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PIERCE COUNTY WASHINGTON
KEVIN STOCK County Clerk
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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
BROME and "JANE DOE" BROME,
husband and wife; and JAMES
HAIRSTON and "JANE DOE"
HAIRSTON, husband and wife,

Defendants.

No. 99-2-13911-4

REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT
REGARDING PLAINTIFF'S
CLAIM OF RETALIATION FOR
PROTECTED UNION ACTIVITY

NOTED FOR:
January 10, 2003

ASSIGNED:
Judge Katherine M. Stolz

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING PLAINTIFF'S CLAIM OF RETALIATION
FOR PROTECTED UNION ACTIVITY - 1

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

ORIGINAL

1 **I. As plaintiff did not plead a §1983 claim for an alleged violation of**
 2 **his First Amendment rights, he is precluded from asserting it now.**

3 In response to the defendants' motion for summary judgment on his
 4 RCW 41.56 protected union activity claim, plaintiff asserts – for the first time –
 5 that what he is *really* claiming is a violation of his First Amendment rights.

6 Plaintiff's failure, however, to plead such a claim precludes him from pursuing it
 7 at this point. Dewey v. Tacoma School District, 95 Wn. App. 18, 974 P.2d 847
 8 (1999).

9 In Dewey, the plaintiff – a former employee of the Tacoma School
 10 District – claimed that “the District had terminated his employment in retaliation
 11 for (1) reporting [a supervisor's] use of District employees to move household
 12 furniture during work hours; and (2) reporting [the same supervisor's] refusal to
 13 investigate a subordinate employee's suspected misuse of compensatory time.”
 14 Id. at 21. In his amended complaint, Dewey alleged the following legal
 15 theories: breach of employment contract; wrongful discharge in violation of the
 16 “whistle-blower” statutes; misrepresentation; interference with a business
 17 relationship; civil conspiracy; age discrimination; and intentional infliction of
 18 emotional distress. Id. at 22. Nowhere in his complaint did he use the words
 19 “First Amendment” or “free speech.” Id. at 23.

21 After the parties had conducted significant discovery, and after one
 22 motion for summary judgment, the District moved to dismiss all of plaintiff's
 23 remaining claims. Id. In response to this motion, Dewey argued – for the first
 24 time – that his termination violated his First Amendment rights. Id. Although
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1 the trial court denied the District's motion to dismiss, it did not address Dewey's
2 First Amendment claim. Id. The parties proceeded to trial and after the plaintiff
3 rested his case, the court ruled that the First Amendment claim had not been
4 properly pled, and denied the plaintiff's motion to amend his complaint.

5 Division II affirmed the trial court, finding that plaintiff had failed to satisfy
6 even the liberal, notice-pleading standards imposed by the procedural rules.

7 The court noted that "**[a]lthough inexpert pleading is permitted, insufficient**
8 **pleading is not.**" (Emphasis added.) Id. at 23. "A pleading is insufficient
9 when it does not give the opposing party fair notice of what the claim is and the
10 [legal] ground upon which it rests." Id. In determining whether Dewey had met
11 this standard, the court looked to the specific language in his amended
12 complaint. Since he did not expressly plead a First Amendment claim or use
13 the words "free speech" in his complaint, the court examined his complaint to
14 determine whether all of the necessary elements of the claim could be inferred
15 and determined they could not. Id. at 23-24. Specifically, the court noted that
16 Dewey had failed to allege two essential elements: (1) that his free speech
17 interests were greater than the District's interests in promoting the efficient
18 operation of its agency; and (2) that the District would not have made the same
19 personnel decision in the absence of the protected speech. Id. at 24-25.

20 Absent specific facts alleged in support of these elements, his complaint could
21 not fairly be said to include a First Amendment claim. Id.

1 Moreover, the Court of Appeals affirmed the denial of plaintiff's motion to
 2 amend the complaint. Although CR 15(a) provides that leave to amend shall be
 3 freely given "when justice so requires," the court concluded that justice did not
 4 so require under the facts of this case. *Id.* at 27-28. The court based its
 5 holding on the fact that the plaintiff had waited until the last possible minute and
 6 that to allow him to amend at such a late stage of the proceeding caused actual
 7 prejudice to the District:

8 The District correctly argued it did not receive proper notice that
 9 the First Amendment theory was an issue in the case. *Allowing*
 10 *Dewey to amend his complaint could have caused actual*
 11 *prejudice to the District.* The District, at the last minute, would
 12 have been required to refute the elements of a First Amendment
 13 claim, requiring an additional showing that: (1) Dewey's speech
 14 was not protected; (2) the District's interest in providing efficient
 15 public services outweighed Dewey's speech interest, and (3) the
 16 District would have made the same personnel decision even in
 17 the absence of speech. *As discussed above, a First Amendment*
 18 *claim involves different facts and evidence than the claims alleged*
 19 *in Dewey's amended complaint.*

20 (Emphasis added; internal citations omitted.) *Id.* at 28.

