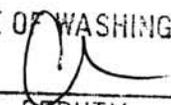


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 43865-8-II

BY 
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DOUGLAS MERINO and KAY MERINO, husband and wife, and the
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and ITS AGENCIES; THE
WASHINGTON STATE DEPARTMENT OF RETIREMENT
SYSTEMS; THE WASHINGTON STATE PATROL, and JOHN R.
BATISTE, Chief Thereof, and DAVID J. KARNITZ Deputy Chief
Thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The plaintiffs in this matter are Douglas Merino and his wife Kay Merino. Mr. Merino is a former State Trooper with the Washington State Patrol. Mr. Merino was on disability status with the State Patrol between February of 1994 and August of 2008. State Patrol officers on disability status are statutorily entitled to one-half wages so long as they remain disabled and employed by the State Patrol. In August of 2008 he was terminated for cause from the State Patrol.

Mr. Merino was terminated for violating State Patrol departmental policies. In 2005 and 2006, Mr. Merino attempted to defraud Farmers Insurance of \$60,000. Mr. Merino lied to insurance investigators on at least two occasions during the investigation of the claim. On January 28, 2008, Mr. Merino was convicted by a jury in Thurston County Superior Court of two felonies, Attempted Theft in the First Degree and Conspiracy to Commit Theft in the First Degree. Mr. Merino was an employee of the Washington State Patrol throughout the criminal investigation and trial.

Following an independent State Patrol investigation of the events that contributed to his criminal conviction, Mr. Merino was terminated from employment with the Washington State Patrol. Mr. Merino's employment was terminated for violations of the Rule of Conduct

8.00.010 for State Patrol officers by Chief John Batiste.¹ The termination of his employment led to the termination of ongoing State Patrol wages, regardless of his disability. Mr. Merino was no longer entitled to receive wages in any amount from the State Patrol.

Following his termination from the State Patrol, Mr. Merino and his spouse filed suit in Thurston County Superior Court against the State of Washington, the Washington State Patrol, the Department of Retirement Systems, State Patrol Chief Batiste and State Patrol Deputy Chief Karnitz.²

Plaintiffs and defendants filed cross-motions for summary judgment pursuant to CR 56. The Honorable W. Thomas McPhee denied the plaintiffs' motion and granted the defendants' summary judgment. The Merinos appeal the decision of the trial court granting defendants' motion and denying plaintiffs' CR 56 motion seeking to establish liability as a matter of law against the defendants.

¹ WSP Regulation 8.00.010(A) requires that State Patrol employees are required to obey the Rules of Conduct of the State Patrol. The portion of the policy quoted in the Notice of Discipline states that "1. The Washington State Patrol Rules of Conduct shall govern the official and unofficial actions of all employees. A violation of the Rules of Conduct may be sufficient cause for disciplinary action. 2. Employees shall obey all laws of the United States, of this state, and of local jurisdictions. 3. Employees shall not commit any acts or omissions which would constitute a violation of any of the rules, regulations, directives, orders, or policies of the state of Washington or the Washington State Patrol. Ignorance shall not be considered justification for any violation." CP at 137.

² Claims against Department of Retirement Systems were also dismissed pursuant to the defendants' CR 56 motion, but the plaintiffs have not challenged that ruling in their opening brief. Accordingly, the trial court's decision dismissing claims against DRS should be affirmed.

There is no legal basis to reverse these decisions. The statutory basis for providing wages to disabled State Patrol officers requires ongoing employment with the State Patrol. The State Patrol was obligated to terminate Mr. Merino's employment based upon his misconduct. Consequently, Mr. Merino's termination for cause from the State Patrol ended his entitlement to receive wages from the State Patrol and precludes any argument that wages paid to him while he was disabled had become a permanently vested right.

II. RESTATEMENT OF ISSUES

1. Does an officer receiving wage payments while disabled under RCW 43.43.040 have to remain an employee with the Washington State Patrol in order to receive wage payments?

2. Is Mr. Merino statutorily entitled to retain an employment relationship and the title of Washington State Patrol officer in spite of his admitted acts of moral turpitude and felony convictions for crimes of dishonesty?

3. Did Mr. Merino's wage payments vest under 43.43 RCW and become his estate at any point prior to his termination in August, 2008?

4. Did Mr. Merino's wage payments cease as a consequence of his termination for cause from employment as a Washington State Patrol officer?

