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STATE OF WASHINGTON        )  
  ) ss.  
COUNTY OF PIERCE         )

SHELLEY M. KERSLAKE, being first duly sworn on oath, deposes and states as follows:

Plaintiff claims that the defendants "laid in the weeds" to ambush them at the last minute by pointing out to the court that they had not ever plead a First Amendment claim. This is simply not the case.

Plaintiff claims that he filed a "notice of claim" in July, 2002. This does not relieve him of his obligation to amend his complaint. The defendants are at a loss as to why leave of court was not requested to amend the complaint at that time, as the claim filing requirement does not apply to constitutional claims. But a claim is not a complaint, and it is not for the defendants to figure out what theories the plaintiff intends to pursue. For all I knew, he had decided to abandon that claim after doing more legal research. As the court will note, various causes of action are enumerated in plaintiff's amended complaint, a First Amendment violation is not one of them. As the Dewey court pointed out, it is a difficult, if not impossible, task to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint.

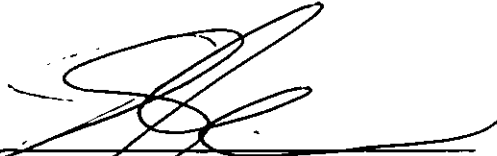
More importantly, as the Dewey court held, facts must be plead indicating the essential elements of a First Amendment claim. This was certainly not done in this case. Even if the court accepts that plaintiff's "notice of claim" somehow absolves him from actually pleading the First Amendment,

1 this "claim" does not articulate facts which establish the cause of action. To  
2 prove a prima facie case of a violation of the First Amendment, a plaintiff must  
3 plead and prove (1) the speech dealt with a matter of public concern; (2) the  
4 employee's free speech interest is greater than the employer's interest in  
5 promoting the efficiency of the public service provided; (3) the speech was a  
6 substantial or motivating factor in the personnel decision adverse to the  
7 employee; and (4) in the absence of the protected speech, the employer would  
8 not have made the same personnel decision. Id. All four elements must be  
9 present in the complaint. Id. citing, Binkley v. City of Tacoma, 114 Wn.2d 373  
10 (1990). Thus, plaintiff's complaint fails to plead a free speech violation.  
11

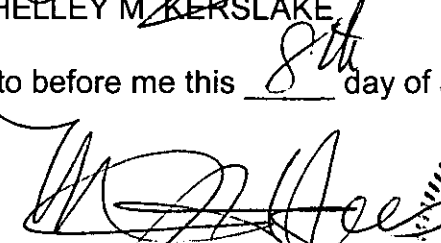
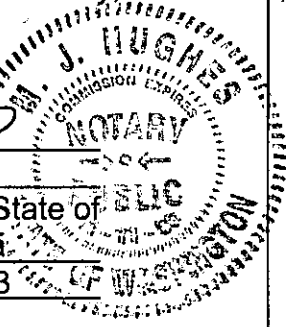
12 Plaintiff indicates that the defendants took no steps to find out about  
13 plaintiff's claims. The record belies this argument. Defendants propounded  
14 interrogatories regarding plaintiff's claim of retaliation (Exhibit 1). After  
15 receiving the responses, the defendants moved for summary judgment on  
16 plaintiff's claim (Exhibit 2). In response to that motion, the plaintiff asked if I  
17 would stipulate to his amendment of the complaint, which I did. He then  
18 alleged retaliation in violation of RCW 41.53 (Exhibit 3). The complaint was  
19 never subsequently amended to allege facts sufficient to plead a First  
20 Amendment case, nor was the complaint amended to include the First  
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1 Amendment in any way. Thus, plaintiff's arguments to the contrary are  
2 disingenuous, and should be disregarded by the court.

3 FURTHER YOUR AFFIANT SAYETH NAUGHT.

4  
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6 \_\_\_\_\_  
SHELLEY M. KERSLAKE

7 SUBSCRIBED and SWORN to before me this 8<sup>th</sup> day of January,  
8 2003.

9   
10 \_\_\_\_\_  
11 Printed Name: M. J. HUGHES  
12 NOTARY PUBLIC in and for the State of WA  
13 Washington, residing at: Tacoma  
14 My commission expires: 11/11/03  
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# EXHIBIT

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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 BRAME and "JANE DOE" BRAME, husband and wife; and JAMES HAIRSTON and "JANE DOE" HAIRSTON, husband and wife,

Defendants.

