Court of Appeals No. 76143-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 95608-1

THE KROGER CO., an Ohio corporation; FRED MEYER STORES, INC., doing business as QUALITY FOOD CENTERS, INC. (aka QFC),

Appellant,

v.

SUE JIN YI, an individual; and RONALD COX, an individual, on behalf of themselves and others similarly situated,

Respondent.

QUALITY FOOD CENTERS' PETITION FOR SUPREME COURT REVIEW

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Petitioner Fred Meyer Stores, Inc. dba Quality Food Centers ("QFC") seeks review of a Court of Appeals decision attached as Appendix A ("App. at __").

This case raises an important issue of first impression regarding a plaintiff's ability to convert, through artful pleading, a contract interpretation issue regarding calculation of the amount of wages owed under a collective bargaining agreement ("CBA") into a statutory issue by seeking to recover CBA wages under RCW 49.52.050(2), Washington's Wage Recovery Act ("WRA"), thereby avoiding arbitration.

Plaintiff alleges that QFC's practice of rounding all hourly store employees time to the quarter hour resulted in his clocked time being rounded down depriving him of both statutory and CBA wages. In his amended class action complaint, Plaintiff Ronald Cox sought to recover statutory overtime and minimum wage damages for violation of both the Washington and Oregon Minimum Wage Acts ("MWA") and separately CBA wages for QFC's alleged incorrect calculation of the number of compensable hours worked at CBA hourly rates during the first 40 hours of each work week.

Without citing to any state or federal case authority and contrary to a Ninth Circuit case holding that CBA disputes regarding the "amount of wages" owed under the Oregon WRA are not statutory claims, the panel held that Plaintiff's contract claims regarding the amount of wages owed are

statutory claims, not subject to the CBA arbitration clauses. Compare App. at 6-7 with *Kobold v. Good Samaritan Regional Medical Center*, 832 F.3d 1024, 1035 (9th Cir. 2016).

The court's holding would allow employees with a CBA claim regarding the amount of his/her wages to file suit under the Washington WRA and bypass both the employee's union and an otherwise valid arbitration clause, contrary to Washington case law applying federal labor law.

QFC petitions for review of the decision under RAP 13.4(b)(4).

II. DECISION OF THE COURT OF APPEALS

QFC seeks review of the Division I decision published on February 5, 2018, upholding the trial court's 2016 order denying QFC's motion to compel arbitration. App. 1-16.

III. ISSUES PRESENTED FOR REVIEW

A. Did the appellate panel err in a decision of first impression in Washington by holding that an employee can avoid arbitration of his CBA claim regarding the amount of wages owed, by seeking recovery of the CBA wages under RCW 49.52.050(2), the WRA provision allowing recovery of the contract "wage such employer shall pay?"

1. Did the appellate court err by apparently assuming that the Washington WRA imposed state statutory standards for the calculation of rounded time as hours worked for purposes of determining CBA wages, when Department of Labor and Industries' ("L&I") issued its

guidance on rounded time under RCW 49.46.040 and .070, Washington MWA, and RCW 49.12.050, the Industrial Welfare Act, not under the Washington WRA? Policy Number ES.D.1 Recordkeeping and Access to Payroll Records, rev. 5/7/2004 ("Guidance").

2. Does federal labor law, as well as the Federal Arbitration Act, 9 U.S.C. §§ 1-9, determine the arbitrability of CBA claims?

B. Did the trial court err in disregarding Ninth Circuit law holding the Oregon WRA and by analogy the Washington WRA "provide only that an employee be paid the wages 'due and owing them.' Or. Rev. Stat. § 652.120(1)"? *Kobold*, 832 F.3d at 1035.

C. Does the panel decision deprive the Union of participation in the arbitration/grievance process, thereby preventing the Union from representing other bargaining unit members who are adversely affected by Plaintiff's interpretation of clocked time rather than rounded time as compensable under the CBAs with QFC?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. Defendant/Appellant QFC.

Defendant/Appellant QFC operates approximately 65 Washington and Oregon grocery stores employing approximately 6,000 hourly store employees. CP 1408-09. Twenty CBAs determine the hourly rates and compensable time used to calculate QFC store employee hourly wages.

CP 557. Although the International Brotherhood of Teamsters and the Bakery, Confectionary, Tobacco, and Grain Millers International unions have negotiated wages for some store employees, United Food and Commercial Workers' Local 555 ("UFCW") represented Plaintiff and all other QFC grocery workers in QFC's Portland and Clark County stores. CP 1-13, 557.

Fred Meyer Stores, Inc., purchased QFC in 1998 and installed a single time clock in all stores, typically in the lunch rooms many of which are on the second floor above the grocery sale floors. CP 293-95, 556-558, CP 1110. After the 2000 time clock installation, QFC rounded employee time to the quarter hour, providing a "grace period" for employees who showed up less than 7½ minutes late or left less than 7½ minutes early.[1] CP 556-57. Plaintiff and other hourly employees signed acknowledgements regarding the "seven-minute grace period which rounds the eighth minute to the quarter hour." CP 561.

Based on QFC time data during Plaintiff's employment from 2011 to 2014, store employee time was rounded down by an average of 18.36 seconds per employee swipe of the time clock, according to QFC's expert. CP 1128. Plaintiff's expert did not contradict this calculation, but calculated the average amount of cumulative time rounded down for those employees whose card swipes showed a net amount of time rounded down.

[1] For example, if an employee clocked in at 1:59 for a 2:00 shift, her time would be rounded down by one minute. Likewise, if she clocked out at 8:55 for a shift that was scheduled to end at 9:00, her time was rounded up by five minutes.

