

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES BEEDE,

Plaintiff/Appellant,

v.

CITY OF TUCSON, a municipal
Corporation of the State of Arizona;
TUCSON POLICE DEPARTMENT, an
Agency of the City of Tucson;
ANTHONY SABORI, individually
and as husband and wife; et al,

Defendants/Appellee.

Court of Appeals
Division Two
No. 2 CA-CV 2010-0182

Pima County Superior Court
Case No. C20095599

DEFENDANT'S/APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

¶1 Plaintiff filed his complaint against the City of Tucson and Sgt. Sabori on July 17, 2009, alleging constructive discharge in violation of state law, a §1983 violation of due process rights and negligent supervision and retention. (ROA 2)¹. Defendants filed their answer August 10, 2009, denying the allegations and raising as an affirmative defense “Plaintiff’s Notice of Claim does not satisfy the statutory requirements set forth in A.R.S. §12-821. (ROA 8) Defendants filed their Motion for Summary Judgment on April 21, 2010 seeking dismissal of all claims on the defective notice of claim, that there was no evidence to support Plaintiff’s claims and no genuine issue of material fact. (ROA 21, 22)²

¶2 On May 6, 2010, Plaintiff moved to amend his complaint, seeking to add new parties, new facts and new causes of action unrelated to and post-dating the original complaint. (ROA 26) Plaintiff’s new allegations were defamation, libel, slander, and invasion of privacy based on the behavior of Tucson Police Officers Association, the police union, a party neither affiliated with the City nor under the supervision or direction of the City. The publication of the alleged defamatory remarks occurred nine months after Plaintiff’s complaint was filed and

¹ When the Record on Appeal (ROA) references a particular document, it will be shown as: ROA ___ (document number), p. ___ or ¶ __.

² Sgt. Sabori was dismissed from the case as an individual defendant prior to the motion. Plaintiff has not appealed that dismissal.

was on an independently funded website with no involvement, oversight or ownership by the Defendants. (ROA 30, pp. 1-9)

Defendants opposed the amendment, both orally at the previously scheduled status conference on May 17, 2010 (ROA 19, 29), and in a written Motion in Opposition (ROA 30), arguing prejudice because nothing in the original complaint could have put Defendants on notice of defending against the new allegations and futility because the Plaintiff filed an “Amended Notice of Claim” on May 18, 2010, after they filed their Motion to Amend.

At the status conference Plaintiff advised the Court they needed to continue the current trial date of July 20, 2010. Defendants did not oppose the continuance. Plaintiff did not ask to extend discovery or any other pre-trial deadlines that had passed.

By Minute Entry Order entered June 4, 2010, the trial court denied leave to amend, specifically noting that “...this matter has been pending for some time and that most (if not all) of the disclosure, discovery, and deadlines have passed. ... [F]urther the addition of a new party, and these new facts would cause significant delay” and ... substantial prejudice to the Defendant.” (ROA 38)

¶3 Plaintiff filed his response in opposition to Defendants’ Motion for Summary Judgment (ROA 32, 33) on May 27, 2010. Oral argument on Defendants motion was heard on June 14, 2010. By Minute Entry Order entered

on June 22, 2010, the trial court granted Defendants' Motion for Summary Judgment, finding that Plaintiff had "failed to timely and properly file his Notice" and as "an alternative basis for granting the City's motion, that even viewing the facts and reasonable inferences in the light most favorable to the non-moving party, as this Court must, the facts presented fail in that no reasonable jury could find in favor of the Plaintiff." (ROA 43) The trial court entered judgment on July 28, 2010. (ROA 45)

¶4 The Opening Brief correctly states that this is an appeal from the denial of a Motion to Amend and an Order Granting Defendants' Motion for Summary Judgment. This court reviews the facts in the light most favorable to the party opposing summary judgment and will draw all reasonable inferences arising from the evidence in the light most favorable to that party. *McCloud v. Kimbro*, 224 Ariz. 121, 122, 228 P.3d 113, 114 (App.2010) citing *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App.1996). Where facts set forth in an affidavit in support of a motion for summary judgment are not controverted, they are presumed true for purposes of the ruling on the motion. *Eastwood Elec. Co., v. R.L.Branaman Contractor, Inc.* 102 Ariz. 406, 410 432 P.2d 139, 143 (1967).

¶5 Plaintiff filed his Notice of Appeal on August 30, 2010. (ROA 50)

¶6 Plaintiff's Notice of Appeal was timely filed under Arizona Rules of Civil Appellate Procedure 9(a). This Court has jurisdiction over the appeal of the final Judgment under A.R.S. §12-2101(B).

STATEMENT OF FACTS

¶7 Plaintiff's Statement of Facts in his Opening Brief is taken almost word for word from the Statement of Facts submitted in support of his opposition to Defendants' Motion for Summary Judgment. To support that set of facts, Plaintiff submitted an unsigned, undated, un-sworn affidavit. (Exhibit 7 to Plaintiff's Statement of Facts in Opposition to Defendants' Motion for Summary Judgment, ROA 32) Noting these deficiencies and the requirement that affidavits opposing a motion for summary judgment shall set forth facts that would be admissible in evidence, Defendants asked the trial court to strike the affidavit in its Reply Memorandum in support of its Motion for Summary Judgment. (ROA 39, pp. 5-9)

In granting summary judgment to the Defendants, the trial court stated, "Plaintiff's Statement of Facts rests – on the merits – almost exclusively on Mr. Beede's Affidavit (Exhibit 7)." (ROA 43, p. 3) Observing that the Affidavit was not signed, not dated and not notarized, the court further opined that "[T]he real problem with Mr. Beede's Affidavit is that much of it is inadmissible, and contains hearsay, conjecture, and speculation." (ROA 43, p. 3) Although the court did not strike the Affidavit, it did "strike and ignore those portions which are inadmissible." (ROA 43 p.4) Paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34 of Appellant's Opening Brief are based in whole or part on Plaintiff's Exhibit 7,

the unsigned, undated, non-sworn affidavit. (ROA 32) Appellant's Opening Brief further relies upon specific paragraphs in the Affidavit that the lower court ruled inadmissible, paragraphs 24, 27, and 31, without having appealed or addressed the lower court's evidentiary ruling.

