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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 AHSSON SPRY,

12 Plaintiff,

13 v.

14 PIERCE COUNTY, *et. al.*,

15 Defendants.  
16

No. C ~~09-5097~~ KLS

ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT (CITY OF  
LAKEWOOD and OFFICER SANDALL)

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18 This matter comes before the Court on the City of Lakewood and Officer Sandall's Motion for  
19 Summary Judgment. Dkt. 6. This motion was filed shortly after removal to federal court and the  
20 Defendants have adopted, for purposes of this motion, the Plaintiff's factual assertions contained in his  
21 Amended Complaint. Dkt. 1. The Plaintiff filed his opposition to the motion (Dkt. 15) along with the  
22 Declaration of Kari M. Spry, the plaintiff's wife. Dkt. 16. The Defendants filed their Reply. Dkt. 18.

23 The Plaintiff's Amended Complaint asserts claims against a number of defendants. To date, only  
24 the City of Lakewood and Officer Sandall have appeared in this matter. The Plaintiff admitted in a letter  
25 to the Court (Dkt. 12) that as of May 19, 2009 he had not yet served the other listed defendants.

26 **CLAIMS**

27 In his Amended Complaint, the Plaintiff asserts the following claims against these two  
28

1 Defendants: violation of his Constitutional rights and conspiracy to violate his constitutional rights, as  
2 well as state law claims of defamation, negligence, intentional infliction of emotional distress, negligent  
3 infliction of emotional distress, and a claim entitled "Quiet Enjoyment."

#### 4 **UNDISPUTED FACTS**

5 The only facts alleged in the Plaintiff's Amended Complaint that implicate the City of Lakewood  
6 and Officer Sandall occurred on May 10, 2007. Mr. Spry alleges that "after nearly being run off the  
7 freeway while driving home, Plaintiff was accosted by six to eight Pierce County Sheriff and Lakewood  
8 Police vehicles in his business parking lot for an alleged speeding ticket that occurred 4 miles away." He  
9 believes that the amount of police vehicles at this incident "was a clear attempt to humiliate and  
10 intimidate Plaintiff as he was a well known business owner in the complex."

11 In his Declaration, Officer Sandall provides additional uncontradicted facts regarding the incident  
12 on May 10, 2007. He was in his marked patrol car en route to training in Gig Harbor when he heard a  
13 radio call request for assistance from Deputy Wulick. The request was related to a traffic stop at the QFC  
14 located at Point Fosdick Road and Olympic Drive in Gig Harbor. As he was close to that location he  
15 drove into the parking lot where the traffic stop was taking place, stopped and exited his vehicle, and both  
16 listened to and observed the exchange that was taking place between Deputy Wulick and the individual  
17 who had been stopped. Officer Sandall did not know the name of the individual who had been stopped nor  
18 did he have any interaction or conversation with that individual. Once that individual was given "what  
19 appeared to be a traffic infraction," Officer Sandall left the scene.

20 In addition, Stori Sanders, the Risk Manager for the City of Lakewood, filed a declaration (Dkt. 8)  
21 wherein she testified that the City of Lakewood has never received a Claim for Damages from the  
22 Plaintiff regarding the matters set forth in his Amended Complaint.

#### 23 **PLAINTIFF'S REPLY**

24 Mr. Spry filed a Reply to the Defendants' Motion for Summary Judgment. That reply contained  
25 statements that are not under oath and therefore do not comply with Fed. R. Civ. P. 56 (e)(2) which states  
26 that a party opposing a summary judgment "may not rely merely on allegations or denials in its own  
27 pleadings; rather, its response must - by affidavits or as otherwise provided in this rule - set out specific  
28 facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment

1 should, if appropriate, be entered against that party.”

2 Mr. Spry did not file an affidavit or declaration setting forth any facts that contradict facts  
3 presented by the Defendants. He made assertions in his reply but it is clear, by the rule, that he cannot  
4 merely rely on those assertions. He has failed to present any facts which create a genuine material issue  
5 for trial with regard to these defendants.

6 Mr. Spry appears to rely on the assertion in his responsive pleading that Officer Sandall told him  
7 to “stop being an asshole.” He also asserts that Officer Wulick was previously employed with the City of  
8 Lakewood as a police officer. As noted above, neither of these allegations are contained in a declaration  
9 or affidavit, are not made under oath and are therefore not evidence before the Court. However, even if  
10 they were properly before the Court, a single statement attributed to Officer Sandall is not sufficient to  
11 raise a material issue of fact regarding the issues before the Court. In addition, even if Officer Wulick  
12 was employed by the City of Lakewood as a police officer sometime in the past, it is unclear how that  
13 prior employment relates in any fashion to the Plaintiff’s claims against these two defendants. This is true  
14 particularly in light of the fact that the Plaintiff’s claims against Officer Wulick all relate to the time when  
15 he was apparently employed by the Pierce County Sheriff. The undersigned concludes that these two  
16 assertions, even if they were contained within an affidavit or declaration, would not be sufficient to create  
17 a material issue of fact that would preclude the grant of summary judgment.

