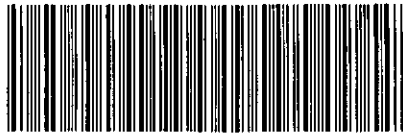


Hon. John McCarthy



03-2-06879-4 19858140 RPY 10-21-03

FILED
IN COUNTY CLERK'S OFFICE

A.M. OCT 20 2003 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

Jane Doe,

Plaintiff,

NO. 03 2 06879 4

vs.

Pierce County, a political subdivision of the
State of Washington, et al.,

Defendants.

PIERCE COUNTY'S REPLY TO PLAIN-
TIF'S OPPOSITION TO SUMMARY
JUDGMENT

NOTED ON MOTION CALANDER:
OCTOBER 24, 2003

I. INTRODUCTION

Before the County can respond to plaintiff's opposition to summary judgment, the latter's misunderstanding of both the proper legal standard and the actual facts of record must be noted. First, plaintiff begins by stating -- without providing any meaningful citation to authority -- that the "court must accept as true all the allegations in a plaintiff's complaint and any reasonable inferences therein." P's S.J. Opp. at 1. In fact, the rule on summary judgment instead is that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." See CR 56(e)(emphasis added).

1 Second, plaintiff follows this misstatement of the law by then misstating the undisputed facts
2 of record and claiming without any factual basis that the “documents initiating the investiga-
3 tion clearly identify that the investigation was commenced internally, it did not involve law-
4 yers or their staff [sic], and it was not for litigation but to respond to issues such as non-
5 payment of multiple employees’ wages and failure to investigate multiple EEO complaints . .
6 ..” P’s S.J. Opp. at 2. Apart from simply ignoring the only admissible evidence of record, see
7 Greer Aff., such assertions by plaintiff ignore her own submissions.
8

9 Plaintiff’s initial request letter never broadly requested all “documents initiating the
10 investigation” but instead sought “a copy of the investigation conducted by Ms. Kristina Mor-
11 ris of the Washington Firm LTD in the matter concerning me and Ms. Betsy Sawyers.” Rod-
12 riguez Dec.: 10/23/02 Rodriguez Letter (emphasis added). As to that investigation, the only
13 admissible evidence of record confirms that because plaintiff had complained of a “hostile
14 work environment” and “retaliation,” the matter had been forwarded to the County Deputy
15 Prosecuting Attorney that handles employment lawsuits who then “concluded Ms. Rodriguez
16 was alleging various legal causes of action and that the Prosecuting Attorney’s Office needed
17 to conduct an investigation of those allegations in anticipation of litigating the legal claims
18 asserted by Ms. Rodriguez” and therefore “in anticipation of litigation . . . retained a human
19 resources consultant, i.e. ‘The Washington Firm, LTD.’ to conduct an investigation of the
20 allegations raised by Ms. Rodriguez.” See Greer Aff., at 1-2 & Ex. “A:” 4/16/02 Rodriguez
21 Memo. Indeed, contemporaneous records confirm not only that the Washington Firm and Ms.
22 Moris were retained “to assist [the prosecutor] by investigating” the Rodriguez complaint but
23 also that such communications from the beginning were expressly characterized as “Attorney
24 Work Product.” See Supp. Greer Aff., Ex. “F:” 5/23/02 Greer Letter.
25

1 As demonstrated below, an application of the proper standard on summary judgment
2 to the only facts of record confirm that plaintiff's opposition is baseless as a matter of law.

