NO. 102040-6

SUPREME COURT OF THE STATE OF WASHINGTON

BARBARA WERNER

Petitioner,

v.

THE STATE OF WASHINGTON, WASHINGTON STATE PATROL, JEFFREY DEVERE, JAY CABEZUELA, TIMOTHY WINCHELL, and JOHN BATISTE,

Respondents.

STATE'S RESPONSE TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Faithfully applying existing precedent, in an unpublished opinion, the Court of Appeals affirmed summary judgment dismissing Petitioner Werner's challenge to the application of a Washington State Patrol (WSP) policy that normalizes all employees' work schedules after 15 days of military leave. The policy was created "to ensure all WSP employees are treated equally while on any type of long-term leave." *Martin v. State*, No. 38332-6-III, 2023 WL 3116657, at *3 (Wash. Ct. App. Apr. 27, 2023) (unpublished).[1]

Under this WSP policy, called TAR § 2.020, the disparity in employee compensation that occurs when employees with different work shifts enter long-term leave status is mitigated. To achieve its purpose, TAR § 2.020makes all alternative work schedules conditional by requiring a schedule reversion to a standard work schedule when employees enter various forms of

[1] Pursuant to GR 14.1, this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

long-term leave. The schedule reversion applies to several forms of long-term leave, not just RCW 38.40.060's paid military leave. Accordingly, requiring employees like Werner, who work conditional, alternative four day, 10 hour weekly schedules, to revert to a standard Monday through Friday, 8 a.m. to 5 p.m. weekly schedule after entering long-term leave status, does not discriminate against military personnel.

While Werner contends that the application of TAR § 2.020violates the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA), both courts below disagreed. In the Court of Appeals' analysis of TAR § 2.020, it explained:

> During the first 15 days of military leave, the employees on a four tens schedule are able to exhaust their paid military leave *more slowly*. During that period, they are able to preserve their usual weekly income by requesting and using only 4 of their 21 days of statutory leave, which is what Trooper Werner did in October 2017. To preserve *their* usual weekly income, employees on a five eights schedule must request and use up 5 leave days.

> After the 15th day, TAR § 2.020 does not make employees on a four tens schedule 'burn through [their] military leave days faster'—a leave 'day' for them, like their coworkers on a five eights schedule, is still a day. But they are then receiving less compensation for their leave days. They are now receiving only 100 percent of what an employee on a five eights schedule receives for a leave day. Earlier, they were receiving 125 percent of the amount an employee on a five eights schedule receives for a leave day.

Martin, 2023 WL 3116657, at *5 (emphasis in original).

Werner claims the Court of Appeals' decision conflicts with *Washington Federation of State Employees v. State Personnel Board*, 54 Wn. App. 305, 773 P.2d 421 (1989). Werner's argument is based on an erroneous reading of case law. *Washington Federation* addressed whether paid leave should be charged according to calendar days rather than work days. But TAR § 2.020only applies to leave on days "which the employee is scheduled to work." RCW 38.40.060(4)(a). There is no conflict with precedent.

Werner also assigns error on the basis that military leave is not a right or benefit determined by seniority, but this claim

is abandoned because she fails to advance an argument concerning it. Even reaching the merits, however, military leave under RCW 38.40.060(4)(a) is not determined by seniority because it has no relationship to an individual's longevity in state employment. Again, the Court of Appeals' decision on this point does not conflict with *Washington Federation* or any other published case.

Lastly, Werner does not raise an issue of substantial public interest as TAR § 2.020governs the schedules of only WSP employees, and as Werner herself lacks standing to pursue claims due to not possessing any injuries resulting from the policy's application, she cannot act as a class representative.

Consequently, this Court should deny Werner's Petition for Review of the Court of Appeals' unpublished opinion.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Werner failed to establish a violation of 38 U.S.C. § 4316(d) where WSP employees are charged leave based on working, and not calendar, days and TAR § 2.020

permits each military member to take the full 21 day allotment of paid military leave provided by RCW 38.40.060.

2. Whether Werner's 38 U.S.C. § 4316(a) claim fails because paid military leave under state law is not a right or benefit determined by seniority.

3. Whether Werner is qualified to pursue claims as a class representative where she failed to demonstrate she suffered any injury under § 4316(a) or § 4316(d).

III. COUNTERSTATEMENT OF THE CASE

A. WSP's Work Schedule Policy Reduces Compensation Disparities

The WSP's Time and Activity Report Manual § 2.020 (TAR § 2.020)creates an official work schedule of five days a week, eight hours a day for scheduled employees. CP 316-17, 321. The manual also permits employees to seek alternative schedules approved by management, such as working four days a week, ten hours a day. CP 316-17, 321.

