

NO. 42332-4-II

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

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES AND DEPARTMENT OF PERSONNEL,

Appellants,

v.

MICHAEL SCHATZ, ET AL,

Appellees.

AMENDED REPLY BRIEF OF APPELLANTS

ROBERT M. MCKENNA
Attorney General

KARA A. LARSEN
WSBA No. 19247
Senior Counsel
ALICIA O. YOUNG
WSBA No. 35553
Assistant Attorney General

Labor and Personnel Division
P.O. Box 40145
Olympia, WA 98504-0145
(360) 664-4167

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. ARGUMENT4

 A. Civil Rule 50, Entitled “Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings,” Is Inapplicable In This Case, Which Was Tried To The Court, Not A Jury4

 B. The State’s Assignment Of Errors Comply With RAP 10.3 And Its Legal Arguments Are Properly Before This Court5

 C. Substantial Evidence Demonstrated That PSNs Are Not Similarly Situated To LPN4s And PSAs Are Not Similarly Situated To MHT3s.....7

 D. Even If Plaintiffs Are Similarly Situated To Other Employees, There Is A Rational Basis For Different Treatment Under The State’s Classification And Compensation System.....19

 E. Plaintiffs Should Not Be Allowed To Raise A New Claim On Appeal, But In Any Event, The Comparable Worth Statutes Do Not Create A Private Cause of Action22

 F. It Was Not Appropriate For The Trial Court To Subjectively Determine The Comparable Worth Of Positions.....28

 G. If Collateral Estoppel Or Judicial Estoppel Apply In This Case, They Operate To The State’s Favor29

 H. Plaintiffs Are Not Entitled To Double Damages And Attorneys’ Fees Under RCW 49.52.070 Because They Cannot Establish A Willful Violation Of RCW 49.52.05030

III. CONCLUSION32

TABLE OF AUTHORITIES

Cases

<i>Allstot v. Edwards</i> 114 Wn. App. 625, 60 P.3d 601 (2002).....	31
<i>American Fed'n of State, Cy. and Mun. Employees, AFL-CIO (AFSCME) v. State of Washington</i> 770 F.2d 1401 (9th Cir. 1985).....	25
<i>Aripa v. Dep't of Soc. & Health Serv.</i> 91 Wn.2d 135, 139, 588 P.2d 185 (1978)	23
<i>Bates v. City of Richland</i> 112 Wn. App. 919, 939, 51 P.3d 816 (2002).....	32
<i>Baumgartner v. Dep't of Corr.</i> 124 Wn. App. 738, 746, 100 P.3d 827 (2004), <i>review denied</i> 154 Wn.2d 1025 (2005).....	31
<i>Beavers v. American Cast Iron Pipe Co.</i> 975 F.2d 792, 801 (11th Cir. 1992).....	29
<i>Bennett v. Hardy</i> 113 Wn.2d 912, 784 P.2d 1258 (1990)	25
<i>Braam v. Dep't of Soc. and Health Serv.</i> 150 Wn.2d 689, 711, 81 P.3d 851 (2003)	23, 24, 27
<i>Cannon v. City of Moses Lake</i> 35 Wn. App. 120, 663 P.2d 865 (1983).....	30
<i>Ebling v. Gove's Cove, Inc.</i> 34 Wn. App. 495, 663 P.2d 132 (1983).....	30
<i>Ellerman v. Centerpoint Prepress, Inc.</i> 143 Wn.2d 514, 22 P.3d 795 (2001)	30

<i>Engquist v. Oregon Dept. of Agric.</i> 553 U.S. 591, 598-99, 128 S. Ct. 2146, 170 L. Ed. 2d. 975 (2008).....	21
<i>Exacto Spring Corp. v. C.I.R.</i> 196 F.3d 833, 835 (7th Cir. 1999).....	29
<i>Fed. Commc 'ns Comm'n v. Beach Commc 'ns, Inc.</i> 508 U.S. 307, 313-15, 113 S. Ct. 2096, 124 L. Ed. 2d. 211 (1993).....	19
<i>Ferencak v. Dep't of Labor & Indus.</i> 142 Wn. App. 713, 729, 175 P.3d 1109 (2008).....	22
<i>Flower v. T.R.A. Indus.</i> 127 Wn. App. 13, 36, 111 P.3d 1192 (2005).....	31
<i>Gilmartin v. Stevens Inv. Co.</i> 43 Wn.2d 289, 299, 261 P.2d 73 (1953)	6
<i>Goehle v. Fred Hutchinson Cancer Research Ctr.</i> 100 Wn. App. 609, 613-14, 1 P.3d 579, review denied, 142 Wn.2d 1010 (2000)	6
<i>Hisle v. Todd Pacific Shipyards Corp.</i> 113 Wn. App. 401, 54 P.3d 687 (2002).....	30
<i>In re J.R.</i> 156 Wn. App. 9, 20, 230 P.3d 1087 (2010).....	7
<i>Kustura v. Dep't of Labor & Indus.</i> 169 Wn.2d 81, 233 P.3d 853 (2010)	23
<i>Lillig v. Becton-Dickinson</i> 105 Wn.2d 653, 659, 717 P.2d 1371 (1986)	31
<i>Pannell v. Thompson</i> 91 Wn.2d 591, 599, 589 P.2d 1235 (1979)	27
<i>Ranahan v. Gibbons</i> 23 Wash. 255, 261, 62 P. 773 (1900).....	6

<i>Ritchie v. U.S.</i> 451 F.3d 1019 (9th Cir. 2006)	4
<i>Schilling v. Radio Holdings, Inc.</i> 136 Wn.2d 152, 161, 961 P.2d 371 (1998)	31
<i>Schooley v. Pinch's Deli Market, Inc.</i> 134 Wn.2d 468, 475, 951 P.2d 749 (1998)	25
<i>State v. Gassman</i> 160 Wn. App. 600, 611-12, 248 P.3d 155 (2011)	6
<i>State v. Handley</i> 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990)	7
<i>State v. Osman</i> 157 Wn.2d 474, 486, 139 P.3d 334 (2006)	19
<i>State v. Scherner</i> 153 Wn. App. 621, 225 P.3d 248 (2009).....	19, 20
<i>State v. Williams</i> 96 Wn.2d 215, 220, 634 P.2d 868 (1981)	6
<i>State v. WWJ Corp.</i> 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)	23
<i>Stone v. Chelan County Sheriff's Dep't</i> 110 Wn.2d 206, 811-12, 756 P.2d 736 (1988)	7
<i>Sunnyside Valley Irrig. Dist. v. Dickie</i> 149 Wn.2d 873, 880, 73 P.3d 369 (2003)	20
<i>Viereck v. Fibreboard Corp.</i> 81 Wn. App. 579, 582-83, 915 P.2d 581, review denied 130 Wn.2d 1009, 928 P.2d 414 (1996)	6
<i>Wash. Fed'n of State Employees v. State</i> 101 Wn.2d 536, 541-42, 682 P.2d 869 (1984)	27

