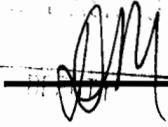


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STATE OF WASHINGTON

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NO. 34352-5-II

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COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

DAVIS, et al.,

Respondents.

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR .....2

    A. The trial court erred in entering judgment in favor of the plaintiffs on January 27, 2006.....2

    B. The trial court erred in granting partial summary judgment to plaintiffs and denying DOT’s Motion for Summary Judgment on January 6, 2006, and ruling that DOT willfully withheld wages owing to plaintiffs, and that plaintiffs are entitled to recover fifteen minutes of overtime each time they performed a watch turnover outside their scheduled watch. ....2

    C. The trial court erred in granting partial summary judgment to plaintiffs on November 10, 2005, and ruling that RCW 49.52 provides a substantive right to wages independent of any statute, ordinance or contract governing the employer and employees. ....2

    D. The trial court erred in denying DOT’s motion for summary judgment on February 25, 2005, and finding plaintiffs had a statutory cause of action under RCW 49.48 and/or RCW 49.52 for additional compensation for watch turnover activities that are not compensable under their collective bargaining agreements. ....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

    1. Where employees are not covered by the Minimum Wage Act and the employees’ have a collective bargaining agreement that covers their wages, hours, and working conditions, are such employees entitled to wages under RCW 49.52 for an activity that is not compensable under the collective bargaining agreement?.....2

2.	Does the definition of “hours worked” in WAC 296-126-002(8) create a legal entitlement to wages:.....	2
a.	where the regulation in and of itself does not purport to create a right to wages? .....	2
b.	where the specific legislative mandate in RCW 47.64 that ferry system employees bargain their wages and hours of work supersedes the general definition of “hours worked” in WAC 296-126-002(8)? .....	3
c.	where WAC 296-126-001 provides an exemption from the regulations in WAC 296-126 for ferry system employees because WAC 296-126 conflicts with RCW 47.64, which mandates collective bargaining of wages, hours, and working conditions? .....	3
3.	Assuming for purposes of argument that the regulatory definition of “hours worked” provides wages in addition to wages under the terms of their collective bargaining agreements, were DOT’s actions in complying with the collective bargaining agreements and not providing additional compensation for watch turnover willful for purposes of RCW 49.52.050 and .070? .....	3
4.	Assuming for purposes of argument that the regulatory definition of “hours worked” provides wages in addition to wages under the terms of their collective bargaining agreements, is the few minutes plaintiffs may spend engaging in watch turnover because the watches do not overlap, “de minimis” and therefore not compensable? .....	3
IV.	STATEMENT OF THE CASE .....	3
A:	Statement Of Facts .....	3
1.	Engine room personnel.....	3
2.	The collective bargaining agreements.....	4
3.	Watch turnover.....	8

4.	Watch scheduling and relief times. ....	10
B.	Procedural History. ....	12
V.	STANDARD OF REVIEW.....	14
VI.	SUMMARY OF ARGUMENT.....	15
VII.	ARGUMENT .....	17
A.	Because Plaintiffs Are Not Covered By The Minimum Wage Act, Their Collective Bargaining Agreements Mandated By RCW 47.64 Are The Exclusive Source Of Any Right To Wages. ....	17
1.	As maritime employees, plaintiffs are exempt from the MWA because their employment relationship is subject to a more specific statutory scheme. ....	17
2.	RCW 47.64 mandates that ferry system employees engage in collective bargaining regarding wages, hours, and working conditions, and establishes the Marine Employees' Commission (MEC) to resolve any disputes. ....	20
3.	The policy behind collective bargaining favors enforcement of collective bargaining agreements and resolution of labor disputes through procedures established through collective bargaining. ....	22
4.	Because the collective bargaining agreements cover the entire employment relationship between the WSF and plaintiffs, this case must be decided by reference to the terms of the collective bargaining agreements, including custom and practice. ....	25
B.	Plaintiffs' Claim Should Have Been Dismissed In Any Event Because They Failed To Follow The Grievance Procedures In The Collective Bargaining Agreements.....	29

C.	The Collective Bargaining Agreements Do Not Grant A Right To Compensation For Watch Turnover, And The Plaintiffs Are Not Covered Under The MWA; Therefore, DOT Did Not Violate RCW 49.52.050 Because There Is No Statute Or Contract Under Which Wages Are Owed. ....	33
1.	Recovery of wages and double damages under RCW 49.52.050 and .070 is a remedy for an employer’s criminal act of willfully and intentionally depriving an employee of wages the employer is obligated to pay. ....	33
2.	The plain language of WAC 296-126-002(8) defining “hours worked” does not confer a substantive right to wages. ....	35
3.	<i>SPEEA</i> did not hold that MWA-exempt employees are entitled to receive additional compensation for activities not subject to such compensation under their collective bargaining agreement. ....	37
4.	<i>Wingert</i> did not hold that the definition of “hours worked” in WAC 296-126-002(8) is a substantive regulation enforceable by MWA-exempt employees to obtain compensation in addition to the compensation they are owed under their collective bargaining agreements. ....	39
5.	DLI regulations under the Industrial Welfare Act do not apply to ferry system employees. ....	41
6.	For the exemption from MWA to be meaningful, the Court must conclude that plaintiffs are not entitled to additional compensation based on the DLI regulation defining “hours worked.” ....	43
D.	DOT Has Not Willfully And Intentionally Deprived Plaintiffs Of Any Wages Owed Under RCW 49.52 Because A Bona Fide Dispute Exists.....	44

E. Even If Watch Turnover Is Compensable, Plaintiffs Cannot Recover Because The Time Spent Relieving The Watches Is De Minimis.....	47
VIII. CONCLUSION .....	50

## TABLE OF AUTHORITIES

### Cases

<i>Allstot v. Edwards</i> , 114 Wn. App. 625, 60 P.3d 601 (2002).....	35
<i>Anderson v. Pilgrim's Pride Corp.</i> , 147 F. Supp. 2d 556 (E.D. Tex. 2001).....	49
<i>Ass'n of Washington Business v. Dep't of Revenue</i> , 155 Wn.2d 430, 120 P.3d 46 (2005).....	39
<i>Bonnell/Tredegear Indus., Inc. v. NLRB</i> , 46 F.3d 339 (4th Cir. 1995).....	27
<i>Burke &amp; Thomas, Inc. v. Int'l Organization of Masters, Mates &amp; Pilots</i> , 92 Wn.2d 762, 600 P.2d 1282 (1979).....	23, 30, 31
<i>Carter v. Panama Canal Co.</i> , 314 F. Supp. 386 (D.D.C. 1970), <i>aff'd</i> , 463 F.2d 1289 (D.C. Cir.), <i>cert. denied</i> , 409 U.S. 1012 (1972).....	49
<i>Dep't of Transp. v. State Employees' Ins. Bd.</i> , 97 Wn.2d 454, 645 P.2d 1076 (1982).....	20
<i>Dep't of Transportation v. Inlandboatmen's Union of the Pacific</i> , 103 Wn. App. 573, 13 P.3d 663 (2000).....	20
<i>Detroit &amp; Toledo Shore Line R.R. Co. v. United Transp. Union</i> , 396 U.S. 142, 90 S. Ct. 294, 24 L. Ed. 2d 325 (1969).....	27
<i>Dickens v. Alliance Analytical Laboratories, L.L.C.</i> , 127 Wn. App. 433, 111 P.3d 889 (2005).....	34
<i>E.I. Du Pont De Nemours &amp; Co. v. Harrup</i> , 227 F.2d 133 (4th Cir. 1955).....	49
<i>Ebling v. Gove's Cove, Inc.</i> , 34 Wn. App. 495, 663 P.2d 132 (1983).....	45

<i>Frederick v. Kirby Tankships, Inc.</i> , 205 F.3d 1277 (11th Cir. 2000) .....	28
<i>Gallo v. Dep't of Labor &amp; Industries</i> , 155 Wn.2d 470, 120 P.3d 564 (2005).....	28
<i>Gardiner v. Sea-Land Service, Inc.</i> , 786 F.2d 943 (9th Cir.), <i>cert. denied</i> , 479 U.S. 924, 107 S. Ct. 331, 93 L. Ed. 2d 303 (1986).....	26
<i>Gonzales v. Oregon</i> , 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).....	44
<i>Green v. Planters Nut &amp; Chocolate Co.</i> , 177 F.2d 187 (4th Cir. 1949) .....	49
<i>Hemming v. Tidyman's, Inc.</i> , 285 F.3d 1174 (9th Cir. 2002) .....	35
<i>Hill v. Dep't of Transportation</i> , 76 Wn. App. 631, 887 P.2d 476 (1995).....	32
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	14
<i>Hodgson v. Katz &amp; Besthoff, No. 38, Inc.</i> , 365 F. Supp. 1193 (W.D. La. 1973) .....	49
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	39
<i>Inniss v. Tandy Corp.</i> , 141 Wn.2d 517, 7 P.3d 807 (2000).....	18
<i>Int'l Union v. Yard-Man, Inc.</i> , 716 F.2d 1476 (6th Cir. 1983) .....	25
<i>Krystad v. Lau</i> , 65 Wn.2d 827, 400 P.2d 72 (1965).....	23

