoma*, 23 Wn. App. 631 (1979). Thus damages for emotional distress are awarded as part of assault damages. *Id.* Although the tort of Outrage may not be asserted with other tort remedies "such as assault, battery, ...or the like," the Plaintiffs are asserting claims of discrimination and civil rights violations that are separate and distinct from the tort of Outrage. *Rice* at 62.

Moreover, the Supreme Court of Washington has recognized that damages for intentional infliction of emotional distress may be recovered in addition to claims of discrimination. *Browning v. Slenderella Systems of Seattle*, 54 Wn.2d 440

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(1959) *overruled on other grounds, Nord v. Shoreline Sav. Assn.* 116 Wn.2d 477 (1991).

2. There exist genuine issues of material fact as to the tort of Outrage.

The tort of outrage is not subject to PERC. *Smith* at 810. The tort of outrage or intentional infliction of emotional distress has long been recognized in Washington. *Rice* at 61. To state a claim for the tort of outrage a plaintiff must show: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Snyder v. Medical Services Corp. of Eastern WA.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). The question of whether conduct is sufficiently outrageous to warrant recovery is generally a question of fact for the jury. *Id.* Factors considered in the determination of outrageous conduct are as follows: 1) the position of the defendant; 2) whether the plaintiff was particularly susceptible to emotional distress, and if the defendant knew this fact; 3)whether the defendant's conduct was privileged; 4) whether degree of emotional distress was severe; 5) whether the actor was aware of a high probability that conduct would cause severe emotional distress and proceeded in conscious disregard of it. *Id.*

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The position of the defendants- The defendants were each part of the TPD command structure that is responsible for the safety of officers. *Declaration of Joseph Kirby*. They are in the position to direct departmental policy for the benefit of the officers, as well as the public. *Id*. The position of the defendant is such that improper and abusive exercise of authority may result in unsafe conditions for the officers in the field.

Defendant's knowledge of Plaintiff's particular susceptibility- Additionally, the defendants knew about the plaintiff's disability. *Deposition of Joseph Kirby* 25:16-20. In fact, the disability was documented in interdepartmental memos. Exhibit 2 attached to the *Deposition of Charles Meinema*. In addition, Mr. Kirby's best friend was killed by gunfire in the line of duty, which gave rise to his post-traumatic stress disorder, facts known to the command staff. *Deposition of Philip Lindsay* 11:2-5; 12:2-13 and See *Deposition of Charles Meinema* 100:15 - 102:21. Any reasonable individual would know that such a traumatic experience would make Mr. Kirby more susceptible to emotional harm.

Conscious disregard of high probability of emotional harm- Although the defendants knew about Mr. Kirby's emotional condition, they consciously disregarded it by imposing the hitherto mentioned proceedings and evaluations; proceedings

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and evaluations which were unjustified, unnecessary, and knowingly frivolous. There can be no question that Mr. Kirby was in a known vulnerable state after his diagnosis and that instigating vengeful and unnecessary proceedings against him would lead to severe emotional distress. Systematic punishment, harassment, and retaliation, instigated by various members of the command staff, where the recipient has suffered the death of close friend, is outrageous conduct. At the very least, a jury could draw a reasonable inference that the defendant's conduct, seen as a whole, was outrageous and recklessly inflicted upon the plaintiff.

Furthermore, Captain Meinema, who had observed the emotional impact of unjustified proceedings on Mr. Kirby, commented as follows:

> Being under the gun is in and of itself a punishment. If I could suspend you for ten days, but instead I fire you, yes, the civil service board will give you your job back, but in the interim, you will have to hire an attorney. You'll have to worry about mortgage payments, losing your home, getting an extra job...[you have] all that additional stress, strain, concern, fear for your family, your job and the lost monies you will never recoup from attorney's fees... *Deposition of Charles Meinema* at 115:10-22.

Severe emotional damages- As to the last element of the claim, the plaintiff need only present evidence that the plaintiff has suffered *actual* damages, as opposed to conjecture or speculation. See *Snyder* at 242. Mr. Kirby has

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been diagnosed with various degrees of mental disability, from "anxiety disorder" to "major depressive disorder." *Declaration of Philip Lindsay.*

Furthermore, Dr. Lindsay opines that "the major depressive disorder was and is a direct result of workplace stressors...His work related conditions developed within days or weeks following the triggering factors. *Id.*

Although the plaintiffs need only establish that the facts create a reasonable inference of Outrage, cases far less egregious than the case at bar has satisfied a judgment on a claim of outrage. *Phillips v. Hardwick*, 29 Wn. App. 382 (1981). In *Phillips*, the plaintiff entered into an agreement to purchase the home of the defendant. Possession was to occur on or before 11-21-1997. Defendant later advised the plaintiff that the home would not be completed until 11-25 and that he would agree to pay a rental fee and vacate on 12-1. On 11-30, the defendant advised the plaintiff he would not vacate and when the plaintiff arrived on 12-4 to enter the premises the defendant insisted he would not vacate. The trial court entered judgment for the plaintiff on his claim of Outrage and the Court of Appeals affirmed this ruling, holding that substantial evidence supported the trial court's findings.

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In the case at hand, the facts are significantly more egregious than those in *Phillips*, since the Mr. Kirby was subject to systematic harassment and disparate treatment for years. The extensive list of actions taken against Mr. Kirby, cited in the record, in addition to Mr. Kirby's known vulnerable condition after his best friend's death, clearly surpasses the conduct found to be outrageous in *Phillips*.

With the facts viewed in a light most favorably to the plaintiffs, a jury could make the reasonable inference that the defendant's outrageous conduct was recklessly inflicted on Mr. Kirby, causing severe emotional damage.

V. CONCLUSION

A court may only grant summary judgment when the factual scenario does not support the issues or claims presented by the non-moving party. In this case, summary judgment is not proper since the facts establish Plaintiff's claims or at the very least provide genuine issues for trial.

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