<i>Whatcom Cy. v. Langlie</i> 40 Wn.2d 855, 861-62, 246 P.2d 836 (1952)	23
<i>Willis v. Simpson Inv. Co.</i> 79 Wn. App. 405, 410, 902 P.2d 1263 (1995).....	5
<i>Wilson v. U.S.</i> 645 F.2d 728, 730 (9th Cir. 1981)	4, 5
<i>WPEA v. State</i> 127 Wn. App. 254, 261-62, 110 P.3d 1154 (2005)	27
<i>Yates v. State Board for Cmty. Coll. Educ.</i> 54 Wn. App. 170, 176, 773 P.2d 89 (1989).....	32

Statutes

RCW 74.13..280	24
RCW 41.06.133	2, 26, 27
RCW 41.06.150(14).....	31
RCW 41.06.155	26, 27, 31
RCW 41.80	22
RCW 49.52	31
RCW 49.52.050	30, 32
RCW 49.52.070	30, 31, 32
RCW 74.13.250	24
RCW 74.14A.050(2)-(3).....	24

Rules

CR 41	4
-------------	---

CR 50	1, 4, 5
CR 59	5
RAP 1.2(a)	6, 7
RAP 10.3	5, 7
RAP 2.5	22

Treatises

14A Karl B. Tegland, <i>Washington Practice, Civil Procedure</i> §24:3 at 67 (2d ed. 2009)	4, 5
---	------

Regulations

WAC 357	26
WAC 357-28-020	8

Constitutional Provisions

Wash. Const. art. VII and VIII, § 4	27
---	----

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs rely on specious procedural claims to distract this Court's attention from the merits. Civil Rule (CR) 50 by its very terms applies only to jury trials. The action below was a bench trial. Thus, CR 50 is inapplicable to this case and Plaintiffs' argument is perplexing to say the least. Further, the State adequately assigned error to the trial court's findings and conclusions in compliance with the Rules of Appellate Procedure (RAP), by grouping duplicative findings and distilling them to their essence. The state then identified the issues related to the findings and identified each finding corresponding to the issue by number. Plaintiffs' argument in this regard is spurious as well.

The plain fact of the matter that Plaintiffs cannot get around by their diversions is that Psychiatric Security Nurses (PSN) are not similarly situated to Licensed Practical Nurse (LPN) 4s and Psychiatric Security Attendants (PSA) are not similarly situated to Mental Health Technician (MHT) 3s, and this is substantiated by the weight of the evidence presented at trial. In their brief, Plaintiffs focus on a comparison of the classification specifications, which is the wrong comparator. Classification specifications are a general description of the types of activities that could fall within a job class. The classification specifications generated by the Department of Personnel (DOP) are a mere allocation tool. The actual duties are contained in position description forms generated by the employing agencies and it is the position description forms that should form the basis of any comparison of job

duties. The position description forms and the testimony at trial demonstrate that PSNs and PSAs are not similarly situated to LPN4s and MHT3s, respectively. If the PSN classification is similarly situated to the LPN classification, it is to the LPN2 level of the series, not the LPN4 level. If the PSA classification is similarly situated to the MHT classification, it is to the MHT2 level of the series, not the MHT3.

Nevertheless, under any set of facts, it is rational for different job classifications to be treated separately, and, therefore, differently under the State's compensation system. Plaintiffs in this case advocated that they should be in separate job classes from their alleged comparators, so the issue is not whether it is rational for them to be separately classified. Once it is determined that there is a rational basis for treating the job classes differently, there is no qualitative examination of the different treatment. The degree of the difference is irrelevant for equal protection analysis.

Plaintiffs argue for the first time that they have a private right of action under the comparable worth statutes. Neither their complaint, summary judgment briefing, nor trial brief alleged an independent right to relief under comparable worth. Rather, they asked for a declaratory judgment that the State violated the statutes, and a constitutional writ of certiorari and injunction directing the State to comply with them in the future. They cannot now raise a new claim on appeal. Nevertheless, RCW 41.06.133, which directs a state agency to promulgate rules, does

not create a private right of action. And, regardless, Plaintiffs cannot establish a violation of the statute that works in their favor.

Moreover, comparable worth was the product of a settlement of a lawsuit brought by Plaintiffs' union decades ago and was achieved in 1993. There is no ongoing obligation under the statute and the time for complaining about the implementation of the settlement agreement is long past.

Any recourse Plaintiffs may have for their dissatisfaction with their pay is through their union, the Washington Federation of State Employees (WFSE), and the collective bargaining process. WFSE is their exclusive representative for bargaining of wages and working conditions and has bargained on behalf of Plaintiffs at all times relevant to this case. Plaintiffs should not be permitted to seek from the courts what their union was unable or unwilling to achieve in collective bargaining.

Finally, in response to Plaintiffs' counter-claim for double damages and attorneys' fees, Plaintiffs' claim is that they were misclassified as to wages, not that the State willfully withheld wages that they had earned. This Court has already ruled that such a scenario does not entitle Plaintiffs to a claim under the State's wage withholding statutes.

Plaintiffs are not entitled to an increase in their wages, and therefore, are not entitled to double damages or attorneys' fees.

II. ARGUMENT

A. **Civil Rule 50, Entitled “Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings,” Is Inapplicable In This Case, Which Was Tried To The Court, Not A Jury**

CR 50 by its very terms, applies only to jury trials. It does not apply to bench trials. 14A Karl B. Tegland, *Washington Practice, Civil Procedure* §24:3 at 67 (2d ed. 2009). Indeed, there is no need for a comparable rule in a bench trial because the judge considers the sufficiency of the evidence in the course of reaching a decision. In *Ritchie v. U.S.*, 451 F.3d 1019 (9th Cir. 2006), the Court explained the rationale for Rule 50. With a jury trial, it is the jury, not the judge, that is the trier of fact. Because the judge lacks the authority to resolve disputed issues of fact, then judgment as a matter of law is appropriate only if no reasonable jury could find for a party on that claim. *Ritchie*, 451 F.3d at 1022-23.

In *Wilson v. U.S.*, 645 F.2d 728, 730 (9th Cir. 1981), the Court distinguished Rule 50 from Rule 41 motions. A directed verdict under Rule 50 is appropriate where, in a case tried to a jury, the trial judge is convinced that a reasonable person could decide the case only one way. The trial judge does not act as factfinder. Dismissal under Rule 41(b), in contrast, occurs in a bench trial when the trial judge concludes that the Plaintiff has not made out a case. The trial judge in ruling on a Rule 41(b) motion is the factfinder. The role of the judge is different under the two

rules. *Wilson*, 645 F.2d at 730. (citing 5 Moore's Federal Practice P 41.13(4) at 41-193 through 94 (2d ed. 1980)).

