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

JANET LANE,
Plaintiff/Appellant,

v.

HARBORVIEW MEDICAL CENTER,
Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Plaintiff Janet Lane worked as a registered nurse for defendant Harborview Medical Center nearly full-time for nine years (1999-2007). During those *nine years Harborview classified Lane as a “per diem” temporary nurse* not eligible for benefits under the hospital’s Collective Bargaining Agreement (CBA).

Under the CBA, “part-time” and “full-time” nurses are eligible for benefits such as paid holidays, vacation, sick leave, annual pay step increases, and cost of living pay adjustments (CP 22-25, 397), while “temporary” or “per diem” nurses are not. CP 114, 274, 397. Harborview’s CBA defines a “part-time” nurse as one regularly scheduled to work 20 or more hours per week (at least half-time), and “full-time” is 40 hours per week. The “per diem” category at Harborview has no relationship to its meaning, but is defined to mean “temporary.”¹ CP 114, 479-84.

Under the public employee misclassification act,² a public employer must provide employee benefits under “objective” standards, *not* based on initial labels such as “temporary” given at the time of hire, and an employee may seek a correction to any misclassification. Here, Lane was not a “temporary” nurse; she was actually a “part-time” nurse eligible for CBA benefits based on objective standards because Harborview regu-

¹ “Per diem” employees are those paid “by the day,” *e.g.*, day laborers. J. Shafritz, *Dictionary of Personnel Management and Industrial Relations*, p. 323 (Facts on File, 1985). But Harborview uses “per diem” to mean “temporary.” CP 114, 479-84.

² Ch. 155, Laws of 2002, SSB 5264, codified at RCW 49.44.160 and -.170.

larly scheduled her to work nearly full-time for *nine* years. CP 407, 399-400.

Harborview does not dispute Lane's length of employment or her regular, essentially full-time, actual hours worked. Instead, Harborview argues that Lane "classified herself" as a "per diem" temporary nurse when she took that job and Harborview had *no* duty to correctly classify her thereafter based on her actual hours and duration of employment – "Harborview did not 'classify' or 'misclassify' her [Lane]." CP 372. According to Harborview, anyone taking a job as a "per diem" nurse has no "commitment" to "long-term" work, because that job title *does not require* long-term regular work, even when she in *fact* works more than half-time on a long-term basis. CP 378-79. Because Harborview maintains that "per diem" status is determined at the time of hire, and never changes, it argues that Janet Lane had to start over by applying for another job at the hospital if she wanted a job considered full-time or part-time. CP 231, 234, 372,-73, 381-82, 489. Harborview's contention that it had no duty to correctly classify Lane, based on her actual work schedule and the actual duration of her employment, is contrary to the public employee misclassification act. *Mader v. Health Care Authority*, 149 Wn.2d 458, 474-77 (2003) (employer's duty to provide benefits cannot depend on label, but must be based on the hours and duration of the work actually performed by the individual).

The trial court erred when it granted Harborview's motion for

summary judgment and denied Lane's motion for partial summary judgment. The trial court entered its order without explanation. CP 611-12. Upon *de novo* review, the Court should reverse the trial court.

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to grant partial summary judgment for the plaintiff, Janet Lane, when the undisputed facts show that she was not "temporary," but part-time and thus entitled to the employee benefits applicable to part-time nurses under the nurses' Collective Bargaining Agreement.

2. The trial court erred by granting Harborview's motion for summary judgment based on the initial label placed on Janet Lane when she was hired – "per diem" temporary – and based on the conditions applicable to "per diem" nurses in general, rather than on her individual work circumstances.

3. The trial court erred in granting Harborview's motion to strike portions of Lane's evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At Harborview "per diem" temporary nurses are not eligible for benefits, while "part-time" nurses who work half-time or more receive benefits. Under the public employee misclassification act, a public employer cannot continue to classify an employee as "temporary" when the employee actually works indefinitely, rather than just for a short "temporary" term. Did the trial court err when it decided that Lane continued

to be a “temporary” employee not eligible for benefits because she had accepted the “per diem” job title years earlier, even though she worked at Harborview nearly full time for nine years?

2. Harborview opposed Janet Lane’s claim on the theory that Janet Lane “classified herself” by taking the “per diem” nurse position and said “Harborview did not ‘classify’ or ‘misclassify’ her.” The public employee misclassification act, requires, however, that public employers classify employees based on *actual* hours, *actual* duration of employment, and *actual* work circumstances, using *objective standards*. Did the trial court err in dismissing Lane’s claim under the public employee misclassification act by accepting Harborview’s argument that Lane’s actual hours and years do not matter because Lane “classified herself” at the time of hire by accepting a “per diem” title?

3. Janet Lane worked at the UW Medical Center for twelve years, then at Harborview Medical Center for nine years as a “temporary” nurse, and then she worked in another “full-time” Harborview position starting in August 2007. Lane submitted testimony below concerning the different pay and benefits received by “per diem” temporary nurses compared to part-time and full-time nurses. The trial court struck Lane’s testimony due to “lack of foundation.” Could the trial court reasonably find that Lane could not have personal knowledge of the different pay and benefits received by “per diem” nurses compared to full-time nurses when she worked at Harborview for many years and in both job titles?

STATEMENT OF THE CASE

A. Nature of the Case.

This case was brought under the public employee misclassification act. RCW 49.44.160 and -.170; Laws of 2002, Ch. 155. The case was necessary because Harborview has no internal remedy for a “temporary” employee to request a corrected classification when the work is not in fact temporary.³ The University of Washington, of which Harborview is a part, CP 88, has no administrative remedy to seek a change in the classification, CP 90, 433, and Harborview’s Collective Bargaining Agreement covering registered nurses, such as Janet Lane, excludes “per diem” nurses from the grievance procedure. CP 114.

Under the public employee misclassification act, RCW 49.44.170, employers may not classify employees as “temporary” when they are not *objectively* temporary. Employees are not “temporary” workers when, in their “actual work circumstances,” they are actually working regular full-time or part-time hours and do not have short-term employment. Because they are not “temporary,” they are entitled to receive the benefits due to regular part-time or full-time employees under the applicable collective bargaining agreement. RCW 49.44.170 and -.170(2)(b). Janet Lane sought these employee benefits in this action, including pay steps, vacation, sick leave, holiday pay, deferred compensation, cost of living raises

³ Harborview is an employer subject to the Act. RCW 49.44.170.2(c); CP 340.

seniority, and job seniority. CP 4.

