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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' RESPONSE TO
PLAINTIFFS' MOTION FOR
RECONSIDERATION OF
COURT'S SUMMARY JUDGMENT
RULING AND ORDER GRANTING
SUMMARY JUDGMENT AND
BRIEF IN SUPPORT OF MOTION

NOTED FOR:
January 24, 2003

ASSIGNED:
Judge Katherine M. Stolz

ORIGINAL

1 Plaintiff has asked the court to reconsider its ruling granting defendants'
2 motions for summary judgment. He has provided this court with no basis for
3 modifying the court's ruling, and the motion should be denied.

4 Plaintiff addresses three areas in his motion for reconsideration -
5 retaliation, disability discrimination, and intentional infliction of emotional
6 distress. The court was correct in its ruling in all of these areas, and the plaintiff
7 has shown no reason why the court should reconsider its earlier decision.

8 Although plaintiff has provided absolutely no evidence that any discriminatory
9 animus motivated the defendants' actions in this matter, plaintiff contends "the
10 defendants proffered non-discriminatory reasons for the failure to promote and
11 its other alleged misconduct. Plaintiff claims that those reasons are subject to
12 juror scrutiny." (Plaintiff's Brief in Support of Motion for Reconsideration, page
13 3, lines 4-7.) This is simply not the case. Throughout the entire motion practice
14 in this case, plaintiff has ignored his burden of proof and put his head in the
15 sand regarding the shifting burden framework, which governs this analysis.

17 As outlined extensively in defendants' memorandums in support of its
18 motions for summary judgment, plaintiff cannot make out a prima facie case, as
19 he cannot show an actionable adverse employment action (with the exception
20 of the failure to promote claim). But even assuming for the sake of argument
21 that he has stated a prima facie case for disability discrimination and retaliation,
22 the burden then shifts to defendants to state a legitimate non-discriminatory
23 reason for its decisions. The defendants did this in this case. Then, and this is
24 where the plaintiff misunderstands the legal standard, the burden shifts back to
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1 the plaintiff to demonstrate pretext, that is that defendants' reason is false or
 2 not worthy of credence, and is a sham for a discriminatory motive. Blue v.
 3 Widnall, 162 F.3d 541 (9th Cir. 1998) (plaintiff needed to produce evidence of
 4 facts that either directly showed a discriminatory motive, or showed that the
 5 defendant's explanation was not credible). Plaintiff has presented no evidence
 6 in this regard, not in response to defendants' motions for summary judgment,
 7 and not in his motion for reconsideration. Thus, his claims are not "entitled to
 8 juror scrutiny." Kuyper v. State, 79 Wn. App. 732, 736, 904 P.2d 793 (1995) (to
 9 overcome the employer's summary judgment motion, the employee must cite
 10 facts, and not just conclusions that support his claim.)