III. STATEMENT OF FACTS

Mr. Merino joined the WSP in 1978 and actively served as a fully commissioned trooper until February 1994, when he was placed on job-related disability status as a result of neck and back injuries. CP at 172-73, 328-29.³ Merino was terminated from employment by WSP in August 2008 following his involvement with an insurance fraud scheme. CP at 137-45.

The consequences of failing to follow State Patrol policies and regulations while in disability status had been previously explained to Mr. Merino. CP at 212. In November of 1999 Mr. Merino and other State Patrol officers who were in disability status received a certified letter that asked them to acknowledge their ongoing obligation to comply with State Patrol regulations and policies. CP at 179, 212. Mr. Merino signed and returned this acknowledgment on November 6, 1999. CP at 212. The letter acknowledged that he understood that his "failure to comply with State Patrol policies and regulations could lead to the denial of his disability allowance." CP at 212.

³ Mr. Merino's disability did not prevent him from being employed as an Investigator II with the Department of Labor and Industries until 2008. CP at 318.

Despite having signed the 1999 letter regarding expectations while receiving disability compensation, in 2005 Mr. Merino became involved with an insurance fraud scheme. Mr. Merino and Jim Varner, who was a co-worker of Mr. Merino's at the Department of Labor and Industries, as well as being a former State Patrol officer himself, attempted to defraud Farmers Insurance Company of \$60,000. CP at 137-45. Mr. Merino ultimately admitted the fraud to law enforcement officers following the death of Jim Varner in early 2006. CP at 140.

Mr. Merino was criminally charged for these actions in Thurston County Superior Court. CP at 141. Mr. Merino was tried and convicted of two felonies, Attempted Theft in the First Degree and Conspiracy to Commit Theft in the First Degree, by a jury on January 28, 2008 in Thurston County Superior Court. CP at 141. Mr. Merino was terminated from the State Patrol following an internal investigation of the events that led to Mr. Merino's January 28, 2008 Thurston County convictions. CP at 137-45.

Chief John Batiste, with the assistance of Deputy Chief David Karnitz, terminated Mr. Merino's employment for violations of the Rule of Conduct 8.00.010 for State Patrol officers. CP at 137-45. Rule of Conduct 8.00.010 required that any State Patrol employee was required to follow directives, orders or policies of the State Patrol. CP at 137. Mr.

Merino's involvement in an insurance fraud scheme and dishonesty with investigators of that crime was a direct violation of the November 1999 letter directing Mr. Merino that he was required to continue to comply with departmental policies, including policies regarding "unbecoming conduct"⁴ and "truthfulness."⁵ CP at 141-42.

The State Patrol issued a Notice of Disciplinary Charges regarding Mr. Merino's termination on August 6, 2008. CP at 137-45. This document informed Mr. Merino that his termination was the consequence of a finding by a preponderance of evidence that he had been involved with a scheme to defraud Farmers Insurance for \$60,000 and in the course of that scheme, Mr. Merino had lied to insurance investigators, and had used a non-existent car as collateral for a loan from Washington State Employees Credit Union. CP at 141-42. Deputy Chief Karnitz wrote in Mr. Merino's Notice of Discipline that,

"I find you violated departmental policy and the appropriate sanction for your misconduct is termination. Your behavior as it relates to using falsified documents and fictitious collateral to obtain a loan, and more so, your pivotal role in the \$60,000.00 insurance scam amounts to gross breaches of integrity and violated WSP Rules of Conduct. Furthermore, your compounded lies on top of your deceitful actions in an attempt to escape the consequences of your actions is wholly unacceptable behavior." CP at 142.

⁴ Regulation 8.00.030.

⁵ Regulation 8.00.300.

Mr. Merino was represented by counsel in these proceedings. CP at 143-44. Merino received notice of these findings and failed to appear, appeal, or request a trial board to dispute the findings, as was his right. *Id.* Based upon his termination from employment, Mr. Merino's disability payments were stopped. CP at 229-30.

The State Patrol maintains a disability and retirement system wholly separate and distinct from any other disability or retirement system in the State. RCW 43.43.040. The statute specifically addresses disabilities suffered by State Patrol officers while those officers are on or available for active duty.⁶ Under the statutory scheme applicable to the State Patrol, a State Patrol officer who is injured or incapacitated while on duty, on standby, or available for duty remains a State Patrol employee on disability status, entitled to half-wages. RCW 43.43.040(2)(a). Thus, when Mr. Merino was terminated from the State Patrol due to his misconduct, he was no longer a State Patrol employee on disability status entitled to half of his wages.

