

FILED
Court of Appeals
Division III
State of Washington
11/15/2018 4:08 PM

NO. 36030-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JANE DOE #1, a married person; JANE DOES #2-10, et al.,

Respondents,

v.

COWLES PUBLISHING COMPANY,

Appellant.

BRIEF OF RESPONDENTS JANE DOES NO. 1-10

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The right to be free from discrimination because of ... sex ...is recognized as and declared to be a civil right. This shall include, but not limited to: the right to obtained and hold employment without discrimination¹.

I. INTRODUCTION

The pervasiveness of sexual harassment in the workplace is abundant. Victims are often frightened and embarrassed to report the abuse they have endured. It takes a great amount of courage to come forward, disclosing that one was sexually harassed in the workplace. No one wants the world to know the degrading things they were forced to do. But when one victim is brave enough to say “no more,” and report, they give courage to others to do the same.

A threat that their name and the intimate details of abuse will be disclosed to any and everyone would cause even fewer victims to come forward. This potential is detrimental to society. It would mean that sexual harassment in the workplace would be reported even less. Embarrassment, intimidation, and public backlash are real fears for victims of sexual harassment. These fears are even greater when the harasser is one in a prominent position. Disclosure discourages victims to report. When victims are too frightened to report, their abusers are able to continue their predatory behavior.

¹ RCW 49.60.030(1)(a).

The Public Records Act (“PRA”) codified at RCW 42.56 *et seq.* provides protection for those victims reporting sexual harassment in the workplace. It does so by making the identifying information exempt as personal information the disclosure of which would violate the employee’s right to privacy. RCW 42.56.230(3).

Despite this clear protection, Appellant seeks disclosure of identifying information of the victims and witnesses of sexual harassment committed by Dr. Darren Pitcher, in an attempt to sell a few more newspapers. These documents are of a highly offensive nature. Disclosing the names and identifiers to the public would violate Jane Does #1-10’s right to privacy, and would cause a chilling effect on reporting sexual harassment. There exists no public interest in the disclosure of the names and identifiers of victims of such conduct. The Trial Court properly found that an exemption applied to the disclosure of such documents under RCW 42.56.230(3), and granted a permanent injunction. Respondents request this Court affirm the Trial Court’s decision.

II. STATEMENT OF THE CASE

A. Factual Background

On or about January 16, 2018, Jane Doe #1 made a complaint of sexual harassment and retaliation/discrimination against the former Acting President of Spokane Falls Community College Darren Pitcher. (C.P. 4-5,

7). The complaint detailed Dr. Pitcher's extreme inappropriate behavior and the effect it had on her. (C.P. 30). She was interviewed, during which time the details of her experience, the sexual harassment, sexual intercourse and sexual exposure were documented. (C.P. 30). Jane Doe #1 was subjected to severe and pervasive sexual harassment, intimidation and retaliation at the hands of Dr. Pitcher. (C.P. 7). This conduct included, but was not limited to: Dr. Pitcher exposing his penis to Jane Doe #1, grooming her for a quid pro quo sexual encounter, and culminated in sexual intercourse on a work trip. (C.P. 5, 7). Jane Doe #1 also informed the College that Dr. Pitcher engaged in numerous other sexual predatory behaviors and had numerous sexual relationships with his subordinates, who either gained promotion as a result of the sexual relationship or were fired or demoted if his sexual advances were rebuffed. (C.P. 30). Being the victim of Dr. Pitcher's sexual predatory behavior has caused Jane Doe #1 extreme emotional distress, embarrassment, and humiliation. (C.P. 30). If she had known her name would be disclosed she would not have come forward. (C.P. 30).

The College investigated the matter and contacted/interviewed numerous individuals, including but not limited to Jane Does #2-9. (C.P. 8). Jane Doe #9 was specifically targeted by Dr. Pitcher and was sent instant messenger messages of a sexual nature. (C.P. 8). The messages

described and commented on her genital and breasts. (C.P. 55). Disclosure of Jane Doe #9's name and identity would be humiliating, embarrassing and would cause irreparable damage to her reputation. (C.P. 55). If Jane Doe #9 had known her name would be disclosed, she would not have come forward. (C.P. 55).