¶8 The Tucson Police Department (TPD) hired plaintiff in 1983 as a Community Services Officer. In August 1984, he became a police officer. In 2003, he was transferred to the Crimes Against Persons Division (CAPD) Sex Offender and Tracking Unit (SORT).³ Effective March 22, 2009, Captain John Stamatopolous transferred Plaintiff to the CAPD/Night Detectives unit. (ROA 21, ¶1, Exhibit A, ¶¶ 4, 5, 7, 8, Exhibit A.2.)⁴

The March 22, 2009, decision to transfer Plaintiff was made by the Captain, in accordance with TPD policy and procedure and with the concurrence of an Assistant Chief based on Plaintiff's documented poor performance in case management and productivity. (ROA 21, ¶¶ 7, 8, 9, 10, 12, Exhibit A ¶¶ 7, 8) Moreover, "Mr. Beede had been moved away from Sabori to be given a fresh

³ The Crimes Against Persons Division includes the Family and Sex Crimes Section. Included in Family and Sex Crimes are the following units: Adult Sexual Assault, Child Sex Abuse, Dependent Child Unit, Domestic Violence Unit, and the Sex Offender Registration and Tracking Unit (SORT) which includes Internet Crimes Against Children and Missing Juveniles.

⁴ The reference (A.2) is to the e-mail, Attachment 2 to Exhibit A to the Statement of Facts, ROA 21. Further references to exhibits that are attached to other exhibits will be designated in this manner.

start.” (ROA 21 ¶¶ 1-2, Exhibit A, ¶¶ 7, 8; Exhibit B ¶10; Exhibit C ¶¶ 8, 10; Exhibit D)⁵

I. Plaintiff Retires from the Tucson Police Department.

¶9 Plaintiff submitted a letter dated April 29, 2009, announcing his intent to retire from the Tucson Police Department effective May 30, 2009. (ROA 21 ¶2, Exhibit D) In the letter, Plaintiff claimed his working conditions were so intolerable that he felt compelled to retire. His accusations were specifically directed towards his former assignment under Sergeant Tony Sabori. (ROA 21, Exhibit D)

¶10 At the time Plaintiff tendered his notice of intent to retire, he had been working under the supervision of Sergeant Saunders in the CAPD/Night Detective unit for approximately six weeks. For more than two months prior to the effective date of his retirement (May 30, 2009), Plaintiff had not been supervised by Sergeant Sabori. Plaintiff never alleged that any subsequent supervisors were intolerable or explained why, after the transfer, he was “compelled” to retire. (ROA 39 pp.7-8; ROA 43, p. 5)

⁵ Attached to Defendants Statement of Facts, ROA 21 are Affidavits and supporting documents to those Affidavits: Exhibit A is Captain John Stamatopolous’ Affidavit; Exhibit B is Lieutenant Robert Wilson’s Affidavit; and Exhibit C is Sergeant Tony Sabori’s Affidavit. Exhibit D to ROA 21 is Plaintiff’s Retirement Letter; Exhibit G is the Affidavit of Roger Randolph, City Clerk of the City of Tucson.

II. Plaintiff Sends Letters to the Tucson Police Department and the City of Tucson Legal Department.

¶11 In a certified letter dated March 6, 2009, Plaintiff's attorney sent a list of allegations addressed to: "Legal Department," City of Tucson, City Hall, 7th Floor, 255 West Alameda, Tucson, Arizona; and to Acting Chief of Police Kermit Miller, 270 South Stone, Tucson, Arizona. A second certified letter, dated April 29, 2009, was sent to "Legal Department," City of Tucson, City Hall, 7th Floor, 255 West Alameda, Tucson, Arizona; Acting Chief of Police Kermit Miller, Tucson Police Department, 270 S. Stone, Tucson, Arizona; and to Baird S. Greene, Esq., Principal Assistant City Attorney, TPD Legal Advisor, Tucson Police Department, 270 S. Stone, Tucson, Arizona. (ROA 21, Exhibits E & F)⁶

¶12 A.R.S. §12-821.01(A) requires that in Arizona, persons having claims against a public entity shall file their claims "with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona Rules of Civil Procedure."

Plaintiff does not dispute that neither the letter dated March 6, 2009, nor the letter dated April 29, 2009, was sent/filed/served on the City Clerk of the City of Tucson. (ROA 39, p. 2; ROA 43 p.1) Pursuant to the City Clerk is authorized to

⁶ The Police Legal Advisor provides technical legal advice to the police department, but does not represent the department in civil litigation and is not authorized to accept service on behalf of the City of Tucson.

accept service on behalf of the City of Tucson.⁷ (ROA 30, p. 3) The City Clerk searched their records and found no Notice of Claim from Plaintiff. (ROA 21, Exhibit G) “Plaintiff agrees he should have served the City Clerk ...” (Appellant’s Opening Brief, pg. 29, ¶58).