CP 1304-05. She stated that the average total rounded-down time for those store employees with net rounded down time was 12.2-12.4 hours from 2011 through 2014. *Id.* She did not calculate an average for QFC employees whose net rounded clocked time was rounded up for purposes of calculating the amount of CBA wages. CP 1302-06.

2. Plaintiff Ronald Cox.

Plaintiff/Respondent Cox worked as a grocery clerk at QFC's Camas, Washington, store and then at its Moreland store in Portland from October 2011 until he resigned in February of 2014. CP 557. He testified that he clocked in at the break room time clock and then walked to his workstation. CP 1097, 1103. He testified it took him a minute to walk from the time clock to his Camas workstation in Washington and less than a minute to walk from the time clock on the second floor break room to his workstation in Portland. CP 1103, 1110.

Plaintiff's hourly pay rate and compensable time were subject to the UFCW's separate CBAs for its Clark County and Portland QFC store employees. CP 557-58.

3. UFCW 555 CBAs With QFC.

The CBAs address compensable time and hours worked in Articles 4 (Hours of Work), 5 (Seniority), 6 (Wage Scale), 13 (General Conditions), and 17 (Free work Prohibition). CP 568-93 (Portland CBA); CP 616-37 (Clark County CBA). CBA provisions relevant to the

compensability of travel time from clock to workstation at the start of each shift and back to the clock at the end of each shift include the following:

> 5.9 No Guarantee – No Pay for time Not Worked. Nothing in this article shall be construed to require pay for time not worked.
>
> 6.9 Wage Claims. All claims for back wages must be presented through the Union . . .
>
> 13.8 Travel Between Stores. Time spent by employees in travel from place to place during the work day in order to perform work assigned to them by the employer shall be paid for as time worked.
>
> 17. Free Work Prohibition.
>
> 17.1 The Employer agrees that there shall not be "free" or "time off the clock" work under this Agreement.

CP 573, 575, 585, 593 (Portland CBA); 621, 623, 632, 637 (Clark County CBA).

Although the CBA does not contain sections titled compensability of "rounded time" or travel time from the time clock to the workstation, the parties' bargaining history and past practice provide for the compensability of rounded time rather than clocked time. CP 557-58. Moreover, all QFC policies are subject to Union review under provisions in the CBAs. CP 603, 642.

An arbitrator resolves CBA disputes regarding interpretation of what time is compensable, including the minute or less that Plaintiff testified that

he spent walking between the time clock and his workstation. CP 594-96, 638-39.

> 19. Grievance Administration Procedures.
>
> 19.1 Any Grievance or dispute concerning the application or interpretation of this Agreement shall be presented in writing by the agreed Party to the other Party with . . .
>
> 19.3 Jurisdiction and Authority.
>
> a. The jurisdiction and authority of the Arbitrator shall be confined exclusively to the application or interpretation of a specific provision or provisions of the Agreement between the Parties. The Arbitrator may consider the entire Agreement in making his or her award.

CP 594-96, 638-39.

4. "Time Not Worked."

The parties disagree whether the travel time that Plaintiff spent walking between the time clock and his work station at the Camas store and the "less than one minute" that he spent walking between the second-floor time clock and his first-floor workstation in the Portland store was "time not worked" under the CBA and thus, not compensable. CBA §§ 5.7, 5.9 (CP 573; CP 621), *cf.* CP 1007-1039, 1140-67 (parties' briefs on QFC's summary judgment regarding compensability of travel time between time clocks and work stations under the Washington and Oregon minimum wage acts).

5. Hourly Rates.

Although Plaintiff claimed $12/hour as his CBA hourly rate for calculating wages for rounded down time in his December 2014 interrogatory answer (CP 349, 350), the Court of Appeals accepted his representation in his 2017 appeal brief that he's no longer seeking "damages calculated using any premium rates or shift premiums provided in any collective bargaining agreements." App. at 6 (quoting Respondent's brief at 5). Although the Court of Appeals accepted Plaintiff's recanting of his interrogatory answer, Plaintiff has not withdrawn his attorney's 2015 representation that he is seeking CBA wage rates above the state minimum wages for any minutes in the first 40 hours of each work week that were rounded down.

> [W]e are asking the court to award the regular rate of pay. Not simply minimum wage or overtime wages, there will be times when you get a damage analysis for time worked is not overtime, but it is straight time and in that situation the amount awarded should be the regular rate of pay. . . .

Report of Proceedings ("RP") at 18-19. Plaintiff received $12 per hour in Portland, a premium hourly rate above Oregon's minimum wage and above the CBA hourly pay rate for Plaintiff, whose 2,148.25 "apprentice" hours in 2013 set his rate on the scale. CBA rate. CP 601,667.

6. Employer Right to Deduct Overpayments under CBA.

The UFCW CBA also provides that QFC has the right to deduct overpayments from employee paychecks. CP 576.

> 6.13 Payroll Overpayments. When a payroll overpayment is discovered, the Employer is authorized to make

> appropriate payroll corrections, including recovering the amount of overpayment in the form of a weekly payroll deduction.

Id.

QFC has never deducted pay from any employee whose time was rounded up overall, because the UFCW and QFC have always agreed that compensable time should be calculated based on rounded time, not clocked time, nor has Plaintiff or any other employee ever grieved the use of rounded time, as opposed to clocked time, to determine compensable hours. CP 557-58. Plaintiff's expert estimated that more than 3,000 of QFC's hourly employees who worked in QFC stores from July 2011 through 2014 had their time rounded up "on net due to the rounding system." CP 1303-04.

B. PROCEDURAL BACKGROUND

Plaintiff Cox filed in May of 2015 his amended complaint[2] in this putative class action of hourly QFC store employees, asserting four causes of action: violation of Washington and Oregon MWAs and violation of Washington and Oregon WRAs.