21 The same rationale applies to this case. Different discovery would have
 22 been conducted by the defendants had plaintiff properly plead a First
 23 Amendment violation. Without such discovery, the defendants are prejudiced
 24 in presenting a defense to this new claim. Furthermore, upon amending his
 25 complaint to include a Title VII claim, defendants removed this case to federal
 26 court. Upon dismissal of plaintiff's Title VII claim, the federal court remanded
 the case to state court as no federal question remained (see Exhibit 1, court's
 order). Thus, the federal court divested itself of jurisdiction based on plaintiff's
 pleadings.

1 **II. The defendants are presumed to be qualifiedly immune from suit;**
 2 **plaintiff bears the burden of rebutting this presumption.**

3 If the court does consider plaintiff's First Amendment claim, then the
 4 doctrine of qualified immunity warrants dismissal. Public officials acting within
 5 the scope of their discretionary authority are shielded by a qualified immunity
 6 from suit. Butz v. Economou, 438 U.S. 478, 507-508, 98 S.Ct. 2894, 2911, 57
 7 L.Ed.2d 895 (1978), Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct 2806, 86
 8 L.Ed.2d 411 (1985) (*qualified immunity is immunity from suit*). The purpose of
 9 qualified immunity is to "keep the public official out of the courtroom, free to
 10 exercise discretionary duties under clearly established law without the constant
 11 threat of lawsuits. Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991). See
 12 also Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct 2727, 2736, 73 L.Ed.2d 396
 13 (1992).

14 Qualified immunity shields government officials so long as their actions
 15 could reasonably have been thought consistent with the rights they are alleged
 16 to have violated. Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97
 17 L.Ed.2d 523 (1987). Officials are immune unless the law clearly proscribed the
 18 actions they took. Mitchell v. Forsyth, supra. **In other words, there is**
 19 **complete immunity from suit unless the unlawfulness of the action is**
 20 **apparent. Anderson v. Creighton, supra. Thus, the immunity "protects all**
 21 **but the plainly incompetent or those that knowingly violate the law."**
 22 (Emphasis added.) Malley v. Briggs, 475 U.S. 345, 106 S.Ct 1093, 89 L.Ed.2d
 23 271 (1986).
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1 Public officials are **presumed** to be qualifiedly immune from damages
 2 caused by an alleged constitutional deprivation. Gasho v. U.S., 39 F.3d 1420
 3 (9th Cir. 1994), cert. denied by Ball v. Gasho, 505 U.S. 1144, 115 S.Ct. 2582,
 4 132 L.Ed.2d 831 (1995). Because of this presumption, once the defendant
 5 properly raises the issue of qualified immunity, **the plaintiff bears the burden**
 6 **of proving that the right allegedly violated was "clearly established" at the**
 7 **time of the conduct in question.** Davis v. Scherer, 468 U.S. 183, 197, 104
 8 S.Ct. 3012, 82 L.Ed.2d 139 (1984). See also Brewster v. Board of Education of
 9 the Lynwood Unified School Dist., 149 F.3d 971, 976 (9th Cir. 1998) ("The
 10 plaintiff shoulders the burden of proving that the rights he claims are 'clearly
 11 established.'").

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 13 The court, in analyzing the defendants' claim of qualified immunity,
 14 "need not consider the correctness of the plaintiff's version of the facts, nor
 15 even determine whether the plaintiff's allegations actually state a claim. *All it*
 16 *need determine is a question of law: whether the legal norms allegedly*
 17 *violated by the defendant were clearly established at the time of the challenged*
 18 *actions[.]"* (Emphasis added.) Mitchell v. Forsyth, 472 U.S. at 526, 105 S.Ct.
 19 at 2816.

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 21 In order to be considered "clearly established," the contours of the right
 22 must have been sufficiently clear at the time of the challenged conduct such
 23 that a reasonable official would have understood that what he was doing
 24 violated that right. Anderson v. Creighton, 483 U.S. at 640. "In other words,
 25 courts adjudicating claims of qualified immunity must look not to constitutional
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1 guarantees themselves but to the various doctrinal tests and standards that
2 have been developed to implement and to administer those guarantees.”