¶13 Plaintiff failed to provide any documentation or legal support for his assertion that the individual who signed accepting receipt of the March 6, 2009 and April 29, 2009 letters was an agent authorized to accept service on behalf of the City Clerk or the Legal Department of the City of Tucson. (ROA 39, pp.2-3)

¶14 Legal Advisor Baird Greene responded to Plaintiff’s attorney on March 16, 2009 (ROA 32, Exhibit 3), and expressly advised that he would be addressing the public records request made by Plaintiff. The Legal Advisor is not an individual authorized to accept service on behalf of the City of Tucson. (ROA 39, pp.3-4)

¶15 In these letters, Plaintiff made several specific allegations against Sergeant Tony Sabori, claiming that from 2005 through the present (2009) Plaintiff had been subjected to “constant threats, harassment and retaliation at the hands of his present supervisor, Sgt. Tony Sabori.” (ROA 21 ¶3)

¶16 Plaintiff acknowledged that he never served a Notice of Claim on Sergeant Sabori (ROA 42) and does not “seriously dispute that his Notice of Claim

⁷ Rule 4.1(i) provides that service on a city may be made upon the chief executive officer, the secretary, clerk or recording officer.

was not filed in compliance with this statute [A.R.S. §12-821.01] and Rule 4.1(i).”
(ROA 43 p.1)

III. Defendants Provided Notice of Their Notice of Claim Affirmative Defense.

¶17 Defendants initially stated in their answer the affirmative defense that Plaintiff failed to comply with A.R.S. §12-821.01. Subsequently Plaintiff served Defendants on August 21, 2009, with its First Set of Uniform Interrogatories, First Set of Requests for Production, First Set of Requests for Admissions and Notice of Deposition of Anthony Sabori. (ROA 12) In their Answers to Uniform Interrogatories and Requests for Admission served on Plaintiff on September 29, 2009, Defendants again advised Plaintiff that “the Notice of Claim does not satisfy the statutory requirements set forth in A.R.S. §12-821.01.” (ROA 14)

Plaintiff never contacted the Defendants seeking a more definitive explanation regarding the defective Notice of Claim. Plaintiff did not file any motion to compel further answers.

¶18 Defendants filed their Motion for Summary Judgment on April 21, 2010. (ROA 19, 21, 22) At the time of filing, no depositions had been taken by either party of any witness or party to the lawsuit, no discovery had been undertaken or initiated by Defendants and no other pretrial motions had been initiated by the Defendants. (ROA 43, p. 2)

IV. Defendants Submitted Documented Facts to Controvert Plaintiff's Unsubstantiated and Conclusory Allegations.

¶19 Defendants' Motion for Summary Judgment was supported in part by Affidavits from Captain John Stamatopolous, Lieutenant Robert Wilson and Sergeant Tony Sabori, all of whom have personal knowledge regarding management procedures and actions, as well as Plaintiff's tenure and work performance in the CAPD/SORT unit. Documents supporting the Affidavits were attached. (ROA 21; ROA 21, ¶¶ 8-13; Exhibit A, Exhibit B)

Plaintiff's command staff (Captain Stamatopolous, Lieutenant Rau and Lieutenant Wilson) and immediate supervisor (Sergeant Sabori) spent considerable time and effort trying to bring his job performance up to an acceptable level. (ROA 21, ¶¶ 6, 7, 8, 9, 10; *see also*: ROA 43 pg.5) Sergeant Sabori authored three performance evaluations of Plaintiff. (ROA 21, ¶7, Exhibit C ¶¶ 5, 6) Each recorded Sergeant Sabori's concern about the small case load Plaintiff was handling. (ROA 21, ¶7, Exhibit C ¶6, C.2-4.) In 2006-2007, Sergeant Sabori noted that Plaintiff would become the unit's Internet Traveler expert with an increase in his duties.⁸ In 2007-2008, Sergeant Sabori was concerned about the small number

⁸ Internet Traveler cases are investigations conducted by law enforcement targeting persons using the Internet to recruit minors into dangerous illegal sexual relationships. Law enforcement personnel posing as underage minors enter into online chats with the predators with the ultimate goal being the arrest of the predator.

of Internet Traveler cases Plaintiff conducted with the FBI SAFETeam.⁹ The Sergeant compared the Child Sex Unit's 11 Internet investigations (seven arrests) in six weeks with the two Internet investigations (two arrests) conducted by SORT in 12 months. Plaintiff was told these numbers were unacceptable and was instructed to put more emphasis on the Internet cases with an expectation of one or two investigations a month. (ROA 21, ¶7, Exhibit C ¶7)

¶20 In August 2008, Lieutenant Rau and Sergeant Sabori met with Plaintiff and discussed their concerns about his poor work performance. They gave him clear goals with the objective of conducting one to two Internet Traveler investigations a month. Instead of following his supervisors' direction, Plaintiff did no Internet Traveler cases in August, September, October or November 2008. (ROA 21, ¶8, Exhibit C ¶7, C.6.)

In November 2008, Assistant Chief Villasenor and Captain Stamatopolous observed Plaintiff in the workplace at the FBI SAFETeam, both noted the "target rich" environment available on-line and expressed confidence that one to two Internet Traveler case investigations a month was a realistic and attainable goal. (ROA 21, ¶8, Exhibit C, C.5.)

