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No. 58809-5-I
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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SWANSON, JAMES TAYLOR, GREGORY TWENTEY,

Reply 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 REPLY BRIEF

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A. INTRODUCTION

In their opening brief, Plaintiff-Appellants (“Plaintiffs”) identified those errors by the trial court necessitating reversal of the lower court’s partial summary judgment order and the order dismissing Plaintiffs’ wage claims arising under the Minimum Wage Act, RCW Ch. 49.46, Wage Payment Act, RCW Ch. 49.48, and Wage Rebate Act, RCW Ch. 49.52. Plaintiffs requested that this Court hold that Plaintiffs possess a statutory remedy for the delayed payment of a retroactive wage award arising under the respective wage statutes and that the timing of the payment of such award is controlled by the provisions of WAC 296-128-035. Plaintiffs further requested that this Court reverse the dismissal of Plaintiffs’ claims for interest and attorneys’ fees.

The Defendant City of Redmond (“Defendant” or “the City”) has responded by arguing: (1) an interest arbitration award does not create an immediate obligation to pay money to employees and it is not equivalent to an order to pay money; (2) an interest arbitration decision is neither self executing nor fully liquidated until reduced to a judgment or a signed agreement and, therefore, is unenforceable under Washington’s wage and hour statutes; and (3) that the time-of-payment regulation relied upon by Plaintiffs, WAC 296-128-035, has no application to the payment of a retroactive wage increase arising from an interest arbitration award. The Defendant also makes various arguments in response to Plaintiffs’ claims for interest and attorney fees, none of

which have merit. Finally, the Defendant raises the defense of laches – an argument expressly rejected by the trial court below.

As set forth in this Reply, Defendant’s first argument ignores controlling law holding that retroactive wage awards made pursuant to an interest arbitration proceeding are subject to Washington’s wage and hour laws. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 857, 861, 93 P.3d 108 (2004). Defendant’s second argument misstates the applicable inquiry for determining when wages become “due” under WAC 296-128-035. Defendant’s third argument is diametrically opposed to controlling Washington law that holds the term “wages” specifically includes retroactive wage awards entered pursuant to an interest arbitration proceeding. Similarly, Defendant’s attempts to avoid interest on the late payment of the retroactive wage award are inconsistent with how courts have interpreted the civil enforcement provisions in the respective statutes. For all of those reasons, the trial court’s findings below must be reversed and this case remanded for further consideration.

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B. ARGUMENT

1. **Retroactive wage awards made pursuant to an interest arbitration proceeding are subject to Washington's wage and hour laws, including WAC 296-128-035.**

As set forth in Plaintiffs' opening brief, Washington courts have uniformly held that retroactive wage awards entered by an arbitrator in the course of an interest arbitration proceeding under RCW 41.56.450 are in fact wages. "Wages," as that term is used in the wage statutes includes all "compensation due to an employee by reason of employment," *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988), and specifically includes retroactive wages issued pursuant to an interest arbitration award. *Hisle*, 151 Wn.2d at 857.

In *Hisle*, an arbitrator awarded the employees a one-time retroactive pay increase. The employer calculated 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 Minimum Wage Act ("MWA"), RCW 49.46.130. The defendant argued, like here, that the MWA did not apply to retroactive wage payments, however the Court concluded that "the overtime provisions of the MWA apply to the retroactive payment contained in the CBA" *Id.* at 861.

The essential facts in this case are indistinguishable from those in *Hisle*. Arbitrator Jane Wilkinson entered an interest arbitration award on March 3, 2004. CP 446-487. Because the retroactive wage award constitutes an award of “wages,” the Defendant was under an obligation to pay the wages in the method and manner set forth in the respective wage and hour laws and regulations. In *Hisle*, the court determined that the Minimum Wage Act imposed an obligation on the employer to pay the retroactive wage award with appropriate consideration given to the overtime requirements in RCW 49.46.130. *Hisle*, 151 Wn.2d at 861. Here, the Defendant was under an obligation to pay the wages in the manner set forth in WAC 296-128-035.

In WAC 296-128-035, the Department of Labor & Industry has ruled that “all wages due” must be paid “at no longer than monthly intervals to each employee on established regular pay days.” In accordance with WAC 296-128-035, Plaintiffs were entitled to payment of the retroactive wage award no later than March 25, 2004. It is not in contention that Plaintiffs remained unpaid on the retroactive wage award until May 25, 2004 – a delay of approximately two months beyond the time limits established in WAC 296-128-035.

When a violation of the regulation is established, Washington’s Minimum Wage Act, Wage Payment Act, and Wage Rebate Act provide for civil enforcement remedies. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849-850, 50 P.3d 256 (2002). With

respect to Plaintiffs' claims arising under RCW Ch. 49.46, 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 remedy requested in Plaintiffs' Complaint tracks the civil enforcement provisions in RCW 49.46.090 as Plaintiffs seek recovery of monetary damages for wages that remained unpaid during the period of March 25 through May 25, 2004. The trial court erred in concluding no such remedy exists.

