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NO. 54300-8-I

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

BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6 and 9,

Appellants,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2 AND SEATTLE JOHN DOES 1-5, 7-8 and 10-12
AND JOHN DOE,

Plaintiffs/ Non-Appellants/ Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL
DISTRICT #210, AND SEATTLE SCHOOL DISTRICT #1,

Respondents; AND

THE SEATTLE TIMES COMPANY,

Respondent/ Cross-Appellant.

BRIEF OF AMICUS CURIAE
WASHINGTON EDUCATION ASSOCIATION

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FILED
COURT OF APPEALS
2005 FEB - 4 PM 4:30

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I. INTRODUCTION

In an age when all allegations are investigated, where rumor is spread over electronic media instantaneously and where false allegations stigmatize and damage the reputations of professionals, it is imperative that this court protect the identity of those against whom false allegations are made.

This court must affirm the trial court's careful and deliberate examination of the facts in each individual plaintiff's case and its subsequent application of existing law to those facts. The trial court's legal analysis is sound and should be affirmed under either of two theories: (1) Under the *Dawson v. Daly* and *Brown* analysis, where there is no finding of misconduct but rather a letter of direction, the identity of the accused is exempt from disclosure. A letter of direction is an evaluative tool similar to a performance evaluation; it is a powerful means of communication between employer and employee protecting each in the case of actual wrongdoing in the future. (2) Alternatively, under the *Tacoma News Tribune* analysis, redaction of the identity of the teacher is appropriate because there is no legitimate public concern in the identity of the teacher where is no finding of misconduct and allegations remain unsubstantiated or false after an adequate investigation of those allegations.

II. STATEMENT OF THE CASE

This case involves the appeal of a trial court decision regarding thirty-seven plaintiffs wherein the trial court issued a permanent injunction enjoining the relevant school districts from releasing to the Seattle Times the identities of fifteen of the plaintiffs. In each of those fifteen cases, the trial court specifically found that there was no finding of misconduct by the employee after an adequate investigation. In each of those cases, either a letter of direction was issued after the investigation resulted in no finding of misconduct (Bellevue John Does 1, 2, 4, 6, 7 and 9 and Federal Way John Doe 3) or the investigation resulted in a determination that the allegations were false or unfounded (Bellevue John Doe 3, Federal Way John Does 1 and 2 and Seattle John Does 1, 3, 5, 7 and 10).

The trial court took live testimony and extensively reviewed *in camera* all of the records sought by the Seattle Times. CP 99. A copy of the records, with identifying information redacted was provided to the Seattle Times. CP 99. The only issue for the trial court was whether the information redacted from the records should be released to the Seattle Times. CP 99.

The record contains evidence from school administrators and union representatives regarding the importance of candid communication between school districts and teachers about how school duties should be

performed. The record is replete with evidence that letters of direction or written warnings assist the District and employee in accomplishing this purpose and how public disclosure of these letters of direction would thwart these communications.

Specifically, the record contains a Declaration of Chuck Christensen, Director of Human Resources for Federal Way School District. Mr. Christensen is personally involved with investigations of employee misconduct as well as supervision and evaluation of teachers. CP 859. Mr. Christensen describes the District's practice of imposing appropriate discipline when allegations of misconduct are substantiated and issuing a letter of direction when allegations are not substantiated. A letter of direction is an appropriate supervisory tool for the District because it ensures that the employee is provided with specific notice of particular school district policies. A letter of direction is also a valuable tool for the employee because since it is not a public record but rather is an evaluative tool, it enables the employee to avoid a time-consuming grievance process associated with employee discipline. A letter of direction does not constitute a finding of misconduct or that the employee violated a District policy. Rather, it is a judgment-neutral reminder for how District employees should act. See Declaration of William Bleakney, CP 67-9. If letters of direction resulting from unsubstantiated allegations

become subject to public disclosure, their value as an evaluative tool will be eliminated. CP 860; *See also* Declaration of Delores Humiston, CP 873-4; Declaration of Steve Pulkkinen, CP 63-6.

The trial court specifically found that it would harm the public interest in efficient administration of government to release records pursuant to the Public Records Act related to a public employer's guidance and direction to an employee contained in a "letter of direction." FF 10. CP 100. The trial court found that public disclosure of "letters of direction" would harm the public interest in efficient government administration by interfering with the employer's ability to give candid advice and direction to its employees and would also "substantially and irreparably damage" vital government functions by chilling employer-employee communications. The chilling effect would arise if all written communications between the employer and employee were subject to disclosure. CP 100.