¶21 Lieutenant Wilson was assigned to CAPD in December 2008. He became aware that his predecessor, Lieutenant Rau, conducted a review of

⁹ Until early 2009, the TPD SORT unit worked with the FBI conducting Internet Traveler cases (FBI SAFETeam). (ROA 21, Exhibit B, ¶ 3)

Plaintiff's work performance and pulled his work history, determining that in the preceding 28 months Plaintiff conducted only four Internet Traveler cases. (ROA 21, ¶9, Exhibit B ¶¶ 2, 5) Lieutenant Wilson also discovered Plaintiff had conducted unacceptable substandard investigations in several of his other assigned cases. Given these findings the Lieutenant reviewed and approved a Special Performance Evaluation and Work Improvement Plan for the Plaintiff in December 2008. (ROA 21, ¶9, Exhibit B ¶5, B.2.) The Lieutenant met with Sergeant Sabori frequently over the next several months to monitor and discuss Plaintiff's work performance. (ROA 21, Exhibit C, ¶9, C.6.) Lieutenant Wilson deemed Plaintiff's performance unacceptable and below standards. (ROA 21, ¶ 9, Exhibit B, ¶6)

“[R]obert Wilson's Affidavit is clear that TPD disagreed with Mr. Beede regarding the number of Internet Traveler investigations that were to be reasonably expected as a goal for Beede and other TPD officers; why TPD thought they were reasonable; the fact that Beede, over a twenty-ninth month period conducted only four such cases; that Beede's work performance decisions were made by Lt. Wilson and Captain Stamatopolous; and that since August 2009, TPD has made (with one full-time and one part-time officer) twenty-six arrests on the same type of cases on which Beede was working.” (ROA 43, p.4)

¶22 In early 2009, Lieutenant Wilson observed Plaintiff at the FBI SAFETeam office and saw that within five minutes of logging on Plaintiff had a screen full of chat conversations occurring simultaneously, some of these very aggressive. Despite the on-line activity, it was the Lieutenant's opinion that

Plaintiff was avoiding the more aggressive chats; throughout his observation the Lieutenant never saw Plaintiff engage in any meaningful conversations. (ROA 21, ¶10, Exhibit B ¶7)

¶23 In January 2009, Lieutenant Wilson opened an Internal Affairs investigation IA #09-0012, referencing a possible access integrity issue regarding a SORT file. (ROA 21, Exhibit B, B.3.) Ultimately the focus of the investigation became Plaintiff's untruthfulness. (ROA 21, ¶11, Exhibit B, ¶8, B.3.) The decision to conduct the investigation was Lieutenant Wilson's; the final determination that Plaintiff had violated TPD General Orders was made by Captain Stamatopolous and Lieutenant Wilson (Plaintiff's Chain of Command), with the approval and concurrence of the Chief of Police. (ROA 21, ¶ 11, Exhibit B, ¶8)

A twenty hour suspension was recommended and approved by Chief Villasenor. Plaintiff was served on May 26, 2010, with a Notice of Intent to impose discipline. No suspension was ever imposed because of Plaintiff's intent to retire effective May 30, 2010. (ROA 21, Exhibit B ¶8, B.3.) Chief Villasenor noted that the suspension would only be served if Plaintiff did not retire. (ROA 21, B.3.)

¶24 In March 2009, Captain Stamatopolous and Lieutenant Wilson reviewed and discussed Plaintiff's Work Improvement Plan and his progress. Both determined that Plaintiff was neither meeting his goals nor performing at an

acceptable level. (ROA 21, ¶12) Captain Stamatopolous with the concurrence of Chief Villasenor made the decision to transfer Plaintiff to CAPD/Night Detectives. (ROA 21, ¶12, Exhibit A, ¶¶ 6, 7, 8, A. 2., Exhibit B, ¶10, Exhibit C, ¶ 10) The primary purpose of the transfer was the best and most efficient use of personnel and resources in a critical function and to give Plaintiff a fresh start. (ROA 21, Exhibit A, ¶8)

¶25 Internal Affairs conducted an investigation, IA #09-0232, into Plaintiff's allegations of hostile work environment and a fraudulently altered special evaluation. The allegations were deemed unfounded. (ROA 21, Exhibit A, ¶7; ROA 39, p.8, Exhibit B, pp.1-7) As Captain of CAPD, Captain Stamatopolous had the opportunity to observe Plaintiff's interactions with his peers and Sergeant. Captain Stamatopolous stated that the basis of most of Plaintiff's allegations was his unfounded belief that Sergeant Sabori was responsible for having him transferred. (ROA 21, Exhibit A ¶7) As noted by the Captain, Sergeant Sabori, as a sergeant, did not have the authority to transfer any member of the department. (ROA 21, Exhibit A ¶7) The trial court found that:

The City's Statement of Facts and Supporting Affidavits make clear that, contrary to Mr. Beede's opinion and supposition, command structure was followed; that Beede and Sabori's supervisors were integrally involved in the setting of goals that Mr. Beede complains of and decisions that were made." (ROA 43, p.4)

¶26 Following Plaintiff's transfer out of CAPD/SORT to CAPD/Night Detectives, several of Plaintiff's cases were reassigned. Other members of CAPD/SORT were successful in completing "several sub par inadequately investigated investigations" originally handled by the Plaintiff. (ROA 21, Exhibit B, ¶12, Exhibit C, ¶12) CAPD/SORT successfully investigated and made twenty-six arrests between August 2009 and April 2010. (ROA 21, Exhibit B ¶11)

¶27 Sergeant Sabori has been an employee of TPD since 1987, and was promoted to Sergeant in 1999. In 1993, he received a major disciplinary action; he was terminated for violation of Department Rules and Procedures. He appealed this discipline to the City of Tucson Civil Service Commission and, after a four-day hearing; the Commission found that the City did not have just cause for termination. The Commission decided there had been a rule violation and imposed a thirty-day suspension. (ROA 21 ¶5, Exhibit C ¶¶ 1-4, C.1.) Sergeant Sabori's personnel file reveals one other disciplinary action; in 1999, he was given a lesser written reprimand for conducting a "sweep search" that was not in accordance with TPD policy. (ROA 21 ¶ 5, Exhibit C ¶4)

¶28 Plaintiff has never disclosed an EEO complaint or any documentation to support his avowal that his "EEO charge was successful." (ROA 39, p.8) To the contrary, Captain Stamatopolous' Affidavit, IA #09-0232 and Defendants answers to interrogatories disprove this claim. (ROA 39, p.8, Exhibit B; ROA 21

Exhibit A ¶7) When asked by Lieutenant Wilson to provide documentation of any complaint, Plaintiff responded that “[h]e did not actually file any formal EEOC complaint.” (ROA 39, p.8 FN 6)

ISSUES PRESENTED FOR REVIEW

¶29 1. Was the trial court correct in granting Defendants' Motion for Summary Judgment because there were no facts upon which a reasonable jury could find for the Plaintiff?

