

84711-8
NO. 84799-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of

CARLOS JOHN WILLIAMS;

Petitioner.

**ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY
REVIEW**

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I. RESPONDENT

The Respondent is the Washington State Attorney Generals' Office which was designated as the Respondent in this matter pursuant to the February 2, 2011 letter from Supreme Court Deputy Clerk Susan L. Carlson.

II. DECISION BELOW

The decision below is an unpublished order by Chief Judge J. Robert Leach of the Washington State Court of Appeals (Division I) entered on June 1, 2010 dismissing Mr. Williams' Personal Restraint Petition (PRP).

III. ISSUE FOR REVIEW

Whether Petitioner has demonstrated that he is entitled to discretionary review of the Court of Appeals' June 1, 2010 decision treating his civil action as a PRP and dismissing the PRP as meritless under RAP 16.11(b).

IV. STATEMENT OF THE CASE

Respondent accepts as accurate Petitioner's statement of the case.

V. ARGUMENT

Petitioner Has Not Met The Criteria For Discretionary Review

RAP 16.14(c) states that if a personal restraint petition is dismissed by the Chief Judge of the Court of Appeals, the dismissal may be reviewed

by the Supreme Court only by a motion for discretionary review in compliance with RAP 13.5A. In ruling on motions for discretionary review pursuant to RAP 13.5A, this Court will apply the considerations set out in rule 13.4(b). The standards for discretionary review under RAP 13.4(b) are as follows:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Petitioner has not met his burden of showing that this Court should accept review under the criteria set forth in RAP 13.4(b) as Petitioner has failed to demonstrate that the Court of Appeals' decision is in conflict with a decision of this Court or the other Courts of Appeals, or that this case involves either a significant constitutional issue or an issue of substantial public interest.

While Petitioner has not demonstrated that he has satisfied the criteria for discretionary review, he nonetheless argues that the Superior Court and Court of Appeals erred in treating his civil action as a PRP. Respondent agrees with Petitioner on this point as Petitioner did not title

his action as a PRP and nothing in Petitioner's action has any of the hallmarks of a PRP; his complaint only seeks money damages against the Department of Corrections (DOC) for alleged violations of his federal constitutional rights and does not claim that he is unlawfully restrained. Nevertheless, this apparent error does not provide a basis to grant discretionary review for the reasons set forth below.

Petitioner argues that this Court should grant review and order the Superior Court to allow him to proceed in forma pauperis in this case, citing to *Neal v. Wallace*, 15 Wn. App. 506, 550 P.2d (1976). However, under *Neal v. Wallace, supra*, the Superior Court did not err in refusing to allow Petitioner to file his action at public expense.

In order to be allowed a waiver of fees and to proceed at public expense in a civil action, a plaintiff must show:

(1) . . . actual, not theoretical indigency; (2) that but for such waiver a litigant would be unable to maintain the action; (3) that there are no alternative means available for procuring the fees; and (4) that plaintiff's claim is 'brought in good faith and with probable merit.'"

Id. at 508-09.

The waiver of fees for an indigent litigant is discretionary with the trial court. *Id.*

Although the Superior Court did not articulate its reasons for denying Petitioner's request to file his civil damages case against the DOC

at public expense,¹ the Superior Court's decision is supportable as Petitioner has not demonstrated that his claims stemming from prison staff allegedly requiring him to be cleared by prison medical staff before working in the prison kitchen have "probable merit". *Id.*

Petitioner claims that being required to be cleared by medical staff before working in the prison kitchen violated his Eighth Amendment right to be free from cruel and unusual punishment, and also violated his First Amendment rights because this requirement was imposed only on Petitioner and not on other inmates in retaliation for Petitioner's grievances concerning kosher meals. Petitioner's constitutional claims lack probable merit.

Prison conditions violate an inmate's Eighth Amendment right to be free from cruel and unusual punishment only when the conditions deny the inmate the minimal civilized measure of life's necessities. *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399 (1981). Besides showing an objectively serious deprivation, an inmate attempting to establish an Eighth Amendment claim must also demonstrate that prison officials were deliberately indifferent to the inmate's condition. *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327 (1991). Accordingly, a

¹ The Superior Court's April 19, 2010 order denying Petitioner's motion to waive filing fee and proceed in forma pauperis states only that the court "considered the records and files herein".

prison official must actually know of and disregard an excessive risk to an inmate's health or safety to be liable under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 840-44, 114 S. Ct. 1970, 1980-82 (1994). It is clear beyond cavil that the denial of a prison job could not, as a matter of law, cause the harm required to establish an Eighth Amendment claim.