B. Harborview's Work Schedules for Nurses and Its Nursing Job Classifications.

Harborview is a very large hospital with many different units. The operating room where Janet Lane works is one of these units. The operating room needs nurses 24 hours a day seven days a week. CP 51, 154. There are 17 operating rooms, all of which are operational Mondays through Fridays. CP 53, 156. On Saturdays and Sundays usually only four or five operating rooms are used, but they need staffing for the entire 24 hours. *Id.* There are about 100 nurses assigned to the operating room, five of which were classified by Harborview as "per diems." CP 156. Janet Lane was one of those "per diem" nurses.

Lane always wanted full-time work at Harborview, not a part-time or occasional shift. Lane applied in 1998 for a full-time position in Harborview's operating room (CP 261), but the only opening there was as a "per diem" nurse. CP 260-61. Lane accepted the position and started working for Harborview in December 1998 "as a Registered Nurse II at Harborview Medical Center assigned to a per diem position in the Operating Room." CP 26. Janet Lane told Harborview that she was available to work all types of shifts – "Days," "Evenings," "Nights," "Weekends," "Holidays," and "Rotating." CP 336.

For the nine years that Lane worked as a "per diem" temporary nurse at Harborview (1998-2007), the hospital's Collective Bargaining

Agreement had three categories of nurses: (1) full-time regularly scheduled for 40 hours in seven days or 80 hours in 14 days; (2) part-time regularly scheduled 20 or more hours in seven days or 40 or more hours in 14 days; and (3) “per diem” nurses who are “temporary University employees.”⁴ CP 114, 479-84. These nurses are in three classes: Registered Nurse 1, 2, and 3, with 3 being the highest class and the highest paid. CP 114. Under the CBA, “per diem” nurses are limited to “providing coverage during periods when regular staff are on leaves,” e.g., vacation, sick, family leave, etc. *Id.* They “may also be used to provide coverage for recruitment, vacancies, arbitration, and fluctuations in census.” *Id.* Harborview requires its “per diem” nurses to work at least 48 hours every four weeks (CP 29) and there is no maximum number of hours that they can work in a year while classified as “temporary” employees. CP 33, 336, 448.

C. “Per Diem” Temporary Nurses Do Not Receive Many Employment Benefits.

Harborview considers “per diem” nurses to be “temporary” employees who are not eligible for automatic annual pay step increases, shift-break premiums, and cost of living increases that full-time and part-time nurses receive. CP 21-25, 48-49, 114. They also do not receive sick leave, paid vacations, paid holidays, and some other employee benefits.

⁴ Harborview also calls its “part-time” and “full-time” nurses “classified” nurses and “permanent” nurses. CP 474-84. Lane use the terms “part-time” and “full-time” in this brief since the issue here is whether under the CBA Lane was a “part-time” employee misclassified as a “per diem” temporary employee.

CP 28, 48-49, 169, 336. “Per diem” nurses receive 15% “premium” pay (15% over original base pay), CP 28, but this additional pay is much less than the value of pay steps (salary increases based on longevity), cost of living increases, shift-break pay, and the several types of paid time off that full-time and part-time nurses receive under the CBA. CP 396-97.

D. Janet Lane’s Actual Work Circumstances – Hours, Schedule, and Duration of Employment – Were Not “Temporary.”

Janet Lane was actually scheduled to work more than half-time, nearly full-time, at Harborview for nine years, while being called a “per diem” temporary nurse. CP 407. Indeed, Harborview confirmed that “from December 1998 through July 2007, Ms. Lane’s hours as a per diem averaged 71% (to perhaps 73%) FTE [full-time equivalency] on a monthly basis, over that time.” CP 407. And if the paid time off she did not receive (holidays, sick leave, disability leave, vacation) were considered, she worked 83 to 85% of the standard hours worked by a full-time nurse. *Id.* Thus, Janet Lane worked well over half-time for nine years.

As a “per diem” temporary nurse Janet Lane performed “the same core duties as permanent staff in the same classification,” *i.e.*, Registered Nurse II. CP 64-65. Indeed, she even worked in a higher position, in charge of the operating room on weekends as the Supervising Charge Nurse. CP 52-53.

While being classified as “per diem,” Harborview scheduled Janet Lane’s work in the same manner as it does for many full-time and part-

time nurses in the operating room. CP 51-52, 58-62, 392-93. The operating room needs nurses 24 hours a day, seven days a week. CP 51-52, 68, 392. Actual regular work schedules for “part-time” and “full-time” nurses are thus “pretty varying from full-time days, full-time evenings, to full-time nights, to full-time rotating variable, to .9, .8, .7, .6 .5 [percent of full-time] types of part-time kinds of schedules.” CP 97-98. Although *some* part-time and full-time nurses in the operating room with seniority have pre-determined schedules throughout the year, many part-time and full-time nurses (as well as “per diem” nurses) are assigned various work schedules for the operating room four weeks in advance based on their availability and Harborview’s needs. CP 58. The nurses tell the operating room scheduler four weeks in advance what days and shifts they are available to work, and the scheduler creates a work schedule for the following four-week period. CP 58-62. Because there is often a shortage of nurses, in addition to using part-time, full-time, and per diem nurses, the operating room also uses “agency nurses” who are hired from outside staffing firms and “traveling nurses” who work on 13-week contracts to fill shifts in the operating room’s four-week schedule. CP 53-54.

The operating room scheduler starts with the full-time and part-time nurses with established pre-set hours, then she schedules shifts for the many full-time and part-time nurses who do not have pre-set schedules, taking into account their stated time constraints. CP 57-62, 431-32. Next, she schedules the “traveling nurses,” who are nurses from other states who

have contracts with Harborview to work for a number of weeks. *Id.* She then adds the “per diems” to the schedule, giving them the lowest priority in shift selections. *Id.*

Thus, Harborview regularly scheduled Janet Lane to work, four weeks in advance, more than half-time (20 hours per week) in the same manner as it scheduled many other full-time and part-time operating room nurses. Janet Lane always received the least desirable shifts because “full-time” and “part-time” were first given the schedules they requested in the four-week calendars. CP 58, 393, 431-32. Consequently, the *only* difference between Janet Lane’s scheduling and full-time and part-time nurses’ scheduling is that she had less desirable schedules.