¶30 2. Did the trial court properly grant Defendants' Motion for Summary Judgment by ruling that Plaintiff had failed to timely and properly file his Notice of Claim pursuant to A.R.S. §12-821.01?

¶31 3. Was it an abuse of discretion for the trial court to deny Plaintiff's motion to amend his complaint when Plaintiff was seeking to introduce new facts, new theories, new parties and new issues regarding an incident that post dated the original complaint?

ARGUMENT

I. There Was no Error in Granting Defendants' Motion for Summary Judgment After Reviewing the Facts and Reasonable Inferences in the Light Most Favorable to the Non-Moving Party and Finding that no Reasonable Jury Could Find in Favor of the Plaintiff.

A. Standard of Review.

¶32 The Court reviews *de novo* the propriety of granting summary judgment, *Phipps v. CW Leasing*, 186 Ariz. 397,400 923 P.2d 863,866 (App. 1996), and views the facts and all reasonable inferences in the light most favorable to the party opposing the motion. *Southwest Auto Painting & Body Repair v. Binsfeld*, 183 Ariz. 444, 445, 904 P.2d 1268, 1269 (App. 1995). A motion for summary judgment should be granted if “ the facts produced in support of the claim ... have so little probative value ... that reasonable people could not agree with the conclusion advanced by the proponent of the claim.” *Orme Sch. v. Reeves*, 198 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). This Court will uphold the trial court if it is correct for any reason. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App.1996).

B. Plaintiff Failed to Present Facts by Affidavit or Other Competent Evidence to Controvert Defendants' Affidavits and Documentation.

¶33 “Self-serving assertions without factual support in the record will not defeat a motion for summary judgment.” *McDonnell v. Cournia*, 990 F.2d 963, 967 (7th Cir. 1993). The trial Court addressed Plaintiff’s facts:

Plaintiff’s Statement of Facts rests – on the merits – almost exclusively on Mr. Beede’s Affidavit (Exhibit 7). This Affidavit is unsigned, not dated, and not notarized. Plaintiff, without leave of the Court, filed a signed Affidavit on the day following oral argument on this motion.

The real problem with Mr. Beede’s Affidavit is that much of it is inadmissible, and contains hearsay, conjecture, and speculation. Defendant noted these problems and moved to strike the “Affidavit.” Further, Defendant noted that, in the face of the Defendant’s properly supported motion, Statement of Facts and Affidavits, the Plaintiff’s failure to show material genuine factual issues (rather than his conclusions, opinions, et cetera) is fatal.

While the Court will not strike the entire Affidavit, it will strike and ignore those portions which are inadmissible. (ROA 43, pp. 3-4)

¶34 Plaintiff alleges that he was constructively discharged. But, Plaintiff’s conclusory statements as to this allegation are not supported by evidentiary detail as to their validity or relevancy. To the contrary, most are no more than Plaintiff’s opinion based largely on inadmissible hearsay and unsubstantiated rumor. *Jabczenski v. Southern Pacific Memorial Hospitals*, 119 Ariz. 15, 19, 579 P.2d 53, 57 (App.1978). Applying the relevant standard, the trial Court correctly found that Plaintiff failed to “[produce] facts sufficient for a reasonable jury to conclude that his working conditions were so intolerable that a reasonable person would have

been compelled to resign (an objective test) [required under A.R.S. §23-1502(A)(1)] nor does the record show evidence of “outrageous conduct.” (ROA 43, p.5) “[Plaintiffs’] claim is premised upon his opinions regarding Sabori’s harassment, Sabori’s campaign to favor his friends over Beede, and the imposition of unreasonable goals of one to two traveler cases per month.” (*Id.*) But, as the Court noted, Defendants Statement of Facts established that the goals were imposed by the command structure of TPD not Sabori, and the decision to transfer Plaintiff was a command decision, not Sabori’s and was made to give him a fresh start with a manageable caseload. (ROA 43, pp.4-5)

¶35 Once Defendants made a *prima facie* showing that no genuine issue of material fact exists, the burden shifted to Plaintiff to produce sufficient evidence to show that there is an issue. *GM Development Corp. v. Community American Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (Ariz.App., 1990). To defeat summary judgment Plaintiff was required to show, with specific facts that his working conditions were so unreasonable or intolerable that no person could have remained. Plaintiff failed to do this; instead offering only unsupported factual and legal conclusions, speculative comments, and opinions. “The object of [56(e)] is not to replace conclusory allegations of the complaint ... with conclusory allegations of an affidavit.” *Jones v. Merchants National Bank & Trust Company of Indianapolis*, 42 F.3d 1054, 1059 (7th Cir. 1994).

¶36 Lastly, at the time of Plaintiff's letter claiming constructive discharge he had already been transferred from Sabori's division. "Accordingly, unless the move itself was so intolerable, Beede has no facts to support a claim that at that time he was constructively discharged from his new duties," (ROA 43, p.5) and " ... does not establish facts that would allow a reasonable jury to conclude that his new working conditions were so intolerable that a reasonable person would be forced to resign." (*Id.*)

¶37 The trial Court did not err in granting Defendants' Motion for Summary Judgment.