Every WSP employee who takes military leave, shared leave, approved temporary disability status, or long-term leave without pay for longer than 15 working days is subject to a mandatory reversion to a Monday-Friday, 8 a.m. to 5 p.m. work schedule. CP 316-17, 321. The purpose of this work schedule reversion is to avoid disparities in employee compensation that can exist when employees with varying work schedules enter these forms of long-term leave. CP 316-17.

The following illustration shows how a four tens employee is treated more favorably under TAR § 2.020 th an an employee working a standard five eights over the same period of time spanning four workweeks:

Days 1-15 (four tens)	Employee uses four days of leave to cover weekly income during each of these three workweeks, with each day worth 125% of per diem value compared to a five eights employee. Total leave used is 12 days.
Days 1-15 (five eights)	Uses five days of leave to cover weekly income during each of these three workweeks. Total leave used is 15 days.

Days 16-20 (four tens changed to five eights)	Uses five days of leave to cover weekly income during this one workweek because TAR § 2.020 reverts the employee's schedule to five eights. Total leave used is 17 (12 +5) days.
Days 16-20 (five eights)	Uses five days of leave to cover weekly income during this one workweek. Total leave used is 20 (15 + 5) days—*a higher amount* than a four tens employee whose schedule was changed due to TAR § 2.020.

Consequently, TAR § 2.020results in *no loss* to four tens employees who are subject to a schedule reversion.

Moreover, if the reversion policy did not exist, a WSP trooper on a four tens work schedule who uses 21 days of military leave would be compensated for 210 absent work hours (21 days x 10 hours per day), but a WSP trooper on a five eights work schedule who uses 21 days of military leave would only be compensated for 168 absent work hours (21 days x 8 hours per day). CP 309-10 (providing a similar illustration). TAR § 2.020mitigates this disparity by requiring similarly situated employees to be on the same Monday-Friday, 8 a.m. to 5 p.m. work schedule. CP 316-17.

B. Werner Lacked Standing to Act as Class Representative and Defendants Obtained Summary Judgment

A group of WSP employees filed a class action primarily alleging that WSP failed to properly apply veteran's preference points in hiring and promotion decisions. CP 64-103. In September 2017, the Spokane County Superior Court entered an order granting final approval to a settlement agreement and plan of allocation. CP 277-85. Claims arising under 38 U.S.C. § 4316(a) and (d) were carved out of the settlement for further litigation between the parties. CP 97-98, 273, 346.

However, none of Plaintiffs' class representatives had their work shift schedules changed pursuant to TAR § 2.020 a fter December 21, 2016, the relevant period for this matter. CP 317-18, 323-28. Thus, Plaintiffs sought to substitute Petitioner Werner as class representative. CP 491-99.

From October 2017 through September 2018, WSP provided Werner the full extent of 21 days' paid military leave

authorized by RCW 38.40.060.[2] CP 548-50. On November 2, 2017, while she still had 6 days of paid military leave remaining, Werner chose to use alternative forms of leave instead of paid military leave. CP 548-50. She used 19 days of unpaid military leave and one day of paid annual leave prior to her next request for paid military leave on December 1, 2017. CP 548-49.

Moreover, Werner did not exhaust her paid military leave until February 1, 2018, nearly four months after she began long-term leave. CP 548-50. From October 2018 through September 2019, Werner did not exhaust all of her paid military leave. CP 556. Despite being absent for 32 work days, Werner took only 14 days of paid military leave and chose not to use the remainder of her allotment. CP 556.

On June 21, 2021, the trial court entered an order granting Defendants' motion for summary judgment and

[2] RCW 38.40.060 provides public employees up to 21 days of paid military leave each year beginning October 1 and ending the following September 30.

denying both Plaintiffs' motion for summary judgment and Plaintiffs' motion to substitute a class representative. CP 647-58.

On April 27, 2023, Division Three of the Court of Appeals affirmed the trial court's rulings in an unpublished opinion. *Martin*, 2023 WL 3116657.

IV. ARGUMENT

A. Standard of Review

A party petitioning the Supreme Court to accept discretionary review must demonstrate sufficient grounds based on the considerations found in under RAP 13.4(b); Petitioner argues only two of those grounds, namely:

> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

See Br. of Pet'r at 15 (specifying these bases).