Jane Does #2-8 provided information and gave interviews during the College's investigation of the sexual harassment and retaliation/discrimination complaint against Dr. Pitcher. (C.P. 5). Had Jane Does #2-8 known their names or identities would become public they never would have agreed to be interviewed. (CP. 34, 37, 40, 43, 46, 49, 52). Being a part of the investigation has caused Jane Does #2-8 and #10 to feel emotionally distressed, humiliated and embarrassed. (C.P. 34, 37, 40, 43, 46, 49, 52).

Sometime in early March 2018 Dr. Pitcher resigned. (C.P. 8). Defendants Media made public record act requests to Defendant College to produce public records regarding the resignation and investigation of Dr. Pitcher. (C.P. 8). These documents contain the names and identifiers of Jane Does #1-9. (C.P. 8). HR contacted Jane Does #1-10 and told them that the records were going to be disclosed on March 20, 2018. (C.P. 31, 34, 37, 40, 43, 46, 49, 52, 55, 64). On March 16, 2018 Jane Does #1-9, through counsel, filed a Complaint and Motion for Temporary Restraining

Order and Preliminary Injunction. (C.P. 73). Jane Does #1-10 do not challenge the underlying disclosure of the documents, but seek to enjoin the release of their names and identifiers contained within the documents without. (C.P. 74).

B. Procedural History

On March 16, 2018 Jane Does #1-9 filed a Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction. (C.P. 73). On March 20, 2018 the Spokane County Superior Court granted Jane Does #1-9's Temporary Restraining Order enjoining Defendant College from disclosing the names and identifiers of Jane Does #1-9. (C.P. 60).

On March 21, 2018 an amended complaint for injunction was filed, which added Jane Doe #10 as a plaintiff. (C.P. 64).

On March 28, 2018 Jane Does #1-9 filed a Motion for A Permanent Injunction. (C.P. 89). On March 30, 2018 the Spokane County Superior Court granted the motion for permanent injunction, which permanently enjoined Defendant College from disclosing the names and identifiers of Jane Does #1-10 in any response to the requests or in a response to future requests. (C.P. 105, 106).

On April 25, 2018, Appellant filed a notice of appeal. (C.P. 109).

III. RESTATEMENT OF THE ISSUES

1. Did the Superior Court err when it properly issued a permanent injunction, finding that the names and personal identifiers of the victims of sexual harassment clearly fall within an exemption, pursuant to RCW 42.56.230(3); and

2. Did the Superior Court err when it found that disclosure of documents would be an invasion of privacy of the victims and that disclosure would create a chilling effect in public agencies throughout the state?

IV. ARGUMENT

A. Standard of Review

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.” RCW 42.56.550(3). Decisions under the PDA are reviewed de novo. See Bellevue John Does 1-11 v. Bellevue School District #405, 164 Wn.2d 199, 208, 189 P.3d 139 (2008); Doe ex rel. Roe v. Washington State Patrol, 185 Wn.2d 363, 370, 374 P.3d 63 (2016).

B. The Superior Court Correctly Granted A Permanent Injunction.

1. Jane Does #1-10's Names And Identifiers Fall Into The Exemption Of RCW 42.56.230(3) As Personal Information Maintained In Files For Employees, Disclosure Of Which Would Violate Their Right To Privacy.

Under the PRA, the legislature specifically authorized this Court to enjoin disclosure of a public record that is clearly not in the public interest and would cause substantial and irreparable harm. Specifically, RCW 42.56.540 states: *“The examination of any specific public record may be enjoined if. . . the superior court. . . finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person. . . .”*

Some records are exempt from disclosure. RCW 42.56.230(3) exempts *“personal information in files maintained for employees... to the extent that disclosure would violate their right to privacy.”* The party seeking to enjoin disclosure of a public record under the PRA must show *“(1) that the record in question specifically pertains to [the] party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.”* Ameriquest Mortg. Co. v. Office of Attorney General of Washington, 177 Wn.2d 467, 487, 300 P.3d 799

(2013). Where information in such a record is exempt, and redaction and disclosure is possible, the Court must order redaction. Id.

a. The Records In Question Specifically Pertain To Jane Does #1-10.

