IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

JANE DOE (a fictitious name for a real Jackson County resident), Plaintiff, vs. MEDFORD SCHOOL DISTRICT 549C, Defendant.	Case No. 07-3765-E2 DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS TO STRIKE AND DISMISS PURSUANT TO ORCP 21

I. Even Under Plaintiff's First Amended Complaint, Plaintiff Still Has Not Alleged a Justiciable Controversy.

As discussed in the District's Motion, courts cannot issue declaratory judgments in a vacuum and must only resolve "actual" or "justiciable" controversies which are based on present facts rather than on contingent or hypothetical events. *TVKO v Howland*, 335 Or 527, 534 (2003). Declaratory relief is therefore only available where a plaintiff can demonstrate that the alleged injury is not too speculative. *League of Oregon Cities v. State of Oregon*, 334 Or 645, 658 (2002) (citations omitted).

The allegations set forth in plaintiff's proffered Amended Complaint still fail to rise to the level of a justiciable controversy as recognized by Oregon courts. Her proffered Amended Complaint now alleges that she will carry her handgun concealed upon her person while engaged in her work for defendant no later than October 30, 2007. Amended Complaint, ¶ 4. She also alleges that she received a memo from the District, reminding her of her obligation to comply with the District's policy concerning the possession of firearms on District property and advising that a failure to so comply would result in disciplinary action. *Id.*, ¶ 5. Importantly, she has not alleged that she has in fact brought a handgun onto

the District's property or that she has been disciplined in any manner for doing so. Such allegations are too speculative and legally insufficient to present a justiciable controversy capable of being remedied through the issuance of a declaratory judgment.

Plaintiff's current standing is identical to the plaintiff in *Stubbs v Goldschmidt*, 2004 WL 1490323 (D.Or. 2004), cited in the District's Motion. In that case the University's policy concerning gun possession on its property had not actually been enforced against the plaintiff and the plaintiff had thus not suffered any injury. The Court found that the plaintiff had not been injured by the mere existence of the defendants' policy, stating "the alleged injury, prohibition of plaintiff's weapon, is merely what [the policy] itself requires and has not actually been enforced by defendants. No threat to plaintiff's rights appear beyond that implied by the existence of the regulation itself." *Id.* at *4. Accordingly, "the plaintiff's voluntary compliance with [the policy] causes his own alleged injury" and "plaintiff's argument of actual enforcement amounts to a complaint about the mere existence of the challenged regulation." *Id.* at *5.

In sum, plaintiff's allegations as to what she may or may not do in the future are simply too speculative to rise to the level of a current, justiciable controversy.

II. The District's Policy Does Not Violate ORS 166.170 Or Any Other Statute.

A. A School District Is Not a "District" Within the Meaning of ORS 166.170.

Plaintiff's Response states as fact, without any supporting authority, that the District is a "district" as that term is used in ORS 166.170(2). Such an assumption is conclusory and simply wrong. As pointed out by the District in its Motion, the legislative history of that statute indicates that the term "district" was meant to apply only to "special districts". *See* Pauck Aff., ¶ 5, and Ex. "A" to District's Motion, p. 46 (Oregon Senate Staff Measure Summary, stating that the need for HB 2784 arises because "cities, counties, some special districts and municipal groups are all writing their own firearm regulations, including civil fine and forfeiture provisions, to which the public must comply.") (emphasis added).

"Special districts", which are described in ORS Chapter 198, do not include school districts. ORS 198.010; *See also* ORS 174.116 (which defines "local service district" and does not include school districts within that definition) and ORS 174.117 (including school districts within the definition of "special government body", as opposed to "local service district")[1]. Special districts are established to provide limited public services to citizens residing within the jurisdiction, and are authorized to enact ordinances and regulations which affect those members of the public. *See, e.g.*, ORS 198.510 through 198.600. Furthermore, ORS 198.605 defines a "local service district" as a municipal corporation. Thus, when ORS 166.170(2) is read in context to prohibit any "municipal corporation or district" from enacting ordinances regulating gun possession, it becomes clear that the legislature intended the word "district" to be a subset of "municipal corporations". If the legislature had not intended to link municipal corporations and districts together, it would not have needed to include the word "or" immediately following the word "city" in ORS 166.170(2), and the statute would have read "Except as expressly authorized by state statute, no county, city, other municipal corporation or district may enact * * *." Because the District is not the type of special district referred to in ORS 166.170(2), it falls entirely outside the scope of that statute.