There is no conflict between the Court of Appeals' opinion in this case and prior decisional authority. Likewise,

there is no issue of substantial public interest, particularly as Werner suffered no injury and is therefore not qualified to bring claims as a class representative.

B. Werner Does Not Establish a Conflict With Published Precedent Under RAP 13.4(b)(2)

The Court of Appeals decision on Werner's § 4316(d) claim does not conflict with any published case that addresses Werner's claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). 38 U.S.C. §§ 4301-4335.

USERRA encourages military service by reducing disadvantages that can result in coexisting civilian careers, and the Act prohibits discrimination against service members. 38 U.S.C. § 4301(a). Under USERRA, service members have a right to use specific forms of leave during a period of military service:

> Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with

> pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

38 U.S.C. § 4316(d). This provision applies where a service member claims an employer forced them to take specific forms of paid leave, or refused such requests. *E.g.*, *Buckley v. Peak6 Invs., LP*, 827 F. Supp. 2d 846, 856 (N.D. Ill. 2011) (claim dismissed where policy permitted use of vacation leave and no requests were denied); *Conners v. Billerica Police Department*, 679 F. Supp. 2d 218, 226 (D. Mass. 2010) (police chief required subordinate to submit a request for vacation leave rather than military leave).

Werner's first claim is that, after a WSP employee uses 15 consecutive days of leave, WSP's policy in TAR § 2.020violates 38 U.S.C. § 4316(d) by causing the employee to receive eight hours of pay rather than ten hours of pay during remaining paid leave days. Br. of Pet'r at 13. Werner maintains that TAR § 2.020 compels employees to use other forms of

leave to "cover an additional absence each week" and suggests they are paid less as a result. *Id*.

Werner mischaracterizes four day, ten hour work shifts as customary so she can argue TAR § 2.020

disrupts these "common" schedules. Br. of Pet'r at 10. What Werner fails to acknowledge is that four day, ten hour shifts are both alternative to the norm and conditional from their inception.

CP 316-17, 321. TAR § 2.020 makes every four day, ten hour shift subject to reversion to ensure compensation equity within the WSP. CP 310, 317. Thus, TAR § 2.020does not negatively affect anyone's schedule—a Monday through Friday, eight hour, five day workweek is always standard for anyone utilizing various forms of long-term leave. *Cf.* Br. of Pet'r at 11.

Werner seeks discretionary review on the basis that the Court of Appeals' opinion addressing the effect of TAR § 2.020conflicts with *Washington Federation*, but no such conflict exists. Br. of Pet'r at 20.

Washington Federation addressed whether a State employee should be charged under a Washington Personnel Board rule with taking military leave on non-work days. 54 Wn. App. at 307. For example, an employee who took military training on a Friday through the following Monday was charged with four days of leave even if the employee would not have worked over the weekend. *Id*. The Court of Appeals considered this issue in the context of RCW 38.40.060, stating in pertinent part:

> Every officer and employee of the state.... shall be entitled to and shall be granted military leave for absence *from such employment* for a period not exceeding *fifteen days* during each calendar year . . . . Such military leave of absence shall be in addition to any vacation or sick leave to which the officer or employee might otherwise be entitled, and shall not involve any loss of efficiency rating, privileges, or pay . . . .

Id. at 307 (citing RCW 38.40.060; emphasis in original). The Court of Appeals concluded that, based on plain statutory language, "the term 'days' as used in the context of 'employment,' evidences the Legislature's clear and

unequivocal intent that military leave be computed on a work day basis" and not on a calendar day basis. *Id*. at 314.

The question of charging leave based on calendar days, not work days, is the same issue addressed in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). Although the application of a federal court case is not one of the considerations found in RAP 13.4(b), Werner nonetheless contends that *Butterbaugh* is "central" to her legal theories. Br. of Pet'r at 18 n.2. However, as the Court of Appeals noted below, *Butterbaugh* "construed a statute not involved in this case" and determined that "employees should only be charged for the days on which they were scheduled to work." *Martin*, 2023 WL 3116657, at *5 (citing 5 U.S.C. § 6323(a)(1)).

