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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

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

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

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

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

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

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

1 “Special districts”, which are described in ORS Chapter 198, do not include school
2 districts. ORS 198.010; *See also* ORS 174.116 (which defines “local service district” and
3 does not include school districts within that definition) and ORS 174.117 (including school
4 districts within the definition of “special government body”, as opposed to “local service
5 district”)¹. Special districts are established to provide limited public services to citizens
6 residing within the jurisdiction, and are authorized to enact ordinances and regulations which
7 affect those members of the public. *See, e.g.*, ORS 198.510 through 198.600. Furthermore,
8 ORS 198.605 defines a “local service district” as a municipal corporation. Thus, when ORS
9 166.170(2) is read in context to prohibit any “municipal corporation or district” from
10 enacting ordinances regulating gun possession, it becomes clear that the legislature intended
11 the word “district” to be a subset of “municipal corporations”. If the legislature had not
12 intended to link municipal corporations and districts together, it would not have needed to
13 include the word “or” immediately following the word “city” in ORS 166.170(2), and the
14 statute would have read “Except as expressly authorized by state statute, no county, city,
15 other municipal corporation or district may enact * * *.” Because the District is not the type
16 of special district referred to in ORS 166.170(2), it falls entirely outside the scope of that
17 statute.

18 *B. The District’s Policy Is Not An “Ordinance” Under ORS 166.170.*

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

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25 ¹ Thus, contrary to plaintiff’s conclusory statement, the District is not necessarily a
26 “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.

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

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

11 "A rule established by authority; a permanent rule of action; a
12 law or statute. In its most common meaning, the term is used to
13 designate the enactments of the legislative body of a municipal
14 corporation. It designates a local law of a municipal
15 corporation, duly enacted by the proper authorities, prescribing
16 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."

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

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

1 than to state that the Washington statute in that case was “markedly different from ORS
2 166.170.” However, *Cherry* and the statute at issue therein were similar enough to ORS
3 166.170 to cause the Oregon Employment Relations Board to rely upon those authorities in
4 upholding an employment policy similar to the District’s Policy from a challenge under ORS
5 166.170 in *Federation of Oregon Parole and Probation Officers v. Washington County*, 19
6 PECBR 411 (Aug. 21, 2001). See also *McMann v City of Tucson*, 47 P.3d 672
7 (Ariz.Ct.App. 2002) (interpreting preemption statute similar to ORS 166.170 and finding, on
8 grounds similar to *Cherry*, that Arizona’s preemption statute did not clearly apply to the
9 city’s control of its own property, as opposed to general regulation attempting to control third
10 parties).

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

15 “Unless specifically authorized by the Legislature by statute, a
16 local authority or state entity may not enact, establish, or enforce
17 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]

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

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

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

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

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

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

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

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

10 **III. Conclusion.**

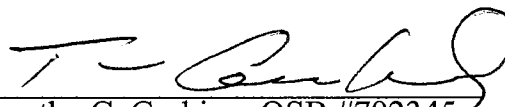
11 Plaintiff’s position appears to be essentially that the legislature has granted persons
12 with concealed handgun licenses permission to carry firearms in public buildings and
13 therefore plaintiff, the holder of a concealed handgun license, should be allowed to take her
14 gun to school. Plaintiff’s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

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

3 DATED: October 10, 2007.

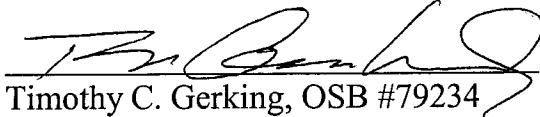
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6 Timothy C. Gerking, OSB #792345
7 Thaddeus G. Pauck, OSB#98318
8 BROPHY, MILLS, SCHMOR
9 GERKING, BROPHY & PARADIS, LLP
10 Attorneys for Defendant

11 P.O. Box 128
12 Medford, OR 97501
13 Telephone: (541) 772-7123
14 Trial Attorney: Timothy C. Gerking
15
16
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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.

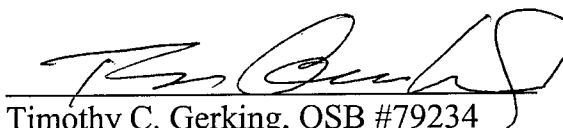

Timothy C. Gerking, OSB #79234
Thaddeus G. Pauck, OSB #98318
Of Attorneys for Defendant

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
Attorney at Law
P.O. Box 1684
Lake Oswego, OR 97035
Fax No. (503) 419-6415
Attorney for Plaintiff

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
Thaddeus G. Pauck, OSB #98318
Of Attorneys for Defendant