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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BRIAN P. CARR,

PLAINTIFF,

v.

State of Oregon, through **Hardy Myers** in his official capacity as Attorney General of the State of Oregon and the **City of Portland** through **Linda Meng** in her official capacity as City Attorney for the City of Portland**,**

DEFENDANTS.

Civil No. 08-398-HA

DEFENDANT CITY OF PORTLAND'S MEMORANDUM OF LAW IN SUPPORT OF RULE 12 MOTION TO DISMISS (FED R CIV P 12(B)(6)

INTRODUCTION

Plaintiff seeks declaratory relief and damages against the State of Oregon and the City of Portland[1] for alleged violations of plaintiff's constitutional rights. In addition, plaintiff asks this Court to seal the record of plaintiff's arrest on November 5, 2004. Defendant City of Portland

[1]With regard to the City of Portland, plaintiff states his claim as against "the City of Portland through Linda Meng in her official capacity as City Attorney of the City of Portland." No allegations are specifically directed against Ms. Meng, and this Memorandum will refer to the City defendant(s) singularly as "the City of Portland."

submits this Memorandum in support of its Motion to Dismiss Plaintiff's Complaint pursuant to Fed R Civ P 12(b)(6) for failure to state any claim upon which relief can be granted. It is apparent from the face of plaintiff's complaint that 1) under the Rooker-Feldman doctrine, the Court lacks jurisdiction over three of plaintiff's claims; 2) three of plaintiff's claims are also barred by *res judicata* (issue preclusion); 3) plaintiff's remaining claims are barred by the statute of limitations; and 4) plaintiff has not alleged the required elements of these remaining claims.

PRIOR RELATED LITIGATION

This action is preceded by a long trail of litigation brought by plaintiff in both Oregon and Washington and in both state and federal court. To date, plaintiff's legal arguments have been uniformly rejected by every court which has considered them. Those courts include the Multnomah County Circuit Court, the Oregon Court of Appeals, the Oregon Supreme Court (denial of review), the Clark County Washington Superior Court, the Washington Court of Appeals, the Washington Supreme Court (denial of review), and the United States District Court for the Western District of Washington.[2] For a detailed summary of plaintiff's prior litigation in Washington, please see the decision in Carr v. Reed, No. C07-5260RJB (USDC WD WA 2007) (order granting defendants' motions for summary judgment) at pp. 3-5. (Copy attached as Exhibit 1 to the accompanying Affidavit of Tracy Pool Reeve.)

At the root of plaintiff's action against defendants is an Order of Protection (domestic violence restraining order) issued on October 15, 2004 by a Clark County, Washington Superior Court judge.[3] This Order required plaintiff to stay more than 300 feet away from Karyn, plaintiff's former spouse. (Complaint, ¶¶ 32, 45.) Another Clark County Superior Court judge

[2] Plaintiff recites the history of much of this litigation in his complaint. For the Court's convenience, defendant City of Portland is submitting herewith (as exhibits to the June 3, 2008, Affidavit of Tracy Pool Reeve – "Reeve Aff.") true and correct copies of certain records from the prior decisions. The Court may take judicial notice of these public records without converting this motion to dismiss into a motion for summary judgment. See Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir 2001). This Court has previously taken judicial notice of such public records. AT&T Communications-East, Inc. v. BNSF Ry. Co., 2006 WL 3408035 (unpublished decision)(D.Or. 2006).

[3] A copy of this Order is attached as Ex. 2 to the Reeve Aff.

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extended the Order of Protection for a year from the date of the original order.[4] See Clark County Superior Court Case Nos. 04-2-08824-4 and 04-2-08908-9.

