

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 12 PM 1:44

No. 47812-9-II

STATE OF WASHINGTON

BY: 

THE COURT OF APPEALS, DIVISION II

State of Washington

94046.1

DREW OTA, CRAIG GARDNER, ET AL,

PLAINTIFFS

v.

PIERCE COUNTY,

DEFENDANT

PETITION FOR REVIEW

J. Mills
WSBA# 15842
Attorney For Appellant
201 Atrium Court
705 S. 9th Street
Tacoma, Washington 98405
(253) 226-6362
jmills@jmills.pro

TABLE of CONTENTS

Identity of Petitioner	1
Court of Appeals Decision	1
Issues Presented for Review	1
Statement of the Case	2
Argument Why Review Should Be Accepted	3
Conclusion	5

TABLE of AUTHORITIES

Washington Cases

Wingert v. Yellow Freight Sys., Inc., 146 Wash.2d 841,
50 P.3d 256 (2002) 3

Lew v. Seattle Sch. Dist. No. 1, 47 Wn.App. 575, 736 P.2d 690 (1987) 4

RCW 49.52.

RCW 49.52.070

Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW **49.52.050** (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

[2010 c 8 § 12056; 1939 c 195 § 3; RRS § 7612-23.]

A. Identity of Petitioner

Plaintiffs, and appellants, requests that The Supreme Court accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Plaintiffs seek review of The Court of Appeals decision terminating review by unpublished opinion. A copy of the decision is appended as Exhibit A.

C. Issue Presented for Review

This case presents a single issue: Does a union contract between providing for a general, albeit comprehensive grievance process, destroy an employee's right to elect as a remedy for unpaid wages, the statutory rights granted under under Ch. 49.52 RCW; is the grievance procedure an exclusive remedy that must be exhausted as a precondition to exercising those statutory rights, and does the union contract thus waive rights to just proceed directly under the statute to recover the unpaid wages as any non-union employee might?

D. Statement of the Case

This case involves a group of Pierce County corrections officers who allege that they were not paid their contract wages due. The officers are part of a group covered by a comprehensive collective bargaining agreement. The agreement contains a not unusual grievance process that, if started promptly, could have resolved the dispute to the satisfaction of the officers.

There is no dispute that at least one of the plaintiffs attempted to grieve the dispute and pushed his grievance through the process, but was stymied eventually when the union declined to pursue it further at the point where further appeals in the grievance process required union intervention. It is thus accurate to say that the grievance process was not pursued to its final conclusion, although it was pursued for so far as the officer could force review. *See* COA decision at page 8-9.

A long time passed, but before rights expired under Ch. 49.52 RCW, the Officers filed a routine lawsuit in Superior Court seeking recovery of unpaid wages due.

The case was dismissed by summary judgment. The dismissal was affirmed by the Court of Appeals, ruling that failure to exhaust the

administrative remedies of the grievance process deprived the Officers of their Ch. 49.52 right to sue for unpaid wages in the Superior Court.

Plaintiffs seek review.

E. Argument Why Review Should be Accepted

Although some cases have flirted with the issue, it's believed that no Washington case squarely addresses the question of whether Ch. 49.52 rights to sue for unpaid wages in the Superior Court are pre-empted, superceded by, or destroyed by a union grievance procedure. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash.2d 841, 847, 50 P.3d 256 (2002) comes closest to resolving the question.

However, review should be accepted pursuant to RAP 13.4(b)(4) because it involves an issue of substantial public interest that should be determined by the Supreme Court. If union members have their statutory rights to sue for unpaid wages, and by implication their statutory remedies for many other injuries, curtailed or impaired by the existence of a general grievance procedure, that's something everyone needs to know as it's an important consideration in choosing to provide for a grievance procedure or at least in describing the application of grievance procedures to specific issues.

