



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FILED
IN COUNTY CLERK'S OFFICE

A.M. JAN 6 - 2003 P.M.

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 PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFF'S AGE DISCRIMINATION CLAIM

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 PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFF'S AGE DISCRIMINATION CLAIM - 1

ORIGINAL

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

1 **I. Plaintiff has failed to present evidence of a prima facie case of age**
 2 **discrimination.**

3 Plaintiff has failed to establish a claim of age discrimination. He bases
 4 this claim on his failure to be promoted to the position of Captain by Chief
 5 Hairston in 1999, and again in 2000. Although plaintiff, at fifty-six, was within
 6 the protected age group (see RCW 49.44.090), he has failed to present any
 7 evidence that age was a factor in his pass over, or that he was otherwise
 8 discriminated against because of his age. To make out a prima facie case,
 9 plaintiff must present evidence indicating that age was a substantial factor in
 10 the decision. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001).
 11 (Emphasis added.) He has presented no evidence in this regard. Even
 12 assuming, for sake of this argument only, that he was the most qualified for the
 13 position, he has failed to demonstrate that he was not chosen because of his
 14 age.

15 **II. Plaintiff was passed over for candidates who are also in the**
 16 **protected age group.**

17 Washington courts have required that in order for a plaintiff to survive
 18 summary judgment in an age discrimination case, they must demonstrate that
 19 they were replaced, or in this case, passed over, for someone outside the
 20 protected age group. Brady v. Daily World, 105 Wn.2d 770, 718 P.2d 785
 21 (1986). In this case, both candidates chosen were over forty years old. At the
 22 time of the selection for Captain, plaintiff was fifty-two and fifty-three,
 23 respectively. In 1999, Lt. Woodard was selected for the Captain's position, and
 24 at the time, she was forty-five years old. (See Exhibits 1 and 2.)
 25
 26

1 In 2000, Lt. Langford was selected for a Captain's position, and he was
 2 forty-three years old. (See Exhibits 3 and 4.) Thus, both candidates selected
 3 were over the threshold age. It is axiomatic that discrimination can be proven
 4 by selection of someone also in the protected class. Even the case relied on by
 5 the plaintiff, Corey v. Smithkline, 585 F. Supp. 871 (PA. D. 1984) the District
 6 Court of Pennsylvania required that the selected candidate be "substantially"
 7 younger than the plaintiff, and the court will note, in Corey, that meant the
 8 selected employee was *outside the protected age group*. In fact, most cases
 9 that discuss age discrimination, do so in terms of replacement by a worker
 10 outside the protected group. See, e.g., Marshall v. Goodyear Tire & Rubber,
 11 554 F.2d 730 (5th Cir. 1977) (fifty-seven year old worker replaced by a nineteen
 12 year old); Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980); cert. denied, 481
 13 U.S. 945, 101 S. Ct. 2028, 68 L.Ed.2d 332 (1981) (twenty-six year old teacher
 14 with three years experience was hired over fifty-five year old teacher with
 15 thirteen years experience). Thus, because plaintiff was passed over in favor of
 16 employees over forty, summary judgment is appropriate on this cause of action.
 17

18 **III. Defendants had a legitimate non-discriminatory reason for not**
 19 **promoting plaintiff.**

20 Even if the court finds that plaintiff has made a prima facie case, he has
 21 not rebutted the City's legitimate non-discriminatory reason for choosing the
 22 other candidates. The plaintiff acknowledges that there were non-
 23 discriminatory reasons not to promote him. In his deposition, he stated:
 24
 25
 26

1 Q Is it your position that you weren't chosen for the
2 permanent captain's position based on your age?

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

5 * * *

6 A What do I personally think the reason is?

7 Q Yes.

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

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

25 And I would posit further that you can't sustain
26 or support a legitimate reason for that Passover
unless you simply choose to devalue leadership in
field activities. (Emphasis added.)

(Exhibit 5, deposition excerpt of Joseph Kirby, pages 34-36.)

27 Plaintiff's own testimony supports the defendants' legitimate reason for
28 not promoting the plaintiff. His relationship with the command staff was
29 contentions at best. (See, e.g., Exhibit 6, 1999 counseling memo,
30 documenting that he did not trust the Chief of Police, and Exhibit 7, deposition

1 excerpts of William Woodard describing Kirby's use of profanity with a
2 commanding officer, and disruption in the work place caused by Kirby.)
3 Further, the City's personnel rules allow the Chief to pick *any* candidate from
4 the top three. (Exhibit 8, Affidavit of Mary Brown.) Unfortunately for the
5 plaintiff, employers are not obligated to promote those employees who are not
6 team players, and who cause disruption in the work place. (Exhibit 5,
7 deposition excerpts of Joseph Kirby wherein he describes his disdain for the
8 management styles of his commanders, pages 155-159, and 162-164.)
9

10 **IV. There is no evidence of pretext.**

11 Under the McDonald Douglas shifting burden analysis, plaintiff must
12 demonstrate that the stated, non-discriminatory reason for the pass over was
13 pretext for intentional discrimination. Reeves v. Sanderson Plumbing, 530 U.S.
14 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). Plaintiff has presented no such
15 evidence. In fact, his own statements belie this argument. He admits he was
16 not a good fit for the management team. He was suing several of them,
17 including the Chief of Police. The qualities the Chief was looking for were
18 people who would be a good team member, someone who could reach
19 consensus with other management team members, someone who was not
20 disruptive and would have the ability to move the team forward. (Exhibit 9,
21 deposition excerpts of Chief James Hairston.) These qualities were embodied
22 by the candidates who were chosen and were not found in the plaintiff. Id.
23

24 Plaintiff must demonstrate that age actually motivated the employer's
25 decision. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 123 L.Ed.2d 338,
26

1 113 S. Ct. 1701 (1993). That is, the plaintiff's age must have actually played a
 2 role in the employer's decision making process, and had a determinative
 3 influence on the outcome. Id. He has failed to present any evidence that a
 4 fifty-four year old Chief, chose a forty-five year old, and a forty-three year old
 5 over the plaintiff because of his age. Thus, plaintiff's age discrimination claim
 6 fails as a matter of law. Celotex, 477 U.S. at 322-23 (failure of proof to
 7 establish existence of essential element renders all other facts immaterial).

8 **V. A stray remark by a non-decision maker, in he workplace cannot**
 9 **form the basis of plaintiffs' claim.**

10 Throughout his material, plaintiff references a remark made by Chief
 11 Arreola, "Now if I can just get some of these grey haired old Captains to
 12 leave...." (Plaintiff's Brief, p. 24.) He presents this as some sort of evidence to
 13 satisfy his prima facie case. This attempt fails on several levels. To begin, as
 14 a matter of law, a single stray remark does not establish the existence of a
 15 material issue of fact warranting the denial of a motion for summary judgment.
 16 LaCoparra v. Pergment Home Center, Inc., 982 F. Supp. 213, 225 (SDNY
 17 1997) (holding that three isolated remarks were insufficient to establish pretext,
 18 and observing that "many courts have held that stray remarks in the workplace,
 19 by themselves, and without a demonstrated nexus to the complained of
 20 personnel actions will not defeat the employers' motion for summary judgment.
 21 See also, Bellam v. Nieman Marcus Group, 975 F. Supp. 527 (1997); Bern v.
 22 United Mercantile Agencies, 942 F. Supp. 217, 220 (SDNY 1996).