Here, in stark contrast to the rules at issue in both *Washington Federation* and *Butterbaugh*, TAR § 2.020 only proscribes the use of paid leave during work days, not calendar days. Werner concedes that TAR § 2.020implements a "Monday through Friday, 9 a.m. to 5 p.m. schedule—a five-day

workweek." Br. of Pet'r at 10; *see also id.* at 25 (Werner acknowledges RCW 38.40.060(4)(a) governs leave on days "which the employee is scheduled to work."). For employees that return to work after 15 days of military leave, they are "restored to their prior 4-10 [four days a week, ten hours a day] schedule." *Id*. at 11. As the Court of Appeals observed, a leave day for employees on both a four tens and five eights schedule is "still a day." *Martin*, 2023 WL 3116657, at *5. Werner does not argue, nor does she present evidence, that she was compelled to use paid leave based on calendar days rather than work days.

Because the *Washington Federation* decision regarding the use of work days instead of calendar days when charging employee leave does not conflict with the Court of Appeals' opinion here, Werner is unable to show that discretionary review should be accepted under RAP 13.4(b)(2).

C. There is Also No Conflict with Precedent Because Paid Military Leave under RCW 38.40.060 Does Not Qualify as a Right or Benefit Determined by Seniority

Werner does not present any argument in support of her additional 38 U.S.C. § 4316(a) claim that paid military leave granted under RCW 38.40.060 is a right or benefit determined by seniority. Br. of Pet'r at 4. The Court should deem this assignment of error abandoned. *See* RAP 10.3(a)(6); *see also Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) ("We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits.") (citations omitted); *Samra v. Singh*, 15 Wn. App. 2d 823, 836, 479 P.3d 713 (2020) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."); *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App. 148, 152, 848 P.2d 733 (1993) ("In the absence of argument and citation of authority, we will not consider these issues.").

Should Werner's argument nonetheless be reached, she still cannot show sufficient grounds under RAP 13.4(b)(2) warranting discretionary review. In order for a claim to be actionable under § 4316(a), the statute requires that the claim involve a right or benefit determined by seniority:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits *determined by seniority* that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

38 U.S.C. § 4316(a) (emphasis added). "A right and benefit is seniority-based if the right (1) 'would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer'; and (2) if 'it is in the nature of a reward for length of service.'" *Moss v. United Airlines, Inc.*, 20 F.4th 375, 382 (7th Cir. 2021); *see also Alabama Power Co. v. Davis,* 431 U.S. 581, 594, 97 S. Ct. 2002, 52 L. Ed. 2d 595 (1977) (explaining that because pension plans

reward longevity in employment it is a right or benefit determined by seniority).

In Washington, no vesting period is required to accrue or use paid military leave; all public employees called to military service are entitled to paid military leave. *See* RCW 38.40.060(1). Further, the amount of paid military leave does not increase based upon longevity—all employees receive a 21 day allotment regardless of how long they have been employed. *Id.*; *cf.* 38 U.S.C. § 4303(12) (defining "seniority" under USERRA as "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment."). There is simply no connection between the amounts of paid military leave authorized by RCW 38.40.060(1) and the length of time an employee has worked for the State. Thus, to the extent Werner assigns error to the dismissal of her § 4316(a) claim, she cannot sustain that theory of liability and this Court should not review it.

D. Werner Does Not Establish an Issue of Substantial Public Interest Under RAP 13.4(b)(4)

Werner's petition does nothing more than raise erroneous theories about the effect of TAR § 2.020on paid leave—theories that are not only limited to WSP employees subject to the specific policy, but that have been soundly rejected in both the trial court and Court of Appeals. Discretionary review is therefore not appropriate because Werner fails to raise "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

Further appellate review will also not provide a "clarification of benefits" as Werner asserts. Br. of Pet'r at 25. RCW 38.40.060 unambiguously provides for paid leave during military service, and TAR § 2.020restores WSP employees to the normal five eights schedule when they exceed 15 days of *any* form of long-term leave. There is no "confusion" regarding the applicability of either the statute or policy. *Cf.* Br. of Pet'r at 25.

While *Bearden v. City of Ocean Shores*, No. C21-5035 BHS, 2022 WL 17532303 (W.D. Wash. Dec. 8, 2022) addressed USERRA claims in the context of RCW 38.40.060(1), the alleged similarity to this case ends there. *See* Br. of Pet'r at 21 n.3. The *Bearden* plaintiff was charged non-military accrued leave after "he did not provide . . . any documentation indicating that he was required to report for military duty," and had no entitlement to military leave on days he was not scheduled to work. *Bearden*, 2022 WL 17532303, at *5-7. By contrast, Werner failed to demonstrate in proceedings below even a single instance where WSP required an employee to use any form of paid leave or denied an employee the use of paid leave.