11
 12 **I. Retaliation.**

13 Plaintiff relies on Robel v. Roundup Corp., ___ Wn.2d ___, 59 P.3d 611
 14 (2002) to establish his retaliation claim. This reliance is misplaced. To begin,
 15 plaintiff ignores the procedural posture of the Robel case. This appeal
 16 occurred after a bench trial wherein specific findings of fact were made. Many
 17 of these findings were not challenged on appeal and thus, became verities. Id.
 18 at 7. Two of the specific unchallenged findings were: "Fred Meyer's actions
 19 and or inactions in regard to the verbal and non-verbal harassment of Robel in
 20 the work setting...was an unlawful action of retaliation in response to her filing
 21 and/or pursuing an industrial insurance claim under RCW 51 et. seq., a
 22 statutorily protected activity" and "There exists a direct causal connection
 23 between Robel's protected activity and the adverse employment action." Id. at
 24 21. Thus, when conducting the analysis, the court was constrained by these
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1 unchallenged findings. The court held, with little discussion, that the elements
2 of this type of claim **required proof of a causal connection between the**
3 **filing of a claim and the allegedly retaliatory termination.** Id. at 23. The
4 plaintiff was required to prove that she had filed a claim, that the employer
5 thereafter discriminated against her in some way, and that the claim and **the**
6 **discrimination were causally connected.** Id. In the Robel case, the court
7 stated that "because the findings of fact satisfy these elements and were not
8 challenged on appeal we reverse the court of appeals." In the instant case, the
9 plaintiff does not have such findings of fact to make his prima facie case. The
10 facts, viewed in the light most favorable to the plaintiff, demonstrate that he
11 may have filed a grievance (see Declaration of John Messina in Support of
12 Plaintiff's Motion for Reconsideration), which is a protected activity under RCW
13 41.56. This is the only relevant fact he established. There is no evidence that
14 there was an adverse action, and there is absolutely no evidence that there is
15 the requisite causal connection between the filing of the grievance and any
16 alleged adverse employment action. Plaintiff merely states, without any citation
17 to the record or any analysis telling the court what these issues might possibly
18 be, that "the record in this case creates multiple issues of fact on this point."
19 Apparently the plaintiff wants the court to take judicial notice of facts which are
20 not in evidence, and frankly do not exist. Without such evidence, plaintiff's
21 claim fails as a matter of law.
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1 **II. Disability discrimination.**

2 In support of his argument for reconsideration of his disability claim,
3 plaintiff outlines the elements for a hostile work environment claim, presumably
4 because this was the "winning" theory in the Robel case. This was not their
5 theory in response to the defendants' motions for summary judgment, and as
6 such should not be considered at this procedural juncture. Hill v. BCTI Income
7 Fund-I, 144 Wn.2d 172 (2001). Even if the court does consider this new
8 theory, the plaintiff has failed to demonstrate how the record satisfies any of the
9 elements of a hostile work environment claim. The burden of proof is on the
10 plaintiff, and failure to provide proof of each and every element of his prima
11 facie case mandates dismissal. Right-Price Recreation, LLC v. Connells Prairie
12 County Council, 146 Wn.2d 370 (2002).

13 **III. Intentional infliction of emotional distress.**

14 In support of his motion for reconsideration of his outrage claim, plaintiff
15 has presented no new evidence, has presented no different analysis, and has
16 not demonstrated that the court's ruling was incorrect in any way. The fact the
17 plaintiff did not like the outcome of the motion is not grounds for the court to
18 reverse itself.

19 **IV. Conclusion.**


20 Plaintiff wants to ignore his burden and "let a jury sift through the
21 stories." Unfortunately for the plaintiff, that is not how it works in discrimination
22 cases. The only way a plaintiff can get to a jury is by going through the steps in
23 the McDonnell- Douglas framework. First, he must present a prima facie case
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1 of discrimination. Then the burden shifts to the employer to state a legitimate
 2 non-discriminatory reason for its employment decision. Plaintiff has admitted
 3 the defendants did this in this case. (Plaintiff's brief, page 3.) Then the burden
 4 shifts back to the plaintiff to demonstrate that the employer's reason was a
 5 pretext for discrimination. In this case, the plaintiff has produced no evidence
 6 that any actionable adverse employment decision occurred because of
 7 plaintiff's protected status, and has not demonstrated that the explanations
 8 offered by the defendants were pretextual. If, and only if, the plaintiff satisfies
 9 each step of the analysis, is a jury entitled to "sift through the stories." That
 10 was not done in this case - not in response to the motions for summary
 11 judgment, and not in his motion for reconsideration. The court's rulings on the
 12 summary judgment motions were corrected, well founded in the law, and
 13 should not be reconsidered. Thus, defendants respectfully request that the
 14 court deny plaintiff's motion for reconsideration, and enter judgment in favor of
 15 the defendants.
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17 DATED this 22 day of January, 2003.

18
 19 ROBIN S. JENKINSON, City Attorney
 ELIZABETH A. PAULI, Ch. Asst. City Atty.

20
 21
 22 By:


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