

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC KUHN
Plaintiff,

11191
v.

Hood
WASHTENAW COUNTY, et al.
Defendant.

CASE NO.: 2:10-CV-

HON.: Denise Page

____/

Attorneys for Defendant

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____/

**PLAINTIFF ERIC KUHN'S MOTION TO REOPEN DISCOVERY REGARDING
INVESTIGATION BY THE WASHTENAW COUNTY SHERIFF'S
DEPARTMENT INTO AN INCIDENT OF MARCH 2011**

NOW COMES the Plaintiff Eric Kuhn, by and through his attorneys The Cortese Law Firm, PLC and for this his Motion to Reopen Discovery Regarding Investigation by the Washtenaw County Sheriff's Department into an Incident of March 2011 states as follows:

1. As this Honorable Court is no doubt aware, this case arises out of Plaintiff Eric Kuhn's termination by the Defendant County of Washtenaw from his position as a Washtenaw County Sheriff's Deputy and treatment which he experienced while

employed as a Deputy. Eric Kuhn's claims include claims that he was subject to discrimination based upon race arising out of allegations made by a white suspect Marianne Joseph that she was sexually assaulted during the course of an arrest in which Deputy Kuhn was involved. Deputy Kuhn has alleged that he was the subject of an internal investigation/citizen's complaint based upon clearly unfounded allegations by Joseph when similarly situated white officers who were accused of misconduct were not subject to having an investigation or citizen's complaint opened. See Plaintiff's Complaint at paragraphs 75 and 98.

2. Plaintiff has come to be aware that there was an incident on or about March 8, 2011 which occurred at Ypsilanti Township's location. On or about March 8, 2011 April Salley, who is employed as a Court Officer had her husband place \$20.00 in a cup holder for her in her car so she could have money for lunch. On March 9, 2011 Kathy Collins, the Court Administrator for 42-B District Court sent an e-mail to Michael Radzik who is the Police Coordinator for Ypsilanti Township stating that April Salley believed the money was taken from her vehicle and asked if he could take a look at the video. See Exhibit 1 materials obtained from Ypsilanti Township pursuant to FOIA requests.
3. Apparently a video was reviewed of the parking lot area the Ypsilanti Township location to determine if the video could show who went into April Salley's car.
4. Apparently the video showed an employee, believed to be a high ranking officer, of the Washtenaw County Sheriff's Department as the person being in the vicinity of April Salley's vehicle. Michael Radzik, the police coordinator for Ypsilanti Township sent an e-mail to Jerry Clayton the Washtenaw County Sheriff on March 9,

2011 stating, “Jerry, will you please call me when you have a minute? I need to discuss a potentially sensitive personnel matter with you.” See Exhibit 1.

5. Counsel for Plaintiff has subpoenaed the records from Ypsilanti Township relating to this investigation of a Sheriff’s Department employee and the theft from April Salley’s vehicle. Ypsilanti Township has responded to this subpoena by providing the documents attached as Exhibit 1. The attorney for Ypsilanti Township William Douglas Winters states that Jeff Allen, Ypsilanti Township’s Residential Services Director, has advised that he met with Brian Miller, a representative of the Washtenaw County Sheriff’s Department on Friday, March 11, 2011 at which time he gave Mr. Miller the only copy of the video that was created. See Exhibit 2.
6. Counsel for Plaintiff Eric Kuhn has attempted to obtain this information pursuant to a Freedom of Information Act request but counsel for Washtenaw County has refused to provide this information on behalf of Washtenaw County, citing the exemption to the Freedom of Information Act for pending civil litigation. See Exhibit 3.
7. Undersheriff Mark Ptaszek informed Michael Radzik, the Police Coordinator for Ypsilanti Township, on April 18, 2011 that Washtenaw County had conducted an investigation but did not provide any reports of that investigation to Radzik, Ypsilanti Township or April Salley. Exhibit 1.
8. The conduct of this investigation is highly relevant to the instant case. Eric Kuhn has alleged that he was subject to an internal investigation based upon unfounded allegations by Marianne Joseph when similarly situated white officers were not subject to internal investigations. See Plaintiff’s Complaint at paragraphs 75 and 98. In the instant case, it is highly relevant whether Washtenaw County actually opened