On November 5, 2004, Karyn called 911 from a location in Portland to report that plaintiff was violating the Order for Protection. Portland police responded to Karyn's call and arrested plaintiff for violating the order for protection. (Complaint, ¶ 61). The Multnomah County District Attorney's office did not bring charges against plaintiff. State v. Carr, Multnomah County Circuit Court Case No. 0601-30000. (Complaint, ¶ 3.) Plaintiff then moved to have the case sealed and the record of his arrest expunged. (Complaint, ¶¶ 2, 4.) However, the Multnomah County Circuit Court denied plaintiff's motion because Oregon law does not permit expungement of arrests for a civil restraining order violation. (Complaint, ¶ 4.) Plaintiff appealed to the Oregon Court of Appeals, which affirmed the Circuit Court without opinion on November 7, 2007. Id.[5] Plaintiff filed a Petition for Review in the Oregon Supreme Court, which was denied by Order dated March 5, 2008.[6]

Meanwhile, on May 10, 2005, plaintiff appealed the Order of Protection to Division II of the Court of Appeals of the State of Washington, and claimed (1) that the lower court had no cause to issue the order, (2) that court commissioners lack authority to issue protective orders, and (3) that his due process rights were violated. Carr v. Karyn, No. 32671-0-II / 32811-9-II, slip op. at 1 (Wash. App. 2006)[7]. On May 9, 2006, in an unpublished opinion, the Washington Court of Appeals affirmed the trial court's decision to issue the Order of Protection. Id. Plaintiff then appealed to the Washington Supreme Court, which denied his petition for review on January 31, 2007. Carr v. Huntting, 153 P.3d 196 (2007). (Complaint, ¶ 56.)

Undeterred, plaintiff filed the (previously referenced) lawsuit in the United States District

[4] A copy of this Order is attached as Ex. 3 to the Reeve Aff.
[5] A certified copy of the Court of Appeals AWOP decision is attached as Ex. 4 to the Reeve Aff.
[6] A certified copy of the Supreme Court's Order Denying Review is attached as Ex. 5 to the Reeve Aff.
[7] A certified copy of the Washington Court of Appeals' unpublished decision is attached as Ex. 6 to the Reeve Aff.

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Court for the Western District of Washington against the Clark County judges who issued the restraining orders, the Washington Court of Appeals judges who denied his appeal of the restraining orders, and justices of the Washington Supreme Court who denied his petition for review. Carr v. Reed, No. C07-5260RJB, slip op. at 6 (W.D. Wa 2007) (order granting defendants' motions for summary judgment) (Reeve Aff., Ex. 1). In that litigation, plaintiff again claimed that he had been denied due process and equal protection under the law. (Id.) In addition, plaintiff claimed that the Order of Protection was a blemish on his record that hurt his ability to gain employment. Complaint, Case No. C07-5260RJB, ¶ 6.[8] On November 5, 2007, the federal district court granted defendants' motion for summary judgment and dismissed plaintiff's action. See Reeve Aff., Ex. 1.

Plaintiff now seeks to collaterally attack the Order of Protection, the several court decisions supporting that order, and plaintiff's arrest for violating the order. As explained below, plaintiff's complaint fails to state a claim for which relief can be granted, for numerous reasons.

THE COMPLAINT

Plaintiff's complaint alleges that the State of Oregon and the City of Portland violated his rights under the Fourteenth Amendment, including alleged violations (under various headings) of the Equal Protection Clause and the Due Process Clause. (Complaint, ¶¶ 1, 15, 19, 36, 38, 44, 59, 64.)

Plaintiff's complaint in the instant case purports to state five "counts" for relief: Count I – Equal Protection, Absence of Any Crime; Count II – Equal Protection, Sexual Bias; Count III – Due Process, Inaccurate Records; Count IV – Due Process, No Evidence Considered, Criminal Order for Protection, No Jurisdiction for Restraining Order; and Count V – Damages, No Probable Cause. While it is difficult to tell who plaintiff is naming in each "count," three of plaintiff's claims appear to be directed at defendant City of Portland. First, the complaint states

[8] A true and correct copy of plaintiff's complaint in that case is attached as Ex. 7 to the Reeve Aff.

