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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
REGARDING PLAINTIFF'S
DISABILITY 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

Defendants.

ASSIGNED:
Judge Katherine M. Stolz

REPLY MEMORANDUM IN SUPPORT OF DEFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING PLAINTIFF'S DISABILITY
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 completely failed to carry his burden, and summary**
 2 **judgment for the defendants are appropriate.**

3 In responding to a summary judgment motion, it is incumbent on the
 4 plaintiff to "set forth specific and material facts to support each element of his
 5 prima facie case."¹ Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618
 6 (1992). In response the motion brought by the defendants on his disability
 7 discrimination claim, plaintiff has ignored that he is required to tie his disparate
 8 treatment claim to his alleged disability. When a plaintiff alleges disparate
 9 treatment, "liability depends on whether the protected trait actually motivated
 10 the employer's decision. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 123
 11 L.Ed.2d 338, 113 S.Ct. 1701 (1993). That is, plaintiff's disability must have
 12 "actually played a role in [the employer's decision making] process and had a
 13 determinative influence on the outcome." Id.

14
 15
 16 **II. Plaintiff's only claim of disability discrimination is based on his**
 17 **removal from the Clandestine Lab Team, and this removal predates**
 18 **his disability.**

19 Plaintiff bears the burden of proving that the employer had notice of his
 20 disability prior to the alleged discriminatory act. Sommer v. DSHS, 104 Wn.
 21 App. 160, 173, 14 P.3d 664 (2001). If he fails to establish notice, his claim
 22 must fail as an employer can not be liable for discrimination for a condition it
 23 does not know exists. Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928 (7th Cir.

24
 25 ¹ For purposes of this motion only, defendants are not disputing plaintiff is disabled. However, at
 26 trial, this issue will be contested. See, Henley v. Lee Smart, 12 P.3d 626 (2000) (emotional
 disability caused by an employment situation does not constitute a disability under the WLAD).

1 1994). The only incident that the plaintiff attempts to tie to his disability is his
2 removal from the Clandestine Lab Team:

3 "they removed me from the clandestine lab team where I served
4 for six or seven years, where I was completely qualified. I was a
5 Lieutenant, they removed me. I was actually the team commander.
6 And they told me the removal was because I was a Lieutenant and
7 I was not on the SID." (Plaintiff's Opposition Brief, p. 21-22.) (See
8 also, Exhibit 1, deposition excerpt of Joseph Kirby.)

9 Kirby became a Lieutenant on January 19, 1996. (See Exhibit 2.) In the
10 light most favorable to the plaintiff, the City was notified of his alleged disability
11 on July 31, 1998. (Exhibit 3.) Thus, his removal from the Clandestine Lab
12 Team for becoming a Lieutenant, predated the Department's notice of disability
13 by two years and seven months.

14 Later in his opposition material, when discussing pretext, plaintiff alludes
15 to a memo which references Kirby's disability when discussing the lab team.
16 And then states that "any legitimate and nondiscriminatory reasons given for
17 Mr. Kirby's removal from the Clandestine Lab Team, in light of this evidence is
18 pretext." (Plaintiff's Opposition Brief, p. 27.) However, plaintiff is attempting to
19 use documents that are unrelated to the issue of removal from the lab team,
20 and is creating a misleading record.

21 To begin, as discussed *infra.*, Kirby was removed from the Clandestine
22 Lab Team upon becoming a Lieutenant. This occurred in 1996, several years
23 before the alleged disability occurred - thus, cannot form the basis for a claim of
24 disability discrimination. Several years later, an officer was allowed to stay as
25
26

1 commander of the Clandestine Lab Team upon becoming a lieutenant,
 2 because there were no certified team leaders at that time. (See Affidavit of
 3 Paul Mielbrecht.) As soon as a certified team leader became available, he too
 4 was removed from the team. (Affidavit of Paul Mielbrecht.) However, disparate
 5 treatment must be based on the protected status. If the department was not
 6 notified of Kirby's disability in 1996, when it made the decision to remove him
 7 from the team, the decision cannot be *because of this disability*, and his claim
 8 fails as a matter of law. Hedberg, supra.