B. The District's Policy Is Not An "Ordinance" Under ORS 166.170.

Plaintiff next attempts to stretch the definition of "ordinance" in ORS 166.170(2) beyond its ordinary and reasonable use to include "policies", including the employment policies created by the District. Plaintiff's position relies on the third accepted meaning of the word "ordinance" in Webster's Dictionary as an "established rule, policy or practice".

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[1] Thus, contrary to plaintiff's conclusory statement, the District is not necessarily a "district" within the meaning of ORS 166.170 simply because it is called a school district. If that were the case, school districts would have been included within the definition of "district" set forth in ORS 174.116 and ORS Chapter 198.

Plaintiff's argument, that Webster's Dictionary authoritatively "establishes" that a policy is an ordinance, and that the District's policy is therefore an ordinance, as well, is frankly ridiculous.

In the event that this Court finds that the District is a "district" within the meaning of ORS 166.170, it must nevertheless hold that the employment policy at issue here is not an "ordinance". Although the term "ordinance" as used in ORS 166.170 has no statutorily defined meaning, it is abundantly clear from the context of the statute that it is intended to apply only to rules, laws or statutes that govern the general public. Such an interpretation is in accord with the definition of "ordinance" supplied by Black's Law Dictionary, Sixth Edition (1990), which defines that term as:

> "A rule established by authority; a permanent rule of action; a law or statute. In its most common meaning, the term is used to designate the enactments of the legislative body of a municipal corporation. It designates a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct relating to the corporate affairs of the municipality. * * * An ordinance is the equivalent of a municipal statute, passed by the city council, or equivalent body, and governing matters not already covered by federal or state law. Ordinances commonly govern zoning, building, safety, etc. matters of municipality."

Under that definition, which is the proper construction to give to ORS 166.170, employment policies and other similar rules which do not affect the general public are not ordinances. The District's policy which is at issue here is not an ordinance and therefore falls outside the scope of ORS 166.170.

As discussed extensively in the District's Motion, ORS 166.170 does not prohibit the District from creating and enforcing workplace rules and policies with respect to its employees, including but not limited to rules and policies which relate to firearm possession by District employees while on District property. The leading case on this issue is *Cherry v Municipality of Metropolitan Seattle*, 116 Wash.2d 794, 808 P.2d 746 (1991), cited in the District's Motion. Plaintiff does not and cannot distinguish this case in her Response, other

than to state that the Washington statute in that case was "markedly different from ORS 166.170." However, *Cherry* and the statute at issue therein were similar enough to ORS 166.170 to cause the Oregon Employment Relations Board to rely upon those authorities in upholding an employment policy similar to the District's Policy from a challenge under ORS 166.170 in *Federation of Oregon Parole and Probation Officers v. Washington County*, 19 PECBR 411 (Aug. 21, 2001). *See also McMann v City of Tucson*, 47 P.3d 672 (Ariz.Ct.App. 2002) (interpreting preemption statute similar to ORS 166.170 and finding, on grounds similar to *Cherry*, that Arizona's preemption statute did not clearly apply to the city's control of its own property, as opposed to general regulation attempting to control third parties).

The statute at issue in *Cherry* was also more akin to ORS 166.170 than the statute at issue in *University of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006), a case cited without discussion by plaintiff. In that case, the statute was much broader than ORS 166.170 and provided:

> "Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact, establish, or enforce any ordinance, regulation, rule, or policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property." [emphasis added]

The statute was thus not limited to counties, cities, or municipal corporations and districts, as is ORS 166.170, but applied to all local authorities and state entities. Further, the Utah statute prohibited the enactment not only of ordinances, but also any "regulation, rule, or policy". The scope of the Utah statute was therefore far beyond that of ORS 166.170.

Shurtleff is also distinguishable from the case at bar on the basis of its procedural history. None of the parties in *Shurtleff* were asserting a personal right to carry firearms on the University's property, and the case at its core was not even about the right to carry firearms on the University's property. Instead, the case itself and the Court's holding focused on whether or not the University had institutional autonomy under the Utah Constitution with

the authority to disregard Utah law to the extent those laws interfered with its internal academic affairs.

