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SUPREME COURT OF THE
STATE OF WASHINGTON

No. 33556-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly-situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

**PETITION FOR REVIEW BY THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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I. Petition for Review by the Washington Supreme Court

A. Identity of Petitioners and Citation to Court of Appeals Decision

The Petitioners are Judith Q. Chavez, Kathleen Christianson, Oralia Garcia, and Marrietta Jones (the "Nurses"). The Nurses seek review of the February 9, 2017 Opinion issued by the Washington Court of Appeals, Division III ("COA"), affirming the denial of class-certification.[1]

B. Issues Presented for Review

ISSUE ONE: Did the trial court abuse its discretion by failing to liberally construe the requirements of CR 23 and Washington wage-and-hour law in favor of class certification, and did the Court of Appeals commit reversible error by affirming the trial court despite the trial court's application of erroneous legal standards?

ISSUE TWO: Did the trial court commit reversible error by failing to adequately articulate its reasons for ruling that the Nurses failed to meet CR 23's requirements?

ISSUE THREE: Did the COA commit reversible error when it "assumed" the trial court resolved evidentiary conflicts in a light most favorable to the Hospital and then "deferred" to those purported findings even though they were not articulated in the trial court's class-certification order?

ISSUE FOUR: Did the trial court and COA commit reversible error by failing to explain which element of the substantive claim purportedly required individualized proof such that the case cannot be managed as a class action?

ISSUE FIVE: Did the COA commit reversible error when it held that the class-action procedure is not superior in this case because the individual nurses can pursue wage claims for missed rest periods in *small claims court*?

[1] *See* RAP 13.4. On May 4, 2017, the COA denied Respondents' Motion to Publish.

ISSUE SIX: Did the trial court commit reversible error by requiring *the Nurses* to move for summary judgment before ruling on the motion for class certification and thereby considered absent class members' claims on the merits, and did the COA commit reversible error by endorsing this irregular and unauthorized procedure?

ISSUE SEVEN: Did the trial court and the COA commit reversible error when it concluded that this case cannot be certified as a hybrid CR 23(b)(1) or (b)(2) class as a matter of law because the Nurses also sought monetary relief under CR 23(b)(3)?

C. Statement of the Case

Respondent Our Lady of Lourdes Hospital (the "Hospital") is an acute-care hospital with nine departments. (CP319, CP357, CP370-371.) The Hospital uses over 100 Registered Nurses to work 8, 10, or 12-hour shifts, but it uses *mostly* 12-hour shifts. (CP370-371, CP399.) Petitioners are current or former Registered Nurses (the "Nurses"). (CR866-869.) The Nurses sued the Hospital for wage-and-hour and meal-and-rest period violations. (CP979-990.) After preliminary document discovery on the Hospital's policies, and limited-pre-class-party-only depositions, the Nurses moved to certify a class or subclasses to litigate common liability questions related to the Hospital's illegal wage-payment and meal-and-break policies and practices. (CP288-935, 938, 943.)

The Hospital's class-certification defense is essentially that operational differences between departments would force the court to make an "individualized inquiry" to determine whether any particular nurse

missed a meal or rest period on any particular shift. (CP226-287.)

On March 27, 2015—after complying with the trial court's directive that the *Nurses* move for summary judgment on various substantive/merits issues before renewing a motion for class certification (RP123-129, RP137)—the Nurses filed a Renewed Motion for Class Certification. (CP1583-1618.) The Nurses noted in the renewed motion that all but one case the Superior Court relied on in making its summary-judgment ruling came from meals-and-breaks cases decided (whether the plaintiffs won or lost) on a collective, large-group or class basis. (CP1584.) The Nurses, citing the Hospital's uniform written policies, discovery responses, CR 30(b)(6) admissions, and other nurse-witness testimony, showed that:

- The Hospital's meals-and-break policies are general HR policies that apply uniformly to all nursing departments and that *there are no relevant written department-level policies.*

- The law requires the Hospital to provide nurses with mandatory rest periods on its time, and pay them for extra hours worked if the mandatory rest periods are not enforced. Nevertheless, *the Hospital systematically failed to track time for missed rest periods* (*i.e.*, track hours worked as required by law) and failed to pay *any* nurse for *any* missed-rest period during the back-pay period. The Hospital's own evidence submitted by way of declarations from managers along with evidence submitted by the Nurses shows that every nurse, in every department, missed some rest periods when the Hospital is busy or when patient acuity required it. Thus, every nurse, regardless of department, was entitled to back pay for missed rest periods.

- The law requires the Hospital to "schedule" breaks at regular intervals if the "nature of the work requires." The Nursing Director and the Hospital's CR 30(b)(6) representative admitted that, when nurses are "in patient assignment," *i.e.*, when they are assigned to care for a specific patient(s), a universal nursing standard makes them responsible for that patient's care until they are relieved by another competent nurse or the patient is discharged. This universal nursing standard imposes an obligation on the Hospital to schedule breaks and relieve a nurse of patient assignment to comply with WAC 296-126-092(4) based on the "nature of the work." Nevertheless, the Hospital contends that the nature of a nurses' work does not require scheduling. To the contrary, the Hospital's litigation position is that the *nurses* have the burden of "finding time" to take breaks when there are lulls in the patient census, or that the law allows them to take "mini" or "intermittent breaks" while they are actively caring for patients.

- The law requires the Hospital to provide a presumptively *paid* meal period if the nurse is required to remain on call to respond to patient needs while eating. The Nurses contend the Hospital (mis)classified them in *every single department* as presumptively being "off duty" during their first meal period by automatically deducting 30-minutes time from their hours worked through their "Kronos" time system. Substantial evidence, including inferences to be drawn from the Hospital's manger-provided declarations, shows the Nurses in every department were on call during their first meal period and subject to recall, but misclassified.

- Although the Hospital was legally required to provide 12-hour shift nurses with two meal periods, its Nursing Director admitted in a CR 30(b)(6) deposition that it only provided them with one meal period as a matter of course. The Nurses confirmed by declaration and deposition testimony that the Nursing Director's admission was correct: they were not provided with a second meal period as a matter of course.

- The Hospital discouraged reporting even completely missed, presumptively unpaid first lunches for payment, through its

> official written no-unauthorized-overtime-without-advance-approval policy. The Hospital admitted this policy applied to every nurse, regardless of department.

The Superior Court denied the motion. (Appx.53-55.)

D. Argument

As discussed later in this Petition, the Division I Court of Appeals, in cases like *Brink's* and *Hill*, has consistently rejected the argument that "operational differences" between an employer's departments and a focus on individual-damage issues in this type of wage-and-hour case is improper: the proper focus is on the common illegal policy and whether class members are entitled to compensation because of the illegal policy.

The Hospital, joined by "Third Party Evergreen Hospital Medical Center," recognizes the COA's Opinion here is a major departure from Division I's meal-and-breaks class decisions in its Joint Motion to Publish the COA Opinion. [2] (Appx.47.) They admit the Opinion concerns the public interest and conflicts with other published decisions. (Appx.47.) Evergreen is defending two separate class actions involving nurses and similar issues and admit this case has "great importance to those in the healthcare industry." (Appx.49-50.) They also sought publication because no other published Washington case "provides guidance to trial courts" on

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[2] *See* RAP 13.4(2).

the "superiority element." (Appx.45-46.) Despite lack of publication, review by this Court is necessary to prevent other hospitals that treat meals and breaks as a mere nuisance from relying on the COA Opinion as a persuasive "roadmap" under GR 14.1 to defend their illegal policies in every putative hospital class meal-and-breaks case. (*E.g.*, Appx.47-49.) Thus, this case conflicts with published opinions, has crucial public interest, and implicates the public's health and safety.[3]

1. **The trial court abused its discretion by failing to liberally construe the requirements of CR 23 and Washington wage-and-hour law in favor of class certification, and the COA committed reversible error by affirming the trial court despite the trial court's application of erroneous legal standards.**

Washington State is a "pioneer" in assuring workers' rights including the obligation to pay wages.[4] Washington courts are required to (1) liberally construe CR 23 in favor of certification when its requirements are met;[5] (2) err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification as the case develops;[6]

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[3] *See* RAP 13.4(b)(4).

[4] *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002); *Drinkwitz* v. *Alliant Techsystems*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

[5] *See, e.g., Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

[6] *See Moeller*, 173 Wn.2d at 278; *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971).

and to (3) interpret the substantive wage-and-hour statutes liberally to protect workers' wage rights and to protect workers and the public from fatigued employees.[7] The wage statutes work in concert with the Industrial Welfare Act to ensure that nurses "maintain the necessary awareness and focus required to provide safe and quality patient care."[8]

A Washington employer's relevant meal-and-rest period obligations, as well as its payment obligations for missed-meal-and-rest periods, are governed by WAC 296-126-092 (meals and breaks), WAC 296-126-002(c)(8) (hours worked), and Wash. Dep't of Labor & Indus. Admin. Policy ES.C.6 (interpretive guidelines),[9] as interpreted by mostly collectively-decided or large-group cases like *Demetrio* (farm workers), *Sacred Heart* (acute-care nurses), *Yellow Freight* (truck drivers); *Brink's* (armored-car drivers), *White* (counselors or therapists), *Weeks* (police officers), and *Frese* (prison guards).[10]

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[7] *See, e.g., Champagne*, 163 Wn.2d at 76; *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001); *see also Edwards v. First American Corp.*, 798 F.3d 1172, 1179-84 (9th Cir. 2015) (reversing denial of class certification using the abuse-of-discretion standard).

[8] *See Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 830-32 & n.1, 287 P.3d 516 (2012).

[9] Policy ES.C.6 (and previous versions) is reproduced at Appx.72-90.

[10] *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.2d 258 (2015) (class-action brought by migrant-workers), *Sacred Heart Med. Ctr.*, 175 Wn.2d at 822-824 (collective action brought by acute-care nurses), *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002) (large-group collective action brought by individual truck drivers); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982) (class action brought by members of Washington State Patrol); *Pellino v. Brink's, Inc.*, 164 Wn.

As shown in the following Sections Two through Seven and the underlying briefing, the Nurses met CR 23's requirements, but both the trial court and the COA used legally erroneous, unsupported, or arbitrary reasons to justify class denial in a manner inconsistent with liberal construction of CR 23, the wage-and-hour laws' purpose, and other appellate decisions.

2. The trial court committed reversible error by failing to adequately articulate its reasons for ruling that the Nurses failed to meet CR 23's requirements.

The trial court ruled that movants met all CR 23(a) requirements for class certification, but that movants failed to show the Nurses met CR 23(b)(3)'s "predominance" and "superiority" elements. The Court of Appeals correctly noted, however, that the trial court failed to: (1) reference the specific evidence it relied on to deny class certification (Appx.4); (2) "expressly resolve conflicts in the evidence," (Appx.32); or (3) conduct an evidentiary hearing (Appx.32). The trial court also failed to provide any legally adequate or supportable reasons *why* the Nurses failed to meet CR 23(b)(3)'s "predominance" and "superiority" elements.

A trial court must do more than simply recite the language of the rule for its certification order to be affirmed on appeal; it must base its class

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App. 668, 668-69, 267 P.3d 383 (2011) (class action brought by armored-car drivers), *Frese v. Snohomish County*, 129 Wn. App. 659, 666, 120 P.3d 89 (2005) (collective action brought by 162 prison guards), *Iverson v. Snohomish County*, 117 Wn. App. 618, 72 P.3d 772 (2003) (custody officer), and *White v. Salvation Army*, 118 Wn. App. 272, 75 P.3d 990 (2003) (collective action brought by counselors and therapists).

decision on legally sound and articulated reasons.[11] Its analysis must be "rigorous." The affirmance of the trial court despite the lack of adequate findings and reasons is in direct conflict with cases like *Oda v. State*, which requires the trial court to make legally adequate findings to be affirmed.[12]

At the end of oral argument on certification, the Superior Court ruled—without making any specific factual findings or conducting an evidentiary hearing—that, although "***there are certainly some important class issues that are there and that exist***, . . . what happens from shift to shift, from nurse to nurse, from nurse type to nurse type, from census to census and so on . . . I believe would consume and overrun the specifics." (RP406-407.) "***It does appear to me that virtually—well, I'll say that all of the other requirements of CR 23 are met***," except for predominance and manageability. (RP407.) The Superior Court's written order ruled that the Nurses had met numerosity, commonality, typicality, and adequacy of representation under CR 23(a), but did not meet CR 23(b)(3) because "common class issues do not predominate over individual questions

[11] *See Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002) ("*WEA* does not hold that a certification decision must be upheld if the trial court explicitly considers the CR 23 factors. As is true in all types of cases, a court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. The record does indeed show that the trial court here expressly considered the factors set forth in CR 23 before deciding to certify the class. Whether that decision rests on tenable grounds remains a question to be decided by this court." [citations omitted]);

[12] *See* RAP 13.4(b)(2) & (4).

because [unspecified] issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun the generalities," without explaining how these non-specific individual "issues" or facts would actually impact managing a class or why they related to any element of any claim or common issue framed by the Nurses. (CP1011-1012.) For example, it failed to explain how or why any alleged "departmental differences" are relevant or would impact predominance when the Hospital uniformly and without exception failed to pay *any* nurse on *any* shift in *any* department for any missed rest period, and when the Hospital admitted that *no department-level meals-and-breaks policies exist.* "Operational differences" between departments are similarly irrelevant to each of the common issues identified in the briefing that apply to all nurses in all departments. The Superior Court's failure to provide legally relevant reasons to justify denying the class was an abuse of discretion.

3. The COA committed reversible error when it "assumed" the trial court resolved evidentiary conflicts in a light most favorable to the Hospital and then "deferred" to those purported findings even though they were not articulated in the trial court's class-certification order.

The COA abdicated its legal-review obligations by deferring to *implied findings* that the trial court simply did not make. Although the standard of review is "abuse of discretion," whether CR 23's requirements

are met is either a question of law or a mixed question of law and fact. Mixed questions of law and fact are generally reviewed *de novo, except as to fact findings*.[13] Thus, cases outside this jurisdiction—consistent with *Oda v. State*—recognize that "abuse of discretion" in the CR 23 context is a "chameleon phrase" and can be "misleading" when reviewing a class-certification denial, because the requirements of CR 23 are a matter of law.[14] Absent specific findings or a more rigorous analysis than simply reciting CR 23's requirements, the trial court should be granted minimal deference.[15]

Here, to affirm the trial court's decision, the COA determined that the Superior Court necessarily "*must have*" resolved "*conflicts in the evidence*" against the Nurses that "*would have included some determination of the credibility*" of the evidence presented. (Appx.32.) *The COA then held that it was required to construe all the evidence in the record against the Nurses, even though it admitted that no case, rule, or statute expressly compelled the holding, to grant these "implied" findings deference.*

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[13] *See, e.g., Tapper v. Employment Sec. Dept.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); *Pasco v. PERC*, 119 Wn.2d 504, 506–508, 833 P.2d 381 (1992).

[14] *See, e.g., In re Flag Telecom Holdings, Ltd. Securities Litigation*, 574 F.3d 29, 34 (2nd Cir. 2009); *Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 415-16 (5th Cir. 2004).

[15] *See, e.g., Edwards*, 798 F.3d at 1179-84 ("We review the district court's determination of class certification for abuse of discretion and consider "whether the district court correctly selected and applied Rule 23's criteria. . . . The underlying legal questions, however, are reviewed *de novo*, and 'any error of law on which a certification order rests is deemed a *per se* abuse of discretion.'").