9 Further, the memo, dated April 8, 1999, referenced as Exhibit 2 to
 10 Supplemental Declaration of John Messina, deals with another issue entirely.
 11 In March, 1999, Kirby decided he would like to be on the Clandestine Lab Team
 12 as a member, not a team leader. At the time of the interview, he was off, on
 13 leave, due to his alleged emotional distress issues. Pursuant to Department
 14 policy and specific direction, while an officer is off on leave of this nature, he or
 15 she is banned from entering police facilities, and is relieved of taking any police
 16 action. (See Exhibit 4.) Thus, in the memo referenced by plaintiff, Captain
 17 Meinema's decision to allow Kirby to take the oral exam for the team position
 18 was questioned, given Kirby's leave status. (Exhibit 5.) Kirby has made no
 19 claim that his non-selection for the Clandestine Lab Team as a team member
 20 was the basis of any claim.² Thus, the memo which the plaintiff points to as
 21 evidence of pretext was written more than three years, after the decision to
 22
 23
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25 ² That is because his chances of selection were slim due to the fact that he was a lieutenant,
 26 and they were looking for subordinate team members. (Affidavit of Paul Mielbrecht.)

1 remove him as team leader, has nothing to do with that decisional process, and
2 cannot be used to show pretext for his removal as team leader.

3 **III. Conclusion.**

4 Plaintiff has presented no evidence that his alleged disability was a
5 substantial factor in the decision to remove him from the Clandestine Lab Team
6 in 1996. He has not demonstrated that his employer even had notice of his
7 disability at that time. Given this utter lack of evidence, plaintiff has failed to
8 present a prima facie case, and his claim of disability discrimination fails as a
9 matter of law. Defendants respectfully request that the court dismiss plaintiff's
10 cause of action.

11 DATED this 3 day of January, 2003.

12
13 ROBIN S. JENKINSON, City Attorney
ELIZABETH A. PAULI, Ch. Asst. City Atty.

14
15
16 By: 

17 SHELLEY M. KERSLAKE
18 WSBA# 21820
Assistant City Attorney
Attorney for Defendants

EXHIBIT 1

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

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

6 vs.)

No. 99-2-13911-4

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

13 Defendants.)
14

15 DEPOSITION OF JOSEPH J. KIRBY

16 February 15, 2001
17 Tacoma, Washington

18 BYERS & ANDERSON, INC.
19

20 COURT REPORTING & VIDEO

21 2208 North 30th Street
22 Suite 202
Tacoma, Washington 98403
23 (253) 627-6401
24 FAX: (253) 383-4884

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

25 1-800-649-2034

1 I did that. And I think they acted out of what their
2 prejudice was against anyone that might have been
3 placed in a disability status due to any kind of a
4 stress related injury.

5 Q You talk about other decisions you believe were made
6 based on your disability. What decisions are you
7 talking about?

8 A They removed me from the clandestine lab team where I
9 served for six or seven years, where I was completely
10 qualified. I was a lieutenant, they removed me. I
11 was actually the team commander.

12 And they told me the removal was because I was a
13 lieutenant and I was not in SID. Subsequent to that,
14 they allowed Lieutenant Ramsdell to remain affiliated
15 with the team as a lieutenant while not assigned to
16 SID.

17 So as I look at what they did to me and the
18 contradiction in Lieutenant Ramsdell's continued
19 affiliation with the team, it was apparent to me there
20 were two standards there. They were applying a
21 different standard to me. I would also say nothing in
22 my meth team career would merit the removal from that
23 team.