E. Janet Lane Tried to Get Harborview to Change the Classification of Her “Temporary” Position.

In 2002, the Legislature passed the public employee misclassification act, prohibiting public employers from classifying long-term employees as “temporary.” Laws of 2002, Chapter 155, codified as RCW 49.44.160 and .170. The Legislature required that public employers base their classifications on the employee’s “actual work circumstances,” not on labels such as “temporary.” *Id.*

After the misclassification statute was enacted, Harborview did nothing to evaluate the classifications of Lane and other “per diem” nurses to assure that the classifications conformed to each nurse’s actual work circumstances. CP 90, 433. Indeed, Harborview does not have any ad-

ministrative procedure whereby Janet Lane or any other “temporary” employee could ask Harborview to evaluate their temporary classification in light of the misclassification statute. CP 90, 433. And “per diem” nurses are also specifically excluded from the Collective Bargaining Agreement’s grievance procedure. CP 114.

Janet Lane always liked working for Harborview and she consistently received positive annual performance reviews. CP 17, 45, 140-46, 147-53. In 2003 she was rated “outstanding.” CP 44. But because “per diem” nurses did not receive normal pay raises, her pay began to lag far behind the full-time and part-time nurses because they receive automatic annual step pay increases and cost of living increases while she did not. CP 22-25, 397. And not receiving paid time off, particularly sick leave, was a substantial hardship for her. For example in June 2006, Janet had pelvic surgery. After the surgery she could not work in June and July and could only work light duty in August and September. CP 80-83. She would have paid sick leave if she were not considered “per diem.”

Janet Lane asked Harborview on many occasions to provide her with the same pay and benefits received by other nurses who work half-time or more. CP 395. But Harborview refused to do so. *Id.* Lane’s counsel also asked Harborview to classify her as a part-time nurse, instead of as a “per diem” temporary nurse. CP 132-36.⁵ Harborview always maintained that Janet Lane chose the “per diem” status when she was

⁵ The Court struck counsel’s letter. This was an error. See Argument II, *infra*.

hired and, if she wanted full pay and benefits she must completely start over and apply for a job that was already designated by Harborview as benefit-eligible. It said she could not seek to correct the classification of her existing job. CP 395-96.

F. Lane's Lawsuit.

Janet Lane did not agree with Harborview's position that she had to completely start over and apply as a new hire for another job to seek full pay and benefits. She then sued. CP 3-4. Nevertheless, while the lawsuit was pending, a suitable position in the operating room became available and she applied for it. She was "hired" for that position in August 2007. CP 109. Harborview still treats her as a "new hire" as of 2007, e.g., not crediting her prior service for determining her days of annual vacation (12 days instead of 22) and seniority. CP 396-97. She also has no accrued sick leave from all those years of prior service because she was considered a "new hire." *Id.*

PROCEEDINGS BELOW

Lane and Harborview filed motions for summary judgment on her correct classification under the CBA – *i.e.*, whether she was a part-time nurse eligible for benefits (Lane's position) or a "per diem" temporary nurse not entitled to benefits (Harborview's position). CP 619-40; 224-242. The Honorable Suzanne Barnett granted Harborview's motion and denied Lane's motion in an unexplained order. CP 611-12.

The trial court also granted Harborview's motion to strike some of

Lane's testimony based on her personal experience, concerning the scheduling for "per diem" temporary nurses and part-time/full-time nurses at Harborview and rebutting Harborview's argument that she was paid more, as per diem, not less, than regular nurses. The trial court said that Lane's testimony lacked "foundation." CP 601.

DE NOVO STANDARD OF REVIEW

The Court is reviewing an order granting summary judgment for Harborview and denying summary judgment for plaintiff Janet Lane. The standard of review is *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 257, 261, 138 P.3d 943 (2006).

This appeal also concerns the trial court's evidentiary rulings on summary judgment, and the evidentiary rulings are therefore also reviewed *de novo*. *Seybold v. Neu*, 105 Wn.App. 666, 678 (2001) (appellate courts "review the trial court's evidentiary rulings made for summary judgments *de novo*").

ARGUMENT

I. HARBORVIEW VIOLATED THE MISCLASSIFICATION ACT BY CLASSIFYING JANET LANE AS "TEMPORARY," THEREBY IGNORING HER ACTUAL HOURS AND LENGTH OF EMPLOYMENT.

A. A Public Employer Violates the Misclassification Act When It Labels Long-Term Employees as "Temporary," "On Call" or "Per Diem" When They Perform the Same Long-Term Work as Regular Employees.

Harborview contends that "per diem" temporary nurses differ from "regular" nurses in their individual objective "actual work circumstances"

because by definition the “per diem” temporary nurses work “as needed” and they thus do not “mak[e] any long-term commitment.” CP 378-79. And, it says, since Janet Lane was hired into a “per diem” position she could not receive employee benefits, regardless of how many hours and years she actually worked. But of course this logic could justify permanently calling any “temporary” employee a “temporary” indefinitely (*i.e.*, a “permatemp”), whenever someone is hired to work “as needed” and then the “as-needed” work actually consists of working regularly, nearly full-time, year after year. This is precisely the type of situation that the public employee misclassification act intended to end.

The Legislature enacted the public employer misclassification act to make sure that employees labeled “temporary” whose employment is not actually temporary receive benefits under “collective bargaining agreements applicable to the employee’s correct classification.” RCW 49.44.160. A public employer violates the misclassification statute when it labels long-term employees as “temporary,” “on-call,” or “per diem,” when that label does not conform to “objective standards” such as “the length of the employment relationship” (RCW 49.44.160):

The legislature intends that public employers be prohibited from misclassifying employees, or taking other action to avoid providing or continuing to provide employment-based benefits to which employees are entitled under state law or employer policies or collective bargaining agreements applicable to the employee’s correct classification.