The Court of Appeals, and the trial court rely on *Lew v. Seattle Sch. Dist. No. 1*, 47 Wn.App. 575, 736 P.2d 690 (1987) for the proposition that “In general, where 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.” See COA decision at page 5 (bottom).

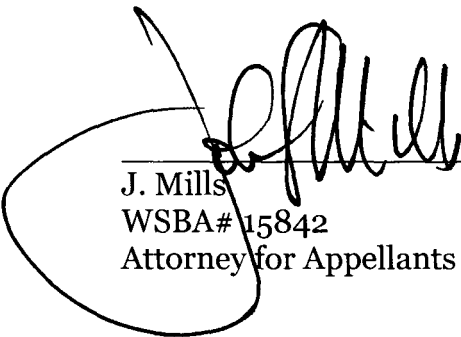
Appellants have no issue with the *Lew* decision. The facts of *Lew* are a little sketchy, but the case started with a parental complaint about a school counselor. The school district made investigation and found that appellant's conduct warranted a written admonition and a transfer to a different position. See *Lew*, 47 Wn.App. at 576.

Whatever can be said of *Lew*, it's just not a **wage** claim that was made. Accordingly, the *Lew* plaintiff could not rely upon any independent **statutory** cause of action. Appellants agree that *absent* the wage-hour statute, the analysis of *Lew* would control, but because of the wage-hour statute, *Lew* is just inapplicable. Neither the union nor county can contract away plaintiff's *statutory* wage claim because a contract doesn't overrule a statute. If so, things like minimum wage laws could be repealed simply by having a business contract for a wage below minimum wage.

F. Conclusion

For reasons set out above, the court should accept review of this case pursuant to RAP 13.4(b)(4). The case presents an issue of substantial public importance that should be determined by the Supreme Court.

RESPECTFULLY SUBMITTED this 12th day of January, 2017.



J. Mills
WSBA# 15842
Attorney for Appellants and Plaintiffs

EXHIBIT A

December 13, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DREW OTA, CRAIG GARDNER, ROBERT
DESMOND, ROBERT BRINK, and ALEC
WILLIAMS,

Appellants,

and

LUIS FIGEROA, DAVID BERWICK, KEITH
VOLK, CAMERON ASHLEY, BRIAN
SAECHAE, MATTHEW WHITEHEAD,
LISA SHANAHAN, JASON HALEY,
JARVIS HARRIS, FE'DFETAI MAREKO,
and ELIZABETH EARP,

Plaintiffs.

v.

PIERCE COUNTY, a political subdivision of
the State of Washington,

Respondent.

No. 47812-9-II

UNPUBLISHED OPINION

MELNICK, J. — Drew Ota, Craig Gardner, Robert Desmond, Robert Brink, and Alec Williams appeal from the trial court's order granting summary judgment dismissal of their action seeking recovery of wages for their work as correctional officers (COs). Because the COs failed to exhaust their grievance remedies under the collective bargaining agreement (CBA), we affirm the trial court's summary judgment in favor of Pierce County (County).

FACTS

I. WAGE CLAIMS

Ota, Gardner, Desmond, Brink, and Williams worked as COs at the Pierce County jail. A CBA set their wages. In the fall of 2006, the COs' union and the County agreed to a new CBA to cover January 1, 2007 to December 31, 2009. It changed the pay range classification for COs and provided that in 2008,

the pay range for the classification of Correctional Officer shall be adjusted as follows: Step 1 shall be dropped and the existing Steps 2 through 6 shall be moved down one step each, to Steps 1 through 5. A new Step 6 will be added which is approximately 2.5% higher than the existing top step. Employees shall each be moved to the corresponding new step number so that their pay rate will not be impacted by this change and step increase counters will continue. However, employees who have been at the top step of the range for a minimum of 26 accruable pay cycles will be advanced to the new Step 6.