The State Patrol's disability system was initially enacted in 1943 and allows for a maximum of six months of full pay and benefits for officers who are injured in the line of duty. RCW 43.43.040(1)(a). At the end of six months, the Chief of the Washington State Patrol must decide

⁶ The statute is broader than comparable statutes, and enables officers to receive disability for more than "line of duty" injuries.

whether to return the officer to active duty or to place that trooper on “disability status.” *Id.* While on disability status, an officer is entitled to one-half of their wage compensation. RCW 43.43.040(2)(a). The statute also specifically states that these officers are subject to “mental or physical examination at any state institution or otherwise under the direction of the chief of the patrol at any time during such relief from duty to ascertain whether or not they are able to resume active duty.” *Id.*

Mr. Merino was on disability status with the State Patrol at the time of his termination. CP at 8; CP at 230. He argues that despite his admitted violation of State Patrol policies and regulations, his conviction of multiple felonies for crimes of dishonesty, the specific finding by the State Patrol of his violation of the State Patrol Rules of Conduct, and his unambiguous acceptance of the terms of his disability allowance in November, 1999, he should have been nonetheless permitted to continue receiving wages from the State Patrol. The defendants respond that the plain language of 43.43 RCW prevents this from happening.

IV. PROCEDURAL POSTURE

On June 1, 2012, Judge Thomas McPhee of the Thurston County Superior Court granted partial summary judgment to the defendants on claims regarding retirement contributions and liability predicated upon alleged deprivation of rights under the Washington State Constitution. CP

at 304-05. The court deliberated on the remainder of the claims, issuing a written opinion on July 11, 2012, which denied the plaintiff's motion for summary judgment and granted the defendants' remaining motions for summary judgment. CP at 306-09. A final order dismissing all of the plaintiffs' claims with prejudice was signed on August 3, 2012 by Judge McPhee. CP at 310-11. The Merinos appeal these rulings.

V. LAW AND ARGUMENT

There is no substantial dispute over the standard of review or relevant legal authority for this matter. This matter entirely revolves around competing interpretations of the statutory authority for the Washington State Patrol. The standard of review is de novo, as this is a review of a dismissal as a matter of law. *Michak v. Trans. Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

The plaintiffs make three arguments in support of reversing the lower court's decision. They request that this court overturn that decision and find that the plaintiffs be granted judgment as a matter of law instead. *See* Plaintiffs' Appellate Brief at 16.

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These three arguments are:

- 1) That Chapter 43.43 RCW, regulations and WAC 446-40 require payment of one-half wages so long as a disability continues,
- 2) That Washington State case law interprets pension and disability compensation as being vested rights, and
- 3) That wages paid to a disabled employee cannot be stopped as a consequence of a criminal conviction without violating Article I, § 15 of the Washington State Constitution, Article I, § 15.

The lower court reviewed each of these issues and properly concluded that the plaintiff was not entitled to the reinstatement of his benefits based upon any of these arguments. That finding should be upheld by this court.

A. Half-Wages Under 43.43.040 RCW Are Available Only To Employees Of The Washington State Patrol

The Washington State Patrol was created by the Washington State Legislature in 1933. RCW 43.43.010. In 1943, the Legislature amended the State Patrol statute, adding a mechanism by which patrol officers who are injured while performing their official duties may be paid despite their disability. RCW 43.43.040. This independent State Patrol disability system has existed since that point with only slight modifications. It exists as an entirely separate entity from the disability and retirement system that

governs to the majority of law enforcement personnel in the State of Washington, the Law Enforcement Officer and Firefighters Retirement System (LEOFF). Chapter 41.26 RCW.

Recipients of State Patrol disability benefits under RCW 43.43.040 are specifically described as “officers on disability status.”⁷ The officer is relieved of their duties, but retains their status as an officer of the State Patrol. In fact, a State Patrol officer remains an officer until their death, resignation, suspension, demotion or discharge. RCW 43.43.050. This means that even in retirement, by statute, a State Patrol officer retains their rank and position. The same remains true while a State Patrol officer is on disability status. *Id.*

Consequently, the State Patrol, statutorily, retains an employment relationship with those who are on disability status. Contrast this with LEOFF, which classifies officers with disabilities lasting longer than six months as permanently retired and severs the employment relationship that existed between the former officer and their branch of law enforcement. RCW 41.26.120(2)-(4).⁸

⁷ Even in Mr. Merino’s termination notice on August 6, 2008, Mr. Merino was identified by the district and detachment that he was assigned to. CP at 137. This classification remained despite Merino having been inactive as a State Patrol officer for 14 years at the point he was terminated.