Contained within the documents requested by Appellant are the names and personal identifiers of Jane Does #1-10. The Washington Supreme Court has defined “*personal information*” as: “*information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general.*” Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 412, 350 P.3d 190 (2011) (quoting Bellevue John Does 1-11 v. Bellevue School Dist. #405, 164 Wn.2d 199, 211, 189 P.3d 139 (2008)).

The “*Personal Information*” exemption under RCW 42.56.230(3) applies when “(a) the report constitutes personal information, (b) the employee has a right to privacy in his or her identity, and (c) when production of the employee’s identity . . . would violate [their] right to privacy.” Id. at 411 (2011) (citing Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 210 (2008)). For purposes of the PRA, “*personal information*” is any “*information relating to or affecting a particular individual.*” Bellevue John Does, 164 Wn.2d at 211.

In Bainbridge Island Police Guild, the petitioner sought to enjoin the disclosure of his identity from files held by neighboring police departments. Bainbridge Island Police Guild, 172 Wn2d at 405. He worked for the Bainbridge Island Police Department, and the requested files were held by the Mercer Island and Puyallup Police Departments, respectively. The Court held that even though the file was maintained in a neighboring police department, the petitioner had a right to privacy in his identity and redaction of his name was required. Id. at 412-422. A file is maintained for an employee so long as it contains "*personal information.*" See Id. at 411. The Court did not require the information to be in the employee's own personal file to classify for the personal information exemption. See Id.

The files requested by Appellant contain personal information of Jane Does #1-10 because: the information affects them, it is associated with a private concern, and what happened to them is not public or general knowledge. Recounting the intimate details of the sexual harassment one was subjected to clearly affects the victim of such conduct. Similarly, witnesses to such behavior and conduct are also affected. Sexual harassment is of a private nature that is related to the victims and witnesses of such conduct, and the predatory sexual behavior Dr. Pitcher engaged in towards Jane Does #1-10 is not general or public knowledge.

Thus, the information contained within the documents requested contains personal information of Jane Does #1-10. See Bainbridge Island Police Guild, 172 Wn.2d at 412.

b. The Names and Identifiers of Jane Does #1-10 are Exempt from Disclosure.

“Personal information in files maintained for employees. . . of any public agency to the extent that such disclosure would violate their right to privacy” is exempt from public disclosure. RCW 42.56.230(3).

The information requested by Appellant consists of emails, investigations and reports, and working documents maintained by Defendant University. Jane Does #1-10’s names and identifiers are contained within those requested and as set forth above, contain their personal information. Appellant argues that because none of these constitute *“files maintained for employees,”* they must be disclosed; that using them in an investigation that may or may not result in discipline is insufficient to turn them into an exempt file. However, the Supreme Court of Washington reached the opposite conclusion in Bainbridge Island Police Guild.

There, the files in question were reports surrounding the criminal and internal investigation of an officer’s alleged misconduct. The files were then forwarded to *“the Kitsap County Prosecuting Attorney for*

review,” Bainbridge Island Police Guild, 172 Wn.2d at 404, but “*the prosecutor declined to initiate any charges against Officer Cain, because there was not sufficient evidence. . . .*” Id. No discipline resulted from these files, yet the Court held that the exemption applied.

The files at issue contain the personal information of Jane Does #1-10. As part of the investigation Jane Does #1-10 were interviewed, contacted, and made a part of the investigative documents Appellant seeks to have disclosed. The fact that the investigation into Dr. Pitcher may not have resulted in discipline is irrelevant, pursuant to Bainbridge Island Police Guild. Therefore, the names and identifiers of Jane Does #1-10 are contained in files maintained for employees, are exempt from disclosure and must be redacted pursuant to RCW 42.56.230(3).

Further, such disclosure of names and identifiers would violate Jane Doe #1-10’s right to privacy. A person’s right to privacy is invaded “*if disclosure about the person: (1) would be highly offensive to a reasonable person, and (2) is of no legitimate public interest.*” Bainbridge Island Police Guild, 172 Wn.2d. at 415. “*The offensiveness of disclosure is implicit in the nature of an allegation of sexual misconduct.*” West v. Port of Olympia, 182 Wn. App 306, 313, 333 P.3d 488 (2014).