(Appx,30-32, 38-39.) Construing all the evidence against the Nurses in the absence of specific findings is directly contrary to the rule that courts are required to err in favor of certifying a class since the class is always subject to the trial court's later modification or decertification as the case develops. The COA erroneously analogized a CR 23 determination to a bench trial, where the trial court is required to make specific findings of fact under CR 52(a)(1) after taking evidence subject to cross-examination; but this analogy is severely flawed because the trial court did not make any actual fact-findings or conduct an evidentiary hearing or even purport to resolve credibility issues.[16] (Appx.29-31.). No authority suggests that the CR 23 ruling in this case is legally analogous to a bench trial on the merits after a final judgment, where the policies of judgment-finality are in play.

The COA expressly recognized the contradiction in its reasoning when it "wondered" whether the "abuse of discretion" standard of review of a certification denial "conflicts" with the principles that appellate courts "generally review decisions certifying a class liberally and err in favor of certifying a class," and resolve "close cases in favor of allowing or

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[16] *See, e.g., Woodruff v. Spence,* 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (a court may abuse its discretion by resolving fact issues in affidavits without an evidentiary hearing).

maintaining a class."[17] (Appx.30-33.) This Court should accept review to confirm that failing to liberally construe CR 23 is an abuse of discretion.

4. The trial court and COA committed reversible error by failing to explain which element of the substantive claim purportedly required individualized proof such that the case cannot be managed as a class action.

The COA compounded its errors by failing to explain which element of the substantive claims purportedly required "individualized proof" such that the case cannot be managed as a class action or that renders other litigation vehicles "superior." (Appx.37-41.) Superiority focuses on a "comparison of available alternatives" to class treatment, "case manageability," "conserving time, effort and expense," "providing a forum for small claimants," and "deterring illegal activities." (Appx.39.) Every one of these superiority factors favor the class vehicle in this case.

The only "element" of any claim asserted by the Nurses that *could* need individual assessment is the extent of damages (back pay) for missed meals and rest periods. The Employer in *Brink's* made the exact same defensive arguments to certification, *i.e.*: "whether to take breaks varied from employee to employee," the "drivers and messengers had the

[17] *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.2d 49 (2003); *Smith v. Berr Process Corp.*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002); *Brown*, 6 Wn. App. at 256-57.

discretion to decide when to take breaks," and that there was no uniform policy governing when or how drivers took breaks.[18] The Division I Court of Appeals rejected the argument and correctly determined that the proper focus is on the common illegal policy, *i.e.*, whether "class members are entitled to compensation for . . . missed rest and meal breaks under Washington law," and not these damage-related issues.[19] The COA here failed to explain why this case presents superiority or management problems, when nearly identical claims and theories were successfully tried to a class judgment in *Brink's*.[20]

The COA Opinion also conflicts with the recent March 27, 2017 Division I Opinion in *Hill v. Garda CL Northwest, Inc.*, which affirmed a wage-and-hour judgment involving 500 employees from different departments but with similar issues.[21] Although the Division I Court of

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[18] *See Brinks*, 164 Wn. App. at 683-85.

[19] *See id.*

[20] *See* RAP 13.4(b)(2) & (4).

[21] *See Hill v. Garda CL Northwest, Inc.*, 198 Wn. App. 326 (2017) ("We conclude that the trial court's findings were sufficient to show that a question common to the Plaintiffs predominated. Additionally, the trial court estimated the value of each individual's claim and concluded that the action would be manageable as a class action. These findings, together with the court's findings that there were likely hundreds of class members and that a common question predominated, are adequate to show the court's reasons for determining that a class action was superior to individual actions.").

Appeals reversed some of the damages, it made short work out of a non-superiority/manageability argument by affirming the finding that:

> The single common and overriding issue presented is whether Drivers and Messengers are allowed legally sufficient rest or meal breaks and whether Drivers and Messengers are entitled to compensation for missed meal periods and rest breaks. The claims of individual class members are likely valued at a few thousand dollars each and adjudicating the claims presented on a class basis will be manageable; *Class adjudication of common issues is therefore superior.*[22]

Moreover, in *Demetrio*, *Sacred Heart*, and *Yellow Freight*, this Court has consistently held that a missed rest period is "hours worked" that must be tracked and compensated.[23] Neither the Court of Appeals nor the trial court explained how alleged "operational differences" and "different management styles" between nursing departments creates a litigation management-problem that would preclude class treatment in resolving the Hospital's failure—and outright refusal—to pay *any* nurse for *any* missed rest period in *any* department during the back-pay period. The Hospital uniformly treated all nurses the same way when he or she missed a rest period regardless of department: ***it always failed to pay them.*** The other class issues are similarly uniform. The only *arguably* individual question for each nurse regarding missed meal-and-rest periods is how much the

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[22] *See id.* (pinpoint pagination unavailable at time of filing) (emphasis added).

[23] *See e.g., Sacred Heart*, 175 Wn.2d at 826.

Hospital owes in back pay, which, under this Court's decision in *Moore*, isn't a permissible reason to deny certification.[24] After class discovery, claim forms, representative-testimony samples, or expert testimony, can be used to calculate damages.[25]

Finally, the COA Opinion is also contrary to the *Tyson Foods* decision, in which the U.S. Supreme Court recently rejected a similar operational-differences defense in a "donning-and-doffing" wage-and-hour case. The U.S. Supreme Court held class certification proper for largely the same reasons urged here: (1) there were important common questions applicable to the class—regardless of any operational difference between members; (2) representative testimony was permissible to establish both liability on a common practice and estimated, class-wide damages; (3) representative testimony was appropriate when the employer violated both its recordkeeping and payment obligations to further the remedial purpose of the FLSA under principles articulated in *Anderson v. Mt. Clemens Pottery Co.*[26]; and (4) it is appropriate to bifurcate, if necessary, liability and damages issues after resolving common issues.[27]

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[24] *See Moore v. Health Care Authority*, 181 Wn.2d 299, 305-15, 332 P.3d 461 (2014).

[25] *See id.*; *see also* RAP 13.4(b)(2) (discretionary review proper when the opinion conflicts with published Supreme Court precedent).

[26] *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

[27] *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044-50 (2016).

5. **The COA committed reversible error when it held that the class-action procedure is not superior in this case because the individual nurses can pursue wage claims for missed rest periods in *small claims court*.**

The COA committed reversible error when it held that the class-action procedure is not superior based on its *observation* that individual nurses could theoretically pursue wage claims for missed rest periods *in small claims court*. (Appx.37-38.) The trial court did not find that small claims court was a superior venue: it found the issues were too legally complex to digest in one class-action hearing. (RP123-129, RP137.) The COA's observation is inconsistent with the record and CR 23's purpose.

Litigating these complex and important public-safety-impacting-wage-and-hour issues in hundreds of individual small-claims court cases is not "superior" to resolving the common issues at once in Superior Court. The issues are too important and too complex for small-claims court and the small damage amount for each nurse is a factor in favor of certification. The deterrence-of-illegal-activity factor favors a class because—as demonstrated by the Hospital's litigation position on its purported lack of any real affirmative rest-break obligations—the difference between granting a class and denying one is the difference between whether the Hospital will work its 12-hour shift nurses straight through their shifts without rest and meal periods, and whether a nurses' rights are systemically

enforced. Frankly, the small-claims-court observation implies the COA viewed the Nurses' statutory wage-and-working condition rights as unimportant or trivial, which is in direct conflict with the teachings of *Demetrio* and *Sacred Heart, i.e.*, that meal-and-rest period obligations implicate important public safety issues and the policy of ensuring employers pay all wages owed.[28] Finally, as noted by the COA, merely filing a putative class caused this Hospital to uniformly change it rest-and meal-period-tracking-and-payment procedures as to each and every nurse, which the COA described as a "substantial, systemic victory." (Appx.37.)

6. The trial court committed reversible error by requiring *the Nurses* to move for summary judgment before ruling on the motion for class certification and by considering absent class members' claims on the merits, and the COA committed reversible error by endorsing this irregular and unauthorized procedure.

At the end of the first class-certification hearing, the Superior Court indicated that because of the "complexity of all this," it was not going to rule on whether class certification was appropriate. (RP122.) The Superior Court was not "comfortable" with the underlying meals-and-breaks law and instructed *the Nurses, not the Hospital,* to file a series of plaintiffs' summary-judgment motions to help the Superior Court understand the legal

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[28] *See also Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830, 991 P.2d 1126 (2000); *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51-52, 925 P.2d 212 (1996); RAP 13.4(b)(1) & (4).

issues and controlling law. (RP123-129, RP137.) The Nurses complied with the trial court's directive and filed three summary-judgment motions, while the Hospital filed one cross-motion. The Superior Court made numerous legal rulings in conjunction with these motions that impacted absent class members pre-class certification. (Appx.57-63.) The COA also expressly endorsed this procedure. (Appx.25-27.) This procedure is flatly inconsistent with protecting the absent-class members' due-process rights through the notice-and-protective order provisions of CR 23(c)-(e) and the rule prohibiting merits-determinations pre-class certification.[29]

7. The COA committed reversible error when it concluded that this case cannot be certified as a hybrid CR 23(b)(1) or (b)(2) class as a matter of law because the Nurses also seek monetary relief under CR 23(b)(3).

The trial court and the COA refused to certify a class under CR 23(b)(1) or (b)(2) because the Nurses also sought to certify a class under CR 23(b)(3), relying on *Nelson v. Appleway Chevrolet, Inc.*[30] (Appx.35.) This ruling is legal error and inconsistent with both *Nelson's* holding and its rationale. The reason courts do not allow damages to be recovered in a CR 23(b)(1) or (b)(2) class—as stated by this Court in *Nelson*—is that

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[29] *See, e.g., Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations.").

[30] *See Nelson*, 160 Wn. 2d at 189.

absent class members are not entitled to the same due-process-notice protections that class members are entitled to under CR 23(b)(3). However, once a court determines that a CR 23(b)(3) class is not appropriate, but that the case otherwise meets the requirements of CR 23(b)(1) or (b)(2), then it should simply limit recovery to exclusively injunctive or declaratory relief rather than denying the CR 23(b)(1) or (b)(2) class altogether.

Here, the Nurses are entitled to declaratory relief on what is obviously a class issue even if court rejects all CR 23(b)(3) grounds: whether intermittent breaks are consistent with the duties of nursing, and, consequently, whether the Hospital has a scheduling obligation under WAC 296-126-092 (4) & (5). This regulation mandates non-waivable rest periods of "at least 10 minutes" for every four hours worked that must be "***scheduled*** as near as possible to the midpoint of the work period," unless "***the nature of the work*** allows employees to take intermittent rest periods equivalent to 10 minutes for each 4-hours worked." The Nurses contend that intermittent breaks are inconsistent with the *nature of acute care nursing*, and this issue needs to be resolved going forward so both the Nurses and the Hospital know their rest-break rights and duties.

E. Conclusion

The Nurses request the Supreme Court accept review of the Court of Appeal's Opinion on the issues listed and described herein.

Signed June 2, 2017:

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PROOF OF SERVICE

I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing **"PETITION FOR REVIEW TO SUPREME COURT OF THE STATE OF WASHINGTON"** to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically.

DATED this June 2, 2017

By:____________________
Jack B. Krona Jr., Esq.

NO. ________

SUPREME COURT OF THE
STATE OF WASHINGTON

No. 33556-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly-situated registered nurses employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center,
AND JOHN SERLE, individually and in his official capacity
as an agent and officer of Lourdes Medical Center,

Respondents.

APPENDIX TO PETITION FOR REVIEW BY THE SUPREME COURT OF THE STATE OF WASHINGTON

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I, Jack B. Krona Jr., certify that on this date, I caused a true and correct copy of the foregoing "**APPENDIX TO PETITION FOR REVIEW TO SUPREME COURT OF THE STATE OF WASHINGTON**" to be served on Aaron Bass and Rebecca Watkins, Sather, Byerly & Holloway, LLP, 111 SW Fifth Ave, Suite 1200, Portland, OR 97204, by e-mail transmission by party agreement to serve documents electronically.

DATED this June 2, 2017

By:____________________
Jack B. Krona Jr., Esq.

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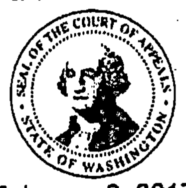

February 9, 2017

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CASE # 335569
Judith Q. Chavez, et al v. Our Lady of Lourdes Hospital, et al
FRANKLIN COUNTY SUPERIOR COURT No. 122505759

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
c: **E-mail** Honorable Bruce Spanner

FILED
FEBRUARY 9, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, and MARRIETTA JONES, individually, and on behalf of all similarly situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,	)	No. 33556-9-III
Petitioners,	)	UNPUBLISHED OPINION
v.	)	
OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a LOURDES MEDICAL CENTER and JOHN SERLE, individually and in his capacity as an agent and officer of Lourdes Medical Center,	)	
Respondents.	)	

FEARING, C.J. — Marietta Jones, Oralia Garcia, Kathleen Christianson, and Judith Chavez, present or former nurses at Pasco's Lourdes Medical Center, sue the hospital and its administrator, John Serle, for allegedly failing to provide nurses with rest periods and

meal periods and failing to pay wages owed as a result of the denial of the periods. The nurses appeal from the trial court's refusal to certify the lawsuit as a class action. The trial court ruled that the requirements of CR 23(a) were met, but that the nurses failed to establish one of the three alternative prerequisites under CR 23(b), including predominance and superiority as required by CR 23(b)(3). Because the trial court is in the best position to determine whether a class action is the superior method of resolving a lawsuit, we defer to the trial court and affirm its denial of certification. We conclude the trial court did not abuse its discretion in this important decision.

FACTS

Lourdes Medical Center is a nonprofit hospital located in Pasco and serving the Tri-Cities region. The hospital maintained or maintains nine departments: an emergency room department, an obstetrics and birthing department, an intensive care unit, a medical-surgical unit, a same day surgery unit, gastrointestinal services department, a rehabilitation center, a post anesthesia care or observation unit, and an operating room department. In June 2013, the hospital, for financial reasons, closed its obstetric unit. Lourdes employs more than one hundred registered nurses, on a full-time, part-time, and per diem basis. Most nurses work twelve-hour shifts.

This lawsuit concerns how Lourdes accounted for nurse's work time and afforded meal and rest breaks. Because the sole issue on appeal concerns certification of a class action, our statement of facts focuses on facts relevant to certification more than facts

relevant to the underlying causes of action against Lourdes Medical Center. Still the facts regarding the substantive claims hold relevance. The nurses claim that: (1) Lourdes systematically failed to record and compensate nurses for missed rest periods, (2) the hospital failed to provide scheduled rest periods as required by law and its own policies, (3) the hospital failed to compensate nurses for on call meal periods, (4) Lourdes failed to provide nurses with a second meal period during twelve-hour shifts, and (5) Lourdes failed to compensate nurses for missed meal periods by discouraging nurses to report missed meal periods. Although we do not mention Lourdes' administrator John Serle again, the reader may assume that our analysis of claims against him mirror our analysis of claims against Lourdes Medical Center.

