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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

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IN AND FOR THE COUNTY OF PIERCE

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FILED
IN COUNTY CLERK'S OFFICE
A.M. SEP 13 2001 P.M.
PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

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JOSEPH J. KIRBY and DEBORAH A.
KIRBY, husband and wife,

No. 99-2-13911-4

11

Plaintiffs,

12

v.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER

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THE CITY OF TACOMA, a municipal
corporation; RAY CORPUZ and "JANE
DOE" CORPUZ, husband and wife; PHILIP
ARREOLA and "JANE DOE" ARREOLA,
husband and wife; WILLIAM WOODARD
and CATHERINE WOODARD, husband and
wife; RAYMOND ROBERTS and "JANE
DOE" ROBERTS, husband and wife; DAVID
BRAME and "JANE DOE" BRAME, husband
and wife; and JAMES HAIRSTON and
"JANE DOE" HAIRSTON, husband and wife,

NOTE FOR HEARING:
September 21, 2001

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Defendants.

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I. FACTS SUPPORTING ISSUANCE OF A PROTECTIVE ORDER.

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Plaintiff has sued the City of Tacoma and the individually named
defendants for claims that arise out of his employment with the Tacoma Police

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DEFENDANTS' MOTION FOR A PROTECTIVE ORDER - 1

ORIGINAL

Tacoma City Attorney
Civil Division
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(253) 591-5885/FAX 591-5755

3 SEP 14 2001

1 Department. His claims include allegations of race discrimination, hostile work
2 environment, age discrimination, violation of his rights for engaging in union
3 activity and negligent hiring. (See Plaintiff's Amended Complaint.)

4 In the deposition of Charles Meinema, plaintiff's attorney asked the
5 deponent whether any one of the named defendants have been investigated on
6 criminal charges. (See attached excerpts of deposition transcript at Tab 1.)

7 This line of questioning was again pursued in the deposition of Michael
8 Darland. (See attached excerpts of deposition transcript at Tab 2.) This line of
9 questioning has no relevance to plaintiff's causes of action, will not lead to any
10 admissible evidence and is intended solely to embarrass and annoy one of the
11 named defendants. The City has attempted to resolve this issue with plaintiff's
12 counsel without court assistance, but has had no success. (See attached
13 correspondence at Tabs 3, 4 and 5.)

14
15 The issue sought to be protected by the defendants surround an incident
16 that occurred in 1987. Then Police Patrol Officer David Brame, went on a date
17 with a woman, and had consensual sex. Fifteen months after that date, she
18 complained to Tacoma Police Internal Affairs that she had been "date raped."
19 The allegation was investigated by Internal Affairs. After a full investigation, it
20 was determined by the Chief of Police that the Internal Affairs complaint was
21 not sustained. No criminal charges were ever brought, nor was it investigated
22 as a criminal matter.
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1 **II. THIS INCIDENT IS NOT RELEVANT, ADMISSIBLE NOR**
 2 **LIKELY TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE,**
 3 **AND A PROTECTIVE ORDER SHOULD BE ENTERED.**

4 A. Standard on Motion for Protective Order.

5 The court enjoys broad discretion in controlling discovery. Doe v. Puget
 6 Sound Blood Ctr., 117 Wn.2d 772, 819 P.2d 371 (1991). A court may limit
 7 discovery "to protect a party or person from annoyance, embarrassment..."

8 CR 26(c).

9 It is the proper function of the trial court to exercise its discretion
 10 in the control of litigation before it. The trial court possesses
 11 broad discretion to manage discovery in a fashion that will
 12 implement full disclosure of *relevant* information and at the same
 13 time protect against harmful side effects. To that end, the court
 14 can issue protective orders regulating the extent and manner of
 15 discovery.

16 (Emphasis added; internal citations omitted.) Burnet v. Spokane Ambulance,
 17 131 Wn.2d 484, 505-06, 933 P.2d 1036 (1997). CR 26(c) allows the court, for
 18 good cause shown, to enter a protective order, limiting or prohibiting discovery
 19 in order to "protect a party of person from annoyance, embarrassment,
 20 oppression, or undue burden or expense[.]"

21 The permissible scope of discovery in civil actions, as established by CR
 22 26(b), is subject to two basic limitations: privilege and relevancy. CR 26(b)(1).
 23 In the instant matter, as to the issues identified herein, privilege is not an issue
 24 – relevancy is.

25 CR 26 provides that a party "may obtain discovery regarding any matter,
 26 not privileged, which is relevant to the subject matter involved in the pending

1 action, whether it relates to the *claim or defense* of the party seeking discovery
2 or to the *claim or defense* of any other party[.] ... It is not grounds for objection
3 that the information sought will be inadmissible at trial if the information sought
4 *appears reasonably calculated to lead to the discovery of admissible evidence.*"

5 (Emphasis added.) As evidenced by the plain language of the rule, the
6 permissible scope of discovery - the "subject matter" - is necessarily
7 established by the parties' claims and defenses. In the instant case, the issue
8 for which information is sought is not relevant to the subject matter of this
9 action.
10