Chapter 155, Laws of 2002 does not mandate that any public employer provide benefits to ***actual temporary***, seasonal, or part-time

employees beyond the benefits to which they are entitled under ... the employee's correct classification... **Public employers ... may exclude categories of workers such as "temporary" or "seasonal," so long as the definitions are objective and applied on a consistent basis. Objective standards, such as control over the work and ... the length of the employment relationship, should determine whether a person is an employee who is entitled to employee benefits, rather than the arbitrary application of labels, such as "temporary" or "contractor."** (Emphasis added.)

The Legislature gave "temporary" as an example of a potentially misclassified employee and it stated the types of objective standards to be used in determining a correct classification. RCW 49.44.160. It identified "the length of the employment relationship" as an objective standard for determining whether an employee is *truly* temporary.⁶ *Id.* Thus, the Legislature's intent was to make sure that "objective standards" will determine each employee's classification, rather than "arbitrary application of labels, such as temporary." *Id.*

"Misclassify" is defined in the act as "to **incorrectly classify or label a long-term public employee as 'temporary,' ... 'leased,' 'contract,' 'seasonal,' 'intermittent' or 'part-time,' or to use a similar label that does not objectively describe the employee's actual work circumstances.**"

RCW 49.44.170(2)(d) (emphasis added). Under the statute "[p]ublic employers may determine eligibility rules" for "employment-based benefits"

⁶ A "temporary employee" is one who is hired for a limited time, not for an indefinite term (Roberts' Dictionary of Industrial Relations, BNA, 3d ed. 1986, p. 708):

"A worker hired for a limited time only, frequently to meet a peak demand or special rush job. Such an employee is hired with the understanding that employment will end with completion of the particular task. A temporary employee does not accumulate seniority."

and the employers may exclude *genuine* temporary or intermittent workers from those benefits, but they must do so only under “objective standards” that are “applied on a consistent basis.” RCW 49.44.160. “Employment-based benefits” are very broadly defined as “*any benefits to which employees are entitled under state law or employer’s policies or collective bargaining agreements applicable to the employee’s correct classification.*” RCW 49.44.170(2)(b) (emphasis added).

The Final Bill Report on the bill (ESSB 5264) explained that the Legislature intended to stop the practice of denying employment-based benefits to so-called “temporary” employees, when their length of service shows that they are not really temporary:

The practice of providing less generous compensation to some contingent workers is sometimes justified on the basis that the employer should provide more generous compensation to persons who perform full-time services, or have performed services for a longer period of time. In some cases, however, *public employers use labels to justify providing different levels of benefits to employees who have rendered identical levels of service, for identical periods of time, for the employer. In these cases, the employer may misclassify an employee as “temporary” or “leased” or “seasonal,” when in fact the employee renders exactly the same services, for the same period of time as another employee who is labeled “permanent” or “full-time,” and hence qualifies for better benefits.* (Emphasis added.)

The statute explicitly provided a new remedy for mislabeled public employees who are called “temporary” employees despite long-term work, *i.e.*, to “bring a civil action” against a public employer to remedy the “unfair practice” and obtain the “employment-based benefits” that are “*appli-*

cable to the employee's correct classification." RCW 49.44.160, -.170(1) and (3) (emphasis added).⁷

The Legislature recognized that the same basic points had already been developed judicially (Final Bill Report on ESSB 5264, p. 1):

In recent years some public employers, ... have been taken to court by employees who claimed they have been misclassified in some manner. ***The law in this field has developed through judicial application*** and there is little statutory warning to public employers of the consequences they may face. (Emphasis added.)

The "law in this field" includes a line of Washington Supreme Court cases saying that public employees' status and rights depend on the work done and not the name given to a position.⁸

One illustrative case that is particularly pertinent here is *State ex rel. Cole v. Coates*, 74 Wash. 35, 133 Pac. 727 (1913). *Cole* is pertinent because, just as Harborview classified Lane as a "per diem" nurse, the public employer in *Cole* also classified an employee's position as "per day." The City of Spokane argued that it could remove an employee from employment without cause because it paid the employee "per day" and the employee was therefore a "day laborer" who could be laid off without cause. 74 Wash. at 37-38. The Supreme Court rejected the City's argu-

⁷ The statute also requires: "This act shall be construed liberally for the accomplishment of its purposes." Laws 2002, Ch. 155, §3, found in RCWA 49.44.160 -.170 statutory notes. The misclassification statute's mandate for "liberal construction" is a "command that the coverage of [the statute's] provisions be liberally construed and that its exceptions be narrowly confined." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128 (1978).

⁸ *E.g.*, *Allard v. Tacoma*, 176 Wash. 441, 24 P.2d 698 (1934) ("The nature of the work done, and not the name given the position, is the controlling feature."); *Petley v. Tacoma*, 127 Wash. 459, 463, 221 Pac. 579 (1923).

ment because the employee's position "has now existed for a longer period than two years, and still continues to exist," while a "day laborer is one whose engagement to labor is but a day long" (*id.* at 38-39):

[T]he position held by the [employee] was plainly not that of a day laborer. A day laborer is one whose engagement to labor is a day long (13 Cyc. 264), while this position had the attribute of permanency. As shown by the record, it has now existed for a longer period than two years, and still continues to exist.

Did the change in the method of compensating for services change the nature of the employment? We think not. ***The employment is still continuous, and this fact, rather than the manner by which it is compensated, fixes its nature.*** [Emphasis added.]

The Supreme Court thus held almost 100 years ago that whether a public employee is in a "day laborer" or "per day" position is not determined by the job's title or method of compensation, but by the actual duration of the work, *i.e.*, "a longer period than two years." *Id.* at 38-39. Here, just as the Supreme Court held in *Cole* that a "***continuous***" position that "***existed for a longer period than two years***" was not a "***day laborer***" position, *id.* (emphasis added), *Lane's nine-year position is also not a "per diem" temporary position.* *Id.*

Shortly after the public employee misclassification act was adopted, the Supreme Court applied it in *Mader v. Health Care Authority*, 149 Wn.2d 458 (2003), rejecting an argument by the employer that is the same as Harborview's argument here. In *Mader*, the Health Care Authority and the lower courts had ruled that part-time community college instructors who continuously worked for years were not eligible for health

benefits in the summer because they were designated “part-time” and “temporary” employees in quarter-to-quarter contracts and they were thus not long-term employees classified as “career seasonal” employees. The Supreme Court reversed and held that the public employee misclassification act, RCW 49.44.160 and .170, prohibits denying benefits based on labels as “temporary” when they were actually not working short-term, regardless of what the quarterly contracts implied. *Mader*, 149 Wn.2d at 475.

