

COURT OF APPEALS
DIVISION II

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No.36722-0-II

STATE OF WASHINGTON
BY _____



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CALHOUN, Plaintiff/Appellant;

v.

STATE OF WASHINGTON, Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
PIERCE COUNTY

The Honorable Vicki L. Hogan

06-2-09956-2

OPENING BRIEF OF APPELLANT CALHOUN

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

 1. Assignments of Error 1

 2. Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 1

C. SUMMARY OF ARGUMENT 3

D. ARGUMENT 4

 1. Summary Judgment Must Not Be Granted When Genuine Issues Of Material Fact Exist 4

 2. Appellant Was An Employee Under RCW 49.60 5

 3. Appellant Was A Vulnerable Adult Under RCW 74.34 9

 4. Appellant Was A Whistleblower Under RCW 74.34 13

E. CONCLUSION 14

TABLE OF AUTHORITIES

Cases	Page
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001)	5
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001)	10
<i>Corbally v. Kennewick School Dist.</i> , 94 Wn.App. 736, 937 P.2d 1074 (1999)	5
<i>Davis v. Balson</i> , 461 F.Supp. 842 (N.D.Ohio 1978)	8
<i>Drinkwitz, v. Alliant Techsystems</i> , 140 Wn.2d 291, 996 P.2d 582 (2000)	8
<i>Goldberg v. Whitaker House Cooperative, Inc.</i> , 366 U.S. 28, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961)	7
<i>Havens v. C&D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)	5
<i>Icicle Seafoods, Inc. v. Worthington</i> , 475 U.S. 709, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986)	7
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002)	10
<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006)	10
<i>Macsga v. Spokane County</i> , 97 Wn. App. 435, 983 P.2d 1167 (1999)	8
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004)	10

<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787(2000)	5
<i>Souder v. Brennan</i> , 367 F. Supp. 808 (D.D.C. 1973)	8-10
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	10
<i>Tift Profl v. Nursing Servs., Inc.</i> , 76 Wn. App. 577, 886 P.2d 1158 (1995)	6
<i>Weidenfeller v. Kidulis</i> , 380 F.Supp. 445 (E.D.Wis. 1974)	8
<i>Wyatt v. Stickney</i> , 344 F.Supp. 387 (M.D.Ala. 1972)	8

Statutes

RCW 11.88	11
RCW 18 et seq.	14
RCW 18.20	11
RCW 18.51	11
RCW 26.44	12
RCW 4.24.500	14, 15
RCW 4.24.510	14
RCW 4.24.520	14
RCW 49.60	1, 3-7, 14, 15
RCW 49.60.030	6
RCW 70.124	12
RCW 70.127	11

RCW 70.128	11
RCW 71.09	1
RCW 71A.10.020	11
RCW 71A.20	11
RCW 72.36	11
RCW 74.34	1, 3, 4, 11-14
RCW 74.34.005	12
RCW 74.34.020	11, 13
RCW 74.34.180	14
RCW 74.34.200	10

A. ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred when it granted Respondent's motion for summary judgment on July 27, 2007, and ruled that RCW 49.60 and RCW 74.34 do not apply to SCC.

2. Issues Pertaining to Assignments of Error.

1. Is a resident of a state operated mental health facility an employee for the purposes of Title 49?

2. Is a resident of a state operated mental health facility a vulnerable adult as defined by RCW 74.34?

3. Is Appellant a whistleblower as defined under RCW 74.34?

B. STATEMENT OF THE CASE

Appellant has been a continuous resident of the Special Commitment Center (SCC) since July 17, 2002. Appellant is a pre-trial detainee under RCW 71.09 and has not been civilly committed. SCC is a treatment facility operated by the Department of Health and Social Services (DSHS). CP 385 and 592.

On or about June, 2004, Appellant started working for the SCC maintenance department under the supervision of William Hutterman and others. CP 386. On September 15, 2004, Mr. Hutterman mentally and

physically abused Appellant in the course of performing his job with SCC. Such abuse was motivated by Appellant's race and color. CP 196-97, 386-88 and 390.

Appellant filed a complaint about the abuse with the Human Rights Commission and with Mr. Hutterman's supervisors (DSHS/SCC). Appellant further requested that SCC refer the incident to local law enforcement as required by the rules and regulations governing SCC and DSHS. CP 390 and 393. This referral apparently was never done. CP 196 and 197.