Clerk's Papers (CP) at 313. The new CBA relabeled the old steps but did not reduce the pay rate. On January 2008, new employees started at a higher salary than their predecessors because they started at the old Step 2 salary rather than the old Step 1 salary. Employees on the six step range were still eligible to receive periodic step increases on the completion of 26 accruable pay cycles. The COs received the next pay step increase at the same time they would have if there had been no change to the range.

II. PROCEDURAL FACTS

The COs each filed a claim for damages for lost wages with the County's Risk Management and Insurance Department. The claims alleged that the County "improperly reset the pay grade clock . . . resulting in pay that was less than the rate outlined in the 2008 contract." CP at 18, 21, 24, 27, 30. After an investigation, the County denied the claims.

The COs filed a complaint against the County in superior court seeking to recover unpaid wages. The complaint alleged that paychecks received by the COs were wrongly calculated and were issued for less pay than agreed to in the CBA.

The County filed its answer and asserted defenses including that the COs failed to exhaust their administrative remedies under the CBA, the statute of limitations barred the claim, the COs failed to state a claim upon which relief may be granted, any recovery is barred by reason of laches, and that the County's actions complied with the terms of the CBA.

On December 23, 2014, the County filed a motion for summary judgment with supporting declarations. In part, the County argued the COs did not exhaust either the contract grievance procedures or the administrative remedies provided for under chapter 41.56 RCW.¹

Deborah Young, the County Employee Relations Manager responsible for labor negotiations and contract administration, stated that, the CO's "step increase counters did not change. The only change was the label of the pay rate. Therefore, they received their next pay step increase at the same time they would have if there had been no bargained change to the pay range at all." CP at 180.

Joe Carrillo, the County Human Resources Deputy Director, described the new pay scale. "All the current Step 1 employees, and all new hires would be moved into the old Step 2 salary . . . , whether or not they had reached their first 26 pay cycle milestone. . . . [T]he salary would be at the old Step 2 salary." CP at 185. Under the new CBA, "each of the other step designations were rolled back a step. Those employees who had already reached Step 2 were re-designated as Step 1 employees, those in Step 3 were re-designated as Step 2." CP at 185. Finally, none of the

¹ Public Employees' Collective Bargaining.

grievances filed was ever taken to binding arbitration, nor was a complaint ever filed with the Public Employment Relations Commission.

On January 12, 2015, the COs filed a response to the County's motion for summary judgment. Among other issues, they argued that the case was not subject to the grievance process set out in the CBA. They claimed that they substantially complied with the grievance process. Ota filed a declaration and explained that he filed grievances, but they were denied by the COs' representation.

The County filed a reply and attached a new declaration by Young which stated that Ota received every step increase and every cost of living adjustment to which he was entitled under the CBA.

On May 8, the trial court heard arguments on the motion for summary judgment. The trial court granted the motion. The trial court signed an order granting the motion because an employee must exhaust the grievance and arbitration procedures if the dispute arises under a CBA. Finally, the trial court stated that the law requires an employee to assert a claim against the union if the union declined to pursue a grievance on the employee's behalf.

The COs appeal.

ANALYSIS

The COs argue that the trial court erred by granting the County summary judgment because the dispute was not a grievance as defined by the CBA. We disagree.

I. STANDARD OF REVIEW

We review an order for summary judgment *de novo*, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We construe all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300.

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. If the nonmoving party fails to demonstrate that a material fact remains in dispute, and reasonable persons could reach but one conclusion from all the evidence, then summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

II. LEGAL PRINCIPLES

“Section 301 of the Labor Management Relations Act (LMRA) of 1947, codified at 29 U.S.C. § 185(a), grants federal courts jurisdiction over claims arising from CBAs,” but state courts have concurrent jurisdiction. *Swinford v. Russ Dunmire Oldsmobile, Inc.*, 82 Wn. App. 401, 408, 918 P.2d 186 (1996). “Even in state courts, however, federal law must be applied to such claims.” *Swinford*, 82 Wn. App. at 408. Federal labor policy requires the exhaustion of grievance procedures before resorting to the court system. *Lew v. Seattle Sch. Dist. No. 1*, 47 Wn. App. 575, 577, 736 P.2d 690 (1987). “In general, where 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.” *Lew*, 47 Wn. App. at 577.