⁸ LEOFF does not classify recipients as officers, but rather reclassifies recipients as being members of LEOFF or being disability retired. RCW 41.26. LEOFF further distinguishes law enforcement employees as being a person who is commissioned on a

1. There Is No Statutory Authority For The Washington State Patrol To Retain Convicted Felon As State Patrol Officer

Mr. Merino did not lose his disability as a consequence of his felony conviction, as will be discussed *infra*, but his felony conviction does prevent his ongoing employment as a State Patrol officer. Since only “officers” may receive one-half of their wages while on disabled status, Mr. Merino’s termination from the State Patrol precludes him receiving officer wages of any amount.

RCW 43.43.040(2)(a) states that “officers on disability status shall receive one-half of their compensation at the existing wage.” The plain language of the statute establishes that remaining an officer is a condition precedent to receiving wages while on disability status. Based upon this statutory requirement, the State Patrol retains all officers on disability status as one-half of a full time employee position. CP at 229-30. The moneys paid to officers on disability status come directly from the Washington State Patrol agency operating budget, are wage payments, and are reported to the Federal Internal Revenue Service by the State of Washington on a W-2 wage statement form.⁹ CP at 229-30.

full time, fully compensated basis. RCW 41.26.030(13) and (18). The State Patrol system makes no such distinction.

⁹ Disability retirement payments under LEOFF, by contrast, are paid by the Department of Retirement Systems and are exempt from federal taxation. CP at 229-30. Mr. Merino received W-2 forms. CP at 287.

In order to retain eligibility to receive disability payments in the form of wages, a State Patrol officer must also retain their eligibility to be an officer. RCW 43.43.040(2)(a). The Chief of the State Patrol is conferred power to hire officers by RCW 43.43.020 and terminate officers by RCW 43.43.070. As the lower court stated,

“(t)he plain meaning of RCW 43.43.040 demonstrates that plaintiff’s contention is untenable. Nowhere in that statute or any other that can be read in conjunction with § .040(1) are rights granted to any person who is not an officer of WSP.” CP at 308.

This exposes the central flaw in the plaintiffs’ argument. Mr. Merino is indisputably no longer eligible to remain a State Patrol officer due to his felony convictions for a crime of dishonesty. RCW 43.43.020; RCW 43.101.095. Under the plain language of the statute, Mr. Merino is only entitled to disability status so long as he remains an officer, employed by the State Patrol. His request of this court would require the State Patrol to continue to classify him as a State Patrol officer, under RCW 43.43.050, despite the fact that he is a convicted felon, charged and convicted of a crime of dishonesty and having admitted lying to investigators of his crime. For obvious reasons this is repugnant to the State Patrol. It is also clearly contrary to statute and State Patrol Policy. RCW 43.43.020 and .050; RCW 43.101.095; State Patrol Rule of Conduct 8.00.010.

The continuing right to receive wages as a result of a disability from the State Patrol, therefore, derives from an officer's ongoing employment with the State Patrol, not from their ongoing disability. Mr. Merino's right to be on disability status ended based upon his termination for cause. Since the statute does not entitle non-officers to be classified as having disability status, Mr. Merino's disability benefits ceased.

2. The Exemption In RCW 43.43.040(c) Cited By Plaintiff Precluding Benefits to Officers Injured While In the Course of Criminal or Tortious Conduct Is Inapplicable To This Case and Does Not Preclude The State Patrol From Terminating Officers For Cause

Appellants do not accept that only officers may receive disability payments and argue that there is but one statutory exemption to receiving disability status which allows denial of the payment of half-wages to officers on disability status. They cite RCW 43.43.040(c) which addresses injuries to officers engaged in willfully tortious or criminal activities. The Merinos argue that the language of RCW 43.43.040(c) is the only limitation on the payment of wages under the statute. *See* Appellants' Brief at 6-7.