3 Brewster, 149 F.3d at 977.

4 “A necessary concomitant to the determination of whether the
5 constitutional right asserted by a plaintiff is ‘clearly established’ at the time the
6 defendant acted is the determination of whether the plaintiff has asserted a
7 violation of a constitutional right at all.” Siegert v. Gilley, 500 U.S. 226, 232,
8 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). A plaintiff claiming to have been
9 retaliated against for exercising his rights of free association must, as a
10 threshold matter, demonstrate that the conduct in question is protected by the
11 First Amendment. Board of County Comm’rs v. Umbehr, 518 U.S. 668, 116
12 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996). To satisfy this requirement, the
13 plaintiff must demonstrate 1) that his right of association with the union touched
14 on matters of public concern¹, Clark v. Yosemite Community College District,
15 785 F.2d 781, 791 (9th Cir. 1985); and 2) that his interests of association with
16 the union outweighed the interests of the Police Department, as an employer, in
17 promoting the efficiency of the public services it performs through its
18 employees, Boddie v. City of Columbus, 989 F.2d 745, 748 (5th Cir 1993)
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24 ¹ For the purposes of the issue of the defendants’ qualified immunity only, the defendants have
25 analyzed the issue assuming that the conduct in question touched on matters of public concern.
26 As outlined in Section II, however, the defendants soundly reject the notion that plaintiff’s
grievances involved anything other than personal complaints concerning only matters of internal
policy, such as length of Internal Affairs investigations.

1 (citing Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20
 2 L.Ed.2d 315 (1987)). See also Roberts v. Van Buren Public Schools, 773 F.2d
 3 949, 957 (8th Cir. 1985).

4 ***Because application of the Pickering test “turns on a context-***
 5 ***intensive, case-by-case balancing analysis, the law regarding such claims***
 6 ***will rarely, if ever, be sufficiently ‘clearly established’ to preclude qualified***
 7 ***immunity under Harlow and its progeny.”*** (Emphasis added.) Moran v.
 8 State of Washington, 147 F.3d 839, 847 (9th Cir. 1998) (“And today we join the
 9 chorus of voices from other circuits that have specifically observed the difficulty
 10 of finding clearly established law under Pickering.”, citing Brewster v. Board of
 11 Education of the Lynwood Unified School Dist., 149 F.3d 971, 979 (9th Cir.
 12 1998); Kincade v. City of Blue Springs, 64 F.3d 389, 398 (8th Cir. 1995);
 13 DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995); O’Connor v. Steeves, 994
 14 F.2d 905, 917 n. 11 (1st Cir. 1993); Guercio v. Brody, 911 F.2d 1179, 1183-85
 15 (6th Cir. 1990); Melton v. City of Oklahoma City, 879 F.2d 706, 729 (10th Cir.
 16 1989), modified on other grounds, 928 F.2d 920 (1991) (en banc); Dartland v.
 17 Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989); Noyola v.
 18 Texas Dep’t of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988);
 19 Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986)).

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 22 As outlined above, the plaintiff bears the burden of demonstrating that
 23 the rights allegedly violated were “clearly established” at the time of the conduct
 24 in question. Moreover, plaintiff cannot discharge his burden by articulating the
 25 rights in question at a level of generality that would render the doctrine of
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1 qualified immunity meaningless. Anderson v. Creighton, 483 U.S. at 639. The
 2 legal right at issue is *not* the generic right to be free from retaliation due to
 3 union association. Brewster, 149 F.3d at 980. ***To defeat the defendants'***
 4 ***claim of qualified immunity, the plaintiff must prove that, at the time of the***
 5 ***complained-of conduct, the law was such that the outcome of the***
 6 ***Pickering balance so clearly favored the plaintiff that it would have been***
 7 ***patently unreasonable for the defendants to believe their conduct was***
 8 ***lawful.*** Id.; Moran, 147 F.3d at 848. As the Ninth Circuit has so emphatically
 9 stated, the application of Pickering is rarely, if ever, that clearly established.
 10 Moran, *supra*.