Similarly, under the Wage Payment Act, RCW 49.48, the City's conduct in delaying payment of the retroactive wage award constituted a withholding of wages beyond the period allowed by WAC 296-128-035 and, as a result, a corresponding violation of RCW 49.48.010, which provides that it is "unlawful for any employer to withhold or divert any portion of an employee's wages." The statutory remedy for a violation of RCW 49.48.010 is a judgment for wages owed and an award of reasonable attorney's fees. RCW 49.48.030. The trial court erred in concluding no such remedy exists.

Third, 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. RCW

49.52.070. The trial court erred in concluding Plaintiffs could prove no set of facts entitling them to relief under the RCW Ch. 49.52.

Defendant asserts that the entire analysis set forth above is superfluous because payment pursuant to an interest arbitration award is not really the payment of “wages.” Defendant cites *IAFF, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), for the proposition that retroactive wage increases in an interest arbitration award do not arise out of “the employment of the employees that are the beneficiaries of the award,” but out of the interest arbitration proceeding itself. Def.’s Response Brief, at 12. Defendant overstates the holding in *City of Everett* and ignores the court’s reasoning in *Hisle*.

In *City of Everett*, an arbitrator ruled that the City had violated the collective bargaining agreement with the Local by suspending two employees without pay and without just cause. The arbitrator ordered the City to set aside the suspensions and to award back pay. Following the arbitration decision, the Local requested the City to pay the attorney fees incurred in challenging the suspensions, but the City refused. On appeal from the trial court’s dismissal of the Local’s claims at summary judgment, the Washington Supreme Court specifically noted that “the term ‘wages or salary owed’ in RCW 49.48.030 has been construed to include back pay.” *Id.* at 35. The Court went on to hold that the Local *was* entitled to an award of

attorney fees when it secured a favorable wage recovery on behalf of the employees in a grievance arbitration proceeding. *Id.* at 51. The Court distinguished grievance arbitration and interest arbitration to the extent that in the former the employee is seeking to vindicate an existing right, while in the latter the employees were not entitled to that award until the arbitrator had determined the terms of the disputed collective bargaining agreement. *Id.* at 47. Based on that distinction, the Court opined in dicta that attorney fees under RCW 49.48.030 are unavailable to an employee who is successful in recovering an award of wages through the interest arbitration process. *Id.*

The discussion set forth in *City of Everett* is inapposite to the claims brought by Plaintiffs. Plaintiffs are not seeking damages or attorney fees as a result of the arbitrator's award of retroactive pay. Rather, what Defendant did *subsequent to* the award is what is at issue in this lawsuit. The timing of the payment of the retroactive wage award forms the basis for Plaintiffs' claims. In any case, Defendant's suggestion that the arbitrator's retroactive wage award is not an award of "wages" as that term is used in WAC 296-128-035 is not supported by – and, in fact, is refuted by – the opinion in *City of Everett*. See also *Hisle*, 151 Wn.2d at 861.

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2. WAC 296-128-035 controls the payment of a retroactive wage increase arising from an interest arbitration award and the trial court erred in concluding otherwise.

Because the retroactive wage award entered on March 3, 2004, can fairly be said to amount to an award of “wages” to Plaintiffs, and therefore subject to the requirements in Washington’s wage and hour statutes and regulations, the crux of Defendant’s argument in support of the lower court’s dismissal of Plaintiffs’ claims rests on the argument that the interest arbitration award created no immediate obligation to pay the wages. In other words, according to the Defendant, WAC 296-128-035’s requirement that “all wages due” be paid in a timely manner is inapplicable in this instance because the wages never became “due.” *See* Def.’s Response Brief, *passim*. If the wages were never “due” to Plaintiffs, Defendant posits, Plaintiffs have no cause of action arising out of the two-month delay in receiving payment of the wages.

Defendant makes several arguments to support its conclusion: first, it argues that retroactive wages are not “due” until an arbitrator’s award is included in a collective bargaining agreement or enforced by a judgment of the superior court. The trial court similarly concluded that the interest arbitration award did not create an immediate obligation to pay money to the employees. Rather, according to the trial court, the obligation to pay had to be created through entry of a

judgment or by way of a collective bargaining agreement. Findings of Fact and Conclusions of Law, 2.1 (July 10, 2006).