The order denying class certification omits a reference to the declarations and affidavits that the trial court reviewed when considering the motion for certification. Therefore, we consider all testimony regardless of whether the testimony addressed a summary judgment motion or the class certification motion. The parties inundated the trial court and inundate us with declarations and deposition excerpts, not that there is anything wrong with that. The nurses' testimony focuses on the rest period, meal period, and worktime accounting at the hospital. Lourdes' testimony focuses on differences between schedules and tasks of individual nurses and nurses by department and by shift. The declarations from the respective parties and their witnesses often conflict.

The parties agree that Lourdes Medical Center utilized a web-based timekeeping

system called Kronos to record employee work time. Employees used Kronos to clock the beginning of work and clock the ending of work. Kronos automatically deducted thirty minutes from an employee's compensable time for a meal period for any shift longer than five hours. When an employee clocked out, the employee could account for a missed meal period by canceling the automatic meal period deduction. When an employee reported a missed meal period, Lourdes paid for the half hour at the appropriate regular or overtime rate. The Kronos system did not record rest periods or missed rest periods.

Lourdes Medical Center maintained no policy that directed nurses to report missed rest breaks to the hospital payroll office and had no formal process for a nurse to report a missed break. Before March 2013, the hospital had no knowledge of any nurse being paid for a missed rest period, maintained no policy that provided for payment for a missed rest break, and never informed employees of the right to receive additional payment for a missed rest break.

We now outline testimony of the plaintiff nurses and their witnesses. We will later outline testimony of Lourdes Medical Center's witnesses.

According to plaintiff nurses, a Washington regulation prohibits a nurse assigned to a patient of abandoning the patient and requires every nurse to transfer a patient's care to another qualified nurse when leaving an assignment. If a Lourdes Medical Center nurse abandoned a patient assignment without a transference, she would suffer discipline.

This rule imposes an obstacle for a nurse with a patient assignment from taking a rest break. Whether a nurse exercises a rest break depends on whether the hospital provides her with another nurse to transfer patient care or the fortuitous event of no patient to care for during a break period. The hospital maintains no procedure of relieving nurses assigned to a patient's care.

Lourdes Medical Center generally assigns nurses to twelve-hour shifts. The hospital did not allow nurses two meal periods during these shifts. The Kronos time electronic system failed to note that nurses, on this half-day shift, should receive two meal breaks. The hospital maintained no system to report missed second lunches. Nurses testified that they often worked a twelve-hour shift without a second meal break.

According to plaintiff witnesses, a Lourdes Medical Center employee subjected herself to discipline if she worked overtime without authorization. Therefore, if a nurse missed a meal period and pressed the deduct cancelation button with the result that she worked overtime during a pay period, the hospital might discipline her. Nevertheless, plaintiffs Oralia Garcia and Marietta Jones testified that every time they reported missing a meal period, the hospital paid each at the appropriate rate, which testimony may conflict with the hospital's concession that no payment occurred before 2013. Garcia and Jones also respectively testified that the hospital never disciplined them for missing meal periods or reporting missed meal breaks.

Oralia Garcia worked as a registered nurse in Lourdes Medical Center's emergency department from 2005 to June 25, 2012. She sometimes assisted in the ambulatory unit. The hospital claims that each of its nine departments discretely trained its department nurses regarding rests and meals. Garcia testified that emergency department nurses never received unit specific training on using rest and meal periods. She was unaware of unit policies that cover rest and meal periods.

As part of its defense to this lawsuit, Lourdes Medical Center contends it met its obligation to allow an employee a fifteen-minute break for every four hours worked, if the employee periodically took small breaks from work duties and those small breaks totaled in time fifteen minutes. Lourdes calls these breaks "intermittent" or "mini" breaks. Presumably, under the hospital's theory, if a nurse rested by closing her eyes for ten seconds, those seconds counted toward a fifteen-minute break. According to Oralia Garcia, Lourdes Medical Center management told her, upon her hire, that she would receive two fifteen-minute minute block rest periods in a twelve-hour shift. Management never suggested to her that she take rest periods in smaller increments of time that, over the course of the day, would equal a half hour. Oralia Garcia conceded sometimes patient flow allowed emergency room nurses to enjoy small incremental breaks, chat about personal matters, surf the internet, check e-mail, read magazines or newspapers, or eat a snack.

According to Oralia Garcia, she frequently missed rest periods. The hospital never assigned another nurse to cover for her during a break. She never observed any nurse transferring duties regarding a patient to another registered nurse during a rest break. Garcia averred that the nursing commission and Lourdes Medical Center held a nurse responsible for the care of a patient even during a time that the nurse rested. Therefore, emergency room nurses feared taking breaks.

Melissa Linfoot signed a declaration, in which she testified that emergency room nurses enjoyed rest breaks. According to Oralia Garcia, Garcia worked with Melissa Linfoot for over three hundred and fifty shifts in the emergency department. Garcia challenges the testimony of Linfoot. Garcia observed Linfoot on many occasions work without exercising rest or uninterrupted meal breaks.

Oralia Garcia testified that she never reported a missed rest period or received additional compensation for a missed period. Hospital management never instructed her to contact her supervisor to report a missed rest period. When Garcia worked in the ambulatory unit, unit manager Dee Hazel told her that missed rest periods were lost time.

According to Oralia Garcia, Lourdes Medical Center never scheduled rest periods for nurses. Garcia never refused to exercise a break or rest period when the hospital arranged for a qualified nurse to assume patient responsibilities under protocol. Garcia once refused to transfer a patient's care to a nurse who lacked required certifications and

needed training.

Oralia Garcia averred that, despite working twelve-hour shifts, Lourdes Medical Center afforded her only one unpaid meal period. She further testified that she missed ninety percent of her meal periods. She never noticed another nurse receiving two meal breaks in a half-day shift. Garcia could not leave the hospital during meal breaks. The hospital required her availability at all times to respond to emergencies and questions concerning patient care.

Lourdes Medical Center claims that it utilized Go Where You're Needed (GWYN) nurses, or nurses that floated from department to department to relieve nurses for rest breaks. Garcia denied that the hospital employed GWYN nurses to allow nurses breaks.

Judith Chavez worked for the Lourdes Medical Center obstetrics department on three twelve-hour shifts per week until the department closed in 2013. According to Chavez, her charge nurse, during orientation, instructed her she must stay on the hospital premises during meal periods in order to respond to emergencies. Judith Chavez testified that family members sometimes brought her food at work during busy times when she lacked thirty minutes of uninterrupted time to eat or when the hospital cafeteria was closed. The family members deposited the food at the nurses' station because she attended to patients and could not leave the obstetrics unit. She sometimes watched a fetal monitor in the break room when exercising a meal period, for which she received no pay. Judith Chavez also testified that she had no knowledge that she could cancel the

automatic meal period deduct programmed into the Kronos system when she needed to stay at the hospital or when work obligations interrupted a meal.

Judith Chavez had never heard of Lourdes Medical Center' terminology of a "mini break" or "intermittent break" until filing this lawsuit. Clerk's Papers (CP) at 144. Chavez testified that at times she made personal phone calls and conversed with coworkers, but these events occurred when she had a patient assignment and was expected to provide patient care for a laboring mother.

Judith Chavez testified that Lourdes Medical Center never offered her a fifteen-minute rest period during which she held no duties. In order to relax, she would need fifteen minutes of uninterrupted rest after she transferred responsibility for a patient to another nurse, not an occasional minute when under assignment. Chavez never transferred care of a patient to another nurse in order to enjoy a fifteen-minute respite. No one ever covered for Chavez during a rest period or a meal period.

Judith Chavez testified that Lourdes Medical Center never informed her that she could report a missed rest period for additional compensation. The hospital never instructed her to contact any supervisor if she missed a rest period. After she filed suit, Lourdes Medical Center instructed her not to claim any rest periods even if she received no fifteen-minute uninterrupted repose but experienced intermittent brief rests.

According to Judith Chavez, despite working only twelve-hour shifts, she never received two meal breaks. Lourdes Medical Center informed her she could take only two

fifteen-minute breaks, not three, during a twelve-hour shift. Chavez denied any obstetrics unit specific policies with regard to rest and meal breaks.

At the beginning of this suit, Marietta Jones worked as a registered nurse in the observation and pre-admit units of Lourdes Medical Center. Earlier in her career, Jones worked in all other hospital units, except the operating room. Jones served as a charge nurse in the medical-surgical and the obstetrics departments. She usually worked twelve-hour shifts.

According to Marietta Jones, Lourdes Medical Center management told her that the hospital did not pay for missed rest periods. Hospital management never informed her that she could report a missed period. Therefore, Jones never complained about missed breaks. The hospital never mentioned to Jones the concept of a mini or intermittent break until after the filing of this lawsuit. The hospital then instructed Jones not to report missed rest breaks if she received intermittent breaks. Jones never received unit specific training regarding rest periods and knows of no policies that apply only to a department.

According to Marietta Jones, the obstetrics department lacked a nurse to cover for another nurse exercising a rest break. Contrary to testimony of a supervisor, Jones never refused a rest or meal period when offered. Once Jones' supervisor assigned another nurse to relieve her during a lunch break, but the substituting nurse stated she could only assist for ten minutes. Jones mentioned the nurse's statement to her supervisor Amber

Champagne-Wright, who appeared agitated but directed the relief nurse to substitute for a half hour.

According to Marietta Jones, nurses cannot safely transfer patient duties to another nurse for a break of two or three minutes in duration. Before the filing of suit, Jones never observed a registered nurse transfer patient responsibility to another nurse so that the first nurse could enjoy a respite.

During Marietta Jones' employment with Lourdes Medical Center, the hospital maintained a policy of one unpaid meal period during a twelve-hour shift. The hospital's Kronos system allowed only one deduction for a lunch during a shift. Management never informed her to use the deduct button if she missed a meal. Jones encountered difficulty eating meals while working because of interruptions for emergencies. She could not leave the hospital for a meal without permission. The hospital utilized GWYN nurses to fill open shifts not to relieve nurses for meal or rest periods.

Plaintiff Kathleen Christianson has worked for Lourdes Medical Center for over twenty-six years and exclusively in the intensive care department since 2005. She previously worked in all units, but the operating room unit. Lourdes also assigned her to serve as its first cover or GWYN nurse. Nevertheless, according to Christianson, a GWYN nurse substituted for an absent or ill nurse and rarely relieved on duty nurses. The hospital never informed Christianson of unit specific policies regarding meal and rest breaks.

During her many years employed by Lourdes Medical Center, Kathleen Christianson has never enjoyed a meal off premises. During all of her meal breaks, she has responded to emergencies and doctor's instructions and answered questions from other nurses.

Kathleen Christianson testified that, before this suit, Lourdes Medical Center informed her she could take two paid fifteen-minute rest periods and one unpaid half hour meal break during a twelve-hour shift. Lourdes did not inform her she could report a missed break and receive compensation. She never received a second meal period during a twelve-hour shift. The hospital never informed her of the ability or right to exercise a second meal break.

According to Kathleen Christianson, no nurse ever covered her duties so that she could exercise a work break. Lourdes Medical Center never relieved her from any patient assignments during a shift. Contrary to the claim of Lourdes Medical Center, Christianson denied ever rejecting the opportunity to exercise a rest period. She often needed to return to work duties when taking a meal break.

Kathleen Christianson testified that Lourdes Medical Center constructed a policy after this lawsuit, under which policy the hospital instructs nurses to take intermittent rest breaks rather than full fifteen-minute breaks. According to Christianson, intermittent rest breaks do not allow a nurse to transfer patient responsibilities to another nurse. Intermittent breaks do not provide the relaxation needed during the course of a day.

Additional nurses signed declarations that echoed the testimony of the plaintiff nurses. Emergency room nurses Vicki Haines and Melanie Bell stated that they exercised no breaks. Conversely, other emergency room nurses testified that day and night shift registered nurses could usually take a thirty-minute uninterrupted meal period and rest breaks.

We now address testimony submitted by Lourdes Medical Center. The hospital's declarations focused on the difference between hospital departments and work shifts, although the declarations also addressed whether Lourdes violated wage laws. Plaintiff Marietta Jones, in her deposition, admitted a difference in the administration of breaks from department to department. We organize the hospital's evidence by hospital department.

Seventeen part-time and full-time registered nurses work in the emergency department at various times on eight or twelve-hour shifts. One nurse, generally the most experienced, serves as the charge nurse. The charge nurse assesses work-flow and patient placement and generally lacks patient assignments. Typically, one registered nurse works in triage, one to order supplies, and another to track patient care. The triage nurse also forgoes patient assignments, while the remaining nurses are assigned to rooms inside the department.

The emergency department nursing orientation includes discussing meal periods and rest breaks. Lourdes Medical Center does not identify ways in which the emergency

room's orientation regarding breaks may differ from other departments. Generally, a registered nurse notifies the charge nurse that he or she wishes a break, although each charge nurse administers meal periods and breaks differently.

The Lourdes Medical Center surgery department usually operates from 7:00 a.m. to 3:30 p.m., Monday through Friday, although emergency surgeries may occur at any hour. This department enjoys a predictable patient flow since the department schedules most surgeries in advance. A fixed schedule accommodates nurses' rest breaks and meal periods.

Eight full-time registered nurses work eight-hour shifts in surgery. Tasks of surgical nurses differ from duties of nurses in other departments. Surgeries require technical precision. Registered nurses work closely with surgeons and must hold highly specialized skills, including knowledge of surgical equipment. Typically, one nurse serves as a charge nurse, lacks patient assignments, and coordinates and covers breaks.

Surgery department nurse orientation includes discussion of meal periods and rest breaks. A surgical nurse rarely misses a meal and rest break, and, when missed, according to Lourdes Medical Center, the hospital compensates the nurse for the hospital missed time. The nurse notifies the charge nurse of a missed rest, and the charge nurse records the missed period on a white board. The charge nurse assigns three registered nurses for each two surgery rooms. A fifth registered nurse serves as a floating nurse, assists with patient care, and covers meal periods and rest breaks. During a lengthy

surgery, a surgical nurse will be relieved for a rest break or meal period.

Lourdes Medical Center also maintains a medical/surgery unit apparently separate from the surgical department. The medical/surgical unit remains open twenty-four hours a day, seven days per week and treats patients needing to stay at the hospital for over twenty-four hours. In this department, registered nurses perform routine physical assessments, administer medications, prepare patients for surgery, and monitor postsurgery patients for complications. The nurses may assist with patient mobility, dieting and toileting needs, check doctor orders, provide patient education and discharge instructions, assist registered nurse students, and record treatment. The medical/surgery unit experiences an unpredictable patient flow. Therefore, registered nurses coordinate breaks based on personal preference and patient care.

Full-time, part-time, and per diem registered nurses, typically on twelve-hour shifts, work in the medical/surgery unit. Nurses rotate into the role of charge nurse. The charge nurse has additional duties of patient admissions, assigning patients to other nurses, and assisting in scheduling. At night, registered nurses in the medical/surgery department routinely exercise meal and rest breaks since patients in the unit sleep. According to Lourdes Medical Center, some registered nurses in the unit waive meal periods on a regular basis despite coverage being offered.

The patient acute care unit operates in tandem with the surgery department by assessing surgical patients for pre-operative and intra-operative surgical care. Three full-

time and two part-time registered nurses work eight-hour shifts in the department. Registered nurses in the unit undergo department orientation that includes training about meal periods and rest breaks. According to Lourdes Medical Center, a nurse in the acute care department rarely misses rest breaks and meal periods.