23
 24 The Ninth Circuit has stated its position on this very issue. Holding that
 25 referring to someone as "promotable" does not give rise to an inference of
 26

1 discriminatory motive on the basis of age. Coleman v. Quaker Oats, 232 F.3d
 2 1271 (9th Cir. 2000). In fact, the court went on to point out that they have held
 3 the use of far more suggestive words on the part of management do not create
 4 a genuine issue of material fact as to age discrimination, citing Nesbit v. Pepsi
 5 Co., 994 F.2d 703, 705 (9th Cir. 1993) (holding that employer's use of the
 6 phrase "[w]e don't necessarily like grey hair" did not support an inference of
 7 discriminatory motive); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918-19
 8 (holding that employer's use of the phrase "old timers" did not support an
 9 inference of discriminatory motive). Thus, the law is well settled that his type
 10 isolated remark cannot form the basis for age discrimination liability.

11
 12 Second, and more importantly, Arreola was not the decision maker with
 13 respect to plaintiff's promotion. In fact, he was not the Chief of Police, and did
 14 not even work for the department at the time the decision was made. (See
 15 Exhibit 10.) The case law is clear if the individual who made the remark was
 16 not the decision maker, summary judgment is appropriate. See Boyle v.
 17 McCann-Erickson Inc., 949 F. Supp. 1095, 1102 (SDNY 1997) (remarks made
 18 by individuals who did not play a role in the termination not actionable);
 19 Chiaromonte v. Fushion Bed Group, Inc., 129 F.3d 391, 402 (7th Cir. 1997)
 20 (stray remarks by non-decision makers do not create material issue on
 21 question of pretext), cert. denied, 118 S. Ct. 1795, 140 L.Ed.2d 936 (1998);
 22 Price Waterhouse v. Hopkins, 490 U.S. 228, 277, 109 S. Ct. 1775, 1805 (1989)
 23 (O'Connor J. concurring) ("statements by non-decision makers, or statements
 24
 25
 26

1 made by decision makers unrelated to the decisional process itself' are
 2 insufficient to establish discriminatory intent.)

3 **VI. Conclusion.**

4 To defeat the defendants' motion, the plaintiff must substantiate his
 5 allegations with enough competent, probative evidence to permit a finding in
 6 his favor based on more than mere speculation, conjecture, or fantasy. Moody
 7 v. St. Charles County, 23 F.3d 1410, 1412 (8th Cir. 1994). Plaintiff's response
 8 is wholly inadequate in this regard. Plaintiff has utterly failed to present
 9 evidence which demonstrates that his failure to be promoted was because of
 10 his age. Without such proof, his claim fails as a matter of law, and the
 11 defendants respectfully request the court dismiss this cause of action.
 12

13 DATED this 6 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 Defendant
 23
 24
 25
 26

EXHIBIT 1



PERSONNEL ORDER

DATE: October 15, 1999
#99-18

1/7/2003 10233 88873

RETIREMENT

Effective October 13, 1999

Captain Bill Woodard retires.

PERMANENT APPOINTMENTS

Effective October 18, 1999

Temporary Captain Catherine Woodard is promoted to the permanent position of captain and remains assigned to the Operations Bureau South.

Temporary Lieutenant Michael Miller is promoted to the permanent position of lieutenant and remains assigned to the Operations Bureau North, Sector Two.

Temporary Sergeant David Peck is promoted to the permanent position of sergeant and remains assigned to the Operations Bureau North, Sector One.

TRANSFER

Effective October 18, 1999

Officer Tom Williams transfers from the Operations Bureau to the Administrative Services Bureau, Support Services Division, as the Advanced Training Officer.

INSTRUCTIONS

Personnel being promoted or transferred shall report to their respective division commanders prior to assignment dates. All employees affected by these changes shall report to the Property Officer to process any equipment or uniform needs.

Deputy Chief Michael J. Darland
Administrative Services Bureau

gh

EXHIBIT 2

Pension Board copy

Lutheran Hospital

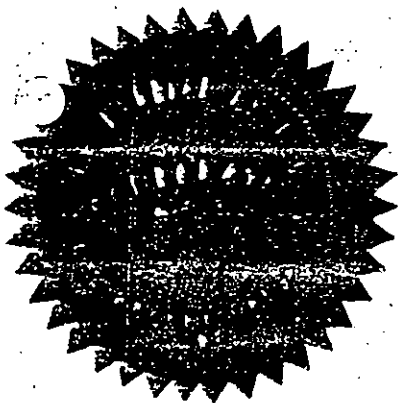
Beaver Dam, Wisconsin

Certificate of Birth

This Certifies that Catherine Jane
was born to Mr & Mrs Donald Arndt
in this Hospital at 4:31 o'clock, A.m. on Sunday
the 23rd day of May 1954

In Witness Whereof the said Hospital has caused this Certificate to be signed by its duly authorized officer, and its Official Seal to be hereunto affixed

D. P. Copley M.D. Walden Kerkness, Jr.
ATTENDING PHYSICIAN SUPERINTENDENT



HOLLISTER PATENTED BIRTH CERTIFICATE
FRANKLIN O. HOLLISTER CO. CHICAGO 18 ILL.

EXHIBIT 3



PERSONNEL ORDER

1/7/2000 18233 00077

January 21, 2000

#00-02

APPOINTMENTS

Effective January 10, 2000

Sergeant Dave Peck, and Officers Loretta Cool, William Muse, and Joseph Strauel are appointed to the Special Weapons and Tactical team. They are filling positions vacated by Sergeant Mark Mann and Officers Bart Hayes and Donald Walkinshaw. One additional negotiator position was added.

PROMOTIONS

Effective January 24, 2000

Lieutenant Mark Langford is promoted to the permanent position of captain and transfers from the Operations Bureau, to the Investigations Bureau, Criminal Investigations Division.

Temporary Lieutenant Barbara Justice is promoted to the permanent position of lieutenant and remains assigned to the Operations Bureau.

Temporary Sergeant Lock is promoted to the permanent position of sergeant and remains assigned to the Operations Bureau.

Police Patrol Officer Jeff Turner is promoted to the permanent position of detective and transfers from the Operations Bureau, Traffic Section, to the Investigations Bureau, Criminal Investigations Division.

RETIREMENTS

Effective February 13, 2000

Officer Gary McDonald retires.

Effective February 19, 2000

Detective Mike Lynch retires.

TRANSFERS

Effective January 24, 2000

Lieutenant Tom Strickland transfers from the Administrative Services Bureau, Support Services Division, to the Investigations Bureau, Criminal Investigations Division

INSTRUCTIONS

Personnel being promoted or transferred shall report to their respective division commanders prior to assignment dates. All employees affected by these changes shall report to the Property Officer to process any equipment or uniform needs.

