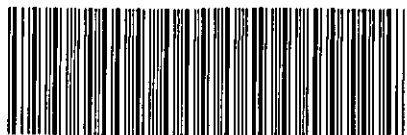


HON. KATHERINE M. STOLZ



99-2-13911-4 10940775 BR 01-03-02

FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

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COUNTY CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

10 JOSEPH J. KIRBY and DEBORAH A.)
 11 KIRBY, husband and wife,)
 12 Plaintiffs,)
 13 vs.)
 14 THE CITY OF TACOMA, a municipal)
 corporation; RAY CORPUZ and)
 15 "JANE DOE" CORPUZ, husband and)
 wife; PHILIP ARREOLA and "JANE)
 16 DOE" ARREOLA, husband and)
 wife; WILLIAM WOODARD and)
 17 CATHERINE WOODARD, husband and)
 wife; RAYMOND ROBERTS and "JANE)
 18 DOE" ROBERTS, husband and wife;)
 DAVID BRAME and "JANE DOE")
 19 BRAME, husband and wife; and)
 JAMES HAIRSTON and "JANE DOE")
 20 HAIRSTON, husband and wife,)
 21 Defendants.)

No. 99 2 13911 4

PLAINTIFFS' BRIEF IN
OPPOSITION TO
DEFENDANT'S MOTION
FOR PROTECTIVE ORDER
RE: REQUEST FOR
PRE-HIRE FILES

I. RELIEF REQUESTED

Plaintiffs respectfully request the Court deny Defendants' motion for a protective order preventing the disclosure

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1 of the pre-hire employment files of the lieutenants of the
2 Tacoma Police Department. The Plaintiff is alleging that he
3 received disparate treatment and can only prove his case by
4 showing that he received disparate treatment compared to
5 similarly situated individuals.

6 II. STATEMENT OF FACTS

7 JOHN L. MESSINA declares as follows:

8 I am the attorney for the plaintiffs herein and I make
9 this declaration in opposition to Defendants' motion for a
10 protective order. I am over the age of 18 and competent to
11 testify as to the matters contained herein. I make this
12 declaration based upon my personal knowledge.

13 Joseph J. Kirby has sued the City of Tacoma for disparate
14 treatment he received while he was an employee at the Tacoma
15 Police Department. Mr. Kirby was discriminated against based
16 on his age, disability, and in retaliation for engaging in
17 union activities. Mr. Kirby has also alleged negligent hiring
18 regarding Phillip Arreola.

19 When Mr. Kirby was hired, he was promised that the pre-
20 hire file gathered by the police department would be used only
21 to determine fitness for the position of patrol officer at the
22 time of hiring. Mr. Kirby has since learned that this
23 statement is not true. The pre-hire files have been used by
24 the Department to defend officers against lawsuits. Mr. Kirby
25 was informed by the records custodian after his lawsuit was

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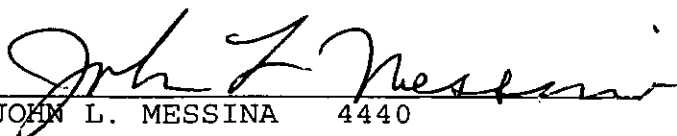
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1 filed that the Defendant had requested his pre-hire file.
 2 Finally, Mr. Kirby was ordered by Deputy Chief Darland to turn
 3 over his pre-hire employment file to the defendant. Kirby
 4 Declaration.

5 I have read the Defendants' brief and Mr. Hairston's
 6 declaration. If the declaration of Mr. Hairston is true, there
 7 would not be a legitimate purpose for the Defendants to go
 8 through the trouble of getting Mr. Kirby's pre-hire employment
 9 file. I suspect that the Defendant is attempting to use Mr.
 10 Kirby's pre-hire file to distinguish Mr. Kirby from other
 11 similarly situated officers. To combat this argument, I
 12 requested the pre-hire employment files of all lieutenants in
 13 the Tacoma City Police Department so it could be proved that
 14 Mr. Kirby received disparate treatment as compared to similarly
 15 situated officers.

16 I certify under penalty of perjury under the laws of the
 17 State of Washington that the foregoing is true and correct.

18 DATED this 2 day of January 2002, at Tacoma,
 19 Washington.

20
 21 
 22 JOHN L. MESSINA 4440

23 **III. EVIDENCE RELIED UPON**

- 24 A. Declaration of John L. Messina, hereinabove.
 25 B. Declaration of Joseph Kirby.

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IV. LAW AND ARGUMENT

A. The Defendants Have Not Shown That it Is Necessary to Issue a Protective Order.

The Defendants have presented no evidence proving that it is necessary to issue a protective order. Protective orders are governed by Civil Rule 26(c). The standard for issuing a protective order is:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown... [the court] may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense... CR 26(c).

The burden is on the moving party to demonstrate good cause for a protective order. In making the determination, the court will balance the interests served by protecting the information against the interest served by allowing discovery of it. *Rhinehart v. The Seattle Times*, 98 Wn.2d 226, 231 (1982).

Nowhere in the Defendant's motion does the Defendant explain how the release of this material will annoy, embarrass, oppress, or place a undue burden or expense on the Defendants. The only argument the Defendant makes is that the requested files are not relevant. If the files are not relevant, as the Defendant argues, the files will inadmissible at trial and there will no possibility of embarrassment for anyone. Since the Defendants have not shown good cause for the protective order, the Court should deny the Defendants' motion.