The motion the State made at the close of Plaintiffs' case was under CR 41(b)(3). See *Willis v. Simpson Inv. Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (1995) (CR 41(b)(3) governs dismissals in bench trials; when a case is before a jury, proper civil rule is CR 50). The State made no motion that would fall under CR 50, and thus was not required to renew the motion. In essence, the State's closing argument to the Court was a renewal of the arguments it made in its CR 41 motion.¹

Plaintiffs also argue that the State was required to make a motion under CR 59. There is no authority that a motion for reconsideration or a new trial under CR 59 is a prerequisite to appeal. See 14A Karl B. Tegland, *Washington Practice: Civil Procedure* §34:3 (2d ed. 2009) (party is allowed to appeal from order or judgment without first making a motion for a new trial or reconsideration under CR 59).

Plaintiffs' argument with respect to CR 50 and CR 59 is without merit.

B. The State's Assignment Of Errors Comply With RAP 10.3 And Its Legal Arguments Are Properly Before This Court

The Plaintiffs incorrectly assert that review of the merits is not appropriate because of flaws in the State's assignments of error. The State properly complied with RAP 10.3(a)(4) and (g) by concisely assigning

¹ Additionally, CR 41 does not contemplate a post-trial renewal of a motion to dismiss made at the close of a plaintiff's case. By its very terms, it applies only "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence." CR 41(b)(3).

error to each of the trial court's findings it contends were erroneous by describing the finding and referring to it by number. See Brief of Appellants (Br. Appellant) at 2-6. The purpose of the rule is simply to allow the reviewing court to ascertain all errors the parties allege from an inspection of the briefs. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 299, 261 P.2d 73 (1953); *Ranahan v. Gibbons*, 23 Wash. 255, 261, 62 P. 773 (1900). Further, under RAP 1.2(a) a “technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such a review. . . [W]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [this court] will consider the merits of the challenge.” *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 613-14, 1 P.3d 579, review denied, 142 Wn.2d 1010 (2000) (appellate court will review the merits of an issue where the nature of that challenge is clear in the appellant's brief). Courts will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and the court has not been overly inconvenienced. *State v. Gassman*, 160 Wn. App. 600, 611-12, 248 P.3d 155 (2011).

The legal issues raised in the State's brief are clear. The issues in this appeal are the same as those raised at the trial court. The Plaintiffs understood those issues well enough to address them in their brief. See *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582-83, 915 P.2d 581, review denied 130 Wn.2d 1009, 928 P.2d 414 (1996) (noting that

RAP 1.2(a) calls for a liberal interpretation of RAP 10.3(a)(3): where the nature of an appeal is clear and the relevant issues are argued in the brief, there is no compelling reason not to consider the merits of the issues).

C. Substantial Evidence Demonstrated That PSNs Are Not Similarly Situated To LPN4s And PSAs Are Not Similarly Situated To MHT3s

The equal protection clauses of the State and Federal constitutions ensure that persons similarly situated with respect to the legitimate purpose of the law receive equal treatment. *In re J.R.*, 156 Wn. App. 9, 20, 230 P.3d 1087 (2010). However, “no equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons.” *Id.*; *State v. Handley*, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). Thus, there is no equal protection issue unless a party first establishes that he is situated similarly to others in a class. *Id.*; *Stone v. Chelan County Sheriff’s Dep’t*, 110 Wn.2d 206, 811-12, 756 P.2d 736 (1988).

The substantial evidence at trial demonstrated without a doubt that, contrary to the trial court’s findings and the Plaintiffs’ argument, PSNs are not similarly situated to LPN4s and PSAs are not similarly situated to MHT3s. The Plaintiffs repeatedly conceded differences between PSNs and LPNs and PSAs and MHTs. *See, e.g.*, VRP at 95, 103, 106, 107, 118-19, 120, 124-25, 128, 143-44, 146, 148, 153, 165, 219, 220, 253-54, 283-84, 289, 319, 325, 328, 330-31, 332, 343, 347-49, 353, 359, 668, 1148, 1150. The exhibits containing the position descriptions of PSNs, LPN4s, and LPN2s demonstrate that PSNs job duties are closer to those of LPN2s

than LPN4s. Trial Exhibits (Ex.) 209, 210, 213. The exhibits containing the position descriptions of PSAs, MHT3s and MHT2s demonstrate that PSA job duties are closer to those of MHT2s than MHT3s. Exs. 211, 212, 214.

Plaintiffs incorrectly rely on an overgeneralized comparison of the classification specifications for the PSN, PSA, LPN4 and MHT3 job classes. Brief of Respondents (Br. Resp.) at 9-13.² DOP creates a classification specification for each job classification in the civil service system. *See* VRP at 677, 678-79. These specifications are then utilized by agencies to allocate employees into the various classifications by comparing their job duties, as documented in the position description form, with the specifications. VRP at 676-77. The agency then allocates the employee to the job classification that represents the best fit with the actual job duties. VRP at 677, 682-83. The classification to which an employee is allocated then governs the employee's compensation, because each job classification is assigned a salary range in the state's compensation system. WAC 357-28-020; Ex. 219 at 97; VRP at 470-73. Thus, the specifications are a tool or a guide, but not intended to be an exact description of the job duties. VRP at 680-81. The position description forms are the most accurate source for the duties performed by

² But even at the class specification level, the LPNs and PSNs are not similarly situated based on the fact that the LPN classification is used by multiple agencies and the PSN class is unique to DSHS. VRP at 685. PSNs cannot be similarly situated to LPNs who work for other agencies, as exemplified by the testimony of the LPN4 from the Department of Veterans Affairs that LPN4s are supervisors in that agency. VRP at 743-48. There is no dispute that PSNs are not supervisors.

employees in a job classification, VRP at 685-86, and demonstrate that PSNs are not similarly situated to LPN4s and PSAs are not similarly situated to MHT3s.

The charts below illustrate that PSNs are more like LPN2s than LPN4s and that PSAs are more like MHT2s than MHT3s.