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(under "Count II") that defendant City of Portland "has shown a definite sexual bias in arrests made for violations of 'domestic violence' restraining orders . . . ." (Complaint, ¶ 19.) Second, the complaint states (under "Count III") that the City is liable for maintaining the arrest record which the Multnomah County Circuit Court has already ruled that plaintiff is not entitled to have expunged. (Complaint, ¶ 36.) Third, the complaint states (under "Count V") that the City of Portland arrested plaintiff without probable cause on November 5, 2004. (Complaint, ¶¶ 2, 61-64.) The remaining Counts I and IV do not appear directed at the City, but as discussed below, they are barred in any event as collateral attacks on 1) the decision of the Multnomah County Circuit Court refusing to expunge plaintiff's record (Count I); and 2) the decision of the Clark County Washington Superior Court upholding the validity of the restraining order (Count IV).

LEGAL ARGUMENT

I. STANDARD FOR MOTION TO DISMISS

The United States Supreme Court has recently clarified the standard for deciding a Rule 12(b)(6) motion challenging the adequacy of the pleading of a claim for relief. In Bell Atlantic v. Twombly, ___ *U.S.* ___127 S. Ct. 1955, 1969, 167 L. Ed. 929,(2007), the Court "retired" the oft-quoted language from Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Court explained that this phrase "has been questioned, criticized, and explained away long enough. . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard. . .." Bell Atlantic, 127 S. Ct. at 1969.

The Supreme Court held instead that:

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.

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127 S. Ct. at 1965 (citations omitted; brackets and interior punctuation added by Court). While *pro se* plaintiffs are given the benefit of doubt as to whether plaintiff has stated a claim for relief, McGuckin v. Smith, 974 F.2d 1050, 1055 (9th Cir. 1992), the court "may not supply essential elements of the claim not initially plead." Delaney v. Merri Souther-Wyatt, Civ. No. 00-35-AS, 2001 U.S. Dist. LEXIS 24808 (Dist. Or. Apr. 27, 2001), citing Pena v. Gardner, 976 F.2d 469 (9th Cir. 1992).

As set forth below, plaintiff has not adequately pleaded facts which, if proven, show "a right to relief above a speculative level." To the contrary, the facts plaintiff has pleaded affirmatively show that he is not entitled to relief and that the City's Rule 12(b)(6) motion to dismiss should be granted.

II. COUNTS I, III AND IV ARE BARRED BY THE ROOKER-FELDMAN DOCTRINE AND BY *RES JUDICATA*

Count I of plaintiff's complaint alleges that the Multnomah County Circuit Court's decision (affirmed by the Oregon Court of Appeals) that plaintiff was not entitled under ORS 137.225 to expungement of his arrest for violation of the restraining order "violates the equal protection under the law required by the Fourteenth Amendment of the United States Constitution." (Complaint, ¶ 17.)

Count III of the complaint alleges that the City of Portland is violating due process by maintaining the arrest record which the Multnomah County Circuit Court has already found not eligible for expungement, and seeks an order that the "record of the arrest . . . be sealed" by this Court. (Complaint, ¶ 36.) (Plaintiff acknowledges, however, that "the records are accurate in accordance with the conclusions of the state courts", id., ¶ 38).

Count IV of the complaint contains various theories as to why the Multnomah County Circuit Court's conclusion that the arrest record could not be sealed, and the Washington courts' conclusion that the restraining order was valid, should be revisited. (Complaint, ¶¶ 38-59.) In particular, plaintiff contends the Multnomah County Circuit Court erred in concluding that the

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arrest was for a civil violation and not a criminal offense (id. ¶¶ 39-41), and that the Washington courts (state and federal) erred in concluding that the restraining order was valid and that there was jurisdiction for its issuance. (Id. ¶¶ 45-59.)

Plaintiff's own complaint demonstrates that prior decisions of the Multnomah County Circuit Court, the Oregon Court of Appeals, the Clark County Washington Superior Court, the Washington Court of Appeals and the United States District Court for the Western District of Washington considered and rejected the claims raised in Counts I, III and IV of plaintiff's complaint. All of these "counts" are accordingly barred by both the Rooker-Feldman doctrine and *res judicata*.