The trial court found that the public has a legitimate concern in learning about investigations performed by school districts of teachers accused of sexual misconduct and in assessing the adequacy of the district's responses and investigations, whether the allegations are sustained, deemed false or deemed unsubstantiated. The trial court

determined that providing the Seattle Times with redacted copies of the records satisfied this legitimate public concern. CP 100.

The trial court reviewed the facts relevant to each plaintiff. In doing so, the trial court assessed the seriousness of the allegation, the adequacy of the investigation, the result of the school district's investigation, whether a letter of direction or discipline including a letter of reprimand was issued and whether the Seattle Times already knew the identity of the plaintiff. In each of the cases of the prevailing John Does, the trial court concluded that the allegations were either false or unsubstantiated after an adequate or extensive investigation and, in many of the cases, that a letter of direction was issued. CP 100-109.

In the cases of eleven plaintiffs who did not appeal, the trial court ordered the Districts to release their identity. The trial court found, in those cases, that there was not an adequate investigation or that the allegations were founded and thus there was a finding of misconduct and discipline imposed, including a written letter of reprimand. CP 100-109. *See:* Federal Way Jane Doe 2 and John Does 4 and 5; Bellevue John Does 8 and 10; and Seattle John Does 2,6, 8, 9, 12 and 13. Thus, the trial court appropriately found that the identity of the accused teacher is a matter of legitimate public concern when the investigation is inadequate or when the allegation is deemed substantiated or the employee is disciplined,

reprimanded or restrictions are imposed on the employee's future assignment or duties. CP 112-3; FF 11, 12.¹

III. ARGUMENT

A. The Trial Court Correctly Applied Existing Law.

The trial court properly applied the relevant sections of the Public Disclosure Act and the case law by enjoining the release of the identity of the plaintiffs, thus ordering redaction of their identities in those cases where there was no finding of misconduct after investigation of allegations of misconduct. The Washington Supreme Court and the Courts of Appeals have consistently applied this policy. *Koenig v. City of Des Moines*, 123 Wash.App. 285, 95 P.3d 777 (2004); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *Brown v. Seattle Public Schools*, 71 Wash.App. 613, 860 P.2d 1059 (1993); *rev. den'd.*, 123 Wn.2d 1031, 877 P.2d 696 (1994); *City of Tacoma v. Tacoma News, Inc.* 65 Wash.App. 140, 827 P.2d 1094 (1992); *rev. den'd.* 119 Wn.2d 1020, 838 P.2d 692 (1992).

Two sections of the Public Disclosure Act are at play in determining whether the trial court properly permitted the identity of the plaintiffs to be redacted to protect the privacy of the falsely accused:

¹ In the case of Seattle John Doe 4, the Times already knew the name of the plaintiff and thus, the trial court did not enjoin the release of the plaintiff's identity.

RCW 42.17.255 and RCW 42.17.010(11). *Koenig*, 95 P.3d at 783-4, citing *Dawson, supra* and *Brown, supra*.

RCW 42.17.255, in pertinent part, provides:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

RCW 42.17.010 (11) states:

It is hereby declared by the sovereign people to be the public policy of the state of Washington:

That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, 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.

Emphasis added.

These two statutes come into play when the individual's privacy interest is pertinent. An individual has a privacy interest, for purposes of the public records act, whenever information which reveals unique facts about those named is linked to an identifiable individual. *Tiberino v. Spokane County*, 103 Wash.App. 680, 13 P.3d 1104 (2000). Such is the case here.

The trial court properly applied RCW 42.17.255 to the facts at issue in this case by ordering the redaction of the records in a manner that protected the identity of individuals whose personnel files contained no substantiated issues of misconduct. The Washington Supreme Court has interpreted RCW 42.17.255 to prohibit courts from engaging in a policy judgment balancing the individual's privacy interest against the interest of the public in disclosure. *Dawson v. Daly*, 120 Wash.2d 782, 845 P.2d 995 (1993). However, while § 255 does not allow balancing of the employee's privacy interest and the public interest, RCW 42.17.010(11) contemplates some balancing of the public's interest in disclosure against the public's interest in the "efficient administration of government." *Koenig, supra* at 783.

