

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

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

REPLY BRIEF OF APPELLANT CALHOUN

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ORIGINAL

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ARGUMENT 1

 1. Appellant Was An Employee Under RCW 49.60 1

 2. Appellant Was A Vulnerable Adult Under RCW 74.34 3

 3. Appellant Was A Whistleblower Under RCW 74.34 6

C. CONCLUSION 6

TABLE OF AUTHORITIES

Cases	Page
<i>Hydrick v. Hunter</i> , 449 F.3d 978 (9 th Cir. 2006)	2
<i>Miller v. Dukakis</i> , 961 F.2d 7 (1 st Cir. 1992)	1, 2
<i>Sharp v. Weston</i> , 233 F.3d 1166 (9 th Cir. 2000)	2
<i>Souder v. Brennan</i> , 367 F. Supp. 808 (D.D.C. 1973)	1
<i>Weidenfeller v. Kidulis</i> , 380 F.Supp. 445 (E.D.Wis. 1974)	1
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	2
Statutes	
RCW 10.77	3
RCW 18 et seq.	6
RCW 26.44	4
RCW 4.24.500	6
RCW 4.24.510	6
RCW 4.24.520	6
RCW 49.60	1, 6
RCW 70.124	4
RCW 71.09	2, 5
RCW 71.09.020	4
RCW 71.09.080	5

Statutes	Page
RCW 71.09.085	5
RCW 74.34	1, 3-6
RCW 74.34.005	3
RCW 74.34.020	3
RCW 74.34.180	6

A. SUMMARY OF ARGUMENT

Mr. Calhoun first shows that his status at the Special Commitment Center is not that of a prisoner. He then proceeds to show he is a vulnerable adult. He finally shows how he was a whistleblower and as such, should be under the protection of RCW 74.34.

B. ARGUMENT

1. Appellant Was An Employee Under RCW 49.60.

Appellees argued in their response that Mr. Calhoun was not an employee because he was essentially a prisoner. Respondent's brief, p. 14 (citing *Miller v. Dukakis*, 961 F.2d 7 (1st Cir. 1992)). In particular, Appellees quoted Miller at page 9:

The brute fact is that the appellants would not be at the Treatment Center had they not committed, and been convicted of, serious crimes. Their placement at the Treatment Center was intended, at least in part, to protect society. This alone justifies treating inmates as "prisoners" for most purposes, including the payment of wages, and distinguishes them from the mental patients and mentally retarded people accorded FLSA coverage in *Souder v. Brennan* and *Weidenfeller v. Kidulis*.

Id. at 9 (some citations omitted) (citing *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973); *Weidenfeller v. Kidulis*, 380 F.Supp. 445 (E.D.Wis. 1974)).¹ Examination of *Miller* in its modern context requires

¹Appellant had cited both *Souder* and *Weidenfeller* in his opening brief expressly as persuasive authority for the arguments made in support of

deconstructing its holding in context with the modern case law defining the rights of individuals being held as sexually violent predators.

Jobs were provided as a consequence of years of litigation to improve conditions at the Special Commitment Center. *Sharp v. Weston*, 233 F.3d 1166, 1169, fn. 2 (9th Cir. 2000). This was because the confinement is therapeutic, not punitive. As a consequence, the state must provide Mr. Calhoun and others at SCC "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982).

Thus, the focus of *Miller* in labeling individuals being held as SVPs justifying treating them as prisoners goes against the modern holding of *Sharp v. Miller*, 961 F.2d at 9. See also *Hydrick v. Hunter*, 449 F.3d 978 (9th Cir. 2006).

Appellants further makes the argument that only those who meet the criteria as set forth in RCW 71.09 as sexually violent predators are housed at SCC. This assertion remarkably ignores the status of individuals like Mr. Calhoun who have not been civilly committed in accordance with RCW 71.09. It also ignores the fact that individuals

a determination he is an employee.

being held at mental health hospitals are often there because of a criminal finding that they were found criminally insane. RCW 10.77.

2. Appellant Was A Vulnerable Adult Under RCW 74.34.

Appellees argued in their response that SCC is not a “facility” under RCW 74.34.020(13)(d) because it was not licensed by the Department of Social and Health Services (DSHS). The fact of the matter is that SCC is operated by DSHS. The license requirement is necessary in order for the state to acquire jurisdiction over a private entity. It already has jurisdiction over itself so a formal license is not necessary.

Again, it should be noted that 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.

Appellees further argue in that state mental hospitals are specifically excluded from the definition of ‘facility’ under RCW 74.34.020(5). This is clearly a false assertion. State mental hospitals are not specifically excluded as there is no express language to specifically exclude them from the definition. In fact such assertion is contrary to the finding of the legislature set forth in the notes to RCW 74.34.005 which states as follows:

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.

Appellees then seek to distinguish mental patients from sexually violent predators. This is just a variation of the previous argument that sexually violent predators should be treated like prisoners. Sexually violent predators by definition suffer from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts. RCW 71.09.020(16). Mental patients and sexually violent predators both suffer from mental abnormalities which require their segregation from society. Both are dependent on the State of Washington to provide for their physical and emotional well-being while they are being detained. Anyone being restrained by another is vulnerable to the party providing for his care and should not be subjected to abuse by that party. RCW 74.34 is a recognition by the legislature of such obligation. The legislature believed that the obligation extended to the private sector as well as to the State itself.

Appellees argue that the treatment of sexually violent predators is governed by RCW 71.09. However, they do not provide any statutory authority under the chapter to support such treatment. A careful review of RCW 71.09 reveals that it deals almost entirely with the confinement of sexually violent predators and not with their treatment. RCW 71.09.080(2) provides that “any person committed pursuant to this chapter has the right to adequate care and individualized treatment.” RCW 71.09.085(1) authorizes DSHS to “enter into contracts with health care practitioners, health care facilities, and other entities or agents as may be necessary to provide basic medical care to residents”. There are no other provisions for the treatment of the detainees. There is no mention of job training, counseling, sex offender treatment, or anything. There are certainly no provisions to support the abuse of the detainees by state employees operating an alleged “vocational” program. RCW 71.09.080(1) provides the detainees under the statute “shall not forfeit any legal right or suffer any legal disability as a consequence” of their confinement. RCW 74.34 provides the necessary restraint on the State to insure the just and humane treatment of the detainees at SCC. Failure to observe the basic standards established RCW 74.34 leaves the detainees at the mercy of their captors without any recourse. This is arbitrary and capricious and renders the

confinement of detainees at SCC illegal under the eighth and sixteenth amendments to the federal and state constitutions.

3. Appellant Was A Whistleblower Under RCW 74.34.

Again, 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.

C. 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 15th day of April, 2008.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael C. Kahrs", written over a horizontal line.

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WASHINGTON DEPARTMENT OF
CORRECTIONS;

Petitioner;

v.

ALLAN PARMELEE;

Respondent.

No. 36722-0-II

PROOF OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on April 15, 2008, 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:

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