The Supreme Court held the act requires that employee classifications be based on objective standards such as “the length of the employment relationship.” *Id.* The Court explained, quoting extensively from the statute and its legislative history (*id.*):

[P]ublic employers are prohibited from misclassifying employees based on labels alone in order to “avoid providing or continuing to provide employment-based benefits to which employees are entitled under state law.” RCW 49.44.160. Rather than arbitrary labels, “[o]bjective standards, such as control over the work and the length of the employment relationship, should determine whether a person is an employee who is entitled to employee benefits.” RCW 49.44.160 (emphasis added). “Misclassify” is defined as “to incorrectly classify or label a long-term public employee as ‘temporary,’ ‘leased,’ ‘contract,’ ‘seasonal,’ ‘intermittent’ or ‘part-time,’ or to use a similar label that does not objectively describe the employee’s *actual work circumstances*.” RCW 49.44.170(2)(d) (emphasis added). The legislature’s expression of its intent in enacting RCW 49.44.160 and .170 is persuasive. In effect, the legislature indicated that the HCA should not exclude employees from eligibility for comprehensive health care coverage simply because they are labeled “part-time.”^{fn} [Emphasis original.]

^{fn}The 2002 legislature was reacting, in part, to the case before us when it enacted RCW 49.44.160 and .170. The 2002 Final Legislative Report, which became RCW 49.44.170, states, “The practice of

providing less generous compensation to some contingent workers is sometimes justified on the basis that the employer should provide more generous compensation to persons who perform full-time services, or have performed services for a longer period of time. In some cases, however, public employers use labels to justify providing different levels of benefits to employees who have rendered identical levels of service, for identical periods of time, for the employer....” * * *

The Supreme Court held that plaintiff Eva Mader’s “individualized” *actual work circumstances*, as opposed to the “temporary” label in quarter-to-quarter contracts, showed that she was actually a “career seasonal employee,” not a “temporary” employee. *Mader, supra*, 149 Wn.2d at 474-77. Even though *some* part-time faculty were truly short-term, Mader had to be considered as an individual, based on her own actual work history. *Id.*

The misclassification statute thus requires that public employers define employees as “temporary” in non-benefited positions only when, based on their *individualized* work histories, they are truly “temporary” and they meet an objective standard for defining “temporary.” The standard must be (1) “objective” and not “arbitrary,” (2) based on *actual* hours and length of employment of the *individual*, not presumed from the label, and (3) “applied on a consistent basis” to “the actual work circumstances” to each individual. RCW 49.44.160 and -.170(2)(d).

B. Harborview Misclassified Janet Lane as a “Per Diem” Temporary Nurse When Her Actual Work Circumstances Show that She Was a Part-Time Nurse Working Regularly for Years.

For the nine years that Janet Lane worked as a “temporary” per diem nurse, Harborview’s CBA had three categories of nurses – “full-

time,” “part-time,” and “per diem.” CP 114. “Full-time” and “part-time” nurses receive employee benefits, but per diem nurses do not. CP 114.

Harborview’s CBA defines these categories as follows (*id.*):

- 6.2 ***Full-Time Nurse.*** A registered nurse who is classified staff and is ***regularly scheduled on a forty (40) hour week*** in a seven (7) day period, or an eighty (80) hour week schedule in a fourteen (14) day period.
- 6.3 ***Part-Time Nurse.*** A registered nurse who is classified staff and who is ***regularly scheduled to work a minimum of twenty (20) hours in a seven (7) day period or forty (40) hours in a fourteen (14) day period.*** Such nurses receive prorated salaries and benefits in accordance with the Civil Service Rules.
- 6.4 ***Per Diem Nurses.*** ***Per Diem Nurses are temporary University employees*** not covered under the provisions of the Civil Service Rules or the terms of this labor agreement. [Emphasis added]

Janet Lane’s actual work circumstances show that her proper classification under the CBA was not as a “per diem” temporary nurse, as Harborview labeled her, but rather as a “part-time” nurse eligible for benefits under the CBA. Janet Lane worked for nine years in the same RN II classification as other “part-time” and “full-time” nurses. She performed the “same core duties” as other nurses classified as “part-time” or “full-time” under the CBA. CP 64-65. She worked more than half-time (almost full-time) as an operating room nurse for those nine years. CP 407.

Harborview scheduled Janet Lane’s work four weeks in advance in the same manner as it does for many part-time and full-time nurses in the operating room. CP 51-52, 58-62, 392-93. Harborview’s witness thus

explained that the actual work schedules for “part-time” and “full-time” nurses are accordingly “pretty varying from full-time days, full-time evenings, to full-time nights, to full-time rotating variable, to .9, .8, .7, .6, and .5 [percent of half-time].” CP 97-98. When Harborview scheduled Janet Lane four weeks in advance, it did not always give her the same days and shifts. CP 57-64. And this is also normal for many other full-time and part-time nurses in Harborview’s operating room. *Id.* Thus, Janet Lane was scheduled to work in the same manner as many part-time and full-time nurses, many of whom also do not have a predetermined schedule.⁹

Janet Lane’s *individual* actual work circumstances show that ob-

⁹ Harborview also argues that Janet Lane had a favored status as a “per diem” because she did not have to work on the two days a week her husband Eric Lane worked 24-hour shifts as a firefighter for the City of Seattle (10 weeks a year he worked three days a week) so that one of them would be at home to take care of their three children. CP 261-72. Lane’s husband’s schedule as a firefighter was determined one year in advance, and Lane could provide his schedule to Harborview a “year-out.” CP 266. The “flexibility” Lane had on her schedule, however, is the *same* flexibility that “part-time” and “full-time” nurses normally received on their schedules – “[i]f a particular [full-time or part-time] nurse has some constraints in their schedule, such as classes, varied schedules, anything,” then Harborview “will try to work with people and help them with their scheduling as much as we can.” CP 59-60. And Harborview could easily accommodate constraints in nurses’ schedules, including Lane’s schedule (as shown by her almost full-time work for nine years), because Harborview is consistently short of nurses and it needs to schedule nurses to work numerous shifts 24 hours a day, seven days a week. CP 55-56, 97-98, 392.