<i>Lindow v. United States</i> , 738 F.2d 1057 (9 <sup>th</sup> Cir. 1984) .....	47, 48
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003).....	39
<i>Maurer v. Joy Tech, Inc.</i> , 212 F.3d 907 (6th Cir. 2000) .....	25, 26
<i>McAnulty v. Snohomish Sch. Dist. No. 201</i> , 9 Wn. App. 834, 515 P.2d 523 (1973).....	45
<i>McConnell v. Mothers Work, Inc.</i> , 131 Wn. App. 525, 128 P.3d 128 (2006).....	42
<i>McGinnis v. State</i> , 152 Wn.2d 639, 99 P.3d 1240 (2004).....	46
<i>Pope v. University of Washington</i> , 121 Wn.2d 479, 852 P.2d 1055 (1994).....	45
<i>Public Employment Relations Comm’n v. City of Vancouver</i> , 107 Wn. App. 694, 33 P.3d 74 (2001).....	25
<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000).....	14
<i>Retail Clerks Health &amp; Welfare Trust Funds v. Shopland Supermarket, Inc.</i> , 96 Wn.2d 939, 640 P.2d 1051 (1982).....	24
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	45
<i>Seattle Professional Engineering Employees Ass’n (SPEEA) v. Boeing</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000).....	passim
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	41

<i>State v. Potter</i> , 68 Wn. App. 134, 842 P.2d 481 (1992).....	39
<i>Swinford v. Russ Dunsmire Oldsmobile</i> , 82 Wn. App. 401, 918 P.2d 186 (1996).....	29
<i>The Denali Pac. Coast Coal Co. v. Alaska S.S. Co.</i> , 105 F.2d 413 (9th Cir. 1939).....	8
<i>Trust Fund Services v. Heyman</i> , 88 Wn.2d 698, 565 P.2d 805 (1977).....	24, 25
<i>Turner v. City of Philadelphia</i> , 262 F.3d 222 (3rd Cir. 2001).....	27
<i>United Steelworkers of America v. Warrior &amp; Gulf Nav. Co.</i> , 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).....	26
<i>Waggoner v. Dallaire</i> , 649 F.2d 1362 (9th Cir. 1981).....	28
<i>Walling v. Bay State Dredging &amp; Contracting Co.</i> , 149 F.2d 346 (1 <sup>st</sup> Cir. 1945).....	19
<i>Western Washington Cement Masons Health &amp; Security Trust Funds v. Hillis Homes, Inc.</i> , 26 Wn. App. 224, 612 P.2d 436 (1980).....	25
<i>Wingert v. Yellow Freight Systems</i> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	36, 40, 41, 46

**Statutes**

29 U.S.C. § 213(b)(6) .....	19
Laws of 1975, 1st Ex. Sess., ch. 289 § 1.....	17
RCW 47.62.220 .....	22
RCW 47.64 .....	passim

RCW 47.64.006 .....	31
RCW 47.64.120 .....	5, 21
RCW 47.64.150 .....	15, 29, 32
RCW 47.64.220 .....	32
RCW 47.64.270 .....	21
RCW 47.64.280 .....	21, 29
RCW 47.64.280(2).....	33
RCW 49.12.005(3)(b).....	41, 46
RCW 49.32.020 .....	23
RCW 49.36.010 .....	22
RCW 49.46 .....	13, 15, 17, 35
RCW 49.46.010(5)(m).....	6, 17, 43
RCW 49.46.020 .....	17
RCW 49.46.090 .....	47
RCW 49.46.130 .....	6, 17
RCW 49.48 .....	2, 12, 13
RCW 49.48.010 .....	12, 34
RCW 49.52 .....	passim
RCW 49.52.050 .....	passim
RCW 49.52.050(2).....	34, 40, 41
RCW 49.52.070 .....	passim

**Rules**

CR 56(c)..... 14

WAC 296-126..... 3, 36, 42

WAC 296-126-001..... 3, 41

WAC 296-126-002(8)..... passim

WAC 296-126-021..... 36

WAC 296-126-030..... 36

WAC 296-126-050..... 36

WAC 296-126-092..... 36

WAC 296-128..... 36, 37

WAC 296-128-500 to -540 ..... 37

**Regulations**

29 C.F.R. § 783.29..... 19

29 C.F.R. § 783.30..... 19

29 C.F.R. § 783.31 ..... 18

29 C.F.R. § 783.32 ..... 18

## I. INTRODUCTION

Plaintiffs are maritime employees of the Washington state ferry system operated by the Department of Transportation (DOT) marine division. They are exempt from the state and federal wage laws, *i.e.*, the Washington Minimum Wage Act (MWA) and the Fair Labor Standards Act (FLSA), but covered by a collective bargaining agreement that contains all the terms and conditions of their employment, including wages and hours of work. Plaintiffs sued to recover wages under RCW 49.52, but the wages claimed are not provided for in the employees' collective bargaining agreements. Nonetheless, plaintiffs asserted, and the trial court ruled on summary judgment, that they have a right to additional wages, independent of their negotiated agreements, based on a Department of Labor & Industries (DLI) regulation defining the phrase "hours worked."

The appellant State of Washington Department of Transportation (DOT) asks this Court to reverse and dismiss plaintiffs' claim, and in so doing enforce the negotiated agreements and clarify that, in order to recover wages under RCW 49.52, employees not subject to the MWA must establish a substantive right to the wages in their collective bargaining agreements.

## **II. ASSIGNMENTS OF ERROR**

- A.** The trial court erred in entering judgment in favor of the plaintiffs on January 27, 2006.
- B.** The trial court erred in granting partial summary judgment to plaintiffs and denying DOT's Motion for Summary Judgment on January 6, 2006, and ruling that DOT willfully withheld wages owing to plaintiffs, and that plaintiffs are entitled to recover fifteen minutes of overtime each time they performed a watch turnover outside their scheduled watch.
- C.** The trial court erred in granting partial summary judgment to plaintiffs on November 10, 2005, and ruling that RCW 49.52 provides a substantive right to wages independent of any statute, ordinance or contract governing the employer and employees.
- D.** The trial court erred in denying DOT's motion for summary judgment on February 25, 2005, and finding plaintiffs had a statutory cause of action under RCW 49.48 and/or RCW 49.52 for additional compensation for watch turnover activities that are not compensable under their collective bargaining agreements.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1.** Where employees are not covered by the Minimum Wage Act and the employees' have a collective bargaining agreement that covers their wages, hours, and working conditions, are such employees entitled to wages under RCW 49.52 for an activity that is not compensable under the collective bargaining agreement?
- 2.** Does the definition of "hours worked" in WAC 296-126-002(8) create a legal entitlement to wages:
  - a.** where the regulation in and of itself does not purport to create a right to wages?



The Engineers consist of Staff Chief Engineers, Chief Engineers, and Assistant Chief Engineers. Engineers must be licensed by the Coast Guard and are referred to as the “licensed” employees. CP 46. The “unlicensed” group consists of Oilers and Wipers who, although not licensed, must be certified by the Coast Guard. CP 46.

The sole and exclusive representative of both groups of engine room employees is the National Marine Engineers Beneficial Association, District No. 1 (MEBA). CP 68, 101. MEBA and DOT, through the Washington State Ferries (WSF), have entered into a collective bargaining agreement for each group. CP 66-96, 97-139.

The engine room employees maintain the engines and ensure that the ferry runs safely and efficiently. CP 46. Engine room staffing numbers vary according to the class of vessel. On a larger class vessel, the engine room crew might include a Chief Engineer, an Assistant Chief, and two Oilers. Smaller vessels might have an engine room crew consisting of one engineer and one oiler. Minimum staffing levels are specified by vessel in the collective bargaining agreements. CP 82, 103.

## **2. The collective bargaining agreements.**

RCW 47.64 governs the employment relationship between ferry system employees and WSF. RCW 47.64 provides for full scope collective bargaining of the terms and conditions of employment,

including wages, hours and working conditions. RCW 47.64.120. These agreements contain all the terms and conditions of employment. CP 68 (“all matters pertaining to wages, hours, and other conditions of employment”). The Agreements constitute the complete agreement between WSF and MEBA and no term or provision of the Agreements may be amended, modified, changed or altered except by written agreement between WSF and MEBA. CP 102.