an investigation into the complaint by April Salley into the theft from her vehicle where there was evidence that a Washtenaw County Sherriff's Department officer was in the vicinity of the vehicle. Counsel for Plaintiff can not determine if Washtenaw County in fact followed its procedures in conducting an investigation, as it claimed it was obligated to do in Eric Kuhn's case, with respect to the April Salley complaint when Washtenaw County refuses to provide the records relating to the investigation.

9. Counsel for Plaintiff did not bring this Motion earlier since counsel for Plaintiff only recently became aware that there was an incident involving a theft from a vehicle in Ypsilanti Township where an officer of the Sheriff's Department was the subject of an investigation. Further, counsel for Plaintiff first wanted to confirm, which she was able to do by subpoenaing Ypsilanti Township, that in fact there was a basis for claiming that an investigation had been conducted into an Washtenaw County Sheriff's Department's officer before making allegations in the public record regarding this incident.
10. This incident may also be relevant for purposes of impeachment at trial. Washtenaw County has taken the position that the investigation of Eric Kuhn based on Joseph's allegation was required because the Department was required to follow policy. See Sherriff's Policy on Citizen Complaints, attached as Exhibit 17. It would be very relevant if Undersheriff Ptaszek and/or the Sherriff's Department did not follow policy with respect to the investigation into the April Salley vehicle theft incident. Further, the Officer who was apparently the subject at the investigation in the April Salley theft incident was also intimately involved in pursuing the investigation

against Eric Kuhn and again, the results of this investigation may be relevant for impeachment of this officer as well.

11. Granting Plaintiff's Motion to reopen discovery for the limited purpose of obtaining information regarding the investigation into the theft from April Salley's vehicle will not require the adjournment of any other dates in this case, including the hearing on the Motion for Summary Judgment which is scheduled for October 19, 2011 at 4:00 p.m. Additionally, this will not impact the scheduling of the pretrial conference or trial.

WHEREFORE, Plaintiff Eric Kuhn requests this Honorable Court reopen discovery in this matter in order to allow counsel for Eric Kuhn to request documents and/or tangible items, including the video tape, relating to the investigation of the March 8, 2011 incident regarding the theft from April Salley's vehicle and to take depositions regarding this investigation including depositions of Undersheriff Ptaszek, Commander Dieter Herren, Brian Miller and/or any others involved in the investigation into this incident.

Respectfully submitted,

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Dated: September 27, 2011

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EASTERN DISTRICT OF MICHIGAN
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**PLAINTIFF ERIC KUHN'S BRIEF IN SUPPORT OF MOTION TO REOPEN
DISCOVERY REGARDING INVESTIGATION BY THE WASHTENAW
COUNTY SHERIFF'S DEPARTMENT INTO AN INCIDENT OF MARCH 2011**

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I. STATEMENT OF FACTS

Eric Kuhn, who is an African American, was a dedicated Washtenaw County Sheriff Deputy who had a reputation as being a good officer. On October 20, 2008, a white female, Marianne Joseph claimed that she was sexually assaulted by a male deputy while being handcuffed after she attempted to flee on foot from a traffic stop. Eric Kuhn was subject to an internal investigation and listed as a suspect on the rape kit submitted to the Michigan State Police despite the fact that the white Deputy, who was the deputy who actually handcuffed Marianne Joseph, was not subject to any investigation or named as a suspect. Further, other white officers, who were also subject to complaints by citizens of potentially serious misconduct were not subject to investigation.

Eric Kuhn has alleged that he was subject to racial discrimination including in violation Title VII, based upon the investigation into the baseless allegations by Marianne Joseph and the fact that similarly situated white officers who were accused by citizens of misconduct were not subject to having an investigation or a citizen's complaint opened. See Plaintiff's Complaint at paragraphs 75 and 98.

