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PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, 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,

No. 99-2-13911-4

Plaintiffs,

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

v.

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

NOTED FOR:  
January 10, 2003

ASSIGNED:  
Judge Katherine M. Stolz

Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFS'  
MOTION FOR SJ REGARDING PLAINTIFF'S  
CLAIM OF INTENTIONAL INFLICTION OF  
EMOTION DISTRESS - 1

**ORIGINAL**

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1       **I. Plaintiff has other remedies available, thus, his claim of intentional**  
2       **infliction of emotional distress is entitled to dismissal.**

3           Plaintiff misunderstands defendants' argument concerning the  
4       unavailability of identical relief under multiple theories of recovery and the  
5       relevant case law. Contrary to plaintiff's view, defendants are not claiming that  
6       Kirby is alleging assault. The tort of assault was merely an illustrative example  
7       of this general principle. As stated in defendants' original summary judgment  
8       motion, the Washington Supreme Court has stated that one can recover for  
9       intentional infliction of emotional distress (outrage) only in the absence of any  
10      other tort remedy. Rice v. Janovich, 109 Wn.2d 48, 62, 742 P.2d 1230 (1987);  
11      Rest. (2nd) of Torts § 46, comment *b* at 72 (1965) ("[T]his Section has been  
12      fully recognized as a separate and distinct basis of tort liability, without the  
13      presence of the elements necessary to any other tort, *such as* assault, battery,  
14      false imprisonment, trespass to land, or the like."). (Emphasis added.) The  
15      purpose of this rule is to prevent plaintiffs from seeking identical relief under  
16      multiple theories of recovery that are based on the identical, operative facts.  
17      Weathers v. American Family Mutual Insurance Company, 793 F.Supp. 1002,  
18      1008 (D. Kansas 1992); see e.g. Rice v. Janovich, 109 Wn.2d 48, 742 P.2d  
19      1230, 1238 (1987) (holding that plaintiff who recovered civil damages under  
20      assault theory could not also recover damages arising from tort of outrage in  
21      connection with the same conduct); Stewart v. Thomas, 538 F.Supp. 891, 896-  
22      97 (D.C.Cir.1982) (holding that plaintiff's claim of intentional infliction of  
23      emotional distress was subsumed by plaintiff's Title VII claim); Wood v. Hustler

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26      REPLY MEMORANDUM IN SUPPORT OF DEFS'  
    MOTION FOR SJ REGARDING PLAINTIFF'S  
    CLAIM OF INTENTIONAL INFLECTION OF  
    EMOTION DISTRESS - 2

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1 Magazine, Inc., 736 F.2d 1084, 1089-92 (5th Cir.1984) (holding that, under  
 2 Texas law, plaintiff whose privacy has been invaded can have only one  
 3 recovery if alternative causes of action contain identical elements of damages  
 4 flowing from the same publication), *cert. denied*, 469 U.S. 1107, 105 S.Ct. 783,  
 5 83 L.Ed.2d 777 (1985); Braun v. Flynt, 726 F.2d 245, 251 (5th Cir.1984)  
 6 (holding that plaintiff could not recover for the same embarrassment and  
 7 humiliation caused by the publication of her photograph in a magazine under  
 8 both defamation and invasion of privacy theories), *cert. denied*, 469 U.S. 883,  
 9 105 S.Ct. 252, 83 L.Ed.2d 189 (1984); Jonap v. Silver, 1 Conn. App. 550, 474  
 10 A.2d 800, 807 (1984) (holding that separate verdicts for both invasion of  
 11 privacy by appropriation and invasion of privacy by false light amounted to an  
 12 improper duplication of damages where the wrong complained of by the  
 13 plaintiff constituted a single transaction); Munsell v. Ideal Food Stores, 208  
 14 Kan. 909, 494 P.2d 1063, 1075 (1972) (holding that claims for invasion of right  
 15 of privacy and for libel and slander arose from the same alleged wrongful act  
 16 on the part of the defendant).

17  
 18 The same principle applies when the alternate theory for recovery is one  
 19 for discrimination. In Anaya v. Graham, plaintiff sued for disability  
 20 discrimination, negligence, and outrage. Anaya v. Graham, 89 Wn. App. 588,  
 21 950 P.2d 16 (1998). The Washington State Court of Appeals, in dismissing  
 22 plaintiff's outrage claim, held that since the claim of outrage presupposed that  
 23 plaintiff's termination violated public policy, the outrage claim duplicated the  
 24 discrimination claim. *Id.* at 597. The court reasoned that if the plaintiff  
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26 REPLY MEMORANDUM IN SUPPORT OF DEFS'  
 MOTION FOR SJ REGARDING PLAINTIFF'S  
 CLAIM OF INTENTIONAL INFLICTION OF  
 EMOTION DISTRESS - 3

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1 succeeded in her discrimination claim, she would be able to obtain emotional  
2 distress damages. Id.