However, “where a grievance procedure has not been exhausted due to the union’s refusal to press the matter on to arbitration,” the courts have generally held that “a prerequisite to maintaining a lawsuit against [the employer] is an allegation that the union acted arbitrarily, discriminatorily, or in bad faith in failing to exhaust the contractual procedures for settling disputes.” *Lew*, 47 Wn. App. at 578 (quoting *Ploof v. Village of Enosburg Falls*, 514 A.2d 1039, 1043 (Vt. 1986)). This prerequisite arises because the union is the agent of the employee, and “in the absence of evidence showing bad faith, discrimination, or arbitrary conduct on the part of the union, its decision to forgo exhaustion of grievance procedures binds the employee and forecloses judicial action on the contract.” *Lew*, 47 Wn. App. at 578. The proper use of the grievance and arbitration procedures prevents employees from “short-circuiting” the established procedure for the court system. *Swinford*, 82 Wn. App. at 412.

In construing a CBA, we apply the following rules: “(1) the intent of the parties controls, (2) we ascertain that intent from reading the contract as a whole, and (3) we do not read ambiguity into the contract.” *Davis v. Dep’t of Transp.*, 138 Wn. App. 811, 818, 159 P.3d 427 (2007). We give words and provisions in a contract their ordinary meaning. *Davis*, 138 Wn. App. at 818. If the meaning of words or provisions are uncertain or if they are capable of more than one meaning, we consider them to be ambiguous. *Davis*, 138 Wn. App. at 818. Words and provisions in a contract are not ambiguous simply because a party suggests an opposing meaning. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). We should also avoid interpreting a contract in a manner that would lead to absurd results. *Forest Mktg. Enters., Inc. v. Dep’t of Nat. Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005).

III. THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT

The COs argue that the trial court erred by granting the County summary judgment because they did not have to exhaust their remedies under the CBA because the circumstances of the case do not fit the definition of a grievance in the CBA. They argue that the County's refusal to pay wages due to them cannot "affect the wages due under the [CBA]"; therefore, their case does not fall within the CBA's definition of grievance. Br. of Appellant at 10 (emphasis omitted). We disagree.

Under the 2007-09 CBA, a "grievance" is defined as "a management interpretation or application of the provisions of this agreement which adversely affects an employee's wages, hours or conditions of employment and is contrary to the terms of this Agreement." CP at 330. The grievance and arbitration procedures provided for in the CBA were "the sole and exclusive method of adjusting all complaints or disputes arising from this Agreement which the Union or employee may have and which relate to or concern the employee and the Employer." CP at 332.

The CBA established five steps to be followed when an employee files a grievance. In Step 1, the grievance had to be filed with the employee's lieutenant within ten working days of the occurrence which gave rise to the grievance. The lieutenant would then meet with the employee within five working days and ten days after the meeting, the lieutenant would provide a written decision. In Step 2, if the grievance was not settled, it would then be presented to the bureau chief or designee within ten working days after the receipt of the decision from Step 1. The corrections administrator or designee would meet with the employee within ten working days. Ten days after the meeting, the written decision would be completed. If the grievance was not settled at Step 2, Step 3 required the grievance be presented to the sheriff or designee within ten working days of receipt of the decision and had to set forth the specific provision of the CBA alleged to be violated,

the reason for dissatisfaction, and the proposed remedy. Then, within ten working days of receiving the grievance, the sheriff or designee would then meet with the employee, and issue a decision within ten working days thereafter. If the grievance was still not resolved, then under Step 4, it would then be presented to the county executive or labor relations designee within ten working days of the prior decision. The county executive or labor relations designee would then meet with the employee within ten working days and issue a decision within ten working days after the meeting. If the grievance remained unresolved after Step 4, an arbitration request could then be submitted by the union designee. However, only signatories to the CBA may advance the grievance to arbitration.