The trial court properly reviewed the facts in this case. Where the appellant does not assign error to the trial court's findings of fact, they become verities on appeal. *Sackett v. Santilli*, 101 Wash.App. 128, 5 P.3d 11 (2000)(citing RAP 10.3(g)).² The Seattle Times' belated argument to the contrary is without merit. *See Times' Reply Br.*, at 21-23.

² Rules Of Appellate Procedure, RAP 10.3 (g) specifically provides, in pertinent part: A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Based on the evidence in the record, the trial court correctly determined that letters of direction are an evaluative tool and do not constitute a finding of misconduct. The trial court accurately distinguished a “letter of direction” or a “letter, memorandum or oral direction which does not impose punishment, but seeks to guide or direct the employee’s future performance” from a “letter of reprimand” which the trial court defined as “a letter or memorandum finding that the employee had engaged in significant misconduct and either formally reprimanding the employee or imposing restrictions on the employee’s future assignments or duties.” Conclusion of Law 11; CP 112-113.

Washington courts have repeatedly reviewed public disclosure issues related to employee records and performance evaluations. Disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of public records act’s invasion of privacy provision. *Tiberino v. Spokane County* 103 Wash.App. 680, 13 P.3d 1104 (2000); *Dawson v. Daly*, 120 Wash.2d 782, 845 P.2d 995 (1993). Evaluations of public employees ordinarily are not subject to public disclosure, since in the normal course, both the supervisor and the employee reasonably expect those evaluations to remain confidential, and the disclosure of that information would be offensive to a reasonable person and of small public

concern. *Spokane Research & Defense Fund v. City of Spokane*, 99 Wash.App. 452, 994 P.2d 267 (2000).

In the public school setting, the court examined RCW 42.17.255 in *Brown v. Seattle Public Schools*, 71 Wash.App. 613, 860 P.2d 1059, rev. den'd., 123 Wash.2d 1031, 877 P.2d 696 (1993). Therein, the court balanced the public school system's need for an effective evaluation system with the public interest in disclosure. The court determined that disclosure of performance evaluations in school principal's personnel records would be highly offensive in regard to principal's right to privacy and that there was no legitimate public concern in disclosure, in view of public school system's need for effective performance evaluation system.

The facts in *Brown* are particularly relevant: the documents at issue included yearly performance evaluations and self-evaluations; the principal's handling of a racially motivated dispute between two teachers; the principal's "inflexible attitude" involving a school district administration intern; the principal's use of school district properties; travel to an administrator's conference at a time when the school was in an uproar; and the principal's handling of an assault on a teacher by a parent at Rainier View Elementary School. Like the cases addressed by the trial court herein, the *Brown* trial court made an *in camera* review of the requested documents and required disclosure of the documents. The

appellate court, having had the benefit of the Supreme Court's decision in *Dawson v. Daly* reversed and protected the requested documents from public disclosure.

Citing *Dawson*, in *Brown, supra*, this Court took judicial notice as follows [71 Wn.App. at 617-8; citations omitted]:

The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice. This sensitivity goes beyond mere embarrassment, which alone is insufficient grounds for nondisclosure . . . Employee evaluations qualify as personal information that bears on the competence of the subject employees. We hold that disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255.

Despite the fact that the records contained allegations of arguable misconduct, this Court determined that there was no discussion of specific instances of misconduct on Brown's part, only shortcomings and performance criticisms.

The trial court's decision is consistent with the existing law. The identity of the teacher should not be disclosed where there is no finding of misconduct, where the allegations are either found to be false or unsubstantiated or where a letter of direction is written to inform a teacher how to act in the future but no punishment or reprimand is issued. The trial court exhaustively and completely evaluated the facts of each

plaintiff's case and also court properly determined that a letter of direction is an evaluative tool and thus properly applied the holdings of *Dawson* and *Brown*. Thus, the trial court's decision must be affirmed.

B. Case-By-Case Analysis Is Appropriate And *In Camera* Review Is The Proper Process.

The Seattle Times challenges the trial court's procedure for review of the documents. However, *in camera* review is the only way a court can determine what portion of a document, if any, is exempt from disclosure. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615, 963 P.2d 869 (1998).

In all of its briefing, the Seattle Times neglects to mention that there is no finding of misconduct in any of the cases of the prevailing John Does. To the extent that privacy rights are relevant in any given case, the trial court must make its factual determination on a case-by-case basis. *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 987 P.2d 620 (1999). The trial court reviewed the records of each of the plaintiffs and properly decided the disclosure issues on a case-by-case basis.

