

Court of Appeals No. 31404-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

Jane Doe,
Appellant,

v.

Pierce County,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. ERROR IS ASSIGNED TO THE TRIAL COURT'S DECISION GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WITH PREJUDICE

The trial court did not enter any findings in support of the motion for summary judgment, and therefore error is not separately assigned here.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly concluded that all of the requested public records were exempt from disclosure under the "work product" exemption?

III. STATEMENT OF THE CASE

The Pierce County Executive or designee is responsible for administering the Pierce County program to prevent employment discrimination. Pierce County Code §3.16.010 (Supp. Dec. of Norma Rodriguez, at 1), CP. 95. A complaint of discrimination is investigated by the counter EEO officer, the Personnel Director, or someone designated to conduct the investigation. Pierce County Code §3.17.080. CP. 95.

The Appellant had worked for over a decade as the EEO Officer for Pierce County, and in March and April, 2000, the Appellant exchanged correspondence with the new Personnel Director of Pierce County involving several concerns, including 1) the lack of commitment by the Personnel

Director to protect the victims of discrimination employed by Pierce County; 2) that she had lied about how CAT leave requests were being processed, 3) that the Appellant had not abused county attendance policies; 4) that county staff had not been paid for attendance at events held on Saturday, and for working after hours on assignments and community functions and minority celebrations; 5) that Appellant could work amicably with a particular co-worker who had been involved in a prior discrimination investigation; 6) a medical issue; 7) the diminishment of the county's EEO investigations and training; and 8) the Appellant's own concern that she was being victimized by a hostile work environment and retaliation. CP. 48-49.

The Personnel Director responded to the Appellant's complaints in April 2002, confirming that as the Personnel Director, "I have a responsibility to take measures to ensure that no violation of the County's Equal Employment Opportunity Policy has or does occur." CP.64. Because the allegations were about the Personnel Director, the matter was forwarded to the County's "Chief of Staff" Lyle Quasim. CP. 65.

In the memorandum in support of summary judgment, the Respondent maintained that it was at this point that the matter was forwarded to county prosecuting attorney Denise Greer, who handled employment related litigation on behalf of Pierce County at the time, and that she retained Ms. Kristina Morris, a human resources consultant, to

investigate the allegations “in anticipation of litigation.” CP. 24. Ms. Greer allegedly mailed a confirmation letter to Ms. Morris dated May 23, 2002, along with “correspondence I have received pertaining to the allegations made by Norma Rodriguez against Betsy Sawyers. Included are the following: [REDACTED – Attorney Work Product].” CP. 83.

As the Appellant pointed out, EEO investigations into workplace harassment on behalf of Pierce County employees had previously been done by outside consultants such as Susan Webb and Janice Marchbanks. CP. 96.

After the investigation was concluded, the Appellant initiated a complaint with the Washington Human Rights Commission and submitted a public records request to Denise Greer on October 24, 2002, requesting: 1) the full investigative report submitted by Ms. Kristina Morris; 2) copies of her investigative notes; and 3) other related communications between department officials and Ms. Morris concerning this matter. CP. 52.

The Respondent’s answered the request in October 28, 2002, providing zero records and instead stating that “the investigation concluded that Ms. Sawyers did not engage in misconduct. Accordingly, your request for investigation records is denied pursuant to RCW 42.17.310(1)(b) and (d) as disclosure would violate the employee’s right to privacy, because the records contain no specific instances of misconduct. CP. 53.

The Appellant responded to the denial, pointing out an inconsistency in the Pierce County response, compared to a newspaper

account of the public disclosure of an investigation into alleged harassment and discriminatory misconduct in the Thurston County Prosecutor's office. CP. 54. In the newspaper account attached to the Appellant's letter, the judge in the Thurston County case "found that there were no grounds to keep [the report] from the public." CP. 56-63.

In April, 2003, the Appellant initiated the present action for failure to disclose any of the requested public records. CP. 5-9. The Respondent filed a motion for summary judgment in the present action, claiming that "the requested material is work product." CP. 22. In a reply brief, the Respondent also argued that the records involved intelligence information gathered for law enforcement purposes. CP. 75.

The parties' initial declarations were then supplemented with additional declarations all cited in the court decision granting summary judgment. At the hearing on the motion for summary judgment, the court concluded that the requested records were public records, and that "the whole point of the law is to disclose records, liberally construed, unless there is an exception, and we have a couple that might apply." RP. 9.