The same day surgery/ambulatory/gastrointestinal laboratory, also known as the same day surgery department, functions from 6:00 a.m. to sometime between 3 p.m. and 6:30 p.m., depending on the day's completion of surgical procedures. This same day surgery department enjoys a predictable patient flow because the unit schedules most surgeries in advance. Nurses thereby experience predictable rest breaks and meal periods within set windows of time.

Seven full-time and three part-time registered nurses work in the same day surgery department. Although most work twelve-hour shifts, three nurses work eight-hour shifts, and one works two eight-hour shifts and two twelve-hour shifts.

The observation department functions twenty-four hours per day, seven days per week. Nevertheless, the department will temporarily close if it monitors no patients. The observation department monitors patients coming from the emergency room and surgery department and assists outpatients who undergo blood transfusions or receive antibiotics or intravenous fluids. Five full-time and one part-time registered nurse, all working twelve-hour shifts, labor in the observation department.

Dee Hazel managed the observation department until January 2012, when Teresa

Pleyo assumed management. Plaintiff Marietta Jones testified that the two had different management styles. Under Pleyo, Jones felt comfortable reporting if she missed a meal period.

The observation department provides training that covers department specific procedures, including meal periods and rest breaks. Under department procedures, a registered nurse must notify the charge nurse or coworkers of a break, but she does not require preapproval from the manager. The transfer of patient care to another registered nurse for meal periods or rest breaks in this unit is easier because the department serves lower acuity patients. This process differs at night since only one registered nurse works in the department during the night shift.

Except when the department's patient census is high, observation department nurses rarely miss rest breaks and meal periods. At night, observation patients usually sleep and require less direct patient care. Night shift nurses thereby enjoy more time to engage in personal activities. Of course, according to the nurses, a nurse remains laboring, despite engaging in personal activities, if she must respond to calls. According to Lourdes Medical Center, registered nurses in the observation department take breaks in small increments throughout the shift to chat about personal matters, check Facebook or e-mail, use cell phones, or otherwise relax.

The intensive care unit treats patients requiring higher level care. The department utilizes specialty equipment such as telemetry, respirators, central lines, and pacemakers.

Nurses monitor medications, monitor ventilators, oversee heavy sedation, manage drips, and engage in emergency protocol and care for critically ill patients.

Full-time, part-time, and per diem registered nurses work in the intensive care unit on twelve-hour shifts. One nurse serves as charge nurse on a shift. The charge nurse coordinates patient admissions, monitors cardiac equipment, and assists with scheduling. No registered nurse need be present in the unit if the unit houses no patient. Nevertheless, one patient requires the presence of two qualified registered nurses. An intensive care unit nurse can monitor only two patients at a time. In the absence of an intensive care department patient, unit nurses may monitor medical/surgical unit patients.

The number of intensive care unit patients varies from time to time. The unit usually houses one to two patients per day, and may go weeks without a patient. Staffing levels generally allow unit nurses to realize meal periods and rest breaks. The unit delivers a department specific orientation for registered nurses, and this orientation discusses target times and protocols for meal periods and rest breaks. When there are two intensive care unit registered nurses, breaks and meal periods can be taken.

According to Lourdes Medical Center, the required certification level for intensive care unit registered nurses complicates finding relief for meal periods and rest breaks with a high acuity patient, but another intensive care unit nurse is usually available to provide relief. Even on busy days, unit nurses generally enjoy time to take breaks, eat, go to the coffee shop, and text.

Cheryl Carr worked at Lourdes as supervisor of the intensive care unit. As manager, she allowed unit registered nurses to coordinate rest and lunch breaks as they wished. Most nurses insisted on taking breaks and lunches as they saw fit. As manager, she observed nurses exercising mini-breaks to socialize, drink coffee, and make personal phone calls. According to Carr, the small breaks totaled at least ten minutes for each four hours. The intensive care unit was not as busy as other departments and allowed more breaks for nurses. Some unit nurses refused a thirty-minute meal and instead preferred to eat periodically. Plaintiff Kathy Christianson often refused a thirty-minute lunch break, and Carr often reminded her to exercise the full break.

Suzanne Hannigan serves as Lourdes Medical Center Director of Nursing Services. She supervises at least thirty-three nurses. Hannigan fears that nurses in the intensive care unit formed a belief that they cannot take breaks or meal periods. Hannigan does not know the source of this belief. Management has never told nurses that they may not exercise breaks. When Hannigan learns that a nurse missed a meal period, she instructs the nurse to cancel the meal deduct or inform payroll.

The inpatient rehabilitation department serves inpatients needing intense rehabilitation following surgery or trauma. Patient flow is predictable. Registered nurses in the department perform standard nursing tasks such as checking vitals, medication management, handling intravenous lines, and assisting with patient transfers.

During most months, the inpatient rehabilitation department employs four full-

time registered nurses and three per diem registered nurses, all whom work twelve-hour shifts. The unit designates one working nurse as the charge nurse. The department may assign other registered nurses to assist with trauma patients. On Tuesdays and Thursdays, unit nurses attend staff meeting and family rounds. The night nurses on Mondays also perform chart reviews for Tuesday staff meetings.

According to Lourdes Medical Center, rehabilitation registered nurses undergo a department specific orientation that covers meal periods and rest breaks, although the hospital identified no differences from other departments. Nurses plan meal periods and rest breaks at the onset of each shift. Rehabilitation nurses remain busy from 8 to 10 a.m. and around meal times. Work slows in the inpatient rehabilitation unit by mid-morning and between 1:00 p.m. and 4:30 p.m. because patients leave the department for therapy. Registered nurses working night shift begin with a couple of hours of patient assessment and care, but then patients sleep and require little attention. As a result, nurses working in the rehabilitation department enjoy lengthy periods of downtime without patient care or responsibilities. During this time, they chat about personal matters, use the internet, go to the espresso bar or gift shop, make personal calls, or read.

The obstetrics and birthing unit closed in June 2013. Until that month, the department remained open twenty-four hours a day, seven days per week. The obstetrics department cared for laboring mothers and postpartum mothers and babies. The department saw unpredictability because of unscheduled births. Sometimes, the unit

experienced weeks without a patient and then assisted numerous laboring mothers simultaneously.

Eleven full-time and two part-time registered nurses worked at various times in obstetrics, all on twelve-hour shifts. The unit maintained a daily minimum staff of four nurses regardless of whether patients were present. One registered nurse acted as a charge nurse and assisted in operation of the department. The charge nurse assigned tasks such as checking crash carts, refrigerators, the warmer, and the C-section room, mailing phenylketonuria data, ensuring the placement of all reports in patient charts, and addressing concerns from physicians. Ideally, two registered nurses engaged in labor and delivery, while other nurses delivered postpartum patient care.

Each obstetrics registered nurse received department training when meal periods and rest breaks were discussed. Typically, a registered nurse informed the charge nurse if he or she wished a break and gave a report about any patient status to the covering nurse.

Due to the relatively low numbers of patients served and core staffing levels, registered nurses in Lourdes Medical Center obstetrics unit experienced prolonged periods of idle time, during which they performed tasks unrelated to work. Registered nurses ate a second meal together on a slow day. Some obstetrics nurses even covered breaks and meal periods for registered nurses in other departments. Even on days with patients, registered nurses in obstetrics could take small breaks, for at least ten minutes per half day, to use cell phones, check e-mail, read magazines, get coffee, and grab

snacks.

Amber Champagne-Wright, a Lourdes Medical Center supervisor, signed a declaration representative of other declarations signed by Lourdes managers and supervisors. Managers, supervisors and other employees discussed, in their respective declarations specific timing as to when they exercised lunch and other breaks. They testified to canceling the automatic deduct function in the Kronos time management system on the rare occasion when they missed a meal. They mentioned the difference between a calm night shift and a day shift and dissimilarities between departments.

Amber Champagne-Wright averred that, since 2004, she has overseen several Lourdes departments including the emergency room, ambulatory unit, observation department, surgery room, labor and delivery unit, rehabilitation department, and medical unit. Fifteen to twenty nurses work per shift. According to Champagne-Wright, registered nurses, on a typical shift, received one thirty-minute unpaid lunch during the first half of the shift. During the second half of any given shift, a registered nurse may eat food in his or her unit. The primary factors determining whether a registered nurse may eat during the second half of the shift is patient census and acuity of care needed.

Amber Champagne-Wright recognized that, when she eats a meal on a unit, she sometimes encounters interruptions. She returns later to finish her meal. All Lourdes' department nurses suffer these interruptions. Often times, despite the interruptions, she still accumulates thirty minutes for the second meal. Depending on how busy she is,

Champagne-Wright and other nurses may enjoy two hours to eat during the second half of the shift. The amount of time for a second meal break varies from shift to shift and department to department.

Amber Champagne-Wright has not suffered discipline or docked pay for exercising a second meal break. She encourages nurses that she supervises to have a second meal. Night shift nurses find it easier to enjoy a second full meal block. Obtaining a second meal break was more common in the obstetrics unit. Staffing requirements demanded nurses in the obstetrics unit at all times, even if no patients present. Nurses in the emergency room found it most difficult to obtain a second meal. Champagne-Wright claims that, on some units and shifts, registered nurses enjoy a half hour to two hours without active patient duties and during which they may pursue personal activities.

Amber Champagne-Wright testified to differences among units. Most same day surgery and ambulatory unit nurses work eight-hour shifts, while other nurses work twelve-hour shifts. The typical nurse works thirty-six hours per week. Some full-time nurses work overtime, while others rarely do. Part-time nurses rarely work overtime.

Amber Champagne-Wright testified that each new registered nurse undergoes orientation specific to his or her departments. Each department orientation includes instructions on meal periods and rest breaks. The charge nurse apprises each nurse to account for unit specific circumstances that may alter her ability to take a lunch or rest

break.

Amber Champagne-Wright testified that the duties of registered nurses vary between night and day shifts. Night nurses experience more free time. Because of this time, night nurses must review a patient's entire chart and ensure the accuracy of the chart. Registered nurse duties on weekend shifts echo the duties of a night shift nurse because of more free time and less distraction from the administration and physicians. According to Amber Champagne-Wright, Marietta Jones has refused a meal break.

Sara Barron served as the director of inpatient services from 2003-2010. Barron learned in the early 2000s of lawsuits by nurses in other hospitals over meal and rest breaks. Therefore, Barron diligently worked to ensure nurses obtained needed breaks.

According to Sara Barron, Judy Chavez refused to be relieved for lunch on several occasions. Chavez's brother-in-law usually brought and ate lunch with her. Barron claimed that Chavez made a significant number of personal calls during work hours. Chavez also frequently socialized with other employees. Her intermittent personal time would total at least ten minutes every four hours. Sara Barron also accused Marietta Jones of socializing and engaging in personal activity throughout a shift. Jones' personal time totaled ten minutes for every four hours worked.

Debra Hill works as Lourdes Medical Center's payroll coordinator. She trains new employees and new managers on the Kronos system. If an employee misses a break or meal, the employee may report the miss to a supervisor, who will contact Hill. Hill

will then adjust the payroll records.

According to Debra Hill, plaintiff Judith Chavez, after filing suit, contacted her supervisor about missing a break. The supervisor notified Hill, who added fifteen minutes to Chavez's work time. Plaintiff Oralia Garcia contacted Hill many times when she did not get paid correctly. Hill then reviewed Garcia's time and pay and entered any needed corrections. Hill expected Garcia to notify Hill of any missed lunches or breaks. She did not.

According to Debra Hill, plaintiff Kathy Christenson frequently contacted her about use of the Kronos system. Hill also expected Christenson to inform her of any missed breaks. Christenson did not. Plaintiff Marrietta Jones contacted Hill when Jones lost a Kronos password or had a question about pay. Jones never reported a missed break.

PROCEDURE

In June 2012, the nurses filed a complaint for unlawful withholding of wages and alleged that the hospital failed to provide nurses with rest periods and meal periods. In the original complaint, the nurses sought monetary, declaratory, and injunctive relief, in addition to class certification.

Effective March 10, 2013, Lourdes adopted a new accounting system. The system permits tracking of intermittent breaks, requires nurses to clock in and out for meal periods, and allows nurses to track missed rest periods.

In April 2013, the nurses filed a motion for class action certification. They sought a class of all registered nurses who worked at least one hourly shift at Lourdes Medical Center at Pasco from June 25, 2009 through the then present to litigate common liability questions related to the hospital's meal and break policies and practices. The nurses also alternatively proposed subclasses of nurses by shift or department. In response, Lourdes Medical Center filed affidavits by managers and supervisors that we quoted, in part, above. Lourdes argued that operational differences within its departments would cause difficulty in resolving damage questions.

After the trial court entertained initial arguments regarding class certification, the court astutely postponed a decision on the motion and offered the nurses an opportunity to present summary judgment motions to clarify the legal theories controlling Lourdes Medical Center's exposure to liability. The law encourages the trial court, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 123 P.3d 88 (2005). At different times, the nurses then brought three summary judgment motions respectively relating to (1) nonmeal rest periods, (2) tracking time and paying for missed rest periods, and (3) the need for a second meal period during a twelve-hour shift. The trial court denied the nurses' motions for partial summary judgment. The court concluded issues of fact existed as to whether individual nurses were afforded time to take a meal break and whether individual nurses were relieved of

work in order to take a break. The ruling noted that availability of a meal break could depend on the shift worked by a nurse.

In March 2015, the nurses amended their complaint. The amendment continues to seek declaratory and injunctive relief. Nevertheless, the complaint notices Lourdes Medical Center's March 2013 change in meals and breaks time keeping policies. The nurses allege that "this lawsuit was a driving force in the policy change that allowed nurses a way to track missed rest periods and that they have already obtained a substantial, systemic victory on a class basis." CP at 1640. The amended complaint sought a requested class period for workers laboring before March 10, 2013.

Also in March 2015, the nurses renewed their motion for class certification for all registered nurses who worked at least one hourly shift at Lourdes Medical Center from June 25, 2009 through March 10, 2013, and, in the alternative, if necessary, to certify subclasses of these same nurses by department or shift hours. The trial court denied class certification. The court ruled that the nurses met the class certification requirements of CR 23(a) but not CR 23(b). In so ruling, the trial court found that the number of nurses was sufficiently large to render joinder impractical. The trial court also found that the potential class members' claims included common liability issues and that the class representatives shared common issues with the class. At the conclusion of the hearing, the trial court commented:

> I still am going to deny the request for class certification because, in my mind, the class issues do not predominate. There are certainly some important class issues that are there and that exist, but, when the rubber meets the road, what happens from shift to shift, from nurse to nurse, from nurse type to nurse type, from census to census and so on, and so on it goes, if we had a class the generalities of what happened at Lourdes or what happens at Lourdes, I believe, would consume and overrun the specifics.
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> . . . .
>
> It does appear to me that virtually—well, I'll say all of the other requirements of CR 23 are met, but just not those—not those three, that way I've made a ruling on all of the subparts.

Report of Proceedings (RP) at 406-07. The order denying class action certification reads, in part:

> 5. The Court finds plaintiffs have not met the required showing that a mandatory class action would be maintainable under CR23(b)(1) because the primary objective of this lawsuit is monetary damages and plaintiffs have failed to show prejudice to absent class members would occur.
>
> 6. The Court finds plaintiffs have not met the required showing that a mandatory class action would be maintainable under CR 23(b)(2) because the primary objective of this lawsuit is monetary damages and plaintiffs have failed to establish the necessity of declaratory or injunctive relief.
>
> 7. The Court finds plaintiffs have not met the required showing that a class action would be maintainable under CR 23(b)(3). The Court finds that common class issues do not predominate over individual questions because issues regarding shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun any generalities. The Court also finds that a class action is not superior to alternatives such as joinder or individual lawsuits for fair and efficient adjudication of the claims. Finally, the Court also finds that the proposed class, or the proposed nine subclasses by department, would be unmanageable at trial.