Deputy Chief Michael J. Darland
Administrative Services Bureau

EXHIBIT 4

A CERTIFIED COPY **CERTIFICATE OF LIVE BIRTH**

Notarized
BIRTH No. 121-*Clerk*

MICHIGAN DEPARTMENT OF HEALTH
Vital Records Section

Local File No. *246*

1. PLACE OF BIRTH a. COUNTY Sanilac		2. USUAL RESIDENCE OF MOTHER (Where does mother live?) a. STATE Michigan		b. COUNTY Tuscola	
b. CITY (If outside corporate limits, write RURAL and give township) OR VILLAGE Marlette Village		c. TOWNSHIP, (Name of) CITY OR VILLAGE Mayville Village		d. Is Residence within limits of a city or incorporated village? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	
c. FULL NAME OF HOSPITAL OR INSTITUTION Marlette Comm. Hospital		e. MAILING ADDRESS 6204 First St. Mayville, ^{ZONE} Mich.			
3. CHILD'S NAME (Type or Print) a. (First) Mark		b. (Middle) ---		c. (Last) Langford	
4. SEX Male	5a. THIS BIRTH Single <input checked="" type="checkbox"/> Twin <input type="checkbox"/> Triplet <input type="checkbox"/>	5b. IF TWIN OR TRIPLET (This child born) 1st <input type="checkbox"/> 2nd <input type="checkbox"/> 3rd <input type="checkbox"/>		6. DATE OF BIRTH (Month) (Day) (Year) 8-15-57	
FATHER OF CHILD					
7. FULL NAME a. (First) William		b. (Middle) Fred		c. (Last) Langford	
8. COLOR OR RACE white		9. AGE (At time of this birth) 36 YEARS		10. BIRTHPLACE (State or foreign country) Michigan	
11a. USUAL OCCUPATION Editor		11b. KIND OF BUSINESS OR INDUSTRY Newspaper			
MOTHER OF CHILD					
12. FULL MAIDEN NAME a. (First) Joanne		b. (Middle) ---		c. (Last) Lawrence	
13. COLOR OR RACE white		14. AGE (At time of this birth) 33 YEARS		15. BIRTHPLACE (State or foreign country) Michigan	
16. CHILDREN PREVIOUSLY BORN TO THIS MOTHER (Do NOT include this child) a. How many OTHER children are now living? 2		b. How many OTHER children were born alive but are now dead? 0		c. How many children are stillborn (born dead after 2 weeks pregnancy)? 0	
17. INFORMANT'S NAME Joanne Lawrence Langford					
I hereby certify that I attended the birth of this child who was born alive on the date stated above.		18a. SIGNATURE Donald E. Gilbert MD		18b. ATTENDANT AT BIRTH M.D. <input checked="" type="checkbox"/> D.O. <input type="checkbox"/> Midwife <input type="checkbox"/> Other (Specify)	
		18c. ADDRESS Mayville, Michigan		18d. DATE SIGNED 8-18-57	
19. DATE RECEIVED BY LOCAL REGISTRAR Aug. 22, 1957			20. REGISTRAR'S SIGNATURE Cecil Dawson		
FOR MEDICAL AND HEALTH USE ONLY (This section MUST be filled out)					
21a. LENGTH OF PREGNANCY Weeks		21b. WEIGHT AT BIRTH Lbs. Ozs.		22. LEGITIMATE Yes <input type="checkbox"/> No <input type="checkbox"/>	
23. HAVE EYES OF CHILD BEEN TREATED WITH ONE PERCENT SOLUTION OF SILVER NITRATE? Yes <input type="checkbox"/> No <input type="checkbox"/>		24a. WAS MOTHER'S BLOOD TESTED FOR SYPHILIS DURING THIS PREGNANCY? Yes <input type="checkbox"/> No <input type="checkbox"/>		24b. DATE OF TEST	
24c. IF BLOOD NOT TESTED, STATE REASON		25a. STATE ANY COMPLICATIONS OF PREGNANCY AND LABOR		25b. STATE ANY OPERATION FOR DELIVERY	
25c. DESCRIBE ANY BIRTH INJURY			25d. DESCRIBE ANY CONGENITAL MALFORMATIONS		

MARGIN RESERVED FOR BINDING
TYPE OR PRINT (EXCEPT SIGNATURES) IN BLACK INK—THIS IS A PERMANENT RECORD

N. B.—In case of more than one child at birth, a SEPARATE RETURN must be made for each and the number of each in order of birth, stated.

EXHIBIT 5

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.)

No. 99-2-13911-4

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

Defendants.)

DEPOSITION OF JOSEPH J. KIRBY

February 15, 2001
Tacoma, Washington

BYERS & ANDERSON, INC.

COURT REPORTING & VIDEO

2208 North 30th Street.
Suite 202
Tacoma, Washington 98403
(253) 627-6401
FAX: (253) 383-4884

One Union Square
600 University Street
Suite 2300
Seattle, Wa 98101-4112
(206) 340-1316

1-800-649-2034

1 think was the initiator of that.

2 Q The initiator of the discipline?

3 A Yes.

4 Q How do you know that?

5 A Don't know anything. It's my belief.

6 Q And your removal from the clandestine lab team, do you
7 believe that was based in part or total on your age?

8 A I think it's difficult to separate my union advocacy
9 and my age because those activities were consistent
10 with what I saw happened to Olsen, Wiegand, Howard,
11 Meinema, and my medical condition that preceded that.
12 I think they're all so intertwined as to make -- as to
13 make an analysis -- to pull them apart and make a
14 critical analysis to each independent element
15 impossible.

16 Q Is there anything we haven't already talked about that
17 you believe is based on your age, any action that was
18 taken against you?

19 MR. SADLER: For the sake of the record,
20 object to the form.

21 WITNESS: At this point I have to think
22 about that for a while.

23 Q (By Ms. Kerslake) Is it your position that you
24 weren't chosen for the permanent captain's position
25 based on your age?

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

3 Q What do you think the reason is?

4 A What do I personally think the reason is?

5 Q Yes.

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

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

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

1 three of them are defendants in this case.

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

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

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

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

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

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

1 MR. SADLER: Can you describe what size
2 this notebook is?

3 WITNESS: It's half of this size, so
4 this is basically 8 and a half by 11, so it would be 8
5 and a half by 5 and a half. Half notebook, spiral
6 bound on the top.

7 Q (By Ms. Kerslake) How would you describe assistant
8 Chief Brame's management style?

9 A I'm not sure he has a management style. I think that
10 that he's very threatened by people senior to him in
11 age or experience. I think that he postures a lot.
12 He attempts to show people that he's the boss, and
13 sometimes those take inappropriate forms.

14 I think that when he initially became assistant
15 chief, he was very unsure of himself. My observations
16 were that he was unable to decentralize the control
17 from himself. He micromanaged. He basically wasn't
18 comfortable with delegating responsibility.