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
<p>General description/ position objective: LPN4 is a lead worker who provides nursing care, educates nursing staff and assigns non-clinical duties to nursing staff under the direction of a Registered Nurse in the Center for Adult Services at WSH. Based on Staffing requirements, may be assigned to other work other wards in the hospital when needed.</p>	<p>General description/ position objective: PSN under the direction of RN provides direct nursing care and security on a Forensic Services Unit ward for individuals charged with a criminal offense. Utilize the nursing process (assessment, planning, implementation, and evaluation) with patients who have been charged with a criminal offense and who have psychiatric and physical illnesses. Administer medications and provide treatments following WSH policies and laws of practice. Responsible for observing and documenting patient behavior as well as other activities as defined by WSH, the nursing department, or unit/ward policies and procedures. Implement and document</p>	<p>General description/ position objective: LPN2 provides direct nursing care on a ward under the direction of RN. Utilize the nursing process (assessment, planning, implementation, and evaluation) with patients who have psychiatric and physical illnesses. Administer medications and provide treatments following WSH policies and laws of practice. Responsible for observing and documenting patient behavior as well as other activities as defined by WSH, the nursing department, or unit/ward policies and procedures. Implement and document treatment</p>

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
	<p>treatment interventions as directed by individualized treatment plans. Intervene to maintain and/or restore optimal mental and physical health and dignity; maintain safety and promote a comfortable therapeutic milieu and communicate respectfully and professionally at all times. Will work with persons who have behavioral/emotional/psychiatric/social/medical problems and who may exhibit aggressive and/or assaultive behavior. Escort or transport patients and participate with patients during the patient's daily routine of program activities, recreation, and activities of daily living. Facilitate or co-facilitate activities groups and participate in treatment planning. Develop a therapeutic relationship with patients using de-escalation skills to assist patients who exhibit high risk behaviors. Help to maintain an attractive and comfortable environment and acts as a patient advocate in healthy maintenance and clinical care. Actively support</p>	<p>interventions as directed by individualized treatment plans. Intervene to maintain and/or restore optimal mental and physical health and dignity; maintain safety and promote a comfortable therapeutic milieu and communicate respectfully and professionally at all times. Will work with persons who have behavioral/emotional/psychiatric/social/medical problems and who may exhibit aggressive and/or assaultive behavior. Escort or transport patients and participate with patients during the patient's daily routine of program activities, recreation, and activities of daily living. Facilitate or co-facilitate activities groups and participate in treatment planning. Develop a therapeutic relationship with patients using de-escalation skills to assist patients who exhibit high risk</p>

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
<p>Supervisory relationships: Lead Position.</p>	<p>WSH's Vision, Philosophy, and Mission and focus on the care delivered within the framework of the Recovery Model based upon the patient's strengths. Actively emulates WSH Nursing Department values and beliefs of respect, kindness, caring, dignity, and acceptance of individual differences.</p> <p>Supervisory relationships: Not a Lead Position. Acts as the lead worker in the physical absence of the RN, may assign non-clinical tasks.</p>	<p>behaviors. Acts as a patient advocate in health maintenance and clinical care; and help to maintain an attractive and comfortable environment and acts as a patient advocate in healthy maintenance and clinical care. Actively support WSH's Vision, Philosophy, and Mission and focus on the care delivered within the framework of the Recovery Model based upon the patient's strengths. Models respect, kindness, caring, and acceptance of individual differences per WSH Nursing Department Philosophy.</p> <p>Supervisory relationships: Not a Lead Position. In the absence of the LPN4 assign non-clinical tasks and acts as the lead worker in the physical absence of the RN and LPN4.</p>

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
<p>Essential Functions: As the designated lead assigns LPNs and MHTs non-clinical duties. Educates and train LPNs and MHTs in nursing care delivery, in the use of patient care equipment, and in utilizing the principals of “Safe Team”. Provide direct nursing care on a ward according to treatment plan. Safely contain an aggressive patient with assistance utilizing the principals of TEAM. Based on staffing requirements, may be assigned to work other wards in the hospital when needed. Administer medication and transcribes</p>	<p>Essential Functions: Administer medications as prescribed and follow documentation procedures through utilization of Pyxis and Medi-Mar. Observe patients, charting and reporting changes in patients’ condition, such as adverse reaction to medication or treatment and take necessary action. Accurately complete and report results of routine treatments, vital signs, height and weight, first aid etc. Provide crisis intervention and 1:1 counseling as needed and as assigned. Utilizes de-escalation techniques emphasizing least restrictive interventions. Communicates therapeutically with patients and work effectively with others. Communicate significant changes in the patient status or condition to members of the treatment team. Maintain strength, agility, and endurance to perform the responsibilities of the job, including but not limited to ability to lift and transfer patients with two persons assist up to 50</p>	<p>Essential Functions: Administer medications as prescribed and follow documentation procedures through utilization of Pyxis and Medi-Mar. Observe patients, charting and reporting changes in patients’ condition, such as adverse reaction to medication or treatment and take necessary action. Accurately complete and report results of routine treatments, vital signs, height and weight, first aid etc. Provide crisis intervention and 1:1 counseling as needed and as assigned. Utilizes de-escalation techniques emphasizing least restrictive interventions. Communicates therapeutically with patients and work effectively with others. Communicates significant changes in</p>

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
<p>orders from MD. Observe, chart changes in patient condition and report to RN. Lead/co-lead groups on a ward or in the education center. Orders for central supply and in the absence of the MHT3 orders commissary supplies.</p>	<p>pounds. Able to hear, speak, read, write and understand Standard English. Help co-lead groups both on ward and in the treatment recovery center (TRC). Guides and encourages patients on implementing treatment strategies of their individualized plans. Assists with the patient admissions process and patient orientation. Provide patient education and orientation to ward rules and policies. Directly assists patients with personal hygiene, to include bathing and dressing, standing and waling. Directly assists in physically lifting, transferring, managing and/or pursuing patients who are out of control. Attendance at work as scheduled and on time. Actively participates in the treatment planning process. Safely, physically, and therapeutically intervene with patients exhibiting high risk behaviors. Adhere to CFS Security Policies and Procedures. Act as a lead worker in the physical absence of the RN. Pursue and contain</p>	<p>the patient status or condition to members of the treatment team. Maintain strength, agility, and endurance to perform the responsibilities of the job, including but not limited to ability to lift and transfer patients with two persons assist up to 25 pounds. Able to hear, speak, read, write and understand Standard English. Help co-lead groups both on ward and in the day treatment center (DTC). Guides and encourages patients on implementing treatment strategies of their individualized plans. Assists with the patient admissions process. Provide patient education and orientation to ward rules and policies. Directly assists patients with personal hygiene, to include bathing and dressing, standing and waling. Directly assists in physically lifting, transferring, managing and/or pursuing</p>