Although plaintiffs concede that the collective bargaining agreements do not provide the wages for watch turnover they seek, it is helpful to understand the comprehensive nature of the collective bargaining agreements, which demonstrates that they are the sole source of compensation for any work performed.

Under the collective bargaining agreements, the plaintiffs have negotiated a workweek of twelve-hour days for seven consecutive days. CP 100. They work seven days on and seven days off. CP 75. Most vessel engine rooms are staffed 24 hours per day, and crews working the night watch perform maintenance when the daily running schedule is concluded and the vessel is tied up and in port. This results in a standard eighty-four

hour workweek for engine room employees — a work schedule unique among state employers.<sup>1</sup>

The collective bargaining agreements contain the rate of pay for each position classification. CP 72, 113. In 2000, the engineers' base wage ranged from \$23.91 to \$34.88 per hour. CP 72. In 2000, the base wage of the wipers and oilers ranged from \$16.24 to \$20.13 per hour. CP 113.<sup>2</sup> Engine room employees are guaranteed eighty hours of pay per two-week work schedule, regardless of actual time worked. CP 75, 78, 107, 133. They also receive another four hours of compensatory time. CP 77, 135, 456. While the engine room employees are paid for eighty hours per two-week period, they report on the time log the actual number of hours and minutes worked. CP 78, 457.<sup>3</sup>

Although there is no legal requirement that plaintiffs receive any overtime compensation for work beyond their scheduled shift, the WSF and MEBA have negotiated for overtime in the collective bargaining agreements. When overtime pay is earned under the collective bargaining agreements, the negotiated rate is two times the base rate. CP 72, 107, 113. Time that has

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<sup>1</sup> Ordinarily, this work schedule would violate wage laws, but it is permissible because the employees are not subject to the overtime provisions of the MWA and thus were able to bargain for this unique schedule. RCW 49.46.010(5)(m) and .130.

<sup>2</sup> These rates have been subject to cost of living increases since the collective bargaining agreements went into effect. *See also* CP 673-81 for a chart of the total compensation earned by the engine room employees in 2004.

<sup>3</sup> They record on their timesheet, however, twelve hours each day, except they record eight hours for the day on which they earn the compensatory time. CP 457.

been negotiated as eligible for overtime pay and that is fifteen minutes or less beyond the regular assigned work day is paid at the overtime rate for one-quarter of an hour and time greater than fifteen minutes beyond the regular assigned work day is paid at the overtime rate for one hour. CP 72, 107. Extended work shifts resulting in overtime are not permitted to be scheduled on a daily or regular basis. *Id.*

Nevertheless, overtime is not always paid when an employee works beyond his or her schedule. In case of an emergency requiring work beyond the designated schedule, the collective bargaining agreements provide that employees are paid at a straight time rate. CP 72, 113.

On the other hand, engine room personnel are paid double time or even triple time, known as “penalty pay,” for certain types of work activity. The licensed engineers’ collective bargaining agreement lists fourteen separate tasks that qualify for penalty pay. CP 74-5. The unlicensed employees’ collective bargaining agreement lists twenty-two separate tasks that qualify for penalty pay. CP 126-28. Unlicensed employees also receive extra compensation for the use of certain power tools. CP 113.

Engine room employees are paid at their straight hourly rate for travel time (plus mileage) when it is necessary for them to temporarily

relieve at terminals other than their designated home terminal.<sup>4</sup> CP 79-80, 105-6.

The collective bargaining agreements also address working conditions. *See, e.g.*, CP 82-4, 114-15 (vacation leave accrual and use); CP 69-71, 85-90, 116-20 (health benefits); CP 92-3, 120 (seniority, assignments, and the filling of vacancies); CP 93-4, 121-22 (sick leave accrual and use); CP 92, 122-23 (severance pay); CP 73-4, 123-24 (holidays); CP 92, 124 (maintenance and cure); CP 125-26 (working conditions generally).

### **3. Watch turnover.**

Plaintiffs' shifts are called "watches." CP 46. Watches refer to the division of the day into time periods of service by the crew of the vessel and to the division of the crew for such service. *The Denali Pac. Coast Coal Co. v. Alaska S.S. Co.*, 105 F.2d 413, 416 (9th Cir. 1939). On the ferries, the watches do not overlap, so when one watch ends and another begins, engine room personnel engage in a process called watch turnover by which the off-going watch is relieved. CP 46, 695-96. This is consistent with watch schedule practices throughout the maritime industry. CP 695-96, 739-40, 743. An oncoming watch relieves an off-going watch by receiving pertinent information regarding any problems or conditions that might affect the

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<sup>4</sup> When in travel status, employees are paid from the time they leave their residence until they return home. Thus, there can be no alleged "off-the-clock" work in this situation.

operation of the vessel. CP 238, 743. This process takes only a few minutes. CP 526, 724-25. Plaintiffs' expert videotaped a number of watch turnovers and concluded that the amount of time spent exchanging information was 6.897 minutes, including non-work-related social conversation. CP 526. DOT's expert, for purposes of summary judgment below, accepted plaintiffs' data, but removed the non-work-related components of the information exchange. CP 724-25. The amount of time spent on watch turnover, using plaintiffs' observations, was 5.3 minutes. *Id.* DOT's port engineers all testified that an ordinary watch turnover should take no more three to four minutes. CP 696, 739, 743.

Plaintiffs allege that this process of watch turnover constitutes "off-the-clock" work for which they must be given extra compensation, notwithstanding their collective bargaining agreements. Plaintiffs claim, additionally, that they are entitled to fifteen minutes of compensation at double the base rate under the overtime provisions of the collective bargaining agreements, even though they have repudiated the relevance of the collective bargaining agreements regarding whether there is a right to extra compensation in the first place.

There is no extra compensation provided under the collective bargaining agreements for any time spent outside a scheduled watch time relieving another watch or being relieved. CP 46, 739-40, 743-44. Watch

turnover is practiced throughout the maritime industry. Within the maritime industry and within WSF, time spent conducting routine watch turnover is not considered compensable time. CP 692, 739-40, 743-44. No ferry system employee has ever sought extra compensation for watch turnover, nor has any ferry system employee ever grieved the issue of compensation for watch turnover. CP 692, 715, 744. It is undisputed that the issue of extra compensation for watch turnover has never been the subject of specific bargaining between the WSF and MEBA. CP 46, 685, 715, 740.

#### **4. Watch scheduling and relief times.**

Given the variability inherent in ferry transportation — the ferry schedules, running times, weather conditions, passenger volume, accidents and mechanical delays — there is no way to guarantee that people who work on the ferries will start and end their shift at the scheduled times, and the work schedules of engine room employees often vary from an exact twelve-hour shift. CP 456. To address this, engine room employees generally work a week of short shifts and a week of long shifts over a four-week period. This is called “cycling” and results in an average twelve-hour shift over the four weeks. CP 456. The actual hours worked are recorded on a time log that must be certified as correct by the chief engineer on the watch. CP 457.

Each vessel has one Staff Chief Engineer who is in charge of all engine room crew assigned to the vessel. The Staff Chief is required to look

at the vessel running schedule and decide the crew watch turnover time according to when the vessel is at the designated relieving dock. Watch relief for each vessel is supposed to take place at the time designated by the Staff Chief Engineer and approved by WSF management, at a location designated by the Staff Chief Engineer on the watch schedule. However, it is a common practice for engine room employees to work out their own arrangements for watch relief that deviate from the official schedule. For example, a relief may be scheduled to take place at the Edmonds dock, but the two employees working on opposite watches might work out an arrangement to relieve each other at the Kingston dock, prior to the scheduled relief time. This informal arrangement, while common, is not reflected in payroll records or employee time sheets. CP 668.

On occasions when an engine room employee is late for relief and misses the boat, his or her counterpart is required to stay on duty in the engine room for another run. While this would generate a claim for overtime on behalf of the employee required to stay over, it is common practice for the affected employees to work out a casual agreement whereby the late employee agrees to do an early relief of his counterpart at a later time, and make up for the extra work time, and the employee who had to work past the end time of his watch does not submit a claim for overtime. CP 668-69.

This is a casual agreement, and not reflected in any payroll records or employee time sheets. *Id.*

**B. Procedural History.**

Plaintiffs filed their original complaint for wages owed on August 11, 2004. CP 5-10. They filed an amended complaint on December 14, 2004. CP 32-38. DOT moved for summary judgment, arguing that plaintiffs were not entitled to relief because they are exempt from the state and federal wage laws and the collective bargaining agreements do not provide for extra compensation for watch turnover. CP 61. Alternatively, DOT argued that the Marine Employees' Commission (MEC) was the proper forum for the dispute. Plaintiffs conceded that they could not recover under the terms of their collective bargaining agreements, but argued that they had a cause of action under RCW 49.48.010 and/or RCW 49.52 as interpreted by the Washington State Supreme Court in *Seattle Professional Engineering Employees Ass'n (SPEEA) v. Boeing*, 139 Wn.2d 824, 991 P.2d 1126 (2000). CP 306-24. The trial court denied DOT's motion for summary judgment on February 25, 2005 and allowed plaintiffs' cause of action to proceed. CP 373-75.