A. The Rooker-Feldman Doctrine Bars Counts I, III and IV

The United States District court for the Western District of Washington has already applied the Rooker-Feldman doctrine to bar plaintiff's claims seeking to relitigate the decisions of the Washington state courts upholding the restraining order. That doctrine should also be applied here to bar the relitigation of those claims, as well as the relitigation of the claim that plaintiff was entitled to expungement of his arrest in Oregon for violation of the restraining order. As the Washington federal district court explained:

> The *Rooker-Feldman* doctrine takes its name from *Rooker v. Fidelity Trust Co*., 263 US 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 US (1983). Under *Rooker-Feldman*, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court; the United States Supreme Court is the only federal court with jurisdiction to hear such an appeal. *Rooker-Feldman* held that when a losing plaintiff in state court brings a suit in federal district court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks to vacate or set aside the judgment of that court, the federal suite is a forbidden de facto appeal. *Noel v. Hall*, 341 F3d 1148, 1158 (9th Cir. 2003). Any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision is also barred from consideration by the federal court. *Id*.
>
> Claims 1 through 6 in this case are attempts to invalidate decisions of the state courts by asserting as legal wrongs the allegedly erroneous rulings of the Clark County Superior Court, the Washington Court of Appeals, and the Washington Supreme Court.

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> Plaintiff contended in state court that the commissioners were without jurisdiction to issue and/or refuse to grant orders of protection because the number of commissioners exceeded the number of authorized by the Washington Constitution, that the orders were issued in violation of the procedures set forth in Chapter 26 RCW, that the trial court engaged in sexual stereotyping, and that he was denied the right to appeal the protective order. *See Carr v. Huntting*, 2006 WL 1233082,*3. Plaintiff now seeks, in claims 1 through 6, to have the federal court review and invalidate the state court orders, essentially asking the federal court to assume appellate jurisdiction over the state court decisions. Plaintiff's argument that he is not attempting to relitigate his dissolution proceedings is without merit. The claims raised in the amended complaint appear to be a transparent attempt to enlist the federal court in invalidating the orders issued in his domestic relations proceedings. Claims 1 through 6 against the state defendants are barred by the *Rooker-Feldman* doctrine.

(Reeve Aff., Ex. 1 at 7, line 20 to p. 8, line 15.)

Not content with the Washington federal district court's conclusion that his federal court claims against the restraining order, plaintiff now seeks yet another bite of the apple. In addition, plaintiff now seeks to challenge the decisions of the Oregon state courts regarding his lack of entitlement to expungement. Those claims, however, are also barred by the Rooker-Feldman doctrine. Accordingly, this Court lacks jurisdiction over Counts I, II and IV of plaintiff's complaint, and those counts must be dismissed.

B. Counts I, III and IV Are Also Barred by *Res Judicata*

As an alternative to its holding that plaintiff's claims challenging the validity of the restraining order were barred by the Rooker-Feldman doctrine, the Washington federal district court also found those claims to be barred by *res judicata.* (Reeve Aff., Ex. 1 at pp. 8-9.) That continues to be true as to the claims involving the validity of the restraining order. In addition, *res judicata* also bars plaintiff's claim here that he is entitled to have his arrest record "sealed." Plaintiff has already litigated the issue of his entitlement to have his record sealed or expunged, and that issue has been determined adversely to him by the Multnomah County Circuit Court (which decision has been affirmed by the Oregon Court of Appeals). (Complaint, ¶ 4.)

Federal courts must apply state law in determining the preclusive effect of state court

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judgments. Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir 2007). Under Washington law (as the Washington federal district court already found), plaintiff is precluded from relitigating the issue of the validity of the restraining order. Under Oregon law, plaintiff is precluded from relitigating the issue of his entitlement to have his arrest record sealed or expunged.

Under Washington law, "[f]or collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Christensen v. Grant County Hospital District No. 1, 152 Wash 2d 299, 307, 96 P2d 957 (2004). Here, a review of the Washington Court of Appeals' decision in Carr v. Hunting (Reeve Aff., Ex. 6) reveals that the Washington courts have already rejected the claims made by plaintiff concerning the validity of the Washington restraining order. (See Complaint, ¶¶ 45-59). Under Washington law, plaintiff is collaterally estopped from raising any claims stemming from the alleged invalidity of the Washington restraining order.