LPN 4 (Ex. 209)	PSN (Ex. 213)	LPN2 (Ex. 210)
<p>Required education, experience, licensure, and skills and abilities: Possession of a valid Washington State License to practice as practical nurse, and two years experience as a LPN.</p>	<p>escape patients and patients exhibiting aggressive dangerous behaviors.</p> <p>Required skills and abilities: Possession of a valid Washington State License to practice as practical nurse, and two years experience in caring for patients or residents in a hospital, school, or mental health facility.</p>	<p>patients who are out of control. Attendance at work as scheduled. Actively participates in the treatment planning process. Safely, physically, and therapeutically intervene with patients exhibiting high risk behaviors. Pursue and contain escape risk patients and patients exhibiting physically dangerous behaviors. Use computer to access specific programs that are necessary to complete assigned tasks.</p> <p>Required skills and abilities: Possession of a valid Washington State License to practice as practical nurse, and one year experience as a licensed practical nurse or experience in caring for patients or residents in a hospital, school, or mental health facility.</p>

MHT 3 (Ex. 211)	PSA (Ex. 214)	MHT2 (Ex. 212)
<p>General description/ position objective: MHT3 provides nursing care and supply clerk on ward under the direction of RN to patients with psychiatric and physical illness. In absence of the ward RN will take direction from a LPN. Participates in providing a therapeutic environment through recognition of pathology of patient behavior and provides guidance toward rational behavior. Implement treatment strategies as outlined in the treatment plan; report and document observations of patient response to treatment. Work with persons who have behavioral/emotional/psychiatric/social/medical problems and who may exhibit aggressive and/or assaultive behavior. Provides for patient safety and comfort through attention to general health, assistance and</p>	<p>General description/ position objective: PSA under the direction of RN provides nursing care and security on a ward to individuals who have psychiatric and physical illness and are charged with a criminal offense. In absence of the ward RN will take direction from a PSN. Participates in providing a therapeutic environment through recognition of pathology of patient behavior and provides guidance toward rational behavior. Implement treatment strategies as outlined in the treatment plan; report and document observations of patient response to treatment; report and document observations of patient response to treatment. Work with persons who have behavioral/emotional/psychiatric/social/medical problems and who may exhibit aggressive and/or assaultive</p>	<p>General description/ position objective: MHT 2 provides nursing care under the direction of RN to patients with psychiatric and physical illness. In the absence of the ward RN the MHT2 will take direction from a LPN. Participates in providing a therapeutic environment through recognition of pathology of patient behavior and provides guidance toward rational behavior. Implement treatment strategies as outlined in the treatment plan; report and document observations of patient response to treatment; report and document observations of patient response to treatment. Work with persons who have behavioral/emotional/psychiatric/social/medical problems and who may exhibit</p>

MHT 3 (Ex. 211)	PSA (Ex. 214)	MHT2 (Ex. 212)
<p>guidance in bathing, dressing, feeding, and assist in lifting and transferring patients. Pursues and assists with containment of an escape risk or potentially dangerous patients. Maintain an attractive and comfortable environment. Encourage, participate, and assist patients in individual or group recreational, social, or related activities. Facilitate or co-facilitate activities/groups and participates in treatment planning. Escort patients to programming, appointments or activities on and off the hospital grounds. Supports the WSH vision, philosophy, mission and focus on the care delivered within the framework of the Recovery Model based upon the patient's strengths. Under the direction and supervision of the RN3, responsible for ward and patient mail;</p>	<p>behavior. Provides for patient safety and comfort through attention to general health, assistance and guidance in bathing, dressing, feeding, and assist in lifting and transferring patients. Help to maintain an attractive and comfortable environment and advocate for patients in all aspects of care. Facilitate or co-facilitate activities/groups and participates in treatment planning. Encourage, participate, and assist patients in individual or group recreational, social, or related activities. Escort patients to programming, appointments or activities on and off the hospital grounds. Supports the WSH vision, philosophy, mission and focus on the care delivered within the framework of the Recovery Model based upon the patient's strengths. Actively emulates the</p>	<p>aggressive and/or assaultive behavior. Provides for patient safety and comfort through attention to general health, assistance and guidance in bathing, dressing, feeding, and assist in lifting and transferring patients. Maintain an attractive and comfortable environment. Encourage, participate, and assist patients in individual or group recreational, social, or related activities. Facilitate or co-facilitate activities/groups and participates in treatment planning. Escort patients to programming, appointments or activities on and off the hospital grounds. Supports the WSH vision, philosophy, mission and focus on the care delivered within the framework of the Recovery Model based upon the patient's strengths. Assists the MHT3 and assumes</p>

MHT 3 (Ex. 211)	PSA (Ex. 214)	MHT2 (Ex. 212)
<p>maintaining environmental safety; maintaining adequate supplies; assisting patients with inventory of personal property and accounts; maintaining accurate patient property and identifying patient personal clothing needs. Inventory and accurately account for ward equipment. Designated Fire Marshall on a ward on dayshift. Models philosophy of care based upon patients strengths. Based on staffing requirements, may be assigned to work other wards in the hospital when needed.</p> <p>Position Specific Qualifications: Three years' experience in a psychiatric or mental health setting. Nursing Assistant Registered Certified Nursing Assistant preferred.</p>	<p>Nursing Department values and beliefs of kindness, respect, dignity, and recognition of individual difference.</p> <p>Position Specific Qualifications: Two years experience in a psychiatric or mental health setting. Nursing Assistant Registered. Nursing Assistant Certification desired.</p>	<p>their responsibilities in their absence. Models philosophy of care based upon the patient's strengths. Actively emulates the Nursing Department values and beliefs of kindness, respect, dignity, and recognition of individual differences. Designated Fire Marshall on an assigned ward.</p> <p>Position Specific Qualifications: Nursing Assistant Registered. Certified Nursing Assistant preferred.</p>

As shown in the position description forms and through trial testimony, LPN4s are either supervisors or the designated lead. VRP at 27, 156-57, 349-50, 687, 745-46; 867-68; Ex. 209. By virtue of being the supervisor or lead, there can be only one LPN4 per shift on a ward. VRP at 27, 29, 359, 873, 1023. PSNs are not supervisors or designated leads. VRP at 148, 347, 800, 874, 1109; Ex. 213. Each and every PSN simply does not carry the same responsibility and authority at all times as each and every LPN4 does at all times. Like LPN2s, PSNs fill in and perform some lead duties when needed in the absence of the designated lead. VRP at 159, 160, 175, 178, 270, 319, 352, 994, 1012; Exs. 210, 213. Each and every PSA does not carry the same suite of responsibilities at all times as each and every MHT3 does. VRP at 31-32, 128, 153, 328, 359, 448-49, 452, 802-03, 806, 831, 833, 875-76, 878-89, 945-46, 967-68, 1101, 1103, 1111-17; Exs. 211, 214. Like MHT2s, PSAs perform some of the MHT3 duties when needed. VRP at 803, 831-32, 876-77; Exs. 212, 214.