CP at 1011-12. We accepted discretionary review of the order denying class certification.

LAW AND ANALYSIS

The nurses contend the trial court erred in some of its summary judgment rulings. We did not accept discretionary review for the purpose of reviewing summary judgment rulings and will not directly address any such rulings. We note that the law instructs courts not to decide the merits of claims when ruling on class certification requests. *Washington Education Association v. Shelton School District No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980).

In challenging the trial court's order denying class certification, the nurses argue on appeal that the trial court failed to liberally construe CR 23 in favor of certification, the trial court failed to enter sufficient factual findings to justify denial of certification, the trial court implicitly and erroneously found facts against them without conducting an evidentiary hearing, the trial court erroneously required them to prove their case as a matter of law, and the trial court erroneously required them to prove damages before certification or discovery. We will not discretely address each argument, although we reject each argument. We will address some of the arguments during the flow of our analysis.

Lourdes Medical Center responds that the trial court acted within its discretion because the court conducted a rigorous analysis of the class certification requirements. The hospital also argues that individual issues predominate with each of the nurses' theories of liability and that common issues do not control as required for certification

under CR 23(b)(3). Additionally, the hospital asserts that the trial court correctly determined the class failed to meet CR 23(b)(3) because the class was unmanageable.

The plaintiff nurses and Lourdes Medical Center forward conflicting facts, including facts important to determining whether to grant class certification. The parties disagree as to the exercise of breaks by the plaintiff nurses, the extent to which Lourdes Medical Center trained workers about meal and rest breaks, the difference in any training and polices from department to department, whether the work atmosphere was conducive or hostile to exercising breaks, the extent of differences with regard to the exercise of breaks from department to department, from shift to shift, and from supervisor to supervisor, the availability of coverage for breaks from department to department and shift to shift, the various reactions of managers to the reporting of missed breaks and meals, the extent to which twelve-hour workers received a second meal, the magnitude of intermittent breaks, whether one or more nurses waived breaks, whether Lourdes paid nurses for missed breaks and meals, and to what extent, if any, does the hospital owe the plaintiff nurses money.

We determine that we must review the facts in a light most favorable to Lourdes Medical Center. We find no case that explicitly directs us to view the facts in such a gloss for purposes of reviewing a class action ruling, but logic and other tangential rules compel such a conclusion. A reviewing court must defer to the trial court's findings of fact entered when certifying or denying certification. *Duncan v. Michigan*, 300 Mich.

App. 176, 832 N.W.2d 761, 766 (2013). Although our trial court did not expressly resolve conflicts in the evidence, the court must have done so when issuing its decision. Plaintiff nurses complain that the trial court resolved conflicts in Lourdes' favor. This resolution of the conflict would have included some determination of the credibility of the respective evidence presented by the parties. We must assume the hospital's testimony to be accurate or else we do not bestow full deference to the court's ruling favoring the hospital. After a bench trial, we view the evidence in the light most favorable to the winning party. *City of Walla Walla v. $401,333.44*, 164 Wn. App. 236, 256, 262 P.3d 1239 (2011). Even when the trial court issues a ruling based on affidavits, we view the evidence in favor of the prevailing party if the trial court weighed credibility of declarants. *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

The nurses contend that the trial court should have conducted an evidentiary hearing. In support of this argument, the nurses cite only *Oda v. State*, 111 Wn. App. 79, 93 n.4, 44 P.3d 8 (2002). The passage in *Oda* contrarily rejects the nurses' contention. The passage reads that many courts encourage an evidentiary hearing, but no court has held that an evidentiary hearing is required on the question of class certification. *Oda v. State*, 111 Wn. App. at 93 n.4.

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. *Comcast Corp. v Behrend*, 569 U.S. __, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013). The purposes of class actions include

the saving of members of the class the cost and trouble of filing individual suits and the freeing of the defendant from the harassment of identical future litigation. *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971). Despite the law seeking to, in part, benefit defendants, defendants, more often than plaintiffs, oppose class certification.

In Washington State, CR 23 governs a determination of whether to certify a class action. Nevertheless, because CR 23 mirrors its federal counterpart, cases interpreting the analogous federal provision are highly persuasive. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d 260, 271, 259 P.3d 129 (2011). Because class actions are a specialized proceeding available in limited circumstances, the trial court must conduct a "rigorous analysis" of the CR 23 requirements to determine whether a class action is appropriate in a particular case. *Oda v. State*, 111 Wn. App. at 93 (2002). Plaintiffs seeking class certification bear the burden of demonstrating that they meet all the requirements of CR 23. *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007). Class actions are specialized types of suits, and, as a general rule, must be brought and maintained in strict conformity with the requirements of CR 23. *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995); *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974).

This court reviews a trial court's decision to certify a class for abuse of discretion. *Miller v. Farmer Brothers Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003); *Oda v. State*, 111 Wn. App. at 90. When this court reviews a trial court's decision to deny class

certification, the decision is afforded a substantial amount of deference. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 266. A court abuses its discretion if its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *Oda v. State*, 111 Wn. App. at 91. We generally review decisions certifying a class liberally and err in favor of certifying a class, since the class is always subject to later modification or decertification by the trial court. *Miller v. Farmer Brothers Co.*, 115 Wn. App. at 820; *Brown v. Brown*, 6 Wn. App. at 256 (1971). An appellate court resolves close cases in favor of allowing or maintaining the class. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002).

We wonder if two of these principles conflict. If we are to defer to the trial court's decision, we question whether we should resolve close cases by approving a class action when the trial court denied certification. The gist of affording a trial court discretion is to affirm the trial court in close calls.

We will reverse a class certification decision if the trial court made its decision without appropriate consideration and without articulated reference to the criteria of CR 23. *Washington Education Association v. Shelton School District No. 309*, 93 Wn.2d at 793. We will not disturb a trial court's certification decision if the record indicates the court properly considered all CR 23 criteria. *Nelson v. Appleway Chevrolet, Inc.*, 160

Wn.2d at 188. Our record shows that the trial court considered all criteria. In fact, the trial court ruled in favor of the plaintiff nurses in all but one CR 23 requirement.

CR 23 divides itself into two sections: CR 23(a), which lists four prerequisites for all class actions; and CR 23(b), which lists three alternative requirements, only one of which need apply. CR 23(a) declares:

> **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Under CR 23(a), the plaintiffs must satisfy the four prerequisites of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of the representatives. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 30-31, 340 P.3d 873 (2014), *review denied*, 183 Wn.2d 1009, 352 P.3d 187 (2015). We do not address whether the nurses fulfilled all requirements of CR 23(a). The trial court found that the nurses' suit fulfilled all four requirements of the subsection, and Lourdes Medical Center does not challenge this ruling on appeal.

In addition to CR 23(a), the plaintiff must meet the requirements of one of the subparagraphs in subsection CR 23(b). This subsection reads:

> **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Although the nurses argue that class certification was appropriate under any of the three subsections of CR 23(b), certification under CR 23(b)(1) and (2) applies only when the primary claim is for injunctive or declaratory relief. Under CR 23(b)(1) and (2), monetary relief must be incidental to the declaratory relief. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d at 189 (2007).

Our trial court ruled that plaintiff nurses did not meet CR 23(b)(1) because plaintiffs' primary recovery is monetary damages. Although the nurses originally

requested injunctive relief, the focus of their claims has been payment for unpaid meal and rest periods. After the nurses filed suit, Lourdes Medical Center ended the practice of utilizing the Kronos system and no longer automatically deducted time for meal breaks. Given this substantial, systemic victory, the nurses need no declaratory or injunctive relief. The nurses may still seek a declaratory ruling with regard to what constitutes a break during acute care when the hospital assigns a nurse to a particular patient. Still the trial court did not abuse its discretion by ruling the nurses' action primarily seeks monetary relief and does not meet the requirements of CR 23(b)(1) or (2).

On appeal, the parties aptly focus their briefing and analysis on whether the trial court correctly denied class certification under CR 23(b)(3). To repeat, CR 23(b)(3) allows certification when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

To restate the rule, class certification is appropriate under CR 23(b)(3) if common questions of fact or law predominate over individual ones and a class action is superior to other available methods of adjudication. *Sitton v. State Farm Mutual Automobile Insurance Co.*, 116 Wn. App. 245, 253, 63 P.3d 198 (2003). Plaintiffs seeking class certification under subsection (3) must show both predominance and superiority. *Admasu v. Port of Seattle*, 185 Wn. App. at 31 (2014).

Our trial court denied certification on a lack of both predominance and superiority. Since both must prevail, we address only superiority. The trial court determined that certification of the class would be unmanageable because of the confusion that could arise from trying to manage nine subclasses. The trial court believed that nine subclasses would be essential because of the differences in the respective hospital departments.

Even if individualized issues predominate, CR 23(b)(3) also requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 275 (2011). Under the rule, a class action must be superior, not just as good as, other available methods. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 275. The superiority requirement focuses on a comparison of available alternatives. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 275; *Sitton v. State Farm Mutual Automobile Insurance Co.*, 116 Wn. App. at 256. In traditional statewide class actions, these alternatives include joinder, intervention, or consolidation. *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 275.

Manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of CR 23, including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities. *Sitton v. State Farm Mutual Automobile Insurance Co.*, 116 Wn. App. at 257. The trial court is

particularly in the best position to address case management concerns. *Sitton v. State Farm Mutual Automobile Insurance Co.*, 116 Wn. App. at 256-57.

At oral argument, the nurses' counsel commented that individual nurse claims could vary between $2,000 and $15,000. Class actions seek to render claims of small amounts easier to litigate. Nevertheless, we note that, as an alternative to a costly superior court class action suit, nurses seeking $5,000 or less could litigate in the inexpensive small claims court. RCW 12.40.010. We further observe that the trial court best knows the ability of the Franklin County Superior Court's ability to manage a class action process and trial.

We note common questions with regard to liability of Lourdes Medical Center for at least many of the nurses. The common issues include what constitutes a rest period in the context of nursing? Do intermittent rest periods comply with the law's demand for a fifteen-minute rest period each four hours of work? To what extent must the employer monitor whether employees receive breaks? Must the hospital have provided a second meal during a twelve-hour shift, and, if so, could the nurse waive the meal? We note, however, that Lourdes Medical Center has not conceded any illegal activities.

Plaintiff nurses may argue a court should certify a class action solely on the ground that the suit contains common issues of law. Nevertheless, the trial court must weigh the commonality with other factors before determining predominance. Also, we base our decision on the superiority prong not the predominance prong.

The plaintiff nurses rely on *Tyson Foods, Inc. v. Bouaphakeo*, __ U.S. __, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016), wherein the nation's high Court affirmed the trial court's certification of an employees' class action suit against an employer because the employees failed to garner statutorily mandated overtime pay for time spent donning and doffing protective equipment. A major distinction between *Tyson Foods* and this appeal, of course, is that the *Tyson Foods*' trial court exercised its discretion in granting class status. Another distinction concerns the variable among workers' activities, on which the employer sought to avoid certification. Tyson Foods argued that differences in the composition of gear worn by various employees caused a variation in the amount of time to don and doff the gear. The variables concerning Lourdes Medical Center nurses' ability to exercise breaks are greater. Each nurse's story will vary such that her story can fill one trial. Retelling those scores of stories in one case could be unmanageable.

In *Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846 (N.D. Ohio 2013), nurses and nursing assistants brought action against a provider of medical and rehabilitative care and alleged violations of the federal Fair Labor Standards Act, 209 U.S.C. §§ 201-219. The employer also utilized the Kronos time system, with an automatic deduct function, for work hours accounting. Employees complained that they often did not break for lunch and the employer did not compensate them for the deducted time. The case involves a unique statute for class actions under the Fair Labor Standards Act. Nevertheless, the substantive rules echo the requirements of Fed. R. Civ. P. 23 and any

difference in the rules benefit the employees. The trial court denied class certification. Although the facts involved workers employed at numerous facilities, the court also noted the ability to exercise uninterrupted breaks depended on the nurse's unit, shift, manager, patient population, job duties, and individual habits. The court recognized the desirability of the nurses pooling resources to seek vindication of employment rights. Nevertheless, the court considered a class action unmanageable because each nurse's right to compensation hinged on his or her individual experience.

We note that at least one decision, *Perez v. Safety-Kleen Systems Inc.*, 253 F.R.D. 508 (2008), likely disagrees with the court's ruling in *Creely v. HCR ManorCare Inc.* Differing decisions, however, bolster the need to afford the trial court discretion in its ruling. The trial court's role remains to assess factors relevant to a decision and weigh those factors in accordance with the idiosyncrasies of the circumstances.

Our trial court's ruling echoed the concerns expressed by the federal court in *Creely v. HCR ManorCare Inc.* At least under the evidence presented by Lourdes Medical Center, the duties and experiences performed by one nurse, even as to nurses working in one hospital department, cannot be generalized. Thus, the trial court did not abuse its discretion in denying class certification.

CONCLUSION

We affirm the trial court's order denying class certification. We remand the case to the superior court for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

Fearing, C.J.

WE CONCUR:

Korsmo, J.

Korsmo, J.

Siddoway, J.

Siddoway, J.

No. 33556-9-III

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON,
ORALIA GARCIA, AND MARRIETTA JONES, individually,
and on behalf of all similarly situated registered RNs employed by
Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center, AND JOHN SERLE,
individually and in his official capacity as an agent and officer of
Lourdes Medical Center,

Respondents.

JOINT MOTION TO PUBLISH BY RESPONDENT AND THIRD PARTY EVERGREEN HOSPITAL MEDICAL CENTER D/B/A KING COUNTY PUBLIC HOSPITAL DISTRICT #2

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MOTION FOR PUBLICATION OF COURT OPINION

Pursuant to RAP 12.3(e), Applicant Our Lady of Lourdes Hospital at Pasco ("Lourdes") and King County Public Hospital District No. 2, d/b/a Evergreen Health Medical center ("Evergreen") respectfully move this Court to publish in its entirety the unpublished decision filed in this matter on February 9, 2017. *Chavez et al v. Our Lady of Lourdes et al, Case 33556-9 Division III* (hereinafter, "Opinion"). The Court should change the unpublished status of its Opinion because it contains clarifications relevant to class certification and important legal analysis in a currently sparse area of law.

INTEREST OF EVERGREEN HOSPITAL MEDICAL CENTER

The Chavez opinion provides guidance to unsettled questions in Washington law regarding class action certification. The case is of general importance to the public.

Evergreen is currently defending two CR 23(b)(3) class action lawsuits brought by registered nurses claiming that Evergreen denied them meal and rest breaks in violation of Washington law: *Pugh v. Evergreen Hospital Medical Center*, King County Superior Court No. 10-2-33125-5 SEA, and *Lee v. Evergreen Hospital Medical Center*, King County Superior Court No. 16-2-27488-9 SEA. Despite numerous federal cases addressing class certification in the context of rest and/or meal breaks

claims against large health care systems,[1] there are no published decisions in Washington to provide guidance to trial courts. In litigating these cases, Evergreen has been challenged by the paucity of Washington case law on the subject of class action lawsuits in the healthcare industry, forced to make ill-fitting comparisons to class actions in other industries where facts are easily distinguishable. *Chavez* is the exception.