11 B. The information sought is outside the scope of plaintiff's claims.

12 The incident at issue, that allegedly occurred over a decade ago, is
13 completely irrelevant to the plaintiff's claims, has no possible bearing on the
14 issues presented in this case and is inadmissible. This is fatal to plaintiff's
15 claim that he is entitled to discover this information. See e.g., Grinnel Corp. v.
16 Hachett, 70 FRD 326 (D.C. RI 1976); Johnson Foils, Inc. v. Hych Corp., 61
17 FRD 405 (D.C. NY 1973). The information sought must have evidential value.
18 Johnson v. Nyack Hosp., 169 FDR 550 (S.D. NY 1996); Johnson v. Morthan,
19 164 FRD 571 (N.D. FLA 1996); Blum v. Schlegel, 150 FRD 38, (W.D. NY
20 1993). In a case of disparate or discriminatory treatment, the plaintiff must
21 demonstrate the he is a member of a protected class, that he engaged in
22 misconduct similar to that of a person outside the protected class, and that the
23 disciplinary measures enforced against him were more severe than those
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1 enforced against the other person who engaged in similar misconduct. Moore
2 v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir.). Plaintiff's complaint does
3 not allege that he was disciplined for allegations of criminal activity while other
4 members of the Department were not; thus, this information has no evidentiary
5 value and should be restricted from discovery. Plaintiff can establish no nexus
6 between an *allegation* of a crime against a police patrol officer - a 1987
7 allegation investigated by internal affairs, and found to be not sustained by the
8 then Chief of Police - and any disparate treatment that he claims to have
9 received by being a member of a protected class.

11 Moreover, **courts have held that disciplinary measures undertaken**
12 **by different supervisors may not be comparable for purposes of**
13 **discrimination analysis.** See Cooper v. City of North Olmstead, 795 F.2d
14 1265, 1271 (6th Cir. 1986). In the instant case, the decision to not sustain the
15 allegation and not discipline David Brame was not made by any named
16 defendant in this case. (See Affidavit of David Brame.) Chief Raymond
17 Fjetland was the Chief of Police at the time of the investigation, and retired in
18 1996. Id.

20 Furthermore, even if Assistant Chief Brame had been convicted of this
21 crime, it would not be admissible, as it would be more than ten years old. ER
22 609. Thus, plaintiff's assertion that a mere allegation which was determined by
23 the former Chief to be unsubstantiated, would be admissible, is without merit.
24 Likewise, the information cannot be used to impeach a witness' reputation or
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1 credibility. U.S. v. Hodnett, 537 F.2d 828 (6th Cir. 1976). (**Effort to impeach**
 2 **witness on basis of mere accusation or arrest is not permissible.**) U.S. v.
 3 Largent, 545 F.2d 1039 (6th Cir. 1976), cert. denied, 97 S.Ct. 1117 429 U.S.
 4 1098, 51 L.Ed.2d 546 (1977). (**Evidence of prior misconduct is not**
 5 **admissible to prove character of person.**) Tafoya v. U.S., 386 F.2d 537
 6 (10th Cir. 1967). (**Only previous convictions, and not previous acts of**
 7 **misconduct, which do not result in conviction may be used to impeach a**
 8 **witness' credibility.**)

9
 10 The *only* reason for this line of inquiry is to annoy, harass and embarrass
 11 a named party. David Brame is now an Assistant Chief with the Tacoma Police
 12 Department, and his reputation and good name are essential to the
 13 performance of his duties as a leader. This is an inappropriate use of the
 14 discovery process, and should not be condoned. It is clear from the information
 15 plaintiff has to date, that the allegation of criminal activity was not sustained,
 16 and is therefore inadmissible for any purpose. (See Tab 1.) Nonetheless, as
 17 plaintiff's letter in response to the City's proposed protective order indicates,
 18 they are seeking to engage in the quintessential "fishing expedition" which can
 19 only be for the purpose of harassing and embarrassing Assistant Chief Brame.

21 C. Plaintiff is using this information to harass, annoy and embarrass
 22 defendant David Brame.

23 Defendants are not just assuming the possibility of abuse of the
 24 discovery process, it was born out the last time this issue was raised in the
 25 discovery process. Although plaintiff's counsel contends that this information is
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1 being sought because it is relevant to Mr. Kirby's claim, Mr. Kirby has
 2 articulated a very different reason for seeking to introduce this topic. (See
 3 Affidavit of William Meeks.) Mr. Kirby indicated that he was seeking this
 4 information because "they are nickel and diming me, so I am going after them."
 5 Id. Claiming that he is "going after" a defendant in this case is not a legitimate
 6 use of the discovery process, and this is exactly the type of harassment by
 7 discovery" that CR 26 seeks to prevent. Furthermore, the fact that David
 8 Brame has received an alpha page that said "Rape..." (see Affidavit of David
 9 Brame) is unconscienable and demonstrates that the harm this information can
 10 do when it is bandied about the work place solely for the purpose of Mr. Kirby's
 11 amusement.
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13 The court in its discretion may issue orders for protection of parties in
 14 taking depositions. Thus, the defendants respectfully request the court enter a
 15 protective order prohibiting plaintiff's further inquiry into this matter pursuant to
 16 CR 26(c)(4).
 17

18 In addition, defendants would respectfully request that this motion be
 19 sealed in the court file to avoid public access to this sensitive information.
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21 DATED this 13 day of September, 2001.

22 ROBIN S. JENKINSON, City Attorney
 23 ELIZABETH A. PAULI, Ch. Asst. City Atty.

24 By:

25 
 26 _____
 SHELLEY M. KERSLAKE
 WSBA# 21820
 Attorney for Defendants