By virtue of being in different job classes, PSNs and PSAs also have different rights under their Collective Bargaining Agreement (CBA) than LPNs and MHTs. Ex. 218 at 41; 219 at 81-82; 220 at 92-94; 221 at 84-86. For example, because they are separately classified from LPNs and MHTs, PSNs and PSAs have more job security than LPNs and MHTs in the face of layoffs. VRP at 357.

Plaintiffs' own evidence and arguments establish they are different from LPNs and MHTs. Plaintiffs introduced evidence of a prior challenge

they made when the State attempted to consolidate their job classifications into the LPN series and MHT series. Plaintiffs fought that effort, and prevailed in getting a superior court to order that they remain separately classified from LPNs and MHTs. Plaintiffs throughout this lawsuit have advocated for separate classification from LPNs and MHTs. This alone establishes that Plaintiffs are not similarly situated to their alleged comparators.

Plaintiffs cannot be similarly situated to LPN4s and MHT3s when they themselves acknowledge they are properly classified. If the employees are not similarly situated, then the equal protection analysis ends there and there is no inquiry into the quality or nature of the treatment of the different classes.

D. Even If Plaintiffs Are Similarly Situated To Other Employees, There Is A Rational Basis For Different Treatment Under The State's Classification And Compensation System

Only if Plaintiffs prove they are similarly situated to another class does a court review difference in treatment. The rational basis level of judicial review applies to equal protection claims when a classification does not involve a suspect class and does not threaten a fundamental right. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009). Under the rational basis test, a law will be upheld if it rests upon a legitimate state objective and is not wholly irrelevant to achieving that objective. *Id.*; *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006). The Court must uphold a classification if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Fed.*

Comm'ns Comm'n v. Beach Comm'ns, Inc., 508 U.S. 307, 313-15, 113 S. Ct. 2096, 124 L. Ed. 2d. 211 (1993) (where there are plausible reasons for the action, the inquiry is at an end). In other words, the party challenging the classification must show that it is “purely arbitrary.” *Scherner*, 153 Wn. App at 649.

This issue is a question of law which the appellate court reviews de novo. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Under any set of facts, the classification of PSNs as PSNs and PSAs as PSAs satisfies the rational basis level of review.

It is important to remember that Plaintiffs do not challenge that they are classified differently from LPNs and MHTs, only that they are paid differently. Thus, Plaintiffs acknowledge and agree that they should be in separate job classifications from LPNs and MHTs. They do not challenge that they should be treated differently from other job classifications for any reason other than pay.

Prior to the advent of collective bargaining in early 2004 pursuant to the Personnel System Reform Act (PSRA), state employees' salaries were set according to a process established by the Legislature and administered by DOP. Each separate job classification was assigned a different salary range based on factors established by the Legislature. Especially with finite resources, it is completely rational to differentiate between employees' salaries based on their job classification. A legislatively mandated process is a perfectly rational basis for establishing the compensation of any state employee, particularly given the deference

owed to the government when acting as an employer. With respect to proprietary functions such as employee pay, the government as employer is not to be held to the same scrutiny when viewing the governments' power to regulate, license, or make law. As noted by the Supreme Court:

We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation." [Citation omitted]. This distinction has been particularly clear in our review of state action in the context of public employment. Thus, "the government as employer indeed has far broader powers than does the government as sovereign." [Citation omitted]. "[T]he extra power the government has in this area comes from the nature of the governments' mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." [Citations omitted].

Engquist v. Oregon Dept. of Agric., 553 U.S. 591, 598-99, 128 S. Ct. 2146, 170 L. Ed. 2d. 975 (2008). Thus, the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. *Id.* The Court concluded:

Given the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," [citation omitted], "constitutional review of government employment decisions must rest on different principles than review of ... restraints imposed by the government as sovereign," [Citation omitted].

Id. Given these considerations, the Legislature's decisions regarding employee compensation must be accorded deference. The legislatively established system for setting employee compensation working as it is supposed to is the embodiment of rational.

In early 2004, Plaintiffs' union began negotiating wages through the collective bargaining process. VRP at 613-15. Wages for union-represented employees are no longer set by the Legislature through the statutory salary-setting process. RCW 41.80. Wages are now the product of this bilateral process. Given the difference in treatment under the CBA of PSNs and PSAs with respect to non-wage issues, it is perfectly rational for their union to have traded higher wages for job security in the bargaining process. Thus, the collective bargaining that has been the method by which Plaintiffs' wages were established for all time periods covered by this case, satisfies the rational basis test.

E. Plaintiffs Should Not Be Allowed To Raise A New Claim On Appeal, But In Any Event, The Comparable Worth Statutes Do Not Create A Private Cause of Action

In their appellate brief, Plaintiffs raise, for the first time, a claim that the comparable worth statutes create a private cause of action. Plaintiffs' complaint and arguments at trial did not allege an independent right to relief under comparable worth. Rather, they asked for a declaratory judgment that the State violated the statutes, and a constitutional writ of certiorari and injunction directing the State to comply with them in the future. They did not argue a private right of action before the trial court and they should not be allowed to now raise

this new issue on appeal. See, e.g., RAP 2.5; *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729, 175 P.3d 1109 (2008) (court declined to consider issues raised for the first time on appeal), *aff'd on other grounds Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010).

Nevertheless, the comparable worth statutes do not create a private right of action. Not every statute provides a means for suing the State for its perceived violation. *Braam v. Dep't of Soc. and Health Servs.*, 150 Wn.2d 689, 711, 81 P.3d 851 (2003). The Washington Supreme Court has adopted a three part test to determine whether a statute impliedly creates a cause of action:

- whether the Plaintiff is within the class for whose 'especial' benefit the statute was enacted;
- whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and
- whether implying a remedy is consistent with the underlying purpose of the legislation.

Id. (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)). “[S]tatutory policy statements as a general rule do not give rise to enforceable rights and duties.” *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 139, 588 P.2d 185 (1978), *overruled in part on other grounds, State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999), (holding that statute providing “[DSHS] shall . . . cooperate with public and private agencies in establishing and conducting programs to provide treatment for alcoholics” in the correctional system did not establish prisoner’s right to alcohol treatment). See also, e.g., *Whatcom Cy. v. Langlie*, 40 Wn.2d 855, 861-62, 246 P.2d 836 (1952) (holding that statute stating department of

health “[s]hall make full use of all existing public and free facilities and services” was policy statement and created no enforceable rights).