This argument is not germane to the case before the court. There is no argument that Mr. Merino was engaged in any felonious activity at the point his disability compensation began in 1994. That is why he remained on disability status for 14 years. His removal was based entirely on his

unbecoming conduct rendering him ineligible to remain a State Patrol officer. RCW 43.43.050; RCW 43.43.070. As RCW 43.43.040(2) clearly requires a State Patrol officer to remain employed with the State Patrol in order to be eligible to receive wages while disabled, RCW 43.43.040(c) has no applicability to the issues before the court.

3. The WAC Provisions Cited By The Merinos Do Not Preclude Termination Of An Employee On State Patrol Disability Status

The plaintiffs allege that the State Patrol WACs specifically limit the ability of the State Patrol to cease disability payments. The applicable WACs do not support this interpretation. Even if they did, that interpretation would not be permissible, as it would be incongruent with the relevant RCWs.

The plaintiffs point to WAC 446-40-050 as the sole method by which an individual on disability status can be removed from that status due to the language of WAC 446-40-030, which states “no member shall be placed in or removed from disability retirement status . . . except in accordance with this regulation.” *Id.* But WAC 446-40-030 and 050 are not simply about the removal of officers from disability status, as the plaintiffs suggest. The WACs address the removal of officers from disability status *to active status*. *See Id.* Mr. Merino was ineligible for active status due to his conduct.

Consequently, these WACs were not relevant to Mr. Merino's situation. The State Patrol was not attempting to reactivate Mr. Merino or otherwise change his status, they were terminating his employment altogether and severing all employment connections between the state and Mr. Merino. Mr. Merino was not entitled to any employment status with the State Patrol once he was terminated. The State Patrol terminated Mr. Merino out of his disability status. Neither the RCW nor the WAC prevents that action.

B. Mr. Merino's Disability Status Is Not A Vested Benefit

The plaintiffs justify asking this court to force the State Patrol to hire and pay wages to a convicted felon based upon the argument that Mr. Merino was the recipient of a vested disability benefit. It is clear from both case law and the plain language of 43.43 RCW that he was not receiving such a benefit, and that Mr. Merino, and all State Patrol officers on disability status, are recipients of a contingent benefit in the form of disability wages.

The plaintiffs argue that Washington State follows a general rule that "pension rights vest upon commencement of employment or when the pension statute becomes applicable to the employee." Appellants' Brief at 8. The case before the court, however, is not a pension case. It is a disability benefits case. Disability benefits do not vest automatically, but

rather are contractual in nature and require the statute authorizing the benefits to permit those benefits to become vested.¹⁰ See *Leonard v. City of Seattle*, 81 Wn.2d 479, 485-86, 503 P.2d 741 (1972).

The State Patrol statute does not authorize the vesting of disability compensation. First, as described *supra*, the recipient of the disability wages must be an officer. The statute is clear that the compensation is contingent on it being received by an officer. Second, the statute is clear that any State Patrol officer on disability status may have their status changed by decision of the Chief of the State Patrol. RCW 43.43.040(2)(a). This means that the benefit itself has a mechanism for its cessation. If the benefit vested, no such mechanism could exist, as the benefit would be received regardless of status change.

The plaintiffs rely on a succession of cases in which disability benefits vest in other disability plans. These cases do not apply to this situation, as these disability plans are clearly distinguishable from the State Patrol's plan, and the holdings of these cases indisputably apply only to other disability plans, most often LEOFF.

¹⁰ Unlike disability compensation, retirement pension benefits are vested. *Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972); *Tembruell v. City of Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964). The plaintiff originally argued that his retirement and disability had been cancelled, but the plaintiff makes no continuing argument regarding retirement benefits, presumably due to the fact that his retirement benefits were never cancelled, but rather ended as a consequence of Mr. Merino's personal withdrawal of all of his remaining WSP retirement funds on November 24, 2009. See CP at 179.

LEOFF is quite different from the State Patrol's system. LEOFF's provision for retirement for disabilities incurred in the line of duty describes a system in which an employee injured in the line of duty is granted a "disability leave." RCW 41.26.120. That disability leave is transformed into a disability retirement if six months elapses without the ability to return to duty.¹¹ RCW 41.26.120(2)-(4).

Significantly, an officer who is disability retired through LEOFF is no longer an employee of the law enforcement organization they became disabled in. They are, for all intents and purposes, retired state employees, who receive payments from the Department of Retirement Systems and are under no ongoing terms and conditions of employment. The State Patrol's system, by contrast, explicitly and by statute, retains an employment relationship, both by describing the disability status payments made under RCW 43.43.040 as "wages" and through the terms of RCW 43.43.050, which states that, by statute, a State Patrol officer remains an officer until their death, resignation, suspension, demotion or discharge.

