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No. 58809-5
King County Superior Court Case No. 04-2-40865-2 SEA

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 DEC -4 PM 3:30

Appellants Brief

KRISTI WILSON AND SHEREE WRIGHT-COX,
Plaintiffs/Appellants,

v.

CITY OF REDMOND, a political subdivision of the
State of Washington, Defendant/Respondent.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in entering the order of February 13, 2006, partially granting defendant's motion for summary judgment on plaintiffs' first cause of action arising under the Washington Minimum Wage Act, RCW Ch. 49.46. The standard of review for this error is de novo.

2. The trial court erred in entering the order of February 13, 2006, partially granting defendant's motion for summary judgment on plaintiffs' third cause of action arising under the Wage Rebate Act, RCW Ch. 49.52. The standard of review for this error is de novo.

3. The trial court erred in entering its July 7, 2006, Findings of Fact and Conclusions of Law and dismissing plaintiffs' second cause of action arising under the Wage Payment Act, RCW Ch. 49.48. The standard of review for this error is de novo.

B. Issues Pertaining to Assignments of Error.

1. Whether WAC 296-128-035, which requires employers to pay "all wages due" on "established regular pay days," imposes an obligation on employers to make timely payment to employees of a retroactive wage increase required by an interest arbitration award issued in accordance with RCW 41.56.450?

2. If an employer delays payment of a retroactive wage increase despite the passage of five intervening paydays between the receipt of an interest arbitration award and final payment of the wage increase, does there exist a violation of WAC 296-128-035 that is enforceable through the civil enforcement provisions in the Washington Minimum Wage Act, RCW Ch. 49.46?

3. Whether a willful violation of WAC 296-128-035 is enforceable through the civil enforcement provisions in the Wage Rebate Act, RCW Ch. 49.52 and whether questions of fact sufficient to preclude summary judgment exist as to the defendant City of Redmond's alleged willfulness in delaying payment of the retroactive wage increase?

4. If an employer delays payment of a retroactive wage increase despite the passage of five intervening paydays between the receipt of an interest arbitration award and final payment of the wage increase, does the Wage Payment Act, RCW Ch. 49.48 permit an award of damages, interest, and attorney's fees?

II. STATEMENT OF THE CASE

A. Factual Background.

Plaintiff-Appellants were employed by the Defendant City of Redmond ("Defendant") as "uniformed personnel" (police officers). Clerk's Papers ("CP") at 383. In this capacity, Plaintiffs were

represented for purposes of collective bargaining by the Redmond Police Association (“RPA”). CP at 383.

The RPA and the City participated in negotiations for a January 1, 2002 through December 31, 2004 collective bargaining agreement between RPA and the City. CP 6. The collective bargaining agreement was to be a successor to a January 1, 2001 through December 31, 2001 collective bargaining agreement between the RPA and the City and was to set forth the wages, hours, and other terms and conditions of employment for the Plaintiffs. CP 384.

The City and the RPA were unable to reach agreement on the terms of a January 1, 2002 through December 31, 2004 collective bargaining agreement. CP 384. The dispute over the unresolved issues between the RPA and the City (the terms of the January 1, 2002 through December 31, 2004 collective bargaining agreement) was submitted to “interest arbitration” in accordance with RCW 41.56.450. CP 384.

On March 3, 2004, arbitrator Jane Wilkinson issued an award providing for, among other things: (a) a wage increase of 3.51% retroactive to January 1, 2002, (b) a wage increase equal to 100% of the percentage change in the Consumer Price Index (“CPI”) retroactive to January 1, 2003, and (c) a wage increase equal to 100% of the percentage change in the CPI retroactive to January 1, 2004. CP 446-

487. The parties received Arbitrator Wilkinson's award on March 5, 2004. CP 384.

Subsequent to receiving Arbitrator Wilkinson's award, attorneys for the City and the RPA exchanged a series of e-mails. CP 387. The substance of these emails addressed incorporating the arbitration award into the language of the collective bargaining agreement and the implementation of the arbitrator's award. CP 387. In this regard, the RPA's position throughout the email exchange (during the months of March and April, 2004) was that payment of the retroactive wage award should occur as quickly as possible. CP 387.