Plaintiffs then sought a partial summary judgment that watch turnover is compensable under RCW 49.48.010 and/or RCW 49.52. Plaintiffs argued that the term "wages" in RCW 49.48 and RCW 49.52 is

defined by the Minimum Wage Act (MWA), RCW 49.46, and the Department of Labor and Industries (DLI) regulation defining "hours of work" requires payment of wages, regardless of whether employees are covered by the MWA and regardless of whether they have a collective bargaining agreement that defines their wages and hours of work. DOT argued that the MWA and the DLI definition of "hours worked" do not apply to ferry system employees, and, therefore, could not support a claim for wages under RCW 49.48 or 49.52. The trial court granted plaintiffs partial summary judgment on November 10, 2005 and found that watch turnover is compensable.

Both parties then moved for summary judgment. Plaintiffs argued that, although they were not entitled to the wages under the collective bargaining agreements, they were entitled to calculate their compensation for watch turnover based on the overtime provisions of the collective bargaining agreements. DOT argued that RCW 49.52 does not apply because the collective bargaining agreements do not provide for the wages sought and DOT did not act willfully in not paying engine room employees extra compensation for watch turnover. In any event, any time spent engaging in watch turnover is de minimis and the plaintiffs have acquiesced in the practice, which has existed for decades. The trial court granted plaintiffs' motion on January 6, 2006, finding DOT's actions

willful and awarding double damages under the overtime provisions of the collective bargaining agreements.

The trial court entered judgment for the plaintiffs on January 27, 2006, including attorneys' fees under the common fund doctrine. The trial court denied plaintiffs' request for prejudgment interest because it found that the State has not waived sovereign immunity with respect to prejudgment interest on wage claims.<sup>5</sup> DOT filed its notice of appeal the same day.

#### V. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Hisle*, 151 Wn.2d at 861.

There are no material facts in dispute and the Court, upon its own inquiry, should find as a matter of law that plaintiffs are not entitled to wages for all the reasons set forth below.

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<sup>5</sup> Plaintiffs have not appealed the trial court's decision regarding prejudgment interest.

## VI. SUMMARY OF ARGUMENT

The plaintiffs are specifically excluded from the requirements of the Minimum Wage Act (MWA), RCW 49.46, as well as the federal Fair Labor Standards Act (FLSA). There is no federal or state wage law governing their employment. Their employment is governed rather by RCW 47.64, which mandates full scope collective bargaining. The collective bargaining agreements contain all the terms and conditions of employment and are the exclusive source for wages. The exclusion from the MWA, the policy behind collective bargaining, and the mandate of RCW 47.64 compel the conclusion that, plaintiffs must look solely to their collective bargaining agreement for compensation. Plaintiffs do not dispute that based on the language of the collective bargaining agreements and maritime custom and practice, there is no compensation for watch turnover under the collective bargaining agreements.

Further, RCW 47.64.150 requires that disputes be addressed through the grievance process in the collective bargaining agreement. Plaintiffs did not pursue their administrative remedies. Accordingly, their claim should be dismissed.

However, plaintiffs brought suit under RCW 49.52 to recover wages outside the terms of their collective bargaining agreements. Their claim must fail because RCW 49.52 does not create rights, but enforces

rights found elsewhere. The plain language of RCW 49.52.050 is that the employer's obligation to pay wages must arise from a statute, ordinance, or contract. RCW 49.52.050 and .070 are a mechanism by which an employee can enforce a preexisting right to wages that the employer has unlawfully withheld. But, the right to wages must be found elsewhere in a statute, ordinance, or contract.

The plaintiffs argued, and the trial court agreed, that the regulatory definition of "hours worked" creates a right to wages and satisfies the language of RCW 49.52.050 requiring wages be owed pursuant to a statute. This is incorrect first, because, as explained above, the collective bargaining agreements are the sole source of plaintiffs' right to wages. Second, the definition of "hours worked" in the regulation does not by itself create a right to wages. Third, the regulation does not meet the precondition of RCW 49.52.050 that wages are owed pursuant to "statute, ordinance, or contract." Finally, the DLI regulations do not apply to plaintiffs' employment because they conflict with RCW 47.64 and the exclusion of WSF vessel operating crews from the MWA.

Even if the regulation defining "hours worked" requires additional compensation for watch turnover, this was not so clearly established in the law that there is not a bona fide dispute regarding the obligation to pay wages, and DOT cannot be considered to have willfully deprived plaintiffs

of wages as required to find liability under RCW 49.52.050 and to impose double damages under RCW 49.52.070.

Alternatively, even if the regulation defining “hours worked” applies, the time involved is not compensable because it is de minimis.

## VII. ARGUMENT

### A. **Because Plaintiffs Are Not Covered By The Minimum Wage Act, Their Collective Bargaining Agreements Mandated By RCW 47.64 Are The Exclusive Source Of Any Right To Wages.**

#### 1. **As maritime employees, plaintiffs are exempt from the MWA because their employment relationship is subject to a more specific statutory scheme.**

The Minimum Wage Act (MWA), RCW 49.46, provides minimum wage standards and workplace protections for certain employees. Primarily, the MWA requires that covered employees receive a minimum hourly wage and receive additional compensation of at least one and half times their regular rate for any hours in a workweek that exceed forty. RCW 49.46.020, .130.

In 1975 the legislature amended the definition of employee for purposes of the MWA to exclude “All vessel operating crews of the Washington State Ferries operated by the department of transportation.” Laws of 1975, 1st Ex. Sess., ch. 289 § 1 (now codified at RCW 49.46.010(5)(m)). This amendment was part of a package of amendments intended to conform state law to the federal Fair Labor Standards Act

(FLSA). *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000).

The wording of the 1975 amendments is almost identical to the parallel provisions of the Fair Labor Standards Act (FLSA).

Congress passed the FLSA in 1938 to prompt economic recovery from the Great Depression by ensuring a maximum number of jobs that paid a minimum, livable wage. The overtime pay provision created a monetary penalty for employers that did not spread the work among a greater number of employees and thus created an incentive to hire more people rather than increase the number of hours worked by existing employees. The FLSA does not cover some employees at all and certain other employees are exempt from particular provisions of the FLSA. When the FLSA was passed, individuals employed as “seamen” were exempted from both the minimum wage and overtime provisions of the FLSA. The term “seamen” includes members of the crew such as sailors, engineers, radio operators, fireman and others who aid in the operation of the vessel as a means of transportation. *See* 29 C.F.R. § 783.31, .32.

When Congress was initially considering the legislation and holding hearings, representatives of the principal labor organizations representing seamen testified that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise and unnecessary to bring them within the scope of the

FLSA. 29 C.F.R. § 783.29. The chief proponents of the seamen's exemption were the Sailors Union of the Pacific and the National Maritime Union. The two maritime employee unions requested the exemption from the FLSA because seamen were already under the jurisdiction of the Maritime Commission pursuant to the Merchant Marine Act of 1936 and their interests already protected. 29 C.F.R. § 783.29; *Walling v. Bay State Dredging & Contracting Co.*, 149 F.2d 346, 349 (1st Cir. 1945). The Chairman of the Committee explained on the floor of the Senate that the purpose of the amendment exempting seamen was to avoid conflict with other legislation regulating wages and hours for this profession. *Walling*, 149 F.2d at 350. Consequently, seamen were exempted from the FLSA because they were subject to other laws unique to their profession.<sup>6</sup>

In Washington, vessel operating crews on state ferries are exempt from the provisions of the MWA for the same reasons behind the FLSA exemption. The vessel operating crews of the state ferries are covered by another law and under the jurisdiction of an agency unique to the profession. Plaintiffs' employment is covered by RCW 47.64, so coverage by the MWA would be inconsistent. Under RCW 47.64, the

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<sup>6</sup> In 1961, Congress extended the minimum wage provisions of the FLSA to seamen employed on American vessels. 29 C.F.R. § 783.30. All seamen remained exempt from the overtime provisions. 29 U.S.C. § 213(b)(6).

terms and conditions of plaintiffs' employment are subject to collective bargaining and plaintiffs are subject to the jurisdiction of the Marine Employees Commission (MEC).

As members of the vessel operating crews of the ferries, plaintiffs are not entitled to a minimum hourly wage and are not entitled to overtime. What they are entitled to under RCW 47.64 is to be represented by a labor organization and to collectively bargain their wages, hours of work, and all other terms and conditions of employment. There is no other source for their wages. Accordingly, no compensation is payable unless provided for in the collective bargaining agreements.