The *Chavez* opinion regarding CR 23's superiority element, and comments on "manageability," provides entirely new and valuable clarity. This opinion is of value to the public as class actions in healthcare gain popularity, taking up vast amounts of time and court resources arguing unsettled questions of law.

The opinion also clarifies the certification standard of review, stating that the federal "rigorous analysis" of evidence is required. Much litigation surrounds the depth of review required by the court and *Chavez* ends this dispute.

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[1] *See e.g., Desilva v. N. Shore-Long Island Jewish Health Sys.*, 27 F. Supp. 3d 313 (E.D.N.Y. 2014); *Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22 (W.D.N.Y. 2014); *Camilotes v. Resurrection Health Care*, 286 F.R.D. 339 (N.D. Ill. 2012); *Roth v. CHA Hollywood Med. Ctr.*, No. 2:12-CV-07559, 2013 WL 5775129 (C.D. Cal. Oct. 25, 2013).

ARGUMENT

Pursuant to RCW 2.06.040, "[a]ll decisions of the court having precedential value shall be published as opinions of the court." In determining whether to publish an opinion, RAP 12.3(d) directs the Court to consider whether: (1) "Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance; or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals." The court's Opinion in this case satisfies the second and third criteria: it clarifies an established principle of law and is of general public interest and importance.

A. The Opinion Clarifies the Standard of Review and Procedural Aspects of Class Certification.

In response to arguments raised by plaintiffs, this court addressed and clarified both the standard of review of class certification decisions as well as the trial court's discretion on procedure in deciding class questions.

Appellate courts review a trial court's decision to certify (or not certify) a class for abuse of discretion. *Schnall v. AT&T Wireless Svcs, Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011). Here, the court itself

recognized that this can be confusing because some cases indicate that decisions to certify are reviewed liberally in favor of a class. The current decision confirms the abuse of discretion standard and that, when a trial court's discretion is at issue, close calls should lead to affirming the trial court's decision. Opinion at p. 33. Instead, the appellate court's review centers on determining if a trial court made its decision "with appropriate consideration" and "articulated reference to the criteria of CR 23." Opinion at 33 (citing *Washington Education Assoc. v. Shelton School Dist. No 309*, 93 Wn.2d 783, 613 P.2d 769 (1980)).

This decision also clarifies the proper or allowable procedure for a class action before the trial courts. The court confirmed and clarified that, as noted in *Oda v. State*, 111 Wn. App. 79, 93 n.4, 44 P.3d 8 (2002), an evidentiary hearing is not required by a trial court contemplating class certification. Opinion at 31. *Oda* did not decide this issue directly, and to applicants' knowledge, Division III has not previously weighed in on the issue. This provides guidance for trial courts and parties. Additionally, the court approved the trial court's decision to hear summary judgment motions before ruling on class certification. Plaintiffs argued strongly that this was an error; the court disagreed, citing *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 123 P.3d 88 (2005). In *Sheehan*, the Court held that a trial court had discretion to delay a class

certification ruling until after dispositive motions. *Id.* at 807. In this case, plaintiffs attacked the trial court's instruction to file such motions before it ruled on the class. This Opinion clarifies and confirms *Sheehan*, approving the trial court's discretion to consider dispositive motions before class certification. This also provides guidance for trial courts.

The Opinion highlights the proper standard of review for a class certification decision, regardless of the issues or facts specific to any given case. Because it clarifies the standard of review, and provides guidance on procedural fronts as well, publishing the opinion would be beneficial.

B. The Opinion Involves Issues and Analyses of Great Importance to Those in the Healthcare Industry.

Washington courts have issued few decisions relative to class action wage and hour claims, particularly those relative to the healthcare industry. At the same time, employers are seeing an increase in class action wage and hour claims. Employers in general, and the healthcare industry in particular, have great interest in obtaining further guidance on when individual claims become class claims.

The healthcare industry faces unique challenges, including highly unpredictable patient flow and large variation of a "typical day" across its shifts and departments. Employees with similar job titles may experience vastly different workflow from day to day. These difference are reflected

in practices regarding breaks and meal shifts. In this industry, each individual has an individual story; as the trial court found, the specifics overwhelm commonalities, creating an unmanageable class and making class treatment a less superior form of litigation.

Notably, the parties and the court looked primarily to cases regarding nurses under federal law and from different states for guidance. Opinion at 39-40. Little or no Washington case law exists to address issues of class certification in the context of healthcare employees and wage and hour law. Publishing this decision would provide case law specific to Washington, helping to fill in this area of law.

CONCLUSION

For the reasons outlined above, applicants respectfully ask for publication of this Opinion.

DATED: February 28, 2017

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this date, I filed a copy of the **JOINT MOTION TO PUBLISH OPINION** via efiling to the following:

Washington Court of Appeals, Division III
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Spokane, WA 99201-1905

I further certify that on this date, I mailed a copy of the foregoing **JOINT MOTION TO PUBLISH OPINION** via email and first class mail, postage prepaid, with the United States Postal Service on the following:

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The Honorable Bruce Spanner

IN THE SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

ORIGINAL FILED
MAY 21 2015
MICHAEL J. KILLIAN
FRANKLIN COUNTY CLERK

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Plaintiffs

vs.

OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, and JOHN SERLE, individually and in his capacity as an agent and officer of Lourdes Medical Center.

Defendants.

No. 12-2-50575-9

ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

On May 17, 2013, Plaintiffs' Motion for Class Certification came before the Court. The Court reviewed the submitted evidence and arguments and did not certify a class at that time. Instead, it instructed plaintiffs to file summary judgment motions on proposed legal theories as a pre-cursor to renewing the class certification motion. By Order dated February 27, 2015, the Court ruled on those motions. The Court also granted plaintiffs' motion to amend the complaint, and plaintiffs filed a First Amended Complaint on March 2, 2015. Plaintiffs have now renewed their motion to certify a class, and the renewed motion came before the Court on April 10, 2015. Having fully considered the briefs, the evidence, and the arguments of the

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1 parties, the Court hereby makes specific findings regarding the requirements of class
2 certification as follows:
3 1. On the prerequisite to a class under CR 23(a)(1), the Court finds plaintiffs met the
4 required showing that the proposed class is numerous enough to make joinder
5 impractical.
6 2. On the prerequisite to a class under CR 23(a)(2), the Court finds plaintiffs met the
7 required showing that there are questions of law or fact common to the proposed class or
8 subclasses.
9 3. On the prerequisite to a class under CR 23(a)(3), the Court finds plaintiffs met the
10 required showing that the representative plaintiffs have claims typical of those of the
11 proposed class or subclasses.
12 4. On the prerequisite to a class under CR 23(a)(4), the Court finds plaintiffs met the
13 required showing of adequate representation by the representative plaintiffs and their
14 attorneys.
15 5. The Court finds plaintiffs have not met the required showing that a mandatory class
16 action would be maintainable under CR23(b)(1) because the primary objective of this
17 lawsuit is monetary damages and plaintiffs have failed to show prejudice to absent class
18 members would occur.
19 6. The Court finds plaintiffs have not met the required showing that a mandatory class
20 action would be maintainable under CR23(b)(2) because the primary objective of this
21 lawsuit is monetary damages and plaintiffs have failed to establish the necessity of
22 declaratory or injunctive relief.
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1 7. The Court finds plaintiffs have not met the required showing that a class action would be
2 maintainable under CR23(b)(3). The Court finds that common class issues do not
3 predominate over individual questions because issues regarding shift, nurse type, nurse
4 roles and job duties, patient assignments and census, managers, and department cause
5 the specifics for each class member to overrun any generalities. The Court also finds
6 that a class action is not superior to alternatives such as joinder or individual lawsuits for
7 fair and efficient adjudication of the claims. Finally, the Court also finds that the
8 proposed class, or the proposed nine subclasses by department, would be unmanageable
9 at trial.

10 For the reasons set out above, the Court hereby DENIES plaintiffs' motion to certify a class of
11 all RNs who have worked one or more hourly shifts in the relevant time period and the proposed
12 subclasses.

13 IT IS SO ORDERED this 21 day of May, 2015.

14
15 HON. BRUCE SPANNER

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 12, 2013, I filed the foregoing via US Mail with the following:

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Dated this 12th day of May, 2015.

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HONORABLE BRUCE SPANNER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center, Plaintiffs vs. **OUR LADY OF LOURDES HOSPITAL AT PASCO**, d/b/a Lourdes Medical Center, and **JOHN SERLE**, individually and in his capacity as an agent and officer of Lourdes Medical Center. Defendants.	No. 12-2-50575-9 **ORDER ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN LEGAL ISSUES RELATING TO NON-MEAL-REST PERIODS**

The following matters came before the court on the parties' motions for partial summary judgment:

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1 1) Plaintiffs' July 23, 2014 Motion for Partial Summary Judgment of Issues Relating to
2 Non-Meal-Rest Periods, Tracking Time, and Paying for Missed Rest Periods, which
3 came before the court on August 22, 2014. Plaintiffs appeared by and through their
4 attorneys Jack Krona, Jr., Jim McGuinness, and Aaron Streepy. Defendants appeared by
5 and through their attorney of record, Aaron Bass.
6 2) Plaintiffs' August 22, 2014 (as amended September 18, 2014) Motion for Partial
7 Summary Judgment on Certain Legal Issues Related to Non-Meal Rest Periods; and
8 Defendants' September 11, 2014 Cross Motion for Summary Judgment And Opposition
9 to Plaintiffs' Motion Regarding "In Assignment" and "Intermittent Breaks", which came
10 before the court on September 26, 2014. Plaintiffs appeared by and through their
11 attorney, Jack Krona, Jr.; defendants appeared by and through their attorney, Aaron Bass.
12 3) Plaintiffs' September 22, 2014 Amended Motion for Partial Summary Judgment on
13 Issues Relating to Second Meal Periods for 12-Hour Shift Nurses, which came before the
14 court on October 17, 2014. Plaintiffs appeared by and through their attorneys Jack
15 Krona, Jr. and Aaron Streepy. Defendants appeared by and through their attorney, Aaron
16 Bass.
17 The court made specific rulings on these motions as outlined below.

18 **1) Plaintiffs' Motion for Partial Summary Judgment of Issues Relating to Non-Meal-Rest Periods, Tracking Time, and Paying for Missed Rest Periods.**

19 Having considered the evidence and arguments submitted by the parties, the Court made
20 the following rulings::

21 1. Employees have a private right to action for missed rest breaks.

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1 2. Employees are entitled to ten minutes of rest break for every four[1] hours worked

2 and if they miss a rest break, they are entitled to an additional ten minutes of pay.

3 3. Rest breaks cannot be waived.

4 4. There is no duty under Washington law to schedule rest breaks when intermittent

5 breaks are appropriate for the nature of the employment.

6 5. An employee can be on call, and if not otherwise engaged in work activity, on a

7 rest break. If an employee must perform any work activities, mental or physical,

8 they are not on a rest break.

9 6. An individualized inquiry into the duties of nurses across departments and shifts

10 is necessary to determine if a particular nurse had a rest break.

11 7. A policy of "vigilance", as was found after trial in the Brinks case (Pellino v

12 Brinks, 164 Wn App 668 (2011) may make on call time such that a break was

13 never received. There is a genuine issue of material fact as to whether the duties

14 of any nurse, or group of nurses are performing work activities without being

15 relieved of patient responsibility.

16 8. If an employer willfully fails to pay rest breaks, employees may recover double

17 damages and attorney fees.

18 9. Employers have an obligation to maintain records of all hours worked, but there is

19 no requirement to systematically track missed rest breaks specifically.

20 10. Liability does not follow automatically from violation of a recordkeeping

21 requirement. Instead, employees must first prove an employee was not

22

23 [1] From the bench, the Court indicated employees receive a non-meal rest break every three hours. WAC 296-126-092 states employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time, where the rest periods must be as near as possible to the mid-point of the work period,

24 and that "[n] employee shall be required to work more than three hours without a rest period."

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1 compensated for all time work, and then must produce sufficient evidence of the
2 amount and extent of the uncompensated work by a fair preponderance of the
3 evidence. If an employee meets that burden, then the burden shifts to the
4 employer to disprove damages.

5 11. The employer can rely on the efforts of employees to record time and prepare
6 records of necessity, but if the records are wrong, incomplete or inadequate, the
7 employer bears the risk of the bad or inadequate record keeping.

8 12. A genuine factual dispute exists regarding whether nurses at Lourdes have or have
9 not been compensated for all time worked. Plaintiffs provided no evidence to the
10 court as to the amount and extent of uncompensated work, although that was not
11 determinative in the summary judgment proceedings.

12 Based on these rulings, the Court hereby DENIES plaintiff's motion in full.

13 **2) Plaintiffs' Amended Motion for Partial Summary Judgment on Certain Legal Issues Related to Non-Meal Rest Periods; and Defendants' Cross Motion for Summary Judgment**
14 **And Opposition to Plaintiffs' Motion Regarding "In Assignment" and "Intermittent Breaks."**
15

16 Having considered the evidence and arguments submitted by the parties, the Court made
17 the following findings and conclusions:

18 1. There is a factual question of whether nurses "in patient assignment" at Lourdes
19 are "vigilant" and engaged in work activities, as was found after trial in the Brinks
20 case, so that they can have breaks without being relieved of assignment.

21 2. The Court does not have enough factual information to determine with sufficient
22 specificity what a nurse does while she is "on duty.

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1 3. The Court cannot grant judgment as a matter of law to either party on the issue of
2 whether intermittent breaks are consistent with the duties of nursing because of
3 genuine disputed issues of material fact.
4 4. If an employee is "on call" during a meal period and subject to recall during the
5 meal period, the law requires that the meal period be considered a "paid lunch" on
6 the employers time and is considered "hours worked."
7 5. If an employee on a "paid lunch" is denied the ability to have a 30-minute paid
8 meal period that is interrupted for work duties, the employee is entitled to
9 payment for an extra 30-minutes of "hours worked."
10 6. The Court ruled that—contrary to the interpretative guidelines—an employer is
11 not required to use its "every effort" to make sure an employee on a paid lunch
12 receives the full 30 minutes.
13 7. A material question of fact exists as to whether a particular nurse on a particular
14 shift with a particular patient assignment can be on a break while in patient
15 assignment.
16 8. Plaintiffs failed to plead a contract claim so the Court will not entertain a motion
17 on that basis.
18 9. As a matter of law, the lack of a written policy on intermittent breaks or failure to
19 mention intermittent breaks in a rest break policy does not preclude intermittent
20 breaks on any given shift.
21 10. Intermittent breaks are not, as a matter of law, inconsistent with nursing duties.
22 This is an individualized factual question dependent on shift, case load, duties and
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1 the practicality of taking intermittent breaks. A material question of fact exists on
2 if and when any particular nurse may be able to take intermittent breaks.
3 11. Employers do not have to schedule breaks when intermittent breaks are
4 appropriate for the nature of the employment. Because when intermittent breaks
5 are appropriate is a question of fact, a question of fact also remains on whether
6 Lourdes routinely failed to comply with scheduling obligations.
7 Except as otherwise stated above, the Court DENIES the cross-motions for summary
8 judgment in full.
9 **3) Plaintiffs' Amended Motion for Partial Summary Judgment on Issues Relating to**
10 **Second Meal Periods for 12-Hour Shift Nurses, which came before the court on October 17,**
11 **2014.**
12 Having considered the evidence and arguments submitted by the parties, the Court made
13 the following rulings::
14 1. 12-hour nurses at Lourdes were entitled to, and were paid for second meal
15 periods.
16 2. Although paid, a 12-hour nurse would still be considered to have missed the
17 second meal period and be entitled to another 30 minutes of pay if the nurse was not sufficiently
18 relieved of duties to have 30 minutes for lunch.
19 3. For a paid meal period, being "on call" or subject to recall does not negate the
20 meal period. The question is whether the nurse was sufficiently relieved of duties for 30 minutes,
21 and the 30 minutes can be either interrupted or in a block.
22
23
24

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111 SW FIFTH AVENUE, STE. 1200
PORTLAND, OREGON 97204
PHONE (503) 225-5858 FAX (503) 721-9272

1 4. Whether or not a particular nurse was sufficiently relieved of duties and received
2 a second meal period is a complex question of fact based on differences between departments
3 and shifts. A genuine factual dispute remains on this issue.