Under Oregon law, a plaintiff will be precluded from relitigating an issue where: 1) the issue in the prior proceeding was the same as the issue in the current proceeding; 2) the issue was actually litigated and was essential to a determination on the merits; 3) the party sought to be precluded had a full and fair opportunity to be heard; 4) the party sought to be precluded was a party to the prior proceeding; and 5) the prior proceeding was the type of proceeding to which the Oregon courts give preclusive effect. Barackman v. Anderson, 338 Or 365, 368, 109 P3d 370 (2005). Here, plaintiff brought an action in Multnomah County Circuit Court alleging a right to have his arrest record sealed or expunged. (Compliant, ¶ 4). The court determined that issue adversely to plaintiff. (Id.) The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review. (Reeve Aff., Exs. 4, 5). Thus, the elements for issue preclusion as to plaintiff's entitlement to have his arrest record sealed or expunged are all present – the issue of

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entitlement to expungement was litigated and was essential to the Circuit Court judgment. Plaintiff had a full and fair opportunity to be heard. Plaintiff was a party to the proceeding. And finally, circuit court judgments, affirmed by the Court of Appeals, are the type of decisions to which the Oregon courts give preclusive effect.

In sum, plaintiff has already litigated the issue of the validity of the restraining order in the Washington courts, and the issue of his entitlement to expungement or sealing of the arrest record in the Oregon courts. Those issues have been determined adversely to him, and they may not be relitigated in this proceeding. Because Counts I, II and IV are based on the invalidity of the restraining order and/or plaintiff's alleged entitlement to have his arrest record sealed or expunged, those counts are barred by *res judicata.*

III. COUNTS II AND V ARE BARRED BY THE STATUTE OF LIMITATIONS

Count II (Equal Protection, Sexual Bias) alleges that "Portland Police Bureau has shown a definite sexual bias in arrests made for violations of 'domestic violence' restraining orders." (Complaint, ¶ 19.) Count V alleges that plaintiff's arrest for violation of the restraining order was without probable cause. Id., ¶ 64. Both of these claims accrued if at all at the time plaintiff was arrested on November 5, 2004. (Complaint, ¶ 2.) Both are time barred by the applicable two-year statute of limitations.

Section 1983 claims are characterized as personal injury actions and the applicable statute of limitations is the general personal injury statute of limitations of the state where the alleged injury occurred. Davis v. Harvey, 789 F.2d 1332, 1333 (9th Cir. 1986), relying upon Wilson v. Garcia, 471 U.S. 261, 280 (1985). Oregon's two-year statute of limitations for personal injury actions applies to actions under 42 U.S.C. § 1983. ORS 12.110(1); Owens v. Okure, 488 U.S. 235, 236 (1985); Davis v. Harvey, 789 F.2d 1332, 1333 (9th Cir. 1986); and Cooper v. City of Ashland, 871 F.2d 104, 105 (9th Cir. 1989).

Oregon law requires a personal injury action to be commenced within two years. ORS 12.110(1). An action is deemed to have been commenced on the date the complaint is filed, if

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summons is served on the defendant within 60 days of filing the complaint. ORS 12.020(2). If plaintiff fails to serve his complaint within 60 days, it is deemed commenced as of the date of service. Baker v. Kennedy, 317 Or. 372, 375, 856 P.2d 314 (1993). If the statute of limitations runs before plaintiff perfects service, his action is barred by the statute of limitations. Id.

Plaintiff's § 1983 action is based on his arrest in November 2004. However, plaintiff did not file this action until March 2008. Thus, plaintiff's claims are time barred under Wallace v. Kato, 127 S.Ct. 1091, reh'g denied, 127 S.Ct. 2090 (2007) and Knox v. Davis, 260 F.3d 1009 (9th Cir. 2001) (plaintiff's action under 42 U.S.C. § 1983 accrues when plaintiff knows or has reason to know of the injury which serves as the basis of the action).