Both Defendant and the lower court misstate the state of the law on when wages become due under WAC 296-128-035. It is incorrect and inconsistent with Washington law to say that a wage claim must first be reduced to a legally enforceable instrument or judgment before an employee is entitled to compensation for his or her services. The DLI's regulations contemplate an entirely different procedure. Under WAC 296-128-035 an employee is entitled to those wages he or she has earned during, at a minimum, the last month of work. All "wages" attributable to an employee during a particular pay period are due to the employee on the employer's pay date corresponding to the particular pay period. *See* WAC 296-128-035. If wages remain unpaid or are paid in a manner that fails to satisfy the regulatory requirements, an employee need not establish the existence of a collective bargaining agreement calling for his or her payment in order to proceed with a wage claim. An agreement on the amount of wages would illustrate the *amount* owing, but is not necessary for an employee to show he or she is entitled to payment in the first place. Nor need the employee obtain a judgment for purposes of determining what wages are "due" to the employee. The DLI has established as a matter of law which wages are due at regular intervals – "all wages" earned during "the pay period covered." WAC 296-128-035.

Here, the March 3, 2004 retroactive pay award is clearly governed by the same requirement as all other wages. The retroactive wage award entitled Plaintiffs to the payment of wages as of March 3, 2005. In accordance with WAC 296-128-035, the Defendant was under an obligation to pay Plaintiffs for their services within the time governed by law. The Defendant's failure to do so cannot be excused on the basis that Plaintiffs first failed to reduce the wage entitlement to a writing or first failed to obtain a court order stating they were entitled to those wages. No court has ever placed that sort of burden on an employee and it would be inappropriate to do so in this case.

Second, Defendant argues that an interest arbitrator's award should not constitute an order to pay money and, therefore, a wage set forth in an arbitrator's award can never be due to the employees without additional action by the employee or his representative. This argument is not well taken. According to Washington's Public Employees' Collective Bargaining Act, the determination of the interest arbitrator is "final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious." RCW 41.56.450. The interest arbitrator is authorized to require the employer to pay an award resulting from the arbitration process. As recognized by the court in *City of Moses Lake v. IAFF, Local 2052*, 68 Wn. App. 742, 847 P.2d 16 (1993), an interest

arbitration award creates a “duty” on the employer to raise salaries in the amount specified. *Id.* at 749. “[T]he signing of a collective bargaining agreement in accordance with that award is *not* a prerequisite to the legal obligation to abide by the award.” *Id.* (emphasis added). Accordingly, the retroactive wage award entered on March 3, 2004, became “due” at the time of the arbitrator’s award and therefore subject to the general time-of-payment requirements in WAC 296-128-035.

Third, Defendant argues WAC 296-128-035’s reference to “wages due for the pay period” essentially means that a retroactive wage award will never be subject to the time-of-payment requirements of the regulation because the award corresponds to “pay dates [that] have long passed.” Def.’s Response Brief, at 13. This reading of the regulation strains the plain reading of the rule and creates an untenable result.

First, from a policy standpoint, Washington has a “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 any departures from this rule should be construed strictly in favor of employees. *See Tift v. Professional Nursery Servs., Inc.*, 76 Wn. App. 577, 582, 886 P.2d 1158, *rev. denied*, 127 Wn.2d 1007, 898 P.2d 309 (1995). Defendant’s attempts to categorically remove retroactive wage awards from the time-of-payment requirements in WAC 296-128-035

is detrimental to employees and runs counter to the legislative intent in ensuring employees are paid all wages due in a timely fashion. *See, e.g., City of Moses Lake*, 68 Wn. App. at 749 (employees entitled to recover pre-judgment interest for the unlawful delay in payment of arbitration award).

Second, Defendant's reading of the regulation creates an exception that simply is not present in the plain language of the rule. Defendant would have this Court create an exception to the requirement that all wages due be paid in a timely manner that adds: "except wages that are due as a result of a retroactive wage increase." There is no authority for creating such an exception where none exists in the plain language of the regulation. Washington courts are clear in this regard: Courts "will not add to or subtract from the clear language of a statute, rule, or regulation even if it believes the Legislature, or [regulatory agency] intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational." *State, Dept. of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). There is no authority for the Defendant's suggestion that a retroactive wage increase does not become "due" for purposes of WAC 296-128-035 at the time the award is made by the arbitrator. After entry of the award, the timing of the retroactive wage payment, like all other forms of wages, is controlled by the requirements in WAC 296-128-035. The

Defendant's failure to comply with WAC 296-128-035 permits

Plaintiffs to recover damages under the civil enforcement provisions of Washington's wage and hour laws. The trial court's conclusions to the contrary were in error.