Despite the RPA's requests for timely payment of the retroactive wage payment, five intervening paydays (approximately two months) passed between the receipt of the arbitrator's award and the payment of wages required by that award. CP 387. On May 25, 2004, the City finally paid RPA members for the retroactive wages owed under the March 3 arbitration award. The City's delay in paying the retroactive wage increase resulted in this litigation.

B. Procedural History.

On December 29, 2004, Plaintiffs filed the complaint based on the delayed payment of the retroactive wage increase. The complaint seeks damages arising out of violations of Washington's Minimum Wage Act, RCW Ch. 49.46, and Wage Payment Act, RCW Ch. 49.48, as interpreted by the Department of Labor and Industries in WAC 296-

128-035. Plaintiffs' complaint seeks damages, costs, attorneys' fees, and prejudgment interest in accordance with the civil enforcement provisions in the Minimum Wage Act, RCW 49.46.090, the Wage Payment Act, RCW 49.48.030, and the Wage Rebate Act, RCW 49.52.070. CP 1-9.

On July 27, 2005, defendant moved for summary judgment on Plaintiffs' claims and, after supplemental briefing by the parties, the Court entered an Order dated February 13, 2006, granting defendant's motion in part, but denying defendant's motion as a matter of law as to Plaintiffs' claims arising under the Wage Payment Act, RCW Ch. 49.48. The trial court dismissed Plaintiffs' claims arising under the Minimum Wage Act, RCW Ch. 49.46, and Wage Rebate Act, RCW Ch. 49.52, with prejudice.

On June 19, 2006, Plaintiffs' second claim for relief was put before the trial court on stipulated facts and exhibits. Having previously dismissed Plaintiffs' first and third claims for relief, the trial court limited its fact finding and conclusions of law to a determination of the City's liability for interest and attorney's fees under Washington's Wage Payment Act, RCW Ch. 49.48. CP 593-596. On August 7, 2006, the trial court entered judgment in the City's favor and dismissed Plaintiffs' second claim for relief with prejudice. CP 593-596.

Plaintiffs filed their notice of appeal on September 1, 2006.

III. ARGUMENT

A. Standard of Review

At issue is the trial court's grant of summary judgment in favor of defendant as to Plaintiffs' statutory claims. In reviewing a summary determination, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

The Court reviews conclusions of law de novo. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). The meaning and proper application of a statute is a question of law that is reviewed de novo. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). A court's fundamental objective in interpreting a statute is to carry out the intent of the legislative body. *Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 245, 963 P.2d 907 (1998).

B. The Department of Labor & Industries Requires Employers Pay Employees All Wages, Including Retroactive Wage Awards, On Established Regular Pay Days.

Washington's Minimum Wage Act ("MWA"), RCW Ch. 49.46, sets forth a statutory minimum wage and further specifies conditions

under which other wages must be paid to employees. *See* RCW 49.46.020; 49.46.130. The MWA authorizes Washington's Department of Labor & Industry ("DLI") to "prescribe by regulation as necessary or appropriate for the enforcement of the provisions of [RCW Ch. 49.46] or the regulations thereunder." RCW 49.46.040.

In 1989, the DLI adopted WAC 296-128-035 in accordance with the authority granted by the MWA. *See* Wash. St. Reg. 89-22-016 (Oct. 24, 1989). WAC 296-128-035 describes when wage payments become due and provides in full:

All wages due shall be paid at no longer than monthly intervals to each employee on established regular pay days. To facilitate bookkeeping, an employer may implement a regular payroll system in which wages from up to seven days before pay day may be withheld from the pay period covered and included in the next pay period.

WAC 296-128-035.

"Wages," as that term is used in the regulation, encompasses all "compensation due to an employee by reason of employment." *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988) (citing RCW 49.46.010(2)). Under this definition, the term "wages" has specifically been held to include retroactive wage awards entered pursuant to an interest arbitration proceeding. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 857, 861, 93 P.3d 108 (2004).