In September 2015, the trial court denied QFC's motion to dismiss Plaintiff's statutory MWA claims, rejecting QFC's argument that federal and Washington's regulatory guidances authorized facially-neutral rounding

[2] The claims of a second plaintiff, Ms. Yi, were dismissed with prejudice, and a fifth cause of action under Oregon Wage Penalty statute was dismissed as preempted by federal labor law. CP 495-497, 512-14.

policies that round time both up and down to the quarter hour at the start and end of each shift. CP 1339-40. In November 2016, the trial court denied QFC's motion to compel Plaintiff to arbitrate his CBA/WRA claims. CP 780-81.

QFC appealed the November 2016 order. CP 775-77.

The Court of Appeals affirmed the trial court's order denying QFC's arbitration motion on February 5, 2018. App. 1-16. The panel correctly identified the "core issue" for its decision. "The core issue is whether these claims are statutory or contractual." App. at 4.

V. ARGUMENT

A. THE COURT OF APPEALS SHOULD HAVE ORDERED THE CBA WAGE CLAIMS ARBITRATED, BECAUSE IT FAILED TO FIND AN INDEPENDENT STATE INTEREST UNDER THE WRA OR A NONNEGOTIABLE RIGHT.

1. Washington holds CBA claims should be arbitrated unless there is a nonnegotiable right or statutory claim imposing standards outside the CBA.

Applying federal labor law, Washington courts interpret CBA arbitration clauses more broadly than arbitration clauses in commercial disputes or individual employment contracts. "[T]he rules governing interpretation of an arbitration clause in a collective bargaining agreement differ from those applicable to commercial contracts." *Meat Cutters v. Rosauers Supermarkets*, 29 Wn. App. 150, 154, 627 P.2d 1330 (1981).

> "An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that

> covers the asserted dispute. *Doubts should be resolved in favor of coverage."*

Id. at 155 (quoting *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 583 (1960) (emphasis added by the Washington Court of Appeals)).

The Washington courts, however, will not order an employee's claim to arbitration, if the source of the employee right asserted arises not out of the CBA, but out of state common law or a statute. *Brundridge v. Fluor Fed. Srvs., Inc.*, 109 Wn. App. 347, 358, 35 P.3d 389 (2001). In *Brundridge*, the Court of Appeals specifically held that a state "claim of wrongful termination in violation of public policy implicates a non-negotiable right." *Id.* "[T]he pipefitters claim for wrongful discharge of public policy does not require interpretation of or application of any term in the agreement." *Id.* at 356; *accord*, *Hisle v. Todd Pacific Shipyards Corporation*, 151 Wn.2d 853, 93 P.3d 108 (overtime claim under MWA involves nonnegotiable state right).

In this case, however, Mr. Cox is seeking CBA wages, using an hourly rate above the minimum wage. That hourly rate is available under the CBA only during the first 40 hours of each workweek. In order to calculate the amount of Cox's CBA wages, the arbitrator will also have to determine if QFC is correct that time rounded up or down is "time not worked" under CBA Sections 5.7 (Clark County) and 5.9 (Portland), and related CBA provisions governing compensability of clocked versus

rounded time. CP 573, 621. *Cf. Ervin v. Columbia Distributing*, 84 Wn. App. 882, 888, 930 P.2d 947 (1997) (contract-based claim barred but statutory claims under MWA involve nonnegotiable right).

Mr. Cox is asserting a CBA right to wages, using hourly rates above the minimum wage for rounded down time during the first 40 hours of each work week, not a statutory or common law right. "A state law claim is independent if it does not rely on a right created by a CBA." *Hill v. Garda CL Northwest, Inc.*, 198 Wn. App. 326, 350, 394 P.3d 390 (2017) (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 839 P.2d 314 (1992), and holding payment for rest breaks is a statutory claim).

The Court of Appeals did not identify a nonnegotiable or independent state right under the WRA for CBA hourly wages, above the minimum wage, or for clocked time that is rounded down during the first 40 hours of each work week. Both the hourly wage and definition of compensable time are determined solely by the CBA, not the WRA.

2. Neither the legislature nor L&I established wage rates or state standards for compensable hours under the WRA.

The WRA provides for recovery of wages payable under "any statutes, ordinance or contract . . . ." Cox's causes of action for minimum wages and overtime under the MWAs are statutory claims involving rights that are nonnegotiable and do not arise out of the CBA. *Huntley v. Frito-Lay*, 96 Wn. App. 398, 979 P.2d 488 (1999) (MWA overtime is nonnegotiable statutory right).

L&I has issued a Guidance addressing "Time Clocks and Rounding Practices." W&I, Administrative Policy No. ES.D. 1, "Recordkeeping and Access to Payroll Records" revised 5/7/2004 ("Guidance"). The Guidance specifically references the MWA and Industrial Welfare Act as both authority for the Guidance and as the statutes to which the Guidance should be applied. Guidance at 1. L&I is authorized to issue this Guidance for recordkeeping purposes "to safeguard the minimum wage." RCW 49.46.040(4). L&I also relied on the Industrial Wage Act's recordkeeping mandate as a statutory basis for the rounding Guidance. RCW 49.12.050.

The Guidance makes no reference to RCW 49.52.050(2) or any other WRA section as authority for the Guidance. The Guidance is "intended as a guide in the interpretation and application of the relevant statutes, regulations and policies" but references only the MWA and Industrial Welfare Act as relevant statutes. Guidance at 1. L&I has not issued any guidance or regulations to interpret the amount of "contract" wages under RCW 49.52.050(2).