3. Interest is an additional appropriate remedy for violations of the wage statutes.

A routine wage claim arising under, *e.g.*, the Minimum Wage Act may seek recovery of unpaid wages, together with statutorily proscribed damages, fees, and costs. In this case, the Defendant has paid those wages awarded under the arbitrator's 2004 interest arbitration award. As such, Plaintiffs' claims differ from a routine wage claim in so much as the damages sought are limited to the statutory damages proscribed by the legislature. In such cases, the respective wage statutes contemplate three distinct types of statutory damages (as opposed to compensatory damages) for the delayed payment of wages. First, Plaintiffs are entitled to statutory damages under the Minimum Wage Act resulting from the late payment of wages in an amount equal to the amount of wages that were not paid in accordance with WAC 296-128-035.¹ Second, Plaintiffs claim that

¹ As explained in Plaintiffs' Opening Brief, to conclude otherwise would sanction the late payment of wages by employers because employees would have no recourse for a violation of WAC 296-128-035. *See* Pl.'s Opening Brief, at 13.

Defendant was willful when it failed to pay Plaintiffs their wages in a timely manner. Washington's Wage Rebate Act, RCW Ch. 49.52 allows for double damages where the employer has willfully withheld wages. The bases for Plaintiffs' claims under both the Minimum Wage Act and the Wage Rebate Act are set forth in full in Plaintiffs' Opening Brief.

Even if this Court were to determine that Plaintiffs possess no statutory claim arising under the Minimum Wage Act or the Wage Rebate Act, a third statutory claim still remains intact based on the interest accruing on the delayed retroactive wage award. Plaintiffs' claim for interest arises under the third of the three statutes at issue, the Wage Payment Act. An employee subject to an unlawful withholding proscribed by the Wage Payment Act, RCW 49.48.010, is 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*, 68 Wn. App. at 749. Here, Plaintiffs' seek, in addition to recovery of statutory damages under the Minimum Wage Act and Wage Rebate Act, recovery of interest resulting from the delayed payment. The trial court improperly dismissed Plaintiffs' claims for interest.

Defendant argues that interest could not have accrued on the retroactive wage award because payment was not due and owing

between the date of the award and the date of payment. The City asserts that it paid Plaintiffs before the legal obligation to do so was created by the signing of the new collective bargaining agreement on June 8, 2004. Def.'s Response Brief, at 14.

As discussed *supra*, Defendant and the trial court have confused obligations arising out of a contract and obligations established by law. Wages become "due" as a matter of law when, during any applicable pay period, an individual earns compensation by reason of employment. An interest arbitration award creates a duty on the employer to pay wages, *City of Moses Lake*, 68 Wn. App. at 749, and a corresponding enforceable wage claim if wages go unpaid. An employee may also be employed under an employment contract that states when wages shall be paid, but the existence of such an agreement is not necessary to implicate the statutory requirements for the prompt payment of wages.

An award of interest on the delayed payment of wages is appropriate to partially compensate Plaintiffs for the unlawful withholding even though the retroactive wages were ultimately paid. The trial court erred in dismissing Plaintiffs' claims for prejudgment interest.

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4. The doctrine of laches is inapplicable under the circumstances of this case.

Finally, Defendant asserts a defense of laches. The defense was raised below, but rejected by the trial court. Under RAP 2.4, this Court should grant affirmative relief to a respondent – such as the reversal of the trial court’s rejection of a defense asserted below – “only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.” Defendant has not appealed the trial court’s rejection of the City’s laches defense, and this is not a case necessitating application of the defense.

Contrary to the Defendant’s claim, the stipulated facts fail to demonstrate that Plaintiffs waived their rights to bring the present action based on their actions at the time. The defense of laches applies only in those cases in which the defendant demonstrates that the plaintiff acquiesced in the defendant’s actions giving rise to the claim by inexcusably delaying an objection, where the delay causes prejudice to the other party. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000).

There is evidence in the record that Plaintiffs, rather than “sandbagging” the City, noted their objections to the delayed payment of wages and made it known that Plaintiffs expected the retroactive wage award to be paid in a timely manner. Specifically, on April 2,

2004, a few days after the retroactive wage award should have been paid, attorneys for the Redmond Police Association ("RPA") sent the City's attorney an e-mail inquiring: "why the payment of the retroactivity is being delayed in light of RCW 41.56.450 which makes the Arbitrator's decision final and binding on the parties." CP 387. This inquiry should have put the City on notice that an issue existed between the City and the Plaintiffs with the delayed payment of the wage award. The trial court agreed on this point, ruling that "the RPA objected to the timing of the payment of wages (retroactive wages) under the Award in a timely manner." Conclusions of Law, 2.8. It is unnecessary to revisit this decision for purposes of resolving this case on appeal.

C. CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, 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 24th day of January, 2007.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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I hereby declare under penalty of perjury according to the laws of the State of Washington that on January 24, 2007, I caused true and correct copies of the:

1. Appellant's Brief; and
2. Certificate of Service

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

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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 25th day of January, 2007



Jennie Gaston