C. The Trial Court Properly Applied RCW 42.17.255 In Evaluating The Truth Or Falsity Of The Allegation.

The Washington Legislature defined privacy in the context of public records in RCW 42.17.255, stating that privacy would be invaded by disclosure of information if the disclosure (1) would be highly

offensive to a reasonable person and (2) is not of legitimate concern to the public.

1. DISCLOSURE OF FALSE ALLEGATIONS IS HIGHLY OFFENSIVE TO THE REASONABLE PERSON.

This Court recently again acknowledged that the public's interest in open public records can and often does conflict with its interests in protecting personal privacy and the efficient administration of government. *Koenig, supra*. Therein, this Court held that highly offensive information that, if disclosed, would harm the efficient administration of government more than it would benefit the public interest, is not of legitimate concern to the public. As a result, this Court held that such information must be redacted prior to disclosure of the remainder of the document. *Id.* Here, this Court must conclude, as it did in *Koenig, supra*, that the harm to efficient administration of justice outweighs any public benefit resulting from access to highly offensive information where there is no legitimate public concern.

The Seattle Times completely mischaracterizes the impact of releasing the identity of persons who have been falsely accused when contending that the disclosure would not be highly offensive to the

reasonable person.³ The Seattle Times has ignored that in each of the cases where the trial court ordered redaction of the identity of the prevailing plaintiff, there was no finding of misconduct.⁴ Rather, the Times insists on repeatedly alluding to high profile cases that were hidden from public view when there were proven allegations of misconduct and which are irrelevant here.

Public disclosure of an accusation of sexual misconduct, even if unsubstantiated or false, is highly offensive because such release can taint a professional teacher's career. There is an unquestionably an unnecessary association of guilt that comes with disclosure of a false allegation. Doubts will be shed on the character of the accused, despite the lack of substantiation of any charges. Such disclosure can make parents needlessly afraid for the safety of their children. Our courts have held that release of true information such as employee names, salaries, publicly funded fringe benefits, and vacation and sick leave is "highly offensive" when it is coupled with employee identification numbers. *Tacoma Public Library v. Woessner*, 90 Wash.App. 205, 951 P.2d 357, 366 (1998). Unquestionably, the disclosure of false or unsubstantiated

³ See Seattle Times Opening Brief, at 43.

⁴ The Seattle Times also erroneously relies on *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 727, 987 P.2d 692 (1999) for support since *Cowles* involved the privacy

allegations linked to the identity of the accused is highly offensive to the reasonable person.

2. FALSE AND UNSUBSTANTIATED ALLEGATIONS ARE NOT OF LEGITIMATE CONCERN.

In *City of Tacoma v. Tacoma News*, *supra*, Division Two held that police department records regarding unsubstantiated allegations of child abuse were not of legitimate public concern under RCW 42.17.255 and thus were exempt from disclosure to newspaper due to unsubstantiated nature of allegations. The Court conducted an *in camera* review of the records and determined that the department's failure to substantiate allegations did not result from lack of full investigation. Rather, the Court held that Legislature intended to allow public agencies and courts to consider whether information in public records is true or false, as one factor bearing on whether the records of legitimate public concern. *Id.* at 149. Furthermore, the Court held that in assessing truth or falsity, public agencies and courts may consider whether information has been substantiated; if information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative, though not always dispositive, of falsity. *Id.*

rights of a different class of individuals entirely than the case at bar: officers against whom complaints have been sustained and who were sanctioned for misconduct.

Here, it is the conduct of the school district's investigation that is of legitimate public concern. There is no additional light shed on the conduct of the school district's investigation by identifying the name of the person investigated when the results of the investigation are that the allegations were false or unsubstantiated. If indeed it is determined that there was not an adequate investigation, the court could order disclosure of the identity of the teacher, as the trial court did in some of the cases before it. There simply is no legitimate purpose in identifying the accused where the witness has recanted or there is another legitimate basis on which the allegations were not substantiated.

In *Dawson*, there was no legitimate concern in the details of a performance evaluation that did not discuss specific instances of misconduct. Similarly, the trial court properly determined that there was no legitimate public concern in the details of a letter of direction that does not discuss specific instances of misconduct.