2. **RCW 47.64 mandates that ferry system employees engage in collective bargaining regarding wages, hours, and working conditions, and establishes the Marine Employees' Commission (MEC) to resolve any disputes.**

As mentioned above, RCW 47.64 governs plaintiffs' employment relationship with WSF.

Clearly, the legislature considered the collective bargaining authority of the ferry system to be of great importance. The preservation of the traditional goal of collective bargaining in maritime labor-management relations was a goal from the outset of the state's involvement in the ferry system in 1949. Laws of 1949, ch. 148, sec. 1, p. 372.

*Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 462, 645 P.2d 1076 (1982). See also *Dep't of Transportation v. Inlandboatmen's Union of the Pacific*, 103 Wn. App. 573, 578, 13 P.3d 663 (2000)

(“Washington's policy is to ‘promote harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively’ and to ‘promote just and fair compensation, benefits, and working conditions for ferry system employees....’ RCW 47.64.006(3), (7).”).

Pursuant to this statutory scheme, ferry system employees historically have been entitled to bargain for wages. RCW 47.64.120 mandates that ferry system employees, through their exclusive bargaining representatives, and WSF negotiate “wages, hours, working conditions, insurance, and health care benefits as limited by RCW 47.64.270, and other matters mutually agreed upon.” This is full scope collective bargaining and the parties’ entire employment relationship is covered in the agreements.

RCW 47.64.280 establishes the MEC as the administrative agency with jurisdiction over the employment relationship between the WSF and ferry system employees. The MEC has authority to “adjust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system”. RCW 47.64.280. The MEC also conducts salary surveys comparing wages, hours, employee benefits, and conditions of employment of ferry system employees with those of “public and private sector employees in states along the west coast of the United

States, including Alaska, and in British Columbia, doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved.” RCW 47.62.220. The salary survey is used as a guide to collective bargaining between the unions and WSF. *Id.*

Accordingly, there exists an administrative agency specifically charges with addressing disputes of ferry system employees and possessing specific expertise in the wages and hours of these and similar maritime employees.

**3. The policy behind collective bargaining favors enforcement of collective bargaining agreements and resolution of labor disputes through procedures established through collective bargaining.**

The right of employees to organize and negotiate the terms and conditions of their employment has been codified in Washington for nearly a century. In 1919, the legislature passed RCW 49.36.010 legalizing labor unions.

It shall be lawful for working men and women to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or carry out their legitimate purposes by any lawful means.

The Supreme Court has determined that this statute was not a change in the law, but rather declaratory of the common law developed between

1842 and 1919. See *Krystad v. Lau*, 65 Wn.2d 827, 836, 400 P.2d 72 (1965).

In 1933, the legislature addressed the jurisdiction of Washington courts to issue injunctions in labor disputes and declared it the public policy of Washington that workers have full freedom to organize and to negotiate the terms and conditions of employment. RCW 49.32.020. The Court in *Burke & Thomas, Inc. v. Int'l Organization of Masters, Mates & Pilots*, 92 Wn.2d 762, 771-72, 600 P.2d 1282 (1979), noted the proliferation of statutory schemes addressing collective bargaining for public employees.

The long and difficult process of establishing and maintaining labor peace in the public sector has led to significant changes in public employee labor relations in recent years. Representation of public employees is increasingly dominated by statutory schemes for collective bargaining and dispute resolution. Our own Code reflects this development, containing a multitude of statutes with both specific and general applicability to various groups of public employees. See Title 41 RCW, Public Employment, Civil Service and Pensions. The Public Employees' Collective Bargaining statute, RCW 41.56 is representative of the legislature's attempts to provide for collective bargaining and dispute resolution. Similarly, RCW 47.64 provides for collective bargaining and adjudication of labor disputes for marine employees. The goal of these statutes can be seen to be the achievement of labor peace.

Thus, Washington has long fostered the right of employees to organize and engage in collective bargaining of the terms and conditions of their employment.

The goal of both federal and state labor law is the stabilization of labor relations. *Trust Fund Services v. Heyman*, 88 Wn.2d 698, 703, 565 P.2d 805 (1977). Thus, there is a strong policy favoring written labor agreements as well as a strong policy in favor of enforcing such labor agreements in order to advance that goal. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 946, 640 P.2d 1051 (1982). The various labor statutes promote labor peace by encouraging collective bargaining and settling labor disputes through agreed-upon procedures such as mediation and arbitration. *Trust Fund Services*, 88 Wn.2d at 703.

Plaintiffs have long had the advantage of collective bargaining for their wages, hours and working conditions. Their present claim for additional wages disrupts this process and impedes the goals of labor policy. If they feel that there are compensation issues that should be addressed, their recourse is to the collective bargaining process. Bringing a lawsuit for wages not provided under the terms of their collective bargaining agreements is a circumvention of the bargaining process. The

Court should enforce the collective bargaining agreements as the exclusive source of wages.

4. **Because the collective bargaining agreements cover the entire employment relationship between the WSF and plaintiffs, this case must be decided by reference to the terms of the collective bargaining agreements, including custom and practice.**

State courts follow federal law to effectuate the statutory policy of enforcement of collective bargaining agreements in order for both parties to have reasonable assurance that the negotiated contract will be honored. *Trust Fund Services*, 88 Wn.2d at 704; *Western Washington Cement Masons Health & Security Trust Funds v. Hillis Homes, Inc.*, 26 Wn. App. 224, 230, 612 P.2d 436 (1980).

Federal law provides guidance in interpreting and applying collective bargaining agreements. *Public Employment Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001). Courts interpret a collective bargaining agreement consistent with the parties' intent. *Maurer v. Joy Tech, Inc.*, 212 F.3d 907, 917 (6th Cir. 2000). Courts look to the explicit language of the collective bargaining agreement for clear manifestations of intent and look to the agreement as a whole to determine its meaning. *Int'l Union v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983). Further, the court should interpret the agreement using the language, context and other indicia of intent that is consistent

with federal labor policy. *Maurer*, 212 F.3d at 915 (quoting *Int'l Union*, 716 F.2d at 1479-80).

Collective bargaining is different from ordinary commercial contracts. A collective bargaining agreement is an effort to erect a system of industrial self-governance. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580, 80 S. Ct. 1347, 1350- 51, 4 L. Ed. 2d 1409 (1960). The collective bargaining agreement states the rights and duties of the parties, but it is more than a contract. *Id.* at 578. It is a generalized code to govern a myriad of situations that cannot be wholly anticipated. *Id.* Thus, the collective bargaining agreement “calls into being a new common law — the common law of a particular industry . . . .” *Id.* at 579.

The Ninth Circuit has reiterated this premise of labor policy and stated that the court will “choose the rule that will promote the enforcement of collective bargaining agreements.” *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 948-49 (9th Cir.), *cert. denied*, 479 U.S. 924, 107 S. Ct. 331, 93 L. Ed. 2d 303 (1986).

In addition, it is a well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence. *See, e.g., Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142,

153-54, 90 S. Ct. 294, 24 L. Ed. 2d 325 (1969); *Turner v. City of Philadelphia*, 262 F.3d 222, 226 (3rd Cir. 2001); *Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 344 (4th Cir. 1995).

Because the issue of compensation for watch turnover is not addressed in the collective bargaining agreements, it is necessary to look to the custom and practice. It is undisputed that the WSF has never paid extra compensation for watch turnover. CP 180, 744. It is undisputed that it is the custom and practice in the maritime industry that watch turnover is not separately compensable. CP 740, 743. Plaintiffs have acquiesced in this custom and practice for decades.

Although the collective bargaining agreements are silent on the specific issue of extra compensation for watch turnover, the custom and practice of not providing extra compensation for watch turnover must be viewed as an expression of the common law of the maritime industry that has become an implied term of the collective bargaining agreements.

Accordingly, to the extent plaintiffs maintain that they can bring an action in court because the collective bargaining agreements do not explicitly address the issue of compensation for watch turnover, the Court should recognize that the custom and practice is an implied term of the collective bargaining agreements. Therefore, the issue is addressed

implicitly by the collective bargaining agreements and plaintiffs are bound by the collective bargaining agreements.

The parties to a collective bargaining agreement are conclusively presumed to have equal bargaining strength. *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir. 1981). The plaintiffs' exclusive bargaining representative, MEBA, negotiated on their behalf and entered into the collective bargaining agreements. The agreements set the rates of pay, the hours of work, when overtime will be paid, and all other working conditions. The plaintiffs then made a determination of the adequacy of their wages by voting for the contracts. *See Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1292 (11th Cir. 2000). Plaintiffs cannot alter the employment relationship and in essence amend the collective bargaining agreements by bringing a judicial action outside of the statutory or contractual process.