Appellant argue that the files requested are not highly offensive to a reasonable person, that because Jane Does #1-10 are public employees,

they shouldn't have expected that their statements or identities would remain confidential. But Appellant overlooks the nature and content of these documents. The information relating to Jane Does #1-10 within the documents is of a delicate and private nature that is contained in files maintained for employees. The files relate to instances of sexual assault, sexual harassment and workplace discrimination. Jane Doe #1 was subjected to severe and pervasive sexual harassment and intimidation. Dr. Pitcher exposed his penis to her and groomed her over a period of months. This grooming escalated to sexual intercourse during a work trip. (C.P. 5, 7). Jane Doe #9 was subjected to instant messages from Dr. Pitcher of a sexual nature. These messages described and commented on her genitalia and breasts. (C.P. 8, 55). Jane Does #2-8 and #10 also witnessed Dr. Pitcher's inappropriate sexual behavior and gave information and interviews to Defendant College during its investigation. Disclosure of the names and identifiers of Jane Does #1-10 in relation to conduct of such a deviant nature would violate their right to privacy. An individual has a right to privacy "*whenever information which reveals unique facts about those named is linked to an individual identifier.*" Tacoma Public Library v. Woessner, 90 Wn.App. 205, 218, 951 P.2d 357 (1999). A person's name is clearly an individual identifier.

It was held in Bellevue John Does that "*the teachers have a right*

to privacy because the unsubstantiated or false allegations are matters concerning the teachers' private lives and are not specific instances of misconduct during the course of employment.” Bellevue John Does, 164 Wn.2d at 215. In that case, teachers were accused of sexual misconduct. Those accusations were later found to be unsubstantiated. Jane Does #1-10 did not participate in any misconduct. Jane Does #1-10 were the victims or witnesses of Dr. Pitcher’s misconduct. Pursuant to the conclusion of the Court in Bellevue John Does, the contents of the documents at issue concern Jane Does #1-10 private lives and they have a right to privacy. If the names and identities of those who were the subjects of unsubstantiated claims of sexual misconduct in a school setting were exempt from disclosure, certainly the names and identifiers of the victims and witnesses of sexual harassment and misconduct are exempt from public disclosure.

c. There Is No Substantial Public Interest In The Disclosure Of The Names And Identifiers Of Jane Does #1-10 And Disclosure Would Substantially And Irreparably Harm Them.

Appellant argues that the files requested are not highly offensive to a reasonable person. That because Jane Does #1-10 are public employees, they shouldn’t have expected their statements or identities would remain confidential – that disclosure should have been anticipated. But Appellant fails to state what the public interest is in knowing the names and

identities of the victims and witnesses to Dr. Pitcher's sexual harassment.

Tacoma Public Library involved the request for information about employees' rates of pay, leave and vacation hours, benefits, and employer contributions. This information was provided, but with the names and employee numbers redacted. The Court held that "*release of employee names would not be similarly offensive or lead to such invasions of privacy,*" Id. at 221, (as opposed to release of employee identification numbers, which would be highly offensive).

Tacoma Public Library is distinguishable from the case at bar. It is distinguishable because the public interest in Tacoma Public Library was to "*ensure that the government is not paying one employee twice, funneling money to non-existent employees, or engaging in nepotism.*" Id. at 222. Whereas here, the public interest is how the College investigated Dr. Pitcher, not the names of his victims. The Media can still write their stories and get insight into the harassment claimed and the investigation performed. Redacting the names of the victims and witnesses of Dr. Pitcher's conduct does not hinder that. The only exempt information contained within the requested documents is the names and identifiers of Jane Does #1-10. The Media is still able to scrutinize how the College performed its investigation without that information.

“Teachers have a right to privacy because the unsubstantiated or false allegations are matters concerning the teachers’ private lives and are not specific instances of misconduct during the course of employment.” Bellevue John Does, 164 Wn.2d at 215. In that case, teachers were accused of sexual misconduct. Those accusations were later found to be unsubstantiated. The Court concluded that: *“Precluding disclosure of the identities of teachers who are subjects of unsubstantiated allegations will not impede the public’s ability to oversee school districts’ investigations of alleged teacher misconduct.”* Id. at 219.

