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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON EDUCATION ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT,

Respondents, individually and on behalf of
all other nonmembers similarly situated.

OPENING BRIEF ON BEHALF OF APPELLANT, WASHINGTON
EDUCATION ASSOCIATION

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A. Assignments of Error

1. The trial court erred by holding that there is an implied private right of action under Section 760 of the Public Disclosure Law.
2. The trial court erred by holding that there is a five-year statute of limitations for its implied private right of action.
3. The trial court erred by refusing to conclude that plaintiffs' claims of fraud and conversion are not subsumed by the duty of fair representation.
4. The trial court erred in denying WEA's Motion to Dismiss.
5. The trial court erred in approving named Respondents and their counsel as adequate representatives of a class, as to Counts I and II of the complaint.

B. Issues Pertaining to Assignments of Error

1. Where the Public Disclosure Act ("PDA") expressly provides for enforcement of its provisions by the Attorney General, or by private citizens *via a qui tam*-type proceeding if government does not act, was it error for the trial court to create an implied private right of action with respect to one of those provisions?
(Assignment of Error Nos. 1, 4)

2. Where an implied private right of action is held to exist, is it error to apply a 5 year statute of limitations, rather than the three-year limitation contained in RCW 4.16.80, or the two-year statute contained in RCW 4.16.130 (Assignment of Error Nos. 2, 4)?

3. Where claims of fraud and conversion brought by employees against the union representing them arise out of the collective bargaining relationship, was it error for the court not to hold that such claims are subsumed by the doctrine of a union's duty of fair representation? (Assignment of Error Nos. 3, 4)

4. Where named plaintiffs have little, if anything, in common with a putative class, was it error for the trial court to hold that they are appropriate representatives of such class? (Assignment of Error No. 5)

C. Statement of the Case

1. The *PDC* Case

In August 2000, the Evergreen Freedom Foundation (EFF) filed a letter of complaint with the PDC alleging that WEA had violated RCW 42.17.760, which provides:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

The PDC acted on EFF's complaint and referred the matter to the Attorney General to bring an enforcement action.¹ On or about October 8, 2000, the Attorney General brought suit pursuant to RCW 42.17.400(1) claiming that WEA had violated the PDA² by allegedly using agency fees collected from non-members for purposes prohibited by RCW 42.17.760. *State ex. rel. Public Disclosure Commission v. WEA*, Thurston County Cause No. 00-2-01837-9. The case was tried to Judge Gary Tabor in May 2001. Judge Tabor ruled, *inter alia*, that agency fees had been collected and used in violation of RCW 42.17.760. That case (the "PDC case") is pending on appeal before this court (Case No. 2826401-II).

2. The *Davenport* Case

Notwithstanding the PDC's enforcement of EFF's charges, in March 2001, EFF attorney, Steven T. O'Ban and National Right to Work Foundation³ attorney Milton Chappell filed this class action case against WEA on behalf of present or former public school employees, alleging a

¹ The PDC had informed WEA that it could not conduct an investigation in sufficient time to preclude EFF from bringing suit pursuant to RCW 42.17.400 unless WEA agreed to stipulate to violations. Given its previous history with the litigious EFF, WEA opted to have the PDC enforce the claim, and thus on September 25, 2000, WEA stipulated that it committed multiple violations of RCW 42.17.760 as to a one-year period (CP 56-57).

² The PDA was created by Initiative 276, passed in 1973, and several sections were added by Initiative 134, passed in 1992. This fact is significant to proper interpretation of the PDA. *See, e.g.: infra*, at p. 12.

³ The National Right to Work Foundation is a self-described "nonprofit, charitable organization" to fight unionism. *See: www.nrtw.org/b/foundation.*

private right of action under the PDA, and several tort claims: conversion, breach of fiduciary duty, and fraudulent concealment. WEA filed a CR 12(c) motion to dismiss, alleging, *inter alia*: (1) that there is no private right of action under the PDA; (2) that there can be no conversion because agency fees by statute belong to the union; and (3) that the plaintiffs' claims of conversion, breach of fiduciary duty, and fraudulent concealment all arose out of the collective bargaining relationship and were thus subsumed by the duty of fair representation ("DFR").⁴ As a consequence, the applicable statute of limitations was six (6) months – the statute of limitations applicable to DFR claims.

On November 2, 2001, Thurston County Superior Court Judge Daniel Berschauer denied WEA's motion to dismiss,⁵ ruling that there is an implied private right of action under the PDA, that the other claims were not subsumed by the duty of fair representation, and that the statute of limitations was three years rather than the six-month statute applicable to DFR claims.⁶ (CP 82-95). The court also certified the case as a class

⁴ See: *Allen v. Seattle Police Guild*, 100 Wn.2d 361, 670 P.2d 246 (1983); *Schmidtke v. Tacoma School Dist.*, 69 Wn.App. 174, 848 P.2d 203 (Div. II, 1993); *Lindsey v. Metropolitan Seattle*, 49 Wn.App. 145, 148, 741 P.2d 575 (1987), *rev. denied*, 109 Wn.2d 1016 (1987); accord *O'Neil v. Air Line Pilots Assoc. Int'l*, 499 U.S. 65, 74-75, 111 S.Ct. 1127 (1991).