The WRA merely allows for collection of attorney fees and double damages if wages under "statutes, ordinance or contract" are willfully withheld by the employer and classifies such withholding as a misdemeanor. RCW 49.52.050. Plaintiff has to show under the MWA that QFC failed to pay statutory overtime or minimum, before he can assert a WRA claim for statutory wages. Similarly, Plaintiff must prove that QFC

failed to calculate his CBA wages correctly to state a WRA claim for "contract" wages.

The panel understandably found no Washington law to support converting a CBA claim into a statutory claim by pleading a WRA claim. This is an issue of first impression. Does the WRA provide a nonnegotiable or independent state law right to use clocked rather than rounded time for the calculation of the CBA "wage such employer is obligated to pay" under RCW 49.52.050(2)? The Court of Appeals gave no supporting authority from other jurisdictions and specifically ignored Ninth Circuit case law holding Oregon's WRA does "not provide any means with which to assess which wages are 'due and owing.'" *Kobold,* 832 F.3d at 1035.

Rather than applying federal labor law to the arbitration issue, the panel relied on commercial arbitration agreements that the Court of Appeals and U.S. Supreme Court have previously held should not be used to interpret CBAs. *Meat Cutters*, 29 Wn. App. at 154. "[T]he hostility evinced by courts toward arbitration of commercial disputes has no place here." *Warrior*, 363 U.S. at 578. Other than *Brundridge*, the Court of Appeals only cited Washington cases involving commercial and consumer disputes and one individual employment agreement in its discussion of the arbitrability of Plaintiff's CBA/WRA claim. *Otis Housing Ass'n, Inc. v. Ha,* 165 Wn.2d 582, 586, 201 P.3d 309 (2009) (arbitration clause in lease with purchase option); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004) (interpreting individual employment contract with arbitration

clause); *Syrovy v. Alpine Res.,* 122 Wn.2d 544, 859 P.2d 51 (1993) (arbitration clause in logging contract); *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 376 P.3d 412 (2016) (arbitration clause in contract for assisted living services); *Wiese v. Cach, LLC*, 189 Wn. App. 466, 358 P.3d 1212 (2015) (arbitration clause in consumer class action).

3. Federal law labor law, as well as the Federal Arbitration Act, controls interpretation of CBAs.

The court held that the Federal Arbitration Act ("FAA"), not federal labor law, "generally" should be applied to interpret the CBA's arbitration clause. App. at 14. The court relied on *Brundridge* and a case involving an individual employment agreement. *See* App. at 7 fn.14, citing *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 1031 P.3d 773 (2004). "'FAA is applicable to the CBA in the present case.'" App. at 7 quoting *Brundridge*, 101 Wn. App. at 355.

Brundridge arose immediately after the U.S. Supreme Court's decision overruling a Ninth Circuit decision that the FAA should not be applied to any employment contract. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 119 (2001). The timing of the 2001 *Brundridge* decision months after the 2001 Supreme Court explains the Court of Appeals application of the FAA in *Brundridge*, 109 Wn. App. at 355. If the Court of Appeals had applied federal labor law to Plaintiff Cox's claim, the court

would have sent the CBA/WRA claims to an arbitrator. *Meat Cutters*, *supra*.[3]

Cox's WRA rights to CBA wages above the minimum wage for rounded down time during the first 40 hours of each work week arise only under the CBA. The WRA neither controls the hourly rate nor determines what is compensable time. This Court should grant the petition and determine whether the WRA establishes nonnegotiable rights or rights based in state law when a plaintiff disputes the amount of his CBA wages.

B. NINTH CIRCUIT AUTHORITY SPECIFICALLY HOLDS THE OREGON WRA DOES NOT ASSERT STATE RIGHTS.

Faced with an issue of first impression in Washington, the Court of Appeals not only failed to cite or distinguish Washington case law applying federal labor law, but also ignored analogous Ninth Circuit authority directly applicable to the Oregon WRA that was before the Court of Appeals.

> The Oregon statutes under which *Kobold* seeks relief provide only that an employee be paid 'the wages due and owing to them.' Or. Rev. Stat. § 652.120(1). They do not provide any means with which to assess *whether* wages are 'due and owing.' To answer that question, a court must consult the GS CBA in this case, because of a particular provision of the GS CBA that is in dispute, a court must interpret not just refer to or look at, the GS CBA.

Kobold, 832 F.3d at 1035-36 (emphasis in the original).

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[3] Because *Brundridge* involved a public policy discharge claim, a nonnegotiable right, and did not involve a CBA right, the denial of the employer's arbitration motion in *Brundridge* would have occurred under both federal labor law and the FAA.

This court should accept the petition and decide whether the Washington WRA, like the Oregon WRA, "provides any means for assessing whether" rounded down time results in CBA wages that QFC "is obligated to pay" under the CBA. *Id.;* RCW 49.52.050(2).

C. THE PANEL'S DECISION PLACES THE WAGES OF THOUSANDS OF EMPLOYEES WHOSE TIME IS ROUNDED UP AT RISK OF SETOFF WITHOUT ALLOWING THE UNION TO PARTICIPATE OR REPRESENT ALL QFC'S HOURLY EMPLOYEES.

The Court of Appeals decision places thousands of QFC employees whose time is rounded up at risk of having their wages setoff under the CBA's Payroll Overpayments provision, if Cox is able to recover CBA wages because clocked time, not rounded time, is compensable. CP 576, CP 1303-04. UFCW Local 555 represents all QFC grocery employees in Clark County and Portland, both those whose time was rounded up and those whose time was rounded down. CP 564, 612. The UFCW negotiated Plaintiff's CBAs, and it has the right to pursue Cox's arbitration claim, based on its evaluation of its members' interests. *Lew v. Seattle School District No. 1*, 47 Wn. App. 575, 577, 736 P.2d 690 (1987) (union had right to refuse to take Plaintiff's CBA claim to arbitration; summary judgment for employer upheld).