In Wallace, the Chicago police arrested Wallace for murder in January of 1994. Wallace was tried and convicted and pursued his criminal appeals. During the various appeals, it was held that the police officers had arrested Wallace without probable cause and also held that Wallace's illegal arrest had not been sufficiently attenuated to render his statements admissible. Eventually, on April 10, 2002, prosecutors dropped the charges against Wallace. Then, on April 2, 2003, Wallace filed his Section 1983 suit against the City of Chicago and several Chicago police officers. The District Court and the Seventh Circuit Court of Appeals both dismissed Wallace's Section 1983 claims as time-barred. Wallace then appealed to the United States Supreme Court.

In analyzing the timeliness of Wallace's Section 1983 claims, the Court carefully examined the "Heck v. Humphrey bar" and clearly rejected it. The United States Supreme Court outlined a rule that states:

> We hold that the statute of limitations upon a Section 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process."

Wallace at 23.

Applying the rule outlined in Wallace, plaintiff's Section 1983 claim accrued in November 2004, when he was arrested. However, plaintiff did not file his complaint until March 2008, well

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beyond the two-year limitations period for a Section 1983 action. Therefore, plaintiff's Section 1983 claims are time-barred and should be dismissed with prejudice.

IV. PLAINTIFF HAS NOT STATED A CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSE

Count II of plaintiff's complaint purports to state a claim for "Equal Protection, Sexual Bias." While courts have recognized a claim under Section 1983 for violation of Equal Protection based on sex discrimination, plaintiff has not stated such a claim here. "To make out such a claim, the plaintiff must prove that []he suffered purposeful or intentional discrimination on the basis of gender." Back v. Hastings on Hudson Union Free School District, 365 F 3d 107, 118 (2d Cir 2004). In order for a plaintiff to prevail on such a claim, he must show that he "was subject to discrimination 'because of [his] sex,'" – namely that "sex was a substantial factor in the discrimination and that if [he] had been a [fe]male, [he] would not have been treated in a similar manner." Hiester v. Rischer, 113 F.Supp 2d 742, 747 (ED PA 2000)(citation omitted).

Here, plaintiff cites a variety of national statistics and articles relating to domestic violence, and statistics alleging that, in the City of Portland, significantly more men than women are arrested for the violation of domestic violence restraining orders. (Compliant, ¶¶ 19-26). Plaintiff nowhere alleges, however, that *his* sex was a substantial factor in *his* arrest, nor does he allege that he would not have been arrested by the Portland Police if he were a similarly situated woman (*i.e.*, a woman who was the subject of a valid domestic violence restraining order and for whom the police had received a call for service indicating a violation of that restraining order). Absent such allegations, plaintiff would fail to state a claim even if his claim were not time barred on its face, which it is. Count II of plaintiff's complaint must be dismissed.

V. PLAINTIFF HAS NOT STATED A CLAIM FOR RELIEF UNDER THE DUE PROCESS CLAUSE

Count III of plaintiff's complaint purports to state a claim for "Due Process, Inaccurate Records." The Fourteenth Amendment to the Constitution of the Unites States prohibits states from depriving "any person of life, liberty, or property, without due process of law." As the

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Court explained in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Property or liberty interests are not defined by the Constitution. Id. Rather, property interests emanate from state law or some other independent source. Id. Where a plaintiff can establish some protected interest, the state must provide notice and opportunity for a hearing appropriate to the nature of the case. Id. at n. 7.

In Roth, the United States Supreme Court held that a teacher whose contract expired did not have a legitimate property or liberty interest in being rehired where he had not acquired contractual rights to continued employment, and nothing under state law granted him any right to a hearing regarding his employment status once his employment contract expired. Id. at 578.

More importantly to the present case, the Supreme Court has held that an allegation of diminution of reputation alone cannot serve as the basis for an equal protection claim. Paul v. Davis, 424 U.S. 693, 713 (1976). Specifically, the Court explained that a person has no property interest in her reputation. 424 U.S. at 711.