19 I also think there were times when he walked
20 away from the ability to create a complete and
21 accurate record of what had occurred. I would posit
22 that in the instance of the Seahawk tickets he did the
23 same thing. He had it for seven, eight hours. He
24 confirmed my part. When it came out, there was no
25 discussion. I came to the same conclusion. I did

1 that.

2 He has an inability to stand up for anyone when
3 if might reflect negatively on himself. That could be
4 considered a positive leadership trait. I'm not sure
5 he's a leader as much as he thinks he's a manager.
6 That's the dilemma for him.

7 Q I take it from your statement your style differs from
8 his that, you don't agree with the way he --

9 A I'm not sure whether it's relevant whether I agree
10 with him or not.

11 Q Can you answer the question?

12 A I would have to look at all the aspects of his style.
13 I don't think of myself as a manager. You manage
14 things; you manage binders; you manage paper; you
15 manage cases. You lead people. You can't manage
16 people. It's just a different philosophy.

17 Perhaps that comes from my military background.
18 I think Dave Brame is a manager. I think his
19 deficiencies become apparent when you don't -- you
20 really need a leader.

21 Q What qualities do you find important -- what
22 leadership do you find important?

23 A For him or me?

24 Q For you.

25 A What do I think leadership is?

1 Q Yes.

2 A I can distill it very easy. It's doing the right
3 thing when nobody's looking.

4 Q What type of qualities would that embody?

5 A Integrity, compassion for your organization's mission,
6 taking care of the welfare of your troupes, being
7 forthright, not being a yes person all the time. Not
8 advancing your career over other people. Standing up
9 for people when you know they've been unjustly accused
10 or wronged, even to the point where it might become
11 detrimental to your own career.

12 Treating people in a manner that you'd like to
13 be treated, consistent with the professionalism of the
14 organization. There's a ton of stuff. I could talk
15 to you for hours about duty, honor and country. I
16 think the same things would apply to the police
17 department.

18 Q What about Ray Roberts, does he in your opinion have
19 these leadership qualities?

20 A No.

21 Q And where do you see the differences?

22 A I think he's a very vindictive man, holds
23 disagreements and personal opinions against you. If
24 you ever had occasion to promote an opinion that was
25 contrary to his, I think he internalizes it and takes

1 it as a direct assault. I think he acts on behalf of
2 that.

3 I think when you point out to him the errors of
4 his way, he becomes more enmeshed in some internal
5 drive to protect his position. I think that he's also
6 a bit of a micromanager who does not shake down
7 authority or responsibility to his supporting
8 commanders. And, frankly, I think he's the Peter
9 principle. He's way past the level of his competence.

10 Q What rank did you hold when Chief Fjetland left the
11 department?

12 A I was a sergeant, and I'm not sure -- I was promoted
13 to -- I believe I was a lieutenant when Fjetland was
14 here.

15 Q How would you contrast his management style with the
16 current administration?

17 A Night and day difference. Fjetland basically told us
18 at one time, your job is to police the city, my job is
19 to sell you. He got us everything we needed. He was
20 the consummate leader. His job was to facilitate our
21 success. He did that on a daily basis.

22 Most of the time was selling us to Rotary or
23 somewhere else. But we always got all the material
24 things we needed for missions. He took care of
25 people. Discipline was more even and I think better

1 received in the department. There wasn't this
2 everything cloaked in mystery. There wasn't this
3 unsettling effect of what discipline was actually for.

4 A lot of the internal processes worked a lot
5 better. I think you can contribute that to fact that
6 he let lieutenants be lieutenants, captains he
7 captains and he let sergeants be sergeants. I had a
8 lot of authority as a sergeant to move troupes and
9 influence outcomes in the field that does not exist
10 today.

11 I also had the collateral responsibility of
12 taking care of my people and that doesn't exist today.
13 So Fjetland created an environment for the success of
14 the whole police department. He did it very well. He
15 was a different type of person.

16 Q In November of 1999, you submitted a transfer request
17 and that transfer stated that, quote, "It's my honest
18 belief that it will not be possible for me to obtain a
19 fair, objective performance evaluation nor maintain
20 the minimum degree of physical or mental health." Do
21 you remember that?

22 A Yes.

23 Q And who were you asking to be transferred from?

24 A I believe that was Dave Brame. I did two, one for
25 Dave and one for Ray Roberts.

1 A I gave it to Brame, and the protocol, you give it to
2 your bureau commander, apparently got up to chief,
3 maybe Deputy Chief Darland at the time, and the chief
4 wrote me back a letter and said we'll transfer you
5 to -- there's a position in investigations, do you
6 want it? And I said I'll go there.

7 Q Do you remember how long it took for the department to
8 get back to you on your request?

9 A I think it was fairly quick.

10 Q That's when you began working for Ray Roberts?

11 A That's when I went and began working with Ray Roberts.

12 Q How long did you work for Ray Roberts?

13 A Very brief time. I think a month, two months. I
14 don't recall.

15 Q And then you again asked for a transfer?

16 A After Roberts presented me with the document you put
17 before me, these probation accounts and statements
18 that resulted in this rebuttal, I thought there's
19 something wrong here. And I again requested a relief
20 from that. I'm not sure exactly timewise when we
21 filed, or when we did the claim or how that factors in
22 as far as calender dates.

23 Q What was your reasoning that you wanted to transfer
24 away from --

25 A The same reasons I think I've articulated from Brame.

1 I didn't have a really good feeling I was being
2 treated properly and that sentence I read to you, that
3 26 in a 25 is not deserving of execution and having my
4 head posted outside the County City building.

5 I felt the way he was treating me was
6 inappropriate to the alleged offenses. I also had
7 reason to believe that in light of the secretaries
8 investigation, there were other people present in my
9 advocacy when that was discussed and I believe one of
10 them was Darland. And I asked Ray, I really think
11 you're mischaracterizing this comment I made in the
12 secretaries meeting. And I would ask professionally
13 that you interview the other secretaries present.

14 And Ray Roberts assured me that would happen,
15 but it never did. So those are integrity issues. If
16 I look you in the eye and I say -- you make a
17 reasonable request, and I say I will do that for
18 you -- whether or not I have intent on doing it or
19 whether I do it, it's moot. The point of it is, it
20 wasn't done. He gave me his personal assurance in
21 front of witnesses that would be done.

22 And that characterizes Ray Roberts' management
23 style. He only use portions of the record that
24 support his case. And I think that's unfair. I think
25 the whole record ought to be viewed. And I think that

1 had the whole record had been reviewed, that's one of
2 the purposes of having Mary Eby on your witness list
3 because she was present during that time.

4 When the whole record gets its proper review,
5 the picture will become apparent that, wait a minute,
6 this was not as it was portrayed in my official
7 records.