3 Contrary to his claim, Kirby's allegations of discrimination and civil rights  
4 violations are not "separate and distinct from the tort of outrage," but rather  
5 duplicative of that claim. For example, as part of his claim of outrage, Kirby  
6 alleges that defendants consciously disregarded the high probability of  
7 emotional harm when defendants allegedly instigated "vengeful and  
8 unnecessary proceedings against him...." Plaintiff's Opposition to Defendants'  
9 Motion for Partial Summary Judgment to Dismiss, p. 31. Kirby also claims  
10 "systematic punishment, harassment, and retaliation instigated by various  
11 members of the command staff...." Id. As in Anaya, Kirby's outrage claim  
12 presupposes that any alleged action against him was wrongful. That is also  
13 the basis for his discrimination and civil rights claims. As the Washington State  
14 Supreme Court made clear, if he succeeds on the merits of his civil rights and  
15 discriminatory claims, Kirby may attempt to recover for emotional distress  
16 damages even if his outrage claim is dismissed. See also Herring v.  
17 Department of Social and Health Services, 81 Wn. App. 1, 25, 914 P.2d 67  
18 (1996) (Upon finding of wrongful termination, plaintiff only needs to proof  
19 emotional distress to recover damages attributable to the wrongful  
20 termination.). Thus, dismissal of his outrage claim will only result in judicial  
21 efficiency, and will in no way prejudice him. Bankhead v. City of Tacoma,

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REPLY MEMORANDUM IN SUPPORT OF DEFS'  
MOTION FOR SJ REGARDING PLAINTIFF'S  
CLAIM OF INTENTIONAL INFLICTION OF  
EMOTION DISTRESS - 4

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1 23 Wn. App. 631, 638 597 P.2d 920 (1979) (outrage claim dismissed where  
 2 other tort remedy available because it "did not prejudice plaintiff, but only  
 3 streamlined the lawsuit.").

4 Kirby's reliance on Browning v. Slenderella Systems of Seattle,  
 5 54 Wn.2d 440, 341 P.2d 859 (1959) for the proposition that outrage can be  
 6 claimed even when another tort remedy is available is misplaced. Browning  
 7 was decided in 1959, prior to the Restatement's Comments, and is out of line  
 8 with current Washington Court decisions. See Anaya v. Graham, 89 Wn. App.  
 9 588, 950 P.2d 16 (1998); Rice, 109 Wn.2d at 62.

10  
 11 **II. Should the court consider plaintiff's claim of outrage, plaintiff's**  
 12 **outrage claim must be dismissed because he cannot prove that the**  
 13 **conduct at issue was extreme or outrageous, intentional or**  
 14 **reckless.**

15 Before plaintiff may reach a jury, he must convince the court that  
 16 reasonable minds could not differ as to whether the conduct at issue was  
 17 sufficiently extreme and outrageous to result in liability. Phillips v. Hardwick,  
 18 29 Wn. App 382, 387, 628 P.2d 606 (1981); Dicomes v. State, 113 Wn.2d 612,  
 19 630, 782 P.2d 1--2 (1989); Stansfield v. Douglas County, 107 Wn. App. 1, 27  
 20 P.3d 205 (2001); Bowe v. Eaton, 17 Wn. App. 840, 565 P.2d 826 (1977); Rest.  
 21 (2nd) of Torts § 46, Comment *h* (1965). To recover under an outrage claim,  
 22 plaintiff must prove: (1) extreme and outrageous conduct; (2) intentional or  
 23 reckless infliction of emotional distress; and (3) actual result to the plaintiff of  
 24 severe emotional distress. Birklid v. Boeing Co., 127 Wn.2d 853, 867, 904  
 25 P.2d 278 (1995). Kirby cannot meet that burden.

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1           **A. Plaintiff's outrage claim must be dismissed because**  
 2           **defendants' alleged conduct was not extreme or outrageous.**

3           Insults, indignities, threats, annoyances, petty oppressions, or other  
 4           trivialities are not sufficient to prove outrageous conduct. Grimsby v. Samson,  
 5           85 Wn.2d 52, 59, 503 P.2d 291 (1975). As Comment *d* of the Rest. (2nd) of  
 6           Torts § 46 states concerning liability arising out of outrage:

7           The liability clearly does not extend to mere insults, indignities,  
 8           threats, annoyances, petty oppressions, or other trivialities. The  
 9           rough edges of our society are still in need of a good deal of filing  
 10          down, and in the meantime plaintiffs must necessarily be expected  
 11          and required to be hardened to a certain amount of rough  
 12          language, and to occasional acts that are definitely inconsiderate  
 13          and unkind.