24 Q What do you base your belief on that was related to
25 your disability in any way?

EXHIBIT 2

Emp. No. 49600	Prefix Last Name, First Name Kirby, Joseph J	SSN 535-46-9964	Effective Date 03/02/97	1/7/97 04183 10261 0001 5
Sex M	Address 11808 SEMINOLE ROAD S.W.	Telephone (Home) 206-581-0098	City TACOMA	State WA
FROM (Also Separations)		TO (Also New Hires - Miscellaneous Transactions)		
Dept Id	Department	Pay Loc.	Payroll Loc. Desc.	
JobCode	Job Title	JobCode	Job Title	Status
		42050	Police Lieutenant	Full-Time
Appx Cd.	Hourly Rate	Step	Appx Cd.	Req. No.
			1	96-04
			28.660	
			A	1
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: DTA Data Chg Reason: Perm appt from temp appt/upgd (Corrected P-100)

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

RACE: 5 White DISABLED? N

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

Signature of Employee _____ (When Required) DATE _____

Recommendations PLEASE USE BALLPOINT PEN TO INSURE LEGIBLE COPIES

IMMEDIATE SUPERVISOR	SECTION HEAD	DEPARTMENTAL PERSONNEL OFFICER	DIVISION HEAD
			AKC [Signature] 2/9/96

Administrative 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 _____
---	--

I-9: _____ Rank: 0 List Date: _____ App No.: _____ Position #: 00175025

JK/TPD PERS 000168

EXHIBIT 3



SELF INSURER
ACCIDENT REPORT
(SIF-2)

CLAIM NUMBER
1772053 18261-00017
001330

WORKER ALL QUESTIONS BELOW MUST BE ANSWERED
START HERE OR THERE MAY BE A DELAY IN PAYMENT OF BENEFITS.

U.S.I. # CLASS

INSURED FIRM NAME CITY OF TACOMA		NAME OF INJURED EMPLOYEE: FIRST MIDDLE LAST JOSEPH JOHN KIRBY			EMPLOYEE'S TELEPHONE NO. 591 3889
ADDRESS		MAILING ADDRESS 11808 SEMINOLE RD SW			SOCIAL SECURITY NUMBER 535469961
STATE	ZIP	CITY	STATE	ZIP CODE	EMPLOYER'S TELEPHONE NO. UNLISTED
		TACOMA	WASHINGTON	98409	

HEIGHT 68"	WEIGHT 160	FULL NAME OF SPOUSE AT TIME OF INJURY DEBORAH A KIRBY	IF DIVORCED, GIVE FINAL DECREE DATE	YOUR JOB TITLE WHEN INJURED POLICE LT.	SEX M	DATE OF BIRTH 2 MAR 47
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GIVE NAME AND BIRTH DATES OF YOUR CHILDREN UNDER 18 SUPPORTED BY YOU						IF DIVORCED AND YOU HAVE MINOR CHILDREN SUBMIT A COPY OF THE COURT ORDER SHOWING LEGAL CUSTODIAN OF SUCH CHILDREN. ALSO GIVE PRESENT ADDRESS OF SUCH CUSTODIAN.
NAME	RELATIONSHIP	BIRTHDATE	NAME	RELATIONSHIP	BIRTHDATE	

CHARACTER OF INJURY OR DISEASE STRESS DUE TO HOSTILE WORK ENVIRONMENT	PART OF BODY AFFECTED PHYSICAL DEMOTIONAL	LEFT <input type="checkbox"/>	RIGHT <input type="checkbox"/>	DATE OF ACCIDENT ONGOING	CUR ACCIDENT OCCURRED AM
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DESCRIBE ACCIDENT FULLY. DESCRIBE WHAT YOU WERE DOING WHEN INJURED. IF YOU FELL, STATE IF IT OCCURRED INDOORS OR OUTDOORS. IF YOU WERE STRUCK, NAME THE OBJECT WHICH STRUCK YOU. WERE YOU LIFTING, PULLING, PUSHING, OR CARRYING? IF MACHINERY WAS INVOLVED, NAME MACHINERY AND DESCRIBE ITS FUNCTION. NAME MECHANICAL INVOLVED IF APPROPRIATE.

