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COURT OF APPEALS
DIVISION II

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NO. 43865-8-II
STATE OF WASHINGTON
BY 
DEPUTY

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

DOUGLAS MERINO and KAY MERINO, husband and wife and the
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and ITS AGENCIES; THE
WASHINGTON STATE DEPARTMENT OF RETIREMENT
SYSTEMS; THE WASHINGTON STATE PATROL and JOHN R.
BATISTE, Chief Thereof, and DAVID J. KARNITZ, Deputy Chief
Thereof,

Respondents.

**DEFENDANTS' RESPONSE TO SUPPLEMENTAL BRIEF OF
DOUGLAS AND KAY MERINO, APPELLANTS**

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I. INTRODUCTION

The Merinos ask to supplement their brief to permit the court to award them wage-related attorney's fees under Chapter 49.48 RCW. There are two possible rationales for the application of the wage statute here: that Mr. Merino was receiving wages in his position as a disabled State Patrol officer, or that he was the recipient of a vested benefit that could be treated like wages.

The Merinos cannot base application of the wage statute on the former because it would constitute an admission that would prevent the Merinos from prevailing in their appeal. The Merinos are not capable of establishing it is the latter for reasons that have already been demonstrated in the State's response brief. In either event, supplementation is improper.

II. LEGAL ARGUMENT

A. Mr. Merino Received Wages

The State will gladly accept the addition of the wage statute if the Merinos are conceding that Mr. Merino was receiving wages. Since the statute is designed to award fees to plaintiffs who have been deprived of wages, and by statute Mr. Merino was being paid wages by the State Patrol while on disability up to the point of his termination¹, the

¹ Again: "(2)(a) Officers on disability status shall receive one-half of their compensation at the existing wage, during the time the disability continues in effect, less any compensation received through the department of labor and industries. They shall be

application of the statute would be self-evident, and the State would have no alternative but to accept supplementation and argue the question of Chapter 49.48 RCW fees.

By making this argument, however, the Merinos would be conceding the basic legal question posed by the Merinos' appeal. The Merinos argue that Mr. Merino was entitled to receive disability payments regardless of his termination. The State's argument is that he is not so entitled because the statute clearly describes those payments as wages, and he was not entitled to receive wages if terminated.² Acknowledging that the payments were actually wages would require this court to summarily affirm the Superior Court's decision.

B. Contingent Benefits Are Not Wages

The Merinos' alternative path to the wage statute is to demonstrate that Mr. Merino received benefits that can be classified as wages under RCW 49.48.030. This, presumably, is the reason for the Merinos' citation to *Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (Div. 3 2002). In *Bates* the appellate court accepted pension benefits as being

subject to mental or physical examination at any state institution or otherwise under the direction of the chief of the patrol at any time during such relief from duty to ascertain whether or not they are able to resume active duty." RCW 43.43.040.

² It seems unlikely that the Merinos are adopting a Pyrrhic stance that the State's theory of the case should be adopted solely for the purpose of arguing attorney's fees should be applied here.

statutorily sufficient to be classified as wages for RCW 49.48 and permitted the imposition of attorney's fees.

The flaw in this argument for the Merinos is the assumption that the pension benefit given to the plaintiffs in *Bates* is indistinguishable from the disability benefit provided to Mr. Merino. The Merinos disregard any conceptual difference in a pension benefit and a disability benefit in doing so.

The plaintiffs in *Bates* were denied pension benefits and pension benefits are vested. As was argued at length in the State's response brief, the disability benefit received by Mr. Merino was not vested. See Respondent's Brief at 16-21.³ While the wage statute is indisputably broadly construed to permit most payments received as a consequence of working to be classified as "wages" under the statute, contingent benefits are not treated as wages for purposes of RCW 49.48.030. *Teamsters v. Northwest Beverages, Inc.*, 95 Wn. App. 767, 976 P.2d 1262 (Div. 1 1999).

The Merinos' reliance on *Bates* further demonstrates the weak foundations upon which their appeal is based. *Bates* arises out of a dispute

³ The Merinos continue to rely on the inapplicable vesting arguments made in the context of LEOFF cases, which functionally merge disability and pension benefits, and ignores the contractual nature of when a benefit vests, as described in *Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972). The proper analytical method is to look to the terms of the contract rather than to presume all benefits of a certain type are vested regardless of the contractual language.

under 41.26 RCW, the Law Enforcement Officers and Fire Fighters (LEOFF) retirement system. As argued in the State's opening brief, the courts have conclusively rejected attempts to interpret or alter the Washington State Patrol disability and retirement statute with other systems, such as LEOFF. As stated in *Callecod v. WSP*:

“(t)he Washington State Patrol’s disability requirements are governed by an exclusive statute and regulations that are not tied by analogy or otherwise to the LEOFF system or to any earlier Washington police disability statute.”

Callecod v. WSP, 84 Wn. App. 663, 672, 929 P.2d 510 (Div. 1 1997), review denied 132 Wn.2d 1004, 939 P.2d 215 (1997).

The Merinos pretend that this statement is ambiguous. It clearly is not. It rejects the general conceptual principal of this appeal, which would imbue the State Patrol system with the same functional requirements as LEOFF despite clear statutory language in the State Patrol statute to the contrary. *Callecod* further rejects the specific sort of argument made here, where a plaintiff is attempting to classify a benefit as vested and wage related under RCW 49.48 simply because a case arising out of LEOFF system says it does.

Callecod prevents the courts from looking at each benefit case as indistinguishable, and, at least in State Patrol cases, demands that the court examine the terms of Chapter 43.43 RCW itself. The Merinos repeatedly

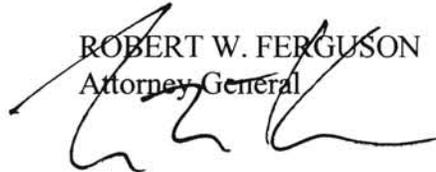
ignore this admonition – including here, in this motion – and ask the court to rule that the State Patrol statute functions in the same manner as LEOFF. The State Patrol statute does not support the conclusion drawn by the Merinos in this case that the benefit was vested and consequently constitutes wages under RCW 49.48.

III. CONCLUSION

Absent acknowledgment by the Merinos that Mr. Merino was receiving wages as per the plain language of the statute, RCW 49.48.030 does not apply to this matter. The Merinos' motion to supplement should be denied.

RESPECTFULLY SUBMITTED this 3rd day of June, 2013.

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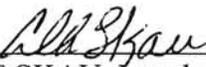
PROOF OF SERVICE

I certify that I had served a copy of Defendants' Response to Supplemental Brief of Douglas and Kay Merino, on appellant's counsel of record on the date below by e-mail and U.S. Mail, postage prepaid, to the Merinos' counsel of record:

Hans Johnson
6513 132nd Avenue NE, #348
Kirkland, WA 98033-8628

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

DATED this 3rd day of June, 2013, at Tacoma, Washington.



CORIE SKAU, Legal Assistant