¹¹ The six month period can be waived at the outset if the disability is anticipated to last six months or longer. RCW 41.26.120(4). This is a further distinction from the State Patrol system, which permits full officer pay for the first six months regardless of circumstance. RCW 43.43.040(1)(a).

Consequently, while the plaintiffs refer to a number of cases which opine on vested benefits, all of those cases examine LEOFF or predecessors of the LEOFF statute.¹² The plaintiffs cannot point to a single case that interprets the State Patrol disability system as conferring a vested benefit.

This absence of authority is significant in light of *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 672, 929 P.2d 510 (1997), *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997). Unlike the authority cited by the plaintiff, *Callecod* actually does interpret 43.43.040. The lower court properly recognized the applicability of *Callecod* to this matter in its own opinion. CP at 308. Despite being the only case to interpret the relevant statute, and despite the prominence of its holding in the decision of the lower court to rule in favor of the defendants, *Callecod* is ignored in the plaintiffs' appeal brief and is dismissed as inapplicable in the plaintiffs' materials submitted to the Superior Court.

¹² *Newlun v. Dep't of Retirement Sys.*, 53 Wn. App. 809, 770 P.2d 1071 (1989) and *Knudson v. City of Ellensburg*, 832 F.2d 1142 (9th Cir. 1987) are both interpretations of LEOFF. *Johnson v. Funkhouser*, 52 Wn.2d 370, 325 P.2d 297 (1958), and *Tembruell v. City of Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964) are interpretations of one of the statutory precedents to LEOFF, "Police Relief and Pensions in First Class Cities," 41.20 RCW. *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) predates 41.20 RCW, and interprets Rem.Comp.Stat. §§ 9579-9592.

Callecod specifically refutes the plaintiffs' position in this case. The plaintiffs' entire argument in favor of a vested disability benefit right under 43.43 RCW is dependent upon the application of principals only found in LEOFF cases. *Callecod* specifically holds that LEOFF cases cannot be used by analogy to interpret the Washington State Patrol's disability system. As stated by Division One in *Callecod*,

“(t)he Washington State Patrol’s disability requirements are governed by an exclusive statute and regulations that are not tied by analogy or otherwise to the LEOFF system or to any earlier Washington police disability retirement statute.”

Callecod at 672.

The holding of *Callecod* means that the plaintiffs' attempt to overlay the holdings of *Knudson v Ellensburg*, *Johnson v. Funkhouser*, *Tembruell v. City of Seattle*, *Bakenhus v. City of Seattle*, or *Newlun v. Dep't of Retirement Sys.* are specifically prevented by law.

The plaintiffs cannot rely upon the logic of LEOFF or other statutes to read a vesting requirement into the statute. Because of the fundamental difference between WSP disability status (employment) and LEOFF (disability retirement), the plaintiffs can offer no legitimate argument that the decision of the lower court was erroneous. The lower court properly recognized the importance of *Callecod* in holding that *Callecod* “specifically rejected (a previous) attempt to analogize LEOFF

case law to a WSP disability determination.” CP at 308 citing to *Callegod* at 672. The dismissal of the plaintiffs’ claims should be upheld.

C. The Plaintiffs Suffered No Forfeiture Of Estate Because of Mr. Merino’s Felony Conviction

Article I §15 of the Washington State Constitution states that no criminal conviction can cause the forfeiture of estate. To the extent that Mr. Merino premises his claim for damages on the Washington State Constitution¹³, he cannot identify an estate forfeited by his conviction. There are two reasons for this. First, the compensation in question is not an estate because the benefit was not vested. Second, even if the benefit were considered an estate, it was not lost due to Mr. Merino’s felony conviction, but rather to his dishonorable behavior which led to his termination from employment.

1. Mr. Merino’s Benefit Was Not An “Estate”

The plaintiffs cite *Tembruell* and *Leonard* as supporting their position that revocation of disability payments because of a felony conviction is unconstitutional. The question before the court does not involve a retirement pension, however, as it did in *Tembruell* and

¹³ Washington State does not have a civil rights act akin to 42 U.S.C. § 1983, and alleged violations of the State Constitution are not independently actionable torts. *Reid v. Pierce County*, 136 Wn.2d 195, 213, 961 P.2d 333 (1998); *Spurrell v. Bloch*, 40 Wn. App. 854, 701 P.2d 529 (1985); *Sys. Amusement, Inc. v. State*, 7 Wn. App. 516, 500 P.2d 1253 (1972). Accordingly, claimed violations of the State constitution do not state a viable cause of action and should be dismissed as a matter of law.