"[W]here a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee must exhaust those procedures before resorting to judicial

remedies." *Id.* at 577 (summary judgment upheld, because union was not named as defendant).

The Court of Appeals in this case bypassed the UFCW and ignored its role as representative of all hourly store employees, although the UFCW locals have supported wage and hour class actions when all its members stand to benefit. The UFCW local that represents QFC's employees in King County stores was a plaintiff in a class action for violation of MWA overtime provisions in Ernst Home Center stores where its members worked. *United Food & Commercial Workers v. Mutual Benefit*, 84 Wn. App. 47, 925 P.2d 212 (1996) (store employees' statutory overtime claim and minimum wage act claims for off the clock work did not require interpretation of CBA).

The Court of Appeals in this case refused to consider 18 years of past practice of the Union and QFC regarding rounding as part of the CBA without either party grieving the issue or negotiating changes to the past practice in the CBA. The panel dismissed this past practice as merely "QFC's historical practice of compensating employees based on the rounded time," rather than as part of the CBA.[4] The panel also made no reference to the bargaining history. Contrary to how the Washington courts and the

[4] The Court of Appeals' exclusive reliance on the language of the CBA is inconsistent with federal labor law, because the parties' past practice and bargaining history may determine the compensability of rounded time. CP 557-58. "[P]ast practices and bargaining history should be an implied part of the bargaining agreement. Both may be considered by the arbitrator in resolving the dispute." *Meat Cutters*, 29 Wn. App. at 156.

U.S. Supreme Court interpret CBAs, the panel's only source for interpreting the CBA was the literal language of the document.

> ". . . [I]t is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless you can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of right and duties . . . ."

Meat Cutters, 29 Wn. App. at 156 (quoting *Warrior & Gulf Navigation Company,* 363 U.S. at 579-80).

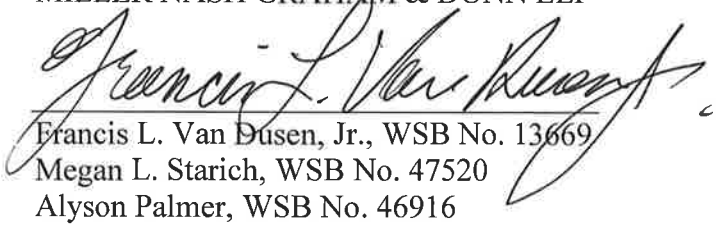
Plaintiffs with claims for additional CBA wages should not be permitted to avoid CBA grievance procedures, particularly when only some employees will benefit from the Plaintiffs' theory of calculating CBA wages.

VI. CONCLUSION

This Court should accept this appeal under RAP 13.4(b)(4) to decide when and if a plaintiff can bypass a CBA arbitration provision in a CBA wage dispute over the amount of wages owed by characterizing his CBA wage claim as a WRA claim under RCW 49.52.050(2).

DATED this 7th day of March, 2018.

MILLER NASH GRAHAM & DUNN LLP



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The undersigned certifies that she caused to be served on the parties a true and correct copy of QUALITY FOOD CENTERS' PETITION FOR SUPREME COURT REVIEW to the following:

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

Signed this 7th day of March, 2018, in Seattle, Washington.

/s/ Kristin Martinez Clark
Kristin Martinez Clark

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RONALD COX, an individual, and on behalf of others similarly situated, Respondent, v. THE KROGER COMPANY, an Ohio corporation, FRED MEYER STORES, INC., doing business as QUALITY FOOD CENTERS (aka QFC), Appellants.	)	No. 76143-9-I PUBLISHED OPINION FILED: February 5, 2018

VERELLEN, C.J. — Ronald Cox, a former Quality Food Centers Inc. (QFC) employee, filed this class action challenging QFC's policy of rounding hourly employees' clocked-in time to the nearest quarter hour. Specifically, he contends QFC intentionally manipulated the application of this policy to result in underpayment of wages.

QFC appeals the trial court's denial of the motion to compel arbitration. Because the collective bargaining agreements (CBAs) governing Cox's employment do not clearly and unmistakably waive his right to a judicial forum for

statutory wage claims, the arbitration provision does not encompass his claims, and the trial court did not err in denying QFC's motion to compel arbitration.

QFC also seeks review of the trial court's earlier determination that Cox's claims were not preempted by section 301 of the Labor Management Relations Act of 1947 (LMRA).[1] Because the interlocutory partial summary judgment order concerning preemption does not prejudicially affect the arbitration order designated in QFC's notice of appeal, the merits of the undesignated preemption ruling are not before us.

We also deny QFC's motion to take judicial notice because the documents at issue relate solely to the question of waiver of the right to arbitrate, and we need not reach waiver. We deny Cox's motion to dismiss this appeal as moot because the appeal presents debatable issues. For the same reason, we deny Cox's request for fees based on the argument that QFC's appeal is frivolous.

Therefore, we affirm.

FACTS

Cox was employed by QFC between October 2011 and February 2014. He worked at the QFC in Camas, Washington, and later transferred to the Moreland QFC in Portland, Oregon.

QFC is a supermarket chain with locations in Washington and Oregon. Between 2000 and 2014, QFC required hourly employees to use a time card to

[1] 29 U.S.C. § 185.

clock in and out at the beginning and end of their shifts. QFC employed a rounding policy that provided:

- Time is credited by the quarter hour. There is a seven minute grace period which rounds the eighth minute to the quarter hour. (Example: An employee is scheduled to work at 7:00 o'clock. The employee punches in at 7:08. The 7:08 punch will round to 7:15. If the employee punches in at 7:07 the punch will round to 7:00.).