In *Braam*, for example, the Washington Supreme Court refused to imply a cause of action in RCW 74.14A.050(2)-(3), which directs the Secretary of DSHS to:

(2) Develop programs that are necessary for the long-term care of children and youth that are identified for the purposes of this section. Programs must: (a) Effectively address the educational, physical, emotional, mental, and medical needs of children and youth; and (b) incorporate an array of family support options, to individual needs and choices of the child and family. The programs must be ready for implementation by January 1, 1995; [and]

(3) Conduct an evaluation of all children currently within the foster care agency caseload to identify those children who meet the criteria set forth in this section. All children entering the foster care system must be evaluated for identification of long-term needs within thirty days of placement. . .

The Court also did not find a cause of action in RCW 74.13.250 and .280, which detail DSHS’s obligations as to foster parent pre-service training and the maintenance and disclosure of client information. While foster children were viewed as the intended beneficiaries of these statutes, the court found no legislative intent to create a private cause of action. *Braam* at 712. The court also recognized that implying a cause of action would be inconsistent with the broad power the legislature vested in DSHS to administer the statutes. Additionally, the court noted that foster children could raise concerns that DSHS was not following these statutes in the context of dependency actions. *Id.*

Similar to the Legislature's instructions to DSHS in *Braam*, the Legislature's instructions to DOP in the comparable worth statutes do not create a private cause of action for state employees. With respect to the first prong of the *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) test, the Plaintiffs cannot show they are within the class for whose benefit the statutes were created. "[w]e look to the language of the statute to ascertain whether the Plaintiff is a member of the protected class." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998). The plain language of the statute does not indicate any class it intends to benefit. As reflected in the legislative history, the comparable worth statutes were enacted in response to a lawsuit brought on behalf of female state employees against the State alleging gender discrimination regarding their pay as compared to male-dominated classifications. *American Fed'n of State, Cy. and Mun. Employees, AFL-CIO (AFSCME) v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985); Ex. 228. The resulting settlement of the lawsuit (ratified by the Legislature) identified the specific job classifications that would benefit from the comparable worth legislation, and Plaintiffs' job classifications were not among the intended beneficiaries. Ex. 228. Plaintiffs have not established (nor can they) that PSNs and PSAs are female-dominated professions (as opposed to LPN 4s and MHT 3s, which they would have to show are male-dominated), such that the comparable worth statutes were enacted for their especial benefit or protection.

Second, Plaintiffs can point to no intent of the Legislature—explicit or implicit—that supports creating a remedy. There is nothing suggesting that the Legislature had any inkling that individual employees would have the ability under this statute to seek adjustment of their wages based on their notion of comparable worth. To the contrary, the explicit text and legislative history reflect the Legislature was appropriating specific funds to DOP with specific directions for its use in achieving and implementing a study and any salary increases warranted by the study, to be completed in 1993.

Moreover, RCW 41.06.133 directs DOP to “adopt rules” regarding the means of adoption and revision of a state salary schedule that reflects the prevailing rates in the private sector in Washington and other governmental units. DOP rules are contained in WAC 357. The CBA to which the Plaintiffs are subject specifically preempts WAC 357, so any rules regarding the state salary schedule are not applicable to represented employees. Ex. 219 at 111.

The statute also provides that the rates in the salary schedule were to be increased *if necessary* to achieve comparable worth under an implementation plan under RCW 41.06.155. The comparable worth settlement agreement ratified by the Legislature became its implementation plan. Plaintiffs were not beneficiaries of that settlement agreement. Ex. 228. Finally, the statute went on to provide that any revisions to a salary schedule are subject to approval by the Office of Financial Management (OFM).

By performing salary surveys and forwarding that information to the Legislature, the DOP accomplished its statutory objectives of providing “the basis and procedures to be followed” for “[a]doption and revision of a state salary schedule to reflect the prevailing rates in Washington state. . . .” RCW 41.06.133(10). Further, DOP achieved comparable worth by the legislative deadline of 1993. *See* RCW 41.06.155; VRP at 527. To the extent Plaintiffs are claiming that they were entitled to salary increases as part of the comparable worth settlement, it is long past any applicable time to complain about the comparable worth settlement implementation with respect to which classes received adjustments.

Moreover, because any revision to the state salary schedule for purposes of comparable worth is still subject to OFM approval and legislative funding, Plaintiffs cannot show that OFM would approve any revision that would increase their salaries for purposes of comparable worth or that the Legislature would fund any such increase. *See WPEA v. State*, 127 Wn. App. 254, 261-62, 110 P.3d 1154 (2005).

Plaintiffs cannot show that the statutes were enacted for their benefit, that the Legislature intended to provide a private right of action for them, or that implying a cause of action would be consistent with the policy underlying the legislation. *See Braam*, 150 Wn.2d at 711. Additionally, implying a cause of action for increased salary based on statutory comparable worth would impinge on the Legislature’s authority to appropriate funds and set employee salaries. *Wash. Fed’n of State*

Employees v. State 101 Wn.2d 536, 541-42, 682 P.2d 869 (1984); Wash. Const. art. VII and VIII, § 4; *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) (“The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.”). The Legislature already decided upon and fulfilled its notion of comparable worth. There is nothing left for the court to do.

F. It Was Not Appropriate For The Trial Court To Subjectively Determine The Comparable Worth Of Positions

Comparable worth was a time-limited legislative policy to address a particular issue of concern at the time. The Legislature gave direction and appropriated funds to DOP to implement the settlement agreement that resulted from the comparable worth litigation. There is no statutory basis for courts to revisit comparable worth post-1993.

Further, implementation of the settlement agreement included a specific methodology for measuring the comparable worth of job classifications. VRP at 476-78-480-81, 524-27. The trial court used no recognized evaluation tool and engaged in no methodologically sound analysis of the positions to determine comparable worth. Judges are ill-equipped to operate as personnel boards and should not be imposing their own view of what jobs are comparable on employers. When faced with a comparable worth claim, the Seventh Circuit wisely concluded:

[T]he irruption of “comparable worth” thinking (see, e.g., *American Nurses’ Ass’n v. Illinois*, 783 F.2d 716 (7th Cir.1986)) in a new context . . . invites the court to decide what the taxpayer’s employees *should* be paid on the basis of the judges’ own ideas of what jobs are comparable, what

relation an employee's salary should bear to the corporation's net earnings, what types of business should pay abnormally high (or low) salaries, and so forth. The judges of the Tax Court are not equipped by training or experience to determine the salaries of corporate officers; no judges are.

Exacto Spring Corp. v. C.I.R., 196 F.3d 833, 835 (7th Cir. 1999) (the court also noted that the role of “superpersonnel department” is unsuitable for courts). Similarly, in *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 801 (11th Cir. 1992), the Court held that arguments regarding comparable worth are best made to legislative bodies. “This court has no authority to create a social-utility hierarchy of positions” within an employer and then ensure that certain positions are paid more than others. *Id.*

The comparable worth statutes do not provide an avenue for a court to make a subjective judgment about the value of civil service jobs and the trial court erred in engaging in such an exercise. If there is any comparable worth issue here, it requires that the State engage in the same process it utilized when it originally implemented comparable worth.