14          Comment *d* of the Rest. (2nd) of Torts § 46. Rather, liability will only be  
 15          imposed where the conduct is "so outrageous in character, and so extreme in  
 16          degree, as to go beyond all possible bounds of decency, and to be regarded as  
 17          atrocious, and utterly intolerable in a civilized community." Id. (*citing Grimsby*  
 18          *v. Samson*, 85 Wn.2d at 59).

19          Kirby bases his outrage claim on the allegation that he was subjected to  
 20          proceedings and evaluations. See Plaintiff's Opposition to Defendants' Motion  
 21          for Partial Summary Judgment to Dismiss, p. 30:22-23, 31:2-11; 31:12. Even  
 22          viewing this claim as true for the sake of argument – as one must for purposes  
 23          of this motion only - it does not meet the extremely high standard of proof  
 24          necessary to substantiate an outrage claim.

25          When compared to cases upholding outrage claims, it becomes clear  
 26          that no jury could find Kirby's allegations even close to the circumstances in

1 these decisions, whichever found, as "going beyond all possible bounds of  
2 decency," or sufficient "to be regarded as atrocious, and utterly intolerable in a  
3 civilized community." See e.g., Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d  
4 2911 (1975) (outrage found where plaintiff was required to witness the agony,  
5 pain and suffering of his wife while she died in front of him while he was unable  
6 to secure any medical care or treatment for his wife); Pavilon v. Kaferly, 561  
7 N.E.2d 1245, 1251-52 (Ill.App.Ct.1990) (upholding intentional infliction of  
8 emotional distress claim asserted against defendant who knew plaintiff was  
9 susceptible to emotional distress, repeatedly propositioned her and offered her  
10 money for sex, fired her when she refused his advances, threatened to kill and  
11 rape her, harassed her family and psychotherapist, threatened to challenge  
12 custody of her child, and harassed her new employer with letters, phone calls  
13 and spurious complaints to government officials); Briggs v. North Shore  
14 Sanitary Dist., 914 F. Supp. 245, 252 (N.D.Ill.1996) (employee forced to  
15 withstand eight-hour exposure to toxic fumes stated intentional infliction claim);  
16 Giraldi v. Schroeder, 833 F.2d 1226 (7th Cir.1987) (evidence supported district  
17 court's findings for employee on state law claims for battery and intentional  
18 infliction of emotional distress after employer raped employee and then, at  
19 insistence of his wife, discharged employee).

21 Accordingly, employees' allegation of otherwise offensive conduct are  
22 frequently rejected by courts as insufficient to make out a claim of outrage.

23 See Lawson v. Boeing Co., 58 Wn. App. 261, 792 P.2d 545 (1990) (assertion  
24 by supervising employee that he suffered depression, loss of appetite, libido  
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26 REPLY MEMORANDUM IN SUPPORT OF DEFS'  
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1 and energy, sleeplessness and increased headaches as result of allegedly  
 2 deliberate, malicious and outrageous lies female employees told when  
 3 complaining that supervisor engaged in sexual harassment was insufficient to  
 4 establish tort of outrage.); Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002  
 5 (1989)(even if plaintiff's allegation that management study was "an intentionally  
 6 prepared false report created for the sole purpose of embarrassing, humiliating  
 7 and then terminating" plaintiff that would still not constitute the tort of outrage);  
 8 Hope v. Larry's Markets, 108 Wn. App. 185, 29 P.3d 1268 (2001) (employer's  
 9 conduct toward employee, in exposing her to industrial-strength cleaning  
 10 chemicals, was not sufficiently extreme to be regarded as utterly intolerable in  
 11 a civilized society, and thus employee could not establish claim for outrageous  
 12 conduct, although conduct may have resulted in deliberate and willful injury to  
 13 her); Pettis v. State, 98 Wn. App. 553, 990 P.2d 453 (1999) (employer's  
 14 ignoring presumption of innocence, reliance on unsubstantiated allegations,  
 15 failure to disclose the nature of the allegations to plaintiff, and the reliance  
 16 solely on plaintiff's loud voice and lack of good relations with students and staff  
 17 in sanctioning her, failed to state conduct that was outrageous or extreme.);  
 18 Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 439-40 (1983) (holding  
 19 employer discipline and written and verbal criticism of employee's job  
 20 performance not extreme and outrageous).