8 Q Did you have any symptoms, physical symptoms as a
9 result of working for Ray Roberts?

10 A I felt sick all the time.

11 Q In what way?

12 A Sick to my stomach. I felt like -- I was sick. I
13 think I was agitated; I was nervous. All of those
14 things.

15 Q Did the department respond to that transfer?

16 A I think what they did is accepted the fitness for duty
17 evaluation, one of the many I've been subjected to.

18 Q Do you know what the basis for that evaluation was?

19 A Couldn't tell you. I guess my alleging they were
20 making me physically and mentally sick by their
21 conduct. Assumption on my part.

22 Q And how long were you off for that evaluation?

23 A I don't remember. It was probably a couple months. I
24 was off and released and the city didn't accept my
25 release, so it became like the Florida vote where the

EXHIBIT 6

TACOMA POLICE DEPARTMENT



Intra-Departmental Memorandum

TO: Captain Joseph Kirby

FROM: Asst. Chief David A. Brame DATE: September 13, 1999
Operations Bureau Commander

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 product, 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

JK 000763

EXHIBIT 7

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON

3 _____
4 JOSEPH J. KIRBY and DEBORAH A.)
5 KIRBY, husband and wife,)

6)
7)
8 Plaintiffs,)

9 vs.)

10) No. C00-5332 FDB
11)

12 THE CITY OF TACOMA, a municipal)
13 corporation; RAY CORPUZ and "JANE)

14 DOE" CORPUZ, husband and wife;)

15 PHILIP ARREOLA and "JANE DOE")

16 ARREOLA, husband and wife; WILLIAM)

17 WOODARD and CATHERINE WOODARD,)

18 husband and wife; RAYMOND ROBERTS)

19 and "JANE DOE" ROBERTS, husband and)

20 wife; DAVID BRAME and "JANE DOE")

21 BRAME, husband and wife; and JAMES)

22 HAIRSTON and "JANE DOE" HAIRSTON,)

23 husband and wife,)

24)
25)
26 Defendants.)

27 _____
28 DEPOSITION OF WILLIAM R. WOODARD
29 Thursday, March 15, 2001
30 _____

31 APPEARANCES

32 For Plaintiffs:

33 JEFFREY H. SADLER

34 Messina Bulzomi

35 5316 Orchard Street West

36 Tacoma, Washington 98467

37 For Defendants:

38 SHELLEY M. KERSLAKE

39 Tacoma City Attorney

40 Civil Division

41 747 Market Street, Room 1120

42 Tacoma, Washington 98402

43 Also present:

44 Joseph J. Kirby

45 Reported by: Cindy Sanderson, RMR, CRR

46 License No. 299-06

1 in a support role, rather than in a police role. But
2 he was dealing with fairly perplexing issues: trying
3 to find space and deal with relocation of our
4 operations. I noticed that within a fairly short time
5 span, he began to appear to be irritable and
6 frustrated. After some point in time, I believe he
7 asked to be relieved of that assignment.

8 Q During the course of your years on the police force,
9 have you ever had any altercations or difficulties with
10 Lieutenant Kirby?

11 A Yes.

12 Q Could you explain those?

13 A When I was promoted to assistant chief and placed in
14 charge of the investigations bureau, Lieutenant Kirby
15 was assigned to the special investigations division as
16 a lieutenant. He, I think, had been having some issues
17 with the administration prior to my assignment there.
18 And it was obvious in his demeanor and his actions, his
19 behavior, that he was unhappy with the chief and that
20 that frequently got in the way of his performance, I
21 think.

22 Q Who was the chief at that time?

23 A Philip Arreola.

24 Q When you say that it was obvious in his demeanor, what
25 do you mean?

1 A Body language, facial expressions, comments, the manner
2 and pattern of his speech. He occasionally would
3 disrupt and delay meetings, making comments that
4 weren't what I would consider appropriate for
5 meeting -- the meeting environment and frequently
6 expressing an opinion -- negative opinions that weren't
7 solicited.

8 Q Back you up.

9 When you say disrupt and delay meetings, can you
10 give me any examples?

11 A Oh, he would make comments that weren't appropriate, I
12 felt weren't on topic, like he was trying to make
13 connections between this issue being discussed and
14 somehow relating it to the chief being responsible for
15 it or somehow connected to this issue, when the real
16 discussion was not about that. It was about the issue
17 and dealing with that issue.

18 Q Can you give me any concrete examples?

19 A Well, we had, I think, one staff meeting where the
20 forensics manager was talking about handling a homicide
21 scene. And in this homicide scene, there was a gas
22 meter that was installed inside the -- inside this
23 dwelling or something, and it was -- created a problem
24 for them because of some of the things they had to do.
25 It was kind of maybe a dangerous situation.

1 I should precede that by saying that in the
2 earlier part of the meeting, we had been having some
3 difficulty with computer equipment that was put in
4 place to assist the detectives in their work. And part
5 of the problem of them not working were people
6 modifying the computers, doing things to the programs
7 to try to make them work better, and they were possibly
8 subverting the system and we're in the process of
9 trying to get that fixed. And I made a comment that --
10 and this is at a time when computer technology is just
11 kind of starting to get spread out in the department --
12 you know, we all have some knowledge or experience with
13 computers, but it's probably not appropriate for our
14 people to be personally making adjustments to this
15 network or to these PCs. It might be causing some of
16 the problems. So until we get the training, let's ask
17 you folks not to mess with this stuff, because it's
18 causing problems. And that was kind of the end of that
19 issue.

20 And then later in the meeting, the discussion
21 about this gas meter inside of a building came up.
22 And Lieutenant Kirby just blurted out, loud, kind of in
23 a boisterous way, that the manager's people in the
24 forensics unit have no business dealing with code
25 violations involving gas meters because they haven't

1 been properly trained to do that. It's none -- it's
2 not their business to be involved in that, because they
3 haven't been trained to do that. And that the people
4 around here can't do anything without training
5 because -- because they haven't been trained to do it,
6 they can't even wipe their own asses. And my inference
7 from that was he was making comments back to me about
8 my earlier comment about don't mess with the computer
9 equipment, which I took as a personal affront.

10 Q Were these meetings that you were in open to
11 discussion?

12 A We had weekly bureau staff meetings. They were
13 agendaed. I would set up an agenda of things I felt we
14 needed to talk about: personnel, vehicle/equipment
15 issues, and things like that. And that was kind of a
16 pattern we went through, and typically I would chair
17 those meetings.

18 Lieutenant Kirby had, on a number of occasions,
19 absented himself from those meetings. I had to ask his
20 captain to have him be there. The other lieutenants
21 were there. It was his duty to be there. He -- it was
22 fairly obvious from his body language that he didn't
23 want to be -- didn't want to participate in these
24 meetings. And I'd asked that he be counseled on more
25 than one occasion about his being a part of the

1 A No. I would say just the exact opposite of that. .
2 That, you know, this wasn't a situation where advocacy
3 was -- bear in mind that it was -- it was a request for
4 anyone present who had information that they wanted to
5 share. He voluntarily said he had information to
6 share. He got -- he shared that information with
7 everyone in the room. He never, before giving the
8 information, said that he was contacted in his role as
9 a -- as a union official. Never said that he was --
10 you know, said, I don't want to -- I was contacted, but
11 I don't want to discuss this because I'm now her
12 advocate. Never said that. He, in fact, never said he
13 was her advocate. He just made the comment about it
14 was a confidential, personal, private call to his home.
15 And we said, it's a work-related issue.