4 5. An employer has no duty to schedule a paid meal period.

5 6. Plaintiffs did not sufficiently plead a waiver issue, so a motion on that basis will
6 not be addressed by the Court.

7 Based on these findings of law and fact, the Court hereby DENIES plaintiff's motion for
8 summary judgment in full.

9 DATED this 27 day of ~~January~~ Feb. 2015.

10

11 Judge Bruce Spanner

12

SUBMITTED BY:

13

14

Aaron Bass, WSB #39073
15 Tel. (503) 225-5858
Fax (503) 721-9272
16 abass@sbhlegal.com
Attorneys for Defendants

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WAC 246-320-136

Leadership.

This section describes leadership's role in assuring care is provided consistently throughout the hospital and according to patient and community needs.

The hospital leaders must:

(1) Appoint or assign a nurse at the executive level to:

(a) Direct the nursing services; and

(b) Approve patient care policies, nursing practices and procedures;

(2) Establish hospital-wide patient care services appropriate for the patients served and available resources which includes:

(a) Approving department specific scope of services;

(b) Integrating and coordinating patient care services;

(c) Standardizing the uniform performance of patient care processes;

(d) Establishing a hospital-approved procedure for double checking certain drugs, biologicals, and agents by appropriately licensed personnel; and

(e) Ensuring immediate access and appropriate dosages for emergency drugs;

(3) Adopt and implement policies and procedures which define standards of care for each specialty service;

(4) Provide practitioner oversight for each specialty service with experience in those specialized services. Specialized services include, but are not limited to:

(a) Surgery;

(b) Anesthesia;

(c) Obstetrics;

(d) Neonatal;

(e) Pediatrics;

(f) Critical or intensive care;

(g) Alcohol or substance abuse;

(h) Psychiatric;

(i) Emergency; and

(j) Dialysis;

(5) Provide all patients access to safe and appropriate care;

(6) Adopt and implement policies and procedures addressing patient care and nursing practices;

(7) Require that individuals conducting business in the hospital comply with hospital policies and procedures;

(8) Establish and implement processes for:

(a) Gathering, assessing and acting on information regarding patient and family satisfaction with the services provided;

(b) Posting the complaint hotline notice according to RCW **70.41.330**; and

(c) Providing patients written billing statements according to RCW **70.41.400**;

(9) Plan, promote, and conduct organization-wide performance-improvement activities according to WAC **246-320-171**;

(10) Adopt and implement policies and procedures concerning abandoned newborn babies and hospitals as a safe haven according to RCW **13.34.360**;

(11) Adopt and implement policies and procedures to require that suspected abuse, assault, sexual assault or other possible crime is reported within forty-eight hours to local police or the appropriate law enforcement agency according to RCW **26.44.030**.

[Statutory Authority: Chapter **70.41** RCW and RCW **43.70.040**. WSR 09-07-050, § 246-320-136, filed 3/11/09, effective 4/11/09.]

WASHINGTON STATE LEGISLATURE

WAC 246-320-171

Improving organizational performance.

The purpose of this section is to ensure that performance improvement activities of staff, medical staff, and outside contractors result in continuous improvement of patient health outcomes. In this section "near miss" means an event which had the potential to cause serious injury, death, or harm but did not happen due to chance, corrective action or timely intervention.

Hospitals must:

(1) Have a hospital-wide approach to process design and performance measurement, assessment, and improving patient care services according to RCW **70.41.200** and include, but not be limited to:

(a) A written performance improvement plan that is periodically evaluated;

(b) Performance improvement activities which are interdisciplinary and include at least one member of the governing authority;

(c) Prioritize performance improvement activities;

(d) Implement and monitor actions taken to improve performance;

(e) Education programs dealing with performance improvement, patient safety, medication errors, injury prevention; and

(f) Review serious or unanticipated patient outcomes in a timely manner;

(2) Systematically collect, measure and assess data on processes and outcomes related to patient care and organization functions;

(3) Collect, measure and assess data including, but not limited to:

(a) Operative, other invasive, and noninvasive procedures that place patients at risk;

(b) Infection rates, pathogen distributions and antimicrobial susceptibility profiles;

(c) Death;

(d) Medication use;

(e) Medication management or administration related to wrong medication, wrong dose, wrong time, near misses and any other medication errors and incidents;

(f) Injuries, falls; restraint use; negative health outcomes and incidents injurious to patients in the hospital;

(g) Adverse events listed in chapter **246-302** WAC;

(h) Discrepancies or patterns between preoperative and postoperative (including pathologic) diagnosis, including pathologic review of specimens removed during surgical or invasive procedures;

(i) Adverse drug reactions (as defined by the hospital);

(j) Confirmed transfusion reactions;

(k) Patient grievances, needs, expectations, and satisfaction; and

(l) Quality control and risk management activities.

[Statutory Authority: Chapter **70.56** RCW. WSR 12-16-057, § 246-320-171, filed 7/30/12, effective 10/1/12. Statutory Authority: Chapter **70.41** RCW and RCW **43.70.040**. WSR 09-07-050, § 246-320-171, filed 3/11/09, effective 4/11/09.]

WAC 296-126-002

Definitions.

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules. For purposes of these rules, the state or its political subdivisions, municipal corporations, or quasi-municipal corporations (collectively called "public employers") are considered to be "employers" and subject to these rules in the following manner:

(a) Before May 20, 2003, public employers are not subject to these rules unless the rules address:

(i) Sick leave and care of family members under RCW 49.12.265 through 49.12.295.

(ii) Parental leave under RCW 49.12.350 through 49.12.370.

(iii) Compensation for required employee uniforms under RCW 49.12.450.

(iv) Employers' duties towards volunteer firefighters and reserve officers under RCW 49.12.460.

(b) On or after May 20, 2003, public employers are subject to these rules only if these rules do not conflict with the following:

(i) Any state statute or rule.

(ii) Any local resolution, ordinance, or rule adopted before April 1, 2003.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. "Employee" does not include:

(a) Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services;

(b) Any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesperson;

(c) Independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

(3) "Employ" means to engage, suffer or permit to work.

(4) "Adult" means any person eighteen years of age or older.

(5) "Minor" means any person under eighteen years of age.

(6) "Student learner" means a person enrolled in a bona fide vocational training program accredited by a national or regional accrediting agency recognized by the United States Office of Education, or authorized and approved by the Washington state commission for vocational education, who may be employed part time in a definitely organized plan of instruction.

(7) "Learner" means a worker whose total experience in an authorized learner occupation is less than the period of time allowed as a learning period for that occupation in a learner certificate issued by the director pursuant to regulations of the department of labor and industries.

(8) "Hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed

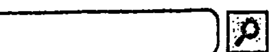
work place.

(9) "Conditions of labor" shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(10) "Department" means the department of labor and industries.

(11) "Director" means the director of the department of labor and industries or the director's designated representative.

[Statutory Authority: Chapter 49.12 RCW. WSR 10-04-092, § 296-126-002, filed 2/2/10, effective 3/15/10; Order 76-15, § 296-126-002, filed 5/17/76; Order 74-9, § 296-126-002, filed 3/13/74, effective 4/15/74.]



WAC 296-126-092

Meal periods—Rest periods.

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

[Order 76-15, § 296-126-092, filed 5/17/76.]

THE HONORABLE BRUCE SPANNER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

JUDY Q. CHAVEZ, KATHLEEN CHRISTIANSEN, ORALIA GARCIA, AND MARRIETA JONES, individually, and on behalf of all similarly situated registered nurse employed by Our Lady of Lourds Hospital at Pasco, d/b/a Lourdes Medical Center, Plaintiffs, vs. OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical center, and JOHN SERLE individually and in his capacity as an agent and officer of Lourdes Medical Center, Defendants.	No. 12-2-50575-9 **DECLARATION OF JACK B. KRONA JR., ESQ.**

I, Jack B. Krona Jr., Esq, hereby declare as follows:

1. I am one of the attorneys representing the Plaintiffs in the above-entitled cause of action. I am seeking to be appointed as class counsel. I give this declaration in support of the **PLAINTIFFS' REPLY REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN LEGAL ISSUES RELATING TO NON-MEAL-REST PERIODS AND BRIEF IN SUPPORT.**

1 2. I am an attorney licensed in the Washington, California, and Texas. I am also
2 admitted to practice in a number of federal districts and circuits. I have never been
3 sanctioned for any reason or subject to discipline in any jurisdiction.
4 3. A true and correct printout of a September 19, 2014 transmittal e-mail from
5 David Johnson, L&I Wage and Hour Technical Specialist, to Jack Krona, is Exhibit 1 to this
6 Declaration, which was transmitted in connection with a records request to obtain a copy of
7 the Jan. 2, 2002 version of Administrative Policy ES.C.6.
8 4. A true and correct printout of the Jan. 2, 2002 Version of ES.C.6 forwarded by
9 D. Johnson is Exhibit 2 to this Declaration, which was an attachment to Exhibit 1.
10 5. A true and correct printout from the Washington Code Reviser website, WSR
11 05-18-091, showing the purpose of the 2005 revision to ES.C.6 is attached as Exhibit 3 to
12 this Declaration.
13 6. A true and correct copy of the current ES.C.6 obtained from the L&I's public
14 website is attached to this Declaration as Exhibit 4.
15 7. A true and correct printout of WAC 246-840-710 from
16 http://app.leg.wa.gov/wac/default.aspx?cite=246-840-710 is attached to this declaration as
17 Exhibit 5.
18 I declare under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and correct.
20 Executed in Pierce County, Washington, this 22nd day of September 2014.
21
22 Jack B. Krona Jr., Esq.
23
24
25
26

Exhibit 1

□Johnson, David L (LNI)□
Sep 19 at 9:07 AM
To
Jack Krona Jr.
I got this from Elaine Fisher, she had kept electronic copies of the policies filed in 2002.

From: Jack Krona Jr. [mailto:j_krona@yahoo.com] **Sent:** Friday, September 19, 2014 8:39 AM**To:** Johnson, David L (LNI)**Subject:** Re: LNI policy

I have not had any luck. An electronic copy or any copy would be great. Thanks so much for your help.

Jack B. Krona Jr., Esq.
(253) 341-9331

From: "Johnson, David L (LNI)" <jodc235@LNI.WA.GOV>**To:** "j_krona@yahoo.com" <j_krona@yahoo.com> **Sent:** Friday, September 19, 2014 8:35 AM**Subject:** LNI policy

Mr. Krona:

Did you have any luck on that 2002 policy? If not, I was able to get an electronic copy from Elaine Fisher.

Let me know if you have it.

Thanks,

David Johnson
Wage and Hour Technical Specialist
Department of Labor and Industries
PO Box 44510, Olympia, WA 98504-4510
360-902-5552

ESC6 Breaks (2002).docDownload

Exhibit 2

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE: MEAL AND REST PERIODS

NUMBER: ES.C.6

CHAPTER: RCW 49.12
WAC 296-126-092

REPLACES: ES-026

ISSUED: 1/2/2002

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

Meal and rest periods are conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act. The department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and –0287. The regulations for agricultural employees are found in WAC 296-131-020.

When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).
- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required, however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

Can an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Employees may not waive their right to a rest period.

Rest periods must be paid. The term "rest period" is a relief from duty. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

Scheduling of rest periods. The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

Intermittent Rest Periods. Employees need not be given a scheduled rest period when the nature of the work allows intermittent rest period equal to ten minutes during each four hours of work. "Intermittent" is defined as intervals of short duration in which

employees are allowed to relax and rest, or a brief inactivity from work or exertion. Generally, if the nature of the work on a production line, for example, does not allow for intermittent rest periods, employees must be given scheduled ten-minute rest periods.

Variances from required meal and rest periods. Employers who need to change the meal and rest periods times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. **See ES.C.9**, Variances.

A Collective Bargaining Agreement cannot provide for meal and rest periods that are less than those required by WAC 296-126-092. The department's interpretation of RCW 49.12 is that that statute and rules promulgated under it, including WAC 296-126-092, establish a minimum standard for working conditions for all employees in the state. Provisions of a collective bargaining agreement covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards.

Exhibit 3

WSR 05-18-091

INTERPRETIVE AND POLICY STATEMENT

DEPARTMENT OF

LABOR AND INDUSTRIES

[Filed September 7, 2005, 10:11 a.m.]

In accordance with RCW 34.05.230(12), following are the policy and interpretive statements issued by the department for June - August 2005.

If you have any questions or need additional information, please call Carmen Moore at (360) 902-4206.

POLICY AND INTERPRETIVE STATEMENTS

WISHA

WISHA Regional Directive (WRD) 18.35, "Grounding Requirements for Temporary Substation Fences."

This policy will remain in effect indefinitely. It applies to all WISHA enforcement and consultation activities involving WAC 296-45-475(3) (installation of temporary substation fences). It replaces all previous guidance on the subject, whether formal or informal. This new policy was issued August 19, 2005.

Contact Marcia Benn, Mailstop 44648, phone (360) 902-5503.

SPECIALTY COMPLIANCE SERVICES

Employment Standards.

Contact person for all policies below: Janis Kerns, Mailstop 44510, phone (360) 902-5552.

Minimum Wage Act Applicability, ES.A.1.

This policy clarifies the MWA may apply to public employees and that public employees are subject to the salary basis regulations. It also clarifies that the exemption for employees of charitable institutions charged with childcare responsibilities applies only to recreational camps run by such organizations. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Collective Bargaining Agreements, ES.A.6.

New language was added in the industrial welfare section to reflect changes made by 2003 legislature to bring public employees under chapter 49.12 WAC, the Industrial Welfare Act. The policy was amended to explain that new information on construction companies that have collective bargaining agreements may

bargain their meal and rest periods to vary from the meal and rest periods provided in WAC 296-126-092. New language was added to explain that meal and rest periods under collective bargaining agreements can vary from or supersede the Industrial Welfare Act for public employees. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Questions and Answers About Salary Basis, Administrative Policy #ES.A.9.1.

This policy was amended to clarify that if an employee is not qualified under a bona fide sick leave plan, the employer may deduct wages in full-day increments. This policy was amended June 24, 2005.

Industrial Welfare Act, Administrative Policy ES.C.1.

This policy is amended to explain conditions of labor and explain that public employees are now covered under the Industrial Welfare Act, chapter 49.12 RCW. Major paragraphs in the policy were numbered for easier reference. This policy was amended June 24, 2005.