Counsel for Eric Kuhn has become aware that there was an incident on or about March 8, 2011 where an officer of the Washtenaw County Sheriff's Department was observed on videotape in the vicinity of a vehicle that Court Officer April Salley alleged had money taken from it. This matter was apparently referred by Ypsilanti Township to the Washtenaw County Sheriff's Department for investigation. On April 18, 2011 Undersheriff Mark Ptaszek informed Michael Radzik, the Police Coordinator for Ypsilanti Township that Washtenaw County had conducted an investigation but did not provide any reports of that investigation to either Radzik, Ypsilanti Township or the citizen who made the initial complaint April Salley. See Exhibit 1.

Counsel for Plaintiff Eric Kuhn submitted a request under the Freedom of Information Act on behalf of Plaintiff Eric Kuhn to Washtenaw County for information regarding the investigation conducted by Washtenaw County into the theft from April Salley's vehicle. Washtenaw County has refused to provide this information citing the exemption to the Freedom of Information Act for pending civil litigation. See Exhibit 3.

The conduct of this investigation is highly relevant to the instant case. Eric Kuhn has alleged that he was subject to an internal investigation based upon unfounded allegations by Marianne Joseph when similarly situated white officers were not subject to internal investigations. See Plaintiff's Complaint at paragraphs 75 and 98.

Washtenaw County has defended this case arguing that it was required to open an investigation against Eric Kuhn arising out the allegations brought by Marianne Joseph. See Defendants' Brief in Support of Motion to Dismiss and for Summary Judgment at page 4-5, attached as Exhibit 5. Washtenaw County, in their Brief in Motion to Dismiss and for Summary Judgment rely upon the Sherriff's policy on Citizen's Complaints which states:

The Washtenaw County Sherriff's Office will accept and investigate all complaints about the conduct of its employees from any citizen or agency employee. Following a thorough and impartial examination of the available factual information, it will be determined if improper employee conduct did in fact occur.

Any allegation of improper conduct by an employee or the inappropriateness of a department directive, regardless of its apparent validity, is a complaint or inquiry and will be recoded on the appropriate form(s).

See Exhibit 5 at p. 4, citing Sherriff's Policy attached as Exhibit 4.

The Citizens Complaint policy also requires under Section 6(d):

The factual basis for the recommended final disposition will be supported in narrative form as part of the final investigative report. A separate page entitled Summary and Recommendation will be used to justify and support the disposition.

See Exhibit 4 at section 6(d).

As can be seen, final investigative report should have been prepared based upon the referral from Ypsilanti Township that it appeared that a Washtenaw County Sherriff's Officer may have been involved in the theft of money from a vehicle. The letter from Undersheriff Ptaszek to Michael Radzik, Police Coordinator, simply states that an investigation was conducted and the allegation was unfounded. Counsel for Plaintiff is seeking a copy of the investigative report that was required to be prepared for this incident and to determine if Washtenaw County followed its policy in that case, as it claimed that it was required to do in Eric Kuhn's case.

Washtenaw County also asserted, in support of their Motion for Summary Judgment, that where a citizens complaint, which may be brought by any citizen or agency employee, also alleges potential criminal conduct that a criminal investigation will proceed separately from the investigation in to the citizen's complaint and that the criminal investigation should be conducted by an outside agency. See Exhibit 5 at p. 5.

In the instant case, it is highly relevant whether Washtenaw County actually opened an investigation into the complaint by April Salley into the theft from her vehicle where there was evidence that a Washtenaw County officer was in the vicinity of the vehicle. Counsel for Plaintiff can not determine if Washtenaw County in fact followed its procedures in conducting an investigation, as it claimed it was obligated to do in Eric Kuhn's case, with respect to the April Salley complaint when Washtenaw County refuses to provided the records relating to the investigation.