16 Then he said to the fact, well, I'm a union
17 executive board member. And then there was a
18 conversation that it's not an advocacy situation and
19 there is no criminal charge pending against anyone.
20 You know, there's -- so I said -- then he jumped up to
21 his feet and snapped a salute and said, fucking
22 Airborne. You'll get your report, but you won't like
23 what's in it.

24 I think just prior to that I had made the comment
25 that, Joe, I need to deal with this personnel -- this

1 is a personnel issue. I need to deal with it. And the
2 chief's not asking for this report. It's me asking for
3 the report, and that as your bureau commander, I fully
4 expect you to provide it.

5 And then I think that was the -- I think that
6 ended the meeting. I don't think anybody was prepared
7 to have any further discussion. I think it was
8 wrapping the meeting up.

9 Q So I can be clear about your testimony, is it your
10 testimony that Dave Brame said that an advocacy
11 privilege did not exist?

12 A I don't think that the word advocacy was used. I don't
13 think it came up at all in discussion. At least, I
14 don't recall it as that.

15 Q Is it also your testimony that Lieutenant Kirby
16 divulged the details of his conversation at that
17 meeting?

18 A Yes.

19 Q He didn't just state an affirmative comment such as,
20 that's what occurred; you might want to be careful what
21 you're saying? Is it your testimony that he actually
22 divulged the conversation's contents?

23 A Yes. He told -- he told the group what they had
24 discussed. And it wasn't -- it wasn't a significant --
25 I mean, there weren't significant issues raised. It

1 real appropriate statement to make at that time, and it
2 wasn't really responsive to what the Chief had asked
3 for.

4 So I don't know when the Chief made that comment.
5 I think it was during -- at this setting, and it may --
6 I think it was in response to what Joe had said. In
7 other words, "Well, you're the voice of dissent. I
8 understand that, but do you still work here? Are you
9 willing to -- are you going to do the job? Are you
10 going to cooperate? Are you going to help things
11 happen? Or are you going to be just the voice of
12 dissent?" In that kind of a fashion.

13 If I'm wrong about the setting or something, you
14 can give me some hints. But that's the way I recall
15 it, and that's the way I kind of took it.

16 Q You remember it as being responsive to Lieutenant
17 Kirby's statements?

18 A I don't -- I don't know if it was in the same proximity
19 as you know -- I don't think he said it to him right
20 then when it occurred. It might have been, you know,
21 at a break or something or just starting up after a
22 break or something like that. It didn't seem to me
23 that he said it right at the time that Joe made his
24 statements.

25 Q Earlier you testified about the use of some profanity

1 by Lieutenant Kirby?

2 A Yes.

3 Q Is it uncommon for officers to use profanity?

4 A The rules of conduct are that you maintain proper
5 demeanor, courteous, you don't use profanity, and so
6 on. We know that in the course of doing our jobs,
7 there are times when you are ordering somebody to drop
8 a gun and they are not responding, that sometimes the
9 profanity used at that time might invoke the action
10 that you want.

11 But it's certainly not commonplace or proper
12 demeanor to stand up and scream in a staff meeting
13 about the fucking chief or fucking reports and things
14 like that, or fucking Airborne. You know, those are
15 comments that are clearly inappropriate, insubordinate,
16 and can't be tolerated. They are very threatening,
17 intimidating to people, and they -- they stop the
18 normal discourse of business. Nobody wants to continue
19 a meeting after somebody does something like that.

20 And that's the kind of behaviors that I as a
21 manager am seeing and concerned about and feel need to
22 be addressed.

23 Q During the course of Chief Arreola's years on the
24 force, did Chief Arreola use profanity in meetings?

25 A I can't recall specific incidents. I think that he,

EXHIBIT 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

v.

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

Defendants.

No. 99-2-13911-4

AFFIDAVIT OF MARY BROWN IN
SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT TO
DISMISS PHILIP ARREOLA,
DAVID BRAME AND RAYMOND
ROBERTS

NOTED FOR:
December 13, 2002

ASSIGNED:
Judge Katherine M. Stolz

COPY

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

MARY BROWN, being first duly sworn on oath, deposes and states as follows:

1. I am over the age of eighteen and competent to give testimony in this matter, and make this affidavit upon personal knowledge.

2. I am the Assistant Human Resources Director for the City of Tacoma, and have been so since 1990.

3. The promotional process for a Captain's position within the Tacoma Police Department is as follows: (1) a written examination is taken by interested employees; (2) an eligible list is prepared in order of score, however, everyone on that list is deemed to be qualified based on the successful passing of the written examination; (3) when there is a vacancy, the top three candidates are certified and interviewed; (4) the interview panel makes a recommendation to the Chief of Police, who then makes the ultimate promotional decision.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Mary L Brown

MARY BROWN

SUBSCRIBED and SWORN to before me this 13th day of November, 2002.

M. J. Hughes

Printed Name: M. J. HUGHES
NOTARY PUBLIC in and for the State of
Washington, residing at: Tacoma
My commission expires: 11/11/03

EXHIBIT 9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH)
KIRBY, husband and wife,)
Plaintiffs,)

vs.

NO. 99-2-13911-4

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

Defendants.)

DEPOSITION OF JAMES HAIRSTON
Friday, April 21, 2000

APPEARANCES

For Plaintiffs:

JOHN L. MESSINA
Messina Bulzomi
Attorneys at Law
5316 Orchard Street West
Tacoma, Washington 98467

For Defendants:

SHELLEY M. KERSLAKE
Assistant City Attorney
747 Market Street, Room 1120
Tacoma, Washington 98402

Reported by: Carol Lynn Frederick, CCR
License No. FREDECL431P4

1 A It's a civil service process. I'm certain he took a
2 number of examinations, written as well as interviews,
3 to reach that position.

4 Q Is there any other evaluation other than the
5 examination process that puts these people in rank
6 order?

7 A From a civil service position, that concludes the rank
8 order.

9 Q I mean do they get like points for seniority or having
10 been war veterans or anything like that?

11 A I think there's still some points in effect as a
12 veteran. I believe it's a 60/40 split between the oral
13 and the written interviews to get to that position and
14 I think veteran's preference is still applied to the
15 promotional positions.

16 Q In the past year, I believe Lieutenant Kirby has been
17 passed over twice for promotion to permanent captain?
18 Is that correct?

19 A Yes, sir.

20 Q Who was the first person promoted over him?

21 A In the last year, I believe the list ranking was
22 Lieutenant Kirby, Lieutenant Woodard and Lieutenant
23 Langford so it would have been Lieutenant Catherine
24 Woodard and in the second round it would have been
25 Lieutenant Mark Langford.