In *Hisle*, the employees were covered by a collective bargaining agreement with the employer and the parties referred a dispute over

the terms of a successor collective bargaining agreement to an arbitrator. As part of his award, the arbitrator awarded the employees a one-time retroactive pay increase. *See* 151 Wn.2d at 857. At issue in *Hisle*, was the employer's decision to calculate the retroactive pay award at a rate of \$0.60 per hour without regard to whether the hours worked were regular or overtime. The employees sued for the employer's failure to compensate overtime hours at time and one-half in violation of the MWA. The defendant argued that the MWA did not apply to retroactive wage payments. *Id.* at 859-60. On appeal, the Court concluded that "the overtime provisions of the MWA apply to the retroactive payment contained in the CBA" *Id.* at 861.

While *Hisle* addressed only the *amount* of wages due an employee, the court's conclusion that retroactive pay awards are in fact "wages" supports Plaintiffs' claim based on the unlawful *manner* and *method* in which those wages were paid by Defendant in this case. Arbitrator Wilkinson's March 3, 2004, arbitration award required the City to make a retroactive wage payment to Plaintiffs. Because the retroactive wage payments at issue were not paid in accordance with the requirements of WAC 296-128-035, Plaintiffs are entitled to recover monetary damages occasioned by the delay.

C. Plaintiffs Possess a Statutory Remedy For the Delayed Payment of Retroactive Wages Arising Under The Minimum Wage Act, RCW Ch. 49.46.

The trial court erred when it dismissed Plaintiffs' claims arising under the Minimum Wage Act, RCW Ch. 49.46. For at least two reasons, the civil enforcement provisions of the Minimum Wage Act clearly provide for an award of damages in the case of a violation of the time-of-payment provisions in WAC 296-128-035.

First, in Washington "properly promulgated, substantive agency regulations have the force and effect of law." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002). That is, WAC regulations are to be considered substantive statutes, enforceable through the civil enforcement provisions of the enacting statute. *Id.*

In *Wingert*, employees brought suit alleging that their employer violated WAC 296-128-092(4) by requiring them to work longer than three consecutive hours without a paid rest period. *See* 146 Wn.2d at 846. The employees sought back wages for the rest periods during which they were required to work and an award of attorney fees and costs pursuant to the Wage Rebate Act, RCW 49.52.070. The defendant asserted in relevant part that RCW Ch. 49.12, the statute under which WAC 296-128-092(4) was adopted, does not create a civil cause of action for a breach of the administrative regulation. The Court held in part that the employees had an implied cause of action

under the enabling statute, RCW Ch. 49.12, based on the regulatory violation. *Id.* at 849-50.

Here, like in *Wingert*, Plaintiffs' claims arise out of the violation of a regulation promulgated by the DLI. Defendant's failure to pay Plaintiffs the retroactive wage payments in the time called for by WAC 296-128-035 constitutes a violation of the regulation for which the legislature has provided a statutory remedy in the Minimum Wage Act. The regulation, WAC 296-128-035, was promulgated on the basis of the statutory authority granted in RCW 49.46.040. As such, violations of the regulation are redressable through the MWA and the trial court's decision to the contrary was in error.

Second, the MWA makes clear that violations of regulations promulgated under the authority of the MWA are enforceable through the MWA. Specifically, RCW 49.46.090 provides a remedy to employees where an employer "pays an employee less than wages to which such employee is entitled under *or by virtue of this chapter.*" RCW 49.46.090 (emphasis added). The time of payment requirements in WAC 296-128-035 arise "by virtue of" the MWA, RCW 49.46.040.

The remedy requested in Plaintiffs' Complaint tracks the civil enforcement provisions in RCW 49.46.090 in as much as Plaintiffs seek recovery of monetary damages for Defendant's violation of WAC 296-128-035. The trial court erred in concluding no such remedy exists. When an employer delays payment of a retroactive wage

increase by withholding the wages, despite the passage of five intervening paydays between the receipt of an interest arbitration award and final payment of the wage increase, that delay is in violation of the requirement that employers pay “all wages” in a timely manner.