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1 **B. The Defendants' Argument as to Relevancy Is Based on**
2 **the Self-Serving Statements of One of the Named**
3 **Defendants.**

4 The Defendants' entire brief argues as to the relevancy
5 of the requested materials. A Defendant or his counsel cannot
6 unilaterally determine the relevancy of evidence during
7 discovery. *Johnson v. Mermis*, 91 Wn.App. 127, 134 (1998). The
8 Defendants' entire argument is based on the following
9 paragraph:

10 This information gathered by the police department
11 is used only to determine fitness for the position
12 patrol officer at the time of hiring. This
13 information is not used by the police department
14 once the candidate is hired. It is not used in
15 any disciplinary process, nor is it used in any
16 promotional process. Citations omitted, emphasis
17 omitted. Defendants' motion for Protective Order,
18 p. 2.

19 The court should first note that this declaration was
20 obtained from James Hairston. Mr. Hairston is a named
21 defendant and cannot be considered impartial. The Defendant
22 argues that since the material is only used for pre-hiring
23 purposes, it is not relevant to the Plaintiff's disparate
24 treatment case. This argument only makes sense if the above
25 statement is true, and the materials are only used for pre-
hiring evaluations.

Three pieces of evidence indicate that the Defendant's
statements regarding the pre-hire files are inaccurate or
untrue. First, Plaintiff has stated that the files have been
used to defend officers against lawsuits. The pre-hiring files

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1 | therefore do have some use after the officer is hired. Second,
2 | the Plaintiff was informed by the records custodian that the
3 | Defendant's Legal Department requested his pre-hire file.
4 | Finally, Deputy Chief Darland ordered the Plaintiff to turn
5 | over his pre-employment file to the Defendant's Legal
6 | Department. *Kirby Declaration.*

7 | The Plaintiff suspects, and the evidence corroborates,
8 | that the Defendant has obtained the Plaintiff's pre-hire file
9 | in an attempt to distinguish the Plaintiff from similarly
10 | situated officers. The Defendant's argument could be that any
11 | disparate treatment was a result facts in the pre-hire file not
12 | because of the Plaintiff's age, disability, or union participa-
13 | tion.

14 | The only way for the Plaintiff to counter this argument
15 | would be to obtain the other Lieutenants' pre-hire files to
16 | prove that he was similarly situated and did receive disparate
17 | treatment. The city by obtaining the Plaintiff's pre-hire file
18 | has made it necessary for the Plaintiff to obtain the pre-hire
19 | file of other similarly situated officers. Ironically, it is
20 | now the city that argues that the material they have already
21 | obtained about the plaintiff is not relevant when the Plaintiff
22 | attempts to discover the same material.

23 |
24 |
25 |

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1 **C. A Party Is Not Allowed to Request a Protective Order for**
2 **the Benefit of Non-Parties.**

3 The Defendants' request for a protective order for the
4 individuals who are not named as defendants is inappropriate.
5 A party may not seek a protective order to protect the
6 interests of another party, or of a nonparty, unless the moving
7 party can demonstrate the discovery would jeopardize his or her
8 own interests. Write & Miller, *Federal Practice and Procedure:*
9 *Civil*, §2035.

10 The Defendants specifically admit that they are
11 attempting to get a protective order on behalf of non-parties.
12 The Defendants' brief is broken into two sections, one
13 regarding the non-party pre-hire files, pp. 4-5, and one
14 regarding the party pre-hire files, pp. 6-7. The Defendants
15 may not seek a protective order to protect the interest of the
16 non-parties.

17 The court should not even consider the Defendants'
18 arguments as to the files of the 26 individuals who are not
19 parties.

20 **D. The Exceptions the Public Disclosure Act the Defendants**
21 **Cite Are Conditional Privileges.**

22 The Defendants state that RCW 42.17.310(1), specifically
23 precludes the dissemination of personal information maintained
24 in employment personnel files. *Defendants' Motion for a*
25 *Protective Order*, p. 5. The Defendants neglect to inform the
court that 42.17.310(1) only protects that material to the

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1 | extent that disclosure would violate the employee's right to
2 | privacy. The defendants present no evidence showing that the
3 | disclosure of this information would violate the employee's
4 | right to privacy.

5 | Privilege under RCW 42.17.310(1)(b), the section the
6 | Defendants are citing to, is conditional. To preclude
7 | disclosure, there must be a showing that disclosure would
8 | violate the right of privacy, make law enforcement ineffective,
9 | or endanger a person's life, physical safety, or property.
10 | *Barfield v. Seattle*, 100 Wn.2d 878, 885 (1984).

11 | A two-prong test has been utilized in Washington for
12 | balancing the privacy interest against the legitimate public
13 | interest. First, the court examines whether the disclosure
14 | sought would be highly offensive to a reasonable person if
15 | disclosed. Second, the court examines whether the information
16 | is of legitimate public concern. *Beltran v. DSHS*, 98 Wn.App.
17 | 245, 257 (1999), citing *Dawson*, 120 Wn.2d at 796. This
18 | analysis "contemplates some balancing of the public interest in
19 | disclosure against the public interest in the 'efficient
20 | administration of government.'" *Beltran v. DSHS*, 98 Wn.App.
21 | 245, 257 (1999).

22 | There are two safeguards built into the discovery
23 | process. The use of in camera reviews and the use of
24 | protective orders can be used to protect a party or person from
25 |

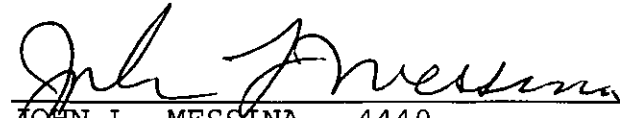
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1 any protective orders necessary to assure the affected
2 individuals' privacy.

3 DATED this 2 day of January 2002.

4 MESSINA BULZOMI

5 By 
6 JOHN L. MESSINA 4440
7 Attorneys for Plaintiffs

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