1 Q Why was Lieutenant Woodard promoted over Lieutenant
2 Kirby?

3 A The process, of course, after the civil service list is
4 established is a permanent position is recognized and
5 that has been an open position. The Rule of 3
6 interview process--

7 Q I'm sorry. I don't mean to interrupt you but where did
8 this Rule of 3 come from?

9 A It's actually been with the city personnel department
10 and the city government for a number of years. It
11 first began in our department in 1986 under Dean
12 Phillips, then Director Dean Phillips.

13 In 1989 when then Sheriff Ray Fjetland became
14 chief of the Tacoma Police Department, he began to
15 utilize the Rule of 3 in essence on an active basis so
16 when I became chief and Chief Arreola and Chief Monner,
17 it's the past practice and it's been ongoing since 1989
18 in terms of the utilization of the Rule of 3.

19 Q Is it written down anywhere or is it just an informal
20 practice?

21 A It is written in the personnel rules so it's not an
22 informal practice.

23 Q Could you tell me why in view of the fact that
24 Lieutenant Kirby was first on the list that Lieutenant
25 Woodard was elevated to captain instead of him?

1 A First in terms of going through the interview process
2 in terms of the Rule of 3 interviews, as I recall, the
3 top three were interviewed by Deputy Chief Darland and
4 Assistant Chief Roberts.

5 Q Did you partake in any of those interviews?

6 A No, sir. Normally the candidates interview for the
7 ranks of captain, lieutenant and detective and
8 sergeant, depending on the position that's open at the
9 time. In this case, for the position of captain there
10 was a vacancy.

11 Normally, the deputy chief and two assistant
12 chiefs complete the interviews of those three
13 candidates. The first time it dealt with the
14 interviews being conducted by I believe Assistant Chief
15 Roberts and Deputy Chief Darland because I think there
16 was a hostile work environment complaint against
17 Assistant Chief Brame so he did not participate.

18 Q Did he have any input despite the fact he didn't
19 participate?

20 A He didn't provide any to me, but I did have, by the
21 way, which I do on just about each and every case, I
22 review the personnel files of the candidates, so in
23 terms of input in terms of probation reports and so
24 forth from the work history of the employee, that was
25 available to me because I look at the personnel files

1 also as a part of that interview process.

2 Q Who makes the ultimate decision as to who gets the
3 captain's job?

4 A The chief of police. In this case, I do, and I did in
5 those instances.

6 Q What I'm getting at is what were your reasons for
7 choosing Lieutenant Woodard over Lieutenant Kirby for
8 the permanent captaincy?

9 A I look at three areas, really. I look at the feedback,
10 comments I get back from the assistant chiefs who
11 interview the applicant.

12 Q What was the feedback you got from them regarding
13 Lieutenant Kirby as opposed to Lieutenant Woodard?

14 A The feedback that I received in terms of both Deputy
15 Chief Darland and Assistant Chief Roberts the first
16 time indicated that they felt that the second
17 applicant, in that case, Lieutenant Woodard, was more
18 qualified and a better fit into the organizational
19 structure for the department.

20 Q Let's talk about both of those things. Let's talk
21 about more qualified first. How was she more qualified
22 than Lieutenant Kirby?

23 A Well, without being in a position now to put words in
24 their mouth, it's a case of what the applicant brings
25 forward in terms of what they can provide for the

1 department and the foundation they have and it has a
2 number of areas to look at in terms of education, in
3 terms of ability and performance to do the job, but
4 that's from their side.

5 As far as mine, I also look at the personnel
6 files, and I also have to look at the manner of team
7 work and how is this employee's position going to have
8 an impact on our organization as a whole and what he or
9 she can bring to the organization.

10 Q Do you feel that she was a better team player than
11 Lieutenant Kirby?

12 A Team player is not a word I like to use. It's team
13 work because it's not a player type of thing. I don't
14 like to put it in context of football or baseball or
15 basketball necessarily, but the work environment and
16 the relationship building and I see it in team work
17 there, not only internally but externally, because we
18 have, particularly as managers, we have to reach a
19 consensus on the issues and move forward, so that was
20 the first one. As you know, there was a second
21 interview process.

22 Q I'm just limiting it to the first one right now. What
23 deficiencies were there in Lieutenant Kirby's team work
24 capacities that caused you to lean in favor of
25 Lieutenant Woodard?

1 A The team work aspect of it was, and performance wise,
2 there may be excellent work here and there may be
3 activity here that will have an impact on that.

4 Some of those, as I recall, and this may have
5 occurred in the first interview process, were things
6 that can be somewhat disruptive to the ability of the
7 team to move forward.

8 Q Like labor activities?

9 A No, sir. In fact, labor activities does not really
10 concern me in that sense. We have a contract and we
11 must comply with the contract.

12 I think there was one or two out in the operations
13 bureau and I don't consider the major things but the
14 minor things that can have an impact on the morale in
15 an organization.

16 I think there was one related to the \$20 bucks or
17 something to give someone to try to locate someone.
18 Now, that's not the greatest infraction on earth, but,
19 on the other hand, that can have an impact on the
20 organization.

21 Q So was the notebook throwing incident involved in your
22 thought process?

23 A I think that had been clarified. I think Assistant
24 Chief Brame had talked to Lieutenant Kirby and that had
25 been something that had been in essence put to rest,

1 they had to come to an agreement about.

2 That one did, and I think the one that was the
3 most current was that one as well as the relationship
4 issues with the other managers.

5 Q Did both Chief Darland and Chief Roberts recommend
6 Lieutenant Woodard over Lieutenant Kirby?

7 A Yes, sir.

8 Q What about the second promotion? I think Lieutenant
9 Langford received that promotion?

10 A Yes, sir.

11 Q What were the reasons for passing Lieutenant Kirby over
12 for a second time, even though he was first on the
13 list?

14 A Again, the interview process, and the top three of the
15 interviews going back to the list was Lieutenant Kirby,
16 Lieutenant Langford and I believe Lieutenant Richard
17 McCrea. Those were the top three at that time and they
18 were interviewed.

19 Q Who interviewed them?

20 A Captain Meeks and Deputy Chief Mike Darland. Now, the
21 reason a captain, which we've used before, kind of a
22 past practice issue, was selected for the interview
23 process this time was because I think there were issues
24 related to the workplace regarding Assistant Chief
25 Roberts and we didn't want him part of the interview

1 process.

2 They came back to me, Captain Meeks and Deputy
3 Chief Darland, with their recommendation to me in terms
4 of that position.

5 Q So did both Captain Meeks and Deputy Chief Darland
6 recommend passing over Lieutenant Kirby once again?

7 A Yes, sir.

8 Q In favor of whom?

9 A In favor of Lieutenant Mark Langford.

10 Q Were there any different reasons on this second process
11 for passing him over as opposed to the first time?

12 A It transpired in this way. When they came back into
13 the room about that, Captain Meeks spoke about it and
14 the reasoning was on the same thing as before in terms
15 of what they felt to be a better team working and
16 better ability for the organization and would support
17 the organization moving forward.