II. The Trial Court Correctly Concluded that Plaintiff Failed to Timely and Properly File His Notice of Claim.

A. Standard of Review.

¶38 This Court reviews the trial court's grant of summary judgment *de novo*. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, 953 P.2d 168, 170 (1998). "We review *de novo* whether there are any genuine issues of material fact and whether the trial court applied the law properly." *Dube v. Desai*, 218 Ariz. 362, 365, 186 P.3d 587, 590 (App. 2008), and review the record and all reasonable inferences which can be drawn from it, in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). This Court will uphold the trial court if it is

correct for any reason. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281,283 (App.1996).

B. Defendants did not Waive the Notice of Claim Defense.

¶39 The trial court did not err in granting Defendants' Motion for Summary Judgment on the "basis that [Plaintiff] failed to timely and properly file his Notice of Claim pursuant to A.R.S. §12-821." The first sentence of the Notice of Claim statute clearly sets out the requirements for service; they are neither complex nor are they vague. A.R.S. §12-821.01(A) requires that a Notice of Claim be filed with the person or persons authorized to accept service for the public entity as set forth in the Arizona rules of civil procedure. Ariz.R.Civ.P. 4.1(i) states that service on a city may be made upon the chief executive officer, the secretary, clerk or recording officer thereof. Plaintiff did not serve his Notice of Claim on the City Clerk; rather he mailed his letters to the Chief of Police, the Legal Advisor, and the City of Tucson Legal Department. "Strict compliance with A.R.S. §12-821.01(A) is required and substantial compliance is insufficient." *Simon v. Maricopa Medical Center*, 225 Ariz. 55, 234 P.3d 623, 629, citing *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, ¶ 10, 144 P.3d 1254, 1256 (2006) (substantial compliance with the service requirement is insufficient).¹⁰ Plaintiff's reliance on case law from another jurisdiction (for the proposition that substantial

¹⁰ Plaintiff never asserted that there was service on the chief executive officer, the secretary, or the recording officer.

compliance is sufficient) does not negate applicable Arizona law. “Plaintiff agrees that he should have served the City Clerk ...” (Opening Brief at 29)

¶40 Plaintiff never personally served Sergeant Sabori and the Tucson Police Department is a non-jural entity. Plaintiff’s Opening Brief does not address the dismissal of Sergeant Sabori or the Tucson Police Department from his lawsuit and so he forfeits argument on those issues. *Hernandez v. State*, 201 Ariz. 336, 338 n.1, 35 P.3d 97, 99 n.1 (App. 2001)

¶41 Plaintiff’s principal arguments are that Defendants waived their Notice of Claim challenge by failing to file their Motion for Summary Judgment earlier and that Defendants ambushed the Plaintiff “late in the proceedings after having let Plaintiff rely on the fact that no attack was coming on the Notice of Claim.” (Opening Brief at 28) This is not true, Defendants raised the defense in their answer and shortly thereafter in response to Plaintiff’s discovery request (requests for admissions and interrogatories). Plaintiff does not identify any action by Defendants that “let” Plaintiff believe the issue was waived and, in fact, Defendants never indicated by pleadings or contact with Plaintiff’s counsel that the issue was not being pursued.

¶42 Relying heavily on *City of Phoenix v. Fields*, 219 Ariz. 568, 201 P.3d 529 (2009), Plaintiff argues that the instant case is comparable because Defendants “substantially participated” in litigation prior to filing their Notice of Claim

defense, thereby waiving the defense. The facts do not support Plaintiffs position and the cases upon which Plaintiff relies are distinguishable. In *City of Phoenix v. Fields*; *Jones v. Cochise County*, 218 Ariz. 372, 187 P.3d 97 (2008); and *Fred Nackard Land Company v. City of Flagstaff*, 225, Ariz. 338, 238 P.3d 149 (2010), the governmental entities initiated pleadings and “substantially” litigated the merits of the respective cases before even raising a defective notice of claim defense.

¶43 In *Fields*, the defendants engaged in extensive briefing on class certification without mentioning a defective notice of claim; filing motions, including several for partial summary judgment unrelated to the sufficiency of the notices of claim; and engaging in discovery after class certification, including Rule 26.1 disclosures that never disclosed a notice of claim defense. The notice of claim defense was raised for the first time in a motion for summary judgment more than four years after the date of the original complaint and more than three years after class certification. *See City of Phoenix*, 219 Ariz. at 575, 201 P.3d at 536.

¶44 The facts in *Jones v. Cochise County* are similar, substantial or extensive litigation by the governmental entity before the notice of claim defense was raised. The County’s answer did not include a notice of claim defense. *Jones*, 218 Ariz. at 374, 187 P.3d at 99. Almost a year after the complaint was filed, the County sought to amend their answer to “assert the affirmative defense of failure to comply with the notice of claim statute.” *Id.* Before raising this defense, the

County provided Plaintiffs with a disclosure statement, answered interrogatories, participated in seven depositions, six of which were initiated by the County and which included those for all three plaintiffs. *Jones*, 218 Ariz. at 380, 187 P.3d at 105. The County went beyond simply responding to the complaint or discovery requests, “it actively investigated and proactively defended the claim by subpoenaing and deposing witnesses and conducting other discovery.” *Id.* (*emphasis added*)

¶45 *Nackard* is similar to *Jones* and *Fields*. The waiver argument in *Nackard* was based on the City’s failure to raise the defense until it had actively litigated the case for years. *Nackard*, 238 P.3d at 154. The City stipulated to class certification, “permitted an amendment to the complaint, participated in trial management conferences, and actively pursued discovery and disclosure for more than three years before seeking a ruling on the validity of the notice of claim.” *Id.*