This incident may also be relevant for purposes of impeachment at trial. It would be very relevant if Undersheriff Ptaszek did not follow policy with respect to the investigation into the April Salley vehicle theft incident. Further, the Officer who was apparently the subject at the

investigation in the April Salley theft incident was also intimately involved in pursuing the investigation against Eric Kuhn and again, the results of this investigation may be relevant for impeachment of this officer as well.

II. ARGUMENT

Federal Rule of Civil Procedure 16 governs Scheduling Orders in a case. Motions to conduct discovery beyond the cutoff established in a Scheduling Order are governed under Federal Rule of Civil Procedure 16. Rule 16(b) provides that a Scheduling Order “shall not be modified except upon a showing of good cause and by leave of the district judge.” “The primary measure of Rule’s ‘good cause’ standard is the moving party’s diligence in attempting to meet the case management order’s requirements.” *Inge v Rock Financial Corporation*, 281 F.3d 613 (6th Cir 2002).

In deciding a moving party’s request for a modification of a scheduling order under Rule 16, including a request to extend discovery, a “Court must consider the moving party’s diligence in attempting to meet the requirements of the existing order, and the potential prejudice to the party opposing the change. *Cheatham v. Secretary of the United States Dep’t of Housing and Urban Development*, 2009 WL 1122035 (E.D. Mich. 2009)(see attached Exhibit 6), citing *Inge, supra*.

Counsel for Plaintiff has diligently complied with this Honorable Court’s Scheduling Order and had completed eight depositions prior to discovery cut-off. Plaintiff’s counsel’s discovery included developing information regarding other investigations, or lack thereof, in to allegations against officers in Sherriff’s Department. Further, the parties have exchanged thousands of pages of written documents and evidence.

Plaintiff was not able to take discovery on the issue of the investigation into the March 8, 2011 incident since counsel for Plaintiff only recently became aware of the incident

and that there had been an investigation. Allowing discovery in to this investigation will enable the trial in this matter to be conducted in a more efficient matter since counsel for Plaintiff will be able to obtain information regarding this investigation prior to trial rather than having to explore the background of this investigation at trial. This investigation is highly relevant to Plaintiff's claims since if discovery reveals that Washtenaw County did not properly conduct an investigation into the incident involving a citizen April Salley, when the allegation potentially implicated a white officer, this would be relevant to Plaintiff's claims. This is particularly so because Defendant Washtenaw County claims that Anuszkiewicz and Heren only pursued the investigation against Eric Kuhn because they were required by policy to do so. However, if the allegations against a white officer were essentially "swept under the rug" while an African-American officer, Eric Kuhn, was dragged through the coals because of baseless allegations this would support Plaintiff Eric Kuhn's claims that the prolonged investigation into Joseph's allegations was racially motivated.

Defendant will not be prejudiced by allowing discovery in to this limited issue since Plaintiff is not seeking to push back any other dates in this case. Further, the documents and evidence, including the video, which Plaintiff will be requesting should not be very voluminous. Further Plaintiff is only seeking to re-open depositions only in to this limited issue and it is anticipated that these depositions would be able to be completed in one day.

Granting Plaintiff the ability to undertake discovery into this limited issue will not impact this Honorable Court's Scheduling Order by pushing back any other dates, including the date for argument on the Motion for Summary Judgment, the Final Pretrial Conference and/or trial itself. **Plaintiff is not requesting an extension of any of these dates.**

WHEREFORE, Plaintiff Eric Kuhn requests this Honorable Court reopen discovery in this matter in order to allow counsel for Eric Kuhn to request documents and/or tangible items, including the video tape, relating to the investigation of the March 8, 2011 incident regarding the theft from April Salley's vehicle and to take depositions regarding this investigation including depositions of Undersheriff Ptaszek, Commander Dieter Herren, Brian Miller and/or any others involved in the investigation into this incident.

Respectfully submitted,

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Dated: September 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2011, I electronically filed the foregoing papers with the Clerk of the Court using the ECF System which will send notification of such filing for the following:

Attorneys for Defendant

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Respectfully submitted,

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