18 At that point, just to clarify, I requested from
19 each. I inquired as to, "Is this your position,
20 Captain Meeks?" and he indicated it was. Then I went
21 to Deputy Chief Darland and I said, "Is this your
22 position because I want to be clear on this; that the
23 selected person that you're recommending to me is Mark
24 Langford," and they both indicated individually that
25 that was who they felt should receive the position.

1 Q I assume that you made the ultimate decision?

2 A Correct.

3 Q Other than their recommendations, what factors did you
4 take into account in choosing the one over the other?

5 A Similar to before in terms of relationships,
6 participation, organization, moving the organization
7 forward and team work.

8 Q At that time, again, what are the deficiencies in
9 Lieutenant Kirby's team work abilities that would cause
10 him to be passed over?

11 A Of course the performance aspect of it, he has had some
12 projects and programs over the years. In particular, I
13 think he just recently did excellent work in that
14 regard. Then there are issues related to consensus of
15 building partnerships with members of the same or
16 similar rank that have caused some of those
17 difficulties.

18 Q Who are some of the people he's had difficulties with?

19 A Not necessarily people. I think in terms of people,
20 though, I think there were differences between his
21 immediate supervisors at that time and I think it was
22 Assistant Chief Brame and Assistant Chief Roberts and
23 working relationship issues, particularly of those two
24 assistant chiefs.

25 Q Was he ever given a reason for not being promoted?

1 A He didn't request one. Under our labor agreement, the
2 employee can do that at any given time and I'm required
3 under the labor contract to respond to the employee in
4 writing but it was never requested on either.

5 By the way, I thought that was unusual. I was
6 waiting for a request. However, on a couple of
7 probation reports the employee had submitted rebuttals
8 to the probation reports, but in the rebuttals he also
9 indicated that the matters would come to light and
10 resolved in a legal sense in a way I think through
11 litigation. I think that is the term. I would have
12 been more than happy to respond if he had requested me
13 to do so through the contract.

14 Q Is there any or was there any technical or failure of
15 technical or tactical competence that prompted your
16 decision to pass him over?

17 A If you could elaborate on that just a little bit to
18 give me a better --

19 Q Well, I think you talked about and I'm hearing reasons
20 given that talk about team work and interpersonal
21 relationships.

22 I've not heard anything yet that he's not a good
23 cop, that he didn't perform his job adequately
24 technically or tactically, that he was not a good
25 leader among his men. None of that came forward from

1 anything you said.

2 A It sure didn't because he has excellent skills in most
3 of those areas and can from time to time demonstrate
4 leadership ability. It falls into primarily the issue
5 of consensus building and partnership and management
6 styles and moving the organization forward.

7 All of us, in my view, it's a team work matter.
8 We've just spoken of will and "Let's do all we can to
9 move the wagon forward together." Those were some
10 deficiencies that I noted as a part of that.

11 There was also, of course, the input from my
12 commanders. I value that input and this is a case in
13 both instances where he didn't have any support from
14 those commanders in terms of the Rule of 3 interviews
15 and that's unusual as well because I know in most of
16 these matters where employees are either promoted or
17 passed over you're going to have support one way or
18 another.

19 Mostly there will be some support and there was
20 not any support on either interviews from the
21 commanders.

22 Q I want to get into this. Do you know who Christie Mayo
23 is?

24 A No, sir. I've seen her name in some of the articles
25 and some of the reports but I don't know her, sir. I

1 have not met her.

2 Q I think she's the person who's complaining that one of
3 your officers is harassing her.

4 A There was an investigation concerning some allegations
5 she made, sir.

6 Q Who was the officer?

7 A I believe it was Officer Michael Rahn, R-a-h-n.

8 Q What were her allegations, generally?

9 A I'm not exactly sure what they are, but on a general
10 basis I think it related to Michael Rahn contacting her
11 or giving her his phone number or a phone number.

12 Q Was there an investigation done?

13 A Yes, sir.

14 Q Who did that?

15 A The Washington State Patrol.

16 Q Was there an internal investigation at anytime by any
17 officers in your division, in your department?

18 A No, sir.

19 Q Do you know if any officers in your department
20 contacted the complaining person?

21 A Yes, sir.

22 Q Who were the officers that contacted her?

23 A I believe a matter came to the attention of Lieutenant
24 Kirby and he may have been temporary Captain Kirby at
25 the time when he was command duty officer.

EXHIBIT 10

Date Submitted: 11/17/98

Emp. No. 33825	Prefix Last Name, First Name Hairston, James O	SSN 240-72-0254	Hire Date 01/27/46	Effit Date 12/01/98 - 3/31/99
Sex M	Address 2316 54th Street Court NW	Telephone (Home) 253/851-5446	City Gig Harbor	State WA
Zip 98335				
FROM (Also Separations)		TO (Also New Hires - Miscellaneous Transactions)		
Dept Id DG200	Department Police	Pay Loc. G201	Payroll Loc. Desc. Pol/Admin	
Dept Id DG200	Department Police	Pay Loc. G201	Payroll Loc. Desc. Pol/Admin	
Job Code 07700	Job Title Police Chief Asst	Job Code 07720	Job Title Police Chief	Status Full-Time
Appr. Cd. 6	Hourly Rate 45.750	Step 4	Appr. Cd. 6	Req. No.
			Hourly Rate 48.830	OT Cat. D
			Step 4	Police Id 002
SUBJECT TO: 1. <input type="checkbox"/> Not Subject to Probation 2. <input type="checkbox"/> 6 mo. Prob. 3. <input type="checkbox"/> 9 mo. Prob. 4. <input type="checkbox"/> 12 mo. Prob.				

Type of Action: **PRO Promotion** Reason: **Acting Appointment**

REQUIRES APPROVAL OF: *HUMAN RESOURCES DIRECTOR **CITY MANAGER **DIRECTOR OF UTILITIES

RACE: 2 Black DISABLED? N

REMARKS, EXPLANATION, OR SUPPORTING FACTS: (Attach Supplementary Data if necessary)

RECEIVED

NOV 18 1998

OFFICE OF
CHIEF OF POLICE

Signature of Employee _____ (When Required) DATE _____

Recommendations

IMMEDIATE SUPERVISOR	SECTION HEAD	DEPARTMENTAL PERSONNEL OFFICER	DIVISION HEAD
			<i>Hairston</i>

Final Actions (FROM) (TO)

APPOINTING AUTHORITY (TRANSFERS)	APPOINTING AUTHORITY (TRANSFERS)
----------------------------------	----------------------------------

ACTION OF CITY MANAGER OR DIRECTOR OF UTILITIES (USE ONLY WHEN REQUIRED) <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED REMARKS _____ _____ _____ SIGNATURE _____ DATE _____	ACTION OF HUMAN RESOURCES DIRECTOR (USE ONLY WHEN REQUIRED) <input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED REMARKS _____ _____ _____ SIGNATURE _____ DATE _____
---	--