In fact, Werner herself cannot act as a class representative because she has not suffered an injury under 38 U.S.C. § 4316(a) or (d). Like her 38 U.S.C. § 4316(a) claim related to seniority, Werner does not present any argument concerning her assignment of error on the issue of standing, and

it should also be deemed abandoned. *See*, *e.g.*, RAP 10.3(a)(6); *Samra*, 15 Wn. App. 2d at 836.

But even if standing is reached as an issue, the trial court did not abuse its discretion when it correctly refused to substitute Werner as a class representative because she failed to establish she suffered any actual injury for purposes of a § 4316(a) or (d) claim.[3]. "A class representative must be part of the class and 'possess the same interest and suffer the *same injury*' as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (emphasis added); *see also E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 404, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (plaintiff was "simply not eligible to represent a class of persons who did allegedly suffer injury."). This requirement ensures a named plaintiff is an appropriate

[3] Appellate review of a trial court's decision regarding class certification, including a motion to substitute the class representative, is for a manifest abuse of discretion. *Elter v. United Servs. Auto. Ass'n*, 17 Wn. App. 2d 643, 654, 487 P.3d 539 (2021).

representative of the class. *Dukes*, 564 U.S. at 349. Four requirements must be proven to establish representative status: numerosity, commonality, typicality and adequate representation. *Id*. (citing Fed. R. Civ. P. 23).[4] Determining whether each element has been established involves an analysis that overlaps with the merits of pled claims. *Id.*at 350-51.

The plain language of 38 U.S.C. § 4316(a) requires the deprivation of a benefit or right *determined by seniority*. 38 U.S.C. § 4316(a) (emphasis added). As discussed above, paid military leave is not a benefit or right determined by seniority. Accordingly, Werner's claims that TAR § 2.020adversely affected her military leave cannot sustain a §4316(a) violation – which in turn prevents her from serving as a class representative for any putative § 4316(a) claims.

A similar flaw precluded Werner from serving as a class

[4] "Because CR 23 is identical to its federal counterpart, Federal Rule of Civil Procedure 23, federal cases interpreting the analogous federal provision are highly persuasive." *Schwendeman v. USAA Cas. Ins. Co.,* 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003).

representative for any putative § 4316(d) claims. A USERRA violation under 38 U.S.C. § 4316(d) requires either (1) a refusal to approve a request to use paid leave or (2) a requirement to use paid leave. But Werner failed to identify any instance when a refusal to approve her own leave occurred, or when she was compelled to use paid leave rather than allowed military leave. *See* CP 532-35 (Werner Decl.). In fact, WSP permitted Werner to use her full complement of 21 days paid military leave, and such leave was never prematurely extinguished because of TAR § 2.020. *See* CP 548-55 (Werner leave schedule). During 2018-19, Werner never used more than four days of paid military leave in any week *before or after* her schedule reverted to five eights. *See* CP 548-55. In 2019-2020, Werner twice used five days of military leave in a week, but she never exhausted her paid military leave benefit during that timeframe despite the opportunity to do so. *See* CP 556-57.

Further, to the extent Werner asserts she received less compensation for leave days relative to other employees, her

argument fails because: 1) as shown in the chart above, four tens employees receive a *greater* benefit during the first 15 days of leave, and 2) all employees are treated *equally* beyond the point when 15 days of leave are used. *Martin*, 2023 WL 3116657, at *5 (paid leave is only "still a day" regardless of days worked per week). Werner is not a proper class representative for a § 4316(d) claim.

Thus, because Werner did not suffer an injury, she does not qualify for class representative status. *See Dukes*, 564 U.S. at 348-49; *Rodriguez*, 431 U.S. at 404. As the Court of Appeals stated:

> The continuing viability of the class action depended on Trooper Werner's ability to demonstrate claims for violations of 38 U.S.C. § 4316(a) and (d). She demonstrated neither. A party who lacks standing herself cannot represent a class of which she is not a party.

Martin, 2023 WL 3116657, at *8 (citing *Johnston v. Beneficial Mgmt. Corp.*, 85 Wn.2d 637, 645, 538 P.2d 510 (1975)). In sum, Werner fails to present an issue of substantial public

interest in seeking discretionary review of claims that she cannot pursue.

V. CONCLUSION

Werner has failed to demonstrate that this Court should accept review under RAP 13.4(b)(2) or (4), and her Petition should be denied.

This document contains 4,367 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 31st day of July 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the **State Respondent's Answer to Petition for Review** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participants as follows:

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

DATED this 31st day of July 2023, at Olympia, Washington.

/s/ Beverly Cox
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