And in the cases of the prevailing plaintiffs, as in *Tacoma News*, the trial court exhaustively determined that allegations remained false or unsubstantiated after an adequate investigation and thus, there was no legitimate public concern in the disclosure of their identities.

3. DISCLOSURE OF FALSE ALLEGATIONS
HARMS THE EFFICIENT ADMINISTRATION

OF GOVERNMENT MORE THAN IT BENEFITS
PUBLIC INTEREST.

While our courts have held that RCW 42.17.255 does not allow balancing of the employee's privacy interest and the public interest, RCW 42.17.010(11) contemplates some balancing of the public's interest in disclosure against the public's interest in the "efficient administration of government." *Dawson, supra; Koenig, supra*. It would be unreasonable to require disclosure where the public's interest in efficient government could be harmed more than the public's interest would be served by disclosure. *Id.*

The harm to the efficient administration of government incorporates the harm to the employee as well as the harm to the employer. The *Dawson* court determined that this balance required exempting performance evaluations from public disclosure. As that court foresaw, to do otherwise would seriously undermine employee morale and would make supervisors reluctant to give candid evaluations. Here, the trial court properly determined that public disclosure of letters of direction used as an evaluative tool would similarly undermine employee morale and impede candid employer-employee communications.

Disclosure of false or unsubstantiated allegations where there is no finding of misconduct would cause the employee to suffer an even greater

harm, because in the public mind, there will be an association of guilt, even if the employee is exonerated. This association of guilt will lead to decline in employee morale and decrease in job satisfaction as well as parents expressing reluctance for the teacher to teach their children.

The letter of direction is a marvelous tool that enables the employer and employee to protect themselves without protracted litigation when there is no need for a sanction. Requiring the school districts to disclose the identity of those falsely accused and those to whom letters of direction are written will harm the employer's ability to provide candid guidance and direction to its employees.

D. Public Disclosure Would Violate The Employee's Right To Due Process.

In *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), the Ninth Circuit affirmed that the law clearly establishes that publication of stigmatizing information, without a name-clearing hearing violates due process. Cox was terminated by his employer, receiving a termination letter that was placed in his personnel file. Cox was never afforded a pre-termination or post-termination hearing. A newspaper filed a request for the release of Cox's termination letter, which the public employer released, believing that the document was a public record. The Court determined that it was a violation of Cox's due process rights to place the

document in the personnel file when he had not been afforded a name-clearing hearing.

In *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), the United States Supreme Court held that a terminated public employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed.

Here, if the trial court is affirmed, the existing law would remain undisturbed and there would be no disclosure of false or unsubstantiated allegations. However, the Seattle Times would like this court to determine that stigmatizing documents becomes a public record just by placing it in the file of the employee. If the trial court was reversed and this Court ordered disclosure of mere allegations of misconduct or of a stigmatizing document, the public employer would be constitutionally required to provide the employee with the opportunity for a name-clearing hearing.⁵

Thus, if this Court were to rule in favor of the Seattle Times, employees would engage in more litigation to protect their due process

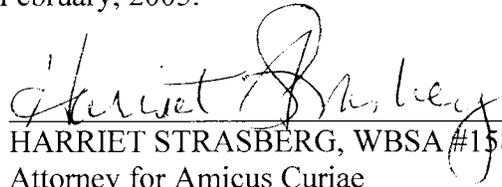
⁵ Where the trial court determined that the record was substantiated and required release of information, the plaintiffs' due process rights unless a name-clearing hearing was held prior to the release of unredacted records. *Cox, supra*.

rights and their privacy interest in false allegations and letters of directions.

IV. CONCLUSION

For all the reasons stated herein, Amicus respectfully requests that this Court affirm the trial court's decision

Dated this 4th day of February, 2005.


HARRIET STRASBERG, WBSA #15890
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am over 18 years of age and work for the law office of Harriet Strasberg.

2. On February 4, 2005, I caused to be served a true and correct copy of the Washington Education Association's Motion To File Amicus Curiae Brief and the Brief Of Amicus Curiae Washington Education Association on the following via the United States Postal Service ("USPS"):

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3. On February 4, 2005, I caused to be served a true and correct copy of the Washington Education Association's Motion To File Amicus Curiae Brief and the Brief Of Amicus Curiae Washington Education Association on the following by delivering the documents to ABC Legal Messenger in Olympia for delivery on February 4, 2005 to:

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DATED this 4th day of February, 2005 at Olympia, Washington.


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