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 23 In addition to Kirby's allegation that defendants' conduct was extreme  
 24 and outrageous because the proceedings and evaluations were "frivolous,"  
 25 "unjustified," or "unnecessary" (Plaintiffs' Opposition to Defendants' Motion for

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1 Partial Summary Judgment to Dismiss, p. 31:1-2; 31:12) are statements of  
 2 opinion and are not material facts admissible into evidence. Grimwood v.  
 3 University of Puget Sound, Inc., 110 Wn.2d 355, 365, 753 P.2d 517 (1988)  
 4 ("conclusory opinions do not amount to material facts admissible in evidence  
 5 showing there is a genuine issue for trial...").

6 **III. Plaintiff's outrage claim must be dismissed because he has failed**  
 7 **to show that defendants intentionally or negligently inflicted**  
 8 **emotional distress.**

9 For Kirby to establish the second prong of his outrage claim, Kirby must  
 10 show that any emotional distress was inflicted intentionally or recklessly.  
 11 Birklid v. Boeing Co., 127 Wn.2d 853, 868, 904 P.2d 278 (1995). Mere  
 12 negligence is not enough. Id. Furthermore, even a defendant's intent was  
 13 tortious, criminal, intended to inflict emotional distress or characterized by  
 14 malice or a degree of aggravation that would entitle a plaintiff to damages for  
 15 another tort, that would not alone prove that the conduct complained of was  
 16 extreme or outrageous. Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d 291  
 17 (1975); *citing* comment *d* of the Rest. (2nd) Torts § 46.

18 Kirby 's attempts to satisfy this prong with self-serving statements of  
 19 opinion must fail because these opinions are not material facts admissible into  
 20 evidence. For example, Kirby states that defendants "consciously disregarded"  
 21 Kirby's emotional decision. See Plaintiffs' Opposition to Defendants' Motion for  
 22 Partial Summary Judgment to Dismiss, p. 30:21-22. Additionally, Kirby states  
 23 that "[t]here can be no question that Mr. Kirby was in a known vulnerable and  
 24 unnecessary proceedings against him would lead to severe emotional distress.  
 25

1 Id. at 31:2-5. Kirby does not offer a single fact to support these bald  
2 allegations and therefore completely fails to establish that defendants  
3 recklessly or intentionally inflicted emotional distress on him. See Grimwood v.  
4 University of Puget Sound, Inc., 110 Wn.2d 355, 365, 753 P.2d 517 (1988)  
5 (“conclusory opinions do not amount to material facts admissible in evidence  
6 showing there is a genuine issue for trial...”). Kirby has failed to show the  
7 requisite deliberate intent to injure on the part of the defendants, and his claim  
8 is subject to dismissal.

9 **IV. Captain Meinema’s testimony concerning outrage may not be**  
10 **considered by this court because his testimony is inadmissible.**

11 For evidence to be considered in a summary judgment motion the  
12 evidence must be admissible. See CR 56(e). In this case, Kirby relies on his  
13 friend, Captain Meinema, to support his claim of outrage. This testimony may  
14 not be considered in this motion because Captain Meinema’s is not an expert  
15 witness in emotional distress, and therefore his lay opinion speaks to an  
16 ultimate conclusion of fact.

17  
18 In Kirby’s response, Captain Meinema’s deposition testimony is limited  
19 to his own inexperienced, speculative opinions to the emotional effects one might feel  
20 as a result of being the subject of a proceeding. Plaintiffs’ Opposition to  
21 Defendants’ Motion for Partial Summary Judgment to Dismiss, p. 31:14-20. He  
22 also addresses, generally, worries of “mortgage payments, losing your home,  
23 getting an extra job.” Id. However, Captain Meinema is not an expert on  
24 emotional distress, and therefore not qualified to discuss the causes and  
25

1 effects of emotional distress. See ER 702. Additionally, Captain Meinema's  
 2 outrage testimony speaks only of generalities, and fails to show neither that it  
 3 applies to Kirby or how it applies to Kirby. Therefore, Captain Meinema's  
 4 testimony would be inadmissible in trial, therefore may not be considered in  
 5 support of Kirby's arguments.

6 **V. Conclusion.**

7 As outlined herein, plaintiff has failed to present any facts in support of  
 8 his claim of outrage. He has failed to show the requisite nexus between legally  
 9 outrageous conduct, and his claimed emotional distress. Further, as other torts  
 10 are being pursued for this incident, plaintiff's claim of intentional infliction of  
 11 emotional distress should be dismissed.  
 12

13 DATED this 3 day of January, 2003.

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

16  
 17 By: 

18 \_\_\_\_\_  
 19 SHELLEY M. KERSLAKE  
 20 WSBA# 21820  
 21 Assistant City Attorney  
 22 Attorney for Defendants  
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REPLY MEMORANDUM IN SUPPORT OF DEFS'  
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