First, it is clear that this case involves a grievance because the alleged wage withholding by the County involved management's application of the CBA's terms as they related to wages. Furthermore, the COs alleged that this application of the CBA adversely affected their wages because they claimed to have received less than they should have. We conclude that this case falls within the CBA's definition of a grievance.


Next, we conclude that the COs failed to exhaust the CBA's grievance remedies. In their response to the County's motion for summary judgment, the COs argued that they substantially complied with the grievance process. Ota's declaration stated that he tried to file formal grievances and that he sent the grievance to Carrillo, who denied the grievance as untimely. He also stated that he asked the union representatives and, later in 2010, the independent guild that replaced the union to push the grievance further, but they refused. Yet Ota did not follow the grievance procedure outlined in the CBA. Ota's 2008 grievance progressed to Step 3, but he failed to push the grievance to Step 4 because he did not present the grievance to the County Executive or Labor

Relations designee within ten working days of the prior decision. Ota could have moved through the grievance procedure, but he did not.

Therefore, because the COs' claim is a grievance under the CBA, and because the COs did not exhaust the grievance remedies under the CBA, the trial court did not err by granting summary judgment to the County.

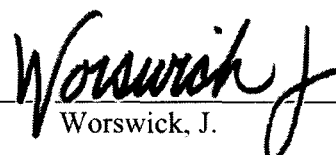
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




Melnick, J.

We concur:



Worswick, J.



Maxa, A.C.J.

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 12 PM 1:44

STATE OF WASHINGTON
DEPUTY

WASHINGTON STATE COURT OF APPEALS
Division Two

Drew Ota, Craig Gardner, Robert
Desmond, Robert Brink, Alec
Williams,

Plaintiffs,

Vs.

Pierce County, a political
subdivision of the State of
Washington,

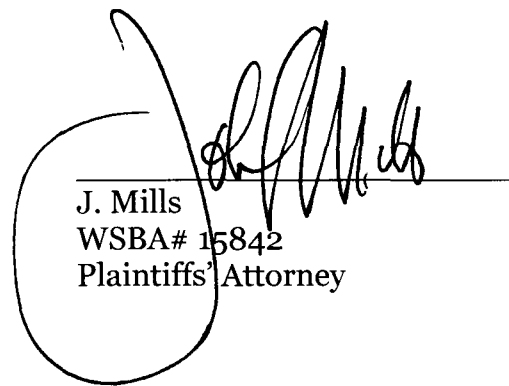
Defendant.

COA No. 47812-9-II

SERVICE DECLARATION
(PETITION FOR REVIEW)

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that on January 12, 2017, I served a true copy of appellant's Petition for Review on counsel for the appellee by delivering a copy in .pdf format by email to Mr. Scott, counsel for Pierce County. See attached email. Email is our customary means of communication, and I hand-delivered a copy of the Petition for Review to Mr. Scott's office, 930 Tacoma Ave S #946, Tacoma, WA 98402.

DATED this 12th day of January, 2017.


J. Mills
WSBA# 15842
Plaintiffs' Attorney

J. Mills

From: J. Mills <jmills@jmills.pro>
Sent: Thursday, January 12, 2017 1:20 PM
To: 'Drew Scott'
Subject: Ota v. Pierce County
Attachments: Our Petition as filed.pdf

Petition for Review attached. And, I'll drop a copy by your office on the way to file this.

J. Mills, return mail: jmills@jmills.pro, Address: 201 Atrium Court, 705 South 9th Tacoma, WA 98405; phone: (253) 226-6362

The information contained in this message may be privileged, confidential, and protected from disclosure. If you are not the intended recipient, or an employee, or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the message and deleting from your computer.