18 Mr. Spry does suggest in his response that this summary judgment motion should not be decided  
19 as no discovery has been accomplished. He does not, however, comply with Fed. R. Civ. P. 56(f) as he  
20 has not provided the court with any specific reasons why he cannot present facts essential to justify his  
21 opposition to the defendants motion. He did supply a declaration of his wife but, as discussed below, that  
22 declaration is not relevant to the claims against Officer Sandall or the City of Lakewood. Also, as pointed  
23 out in their Reply, Mr. Spry obviously was present at the May 10, 2007 incident. It was this incident  
24 which forms the basis of his claims against Officer Sandall. If in fact Officer Sandall violated Mr. Spry’s  
25 Constitutional rights, Mr. Spry would be in the position to place that information properly before the  
26 Court and he has failed to do so. He clearly feels that his rights have been violated but a reading of his  
27 materials suggests that his claims are directed to others who have not yet been served.

28 Therefore, if in fact there was a request by the Plaintiff to continue the Defendants Motion for

1 Summary Judgement, that request is denied as the Plaintiff has failed to present any information to the  
2 Court to support such a request.

### 3 **DECLARATION OF KARI M. SPRY**

4 The only declaration filed by the Plaintiff in opposition to the Defendants motion is the  
5 Declaration of Kari M. Spry. Dkt. 16. In their Reply, the Defendants requested that this Court strike  
6 paragraphs, sentences and portions of sentences on the grounds that the information provided by Ms. Spry  
7 was not based on her first hand, testimonial knowledge and rather was clearly hearsay or conclusion  
8 (rather than fact). The Plaintiff is required to comply with Federal Rules of Civil Procedure 56(e) which  
9 requires that an affidavit "be made on personal knowledge, set out facts that would be admissible in  
10 evidence, and show that the affiant is competent to testify on the matters stated."

11 Based on the Court's review of the Declaration it is clear that it does not comply with the Fed. R.  
12 Civ. P. 56(e). Mrs. Spry references many instances in her declaration that are not based on her personal  
13 knowledge but rather based on what others told her as it is clear she was not present during many of the  
14 events she describes. In addition, there are no facts contained in her declaration that are directed towards  
15 the City of Lakewood or Officer Sandall. In fact, Officer Sandall's name does not appear a single time in  
16 the Declaration nor does Mrs. Spry ever make mention of the City of Lakewood. There is no first hand,  
17 testimonial evidence provided by Mrs. Spry that in anyway contradicts the evidence presented by the  
18 Defendants and therefore her declaration does not create any material issue of fact which would preclude  
19 the granting of summary judgment as requested by these defendants.

### 20 **SUMMARY JUDGMENT STANDARD**

21 Pursuant to Fed. R. Civ. P. 56 ( c), the court may grant summary judgment "if the pleadings,  
22 depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that  
23 there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of  
24 law." The moving party is entitled to judgment as a matter of law when the nonmoving party fails to  
25 make a sufficient showing on an essential element of a claim on which the nonmoving party has the  
26 burden of proof. *Celotex Corp., v. Catrett*, 477 U.S. 317, 323 (1985).

27 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a  
28 rational trier of fact to find for the nonmoving party. *Matsushita elec. Indus. Co. V. Zenith Radio Corp.*,

1 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not  
2 simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over  
3 a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a  
4 judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
5 253 (1986); *T.W. Elec. Service In. V. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9<sup>th</sup>  
6 cir. 1987).

## 7 DISCUSSION

8 **1. Violation of Constitutional Rights.** While Mr. Spry asserts that he was subject to an  
9 unreasonable seizure in violation of his Constitutional rights, he has presented no facts to support that  
10 claim against Officer Sandall. As noted by the Defendant, "more than just presence at the scene" is  
11 required in order to trigger liability under 42 U.S.C. §1983. *Chuman v. Wright*, 76 F.3d 292, 294 (9<sup>th</sup> Cir.  
12 1996). No facts have been present to this Court which would support a claim of unlawful or  
13 unconstitutional activity on the part of Officer Sandall. The Court is granting Officer Sandall's request to  
14 dismiss the Plaintiff's claims against him based on alleged violations of the Plaintiff's constitutional  
15 rights based on lack of proof.