⁵ The trial court did dismiss the Third Cause of Action regarding breach of fiduciary duty.

⁶ After ruling on November 2, 2001, that the appropriate statute of limitations was three (3) years, on December 7, 2001, the trial court ruled that it was a five (5) year statute of limitations (CP 82, 160-164, R.P. 12/7/01, pp. 9-11).

action⁷ and subsequently signed the Consolidated Order on which this appeal is based. (CP 150-151; R.P. 1/18/02, p. 4). Proceedings in this case before the trial court have been stayed pending disposition of this appeal.

WEA filed a timely motion for discretionary review and on March 28, 2002, this Court granted review. Writing for the Court, Commissioner Eric B. Schmidt held (*Ruling Granting Review and Denying Consolidation*, at p. 7):

In summary, it appears that the superior court committed probable error in ruling that Davenport has an implied right of action to allege violations of RCW 42.17.760. Further, the finding of an implied right of action substantially alters the status quo as between WEA and agency shop fee payers. Given the probable error, the alteration of the status quo, and the superior court's certification that immediate review of the Consolidated Order may materially advance the ultimate termination of the litigation, discretionary review is appropriate. . .

⁷ The trial court granted class action status to the implied private right of action and conversion claims, but not to the fraudulent concealment claim.

ARGUMENT

I. THERE IS NO IMPLIED PRIVATE RIGHT OF ACTION UNDER THE PDA

A. The Plain Language of the Statute Reveals No Such Right.

Contrary to the holding of the trial court herein, there is no implied private right of action under the PDA, Chapter 42.17 RCW. The Public Disclosure Commission has the exclusive authority and responsibility to enforce the provisions of the campaign finance provisions contained in Chapter 42.17 RCW. RCW 42.17.360 (5) and (7). The only exception to this general rule is the *qui tam* provision contained in RCW 42.17.400(4).

RCW 42.17.400(4) provides that a citizen can file a citizen action in court **only** if a citizen's complaint is filed consistent with the statutory prerequisites and the attorney general fails to commence an action within specified timelines.⁸ Specifically, RCW 42.17.400(4) provides, in pertinent part, as follows:

Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. **This citizen action may be brought only if** the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-

⁸ The Washington Supreme Court upheld the constitutionality of RCW 42.17.400(4) in *Fritz v. Gorton*, 83 Wn.2d 275, 311-314, 517 P.2d 911 (1973), noting that the attorneys fees provision would protect against frivolous lawsuits.

five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice (emphasis added).

An action brought pursuant to RCW 42.17.400(4) is not a typical private cause of action. Rather, as the *Fritz* court noted, an action brought pursuant to §400(4) is a *qui tam* action where the individual sues for the state as well as for himself. This fact is further clarified by the portion of §400(4) which states that if the citizen prevails, any judgment shall escheat to the state. Thus, the statute provides no means for individuals personally to benefit by pursuing an enforcement action pursuant to Chapter 42.17 RCW.

RCW 42.17.400(4) provides that a citizen cannot pursue an action in superior court unless the citizen has filed a complaint pursuant to RCW 42.17.400(4) and the Attorney General has not filed a lawsuit after the appropriate time has passed and the required notices have been given. Specifically, as the statute requires and the *Fritz* court noted, the citizen is required to give the Attorney General 45 days⁹ notice of the alleged violation and then may proceed only after service of the second ten day

⁹ At the time that *Fritz* was decided, the statute that is now codified as 42.17.400(4) required the citizen to give the Attorney General 40 days notice before issuing the second notice.

notice results in no action on the part of the Attorney General. *Fritz, supra* at 314. Thus, EFF would have had standing to file the lawsuit in Superior Court only if the Attorney General had failed to act on the complaint. However, since the Attorney General pursued an action against the WEA based on the citizen's complaint, neither EFF nor individuals that it purported to represent had standing to pursue an action to enforce RCW 42.17.760.

In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, No. 25272-4-II, 2002 WL 598877, 2002 Wash. App. LEXIS 647 (Wash. Ct. App., Div. II, Apr. 19, 2002), amended, 2002 Wash. App. LEXIS 1412 (June 14, 2002), this Court addressed RCW 42.17.400(4). This Court rejected an argument by EFF that it should have been allowed to amend its complaint to assert an additional claim against WEA, based on a transfer of funds from NEA to WEA that EFF argued was a political contribution.