3 II. ANALYSIS

4 A. THE REPORT IS WORK PRODUCT AS A MATTER OF LAW

5 Plaintiff cannot dispute that Dawson v. Daly, 120 Wn.2d 782, 791 (1993) – expressly
6 cited in the County's letter declining to produce the Moris report – holds that the public dis-
7 closure act “incorporates the work product doctrine as a rule of pretrial discovery” and “is
8 triggered prior to the official initiation of litigation” where litigation is “reasonably antici-
9 pated.” See also Limstrom v. Ladenburg, 136 Wn.2d 595, 609 (1998)(“Application of the
10 civil rule, CR 26(b)(4), to requests for disclosure of documents held in a public attorney's
11 files is consistent with the legislative intent of the work product exemption.”) Hence, plain-
12 tiff's argument that the work product exception is inapplicable because she currently “is not
13 pursuing litigation against Pierce County,” P's Opp. at 2, is unavailing. See e.g. The Overlake
14 Fund v. City of Bellevue, 70 Wn.App. 789, 792-94 (1993) (report of consultant retained by
15 municipal counsel and relied upon “to enable the City to evaluate its potential liability” was
16 protected from public disclosure as “work product.”)

17
18 Even if plaintiff had not filed both a complaint with the Human Rights Commission,
19 see Ex. “B:” 9/20/02 Notice of Complaint, and the prerequisite to a civil suit against the
20 County, see Ex. “E:” 4/23/03 Claim for Damages, it is undisputed that litigation was “rea-
21 sonably anticipated” at the time Ms. Moris was retained by the Prosecutor to “assist” in its
22 investigation because Ms. Rodriguez – herself an “Equal Employment Opportunity official”
23 who “investigated allegations of discriminatory misconduct,” Rodriguez Dec. at 1 – had com-
24 plained to her supervisor using terms of art describing various employment law causes of ac-
25

1 tion. See Ex. "A." 4/16/02 Rodriguez Memo. at pp. 4, 6-7. Such undisputed facts demon-
 2 strate as a matter of law that litigation was "reasonably anticipated" at that time and that the
 3 report of Ms. Moris was to "assist" the Prosecutor's Office and therefore was – as it was char-
 4 acterized at the time – "Attorney Work Product."

5 B. REPORT IS PROTECTED BY RCW 42.17.310(1)(d) AS A MATTER OF LAW

6 Plaintiff also cannot dispute that RCW 42.17.310(1)(d) – also expressly cited in the
 7 County's letter declining to produce the Moris report – provides a privilege against disclosing
 8 "[s]pecific intelligence information and specific investigative records compiled by investiga-
 9 tive . . . agencies, . . . the non-disclosure of which is essential to effective law enforcement or
 10 for the protection of any person's right to privacy." Rather, plaintiff simply claims without
 11 any support that "employees do not have a privacy interest in misconduct investigations." P's
 12 Opp. at 2. Again, however, the law is demonstrably to the contrary. See Cowles Publishing
 13 Co. v. State Patrol, 109 Wn.2d 712, 725 (1988)("Release of files dealing . . . with complaints
 14 which were later dismissed, will constitute a more intrusive invasion of privacy than would
 15 the release of files relating only to a complete investigation which resulted in some sanction
 16 against the officers involved."); City of Tacoma v. Tacoma News Tribune, 65 Wn.App. 140,
 17 146-151 (1992)(investigative reports exempt from disclosure because the right to privacy is
 18 violated by, and the public has no legitimate interest in, disclosure of information that is un-
 19 substantiated after reasonable efforts to investigate it.)

20 Here, the record and an in camera¹ inspection will confirm that the report addresses
 21 specific allegations of misconduct against a particular County official, was produced as part
 22 of an investigation compiled by an investigative agency – i.e. the Prosecuting Attorney's Of-
 23
 24
 25

¹ The Moris report will be provided to the Court at the time of hearing for any discretionary in camera inspec-
 tion.