At summary judgment, Defendant took the position that Plaintiffs do not possess a cause of action because the retroactive wage award was *eventually* paid. However, Defendant’s characterization of the regulation’s requirements is not supported by the law or the policy underlying the requirement for prompt wage payments.

While Defendant would like this Court to find that the eventual payment of wages that are due and owing waives an employee’s right to seek redress for a violation of WAC 296-128-035, such a finding would sanction the payment of wages at the employer’s whim, so long the wages are eventually paid. Taken to its logical extreme, Defendant’s view supports a conclusion that a payment of wages prior to commencement of a lawsuit, or perhaps even prior to a final judgment on an employee’s wage claim, bars any claim by the employee arising out of a violation of WAC 296-128-035. This result would be at odds with Washington’s “strong policy in favor of payment of wages due employees,” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998), and the state’s “long and proud history of being a pioneer in the protection of employee rights.”

International Ass'n of Fire Fighters v. City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002).

In accordance with the requirements of WAC 296-128-035, wages are not considered “paid” unless they are paid within the time provided for in the regulation. Treating the delayed payment of wages equivalent to a non-payment of wages is consistent with federal courts holdings under the Fair Labor Standards Act (“FLSA”) and its interpretive regulations.¹ The FLSA, like Washington’s MWA, requires in pertinent part that “no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee *receives* compensation for his employment” at the prescribed statutory rate. 29 U.S.C. § 207 (emphasis added). To satisfy the requirements of section 207, an employee must actually “receive” compensation and, according to *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), “wages are ‘unpaid’ unless they are paid on the employees’ regular payday.” *Id.* at 1543. In *Biggs*, the Court found that paying state employees 14 to 15 days after the regular payday was in violation

¹ WAC 296-128-035 had not been specifically addressed by Washington courts. In construing the provisions of Washington wage and hour laws, courts will often consider interpretations of similar requirements arising under the FLSA. *See, e.g., Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

of the FLSA's requirement for the prompt payment of wages. 1 F.3d at 1543.

Likewise, in *Brooks v. Village of Ridgefield Park*, 185 F.3d 130 (3d Cir. 1999), the court found that police officers' overtime compensation remain "unpaid" for purposes of an FLSA claim when it was accumulated and deferred (but eventually paid) for as much as six weeks after their regular payday. *Id.* at 136-37. Additionally, in *O'Brien v. Town of Agawam*, 350 F.3d 279, 298 (1st Cir. 2003), the court concluded the FLSA's time-of-payment requirement was violated even where the parties collective bargaining agreement provided for a different compensatory scheme. *Id.* at 297-98.

Defendant's interpretation of the regulation results in poor public policy insomuch as it permits an employer to delay the payment of any or all wages – by days, by weeks, by months, or by years – without the adversely impacted employees having any remedy under Washington's wage and hour laws and regulations, a result inconsistent with the letter and spirit of the law. *Accord Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wn. 290, 88 P. 212 (1907) (describing the postponement of payment as a "real evil"); *State v. Chehalis Furniture & Mfg. Co.*, 47 Wn. 378, 92 P. 227 (1907) ("the state wage and hour statutes were built on the policy that a delay in payment was just as detrimental to an employee as nonpayment"); *Brandt v. Impero*, 1 Wn. App. 678, 463 P.2d 197 (1969) (holding that

nonpayment, as well as unnecessary delay in payment, creates liability for double damages under RCW 49.52.050).

In summary, the trial court erred in concluding the Minimum Wage Act provides no remedy for a violation of the time-of-payment provisions in WAC 296-128-035 and dismissing Plaintiffs' first claim for relief on that basis.

D. Plaintiffs Possess a Statutory Remedy For the Delayed Payment of Retroactive Wages Arising Under The Wage Rebate Act, RCW Ch. 49.52.

Without regard to the factual question of whether Defendant "willfully" withheld Plaintiffs' wages, the trial court concluded that Plaintiffs were not entitled to pursue a claim under the Wage Rebate Act based on Defendant's delay in payment of the retroactive wage increase. This ruling was in error.