In *Shurtleff*, the University of Utah had enacted a policy prohibiting its students, faculty and staff from carrying guns on campus and authorizing disciplinary action for violations. The Utah Attorney General believed that the policy violated Utah's Uniform Firearms Act. The University sued the Attorney General, seeking a declaration that its policy did not contravene Utah's Uniform Firearms Act or its Concealed Weapons Act. The district court agreed with the University, on grounds similar to those described by the Court in *Cherry, supra*, finding that the policy applied only to students, faculty and staff who voluntarily chose to associate themselves with the University. *Id.* at 1113. The Attorney General appealed that decision but before the appeal could be heard by the Utah Supreme Court, the Utah legislature enacted the statute described above, thereby rendering the district court's decision moot. Thus,, it is clear from the context in which that statute was enacted, as well as the broader scope of the statute itself, that the legislature intended it to apply to rules and policies enacted by public employers. That is in stark contrast to the legislative history surrounding ORS 166.170.

The Court in *Shurtleff* then proceeded to analyze the University's policy in constitutional terms, which formed the basis of its holding. Although there are no constitutional issues alleged in this case, plaintiff's claims being statutory only, there is one aspect of the *Shurtleff* case which bears further examination. In conducting its constitutional analysis, the *Shurtleff* Court distinguished between a "legislative act", such as the passage of a statute or an ordinance, and a mere "policy". The Court noted that the enactment of a statute or an ordinance applied to everyone within the geographical area over which the enacting body has jurisdiction. *Id.* at 1115-16. In contrast, the University's policy:

> "does not purport to apply to the population at large or even to the entire category of higher education students or staff, but only to those students enrolled at and those faculty and staff

> employed by the University itself. And the policy applies only to these individuals because of their contractual or quasi-contractual relationships with the University, not because the University has jurisdiction over a particular geographic area or a particular field of endeavor." *Id.* at 1116.

Accordingly, the Court concluded that the University's policy was most appropriately viewed as a contract with its students and employees, rather than being legislative in nature as an ordinance would be. That analysis is consistent with the District's position that its policy is not an ordinance within the scope of ORS 166.170.

III. Conclusion.

Plaintiff's position appears to be essentially that the legislature has granted persons with concealed handgun licenses permission to carry firearms in public buildings and therefore plaintiff, the holder of a concealed handgun license, should be allowed to take her gun to school. Plaintiff's characterization of the issue completely fails to recognize that no Oregon statute, including those statutes pertaining to concealed handgun licensees, affirmatively authorizes the possession of a concealed handgun by any person, anywhere and under any circumstances. The right to carry a concealed handgun is not absolute; it is simply a right to be free from criminal liability for being in possession of a handgun where possession would otherwise be unlawful. For the reasons set forth by the District above and in its Motion, the District is entitled to implement and enforce reasonable workplace policies for its employees, including policies which relate to the possession of firearms by employees on District property, and any such policy is not an "ordinance" under ORS 166.170. If plaintiff's arguments to the contrary were accepted and taken to their logical conclusion, then the District would be powerless to discipline a teacher for brandishing a firearm in an effort to maintain classroom discipline since any such policy would regulate, restrict or prohibit the

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use of firearms in violation of ORS 166.170. Such an absurd and outrageous result cannot be allowed. The District's Motion To Dismiss must be granted with prejudice.

DATED: October 10, 2007.

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CERTIFICATE - TRUE COPY

I hereby certify that I have compared this copy of DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS TO STRIKE AND DISMISS PURSUANT TO ORCP 21 with the original and it is an exact and complete copy thereof.

Timothy C. Gerking, OSB #79234
Thaddeus G. Pauck, OSB #98318
Of Attorneys for Defendant

CERTIFICATE OF MAILING AND FAXING

I hereby certify that I served the foregoing DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS TO STRIKE AND DISMISSAL PURSUANT TO ORCP 21 on the attorneys of record herein on October 10, 2007, by mailing and faxing to said attorney a correct copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at his address and fax number, to-wit:

James E. Leuenberger
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and deposited in the U.S. mail at Medford, Oregon, on said day. That there is regular mail service between Medford, Oregon and the address to which said copy was mailed.

Timothy C. Gerking, OSB #79234
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Of Attorneys for Defendant