  . . . .

- It is the employee's responsibility to follow these procedures, as it will ensure they are paid accurately and on a timely basis.[2]

The rounding policy is not contained in or referred to by the CBAs.

In July 2014, Cox and another former QFC employee, Sue Jin Yi, filed the current class action challenging QFC's rounding policy.[3] The proposed class included hourly QFC employees in Washington and Oregon.

United Food and Commercial Workers Union Local 555 represents QFC employees in Washington and Oregon. Cox's employment with QFC was covered by one CBA while he worked at the QFC in Camas, Washington,[4] and another while he worked at the Moreland QFC in Portland, Oregon.[5] The two CBAs are identical as to all the relevant provisions for this appeal.

In May 2015, the trial court denied QFC's motion to dismiss Cox's second and third causes of action based on chapter 49.52 RCW and Oregon Revised

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[2] Clerk's Papers (CP) at 250.

[3] Yi was dismissed in June 2015.

[4] Referred to as the Clark County CBA.

[5] Referred to as the Portland CBA.

Statutes section 652.120 (ORS) as preempted under section 301 of the LMRA. In November 2016, the court denied QFC's motion to compel arbitration of these same claims.

QFC appeals.

ANALYSIS

I. Nature of Claims

As a preliminary matter, it is critical to our analysis to understand the claims actually asserted by Cox. The first amended complaint specifically alleges QFC's rounding policy "deprives [hourly] employees of regular and overtime pay they have earned."[6] This appeal concerns only Cox's second cause of action, based on chapter 49.52 RCW, and his third cause of action, based on ORS section 652.120. The core issue of this appeal is whether these claims are statutory or contractual.

RCW 49.52.050(2) provides that "[a]ny employer or officer . . . who . . . [w]ilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract" is in violation of the statute. The purpose of the statute is to "ensure that the employee realizes the full amount of his or her wages and that the employer does not evade his or her obligation to pay wages . . . calculated to effect a rebate of part of them."[7]

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[6] CP at 499.

[7] Jumamil v. Lakeside Casino, LLC, 179 Wn. App. 665, 687, 319 P.3d 868 (2014).

Pursuant to ORS section 652.120(1), "[e]very employer shall establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them." The essence of a claim under this statute is "an assertion that one has not received payment from one's employer of 'wages due and owing.'"[8]

Cox contends the claims are statutory wage claims. Cox asserts the rounding policy in conjunction with QFC's other policies and procedures resulted in employees being "consistently and systematically deprived of pay for all straight time and overtime hours they actually work."[9] Specifically, Cox contends QFC's various policies concerning timekeeping and attendance have the impact of inhibiting conduct that would cause the employee to benefit from the rounding policy and promoting conditions that allow the employer to benefit. Commentators have analogized this wage dispute theory challenging unfair rounding policies to casinos where the odds of winning are skewed to favor the "house."[10]

QFC takes a diametrically opposed view, that despite being labeled as statutory wage claims, the claims are contractual because Cox seeks damages

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[8] Arken v. City of Portland, 351 Or. 113, 145, 263 P.3d 975 (2011) (quoting ORS § 652.120(1)).

[9] CP at 503.

[10] Elizabeth Tippett, Charlotte S. Alexander & Zev. J. Eigen, *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 38 (2017) ("While courts do not permit overtly unfair rounding rules, facially neutral rounding rules can act like casino odds when they interact with employer attendance policies—consistently favoring 'the house.'").

only available under the CBAs. A claim for unpaid wages necessarily requires a computation of the regular rate of pay multiplied by the amount of compensable time worked. QFC argues Cox's claims are contractual because the CBA is the source of Cox's regular rate of pay and the definition of "compensable time."

Specifically, as to the Washington law claim, QFC points to an interrogatory answer by Cox referring to claimed damages at a rate of $12 per hour. Because Cox's standard rate when working in Washington was less than $12 per hour, QFC infers that he must be depending on some form of premium wage rate contained in the CBAs. But the interrogatory answer does not constitute a binding admission by Cox that his Washington claim depends on the application of a premium wage rate contained in the CBAs. In fact, he denies his claims include any such rates.[11]

QFC also contends that Cox's wage claims under Oregon and Washington law necessarily require a determination of the definition of "compensable time." Although the rounding policy is not contained in the CBAs, QFC argues the policy controls the calculation of wages. Specifically, QFC relies on Cox's acknowledgement of the rounding policy, declarations from human resource executives about the lack of complaints concerning the rounding policy, and general declarations from QFC executive employees regarding QFC's historical

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[11] See Resp't's Br. at 5 ("Plaintiff does not seek—and has never sought—damages calculated using any premium rates or shift premiums provided for in any collective bargaining agreements.").

practice of compensating employees based on the rounded time. But under a claim for unpaid wages due to the alleged manipulation of the facially neutral rounding policy, the question is not whether the rounding policy exists, the question is whether QFC's policies and practices have the impact of undercompensating the employees.

If an employer intentionally used "bad math" to manipulate the computation of wages owed to employees, an employee would possess a statutory claim for the withholding of wages. Similarly, intentionally manipulating the application of a facially neutral rounding policy used to compute wages owed, resulting in underpayment, runs afoul of Washington's and Oregon's wage and hour statutes. Cox's claims qualify as statutory wage claims.

II. Motion To Compel Arbitration

QFC first challenges the trial court's denial of the motion to compel arbitration.

We review a trial court's denial of a motion to compel arbitration de novo.[12]

Generally, the Federal Arbitration Act (FAA)[13] applies to collective bargaining agreements.[14] "The purpose of the [FAA] is to overcome the courts'

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[12] Otis Hous. Ass'n, Inc. v. Ha, 165 Wn.2d 582, 586, 201 P.3d 309 (2009).