Hours Worked, ES.C.2.

This policy clarifies that public employers are not required to obtain a state minor work permit when they employ persons under the age of eighteen and adds note that public employers are required to comply with federal child labor regulations. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Meal and Rest Periods, Administrative Policy ES.C.6.

This policy was amended to explain that public employees are now entitled to meal and rest periods under chapter 49.12 RCW and WAC 296-126-092 and that labor/management agreement or collective bargaining agreement (CBA) can vary from or supersede the WAC. The policy was also amended to explain that construction workers with a CBA can vary meal and rest periods from the WAC. The definition of rest periods and intermittent rest periods were also clarified. Major paragraphs in the policy have been numbered for easier reference. This policy was amended June 24, 2005.

Administrative Policy ES.A.9.2: General Information Applicable to Exemptions from Minimum Wage and Overtime Requirements for White-Collar Workers (Executive, Administrative, Professional, Computer Professional and Outside Sales).

This new policy replaces the April 1992 Interpretive Guideline, ES-006. This policy is an introduction to the department's interpretation of the state's regulations exempting certain office and nonmanual type work, known as "white collar regulations" and contains general information applicable to all of the regulations under WAC 296-128-500 and 296-128-540. These policies expand ES-006, which had brief summaries of each of the exemptions. ES-006 was withdrawn from the other administrative policies revised and issued January 2, 2002. Each of the "white-collar" classifications was given separate administrative policy numbers. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.3: Exemption from Minimum Wage and Overtime Requirements for Executive Positions.

This new policy interprets the executive positions (white-collar) exemption, WAC 296-128-510. Major

paragraphs in the policy have been numbered for easier reference.

This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.4: Exemption from Minimum Wage and Overtime Requirements for Administrative Positions.

This new policy interprets the administrative (white-collar) exemption, WAC 296-128-520. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.5: Exemption from Minimum Wage and Overtime Requirements for Professional Positions.

This new policy interprets the state's professional (white-collar) exemption, WAC 296-128-530. Major paragraphs in the policy have been numbered for easier reference. This expands the 1992 Interpretive Guideline ES-006, which was repealed January 2, 2002. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.6: Exemption from Minimum Wage and Overtime Requirements for Computer Professional Positions.

This new policy interprets the state's computer professional (white-collar) exemption, WAC 296-128-535. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.7: Exemption from Minimum Wage and Overtime Requirements for Outside Sales Positions.

This new policy interprets the state's outside sales (white-collar) exemption, WAC 296-128-540. Major paragraphs in the policy have been numbered for easier reference. This expands the 1992 Interpretive Guideline ES-006, which was repealed January 2, 2002. This new policy was issued June 24, 2005.

Administrative Policy ES.A.9.8: Definition of Fee Basis in Administrative, Professional and Outside Sales Positions.

This new policy interprets fee basis payments under the administrative, professional, and outside sales exemptions under WAC 296-128-520, 296-128-530, and 296-128-540. These exemptions may be paid either on a salary or fee basis. Major paragraphs in the policy have been numbered for easier reference. This new policy was issued June 24, 2005.

Carmen Moore

Rules Coordinator

© Washington State Code Reviser's Office

Exhibit 4

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	**MEAL AND REST PERIODS FOR NONAGRICULTURAL WORKERS AGE 18 AND OVER**	**NUMBER:**	**ES.C.6**
		REPLACES:	**ES-026**
CHAPTER:	**RCW 49.12** **WAC 296-126-092**	**ISSUED:**	**1/2/2002**
		REVISED:	**6/24/2005**

ADMINISTRATIVE POLICY DISCLAIMER

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This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: Minor employees (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. *See Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements.*

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

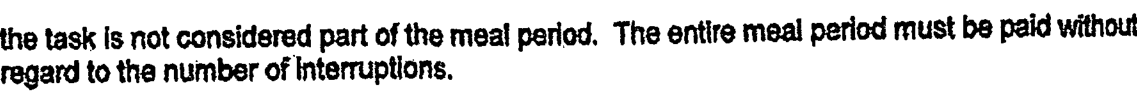
It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing



the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

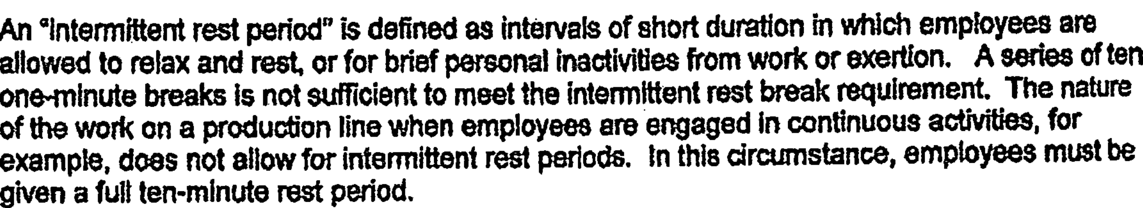
The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.



An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

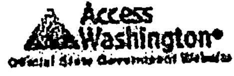
14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. *See ES.C.9, Variances.*

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. *See Administrative Policy ES.A.6 and/or ES.C.1.*

Exhibit 5



No agency filings affecting this section since 2003

WAC 246-840-710

Violations of standards of nursing conduct or practice.

The following conduct may subject a nurse to disciplinary action under the Uniform Disciplinary Act, chapter 18.130 RCW:

(1) Engaging in conduct described in RCW 18.130.180;

(2) Failure to adhere to the standards enumerated in WAC 246-840-700 which may include, but are not limited to:

(a) Failing to assess and evaluate a client's status or failing to institute nursing intervention as required by the client's condition;

(b) Willfully or repeatedly failing to report or document a client's symptoms, responses, progress, medication, or other nursing care accurately and/or legibly;

(c) Willfully or repeatedly failing to make entries, altering entries, destroying entries, making incorrect or illegible entries and/or making false entries in employer or employee records or client records pertaining to the giving of medication, treatments, or other nursing care;

(d) Willfully or repeatedly failing to administer medications and/or treatments in accordance with nursing standards;

(e) Willfully or repeatedly failing to follow the policy and procedure for the wastage of medications where the nurse is employed or working;

(f) Nurses shall not sign any record attesting to the wastage of controlled substances unless the wastage was personally witnessed;

(g) Willfully causing or contributing to physical or emotional abuse to the client;

(h) Engaging in sexual misconduct with a client as defined in WAC 246-840-740; or

(i) Failure to protect clients from unsafe practices or conditions, abusive acts, and neglect;

(3) Failure to adhere to the standards enumerated in WAC 246-840-700(2) which may include:

(a) Delegating nursing care function or responsibilities to a person the nurse knows or has reason to know lacks the ability or knowledge to perform the function or responsibility, or delegating to unlicensed persons those functions or responsibilities the nurse knows or has reason to know are to be performed only by licensed persons. This section should not be construed as prohibiting delegation to family members and other caregivers exempted by RCW 18.79.040(3), 18.79.050, 18.79.060 or 18.79.240; or

(b) Failure to supervise those to whom nursing activities have been delegated. Such supervision shall be adequate to prevent an unreasonable risk of harm to clients;

(4)(a) Performing or attempting to perform nursing techniques and/or procedures for which the nurse lacks the appropriate knowledge, experience, and education and/or failing to obtain instruction, supervision and/or consultation for client safety;

(b) Violating the confidentiality of information or knowledge concerning the client, except where required by law or for the protection of the client; or

(c) Writing prescriptions for drugs unless authorized to do so by the commission;

(5) Other violations:

(a) Appropriating for personal use medication, supplies, equipment, or personal items of the client, agency, or institution. The nurse shall not solicit or borrow money, materials or property from clients;

(b) Practicing nursing while affected by alcohol or drugs, or by a mental, physical or emotional condition to the extent that there is an undue risk that he or she, as a nurse, would cause harm to him or herself or other persons; or

(c) Willfully abandoning clients by leaving a nursing assignment, when continued nursing care is required by the condition of the client(s), without transferring responsibilities to appropriate personnel or caregiver;

(d) Conviction of a crime involving physical abuse or sexual abuse including convictions of any crime or plea of guilty, including crimes against persons as defined in chapter 43.830 RCW [RCW 43.43.830] and crimes involving the personal property of a patient, whether or not the crime relates to the practice of nursing; or

(e) Failure to make mandatory reports to the Nursing Care Quality Assurance Commission concerning unsafe or unprofessional conduct as required in WAC 246-840-730;

Other:

(6) The nurse shall only practice nursing in the state of Washington with a current Washington license;

(7) The licensed nurse shall not permit his or her license to be used by another person;

(8) The nurse shall have knowledge of the statutes and rules governing nursing practice and shall function within the legal scope of nursing practice;

(9) The nurse shall not aid, abet or assist any other person in violating or circumventing the laws or rules pertaining to the conduct and practice of professional registered nursing and licensed practical nursing; or

(10) The nurse shall not disclose the contents of any licensing examination or solicit, accept or compile information regarding the contents of any examination before, during or after its administration.

[Statutory Authority: RCW 18.79.110. WSR 02-06-117, § 246-840-710, filed 3/6/02, effective 4/6/02. Statutory Authority: Chapter 18.79 RCW. WSR 97-13-100, § 246-840-710, filed 6/18/97, effective 7/19/97.]

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Citation: **29 C.F.R. § 103.30**

29 CFR 103.30

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*** This document is current through December 28, 2015 with the ***
*** exception of amendments appearing at 80 FR 80258 and 80 FR 80643 ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER I -- NATIONAL LABOR RELATIONS BOARD
PART 103 -- OTHER RULES
SUBPART C -- APPROPRIATE BARGAINING UNITS

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29 CFR 103.30

§ 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) Hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) Acute care hospital is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) Psychiatric hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A non-conforming unit is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended,

by adjudication.

HISTORY:
[54 FR 16347, Apr. 21, 1989]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

NOTES:
NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
Social Security Administration: See Employees' Benefits, 20 CFR chapter III.
EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
American Hosp. Ass'n v NLRB (1991) 499 US 606, 113 L Ed 2d 675, 111 S Ct 1539
Highlands Hosp. Corp. (1999) 327 NLRB 1049, 162 BNA LRRM 1125
St. Mary's Duluth Clinic Health Sys. (2000) 332 NLRB 1419, 166 BNA LRRM 1057, 2000-1 CCH NLRB P15685

LexisNexis (R) Notes:

CASE NOTES

Healthcare Law
...Business Administration & Organization > Collective Bargaining & Labor Unions

Labor & Employment Law
...Collective Bargaining & Labor Relations > Bargaining Units

...Collective Bargaining & Labor Relations > Duty to Bargain

...Collective Bargaining & Labor Relations > Right to Organize

Healthcare Law
...Business Administration & Organization > Collective Bargaining & Labor Unions

Alta Bates Corp. v. NLRB, 1997 U.S. App. LEXIS 13190 (9th Cir June 4, 1997).

Overview: *A decision by the National Labor Relations Board that three employers were a single employer was supported by substantial evidence, and the Board's decision that the medical technologists of the employers were appropriate bargaining unit was not an abuse of discretion. The unit was a permitted existing nonconforming unit under 29 CFR § 103.30(a).*

- The Health Care Rules, 29 CFR § 103.30, enumerate eight appropriate bargaining units for acute care facilities. 29 CFR § 103.30(a). The Rules also provide three exceptions: cases that present extraordinary circumstances; cases in which nonconforming units already exist; and cases in

which labor organizations seek to combine two or more of the eight specified units. Go To Headnote

Duke Univ. v. NLRB, 1994 U.S. App. LEXIS 34408 (DC Cir Nov. 3, 1994).

Overview: *University's petition to review was denied and NLRB's application for enforcement of its order was granted where NLRB did not abuse its discretion under § 9(b) of NLRA to determine appropriate collective bargaining units by finding university's primary function was not patient care and declaring its bus drivers to be appropriate bargaining unit.*

- In the Final Rule on Appropriate Bargaining Units in the Health Care Industry, the National Labor Relations Board defined a "hospital" (in relevant part) as an institution that is primarily engaged in providing diagnostic services and therapeutic services to injured, disabled, or sick persons, 29 C.F.R. § 103.30(f)(1) (adopting Medicare Act's definition of same term, 42 U.S.C.S. § 1395x). Go To Headnote

Fair Oaks Anesthesia Assoc., P.C. v. NLRB, 975 F.2d 1068, 1992 U.S. App. LEXIS 22396 (4th Cir Sept. 17, 1992).

Overview: *The board did not abuse its discretion by giving more weight to the distinctions between two categories of employees than to their similarities and in concluding that certified registered nurse anesthetists could comprise a separate bargaining unit.*

- Except in extraordinary circumstances, a maximum of eight bargaining units in acute care hospitals is appropriate: (1) all registered nurses; (2) all physicians; (3) all professionals other than registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees other than those categories already specified. 29 C.F.R. § 103.30(a). Go To Headnote
- The acute care facility rule at 29 C.F.R. § 103.30(a) requires all registered nurses to be included in one unit. Go To Headnote

Labor & Employment Law
...Collective Bargaining & Labor Relations > Bargaining Units

NLRB v. Health Mgmt. Assocs., Inc., 1999 U.S. App. LEXIS 3945 (4th Cir Mar. 11, 1999).

Overview: *An order requiring respondent hospital to cease and desist refusing to bargain with an employees' union was enforced by the court where the court determined that the agency was within its discretion in making the order.*

- Business office clerical employees may constitute a separate bargaining unit in acute care hospitals. 29 C.F.R. § 103.30(a) (1998). Go To Headnote

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...Collective Bargaining & Labor Relations > Duty to Bargain

American Hosp. Ass'n v. NLRB, 499 U.S. 606, 59 U.S.L.W. 4331, 111 S. Ct. 1539, 113 L. Ed. 2d 675, 1991 U.S. LEXIS 2398 (Apr. 23, 1991).

Overview: *Board properly promulgated rule addressing individual bargaining units in hospital because National Labor Relations Act (Act) contemplated possibility that board would reshape its policies on basis of more information and experience with Act.*

- The National Labor Relations Board promulgates a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce. The rule is applicable to acute care hospitals and provides, with three exceptions, that eight, and only eight, units shall be appropriate in any such hospital. The three exceptions are for cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine two or more of the eight specified units. The extraordinary circumstance exception applies automatically to hospitals in which the eight-unit rule will produce a unit of five or fewer employees. 29 C.F.R. § 103.30. Go To Headnote

...Collective Bargaining & Labor Relations > Right to Organize

NLRB v. Health Mgmt. Assocs., Inc., 1999 U.S. App. LEXIS 3945 (4th Cir Mar. 11, 1999).

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Citation: **29 C.F.R. § 103.30**

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Cc: Jim McGuinness; Aaron Streepy; Rebecca Watkins; Aaron Bass
Subject: RE: Petition for Review / Div. III COA No. 33556-9-III

Received 6/2/17.

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Subject: Petition for Review / Div. III COA No. 33556-9-III

Attached please find a Petition for Review (with appendix contained in the same .pdf attachment)

in: Division III C.O.A. Case No. 33556-9-III,

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETTA JONES, individually, and on behalf of all similarly-situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center, Petitioners,
v.
OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his official capacity as an agent and officer of Lourdes Medical Center, Respondents.

I am forwarding a filing fee of $200 by check delivered in the U.S. mail today as well.

Please let me know if there is anything else I need to do or if you have trouble with the attachment. Thank you in advance for your help.

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