¶46 In the instant case, after considering both *Jones* and *Fields*, the trial court stated “[t]he contrast here is stark.” (ROA 43, p. 2) The court’s comparison to *Jones* states:

The City raised the defense in its Answer when it was first filed. Shortly after, the City responded to discovery (requests for admissions and interrogatories) and continued to assert that the Plaintiff failed to comply with A.R.S. §12-821. No depositions have been taken, and the Plaintiff has pointed to no discovery undertaken or initiated by the City. (ROA 43, p.2)(*emphasis added*)

Comparison to the facts in *Fields* yielded the conclusion that the only conduct, if any, of the City “upon which waiver could be based,” was their waiting for a year to bring the motion and that “[t]his is inadequate for this Court to find and [sic] factual or legal conclusion as to waiver or estoppel.” (ROA 43, p.3)

¶47 The Defendants in *Fields*, *Jones* and *Nackard* all participated in substantial and/or extensive litigation prior to challenging the validity of the notice of claim, allowing for the factual determination that by their affirmative actions they waived the defense. The facts in the instant case do not support such a conclusion. The trial Court did not err in ruling that Plaintiff failed to timely and properly file his Notice of Claim pursuant to A.R.S §12-821.

C. Defendants were not Estopped from Asserting Non-Compliance with the Notice of Claim Statute.

¶48 Section B, ¶39, *supra*, refutes Plaintiff’s argument that Defendants were estopped from raising the defense of failure to serve the Notice of Claim. Plaintiff’s statement in his Opening Brief that “the letter indicates they are investigating the claim” misstates the record. Assuming for purposes of argument that Plaintiff is referring to the Police Advisor’s letter of March 16, 2009. Mr. Greene stated: “[T]his letter is in response to the correspondence and claim we received from you dated March 6, 2009, and specifically addresses your public records request.” (*emphasis added*) That simply cannot be equated with an

“investigation.” (ROA 32, Exhibit 3) Nor does it constitute service. “Compliance with §12-821.01 is mandatory and ‘is not cured by actual notice or substantial compliance.’” *Harris v. Cochise Health Systems*, 215 Ariz. 344, 351, 160 P.3d 223, 230 (2007)

D. Plaintiff has not Articulated a Constitutional Claim.

¶49 Defendants agree that Plaintiff states in a caption that there was a violation of his Due Process Rights and Constitutional Rights. But making such an assertion is not enough. Plaintiff fails to articulate what “Constitutional Rights” form his §1983 claim. Plaintiff states he was deprived of his Due Process Rights, but never establishes any right that was violated. Although he claims that Sergeant Sabori’s actions violated his rights, he cites no authority supporting this claim. “As a general rule ... an unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment. (*internal cites omitted*) A party asserting a fact has the burden of proving that fact.” *GM Development Corp. v. Community American Mortg. Corp.*, 165 Ariz. 1, 4-6, 795 P.2d 827, 830-832 (Ariz. App., 1990), *citing Yeazell v. Copins*, 98 Ariz. 109, 116, 402 P.2d 541, 546 (1965).

¶50 In the instant case the trial Court found the absence of support for Plaintiff’s Due Process claim significant. Ruling on Defendants’ Motion for Summary Judgment the Court observed:

As with Plaintiff's claim for negligent supervision, Plaintiff's Response Memorandum cites no law in support of his claim that Defendants violated his due process rights, with the exception of the title of the section of his memorandum, "Violation of Section 1983 and Due Process Rights under the 4th [sic] and 14th Amendments." (ROA 43, p.6) (*emphasis original*)

¶51 Without guidance from the Plaintiff, the trial court was left to guess the nature of the §1983 constitutional claims. The Court chose to analyze them as Equal Protection claims and concluded that there was no basis for such claims. Plaintiff's Opening Brief does not dispute that this was the correct issue or assert that the Court's conclusion regarding this issue was in error.

¶52 Plaintiff's appeal compounds this error. Plaintiff's Opening Brief cites no law, no supporting facts and no admissible evidence supporting his assertion.¹¹ With no facts or legal authority identifying any Due Process or Constitutional Right that may or may not have been violated, Plaintiff has forfeited this argument. *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515,529, 217 P.3d 1220, 1234 (App. 2009)(if a litigant has not bothered to cite the record in support of argument, court of appeals need not search it to substantiate it); Ariz.R. Civ.App.P. 13(a)(6) ("An argument ... shall contain the contentions of the

¹¹ In the "Due Process" caption in Plaintiff's Response to Motion for Summary Judgment, Plaintiff cites the 4th Amendment along with the 14th Amendment. His Opening Brief does not specify any constitutional source.

appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on.”)

¶53 Under the caption of his Due Process claim, Plaintiff asserts certain personnel actions were unfair. Plaintiff however, fails to establish that any of the examples he sets out involved a state created property right – a right that is the fundamental element of any Due Process claim.

¶54 Plaintiff further argues that where a public employee gives notice that he has been constructively discharged he “must” be given a due process hearing *citing Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 980 (5th Cir., 1986) Plaintiff misstates the law. A public employee who is forced to chose between being fired and resigning and/or retiring may be entitled to a hearing. *See generally Schultz v. United States Navy*, 810 F.2d 1133, 1135-37 (Fed.Cir. 1987); *Covington v. Department of Health & Human Serv.*, 750 F.2d 937, 942-44 (Fed.Cir. 1984). The facts in the instant case do not fit such a scenario.

¶55 Here, there was no ultimatum. Plaintiff makes no allegation that his retirement was forced under threat of discharge. In fact, as previously noted, Plaintiff’s working environment and immediate supervisor had changed at the time he advised the department that he was retiring at the end of the month. “A plaintiff who contends that [he] was constructively discharged has the burden of proving that allegation.” *Garner v. Wal-Mart Stores, Inc.*, 807 F. 2d 1536, 1537 (8th Cir.