No. 99-2-13911-4

DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF AND REQUESTS FOR PRODUCTION

AND ANSWERS THERETO

**CERTIFICATION**  
I hereby certify that on 3/7/00 I deposited in the mails of the United States of America and/or placed with Legal Messengers and/or faxed a copy of the document to which this certificate is attached, for delivery to all counsel of record.  
V. De Franco  
Messina Law Firm

TO : JOSEPH J. KIRBY and DEBORAH A. KIRBY, plaintiffs;  
AND TO : JEFFREY SADLER, their attorney.

**INTERROGATORY INSTRUCTIONS**

**A. Interrogatories.** You are required to answer the following interrogatories separately and fully, under oath, within 30 days of receipt thereof, in accordance with CR 26, 33, and 34. These interrogatories are continuing in nature so as to require the filing of supplementary answers to the extent called for by CR 26(e). Your answers should include any non-privileged information and documents in the possession of your employees and agents, including your attorneys, consultants and any persons who have acted or are now acting on your behalf.

**In compliance with CR 26(i), a telephone conference is scheduled on March 3, 2000 at 9:00 a.m. This conference will be stricken upon the timely receipt of answers to interrogatories and responses to requests.**

conversation. I provided the compelled statement on 15 June 1998, approximately 1 hour after being ordered to do so. On 30 July 1998, Assistant Chief Woodard advised me in the presence of Cpt. Paul Mielbrecht that he intended to discipline me for asserting my privacy rights as well as my RCW protected union activities. Further, he stated that had I not complied with his orders, he would have recommended the termination of my employment.

(5) That Assistant Chief William Woodard retaliated against me for my union activities when he provided false information in an attempt to prejudice a fair and impartial fitness for duty examination I participated in on 9 September 1998. Further, that Assistant Chief William Woodard released a copy of an unadjudicated internal report of disciplinary findings and recommendations to Dr. Gary Hendricksen relative to the 9 September 1998 fitness for duty exam. These documents were internal working papers and their release in their existing form violated my due process rights as the matters contained therein were under review by Chief Philip Areola and had not been adjudicated law existing management-labor contracts.

The Tacoma Police Department, through agents William Woodard and Chief Arreola, and the City of Tacoma, through Agent Ray Corpuz, demonstrated a well documented pattern of harassment and intimidation for my union advocacy of members of Local #6. Further defendants have engaged in a malicious, ongoing effort to sanction me for my union activities. I believe defendants have violated my conceptional guarantees of privacy, provisions of the Bill of Rights and the Civil Rights Act as well as the RCW prohibiting retaliation against collective bargaining unit members.

Plaintiffs reserve the right to supplement as discovery progresses.

INTERROGATORY NO. 5: Please state, with particularity, all facts upon which you base your allegation that you were retaliated against for exercising your rights under RCW 49.60. Include the following in your response:

- (a) What opposition activity were you engaged in;
- (b) The inclusive dates you were involved in this activity;
- (c) What adverse employment action do you claim was taken against you as a result of this activity; and
- (d) Facts which you believe demonstrate that the protected activity was a factor in the employment action.

ANSWER:

- (a) Advocacy of individual members of Tacoma Police Union Local #6 as well as for union-wide issues involving union positions and controversies with Chief of Police Philip Arreola.

(b) As an elected Executive Board officer of Tacoma Police Union #6, from 4 March 1997 to 18 August 1998, during which time period I was involved on a daily basis in representation and advocacy for members of Local #6.

(c) (1) I was investigated for alleged misconduct on several occasions. The investigations were not in accordance with the existing Labor-Management Contract. The investigations were not closed out in a timely fashion but held over me resulting in increased stress and anxiety.

(2) My electronic mail was seized without a search warrant pursuant to one of these investigations which was "administrative" in nature and not a criminal investigation. This was a violation of the Department's MRP 2.09.01 (XI-F) - Search of Locker or Storage Space - "absent an employee's consent or exigent circumstances, assigned storage space shall not be searched relative to an internal investigation without a search warrant having first been issued."