Washington's Wage Rebate Act, RCW 49.52 *et seq.*, supplements the MWA and mandates the payment of any wages arising under "statute, ordinance, or contract." RCW 49.52.050(2). The civil enforcement provisions in the Wage Rebate Act provide for an award of twice the amount of the wages unlawfully withheld upon a showing that the employer's actions were willful and with the intent to deprive the employee of any part of his wages. *Id.*; RCW 49.52.070.

The trial court dismissed Plaintiffs' claims brought under RCW 49.52.070 without reaching the factual question of whether the Defendant's violations of WAC 296-128-035 were willful. The trial

court's order finds, essentially, that the Wage Rebate Act does not provide a statutory remedy for Defendant's delay in paying the retroactive wage increase. As illustrated by the Supreme Court's decision in *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), the trial court's order is wrong on a number of levels.

In *Wingert*, after reviewing the plaintiffs' claims for damages arising out of the employer's violation of WAC 296-128-092, the Court held that "[a]lthough WAC 296-128-092 is a regulation and not a statute, RCW 49.52.050(2) is applicable in this case because 'properly promulgated, substantive agency regulations have the force and effect of law.'" *Id.* (citations omitted). The Court concluded that the employees had a claim arising under the Wage Rebate Act for violations of a wage and hour regulation. *Id.* at 849-50.

Here, Plaintiffs' claims arise out of the violation of a regulation promulgated by the DLI. The trial court's decision is fundamentally at odds with *Wingert* because, as expressed in *Wingert*, the Wage Payment Act, RCW 49.52.070, in fact permits a claim based on the violation of a wage and hour regulation. *See* 146 Wn.2d at 855 (Alexander, C.J., dissenting) ("The effect of the majority's decision is to rewrite [RCW 49.52.070] to include regulations").

Had the trial court not erred in dismissing Plaintiffs' claims under the Wage Rebate Act, Plaintiffs could have presented evidence indicative of Defendant's willful conduct sufficient to support an

award of double damages. To be entitled to an award of double damages under the Wage Rebate Act, RCW 49.52.070, an employer's failure to pay wages in the amount, method, and time required by substantive wage and hour laws and regulations must be done "willfully and with [the] intent to deprive" the employee of any part of his wages. Under Washington law, a nonpayment of wages is willful "when it is the result of a knowing and intentional action." *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986).

On remand, Plaintiffs will be able to establish that the delayed payment of the retroactive wage increase was done with full knowledge by the Defendant. Washington cases "indicate that there are two instances when an employer's failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and employee regarding the payment of wages." *Schilling*, 136 Wn.2d at 160. Neither exception is applicable in this case.

First, it cannot be said that Defendant was careless in failing to pay wages. "Carelessness" connotes "errors in bookkeeping or other conduct of an accidental character." *Schilling*, 136 Wn.2d at 161. In this case, Defendant admits receipt of the Arbitrator's Award and that it proceeded to calculate the wage payments due and owing under the Award. CP 387. There was no showing by Defendant that the three-

month delay in paying Plaintiffs the wages that were due and owing them was the result of carelessness.

Similarly, Defendant cannot argue that its failure to comply with WAC 296-128-035 was excused as a result of the inefficient administration of its payroll-processing department. Such a “lack of manpower” argument has been soundly rejected in other jurisdictions. See *Cahill v. City of New Brunswick*, 99 F. Supp. 2d 464, 475 (D.N.J. 2000) (“Mere bureaucratic inertia is no excuse for late payment or nonpayment of wages: ‘An employer may not set up an inefficient accounting procedure and then claim it is not responsible for timely payment of wages due to its own incompetence.’”) (quoting *Dominici v. Bd. of Educ.*, 881 F. Supp. 315, 320 (N.D. Ill. 1995)).

In short, the trial court’s erroneous dismissal of Plaintiffs’ claims under the Wage Rebate Act prevented Plaintiffs from presenting evidence relevant to the Defendant’s willful conduct. The trial court’s order must be reversed and the trier of fact permitted to determine whether the Defendant’s failure to timely compensate Plaintiffs was in fact a product of willful conduct.