There is no legal right to a job or rehabilitation in prison. *Hoptowit v. Ray*, 682 F.2d 1237, 1254-55 (9th Cir. 1982). *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985). "It is uniformly well established throughout the federal circuit courts that a prison expectation of keeping a specific prison job, or any job, does not implicate a property or liberty interest under the Fourteenth Amendment." *Hunter v. Heath*, 95 F. Supp.2d 1140, 1147 (U.S. Dist. Ct., D. Oregon 2000), citing, among others, *Coakley v. Murphy*, 884 F.2d 1218, 1221 (9th Cir. 1989). "The Constitution does not create a property or liberty interest in prison employment." *Ingram v. Papalia*, 804 F.2d 595, 596 (10th Cir. 1986).

Inmates are not entitled to a job in prison, the lack of a job cannot cause the harm required to establish an Eighth Amendment violation, and the Superior Court therefore did not err in refusing to allow Petitioner to proceed at public expense on his Eighth Amendment claim which lacks probable merit.

Petitioner also claims that requiring him to get medical approval before working in the inmate kitchen was retaliation for his prior grievances concerning kosher meals. Prisoners have a First Amendment right to file prison grievances. *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). Inmates may not be punished for exercising their First Amendment rights; in order to establish a retaliation claim an inmate must demonstrate that a state actor took an adverse action against the inmate because of the inmate's constitutionally protected activity, that the adverse action chilled the inmate's exercise of his/her rights, and that the action "did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

The Ninth Circuit has held that a retaliation claim may proceed even in the absence of evidence that the threatened retaliation actually inhibited, suppressed, or chilled the Plaintiff's First Amendment activities. *Rhode, supra* at 568-69. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009). However, the Plaintiff must demonstrate a threat of harm that is more than minimal which would have a chilling effect on the First Amendment activities of a "person of ordinary firmness". *Id.* The standard for whether or not an alleged retaliatory action or threat of action has a chilling effect is therefore an objective one and it is immaterial whether or not the action or threat of action had any actual chilling effect

on the Plaintiff. *Id.* Under the foregoing standards, the courts have found actionable retaliation when prison officials threaten to discipline an inmate or threaten to transfer an inmate to a different institution for exercising their First Amendment rights. *Rhodes, supra*, (threat of a transfer to a different prison and destruction of personal property); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (false and retaliatory discipline charge resulting in 10 days confinement and loss of television privileges).

The alleged adverse action in this case, requiring Petitioner to get medically cleared before working in the inmate kitchen, does not constitute actionable retaliation. This requirement does not involve any harm, much less harm that would chill the First Amendment activities of a "person of ordinary firmness". *Brodheim, supra*. Petitioner's retaliation claim therefore fails as a matter of law.

Petitioner's retaliation claim also fails because prison officials clearly advance legitimate correctional goals in requiring prisoners to be medically cleared for prison jobs. *Rhodes, supra*. Finally, Petitioner's assertion that the challenged action in this case occurred because of Petitioner's grievances over kosher meals is entirely speculative. The Superior Court therefore did not err in refusing to allow Petitioner to file this action at public expense as this action does not have probable merit.

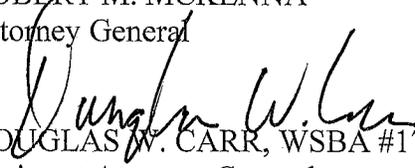
VI. CONCLUSION

While it appears that the Superior Court and the Court of Appeals erred in treating Petitioner's civil damages action as a PRP, discretionary review should nonetheless be denied as the Superior Court did not err in denying Petitioner's motion to proceed at public expense in a case that does not have probable merit.

For the foregoing reasons, Respondent requests that Petitioner's motion for discretionary review be denied.

RESPECTFULLY SUBMITTED this 18th day of February, 2011.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:

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EXECUTED this 18th day of February, 2011 at Olympia, WA.



CHERRIE KOLLMER