Once those decisions are made and written into the CBA's, the terms of these agreements represent the rights and obligations of the parties, which cannot be unilaterally altered, at will, by the worker.

*Gallo v. Dep't of Labor & Industries*, 155 Wn.2d 470, 485, 120 P.3d 564 (2005).

The collective bargaining agreements do not provide for extra compensation for watch turnover. This is the deal the plaintiffs made

consistent with standard maritime industry practice. Accordingly, the Court should effectuate the parties' intent and the goals of labor policy, and find that plaintiffs are bound by their collective bargaining agreements on matters involving wages and no additional wages are due for watch turnover.

**B. Plaintiffs' Claim Should Have Been Dismissed In Any Event Because They Failed To Follow The Grievance Procedures In The Collective Bargaining Agreements.**

Labor policy requires the exhaustion of grievance procedures before resort to the court system. *Swinford v. Russ Duns mire Oldsmobile*, 82 Wn. App. 401, 412, 918 P.2d 186 (1996). The proper use of the procedures contained in the collective bargaining agreement "prevents employers and employees alike from 'short-circuiting' an agreed-upon grievance procedure by resorting to the court system." *Id.* (citing *Clayton v. ITT Gilfillan*, 623 F.2d 563, 568 (9<sup>th</sup> Cir. 1980), *rev'd in part on other grounds*, 451 U.S. 679 (1981)). It is consistent with labor policy that labor disputes should be resolved within the framework of the collective bargaining agreement rather than in the courts. *Id.*

The MEC has authority to adjust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system. RCW 47.64.280. RCW 47.64.150 requires ferry system employees either to follow the grievance procedures provided in the

collective bargaining agreements. Accordingly, the plaintiffs should have grieved this issue in compliance with the statute.

Moreover, the Court should find that plaintiffs failed to exhaust their administrative remedies under RCW 47.64 because the legislature has historically indicated its preference for judicial restraint in the area of labor relations. *Burke & Thomas*, 92 Wn.2d at 771. Inherent in the doctrine of judicial restraint is a recognition that the delicate balance of labor relations is now primarily the province of the legislature, and that the schemes created by statute for collective bargaining and dispute resolution must be allowed to function as intended, without the added coercive power of the courts being thrown into the balance on one side or the other. *Id.* at 772. Otherwise, the Court noted, the judiciary may become an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining process. *Id.* Courts venture into dangerous and basically uncharted waters when they “tinker” with existing legislative schemas. *Id.* Otherwise, the Court cautioned, the precarious and uneasy balance of labor-management power which exists in the public labor relations sector could be easily upset. *Id.*

As in *Burke & Thomas*, the plaintiffs are subject to the jurisdiction of an administrative agency charged with resolving all labor disputes,

complaints and grievances. Judicial involvement in the dispute erodes the effectiveness of the MEC's authority to adjust the dispute. *Id.* at 774.

The MEC is charged with overseeing the employment relationship between WSF and its employees. It has the experience and expertise to develop the facts and resolve any disputes that arise out of the operation of the ferry system. It provides a more efficient process because the MEC already understands the collective bargaining agreements and the complicated scheduling and compensation system. Plaintiffs endanger the MEC's autonomy by ignoring its authority and procedures, as well as violate the legislature's intent in establishing the MEC to govern the labor relations of the ferry system.

The legislature declared the public policy behind the creation of the MEC to be to, among other things, "promote harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively" and "promote just and fair compensation, benefits, and working conditions for ferry system employees as compared with public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia in directly comparable but not necessarily identical positions." RCW 47.64.006. Allowing plaintiffs to disregard the collective bargaining process and the MEC's procedures for hearing

disputes would contravene the legislature's stated policy of promoting harmonious and cooperative relationships between labor and management. Plaintiffs' claim also contravenes the legislature's policy regarding promoting just and fair compensation as compared with other employees doing comparable work because the MEC performs salary surveys that the parties can use to guide their collective bargaining. RCW 47.64.220. Thus, the MEC is in the best position to determine whether the plaintiffs' compensation is fair and just.

As in *Hill v. Dep't of Transportation*, 76 Wn. App. 631, 887 P.2d 476 (1995), the Court should find that the plaintiffs failed to exhaust their administrative remedies. In *Hill*, the plaintiff worked as a seaman on Washington state ferries. He was a member of the Inland Boatmen's Union and subject to a collective bargaining agreement. Mr. Hill sued for negligence and unseaworthiness, constructive discharge, and declaratory relief based on adverse effects he claimed to experience from the rotating shift schedule. On the employment law-based constructive discharge claim, the court held that his claim arose out of the operation of the ferry system and, therefore, he was obligated to pursue his statutory remedies under RCW 47.64. The court determined that according to the plain language of RCW 47.64.150, a ferry employee must pursue a grievance through the grievance procedures in the collective bargaining agreement

unless no procedures are provided. Even if Mr. Hill's claim was not a grievance, the Court ruled that he was still required to pursue a remedy from the MEC before seeking a remedy at law because he had a dispute that arose out of the operation of the ferry system under RCW 47.64.280(2) and the MEC had authority to address his claim.<sup>7</sup>

Plaintiffs' claim for additional compensation for watch relief arises out of the operation of the ferry system. Therefore, they were required to at least grieve their complaint under the collective bargaining agreements before seeking a judicial remedy.

**C. The Collective Bargaining Agreements Do Not Grant A Right To Compensation For Watch Turnover, And The Plaintiffs Are Not Covered Under The MWA; Therefore, DOT Did Not Violate RCW 49.52.050 Because There Is No Statute Or Contract Under Which Wages Are Owed.**

**1. Recovery of wages and double damages under RCW 49.52.050 and .070 is a remedy for an employer's criminal act of willfully and intentionally depriving an employee of wages the employer is obligated to pay.**

Plaintiffs argued to the trial court that, notwithstanding the collective bargaining agreements, they were entitled to additional compensation for time spent outside of their scheduled watch engaging in

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<sup>7</sup> Plaintiffs may argue that their union, MEBA, would not grieve this issue for them. That itself is very telling. If their bargaining representative does not think that this is an issue of dispute, then that should evidence the parties' intent regarding the collective bargaining agreements. If plaintiffs disagree with the union, then that is an issue to be resolved between the union and its members.

watch turnover. They based their claim on the wage recovery statutes RCW 49.48.010 and RCW 49.52.<sup>8</sup>

RCW 49.52.050(2) makes it a misdemeanor for an employer to “willfully and with intent to deprive” the employee of a wage that is lower than the wage the employer is obligated to pay by “statute, ordinance, or contract.” [Emphasis added.] In other words, the law prohibits employers from willfully and intentionally withholding wages due. *Dickens v. Alliance Analytical Laboratories, L.L.C.*, 127 Wn. App. 433, 435, 111 P.3d 889 (2005). An employer commits a criminal act under RCW 49.52.050 when it willfully and intentionally deprives employees of wages that it owes them. The civil penalty for this criminal act is the assessment of double damages and attorneys fees against the employer. RCW 49.52.070.

Under RCW 49.52.050, wages are defined expressly by the context in which they are owed, *i.e.*, statute, ordinance or contract. Liability under RCW 49.52.050(2) is only possible if the employer has a pre-existing duty under a contract or statute to pay a specific compensation. *Hemming v.*

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<sup>8</sup> Plaintiffs abandoned their claim under RCW 49.48.010 and obtained judgment under RCW 49.52. DOT refers the Court to pp 14-18 of Defendant’s Response to Plaintiffs’ Motion for Partial Summary Judgment filed October 28, 2005, CP 435-39, and pp 12-18 of Defendant’s Motion for Summary Judgment filed December 9, 2005, CP 619-625, for the analysis of RCW 49.48.010 and why it does not provide any relief for plaintiffs.

*Tidyman's, Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002); *Allstot v. Edwards*, 114 Wn. App. 625, 634, 60 P.3d 601 (2002).

For employment covered by the MWA, RCW 49.46 is the statute providing the employer's obligation to pay. Where the employment is governed not by the MWA, but by contract, the contract provides the obligation to pay wages. Plaintiffs are attempting to use the definition of wages under the MWA and, therefore, the obligation under that statute to pay wages, for employment governed by a collective bargaining agreement. This results in an improper expansion of wages beyond that negotiated. An employer is entitled to rely on the negotiated agreement and pay only what has been negotiated where no applicable statute provides otherwise. Wages recoverable under RCW 49.52 by employees not subject to the MWA can only be wages owing under their collective bargaining agreement.