(3) I was compelled under threat of termination to divulge the contents of a private conversation I had in the privacy of my own home, off duty with another member of Local #6 while acting in an advocacy relationship by William Woodard. This is a violation of my civil rights and privacy.

(4) I was subsequently disciplined for my initial refusal to provide this information by Chief James Hairston in violation of RCW 49.60.

(5) I was compelled under threat of termination to submit to taped statements in spite of RCW prohibitions and contrary legal opinions.

(6) I was passed over for the Civil Service position of Police Captain twice, in spite of my standing of #1 on the Civil Service Captain's List in large measure, I believe, for my union advocacy and my assertion of rights and privileges under Department MRP 2.09.001 (Complaints and Discipline) which states in Section XIB: Exercise of Rights: Administrative Appeal: "Employees may not be subjected to formal discipline, denied promotion, or threatened with such treatment, because of the exercise of the rights granted under this MRP."

(d) Philip Arreola directly threatened retaliatory action against me as a result of exercising my rights as a recognized member of the Executive Board of Tacoma Police Union Local #6 when I asked advocacy questions involving the length of disciplinary investigations at a general staff meeting of 16 September 1997.

Plaintiffs reserve the right to supplement upon further discovery.

# EXHIBIT

## #2

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

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. C00-5332 FDB

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
OF PLAINTIFF'S CLAIM OF  
RETALIATION UNDER RCW 49.60

NOTE FOR HEARING:  
March 2, 2001

FACTUAL BACKGROUND

Plaintiff is employed by the Tacoma Police Department as a police  
lieutenant. He has filed suit alleging many causes of action against the City  
and several named defendants. For one of his causes of action, plaintiff's

COPY

1 amended complaint alleges that he was "retaliated against for exercising his  
2 rights under RCW 49.60." (Complaint, p. 5, lines 12-14). When asked to  
3 explain the basis for this cause of action in interrogatories, plaintiff answered  
4 that he was retaliated against for engaging in protected union activity. (See  
5 Exhibit 1, excerpts of Plaintiff's Answer to Interrogatories.) Plaintiff has failed to  
6 state a cognizable claim under RCW 49.60.

### 7 STANDARD ON MOTION FOR SUMMARY JUDGMENT

8 Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary  
9 judgment shall be granted if "the pleadings, depositions, answers to  
10 interrogatories, and omissions on file, together with affidavits, if any, show that  
11 there is no genuine issue as to any material fact and that the moving party is  
12 entitled to judgment as a matter of law." One of the principal purposes of the  
13 rule is to dispose of factually and legally unsupported claims or defenses.  
14 Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d  
15 265 (1986).

16  
17 In considering a motion for summary judgment, the court must examine  
18 all of the evidence in the light most favorable to the nonmoving party. United  
19 States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

20  
21 A moving party who does not bear the burden of proof at trial may discharge his  
22 burden of showing that there is no genuine issue of material fact by  
23 demonstrating that "there is an absence of evidence to support the nonmoving  
24 party's case." Celotex, 477 U.S. at 325, 106 S.Ct. at 2554. The moving party  
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1 is not required to produce evidence showing the absence of a genuine issue of  
2 material fact, nor must the moving party support its motion with evidence  
3 negating the nonmoving party's claims. Lujan v. National Wildlife Fed'n, 497  
4 U.S. 871, 885, 110 S.Ct. 3177, 3187; 111 L.Ed.2d 695 (1990); United  
5 Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir.), cert.  
6 denied 493 U.S. 809, 110 S.Ct. 51, 107 L.Ed.2d 20 (1989). Instead, "the  
7 motion may, and should, be granted so long as whatever is before the district  
8 court demonstrates that the standard for the entry of judgment, as set forth in  
9 Rule 56(c) is satisfied." Lujan, 497 U.S. at 885, 110 S.Ct. at 3187 (quoting  
10 Celotex, 477 U.S. at 323, 106 S.Ct. at 2553).  
11