The court ruled that the "investigative records" exemption did not apply because the matter was not being investigated by a law enforcement agency to ferret out crime, such as criminal malfeasance. RP. 19.

The Respondent argued that the public records were created "in reasonable anticipation of litigation" and the Appellant's counsel argued that the public records did not fit the remainder of the exemption as "not otherwise discloseable in litigation." RP. 22-23. The Appellant's counsel pointed out that a more specific statute covered the disclosure of discrimination investigation records. RP. 24. The Appellant's counsel

also pointed out that the request was not just for the investigation; it was also for all the records sent to this investigator as part of the investigation. RP. 25.

Without differentiating between the report prepared by the human resources consultant or the records sent to the investigator, the trial court concluded that there was a “reasonable anticipation of litigation” and therefore the exemption applied. RP. 33. The court signed a motion granting summary judgment with prejudice. CP. 267.

Ms. Rodriguez now seeks review in this court. CP. 270.

IV. ARGUMENT

1. Whether the trial court properly concluded that all of the requested public records were exempt from disclosure under the “work product” exemption?

This case involves the convergence of two fundamental principles in Washington, public disclosure of government records and ensurance that its people are free from discrimination.

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights. Wash. Const. art. I, §

I. The PDA is premised on the policy that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). "The stated purpose of the Public Records

Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions."

Progressive Animal Welfare Soc y v. University of Washington, 125

Wn.2d 243,251,884 P.2d 592 (1990) ("PAWS"). Thus, the PDA is a

"strongly worded mandate for broad disclosure of public records."

Spokane Police Guild v. Liquor Control Ed., 112 Wn.2d 30, 33, 769 P.2d

283 (1989). "The provisions of the act are to be liberally construed to

promote full access to public records so as to assure continuing public

confidence in governmental processes, and to assure that the public

interest will be fully protected." Spokane Police.

Washington's Legislature has also recognized that discrimination is "a matter of state concern ... [that] threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state," RCW 49.60.010. The Legislature mandated that Washington's Anti-Discrimination laws "shall be construed liberally for the accomplishment of the purposes thereof" as it "embodies a public policy of 'the highest priority.'" Hill v. BCTI Income Fund, 144 Wn.2d 172, 179, 23 P.3d 440 (2001). Investigations into public employee

misconduct have long been subject to public disclosure. See Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 791 P.2d 526 (1990)(“investigative records compiled by a state agency with the responsibility to discipline teachers” are public records, including those involving sexual harassment of students); Tacoma Public Library v. Woesnner, 90 Wn. App. 205, 219, 951 P.2d 257 (1998)(citing cases holding that disclosure of specific instances of misconduct or public, on-duty job performance was not "highly offensive").

In two recent United States Supreme Court decisions, the court encouraged private and public employers to maintain policies for dealing with discrimination complaints by providing such formal avenues for seeking relief as those implemented by Pierce County Code §3.16.010. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), Faragher v. City of Boca Raton, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998). The U.S. Supreme Court held in Faragher and Ellerth that a company could defend itself against workplace harassment claims under Title VII if it could prove that it conducted a prompt and thorough investigation and took appropriate

remedial action, thus avoiding the alleged misconduct from being imputed to the employer.

The Washington Supreme Court has similarly explained that in claims involving workplace harassment under RCW 49.60, the harassment must be imputed to the employer. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). Division Two of this court expounded upon the Glasgow decision and adopted a similar rationale to that of the 1998 U.S. Supreme Court decisions, citing the significance of employer investigations as evidence in Herried v. Pierce Transit, 90 Wn. App. 468, 957 P.2d 767 (1998). There, this court held that “the record establishes without dispute that Pierce Transit acted promptly with investigations and recommendations reasonably calculated to resolve the conflicts between Herried and Washington. Herried has, therefore, not produced evidence sufficient to impute liability to Pierce Transit as Washington's employer.”

In declining to grant the Appellant a right to review any of the public records in this matter, however, the trial court did not pass upon the evidentiary issue, and simply concluded that the first prong of the

exemption from public disclosure appearing under RCW 42.17.310(1)(j) applied. That provision exempts:

(j) Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

Recently, the Washington Supreme Court addressed the first part of that exemption, called the “controversy” prong, in Hangartner v. City of Seattle, ___ Wn.2d ___ (No. 73930-7, May 13, 2004). The court declined to find a “controversy” simply because the records were associated with an issue arising in a litigation-charged atmosphere. The court in Hangartner pointed out that in Dawson v. Daly, 120 Wn.2d 782, 791, 845 P.2d 995 (1993), it had attempted to narrowly define the phrase 'relevant to a controversy' as 'completed, existing, or reasonably anticipated litigation.'