11 12 **III. First Amendment Analysis.**

13 Should the court allow plaintiff's First Amendment claim to proceed,
 14 when a public employee claims that he has been retaliated against for
 15 exercising his First Amendment rights, the plaintiff must prove the following:
 16 First, the plaintiff must suffer an adverse employment decision. See Harrington
 17 v. Harris, 118 F.3d 359, 365 (5th Cir. 1997). Second, the plaintiff's speech
 18 must involve a matter of public concern. Connick v. Myers, 461 U.S. 138, 147,
 19 75 L.Ed.2d 708, 103 S. Ct. 1684 (1983). Third, the plaintiff's interest in
 20 commenting on matters of public concern must outweigh the defendants'
 21 interest in promoting efficiency. Id., citing Pickering v. Board of Education, 391
 22 U.S. 563, 568, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). Fourth, the plaintiff's
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1 speech must have motivated the defendants' action. Id., citing Mt Healthy City
 2 School Dist v. Doyle, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977).

3 **A. Kirby suffered no Adverse Employment Action; thus, the**
 4 **inquiry ends, and his claim should be dismissed.**

5 In his responsive material, Kirby outlines three adverse employment
 6 actions taken against him in retaliation for activity protected by the First
 7 Amendment: (1) He was told to "stand down" at a staff meeting, and Chief
 8 Arreola threatened to terminate his employment (Plaintiff's Opposition, page
 9 11), (2) His use of his e-mail was investigated (Plaintiff's Opposition, page 12),
 10 and (3) He was "subjected to investigation proceedings and counseling"
 11 (Plaintiff's Opposition, page 12).

12 None of these incidents rise to the level of an adverse employment
 13 action. To establish an adverse employment action, the plaintiff must
 14 demonstrate that the employment action was a materially adverse change in
 15 the terms and conditions of employment. Richardson v. New York State Dept.
 16 of Correctional Service, 180 F.3d 426 (2nd Cir. 1999). Harsh words at a staff
 17 meeting and "threats" to terminate are not adverse employment actions. See
 18 Nunez v. City of Los Angeles, 147 F.3d 867, 875 (holding that a supervisor's
 19 "scolding ... and threatening to transfer or dismiss" are not adverse
 20 employment actions and explaining that "mere threats and harsh words are
 21 insufficient"). See also Kerns v. Capital Graphics Inc., 178 F.3d 1011, 1017
 22 (8th Cir. 1999) (holding that a supervisor's criticism and threat that the
 23 complainant would be "fired for any subsequent exercise of poor judgment" was
 24 not enough for an adverse employment action).
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1 Similarly, investigations into possible employee misconduct, in this case,
2 improper use of the e-mail, is not an adverse employment action.

3 Investigations into possible employee misconduct or violation of workplace
4 rules does not affect the terms and conditions of employment, and therefore
5 does not qualify as an adverse employment action. Pierce v. Texas Dept. of
6 Criminal Justice, Institutional Div., 37 F.3d 1146 (5th Cir. 1994) (investigation
7 not adverse employment action); O'Hara v. Illinois Dept. of Mental Health, 120
8 F.Supp.2d 704 (N.D. Ill. 2000) (investigation not adverse action and failing to
9 investigate would have been irresponsible). The O'Hara court went on to state
10 that "[t]o discourage investigations when a subject is in a protected group would
11 have the effect of barring all investigations, because everyone is in some
12 protected group." O'Hara, supra, citing Johnson v. Lema Systems Corp., 170
13 F.3d 734, 745 (7th Cir. 1999).
14

15 Finally, being counseled by one's supervisor is not an adverse
16 employment action. As will be discussed more fully below, Kirby was not
17 counseled for speaking out, he was counseled about not bringing the matter to
18 the attention of the Chief *soon enough*. However, for sake of argument, even if
19 Kirby had not engaged in the misconduct, it still is not an adverse employment
20 action. In Sweeny v. West, 149 F.3d 550, 556 (7th Cir. 1998) the court held
21 that an employee had not suffered an adverse employment action when she
22 was unfairly reprimanded for conduct she either did not engage in or should not
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1 have been responsible for. Similarly, in Robinson v. City of Pittsburgh, 120
2 F.3d 1286, 1301(3rd Cir. 1997) the Circuit court held that unsubstantiated oral
3 reprimands and unnecessary derogatory comments following a sexual
4 harassment complaint did not rise to the level of an adverse employment action
5 required for a retaliation claim. Thus, Kirby's counseling regarding his failure to
6 meet his supervisor's expectations does not satisfy the first prong of the
7 analysis.

8 If the employee cannot establish an adverse employment action, he has
9 failed to make his prima facie case of retaliation, and his claim necessarily fails
10 for lack of proof of an essential element. In this case, Kirby cannot establish a
11 legally cognizable adverse employment action and his First Amendment claim
12 must be dismissed.