16 **2. Municipal Liability.** A municipality, in this case the City of Lakewood, cannot be liable  
17 under 42 U.S.C. §1983 under the theory of *respondeat superior*. *Monell v. Dept. of Soc. Servs.*, 436 U.S.  
18 658, 98 S.Ct. 2018 (1978). The City is therefore not liable to the Plaintiff based on any individual  
19 actions or inactions of Officer Sandall.

20 Further, there is nothing before this Court to suggest that the City of Lakewood had an  
21 unconstitutional custom or policy that was the moving force behind a constitutional violation. This is true  
22 particularly in light of the Court's conclusion that Officer Sandall, the only employee of the City of  
23 Lakewood at the scene on May 10, 2007, did nothing to violate the Plaintiff's Constitutional rights.  
24 Officer Sandall responded to a call for back up, observed what was occurring, made no decisions or  
25 recommendations regarding what should happen with Mr. Spry, and once Mr. Spry received a ticket  
26 officer Sandall left the scene. It is difficult to envision any unconstitutional policy or procedure or any  
27 type of deliberate indifference attributable to the City of Lakewood based on these facts.

28 The Court is granting the City of Lakewood's request to dismiss the Plaintiff's constitutional

1 violation claims against it for lack of proof.

2       **3. Commencing a State law claim.** RCW 4.96.020 governs claims for damages against all local  
3 governmental entities. Specifically the statute provides that “[n]o action shall be commenced against any  
4 local governmental entity for damages arising out of tortious conduct until 60 days have elapsed after the  
5 claim has first been presented to and filed with the governing body thereof.” RCW 4.96.020(4). The  
6 Plaintiff is required to comply with this statute and it is undisputed that he has not filed a timely claim  
7 against the City of Lakewood. Failure to comply with the statutory filing requirements requires dismissal  
8 of the action. *Reyes v. City of Renton*, 121 Wn. App. 498, 86 P.3d 155 (Div. I, 2004). The Court is  
9 granting the Defendant City of Lakewood’s request to dismiss the Plaintiff’s claim based on his failure to  
10 comply with RCW 4.96.020.

11       **4. State law claims - Negligence, Negligent Infliction of Emotional Distress, Intentional**  
12 **Infliction of Emotional Distress and “Quiet Enjoyment.”** The Defendants ask this Court to dismiss the  
13 Plaintiff’s state law claims on the merits even though the Plaintiff has failed to comply with R.C.W.  
14 4.96.020. The Court is declining that request. R.C.W. 4.96.020 is clear that no action shall “commence”  
15 absent compliance with the claim filing procedure. Mr. Spry failed to comply with the claim filing  
16 procedure and dismissal for said violation is sufficient.

17       **5. Qualified Immunity.** In light of the fact that the Court found no Constitutional violations by  
18 Officer Sandall, there is no need to address the issue of qualified immunity.

19       **6. Attorney Fees pursuant to 41 U.S.C. ¶ 1988.** The Defendants requested an award of attorney  
20 fees pursuant to 41 U.S.C. ¶ 1988 in their Motion for Summary Judgment and again in their Reply. The  
21 Plaintiff did not respond to that request. Recognizing that the Plaintiff is representing himself pro se, the  
22 Court is reserving ruling on the request for attorney fees and directing the Plaintiff to file a Response to  
23 the Defendants request for an award of attorney fees. This Response is due on or before July 10<sup>th</sup>. The  
24 Defendants may file a Reply on or before July 17<sup>th</sup>. The issue regarding attorney fees will be noted on the  
25 Court’s calendar for July 17<sup>th</sup>.

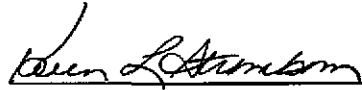
## 26 CONCLUSION

27       The Defendants Motion for Summary Judgment (Dkt. 6) is **GRANTED** and the Plaintiff’s claims  
28 against the City of Lakewood and Officer Sandall are hereby **DISMISSED**.

1 With regard to the Defendants request for an award of attorney fees, the Plaintiff is directed to file  
2 a Reply, that only addresses the request for attorney fees, which is due no later than **July 10, 2009**. The  
3 Defendants may file a Response no later than **July 17, 2009**. The Clerk is directed to note the  
4 Defendants' Motion for Award of Attorney Fees for **July 17, 2009**.

5 The Clerk is hereby directed to send the Plaintiff a copy of this Order Granting Motion for  
6 Summary Judgment.

7 DATED this 18<sup>th</sup> day of June, 2009.

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9 Karen L. Strombom  
10 United States Magistrate Judge  
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