1987); *Draper v. Coeur Rochester, Inc.* 147 F.3d 1104 (9th Cir. 1998); *Salt River Agric. Improvement & Power Dist.*, 179 Ariz. 619, 880 P.2d 1165 (App. 1994). “[N]ot everything that makes an employee unhappy is an actionable adverse action.” *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996).

III. Denial of Plaintiff’s Motion to Amend his Complaint was Not an Abuse of Discretion.

A. Standard of Review.

¶56 A motion for leave to amend the pleadings is within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion. *Matter of the Estate of Tortenson*, 125 Ariz. 373, 609 P.2d 1073 (App. 1980). “An ‘abuse of discretion’ is discretion so manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.” *Torres v. North American Van Lines, Inc.* 135 Ariz. 35, 40, 658 P.2d 835, 841 (App. 1983), *citing Quigley v. City Court of the City of Tucson*, 132 Ariz. 35, 643 P.2d 738 (1982).

B. Allowing the Complaint to be Amended Would Have Prejudiced Defendants.

¶57 Ariz.R.Civ.P. Rule 15(a) provides that a party may amend his pleadings once as a matter of course any time before a responsive pleading has been served. After that, a party may amend his pleading only by leave of the court.

Leave to amend is discretionary but is liberally granted. *Owen v. Superior Ct.*, 133 Ariz. 75, 79 278 P.2d 278, 282 (1982).

¶58 Plaintiff's original complaint (dated July 17, 2009) alleged: constructive discharge, due process violations, and negligent supervision and retention. All events were alleged to have occurred sometime between 2005 through Plaintiff's retirement on May 30, 2009. On May 6, 2010, Plaintiff sought leave to amend the complaint to add new claims of defamation, libel slander or invasion of privacy and new parties based on an event occurring nine months after Plaintiff retired. (ROA 26)

¶59 The original named defendants were the City of Tucson, Tucson Police Department, and Sergeant Tony Sabori. Trial was scheduled for July 20, 2010, with discovery and disclosure completed by May 21, 2010.¹² The amended complaint would have added a new party, the Tucson Police Officers Association, new legal theories, and new facts. Plaintiff's original complaint focused on Sergeant Sabori and allegations specific to his job, work expectations and the workplace. Nothing in the original complaint contemplated defending against the new claims and the new party.

¶60 "Notice and substantial prejudice to the opposing party are critical in determining whether an amendment should be granted." *Owen*, 133 Ariz. at 79,

¹² On May 17, 2010, the parties agreed and the trial Court granted a short adjustment of the trial date. (ROA 38) No deadlines for motions, discovery, or disclosure were adjusted. (ROA 38)

649 P.2d at 282. “Prejudice is the ‘inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.’” *Id.* The trial court denied the Motion to Amend, stating in part “the addition of a new party, and these new facts would cause significant delay. There is no prejudice to the Plaintiff (if there is a basis for suit, this Ruling does not prohibit the filing of a separate lawsuit) while there would be substantial prejudice to the Defendant.” (ROA 38, p. 2)

¶61 The Court’s denial of Plaintiff’s Motion to Amend was not an abuse of discretion.

IV. The City is Entitled to Attorneys Fees.

¶62 The City submits that it is entitled to fees under Ariz.R.Civ.App.P., Rule 25. In multiple instances throughout Plaintiff’s Opening Brief, he has misstated and misrepresented the trial court’s rulings; he also relied upon “facts” stricken by the trial court without having challenged that ruling. This has been done so as to imply that the trial court made findings contrary to those actually entered. Examples are found at: ¶40 ... “the trial judge’s only objection to the Motion to Amend the Complaint was that it was too close to trial.” (ROA 38 refutes this); ¶ 47 “The trial court found that even though Plaintiff had a claim arising under Section 1983 and Due Process constitution rights ...” (there was no such finding by the trial court); ¶59 “ In this case, the City of Tucson responded

...; the letter indicates they are investigating the claim.”; ¶61 “The trial court correctly found no evidence of any bad act on the part of Plaintiff ... because Plaintiff acted quickly to seek to amend ...” (actually the court noted that “this matter has been pending for some time and that most (if not all) of the disclosure, discovery, and deadlines have passed.” (ROA 38).

¶63. More problematic is Plaintiff’s continued assertion that Sergeant Sabori “falsified” documents and evaluations and initiated a “false” internal affairs investigation. Plaintiff has several documents establishing that these statements are not true. Making statements that would be defamatory if they were not in a pleading is inappropriate. The City requests attorneys’ fees in an amount to be determined based upon the submittal of an affidavit following the decision in this matter.

CONCLUSION

¶64. This Court should affirm the judgment of the trial court.

DATED this 1st day of February, 2011.

MICHAEL G. RANKIN
City Attorney

By /s/ Julianne Hughes
Julianne Hughes
Principal Assistant City Attorney
Attorney for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached brief:

Uses proportionately spaced typed of 14 points or more, is double spaced using a Roman font and contains 8135 words; OR

Uses monospaced type of nor more than 10.5 characters per inch and

Does not exceed 40 pages [if Opening or Answering Brief] Does not Exceed 20 pages [if Reply Brief]

Dated: February 1, 2011

PROOF OF SERVICE

Julianne Hughes, Principal Assistant City Attorney for Defendant's/Appellee certifies that on January 28, 2011, she electronically filed the Appellant's Opening Brief with the Clerk of the Court of Appeals, Division Two; and hand-delivered two copies of the foregoing to the following parties on February 1, 2011 to:

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