Harborview’s “flexibility” argument is also contradicted by the undisputed fact that Harborview scheduled Lane’s work *four week in advance* under the *same method* it used to schedule “part-time” and “full-time” nurses. CP 57-64. And because she was classified as a “per diem,” and she was therefore scheduled last, Lane received the least desirable days and shifts. CP 393. Accordingly, rather than “flexibility” in her favor, the undisputed facts are that as a per diem temporary nurse “for years [Lane] worked the night, weekend, and holiday shifts that nobody else wanted to work.” *Id.*; CP 431-32.

jectively her classification was not as a “per diem” temporary nurse, but as a “part-time” nurse eligible for benefits because she was regularly scheduled to work more than half-time. Accordingly, Janet Lane was misclassified as a “temporary” nurse.

C. Harborview’s Theory – that Janet Lane “Chose” Per Diem Status When She Applied For a Position and Harborview Had No Duty to Properly Classify Her Later When Her Actual Work Circumstances Showed She Was No Longer Temporary – is Contrary to Both the Misclassification Statute and the Washington Supreme Court’s Decision Construing the Statute, Mader v. HCA.

Harborview’s theory below – apparently accepted by the trial court since it granted summary judgment – was that Janet Lane “classified herself” by “applying for a per diem position” (CP 373) and she “chose” to be a “per diem” temporary employee because she “did not apply for any of the classified [part-time or full-time] positions that became open.”

CP 231, 234, 372-73, 381-82, 489. This statement is basically a summary of Harborview’s theory that employee status is determined solely at the time of hire, regardless of the actual hours and duration of work after the date of hire. According to Harborview, if Lane wanted to be classified as a regular nurse she had to start over and apply for a regular nurse position. *Id.* Harborview thus contends that it had no duty to reclassify Lane in her existing job for employee benefits under the CBA, *i.e.*, “Harborview did not classify or misclassify her.” CP 372, 373, 381-82.

Harborview’s position is that there is no way for a misclassified “per diem” temporary nurse, such as Janet Lane, to become properly clas-

sified except by applying for and being hired by Harborview into a job that Harborview properly classifies. *Id.* Harborview took this position in this lawsuit and also by not establishing any procedure whereby an employee classified as “temporary” can request that a classification be changed. CP 90, 433. Thus, *once Harborview classified Lane as a “per diem” temporary nurse at the time of hire she indefinitely remained* in that classification excluded from employee benefits under the CBA until such time as she started over by obtaining a new official full-time or part-time position. CP 231, 234, 372-73, 381-82, 489. Under Harborview’s theory, it could *never* misclassify an employee as “per diem” if the employee initially applied for and accepted a “per diem” position, no matter how many hours and years the employee actually works at the hospital. *Id.*

Harborview’s “defense” that it never has to take note of its employees’ individualized work circumstances to determine their eligibility for benefits violates the misclassification statute because the statute creates a *statutory duty* requiring public employers (*not* employees) to correctly classify employees for the purpose of employee benefits under “state law or employer policies or collective bargaining agreements.” RCW 49.44.160.¹⁰ RCW 49.44.160 thus states that “[t]he legislature intends that public employers be prohibited from misclassifying employ-

¹⁰ Whether Harborview had a duty to correctly classify Lane is a question of law. *Retired Public Employees Council of WA. v. Charles*, 148 Wn.2d 602, 622 (2003). And “[t]he existence of a duty may be predicated upon statutory provisions or on common law principles.” *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49 (1996).

ees....” [Emphasis added.] And it is therefore “*an unfair practice for any public employer to . . . [m]isclassify any employee.*” RCW 49.44.170(1) and -(1)(a). A public employer thus violates the statute when it misclassifies a long-term employee as “temporary” because the classification is not based on the employee’s “actual work circumstances.” RCW 49.44.160 and -.170.

Accordingly, Harborview’s argument that “Harborview did not classify or misclassify [Lane]” (CP 372, 373, 381-82) is directly contrary to Harborview’s statutory duty to correctly classify its employees. RCW 49.44.160; RCW 49.44.170(1) and -(1)(a). And Harborview violated this statutory duty by misclassifying Lane as a “per diem” temporary nurse not eligible for benefits.

The Supreme Court also held in *Mader, supra*, that under the misclassification statute an employer “must employ an *individualized approach* to a determination of eligibility for employer contributions to a state employee’s health care coverage.” *Mader*, 149 Wn.2d at 476 (emphasis added). And an employer “must [therefore] examine the *actual work circumstances* of a state employee, rather than the contracts or titles under which he or she is employed, to determine whether an employee satisfies the eligibility requirements” of the particular provision providing benefits. *Id.* at 476-77 (emphasis by Supreme Court).

Here, Lane is not challenging Harborview’s ability to use “per diem” nurses or the category as a whole. She also does not dispute that

many per diem employees work few hours and have no “long term commitment.” Lane’s claim is instead that under an *individualized approach*, based on her *actual work circumstances*, she is eligible for benefits under the CBA because Harborview regularly scheduled her to work much more than half-time or 20 hours per week. And there is *nothing* in the CBA or the misclassification statute that bases eligibility for benefits on an employee’s alleged “choice,” “commitment,” or expectations at the time of initial hire.¹¹

In addition, the Supreme Court in *Mader* rejected an employer’s argument similar to Harborview’s argument here. Specifically, Harborview argues that there are “objective” differences between “per diem” and “regular” nurses because “per diem” nurses supposedly have no “long-term commitment” to work. CP 379, 381, 382-83. The employer colleges in *Mader* similarly focused on the fact that the “part-time” instructors signed contracts for three months or one quarter of work stating they were “part-time” and “temporary” with no guarantee of future employment. 149 Wn.2d at 475-76. And just as Harborview argues here, the colleges argued that they only committed to employ the part-time instructors by the quarter, which therefore supposedly made them not eligible for summer