**2. The plain language of WAC 296-126-002(8) defining "hours worked" does not confer a substantive right to wages.**

Plaintiffs acknowledge that there is no statute or contract requiring additional compensation for watch relief. However, plaintiffs rely on a DLI regulation defining "hours worked". WAC 296-126-002(8). Plaintiffs cite *Seattle Professional Engineering Employees Ass'n (SPEEA) v. Boeing*, 139 Wn.2d 824, 991 P.2d 1126 (2000), and *Wingert v. Yellow*

*Freight Systems*, 146 Wn.2d 841, 50 P.3d 256 (2002), as authority for the proposition that this regulatory definition requires the plaintiffs be paid additional compensation for watch turnover, notwithstanding the terms of their collective bargaining agreements.

The definitions section of a WAC chapter defines the terms used in that chapter to help in the understanding of the rules. By their very nature, definitions do not confer substantive rights. In the case of the definition of “hours worked”, the term is used in chapter 296-126 and chapter 296-128. The regulations in chapter 296-126 that use the term “hours worked” do not use it in the sense of a requirement that the employee be paid for all hours worked. It is used in a neutral and descriptive way, not a prescriptive way that directs that wages be paid. *See, e.g.*, WAC 296-126-021 (Minimum wages – Commissions and piecework); 296-126-030 (Adjustments for overpayments); 296-126-050 (Employment records); 296-126-092 (Meal periods – Rest periods).

As the term is used in WAC 296-128, which is the WAC chapter implementing the MWA, the term “hours worked” is specifically in reference to employment covered by the MWA. To the extent “hours worked” creates a right to wages under this chapter, it does so only in the context of the MWA requirement that employees receive a minimum rate of pay for every hour of work. Because plaintiffs are not covered by the

MWA, WAC 296-128 does not apply to them. Accordingly, neither can the term “hours worked.”

Significantly, the term is also used in the regulations that describe the “white collar” exemptions from the MWA. WAC 296-128-500 to -540. It is used to apply the percentage test with respect to which duties are performed during the hours worked to determine whether the employee performs enough exempt work. But, employees exempt from the MWA under these regulations are not paid based on the quantity of hours worked, but are paid a set salary for the job regardless of the number of hours worked in a workweek. Given this context of its use, to determine an exemption from the MWA, the mere definition of “hours worked” cannot be interpreted to be a requirement that any employee be paid for all “hours worked”, regardless of whether they are exempt from the MWA.

**3. *SPEEA* did not hold that MWA-exempt employees are entitled to receive additional compensation for activities not subject to such compensation under their collective bargaining agreement.**

Plaintiffs argued that the *SPEEA* case holds that employees not covered by the MWA, but covered by a collective bargaining agreement, have a cause of action under RCW 49.52 for wages for time allegedly worked that is not compensable under the collective bargaining agreement.

*SPEEA* does not stand for the proposition for which plaintiffs seek to use it.

The plaintiffs in *SPEEA* brought a claim under the MWA for additional compensation for time spent in pre-employment orientation. Some of the plaintiffs were covered by the MWA and some were not. The Court found that the measure of the compensation owed the employees covered by the MWA was the minimum wage, not their regular rate of pay, because that is all the MWA requires.

The Court then found that the employees that were exempt from the MWA were not entitled to relief under the MWA. The Court suggested that those employees might have been able to pursue a remedy under RCW 49.52, based on the language of the contract. “As previously noted, RCW 49.52.050 and .070, not the WMWA, provide the statutory remedy for unpaid wages owing under a contract.” *SPEEA*, 139 Wn.2d at 835 (emphasis added). If the contract did not support a right to wages, however, then pursuant to the plain language of RCW 49.52.050, their claim would fail, because there would be no entitlement to wages under a statute, ordinance or contract. Contrary to plaintiffs’ position, *SPEEA* does not hold that any employee exempt from the MWA is entitled to seek additional wages under RCW 49.52 when the collective bargaining agreement does not provide for the compensation sought.

Moreover, there was no claim or issue before the *SPEEA* Court regarding RCW 49.52. The Court's suggestion that employees exempt from the MWA might have had a claim under RCW 49.52 had no bearing on the decision that was rendered and was, therefore, dicta. *In re Marriage of Rideout*, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003). "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *State v. Potter*, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992). Dicta has no precedential value and is not binding on a court. *See Ass'n of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005); *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 530-31, 79 P.3d 1154 (2003).

Plaintiffs have taken what is essentially a digression by the Court in *SPEEA* and elevated it to the primary holding in the case. They read too much into *SPEEA* and this Court should put the case into perspective and read it for what it is.

4. ***Wingert* did not hold that the definition of "hours worked" in WAC 296-126-002(8) is a substantive regulation enforceable by MWA-exempt employees to**

**obtain compensation in addition to the compensation they are owed under their collective bargaining agreements.**

In *Wingert*, the Court found that a DLI regulation mandating rest periods for employees fell within the criterion of RCW 49.52.050(2) that an employer have an obligation to pay pursuant to a statute, ordinance, or contract, because substantive agency regulations have the force and effect of law. *Wingert*, 146 Wn.2d at 848.

The plaintiffs argued that the case means that they are entitled to recover additional wages under RCW 49.52.050 because the definition of “hours worked” is a “statute, ordinance or contract” that entitles them to be paid for watch turnover.

Plaintiffs misconstrue *Wingert*. The employees in *Wingert* were subject to the MWA. Plaintiffs are not. Further, the regulations at issue are different. In *Wingert* the regulation sought to be enforced against the employer as a wage violation was the DLI regulation mandating rest periods. The Court called this a “substantive” regulation that fell within the ambit of RCW 49.52.050(2). It was substantive because it created an enforceable right in employees covered by the MWA. *Wingert*, 146 Wn.2d at 850. The regulation plaintiffs rely on to allege a wage violation is definitional, not substantive. As discussed above, the definition of “hours worked” does not create a substantive right that is enforceable in

and of itself. There is nothing in the wording of the definition of “hours worked” that can be construed to impose an obligation to pay any wage at all.<sup>9</sup>

The Court should not expand *Wingert* to a situation involving employees exempt from the MWA, and essentially amend the collective bargaining agreements and defeat the parties’ contractual expectations.

**5. DLI regulations under the Industrial Welfare Act do not apply to ferry system employees.**

Plaintiffs also maintain that DLI regulations impose liability on WSF under RCW 49.52.050(2) even though the wage and hour statutes and the regulations thereunder do not apply to WSF. RCW 49.12.005(3)(b) of the Industrial Welfare Act (IWA) provides:

However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule[.]

WAC 296-126-001 provides:

These standards, adopted pursuant to the authority of chapter 49.12 RCW as amended by chapter 16, Laws of 1973 2nd ex. sess., shall apply to any person employed in

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<sup>9</sup> Although *Wingert* is inapplicable to the case at bar, it bears noting that the conclusion that a regulation is a “statute, ordinance, or contract” under RCW 49.52.050 is not supported by principles of statutory construction. As the dissent correctly points out, if a statute is clear and unambiguous, its meaning must be derived solely from the statutory language. See *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). RCW 49.52.050(2) plainly says “statute, ordinance, or contract.” A regulation is not a statute, ordinance, or contract. A court may not add words to an unambiguous statute when the legislature chose not to include that language. *Delgado*, 148 Wn.2d at 727.

any industry or occupation within the state of Washington,  
unless:

...  
(4) Such person is an employee of the state or any political subdivision, or municipal corporation to the extent that these rules conflict with any statute, rule or regulation adopted under the authority of the appropriate legislative body.

In the statutory definition of employers covered by the IWA and the regulation defining the applicability of DLI's rules in WAC 296-126, the legislature and DLI recognize that to the extent state employees are governed by other statutes or rules that conflict with the IWA and DLI's rules, they are not subject to the IWA or DLI's rules. Plaintiffs are just such employees subject to a different statutory scheme - RCW 47.64 - that conflicts with the IWA and the DLI regulations thereunder.

The legislature adopted RCW 47.64 to govern the employment relationship between WSF and its employees. This statutory scheme conflicts with the IWA and DLI rules because it requires WSF and employee organizations to collectively bargain all aspects of employment. A specific statute will apply over a more general one. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 128 P.3d 128, 130 (2006).

The provisions of the IWA and the DLI regulations cannot impose different obligations without violating the legislature's intent in RCW 47.64. Thus, the more specific RCW 47.64 and the collective bargaining

agreements thereunder supersede the more general DLI regulations under the IWA.

6. **For the exemption from MWA to be meaningful, the Court must conclude that plaintiffs are not entitled to additional compensation based on the DLI regulation defining “hours worked.”**

Plaintiffs are not covered by the MWA. RCW 49.46.010(5)(m). The only statutory requirement that an individual receive wages for all hours worked is in the MWA. Individuals not covered by the MWA do not have a statutory right to an hourly wage, *i.e.*, wages for hours worked.