ONGOING HOSTILE WORKPLACE HARASSMENT & REPRISAL FOR UNION ACTIVITIES MANIFESTING ITSELF IN EXTREME EMOTIONAL PSYCHOLOGICAL AND PHYSICAL DISTRESS REQUIRING MEDICAL DIAGNOSIS AND TREATMENT.

NAME OF ALL WITNESSES TO YOUR ACCIDENT

IF THE EMPLOYER IS DIFFERENT THAN ONE WHERE INJURED, GIVE NAME & ADDRESS

DO YOU HAVE MORE THAN ONE PAYING JOB?
YES NO

DATE LAST WORKED 7-31-98	IF RETURNED TO WORK, GIVE DATE	HOW LONG HAVE YOU WORKED FOR THIS EMPLOYER? 15+ YEARS	WERE YOU DOING YOUR REGULAR WORK AT TIME OF ACCIDENT? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	WHERE DID ACCIDENT OCCUR? <input checked="" type="checkbox"/> EMPLOYER'S PREMISES <input type="checkbox"/> PARKING LOT <input type="checkbox"/> OTHER
------------------------------------	--------------------------------	---	--	--

WAS THE ACCIDENT IN YOUR OPINION CAUSED IN ANY WAY BY SOMEONE NOT EMPLOYED BY YOUR EMPLOYER? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	ADDRESS OR LOCATION WHERE ACCIDENT OCCURRED 930 Tacoma Avenue	COURT? PIERCE
---	---	-------------------------

TO WHOM REPORTED: (NAME & TITLE) AL MIELBRECHT POLICE CAPTAIN	DATE REPORTED TO EMPLOYER 7-31-98	IF REPORTING OF ACCIDENT WAS DELAYED, WHY?
---	---	--

WAS ACCIDENT CAUSED BY FAILURE OF A MACHINE OR PRODUCT? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	HAVE YOU EVER BEEN TREATED FOR SIMILAR INJURY BEFORE? IF SO, DESCRIBE INJURY
--	--

NAME AND ADDRESS OF ATTENDING PHYSICIAN	PAYEE ACCOUNT NO.	TODAY'S DATE
---	-------------------	--------------

NAME OF HOSPITAL	MEDICAL RELEASE AUTHORIZATION. I HEREBY AUTHORIZE MY PHYSICIAN, HOSPITAL AGENCY OR ORGANIZATION TO DISCLOSE TO MY EMPLOYER OR HIS REPRESENTATIVE OR THE DEPT. OF LABOR & INDUSTRIES ANY MEDICAL RECORDS OR OTHER INFORMATION REGARDING TREATMENT WHICH HAS PREVIOUSLY BEEN FURNISHED TO ME.	WORKER'S SIGNATURE <i>[Signature]</i>
------------------	---	--

CITY HOSPITAL LOCATED	SIGNATURE OF SUPERVISOR OR FOREMAN (OPTIONAL)	I HAVE READ LEGAL WARNING ON REVERSE SIDE OF EMPLOYEE'S COPY <i>[Signature]</i>	WORKER'S SIGNATURE <i>[Signature]</i>
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EMPLOYER START HERE	DATE RETURNED TO WORK	WAS EMPLOYEE ENGAGED IN THE REGULAR COURSE OF EMPLOYMENT WHEN INJURED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	RATE OF PAY (NO OVERTIME) WRITE AMOUNT, CIRCLE RATE HR WK \$ _____ DY MO	HRS/DAY	WILL YOU PAY THE EMPLOYEE FULL SALARY OR WAGES DURING PERIOD OF DISABILITY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
---------------------	-----------------------	---	---	--	---------	--

DO YOU AGREE WITH EMPLOYEE'S DESCRIPTION OF THE ACCIDENT? IF NOT, EXPLAIN.