13
14 **B. Even if the court finds an actionable adverse employment**
15 **action, the plaintiff's conduct did not touch on a matter of**
16 **public concern and consequently, is not protected by the**
First Amendment.

17 The threshold inquiry in determining whether associational activity is
18 entitled to constitutional protection is whether the associational activity touched
19 upon matters of public concern. Clark v. Yosemite Community College District,
20 785 F.2d 781, 791 (9th Cir. 1985). If it did not, "then the First Amendment is
21 not triggered at all, and 'it is unnecessary ... to scrutinize the reasons' for the
22 employer's action." Brewster, 149 F.3d at 978 (quoting Connick v. Myers, 461
23 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). Moreover, an
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1 employee's associational activities do not touch upon a matter of public
2 concern merely because they are related to a union. Boals v. Gray, 775 F.2d
3 686, 693 (6th Cir. 1985); Clark v. Yosemite Community College District, 785
4 F.2d 781, 791 (9th Cir. 1985) (citing Boals v. Gray as articulating the test
5 applicable in union-association cases).

6 Whether an employee's First Amendment activity addresses a matter of
7 public concern is determined by the content, form and context of the activity as
8 revealed by the record as a whole. Connick v. Myers, 461 U.S. 138, 147-48,
9 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). (To presume that all matters
10 which transpire within a government office are of public concern would mean
11 that virtually every remark - and certainly every criticism directed at a public
12 official - would plant the seed of a constitutional case. The First Amendment
13 does not require a public office to be run as a round table for employee
14 complaints over internal office affairs.) This issue is a question of law.
15 Connick, 461 U.S. at 148 n.7, 103 S.Ct. at 1691 n. 8. **"[C]ontent is the
16 greatest single factor in the Connick inquiry."** Havekost v. U.S. Dept. of
17 Navy, 925 F.2d 316, 318 (9th Cir. 1991). **"Speech focused on internal policy
18 and personnel grievances does not implicate the First Amendment."**
19 Lambert v. Richard, 59 F.3d 134, 136 (9th Cir. 1995) (quoting Hyland v.
20 Wonder, 972 F.2D 1129, 1137 (9th Cir. 1992), cert. denied, 508 U.S. 908, 113
21 S.Ct. 2337, 124 L.Ed.2d 248 (1993)).
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1 Plaintiff raises three areas of his speech that he believes are entitled to
2 constitutional protection: (1) the length of time the police department takes to
3 administer discipline, (2) procedures of warrant service, and (3) Internal Affairs
4 staff allegedly offering bribes. The burden is on the plaintiff to demonstrate that
5 these issues are matters of public concern. Connick, supra. He has offered no
6 analysis in this regard and has completely failed to carry his burden. To be a
7 matter of public concern the speech must relate to a matter of political, social or
8 other concern to the community. Connick, supra. It is well established that
9 speech is not a matter of public concern when it is primarily an extension of an
10 individual's personal dispute and is not relevant to the "public's evaluation of
11 the performance of the governmental agencies." McKinley v. City of Eloy, 705
12 F.2d 1110, 1114 (9th Cir. 1983). The length of time internal investigations are
13 taking, and disparity of discipline imposed, have no degree of public concern.
14 This is purely a matter of private concern within the police department. Further,
15 what procedures the officers use for serving warrants is again an internal
16 matter which does not help the public evaluate the performance of the police
17 department. The only issue that arguably could be a matter of public concern is
18 that of the Internal Affairs bribery issue. However, plaintiff mischaracterizes the
19 facts as they surround this incident. The record is clear that plaintiff was given
20 a negative evaluation due to his failure to bring the information forward soon
21 enough. (See Exhibit 2, Brame's counseling document.) Thus, the record
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1 the information forward. Thus, this action can not form the basis of a First
2 Amendment retaliation claim.

3 Because the plaintiff has not, as a matter of law, established that his
4 speech touched and concerned matters of public concern, and has offered
5 absolutely no evidence that his speech motivated the defendants' actions,
6 his claim fails, and is appropriately dismissed.

7 **VI. Conclusion.**

8 The plaintiff is unable to articulate anything, beyond his own speculative
9 and conclusory allegations, in support of his prima facie case. Moreover,
10 plaintiff's briefing which has a lack of evidence, mandates dismissal. See
11 Gillette v. Delmore, 886 F.2d 1194, 1199 (9th Cir. 1989) (plaintiff's allegations
12 that his grievance was the cause of termination were insufficient alone to meet
13 burden of proof on causation); Boals v. Gray, 775 F.2d 686, 695 (6th Cir. 1985)
14 ("a fairer characterization of defendant's conduct may be that he was a strict
15 administrator attempting to correct a situation in which discipline was extremely
16 poor."); Parker v. Cronvich, 567 F. Supp. 1073, 1077 (E.D. LA 1983) ("The lack
17 of solid evidence was ultimately devastating to the plaintiffs' suit. No witness
18 could recall or point to a single statement by Sheriff Cronvich indicating that he
19 somehow intended to treat the deputies in the Union differently.").