1 fice -- and that plaintiff's complaints of unlawful employment practices were ultimately found
 2 after investigation to be baseless. Though the law establishes that non-disclosure of such re-
 3 ports protects the right to privacy, plaintiff nowhere addresses -- much less disputes -- that
 4 non-disclosure also is essential to the investigatory process itself because:

5
 6 If an agency's investigatory files were obtainable without limitation
 7 after the investigation was concluded, future . . . efforts by the
 8 agency could be seriously hindered. The names of people who
 9 volunteered the information that had prompted the investigation
 10 initially or who contributed information during the course of the
 11 investigation would be disclosed. The possibility of such disclo-
 12 sure would tend severely to limit the agencies' possibilities for in-
 13 vestigation and enforcement of the law since these agencies rely, to
 14 a large extent, on voluntary cooperation and on information from
 15 informants.

16 Cowles, 109 Wn.2d at 732-733 (quoting Aspin v. Department of Defense, 491 F.2d 24, 30
 17 (D.C. Cir. 1973)). See also id. at 733 (cooperation by officials "is available because they
 18 know the incident will be kept confidential" and if reports were to be disclosed many officials
 19 "would not report incidents of misconduct, or give statements which would discredit a fellow
 20 officer" and "even internal investigations officers would hesitate to uphold a complaint
 21 against an officer, knowing that serious consequences could result from the adverse public-
 22 ity.")

23 Hence RCW 42.17.310(1)(d), as well as the work product doctrine, supports non-
 24 disclosure of the investigation by the Prosecuting Attorney's Office here.

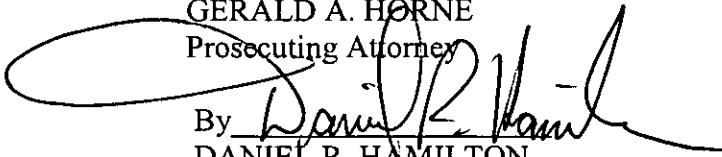
25 III. CONCLUSION

As demonstrated above and by the record, plaintiff has failed her burden "to make a
 showing sufficient to establish the existence of an element essential to that party's case, and
 on which that party will bear the burden of proof at trial." Young v. Key Pharmaceuticals, 112
 Wn.2d 216, 225 n. 1 (1989). See also Carlyle v. Safeway Stores, Inc., 78 Wn.App. 272, 275,

1 rev. denied, 128 Wn.2d 1004 (1995). Accordingly, defendant respectfully requests the Court
2 grant summary judgment and dismiss the instant complaint as a matter of law.