¹¹ Harborview’s argument that benefit eligibility is based on the job title given at the time of hire was emphasized by Harborview’s argument that there were other nursing jobs at Harborview for which she could have applied. CP 172-223. But the jobs were not posted, and were not for operating room nurses, with one exception – a weekend position that was vacant for years because nobody liked the schedule. *Id.*; 395-96.

benefits as career seasonal employees. *Id.* The Court of Appeals adopted this argument in *Mader*, saying that because each instructor “signs a contract for each quarter that she works[,]” the “instructors work on a quarterly basis, not an ‘instructional year (school year)’” and “they are [therefore] not career seasonal employees.” *Mader*, 109 Wn.App. 904, 914 (2002). The Supreme Court *reversed* the Court of Appeals because the part-time employees’ “actual work circumstances,” as opposed to the contractual “quarterly” commitment and the labels contained in the contracts, showed the instructors worked at least half-time on a nine-month seasonal basis and they were therefore “career seasonal” employees eligible for summer health insurance. *Id.*

Lane’s “commitment” to work here is also not shown by Harborview’s contracts and policies; instead, Lane’s “commitment” is shown by her *actual* work hours and nine years of employment. And Lane’s actual work hours show Harborview regularly scheduled her to work much more than 20 hours per week or half-time and she was not temporary – which are the *sole criteria* for determining eligibility under the CBA. CP 114, 407, 399-400. Thus, just as in *Mader*, Lane is eligible for benefits.¹²

¹² Harborview’s argument that an employee’s eligibility for benefits is determined only at the time of initial hire, and Harborview never has to pay any attention to the employee’s actual work circumstances to determine eligibility, is also wrong as shown by the standard by which Harborview determined Lane’s eligibility for health benefits. Specifically, a temporary employee hired by the State is not eligible for health benefits. But if the employee works half-time for more than six months, the employee becomes eligible for health benefits because the employee’s *actual work circumstances* show the employee is no longer “temporary.” CP 169; WAC 182-12-115(2) (a “nonpermanent” employee is eligible for health insurance beginning on the seventh month of
(continued)

II. THE TRIAL COURT ERRED BY STRIKING PORTIONS OF LANE’S TESTIMONY BASED ON LACK OF “FOUNDATION” WHEN HER TESTIMONY WAS BASED ON HER PERSONAL EXPERIENCE, AND IN STRIKING HER COUNSEL’S LETTER TO HARBORVIEW REQUESTING RECLASSIFICATION BEFORE BRINGING SUIT.

The trial court made several erroneous evidentiary rulings in granting summary judgment for Harborview that are apparently prejudicial to Janet Lane.¹³ The Court reviews these rulings *de novo* (*Seybold, supra*, 105 Wn.App. at 678), and the Court should reverse them.¹⁴

Janet Lane submitted a short five and a quarter page declaration in opposition to Harborview’s motion for summary judgment, CP 392-397. Harborview moved to strike portions of Lane’s declaration in which she was responding to factual contentions made by Harborview in its summary

half-time employment); *see also* RCW 41.40.010(25)(a) (employees hired as temporary employees, but whose work shows they are no longer temporary, are also eligible to participate in the PERS pension plan - five months and 70 hours per month).

Accordingly, although Harborview might hire an employee as a temporary worker and determine he or she is not eligible for benefits at the time of initial hire, Harborview still has the duty to monitor the employee’s hours to determine whether the employee’s *actual work circumstances* show the employee has later become eligible for benefits. *Id.*

Here, after Janet Lane worked half-time or more for six months, Harborview provided her health insurance. CP 169. But Harborview did not provide her with employee benefits under the CBA, even though the “half-time” eligibility standard in the CBA is the same as for health insurance. Accordingly, although Harborview initially hired Lane as a “per diem” nurse, which is perfectly acceptable, after it regularly scheduled her to work more than 20 hours per week or half-time for more than six months, Harborview should have recognized her as eligible for benefits under the CBA just as it did for state employee health insurance.

¹³ The trial court did not state the basis for its granting of summary judgment and thus the striking of Lane’s evidence appears to be prejudicial.

¹⁴ Even if the Court agrees with the trial court’s ruling striking portions of Lane’s evidence, it should still reverse the trial court summary judgment for Harborview and its denial of summary judgment for Lane.

judgment motion, *i.e.*, that she received more pay and benefits as a “per diem” temporary nurse than regular nurses did because she got 15% premium pay and that there were supposed scheduling differences between her and other regular nurses.

The trial court granted Harborview’s motion to exclude part of the evidence on the basis of supposed “lack of foundation and speculation” and “competence” (CP 601) striking all of her testimony about how she received less pay and benefits than regular nurses (p. 3-4, ¶¶6-9 of her declaration, CP 394-95) and most of her testimony about scheduling (p. 3, ¶¶2 and 3 of her declaration, CP 393).

The trial court’s ruling is erroneous because Janet Lane has personal knowledge of the pay and benefits that both “per diem” temporary nurses and regular nurses receive since she has been a nurse working for the UW for over 20 years and had been both a “temporary” nurse and was then a regular nurse when she made the declaration. CP 249, 258, 319-21, 395-96. In *State v. Vaughn*, 36 Wn.App. 171, 173, 672 P.2d 771 (1983), *affirmed*, 101 Wn.2d 604, 611-12, 682 P.2d (878) (1984), the Court of Appeals explained:

The role of the judge is limited to determining whether under the circumstances proved, reasonable persons could differ as to whether the witness had an adequate opportunity to observe the facts in question. If reasonable minds could differ, the testimony of the witness should come in. ***The judge should exclude the testimony only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge.*** (Emphasis added and citations omitted.)

Lane's testimony that the trial court struck explains that regular nurses receive automatic step pay and cost of living increases starting from their initial hire date, which Lane did not receive as a temporary per diem nurse. The value of the step pay increases and cost of living increases that regular nurses receive is far more than the 15% premium pay, which was added only to her initial base pay that was set by Harborview when she was hired as "per diem" in 1999. The premium pay is also less valuable than the paid leave vacations, which increase substantially over time, the sick leave that regular nurses receive, and the shift pay differentials that regular nurses receive.