As a result of his complaints, Appellant received two job demotions and lost three jobs in less than six months. Each new job assignment had fewer hours and more difficult work conditions until finally he was terminated entirely from any job position at SCC. CP 389-396.

In addition to retaliation in the workplace, Appellant has endured other forms of retaliation, discrimination, harassment and abuse arising from his complaints against Mr. Hutterman and SCC. CP 392, 393, 399 - 407. These forms of retaliation included cell searches, disciplinary proceedings, forced relocation and solitary confinement. *Id.*

Appellant alleged a cause of action as a vulnerable adult and whistleblower under Chapters RCW 74.34. CP 34-38 and 43-44 He also brought a cause of action under RCW 49.60 for discrimination in the work place. CP 36-39 and 43-44.

Appellee State of Washington brought a motion for summary judgment seeking to dismiss the entire complaint even though they admit in their motion that the incident which was the basis of the complaint actually occurred. CP 196 and 197.

Appellees assert that Appellant was not an employee under RCW 49.60. CP 129 and 130. This assertion is based on the theory that all the jobs offered by SCC are a component of the overall training program, which is a part of the total therapeutic program at SCC. CP 592. However, this assertion is based on facts which are in dispute.

Appellants contend that the only jobs that are available to residents at SCC are institutional jobs that could be done by state employees. CP 409 and 411. Such jobs are menial, institutional need jobs such as cleaning restrooms, sweeping sidewalks, picking up garbage and cigarette butts, working in the kitchen, and stripping and waxing floors. *Id.* There are no classes or positions which would allow the residents to obtain skills to qualify them for employment upon their release from SCC. CP 409-

411 Additionally there are no programs to help them locate jobs upon their release. CP 411-12. The economic reality at SCC is that is no vocational training program at SCC. CP 408-412

The State further argued that the RCW 74.34, the vulnerable adult statute, does apply to the Special Commitment Center. CP 131-133. However this argument is actually opposite the express language of SCC Policy 140 which applies the provisions of RCW 74.34 to SCC. CP 220-227.

Here there is no factual dispute that an employee of SCC verbally and physically abused Appellant on the basis of his race and color. In spite of this admission, Appellees essentially assert that there is no legal basis under the law upon which relief can be granted to Appellant and that the complaint should be dismissed with prejudice as a matter of law. CP 117-139.

The trial court then signed an order on July 27, 2007, granting Respondent's motion for a summary judgment. The court held as a matter of law that the RCW 49.60 and RCW 74.34 do not apply to SCC. CP 674-676.

C. SUMMARY OF ARGUMENT

This case presents several issues of first impression in the State of Washington. First, whether Mr. Calhoun was an employee covered under RCW 49.60. Next, whether he was a vulnerable adult and a whistleblower under RCW 74.34. Finally, whether RCW 49.60 and RCW 74.34 were intended for Appellant's protection and without these statutes, Mr. Calhoun has no protection from racially motivated abuse and harassment which he has received as an employee and a resident at SCC.

D. ARGUMENT

1. Summary Judgment Must Not Be Granted When Genuine Issues Of Material Fact Exist.

Summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact and the moving party is entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). "When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787(2000). When reasonable minds could reach but one conclusion regarding the claims of disputed facts, such questions may be determined as a matter of law. *Corbally v. Kennewick School Dist.*, 94 Wn.App. 736, 740, 937 P.2d

1074 (1999). "All questions of law are reviewed de novo." *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

2. Appellant Was An Employee Under RCW 49.60.

Appellee argued in the motion for summary judgment that Mr. Calhoun was not an employee of the state of Washington, for the purposes of RCW 49.60. This simply is not true because Mr. Calhoun is performing a role which can be performed by any state employee.

In an employment context, the nature of an employee-employer relationship "is a is not simply a factual inference drawn from historical facts, but more accurately, is a legal conclusion based on factual inferences drawn from historical facts." *Tift Profl v. Nursing Servs., Inc.*, 76 Wn. App. 577, 582, 886 P.2d 1158 (1995). As such, this issue must be reviewed de novo.

RCW 49.60.030 provides in pertinent part:

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination; . . .