3 DATED THIS 20 DAY OF OCTOBER, 2003.

4 GERALD A. HORNE
5 Prosecuting Attorney



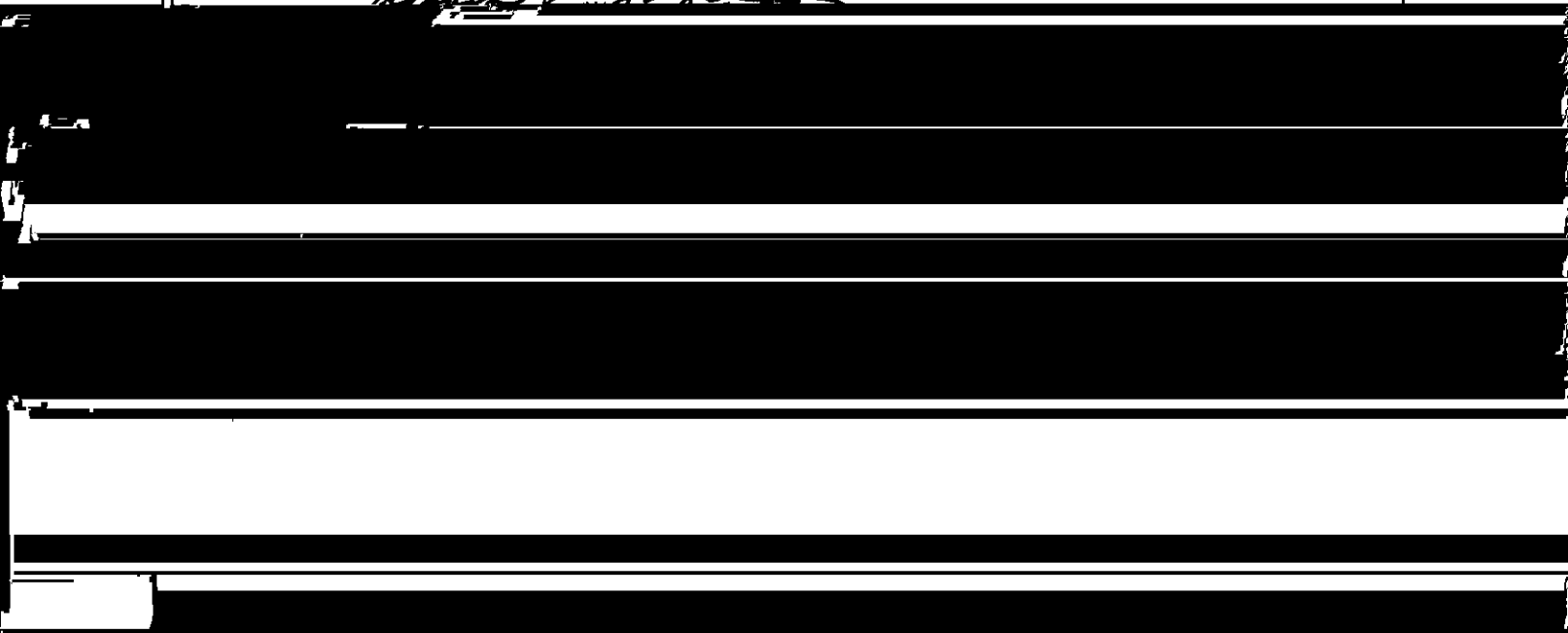
6 By
7 DANIEL R. HAMILTON
8 Deputy Prosecuting Attorney
9 Attorneys for Defendants
10 Ph:(253)798-7746/WSB #14658

11
12
13 **CERTIFICATE**

14 I hereby certify on 10-20-03
15 I delivered a true and accurate
16 copy of the attached document
17 to ABC LEGAL MESSENGERS, INC. for
delivery to:

Christopher L. Brown
attorney(s)

James V. Lane



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

accurate copy of your affiant's May 23, 2002 letter to said firm thanking it for "agreeing to assist me by investigating the above referenced" Rodriguez matter and expressly entitling it "RE: Attorney Work Product; Pierce County Personnel Department Investigation." The materials mentioned in the letter as being provided to the Washington Firm however have been redacted to protect the privileges asserted in this matter.

Further your affiant sayeth naught.

Denise Greer
Denise Greer

SUBSCRIBED and SWORN to before me this 16th day of October, 2003.

Mary Ann Jones
NOTARY PUBLIC in and for
the State of Washington,
Residing at Tacoma
Commission Expires: 1-1-07.



Pierce County

Office of Prosecuting Attorney

REPLY TO:
CIVIL DIVISION
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
FAX: (253) 798-6713

GERALD A. HORNE
Prosecuting Attorney

Main Office: (253) 798-6732
(WA Only) 1-800-992-2456

May 23, 2002

Kristina Moris
The Washington Firm, Ltd.
Two Nickerson Street, Courtyard Suite
Seattle, WA 98109

RE: Attorney Work Product; Pierce County Personnel Department Investigation

Dear Ms. Moris:

Thank you for agreeing to assist me by investigating the above referenced matter. Enclosed is correspondence I have received pertaining to the allegations made by Norma Rodriguez against Betsy Sawyers. Included are the following:

Redacted - Attorney Work Product

Following are telephone numbers you may need:

Norma Rodriguez (253) 798-2912
Betsy Sawyers (253) 798-7469

Please let me know if you need any further information or assistance to initiate the investigation.

Sincerely,

Denise Greer
Deputy Prosecuting Attorney

DG:ma

Enclosures

EXHIBIT NO. _____