Jane Does #1-10 did not participate in any misconduct. Jane Does #1-10 were the victims or witnesses of Dr. Pitcher’s misconduct. Pursuant to the conclusion of the Court in Bellevue John Does, the contents of the documents at issue concern Jane Does #1-10 private lives and they have a right to privacy. If the names and identities of those who were the subjects of unsubstantiated claims of sexual misconduct in a school setting were exempt from disclosure, certainly the names and identifiers of the victims and witnesses of sexual harassment and misconduct are exempt from public disclosure. And, like the Court held in Bellevue John Does, exempting the disclosure of the names and identities of Jane Does #1-10 will not hinder the public’s ability to scrutinize the College’s investigation of Dr. Pitcher.

Disclosing the names and identities of Jane Does #1-10 would substantially and irreparably harm them. They have suffered emotional distress, and fear retaliation and humiliation should their names and identities become known to the public. Disclosure would not merely be embarrassing but would be highly offensive and cause lasting harm. Where disclosure would result in “*stigmatization, mental and emotional distress, and loss of economic opportunity*” and where disclosure undermines a “*carefully crafted legislative scheme*” such disclosure is not in the public interest. Doe ex rel. Roe, 185 Wn.2d at 400 (J. McCloud, dissenting). Disclosure of the names and identities of Jane Does #1-10 in connection with the investigation into Dr. Pitcher’s sexual misconduct would be highly offensive to any reasonable person.

2. Disclosure Of The Names And Identifiers Of Jane Does #1-10 Will Cause A Chilling Effect.

Jane Does #1-10 would never have come forward and reported the predatory sexual behavior of Dr. Pitcher had they known their names would be disclosed to the public. (CP. 34, 37, 40, 43, 46, 49, 52). Had they not come forward it is likely Dr. Pitcher would still be employed at Spokane Falls Community College using his position to exert sexual control over his subordinates. Allowing the names of the witnesses and victims to be publically disclosed will have a devastating affect on all

public employees: they will live in fear that, should they come forward and do what is right, they will be subjected to public humiliation, embarrassment, and retaliation. Requiring disclosure of the names of those who report this deplorable conduct would result in the other Dr. Pitcher's of the world to remain in their positions, continuing to cause irreparable emotional damage to their victims.

Disclosure of the names of Jane Does #1-10 would cause a chilling effect on those coming forward to report workplace sexual harassment, retaliation and discrimination. Because everyone has a right to be free from discrimination in their employment based on sex, disclosure of the names of Jane Does #1-10 should be exempt from disclosure.

V. RAP 18.1 REQUEST FOR ATTORNEYS FEES AND COSTS

This Court is authorized to exercise its discretion and, pursuant to equitable principles, award attorney's fees and costs to Respondents. "*The power to award attorney fees 'springs from our inherent equitable powers, (and) we are at liberty to set the boundaries of the exercise of that power.'*" Hsu Ying Li v. Tang, 87 Wn.2d 796, 799, 557 P.2d 342 (1976) (quoting Weiss v. Bruno, 83 Wn2d 911, 914, 523 P.2d 915 (1974)). Respondents are all individual employees that were forced to incur attorney fees and costs to prevent their privacy from being invaded. If ever there were a case where this Court should exercise its discretion and

award attorney fees and costs, this is the case. Therefore, in the interests of justice and pursuant to RAP 18.1, Jane Does #1-10 respectfully request an award of reasonable attorney fees and costs incurred below and on Appeal.

VI. CONCLUSION

Pursuant to the foregoing, the Trial Court's Order granting a permanent injunction should be affirmed.

DATED this 15th day of November 2018.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the state of Washington, that on the 15th day of November 2018, a true and correct copy of the foregoing brief was delivered to the following persons in the manner indicated:

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November 15, 2018 - 4:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36030-0
Appellate Court Case Title: Jane Doe #1, et al v. WA State Community College District 17, et al
Superior Court Case Number: 18-2-01142-1

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