[13] 9 U.S.C. §§ 1-14.

[14] See Brundridge v. Fluor Fed. Servs., Inc., 109 Wn. App. 347, 355, 35 P.3d 389 (2001) ("FAA is applicable to the CBA in the present case."); Adler v. Fred Lind Manor, 153 Wn.2d 331, 341, 103 P.3d 773 (2004) (FAA "applies to all employment contracts"). Notably, the Washington uniform arbitration act does not apply to employment contracts. RCW 7.04A.030(4).

historical reluctance to enforce agreements to arbitrate."[15] This court must apply federal substantive law to any arbitration agreement within the coverage of the FAA.[16] In determining whether to enforce an arbitration provision, this court must consider (1) "whether the arbitration agreement is valid" and (2) "whether the agreement encompasses the claims asserted."[17]

An arbitration agreement does not encompass statutory claims unless the waiver of an employee's right to judicial forum for such claims is "clear and unmistakable."[18] A clear and unmistakable waiver can occur if the CBA contains "a general clause requiring arbitration under the employment agreement, coupled with a provision that makes it unmistakably clear that the statutes that are the basis for the asserted claims . . . are part of the agreement."[19]

Here, the grievance and arbitration procedure is contained in article 19 of the Clark County CBA and the Portland CBA. The procedure applies to "[a]ny grievance or dispute concerning the application or interpretation of this Agreement."[20] Because article 19 does not identify any specific statutes or make

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[15] Brundridge, 109 Wn. App. at 354.

[16] Schuster v. Prestige Senior Mgmt., LLC, 193 Wn. App. 616, 627, 376 P.3d 412 (2016).

[17] Wiese v. CACH, LLC, 189 Wn. App. 466, 474, 358 P.3d 1213 (2015).

[18] See Brundridge, 109 Wn. App. at 355 ("[F]ederal courts have established that an arbitration clause in a CBA will not waive an employee's right to a judicial forum unless such a waiver is clear and unmistakable.").

[19] Id.

[20] CP at 64 (Portland CBA), 188 (Clark County CBA).

any general reference to statutory wage claims, it does not make it unmistakably clear that claims under chapter 49.52 RCW or ORS section 652.120 are subject to arbitration.

QFC argues the separate wage claims provisions found in article 6 of the CBAs support arbitration. Article 6 states, "All claims for back wages or overtime not paid must be presented through the Union to the Employer."[21] But the wage claims provisions contain no arbitration clause and no reference to article 19. Article 6 also sets a different deadline for filing a claim than a grievance subject to the article 19 arbitration provision.[22] In other sections of the CBAs, the parties included express references to article 19 illustrating the clear intent to apply the arbitration procedures to such provisions.[23] The failure to include a similar cross-reference to article 19 in the wage claim provision is inconsistent with an objective manifestation of intent that the arbitration procedure of article 19 applies to wage

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[21] CP at 45-46 (Portland CBA), 173 (Clark County CBA).

[22] See CP at 45 (Portland CBA), 173 (Clark County CBA) ("All claims for back wages or overtime not paid must be presented through the Union to the Employer in writing within thirty (30) days of the date the employee is paid for the period in which back wages or overtime is claimed."); see also CP at 64 (Portland CBA), 188 (Clark County CBA) ("Any grievance or dispute . . . shall be presented in writing by the aggrieved Party to the other Party within twenty (20) days from the date of the occurrence first giving rise to such grievance or dispute, except that in the cases of discharge the grievance must be presented within ten (10) calendar days.").

[23] See CP at 64 (Portland CBA), 188 (Clark County CBA) ("The Employer and the Union agree that discharges will be made fairly and impartially, but in the event a protest of a discharge is lodged with the Employer, then the provisions of Article 19 . . . shall be invoked.").

claims under article 6.[24] The wage claim provisions also fail to identify any specific statutes covered by the agreement. Absent any reference to specific statutes or article 19, the article 6 CBA wage claim provisions do not support arbitration.

The CBAs do not clearly and unmistakably waive the right to a judicial forum for Cox's statutory wage claims. Therefore, the CBA arbitration provision does not encompass Cox's claims and the trial court did not err in denying the motion to compel arbitration. Given this conclusion, we do not need to address Cox's alternative arguments concerning waiver and unconscionability.

III. Preemption

As to the extensive arguments concerning preemption under section 301 of LMRA, that issue is not before us. Preemption was addressed by the trial court when it denied QFC's motion for partial summary judgment in May 2015.

"RAP 2.2 determines whether a particular superior court decision is appealable."[25] Under RAP 2.2(a)(3), a party may appeal "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." A ruling denying a motion to compel arbitration is appealable as a matter of right under RAP 2.2(a)(3) "because

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[24] See Syrovy v. Alpine Res., 122 Wn.2d 544, 550, 859 P.2d 51 (1993) ("If the parties had wanted to make logging of the various sections optional, they would have used specific language to that effect.").

[25] Munden v. Hazelrigg, 105 Wn.2d 39, 42, 711 P.2d 295 (1985).

it involves issues wholly separate from the merits of the dispute and because an effective challenge to the order is not possible without an interlocutory appeal."[26]

Here, the trial court's interlocutory partial summary judgment order concerning preemption is not appealable as a matter of right because the order does not discontinue the action or prevent final judgment. QFC did not seek discretionary review of the preemption order within 30 days of its entry, and there was no CR 54(b) certification or supporting findings of no just cause for delay.