G. If Collateral Estoppel Or Judicial Estoppel Apply In This Case, They Operate To The State’s Favor

Plaintiffs argue that the trial court’s findings were established by collateral estoppel and that judicial estoppel precludes the State from arguing that PSNs and PSAs are not similarly situated to LPN4s and MHT3s. With respect to collateral estoppel, the earlier litigation actually established that the positions are not similarly situated by differentiating PSNs from LPNs and PSAs from MHTs (HAs) and holding that PSNs and

PSAs should remain in their unique classifications. That judicial decision should have resulted in the dismissal of this case.

With respect to judicial estoppel, the State's position here is not inconsistent with its position in the earlier litigation that resulted in the reversal of the reallocation of PSNs to the LPN classification and PSAs to the MHT (HA) classification. The State maintains, as it always has, that PSNs fit within the general LPN classification, but at the LPN2 level, not the LPN4 level, and that PSAs fit within the MHT classification but at the MHT2 level, not the MHT3 level. It is the Plaintiffs and their union that obstruct every effort by the State to reallocate PSNs to LPN2s and PSAs to MHT2s.³

H. Plaintiffs Are Not Entitled To Double Damages And Attorneys' Fees Under RCW 49.52.070 Because They Cannot Establish A Willful Violation Of RCW 49.52.050

In order to get double damages and attorneys' fees under RCW 49.52.070, Plaintiffs must prove that the State willfully withheld wages owed under RCW 49.52.050. RCW 49.52.050 protects illegal withholding of *specific* wages earned. *See, e.g., Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App. 401, 54 P.3d 687 (2002) (failure to pay overtime); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001) (failure to pay wages while company is in financial trouble); *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 663 P.2d 865 (1983) (failure to pay accumulated sick leave); *Ebling v. Gove's Cove*,

³ Further, to the extent the State's position in the prior litigation regarding the reallocation of PSNs to LPNs and PSAs to MHTs (HAs) was rejected by the Court, it is hard to see how the Plaintiffs could have relied on it in bringing this lawsuit.

Inc., 34 Wn. App. 495, 663 P.2d 132 (1983) (failure to pay agreed sales commission rate); *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002) (failure to pay back wages owed via civil service reinstatement after wrongful termination).

Plaintiffs do not claim that they have not been paid for their work. They assert that they have been misclassified as to salary, not that the State has refused to pay or wrongfully withheld the salary assigned to them. This makes this case like *Baumgartner v. Dep't of Corrs.*, 124 Wn. App. 738, 746, 100 P.3d 827 (2004), *review denied* 154 Wn.2d 1025 (2005). There, the Court of Appeals summarily dismissed a similar argument where DOC lieutenants claimed they had been assigned an improper salary under RCW 41.06.155 and RCW 41.06.150(14), and, therefore, were due unpaid wages under RCW 49.52. The court noted, "This statute clearly applies to a claim for wrongful withholding of salary earned, not to a claim of salary misclassification. As the lieutenants claim the latter and not the former, their argument fails." *Id.*

Plaintiffs failed to prove a willful withholding of wages due by statute, ordinance or contract. Consequently, RCW 49.52.070 is not implicated. If there is a bona fide dispute regarding the obligation to pay, there is no willfulness, which precludes double damages and attorneys' fees.

A bona fide dispute exists if the dispute is fairly debatable. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998); *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371

(1986); *Flower v. T.R.A. Indus.*, 127 Wn. App. 13, 36, 111 P.3d 1192 (2005); *Yates v. State Board for Cmty. Coll. Educ.*, 54 Wn. App. 170, 176, 773 P.2d 89 (1989). The State has paid Plaintiffs exactly what they have been entitled to under their CBA. There has been no withholding of wages due. The fact that the Court may ultimately disagree with the State's position does not mean that there is not a bona fide dispute. The existence of a bona fide dispute is sufficient to preclude a finding of willfulness. *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002). Therefore, Plaintiffs cannot prove a violation of RCW 49.52.050. Accordingly, Plaintiffs cannot recover double damages and attorneys' fees under RCW 49.52.070.

III. CONCLUSION

Based on the foregoing, the State respectfully requests that the Court reverse the trial court's findings, conclusions and judgment, and remand for entry of judgment in favor of the State.

RESPECTFULLY SUBMITTED this 11th day of June, 2012.

ROBERT M. McKENNA
Attorney General



KARA A. LARSEN
WSBA No. 19247
Senior Counsel
ALICIA O. YOUNG
WSBA No. 35553
Assistant Attorney General

WASHINGTON STATE ATTORNEY GENERAL

June 11, 2012 - 2:18 PM

Transmittal Letter

Document Uploaded: 423324-Amended Appellant's Brief.pdf

Case Name: Michael Schatz et al. v. DSHS

Court of Appeals Case Number: 42332-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Comments:

No Comments were entered.

Sender Name: Paige D Lemcke - Email: paigel@atg.wa.gov

A copy of this document has been emailed to the following addresses:

clorym@atg.wa.gov

ericae@atg.wa.gov

NO. 42332-4-II

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

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, DEPARTMENT
OF PERSONNEL,

Appellants,

v.

MICHAEL SCHATZ, DANI
KENDALL, AND JOSEPH MINOR, as
Individuals as Class Representatives for
All Others Similarly Situated,

Respondents.

CERTIFICATE OF
SERVICE

I certify that I served a copy of the Amended Reply Brief of Appellants and this Certificate of Service on all parties or their counsel of record on June 8, 2012 as follows:

XX Via Depositing in U. S. Mail Postage Prepaid and via email

TO:

Richard H. Wooster
1901 South "I" Street
Tacoma, WA 98405
rich@mjwmlaw.com

Philip A. Talmadge
Talmadge/Fizpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
phil@tal-fitzlaw.com

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

Dated this 11th day of June, 2012 at Olympia, WA.



ERICA EDDINGS

WASHINGTON STATE ATTORNEY GENERAL

June 11, 2012 - 2:18 PM

Transmittal Letter

Document Uploaded: 423324-Amended Reply Brief of Appellants COS 42332-4.pdf

Case Name: Michael Schatz et al. v. DSHS

Court of Appeals Case Number: 42332-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: Certificate of Service

Comments:

No Comments were entered.

Sender Name: Paige D Lemcke - Email: paigel@atg.wa.gov

A copy of this document has been emailed to the following addresses:

clorym@atg.wa.gov

ericae@atg.wa.gov