The trial court thus erred in striking Lane's testimony responding to Harborview's false assertion that she was "paid more" than a regular nurse. Certainly, Lane had sufficient personal knowledge to testify about the monetary harm she suffered because of Harborview's misclassification.. *State v. Vaughn, supra*, 36 Wn.App. at 173.

Harborview also objected to portions of paragraphs 2 and 3 of Lane's testimony about scheduling of nurses for the operating room. That testimony is set forth below. The portions that Harborview objected to that the trial court struck on the supposed basis of "lack of foundation" and "speculation" (CP 601) are emphasized in bold face. (CP 393-94):

2. Harborview uses nurses 24 hours per day, seven days a week. There are thus a large number of days and shifts that nurses must work, and the shifts vary from anywhere from eight to 12 hours in length. Harborview nurse manager Cathleen Browne is responsible for creating a

monthly work schedule for the nurses in the operating room. Ms. Browne makes a four-week schedule approximately four weeks in advance of the first day on the schedule. The work is thus scheduled in four-week blocks four to eight weeks in advance of the actual work. There are some “classified” nurses with pre-set work schedules, but there are many other “classified” nurses without pre-set work schedules. Therefore, prior to the time that Harborview creates the four-week work schedule for nurses, Ms. Browne asks both “classified” and “per diem” nurses to submit forms stating their preference for shifts and days they want to work. At any given time there are around 40 classified nurses, approximately one-third of the total number of classified nurses, that have their work scheduled under this method.

3. Under this four-week scheduling method, I would generally request to not work the two days a week my husband worked as a firefighter for the City of Seattle so that one of us could take care of our three children. **Similar to my requests, “classified” nurses also would request not to work certain days or shifts due to school, family commitments, or appointments. And Ms. Browne would try to accommodate all of the nurses’ requests.** A Harborview summary of the hours I worked by month as a “per diem” nurse between 2003 and 2007 is attached to this declaration. In the summer of 2006 my hours were slightly reduced due to my pelvic surgery and required time to recuperate.

The trial court’s ruling that Lane cannot testify about how she and other operating room nurses were scheduled for work is erroneous. *State v. Vaughn, supra*, 36 Wn.App. at 173. Lane personally experienced Harborview’s scheduling, both when she was called a “per diem” temporary nurse and later when she became a regular nurse. CP 249-58, 321, 395-96. Indeed, Harborview’s own witnesses confirmed in depositions that

Lane's explanation of scheduling was exactly how scheduling was actually done. CP 51-52, 58-62, 97-98.¹⁵ Harborview's own witness testimony also confirms that Lane has experience with Harborview's scheduling, and also shows that she had a foundation for her testimony.¹⁶

The trial court also erred in striking the letter that Janet Lane's counsel wrote to Harborview before bringing suit asking Harborview to reclassify Jane Lane from "per diem" temporary nurse to a regular nurse under the collective bargaining agreement. CP 132-136, Letter; CP 600, Order. The letter was not offered for the truth of the matter asserted, but to merely show that Harborview had no internal procedure by which a misclassified "temporary" employee can obtain a reclassification and that Lane tried to obtain reclassification before bringing suit. The letter also informs Harborview that Lane's proper classification under the collective bargaining agreement is as regular part-time nurse, not as a "per diem" temporary nurse. CP 132, 136. This discussion about the CBA refutes Harborview's later contention that Lane's misclassification claim does not encompass the collective bargaining agreement.

¹⁵ In fact, while Harborview objected to Lane's declaration testimony about scheduling, it relied on her deposition testimony about the same scheduling in its own motion. CP 26-66. Thus, Harborview waived any objection to Lane's testimony about scheduling by introducing the same testimony.

¹⁶ The trial court's ruling striking Lane's testimony is also inconsistent because it struck Lane's factual explanation about the scheduling practices, but did not strike other paragraphs in her declaration containing similar (albeit more conclusory) information, *i.e.*, paragraphs 4 and 13 of her declaration.

The trial court erroneously sustained Harborview's boilerplate objections to counsel's letter: "Hearsay; no exception argued or shown; no proper testimonial sponsorship. No authentication. Inadmissible pursuant to ER 408." CP 600.

The trial court erred in striking counsel's letter. First, the letter is not a settlement demand, but is rather an attempt to get Harborview to reclassify Lane without her having to sue. CP 132 ("We represent Janet Lane, a nurse who is regular in terms of duties, but considered on call or per diem, *i.e.* temporary. This letter is to request her reclassification as a regular nurse, a position she has worked in for several years."). But even if it were a settlement demand letter, ER 408 does not prohibit Lane from introducing it because it would be her demand letter, not Harborview's. *Bulalich v. AT&T*, 113 Wn.2d 254, 263-64, 778 P.2d 1031 (1989) (ER 408 prohibits offeree from introducing offeror's offer. Offeror is not prohibited under ER 408 from introducing his own settlement offer.). The letter is also not hearsay because it is not offered for the truth of the matter asserted and it is properly authenticated as a letter sent by Lane's counsel to Harborview before bringing suit. CP 11, 503-04. Indeed the Harborview official to whom the letter requesting reclassification was sent is the same person who responded on behalf of Harborview to Lane's discovery requests. CP 552.

Accordingly, the trial court erred in striking portions of plaintiff's evidence.

CONCLUSION

For the foregoing reasons, the trial court erred by granting defendant Harborview's motion for summary judgment, by denying plaintiff's motion for summary judgment on liability, and by striking a portion of plaintiff's evidence. The trial court's orders should therefore be reversed and the case remanded with instructions.

Dated this 20th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Appellant's Opening Brief was filed by legal messenger in Division I of the Court of Appeals at 600 University St., One Union Square, Seattle, WA 98101.

I further certify that one copy was served *via* facsimile and U.S. mail, postage prepaid, on the following attorney for Respondent:

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

DATED: May 20, 2009, at Seattle, Washington.



MONICA I. DRAGOIU