Individuals not covered by the MWA must enter into employment agreements and bargain for wages and the hours of work for which wages will be paid. RCW 49.52 is a mechanism by which employees can enforce their statutory right under the MWA or their contract rights under their employment agreement. RCW 49.52 cannot be used to enforce a DLI regulation defining “hours worked” when there is a collective bargaining agreement in place that defines hours of work.

The exemption from the MWA avoids conflict with the more specific statute governing ferry employees and the ability of ferry employees to negotiate the deal that best serves their interests. The legislature could not have intended that MWA-exempt employees be able to seek additional wages not provided by their employment agreements by

virtue of a regulation adopted to define “hours worked” for purposes of the MWA. This would create an immense loophole in the statutory scheme – an elephant hiding in a mousehole – that the legislature surely did not intend. *See Gonzales v. Oregon*, 126 S. Ct. 904, 921, 163 L. Ed. 2d 748 (2006), quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes.”).

**D. DOT Has Not Willfully And Intentionally Deprived Plaintiffs Of Any Wages Owed Under RCW 49.52 Because A Bona Fide Dispute Exists.**

Even if the DLI definition of “hours worked” in WAC 296-126-002(8) can be construed as imposing an obligation on the WSF to compensate plaintiffs for watch turnover, contrary to the negotiated terms of the collective bargaining agreements, DOT cannot be liable under RCW 49.52.050 and .070 because it has not acted willfully to deprive plaintiffs of wages owed.

RCW 49.52.050 requires that the employer have withheld wages willfully. Civil liability for double damages under RCW 49.52.070 is premised on a finding of criminal liability under RCW 49.52.050.

There must be affirmative evidence of an intent to deprive the employee of wages to establish liability under RCW 49.52.050. *Pope v. University of Washington*, 121 Wn.2d 479, 490-91, 852 P.2d 1055 (1994). The intent element is required because RCW 49.52.050 describes a criminal act.

Nonpayment of wages is willful and made with intent when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). If an employer has a “bona fide” or “genuine” belief that it is not obligated to pay alleged wages demanded by an employee, the employer has not acted willfully. *Ebling v. Gove’s Cove, Inc.*, 34 Wn. App. 495, 500-02, 663 P.2d 132 (1983); *McAnulty v. Snohomish Sch. Dist. No. 201*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973). A bona fide or genuine belief is one that is not “arbitrary and unreasonable.” *Ebling*, 34 Wn. App. at 500-02. A bona fide or genuine belief defeats liability under RCW 49.52 even if the belief was erroneous. *McAnulty*, 9 Wn. App. at 838.

Plaintiffs argue that *SPEEA* made it clear that plaintiffs were entitled to additional compensation for watch turnover such that there can be no bona fide dispute. In order for the Court to find that WSF acted willfully, it must find that *SPEEA* clearly established the right of MWA-

exempt employees to pursue claims under RCW 49.52 for wages the employer is not obligated to pay under the collective bargaining agreement. The Court must also find that, if *SPEEA* did in fact establish this principle, it should have been clear to the WSF when *SPEEA* was decided in 2000 that the wording of RCW 49.52.050, “statute, ordinance or contract,” also meant regulation, even though *Wingert* was not decided until 2002. The Court must also find that when *Wingert* was decided in 2002, it should have been clear to the WSF that a regulation defining “hours worked”, promulgated under the IWA, would apply to the WSF, even though the IWA as a whole did not apply to public employers until 2003, and the IWA still does not apply to those public employees subject to statutes that conflict with the IWA and its rules, such as RCW 47.64. See RCW 49.12.005(3)(b); *McGinnis v. State*, 152 Wn.2d 639, 99 P.3d 1240 (2004). It strains reason to suggest that the law had so clearly established that the plaintiffs were entitled to extra compensation for watch turnover that the WSF acted willfully when it paid plaintiffs according to the terms of the collective bargaining agreements.

The WSF has paid plaintiffs all compensation due under the collective bargaining agreements. WSF relied on its contracts and their terms regarding employee compensation. Thus, there is a bona fide dispute over whether the wages are truly owed in this case. Accordingly,

RCW 49.52.050 does not apply and there can be no liability for wages under that statute.

When there is no intent to deprive an employee of wages, the remedy for an employer's withholding of wages is either under the MWA, RCW 49.46.090, or the employee's written employment agreement. Plaintiffs are not subject to the MWA and their written employment agreement does not provide for compensation for watch turnover. Accordingly, plaintiffs are not entitled to compensation for watch turnover unless they bargain for it.

**E. Even If Watch Turnover Is Compensable, Plaintiffs Cannot Recover Because The Time Spent Relieving The Watches Is De Minimis.**

The Court may reverse the trial court on the independent ground that work-related activity is not compensable if the time spent on such activity is "de minimis." *Lindow v. United States*, 738 F.2d 1057 (9<sup>th</sup> Cir. 1984). The Court, however, need not reach this issue if it concludes that the WAC definition of "hours worked" does not create a right to wages contrary to the provisions of the collective bargaining agreements.

The *Lindow* case is factually similar to this one and directly on point. In *Lindow*, employees and former employees of the Army Corps of Engineers filed suit seeking to recover overtime compensation. *Lindow*, 738 F.2d at 1059. The plaintiffs worked as power plant operators, control

room operators and general foremen of eight hydroelectric dams located along the Columbia and Snake rivers. *Id.* They sought overtime compensation for 15 minutes of work per day for a period commencing 3 years prior to the filing of their lawsuit. *Id.* They alleged that the Corps required them to report to work 15 minutes before the start of their scheduled shifts to (1) review the log book regarding previous shift activities and plant conditions; (2) exchange information and clarify log entries with the employees leaving their shifts; (3) be available to relieve an outgoing employee who was operating the navigational locks at the time of the shift change; and (4) open and close project gates to gain entry to the dam projects. *Id.* The Corps did not compensate plaintiffs for this pre-shift work. *Id.* The evidence showed that it was the custom for plaintiffs to arrive early and spend about seven to eight minutes per day reading the log book and exchanging information. *Id.* at 1060.

The Ninth Circuit followed the general rule that employees cannot recover for otherwise compensable time if it is de minimis. *Id.* at 1062 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946)). Although there is no precise amount of time that may be denied compensation as de minimis, most courts have found daily periods of approximately 10 minutes de minimis as a matter of law even though otherwise compensable. *Lindow*, 738 F.2d at 1062. *See*,

*e.g.*, *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 564 (E.D. Tex. 2001); *E.I. Du Pont De Nemours & Co. v. Harrup*, 227 F.2d 133, 135-36 (4th Cir. 1955) (10 minutes); *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949) ("obvious" that 10 minutes is de minimis); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (2 to 15 minutes), *aff'd*, 463 F.2d 1289 (D.C. Cir.), *cert. denied*, 409 U.S. 1012 (1972). *See also Hodgson v. Katz & Besthoff, No. 38, Inc.*, 365 F. Supp. 1193, 1197 n. 3 (W.D. La. 1973) (summary of de minimis holdings).

The evidence in this case most favorable to the plaintiffs showed that watch turnover does not take more than an average of just under seven minutes – far less than the ten minute standard under the case law.<sup>10</sup> CP 526, 721-26.

In addition, WSF has no ability to monitor the watch changes because the engine room staff are the only ones present during the watch turnover. Plaintiffs are not required to report to work early to conduct a watch turnover, but it is the custom to do so. Given the variability in the amount and type of information that may be exchanged on any given day,

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<sup>10</sup> WSF port engineers testified that watch relief should not take more than three or four minutes. CP 696, 739, 743. However, for purposes of this brief, DOT is using plaintiffs' data. If the Court determines that the time is not de minimis as a matter of law, the testimony of WSF's witnesses raises a question of disputed material fact that should be decided by the jury at trial.

the human component of individual styles and preferences of the employees in the manner in which watch change is conducted, as well as the amount of time that may be spent in social interaction as opposed to actual work-related exchange of information, the amount of time spent is uncertain and unpredictable. Although there are no Washington cases on the subject of de minimis work time, under persuasive Ninth Circuit precedent, the Court should find that the watch relief time at issue in this case is de minimis as a matter of law and not compensable.

#### VIII. CONCLUSION

Based on the foregoing, DOT respectfully requests that the Court reverse the trial court's judgment and grant summary judgment in favor of DOT.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of June, 2006.

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STATE OF WASHINGTON

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NO. 34352-5-II

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON,  
DEPARTMENT OF  
TRANSPORTATION,

Appellant,

v.

BEN DAVIS, FLOYD FULMER,  
ROY HYETT, DICK OLSON, et  
al.,

Respondents.

CERTIFICATE OF  
SERVICE

I certify that I served a copy of Appellant's Brief on all  
parties or their counsel of record on June 12, 2006 as  
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12<sup>th</sup> day of June, 2006 at Olympia,

WA.

  
TIA J BERTRAND



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