E. Plaintiffs Possess a Statutory Remedy For the Delayed Payment of Retroactive Wages Arising Under The Wage Payment Act, RCW Ch. 49.48.

The trial court further erred in finding in Defendant’s favor on Plaintiffs’ claims arising under the Wage Payment Act, RCW Ch. 49.48. In the trial court’s July 10, 2006, Findings of Fact and

Conclusions of Law the court ruled that Plaintiffs' claims under the Wage Payment Act were foreclosed because both: (a) the interest arbitration award did not create an immediate obligation to pay; and (b) WAC 296-128-035 does not demand that the retroactive wage award be paid in a timely manner. CP 595. Therefore, according to the trial court, the civil enforcement remedies in the Wage Payment Act, including damages, interest, and attorney's fees, were inapplicable, as "RCW 49.48.030 does not create any entitlement by the employees to prejudgment interest or attorney fees under these facts." CP 595.

The substantive statute at issue, RCW 49.48.010, provides in relevant part:

It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

- (1) Required by state or federal law; or
- (2) Specifically agreed upon orally or in writing by the employee and employer; or
- (3) For medical, surgical or hospital care or service, pursuant to any rule or regulation"

RCW 49.48.010. Upon obtaining a judgment for a violation of RCW 49.48.010, the civil enforcement statute provides for an award of reasonable attorney's fees. RCW 49.48.030.

Although the Wage Payment Act contains no definition of "wages," courts have applied the definition contained in a related statute, RCW 49.46.010(2), which states: "[w]age' means

compensation due to an employee by reason of employment.” *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988). *See also, Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002). Using this definition, the term “wages” has specifically been held to include retroactive wage increases awarded in an interest arbitration proceeding. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 857, 861, 93 P.3d 108 (2004) (term “wages” in Washington’s Minimum Wage Act “applies to a collective bargaining agreement (CBA) containing a one-time retroactive payment”).

Here, the arbitration award issued by the interest arbitrator on March 3, 2004, included an award of retroactive wages for Plaintiffs. CP 446-487. As a result, the retroactive increase in wages ordered by interest arbitrator is “wages” for purposes of the Wage Payment Act, RCW 49.48.010.

Like the term “wages,” the Wage Payment Act does not define what constitutes unlawfully “withhold[ing] or divert[ing] any portion of an employee’s wages.” However, the DLI has been given concurrent administrative enforcement powers for claims of failure to pay wages. *See* RCW 49.48.040--48.070. Under DLI’s administrative rules, wages are unlawfully “withheld” if not paid within a reasonable time period. This reasonable time period is set forth in WAC 296-128-035 (the DLI’s time-of-payment regulation) wherein it states, “[a]ll

wages due shall be paid at no longer than monthly intervals to each employee on established regular pay days.”

In this case, Defendant unlawfully delayed payment of the retroactive wage increase ordered by the arbitrator on March 3, 2004 until May 25, 2004. Five intervening paydays passed between the receipt of the arbitration award and the payment of the wages required by that award. As a result, the City’s conduct in delaying payment until May 25, 2006 constituted a withholding of wages beyond the period allowed by the DLI’s time-of-payment regulation, WAC 296-128-035; and a violation of RCW 49.48.010.

When wrongfully withheld wages are paid late, as in the case of Defendant’s May 25, 2004 payment of the retroactive wage increase, the late payment does not absolve the employer of liability resulting from the wrongful withholding. That is, even if an employer eventually pays the wrongfully withheld amount, the fact remains that an employee subject to an unlawful withholding is still denied the use of the withheld moneys during the period of the withholding. As a result, such denial entitles the employee to recover pre-judgment interest for the unlawful delay in payment. *City of Moses Lake v. Int’l Assoc. of Firefighters, Local 2052*, 68 Wn. App. 742, 749, 847 P.2d 16 (1993); see also *Aguirre v. AT&T Wireless Servs.*, 118 Wn. App. 236, 241, 75 P.3d 603 (2003).