12 As in every case where a party moves for summary judgment under Rule  
13 56, the moving party's burden is met "by showing -- that is, pointing out ... that  
14 there is an absence of evidence to support the nonmoving party's case."  
15 Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552. The question is not whether  
16 there is literally no evidence, but "whether there is any upon which a jury can  
17 properly proceed to find a verdict for the party producing it, upon whom the  
18 [burden] of proof is imposed." Anderson v. Liberty Lobby, Inc., 47 U.S. 242,  
19 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). This is so because, in a  
20 summary judgment motion, the "existence of a scintilla of evidence in support of  
21 the plaintiff's position will be insufficient; there must be evidence on which a jury  
22 could reasonably find for the plaintiff." (emphasis added) Anderson, 477 U.S.  
23 at 252, 106 S.Ct. at 2512.  
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## DISCUSSION

1 Plaintiff has plead a claim of retaliation pursuant to RCW 49.60. RCW  
2 49.60.180, in pertinent part, states:

3  
4 **Unfair practice of employers.** It is an unfair  
5 practice for any employer:

6 (3) To discriminate against any person in  
7 compensation or in other terms or conditions of  
8 employment because of *age, sex, marital status,*  
9 *race, creed, color, national origin, or the presence of*  
10 *any sensory, mental or physical disability...*(emphasis  
11 added).

12 The plain language of the statute does not contain union activity as one  
13 of the enumerated protections.

14 Furthermore, RCW 49.60.210 states in relevant part:

15 (1) It is an unfair practice for any employer...  
16 to discharge, expel or otherwise discriminate against  
17 any person because he or she has opposed any  
18 practices forbidden by this chapter...

19 Again, engaging in union activity is not protected under Chapter RCW  
20 49.60, thus, this section is inapplicable.


21 No facts have been alleged by the plaintiff that entitle him to relief for  
22 retaliation under RCW 49.60 for engaging in union activity. Plaintiff has  
23 demonstrated through his allegations that there is an insuperable bar to relief.  
24 The allegations he makes are simply not covered by the statute. Thus, there is  
25 no evidence on which a jury could find for the plaintiff on his claim, and the  
26 claim should be dismissed. Anderson v. Liberty Lobby, Inc., supra. Based on  
the foregoing, defendants respectfully request that the court grant its motion,

as no set of facts in support of the plaintiff's claim entitle him to relief for  
engaging in union activity under RCW 49.60.

DATED this 1 day of February, 2001.

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

By:

  
\_\_\_\_\_  
SHELLEY M. KERSLAKE  
WSBA# 21820  
Attorney for Defendants

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HON. FRANKLIN D. BURGESS

TACOMA CITY ATTORNEY  
CIVIL DIVISION

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

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

No. C00-5332FDB

vs. )

AMENDMENT TO AMENDED  
COMPLAINT FOR PERSONAL  
INJURIES AND DAMAGES  
IN TORT

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. )

COME NOW plaintiffs and make the following clerical  
agreed amendment to plaintiffs' Amended Complaint for Personal  
Injuries and Damages in Tort:

Paragraph VII should read as follows:

VII.

7.1 For another cause of action against defendants, plaintiff claims that said defendants retaliated against him for exercising his rights under RCW 41.53, et seq. for exercising his union rights.


7.2 Plaintiffs' cause of action for harassment and discrimination due to his age and known disability is asserted pursuant to RCW 49.60, et seq.

The remainder of plaintiffs' allegations contained in plaintiffs' Amended Complaint for Personal Injuries and Damages in Tort remain unchanged and are hereby reincorporated and realleged.

MESSINA BULZOMI

DATED: 2/27/01

BY   
JOHN L. MESSINA 4440

BY   
JEFFREY H. SADLER 27136  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, VICKIE A. LO FRANCO, certify that on this day I caused to be served by ABC Legal Messenger copies of the document to which this certificate is attached on counsel of record as follows:

Shelley M. Kerslake  
Tacoma City Attorney  
Civil Division  
747 Market St., Rm. 1120  
Tacoma, WA 98402-3767

MESSINA • BULZOMI

5316 Orchard St. W.  
Tacoma, WA 98467-3633  
(253) 472-6000

1 I declare under penalty of perjury of the laws of the  
2 State of Washington that the foregoing is true and correct.

3 Vickie A. Lo Franco  
4 VICKIE A. LO FRANCO  
5 Legal Assistant

6 2/27, 2001  
7 Tacoma, Washington  
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**MESSINA • BULZOMI**

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Tacoma, WA 98467-3633  
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AMENDMENT TO  
AMENDED COMPLAINT-3.