In Paul, plaintiff-respondent sought damages and injunctive relief against the Chief of Police of the City of Louisville, Kentucky, Division of Police, among others, after the police posted flyer of "active shoplifters", which included plaintiff-respondent's name and picture. Id. at 695. The flyer was handed out to approximately 800 businesses. Id. Before any determination of plaintiff-respondent's guilt or innocence, police added plaintiff-respondent to the "active shoplifters" flyer because he had been arrested in 1971 for shoplifting. Id. at 696. Subsequent to his arrest, the charges against plaintiff-respondent were dismissed by a Louisville Police Court judge. Id.

Plaintiff-respondent specifically alleged that his designation as an active shoplifter violated the Due Process Clause because, in part, the designation "would seriously impair his future

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employment opportunities." Id. at 697. The Court considered plaintiff's alleged harm to his future employment opportunities as harm to his reputation generally. Id.

The Court characterized plaintiff's claim as "a classical claim for defamation actionable in the courts of virtually every State." Id. As the Court explained, had plaintiff brought his claim against a private individual, plaintiff would only have a claim for defamation under state tort law. However, the Court dismissed the idea that plaintiff may invoke the protections of the Fourteenth Amendment simply by alleging tortuous activity by a government employee. Id. Rather, the Court cited cases where the plaintiff actually lost some kind of tangible benefit (government employment for example) to show that something more than defamation must be present to implicate the Due Process Clause of the Fourteenth Amendment. Id. at 702-703. See Goss v. Lopez, 419 U.S. 565 (1975) (where Ohio law established right to attend school, suspension and harm to student's reputation triggered procedural safeguards of the Fourteenth Amendment); Wieman v. Updegraff, 344 U.S. 183 (1952) (loss of state employment due to refusal to execute state loyalty oath triggers Fourteenth Amendment protection), Joint Anti-Fascist refugee Comm. v. McGrath, 341 U.S. 123 (government designation of organization as "Communist," where such designation could result in lost of tax exemption or government employment, triggered Fourteenth Amendment protection).

The Court in Paul also rejected the plaintiff's assertion that he had a constitutionally protected privacy interest in his arrest record. Id. at 713. Because the plaintiff could not demonstrate that the publication of the shoplifters list, or his arrest record, harmed any fundamental privacy right ("matters related to marriage, procreation, contraception, family relationships, child rearing and education"), the Court found that plaintiff's action had no foundation in the Constitution.

Plaintiff seems to make two factual allegations in support of claim that he has been denied a liberty or property interest. First, plaintiff implies that he has a constitutionally protected interest in his previously "blemish free" arrest record. (Complaint, ¶ 2.) Second, plaintiff claims

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his that "[t]he inaccurate Oregon criminal record has restricted [plaintiff's] ability to seek "alternative" employment." (Complaint, ¶ 5.) Emphasis added. Plaintiff's allegations of harm are nearly identical to those at issue in Paul, and like the plaintiff in Paul, plaintiff fails to state any facts that would support a due process claim. For example, plaintiff has not claimed (and cannot claim) that he actually suffered a deprivation of government employment due to his arrest record. Plaintiff has not alleged that he has actually been denied employment because of his arrest record. Rather, plaintiff has alleged that, should he seek other employment, his arrest record would deny him a competitive edge. As the Court explained in Davis, plaintiff's allegations of harm simply do not rise to the level of a constitutional violation. Consequently, plaintiff has not shown and cannot show that defendant City of Portland's maintenance of plaintiff's arrest record harms any constitutionally protected liberty or property interest

CONCLUSION

Counts I, II and IV of plaintiff's complaint are barred by the Rooker-Feldman doctrine and by *res judicata.* Counts III and V fail to state a claim for relief and are time barred on the face of plaintiff's complaint. Accordingly, all of plaintiff's claims fail to state a claim on which relief may be granted and should be dismissed, with prejudice. Fed R Civ P 12(b)(6).

Dated this 3rd day of June, 2008.

Respectfully submitted,

/s/ Tracy Pool Reeve

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