In *City of Moses Lake*, the City sought court review of an arbitration award increasing the salaries of the City's firefighters. The court ultimately found that the salary increase in the arbitration award was consistent with state law and concluded that, as of May 21, 1991, the date of the arbitration award, the City "was under a duty to raise the firefighters' salaries in the amount specified." The court further found that the City's decision to withhold payment and challenge the arbitration award in court amounted to a failure to raise the firefighters' salaries at the requisite time. The court then awarded prejudgment interest stating:

The purpose of awarding interest on a judgment is to compensate a party having the right to use money when it has been denied use of that money.

Id. at 749.

Here, much like in the *City of Moses Lake* case, the employer failed to abide by the terms of the arbitrator's award in the time required by the law. As a result, at a minimum, prejudgment interest is appropriate to compensate Plaintiffs for the unlawful withholding even though the retroactive wages were ultimately paid.

Under the Wage Payment Act, if a person is successful in recovering a judgment for wages owed to him, the court "shall" award reasonable attorney's fees. RCW 49.48.030. Washington courts have interpreted RCW 49.48.030 broadly and attorney's fees have been awarded for under RCW 49.48.030 whenever a judgment is obtained

for any type of compensation due by reason of employment. *See, e.g., Gaglihari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450-51, 815 P.2d 1362 (1991) (breach of employment agreement); *Naches Valley School Dist. v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (breach of labor contract); *Bates*, 112 Wn. App. 919 (recovery of pension benefits); *Hanson v. Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) (award of back pay).

In *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 120 P.3d 102 (2005), the court awarded attorney's fees incurred in determining the amount of interest owed to employees on a judgment for wrongful discharge. According to the court, "[e]stablishing the amount of interest due is part of determining the amount of recovery to which the party is entitled." *Id.* at 684. The Lindsay court determined that this should also be true of a statute that is aimed at compensating individuals who successfully bring wage and salary claims. As a result, "an interpretation of RCW 49.48.030 that allows a party who successfully obtains interest on money to which he or she is entitled to recover attorney fees is consistent with the broad, remedial purpose of the statute." *Id.*

Plaintiffs' third claim for relief alleges a violation of RCW 49.48.010 and seeks damages and attorney's fees under RCW 49.48.030. The trial court erred in finding that no damages existed. At a minimum, Plaintiffs are entitled to an award of pre-judgment interest

resulting from the unlawful delay. When Plaintiffs' second claim for relief is combined with claims arising under the Minimum Wage Act and Wage Rebate Act, it is clear that the collective statutes support the remedy requested in Plaintiffs' complaint. The trial court erred in ruling to the contrary.

IV. CONCLUSION

Based on the foregoing, this Court should reverse the trial court's findings on summary judgment, reverse the trial court's conclusions of law entered on July 19, 2006, and remand this case to the trial court for further proceedings consistent with this appellate Court's direction.

Dated this 4th day of December, 2006.

Respectfully submitted,



Jeffrey Julius, WSBA No. 26845
Of Attorneys for the Appellants

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STATE OF WASHINGTON

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OF THE STATE OF WASHINGTON
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 Gregory TWENTEY, Kristi WILSON,)
 and Sheree WRIGHT-COX,)
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 Plaintiffs/Appellants,)
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 v.)
)
 CITY OF REDMOND, a political)
 subdivision of the state of)
 Washington,)
)
 Defendant/Respondent.)
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I hereby declare under penalty of perjury according to the
 laws of the State of Washington that on December 5, 2006, I
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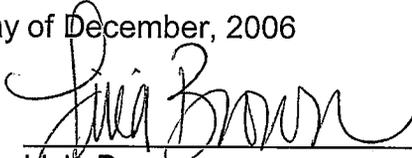
1. Appellant's Brief; and
2. Certificate of Service

to be served via ABC Legal Messenger Mail to the following:

Greg Rubstello, Attorneys for the Defendant
Ogden Murphy Wallace, P.L.L.C.
1601 Fifth Avenue, Suite 2100
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I have also caused the original of the above to be filed with
the Court of Appeals of the State of Washington Division One
through ABC – Legal Messenger.

Dated this 4th day of December, 2006



Livia Brown