SEASONAL PART TIME OR INTERMITTENT YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	IF YES, PROVIDE 12 MOS. GROSS WAGES \$ _____	AVG DLY EARNINGS FROM PIECEWORK, TIPS, & COMMISSIONS AS REPORTED TO IRS \$ _____	L&I USE ONLY
---	---	---	--------------

FATALITY <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	DATE REPORTED TO EMPLOYER	3RD PARTY INVOLVED?
---	---------------------------	---------------------

I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. JK 000272

DATE	SIGNATURE	TREATMENT ONLY: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	WORKER'S COPY MAILED YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	TREATMENT ONLY FOR: LT. DUTY PROVIDED YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
------	-----------	--	---	--

BUSINESS LOCATION NAME	DATE CLOSURE MAILED	ASSOC. COSTS \$ _____
------------------------	---------------------	--------------------------

EMPLOYEES ASSIGNED WORK LOCATION ADDRESS

EXHIBIT 4



City of Tacoma
Police Department

April 1, 1999

Lieutenant Joseph Kirby
11909 Seminole Rd. SW
Tacoma, WA 98499

SUBJECT: DUTY LIMITATIONS DURING SICK LEAVE

Dear Lieutenant Kirby:

On, or about Monday, March 15, 1999, you reported yourself unable to work due to illness. You clarified your condition on Friday, March 19, as being related to ongoing conditions of a prior on the job injury associated with stress.

Per Captain Meinema you have fulfilled the obligation of surrendering your departmental badge, all commission cards, firearms, and assigned take home vehicle, in accordance with MRP 2.04.005 IIIV, "Surrendering Departmental Property and Restricting Access to Police Facilities."

Throughout the duration of the sick leave, until you are released by a physician and the City of Tacoma to return to duty, you are relieved from the obligation of taking proper police action that would ordinarily fall to a police officer in an off duty status.

You are hereby ordered not to enter any premises owned or occupied by the Tacoma Police Department, to include Law Enforcement Support Agency Facilities, without first making prior arrangements with your department contact person. Captain Meeks will be your department contact person and can be reached at 591-5506 during normal duty hours and by electronic pager at 573-6731. The only exception to the notification requirement set forth above is the occasion of a bona fide emergency, which necessitates your immediate presence at the Tacoma Police Department facility.

Willful violation of this order may result in formal discipline.

Sincerely,

Assistant Chief David A. Brame
Operations Bureau

jb
cc: Chief James Hairston
Deputy Chief Michael Darland
Legal Advisor Heidi Horst

EXHIBIT 5

I N T E R O F F I C E M E M O R A N D U M

Date: 08-Apr-1999 12:05 PST
 From: David Brame
 BRAMEDA
 Dept: TPD Investigations
 Tel No: (253) 591-5938
 Number: 019060

O: Charles Meinema

(MEINEMA)

C: James Hairston

(HAIRSTON)

Subject: Administrative Report Directive

Captain Meinema,

It has come to my attention that you authorized Lt. Kirby to participate in an interview for the Meth Team. This interview occurred while Lt. Kirby was on disability/sick leave due to mental or emotional stress.

As you were already aware, Lt. Kirby surrendered departmental property per MRP. Further, MRP restricts access to police facilities while on this type of leave.

This type of leave is sensitive to say the least. Not only is an officer relieved of taking proper police action while on-duty (hence the surrendering of departmental equipment), but also an officer is relieved of taking proper police action while off-duty as well.

This issue calls into question your decision in allowing Lt. Kirby to report for duty for the Meth Team interview. The issue questions your performance specifically.

You are directed to prepare an administrative report detailing your reasons for deciding to allow Lt. Kirby to interview for the Meth Team. Further, you are to include your reasons for not notifying me of this issue.

This administrative report is due on or before Monday, April 12, 1999. No overtime is authorized in preparing this report.

At this point, this issue may result in disciplinary action up to a formal written reprimand.