Neither party has addressed whether an appeal as a matter of right from an order denying a motion to compel arbitration opens the door to include any and all prior interlocutory rulings. But even assuming the preemption ruling could be included in an appeal from a separate motion to compel arbitration, the preemption order was not designated in QFC's notice of appeal.

We will review an undesignated order only if "the order or ruling prejudicially affects the decision designated in the notice."[27] Our Supreme Court has interpreted the term "prejudicially affects" to turn on whether the order designated in the notice of appeal would have occurred absent the other order.[28] "'The issues

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[26] Stein v. Geonerco, Inc., 105 Wn. App. 41, 44, 17 P.3d 1266 (2001).

[27] RAP 2.4(b).

[28] Adkins v. Alum. Co. of Am., 110 Wn.2d 128, 134, 750 P.2d 1257 (1988); Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed.'"[29]

The consequence of section 301 preemption is to require an employee to exhaust contractual remedies.[30] As a result, section 301 of the LMRA is in large part a mechanism "to assure that agreements to arbitrate grievances would be enforced."[31] Although there is overlap in the consequences of rulings concerning preemption and arbitration, the legal questions underlying the doctrine of preemption and the standards applicable to a CBA arbitration provision are not so entwined that we must consider the undesignated preemption ruling.

Even if a claim was preempted by section 301, there would not be a contractual remedy for the employee to exhaust if the arbitration provision does not extend to the particular claim. Because we have determined the arbitration clause does not encompass Cox's statutory wage claims, the preemption decision does not prejudicially affect the arbitration order, and that ruling is not currently before us.[32]

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[29] Foster v. Gilliam, 165 Wn. App. 33, 45, 268 P.3d 945 (2011) (quoting Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 105 Wn. App. 813, 819, 21 P.3d 1157 (2001), remanded, 146 Wn.2d 370).

[30] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965).

[31] Livadas v. Bradshaw, 512 U.S. 107, 122, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).

[32] QFC could potentially appeal the interlocutory preemption ruling as a matter of right from a final judgment resolving all claims as to all parties. See RAP 2.2(a)(1) (a party may appeal from the "final judgment entered in any action or proceeding").

QFC also contends this court may address preemption under RAP 2.5(a) because it implicates the trial court's jurisdiction. But in Wingert v. Yellow Freight Systems, Inc., our Supreme Court rejected the application of RAP 2.5(a) to a section 301 preemption argument because "[t]he preemptive effect of federal law is not an issue that satisfies any of the exceptions to [RAP 2.5(a)]."[33] The 2015 order denying section 301 preemption is not before us in this appeal of the 2016 order denying QFC's motion to compel arbitration.

IV. Cox's Motion To Dismiss

Cox contends QFC's appeal is moot and asks this court to dismiss.

Pursuant to RAP 18.9(c), an appellate court may dismiss a case if it is moot.[34] "A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief."[35]

This appeal is not moot because if we had determined the trial court erred in denying the motion to compel arbitration, we could have provided effective relief to QFC.

We deny Cox's motion to dismiss.

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[33] 146 Wn.2d 841, 853, 50 P.3d 256 (2002).

[34] Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99 117 P.3d 1117 (2005).

[35] Id.

V. Timeliness

Cox contends QFC's appeal is untimely. Cox argues QFC's 2016 motion to compel arbitration was an untimely motion for reconsideration of the trial court's preemption decision in the 2015 partial summary judgment order.

To be timely, an appeal must be filed within 30 days of entry of the order being appealed.[36] Although a timely motion for reconsideration will extend the time for appeal, an untimely motion for reconsideration does not toll the 30-day deadline.[37]

Here, QFC filed a notice of appeal of the arbitration order on December 5, 2016. Cox does not provide any compelling authority to advance his argument that the arbitration motion was an untimely motion for reconsideration of the 2015 order. The two motions sought different relief and required the court to consider different bodies of law.

We conclude QFC's appeal is timely because the notice of appeal was filed within 30 days of the entry of the order denying arbitration.

V. QFC's Motion To Take Judicial Notice

QFC asks this court to take judicial notice of pleadings filed in the removal proceedings before the United States District Court for the Western District of Washington. Specifically, QFC offers Cox's motion to remand, QFC's opposition

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[36] RAP 5.2(a)(1).

[37] CR 59; RAP 5.2(e); Schaefco, Inc. v. Columbia River Gorge Com'n, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

to remand, Cox's reply, and accompanying declarations and exhibits. But QFC offers the pleadings in response to Cox's argument concerning waiver of QFC's right to arbitration.[38] Given our conclusion that the arbitration provision does not encompass Cox's claims, we need not address waiver.[39] We deny QFC's motion to take judicial notice.

VI. Fees on Appeal

Cox seeks an award of fees under RAP 18.9(a), arguing QFC's appeal is frivolous.

RAP 18.9(a) permits this court to award a party attorney fees when the opposing party files a frivolous appeal.[40] "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal."[41]

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[38] Appellant's Reply Br. at 19 ("Cox argues that QFC 'waived any right to compel arbitration' because it actively litigated the case before it moved to compel arbitration. As examples of what Cox deems was QFC's 'aggressive litigation,' Cox faults QFC for . . . removing the case . . . . But with these waiver arguments, Cox misstates the record and omits key details." (citation omitted) (quoting Resp't's Br. at 35)).

[39] Additionally, in appellate courts, ER 201, governing judicial notice, must be read in light of RAP 9.11. Spokane Research & Def. Fund, 155 Wn.2d at 98. QFC has not addressed the criteria of RAP 9.11.

[40] Reid v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004).

[41] Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

QFC's appeal is not frivolous because it presents debatable issues. We deny Cox's request for fees on appeal.

Therefore, we affirm.

WE CONCUR:

MILLER NASH GRAHAM & DUNN

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