20 The defendants have been severely handicapped in responding to this
21 new issue, just now raised by the plaintiff. However, the defendants have
22 carried their burden under Celotex and have demonstrated a lack of evidence
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in the record to support plaintiff's action. Plaintiff's failure to produce sufficient evidence for each element of his action mandates dismissal. Celotex, supra.

DATED this 6 day of January, 2003.

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

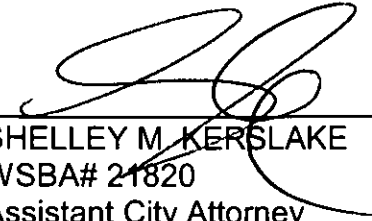
By: 
SHELLEY M. KERSLAKE
WSBA# 21820
Assistant City Attorney
Attorney for Defendants

EXHIBIT 1

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FEDERAL DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

Plaintiff,

v.

THE CITY OF TACOMA, et al,

Defendant.

Case No. C00-5332 FDB

ORDER REMANDING CASE

This case was removed to federal court on June 6, 2000. The basis for federal jurisdiction was the plaintiff's claim for relief under 42 U.S.C. §1983. On March 5, 2001, the court approved the parties' stipulated order for dismissal of the federal claim. The dismissal of the federal claim destroyed the basis for federal jurisdiction and the court declines to maintain jurisdiction over the remaining state law matters.

THEREFORE IT IS HEREBY ORDERED: this case is remanded to Pierce County Superior Court.

DATED this 14 day of March, 2001.

Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

ORDER - 1

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EXHIBIT 2

TACOMA POLICE DEPARTMENT



Intra-Departmental Memorandum

TO: Captain Joseph Kirby

FROM: Asst. Chief David A. Brame
Operations Bureau Commander

DATE: September 13, 1999

SUBJECT: COUNSELING

On August 29, 1999 you received notification from Sgt. Habib that there was a situation involving Internal Affairs personnel. This situation brought to light potential conflicts of interest and MRP violations. The concerns were severe enough in your mind that you responded from your residence to work at the 38th Street Station to direct a preliminary investigation into these allegations.

You directed administrative reports from the reporting employees, as well as directed them to obtain a written statement from the complainant. You instructed Sgt. Habib to place the written materials in a location only known to you. You obtained them Monday morning, August 30, and then reported the incident to me, which included your written report and recommendations.

You decided, as Command Duty Officer, to NOT notify the Chief of Police when the incident was first reported. You determined in your own mind that this situation was serious enough for your personal response, but not serious enough to warrant a notification and courtesy telephone call to the Chief of Police, which is common practice.

This situation was far more serious in nature than other situations which have resulted in notification to the Chief. In addition, I outlined for you in an IDM dated May 10, 1999 that I am to be notified of situations involving our personnel expeditiously. Further, if the situation is something that you would like to be notified about, then notify me as well. Your explanation that I was not in your chain of command because you were CDO is without merit and weak. You responded to the station on duty (overtime) and took action. Your assignment as CDO does not relieve you of your chain of command obligations to me, as well as the Chief.

I find your explanation that you did not notify the Chief because you did not trust how he might handle the situation speculative and inadequate. Sound job performance dictates that you should have notified him, rather than concern yourself with how he might have handled the situation to your dissatisfaction. He is the Chief of Police, not you. You also maintained that you did not have a finished work product and therefore decided not to notify the Chief at that time. By the time you had a completed work project, which included your report and recommendations, you were no longer CDO and you then notified me about the incident. However, as an experienced employee of this organization, you should have notified the Chief of such a serious situation involving critical positions on the department. You have acknowledged the same to me in conversation.

Please be advised that you are counseled for your inaction in this case, and you are reminded that future lapses in performance will result in discipline. I am further redirecting you to review the MRP on Command Duty Officer, as well as review the past IDM from me to you dated May 10, 1999. This Counseling shall remain in your file for a period of one year.

DAB/bmw

REVIEWED
WITH Capt. KIRBY

Dabrame

9-13-99

[Handwritten signature]