Obviously, complaints of employment discrimination necessarily invoke a “charged” atmosphere and potential for litigation, as the complaint involves a reference to unlawful activity in this state. Although the Respondent argued in its motion for summary judgment that it “reasonably anticipated litigation,” and therefore considered the

investigation to be “work product” it is notable that the Respondent provided no evidence or argument in support of the second prong 42.17.310(1)(j), which only exempts public records that would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

Here, it is clear that the trial court failed to read the statutory exemption in its entirety and rule on the second prong, as there was no finding that the records would not be discoverable by another party under the rules of pretrial discovery. As the Supreme court noted in Hangartner, the statute must be read as follows: RCW 42.17.310(1)(j) protects only documents that 'are relevant to a controversy . . . {and} would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.'

To the contrary, the Respondents filed a declaration from attorney Bertha Fitzer, conceding that a similar investigation conducted by another outside investigator was properly disclosed pursuant to a discovery request by another Pierce County employee. It is inconceivable that neither the documents sent to the investigator, nor the investigator's report, would be discoverable in a court proceeding.

The exemption requires not only a “controversy” but a finding that the requested records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts. Absent such a finding, the court’s decision should not be affirmed.

As noted above, discrimination investigations are designed to form the basis for a defense to a discrimination complaint. If this court concludes that discovery of such investigations is precluded in the superior courts, it would undo the precedent established here and under the U.S. Supreme Court. The question of releasing discrimination investigations was addressed in Daniels v. City of Commerce City, 988 P.2d 648 (Colo.App.1999), pet. for writ of cert. denied en banc (Colo. 1999). There, the court rejected completely withholding the entire public record, and instead ordered the non-work product portions to be disclosed. See also Fincher v. State of Ga., 231 Ga. App. 49, 50 (497 S.E.2d 632) (1998)(no legitimate expectation of privacy attaches to misconduct investigation).

In essence, the “work product” privilege asserted by the Defendant disappears in an employment discrimination context because the conduct of such investigations constitute the subject of the lawsuit, wherein the

finder of fact is called upon to determine whether the complained of conduct can be imputed based upon the reasonableness of the investigation and remedial action taken, if any. See Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 26 (N.D.N.Y. 1999). The County can't have it both ways, either it must claim that it conducted an investigation in compliance with its own County code and the case law cited above, or argue the absurd notion that the investigation remains was completely outside the scope of the investigation contemplated by the law and courts, and unreachable in the event of litigation. See Seattle Northwest Securities Corp. v. SDG Holding Co., 61 Wn. App. 725, 744, 812 P.2d 488 (1991) (finding that a party must forego using allegedly privileged evidence to its advantage or it must provide the opposing party access to such evidence); Randa v. Bear, 50 Wn.2d 415, 424, 312 P.2d 640 (1957).

As noted in the cases cited above, the Defendant failed to meet its burden and obtained no finding that the requested records “would not be available to another party under the rules of pretrial discovery.” Notably, Pierce County’s own letter to the investigator suggests that non-exempt records were sent to the investigator.

Washington courts interpreting the “work product” privilege “recognize no work product immunity for documents prepared in the regular course of business.” Barry v. USAA, 98 Wn. App. 199, 207-208, 989 P.2d 1172 (1999). In fact, a review of the Pierce County Code provisions demonstrates that such investigations are not conducted in anticipation of litigation, but in an effort to protect a victim in order to determine whether someone should be terminated from employment for violating the law. In this case the disclosure of the investigation and related documents was requested by the employee who alleged that she was a victim. Obviously, as an employee of Pierce County, the “work product” claim cannot stand against the Plaintiff since that would be inconsistent with RCW 49.12.240 and RCW 49.12.250 (right to review and dispute erroneous personnel records). The Respondents attempted to get around that issue by filing a declaration stating that the report does not go into any particular employee’s personnel file. Under this court’s decision in Tacoma Public Library, the issue is the information contained in the record, not whether the record is specifically labeled as an employee’s individual personnel file. Woessner, at 217.

As Respondents concede, other public records were sent to the investigator for review. It is inconceivable that those records were

generated “in anticipation of litigation.” The Respondents made no effort to individually identify the nature those records, as is necessary to carry their burden that they are exempt, non-discoverable records under the Public Disclosure Act.