Leonard.¹⁴ The compensation in question is Mr. Merino's disability wage payment. Because it was not vested, Mr. Merino had no estate interest in the compensation. Consequently, no estate was forfeited by conviction.

The court in *Leonard* specifically focused on the time and manner of vesting of the benefit in determining that the plaintiff had an actual estate which could be forfeited. It further accepted that the relationship between the recipient and payer of a pension is contractual in nature. *Leonard* at 485-86. Once conditions are met, the right has fully ripened and is the property of the employee. *Id.* at 486.

Thus, the question, once more, is whether this disability compensation was a vested right. As discussed, *supra*, that question cannot be answered by reference or analogy to LEOFF cases and the rights conferred by that statute, or other disability statutes. *See Callecod*. The answer must be found within the framework of the State Patrol statute. The entitlement to disability benefits in RCW 43.43.040 is contingent on being a State Patrol officer and can be ceased by the Chief of the State Patrol. Both of these features render the right contingent and not vested.

¹⁴ Mr. Merino did not lose his retirement to his felony conviction; he lost his retirement to his having withdrawn all the funds from his retirement account. As proven by the date that the funds were removed, Mr. Merino had retirement funds from his time working for the WSP well after his termination and those funds were not affected by his termination.

2. Mr. Merino Lost No Benefit As Result Of His Felony Conviction

Even were the Court to find that the disability compensation conferred in this case was vested, the plaintiffs cannot demonstrate that the wage payment was lost due to a felony conviction. As was made clear in the statutory discipline process, Mr. Merino's employment was terminated based upon the conduct that led to the conviction, not the conviction itself. As Deputy Chief Karnitz wrote in the notice of termination,

"I find you violated departmental policy and the appropriate sanction for your misconduct is termination. Your behavior as it relates to using falsified documents and fictitious collateral to obtain a loan, and more so, your pivotal role in the \$60,000.00 insurance scam amounts to gross breaches of integrity and violated WSP Rules of Conduct. Furthermore, your compounded lies on top of your deceitful actions in an attempt to escape the consequences of your actions is wholly unacceptable behavior." CP at 142.

Mr. Merino received notice of these findings and failed to appear, appeal, or request a trial board to dispute the findings, as was his right. CP at 143-44. Consequently it was Mr. Merino's violation of departmental rules, gravely unbecoming conduct, and failure to appeal or dispute the findings of the department that led to his termination, and proximately led to the cessation of his disability compensation, not the criminal conviction itself.

Moreover, it is undisputed that the compensation itself did not cease at the point of Mr. Merino's conviction in January, 2008. Rather, Mr. Merino's wage payments continued through the process of an investigation and hearing conducted by the State Patrol. This meant that Mr. Merino's employment was not officially terminated until August of 2008, and his disability wages did not end until August 13, 2008. CP at 234-36.

This alone prevents the plaintiff from establishing that his disability compensation was lost due to his felony conviction. There is no factual connection between his conviction and the termination of his compensation. Because there is no evidence that the felony conviction directly led to Mr. Merino's compensation being cancelled, the ruling of the lower court is appropriate and should be upheld.

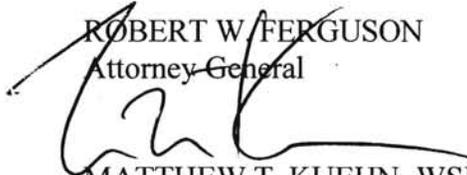
VI. CONCLUSION

The Thurston County Superior Court properly granted summary judgment in favor of the Washington State Patrol based upon the fact that under Chapter 43.43 RCW Mr. Merino was receiving disability wages that were contingent upon his compliance with rules requiring, *inter alia*, continuing ethical and truthful conduct. Mr. Merino had no right to

continue to receive those wages once his employment was properly terminated. The order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of January, 2013.

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PROOF OF SERVICE

I certify that I had served a copy of the Brief of Respondents on appellant's counsel of record on the date below by having it served by ABC Legal Messengers on the office of:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of January, 2012, at Tacoma, Washington.



CORIE SKAU, Legal Assistant

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