To determine whether an employer-employee relationship exists under RCW 49.60 between a treatment facility, such as SCC, and a patient-employee, such as Appellant, is a factual issue, requiring examination of the alleged vocational programs including the job skills and length of training. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-14, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986). This examination in a Fair Labor Standards Act, 29 U.S.C. §201 Et seq. (“FLSA”) is called the economic reality test. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961). This test examines the employment relationship in terms of economic reality, rather than technical terms.

Although the State of Washington claims that jobs available for the residents at SCC are part of an overall training program which is part of the total therapeutic treatment program, the economic reality at SCC is that is no vocational training program. The only jobs that are available to residents at SCC are institutional jobs that could be done by state employees. Courts have recognized this argument for what it can be – a means to get cheap labor.

The fallacy of the argument that the work of patient-worker is therapeutic can be seen in extension to its logical extreme, for the work of most people, inside and out of institutions, is therapeutic in the sense that it provides a sense of accomplishment, something

to occupy the time, and a means to earn one's way. Yet that can hardly mean that employers should pay workers less for what they produce for them.

Souder v. Brennan, 367 F. Supp. 808, 813 fn. 21 (D.D.C. 1973).¹

Cleaning toilets and picking up cigarette butts is not vocational training.

In the federal courts in the context of the FLSA, hospital patient workers have been found to be employees. See e.g. *Souder v. Brennan*, 367 F. Supp. 808 (patients at state mental health facility); *Wyatt v. Stickney*, 344 F.Supp. 387, 402 (M.D.Ala. 1972) (patients at mental hospitals and students at a school for the mentally handicapped); *Weidenfeller v. Kidulis*, 380 F.Supp. 445 (E.D.Wis. 1974) (patients at private mental health facility); *Davis v. Balson*, 461 F.Supp. 842 (N.D.Ohio 1978) (patients in hospital for criminally insane).

The three plaintiffs in Souder's class action were patients in mental hospitals. They performed work that non-patients could perform. The defendants claimed their work, like here, was therapeutic. After

¹"The FLSA is persuasive authority because the [Minimum Wage Act] is based on the FLSA." *Drinkwitz, v. Alliant Techsystems*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). Federal law also provides guidance in cases invoking RCW 49.60. See *MacSuga v. Spokane County*, 97 Wn. App. 435, 983 P.2d 1167 (1999). Because our Courts have not examined the relationship between patient-employees and treatment facility employers, it is helpful to examine the federal cases which have looked at this issue.

consideration, the Souder Court developed a test to establish whether or not this special relationship exists. This test required the Dept. of Labor to examine the following facts.

1. The tasks performed by the patient are part of a program of activities which have been determined, as a matter of medical judgment, to have therapeutic or rehabilitative value in the treatment of the patient, and
2. The patient does not displace a regular employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the hospital or institution or an independent contractor, including, for example, employees of a contractor operating the food service facilities.

Id. at 815.

Clearly, this is a fact specific inquiry requiring close examination of the nature of the relationship including whether or not a job picking up cigarette butts is specifically therapeutic to the individual in question and whether or not that job would originally be performed by the maintenance crew. It is important to note that the Souder Court also used a rebuttable presumption to limit the length of time a job may be considered to have therapeutic or rehabilitative value.

As a general guide, work for a particular employer, whether the hospital, institution, or another establishment, after 3 months will be assumed by the Wage and Hour and Public Contracts Divisions to be part of an employment relationship unless the employer can show the contrary.

Id. at 816.

Given the foregoing, there is clearly a factual dispute as to the nature of the duties for which Mr. Callahan was participating. Since there are genuine issues of material fact as to the nature of the patient-employee relationship, this would preclude a summary judgment on this claim.

3. Appellant Was A Vulnerable Adult Under RCW 74.34.

Mr. Calhoun also alleged he was a vulnerable adult in accordance with and as such, had a cause of action under RCW 74.34.200. CP 12-13. Appellee State of Washington disputed this assertion and the trial court agreed. This decision was incorrect.

Courts must follow the plain meaning of the statute, whenever possible. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Courts should never render parts of the statute "meaningless or superfluous." *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). "Plain language does not require construction." *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006). Statutory interpretation is a question of law reviewed de novo. *Philippides v. Bernard*, 151 Wn.2d 376, 383, 88 P.3d 939 (2004).