Finally, under the well-known rule of statutory construction, the interpretation of Washington’s public disclosure laws must be consistent, and a generally worded exemption must be subordinated to the more specific exemption. Here, the statute must be read as a whole, and each part and word given its proper part in a “harmonious total schema,” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978).

As noted in the Appellant’s argument before the trial court, the Legislature specifically addressed the issue of investigative records compiled by an employing agency conducting an investigation of a possible unfair practice under RCW 49.60 (Washington's Anti-Discrimination Act), or of a possible violation of other federal, state or local laws prohibiting discrimination in employment. Under RCW 42.17.310(1)(ee), the Legislature exempted those records during the investigation, by saying that a “current” investigation was exempt. Unless that entire provision is given no meaning, once the investigation is completed, the investigative records are subject to disclosure. As the

Appellant herself noted, another trial court in Washington that reviewed the same public disclosure laws and ordered the disclosure of precisely the same sort of investigation in anticipation of litigation which the trial court in this case found to be exempt.

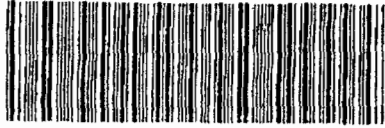
V. CONCLUSION

The decision of the trial court granting the Respondent's motion for summary judgment should be reversed.

Respectfully submitted June 14, 2004.

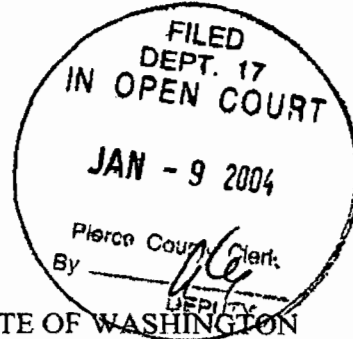
Christopher W. Bawn, WSBA 13417
Counsel for Appellant

APPENDIX



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Hon. Ronald E. Culpepper



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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.

ORDER ON PIERCE COUNTY'S
MOTIONS TO STRIKE AND FOR
SUMMARY JUDGMENT

THIS MATTER coming on to be heard before the undersigned Judge of the above-entitled Court based upon the motion of Defendant Pierce County to strike and for summary judgment; said plaintiff being represented by her attorney Christopher W. Bawn, Pierce County being represented by its Prosecuting Attorney Gerald A Home and Deputy Prosecuting Attorney Daniel R. Hamilton; and the Court having reviewed the files and records herein, including the following:

1. Pierce County's Motion For Summary Judgment;
2. Pierce County's Memorandum in Support of Summary Judgment;

ORDER ON PIERCE COUNTY'S MOTIONS TO STRIKE AND FOR SUMMARY
JUDGMENT - 1
nr3hord.doc
Pierce County Cause No. 03-2-06879-4

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ORIGINAL

- 1 3. 9/26/03 Affidavit of Denise Greer and exhibits thereto;
- 2 4. Plaintiff's Memorandum Opposing Summary Judgment;
- 3 5. 10/13/03 Declaration of Norma Rodriguez and attachments thereto, to the
- 4 extent not stricken;
- 5 6. Pierce County's Reply to Plaintiff's Opposition To Summary Judgment;
- 6 7. 10/16/03 Supplemental Affidavit of Denise Greer and exhibits thereto;
- 7 8. Pierce County's Motion To Strike;
- 8 9. Memorandum in Support of Pierce County's Motion To Strike;
- 9 10. Plaintiff's Reply To Strike Declaration and Reply to Supplemental Declaration;
- 10 11. 10/27/03 Supplemental Declaration of Norma Rodriguez and attachments
- 11 thereto, to the extent not stricken;
- 12 12. 10/27/03 Declaration of Yvette Young and attachments thereto, to the extent
- 13 not stricken;
- 14 13. 11/5/03 Declaration of Christopher Bawn and attachment thereto;
- 15 14. Pierce County's Second Motion To Strike;
- 16 15. Memorandum in Support of Pierce County's Second Motion To Strike and in
- 17 Response to Plaintiff's Reply Memoranda;
- 18 16. 11/25/03 Declaration of Bertha Fitzer;
- 19 17. 11/25/03 Declaration of Betsy Sawyers;

20 The Court having heard oral argument and being otherwise fully advised in the
 21 premises it is hereby;

22 ORDERED, ADJUDGED AND DECREED that defendant's motion to strike the
 23 declarations of Norma Rodriguez and their attachments is hereby DENIED. It is further,

24 ORDERED, ADJUDGED AND DECREED that defendant's motion to strike the
 25 declaration of Yvette Young and their attachments is hereby DENIED. It is further,