Examination of the statutes in question show that the decision below was incorrect. RCW 74.34.020 provides the following pertinent definitions:

(4) "Department" means the department of social and health services.

...

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed by the department.

...

(15) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider.

If SCC is a facility under RCW 74.34.020(5), then Appellant is a vulnerable adult under RCW 74.34.020(15)(d). SCC is operated by DSHS and SCC is an department of DSHS. In essence, no license would be

required as SCC is an agency of DSHS. It would be redundant to require DSHS to license itself. Failure of SCC to have a license from DSHS does not preclude application of the statute to the SCC especially when you consider RCW 74.34.005(1) which provides "some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult." SCC is the care provider for the residents.

The notes to RCW 74.34.005 state as follows:

Findings -- Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters 26.44, 70.124, and 74.34 RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

RCW 70.124 concerns abuse of residents in state mental hospitals run by DSHS. If RCW 74.34 is intended to apply to the state mental hospitals operated by DSHS, then it should apply to SCC which is operated by DSHS for sexually violent predators who by definition have a mental

problem which requires them to be segregated from the public and the mental patients at the state mental hospitals.

DSHS believes RCW 74.34 applies to SCC as the department adopted SCC Policy 140 which specifically references the definitions under RCW 74.34.020 and makes the provisions of the statute applicable to SCC.

In light of the statutory intent, there is no legal basis for the assertion that RCW 74.34 does not apply to Appellant, a resident of SCC, and summary judgment should have been denied on this issue.

The State of Washington in their motion for summary judgment concedes that SCC was subject to SCC Policy 140. They even list the extent to which the staff members went to protect the Appellant. The staff members at SCC were mandatory reporters under the statute and the policy. However, the staff members of SCC refused to follow RCW 74.34 and SCC Policy 140 and refer Mr. Hutterman to the Washington State Patrol for a determination as to whether or not a crime had been committed.

Appellant is still suffering repercussions from Mr. Hutterman's racist conduct. The harassment and intimidation of Appellant is continuing to the present day. The State of Washington is still refusing to

comply with RCW 74.34 and the regulations and policy directives of SCC. Once the physical and verbal abuse of Appellant was substantiated, the employees of SCC were required to refer the matter to the Washington State Patrol to investigate whether a crime was committed. Instead they chose to cover up the racist and criminal conduct. This was a breach of RCW 74.34 and SCC Policy 140 and a violation of their duty to Appellant as a vulnerable adult. The trial court should not have granted the State of Washington's motion on this issue as a matter of law.

4. Appellant Was A Whistleblower Under RCW 74.34.

RCW 74.34.180 provides in pertinent part:

(1) An employee or contractor who is a whistleblower and who as a result of being a whistleblower has been subjected to workplace reprisal or retaliatory action, has the remedies provided under chapter 49.60 RCW. RCW 4.24.500 through 4.24.520, providing certain protection to persons who communicate to government agencies, apply to complaints made under this section...;

(3) For the purposes of this section:

(a) "Whistleblower" means a resident or a person with a mandatory duty to report under this chapter, or any person licensed under Title 18 RCW, who in good faith reports alleged abandonment, abuse, financial exploitation, or neglect to the department, or the department of health, or to a law enforcement agency; (emphasis added)

The use of the word resident means that the protections extended to whistleblowers by RCW 74.34 extends to individuals who are admitted to

the facility as well as the staff. Notice that paragraph extends protection under RCW 49.60 and RCW 4.24.500 to the residents as well. This is further support for the proposition that RCW 49.60 applies to Appellant.

Again this issue is closely tied to the issue of whether or not Appellant was an employee of SCC for purposes of RCW 74.34. As such it is a factual issue and cannot be the basis for a summary judgment.

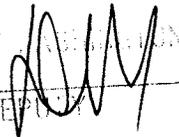
E. CONCLUSION

For the reasons set forth above, Appellant, Rickey Calhoun, respectfully asks this Court to vacate the order of summary judgment entered by the trial court and remand this matter to the trial court for a determination on the merits.

DATED this 12th day of December, 2007.

Respectfully submitted,


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No.36722-0-II

PROOF OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on December 12, 2007, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

- 1. OPENING BRIEF

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