EFF had sent a notice to the Attorney General on October 1, 1997, alleging a violation based on that transfer. On December 4, 1997, it sent a second letter to the Attorney General, giving notice of its intent to file a citizen's action if the Attorney General took no action within ten days. The Attorney General responded, on December 12, 1997, by informing

EFF that it had referred EFF's allegations to the PDC, and that the PDC would file administrative charges based on the transfer of funds.

On these facts, this Court held that EFF was precluded from bringing a citizen's action under RCW 42.17.400(4) on the additional claim and it therefore affirmed the trial court's denial of EFF's motion to amend its complaint. In so doing, this Court implicitly acknowledged that where, as here, the State has acted on a citizen's claim, the citizen thereafter has no right to pursue such claim in court.

A fortiori, the *Davenport* plaintiffs, who never even filed complaints with the PDC or notices to the appropriate governmental authorities, have no standing. As a result, this Court should rule, as a matter of law, that Respondents have no right to enforce RCW 42.17.760.

B. This Case Does Not Fit Within the *Bennett* Test

Washington courts have adopted a test, first pronounced by the United States Supreme Court, to determine whether a private remedy is implicit in a statute not expressly providing one. *See: Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 536-7, 762 P.2d 356 (1988); *rev. den'd*, 112 Wn.2d 1006 (1989); *cert. denied*, 493 U.S. 873, 110 S. Ct. 204 (1989), citing *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080 (1975). *See also: McCandlish Electric, Inc. v. Will Construction Company Inc.*, 107 Wn.App. 85, 25 P.3d 1057 (Div. III 2001); *rev. den'd*, 145 Wn.2d 1012,

37 P.3d 291 (2001); *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

Applying that test to whether a state statute supports the creation of an implied cause of action, the courts have articulated the test as follows:

A cause of action will only be implied if three conditions are met: (1) the plaintiff is within the class for whose benefit the statute was enacted; (2) the legislative intent, explicitly or implicitly, supports creating or denying a remedy; **and** (3) implying a remedy is consistent with the underlying purpose of the legislation.

Bennett, 113 Wn.2d at 920-21 (emphasis added).

1. The PDA Was Designed To Benefit The Public At Large Rather Than Particular Individuals

In order to determine whether plaintiffs are of the class for whose benefit RCW 42.17.760 was enacted, one must look to the purposes of Chapter 42.17 RCW, as found in RCW 42.17.010 and RCW 42.17.620. RCW 42.17.760 was passed as part of Initiative 134, the purposes of which are now codified in RCW 42.17.620.

In reviewing the statutory scheme, it is clear that in neither Initiative 276 nor Initiative 134 was there any intent of the people to create a private remedy. Rather, the statutory scheme clearly establishes only a public and quasi-public cause of action. It grants the Public Disclosure Commission and the Attorney General the primary investigative and enforcement responsibility, and only where the government fails to act, are

citizens granted a limited right to substitute for the State to enforce the statute in a *qui tam* action. See 42.17.360(5) and (7); RCW 42.17.400(1) and (4). By limiting this right, the statutory scheme implicitly denies citizens the right to pursue a solely private right of action, and establishes that the class for whose benefit the statute was passed was the citizenry as a whole, not individuals such as Respondents herein.

2. The Legislative Intent of the PDA Does Not Support Creating A Private Remedy For Individual Litigants

The legislative intent found in Initiative 134, codified as RCW 42.17.620 is particularly relevant because RCW 42.17.760 was passed as part of that Initiative. While RCW 42.17.620(2) states that the people intend to “reduce the influence of large organizational contributors”, that statement neither creates nor addresses the rights of agency fee payers.

As Commissioner Schmidt noted in the *Ruling Granting Review* herein (at pp. 6-7), RCW 42.17.400 forecloses a private right of action under RCW 42.17.760 for two additional reasons. First, Initiative 134 specifically placed RCW 42.17.760 (Laws of 1993, ch.2, § 16) in Chapter 42.17. Laws of 1993, ch. 2, § 33(1). RCW 42.17.400(4), which was enacted twenty years prior¹⁰ to RCW 42.17.760, provides the enforcement mechanism for persons who have “reason to believe that some provision

¹⁰ Laws of 1973, ch. 1, § 40(4).

of **this chapter** is being or has been violated” (emphasis added). Thus, RCW 42.17.400(4) is the enforcement mechanism for individuals who believe that RCW 42.17.760 is being or has been violated. The statutory language, as passed by the voters, simply confers no other rights to the agency fee payer to enforce that statute.

Second, the *Davenport* plaintiffs argued and the trial court held that the five-year statute of limitations, which was also part of Initiative 276¹¹ and which is found in RCW 42.17.410, applies to RCW 42.17.760. It is inconsistent for plaintiffs to argue that RCW 42.17.400(4) does not apply to RCW 42.17.760 but that RCW 42.17.410 does, when RCW 42.17.400(4) and RCW 42.17.410 were enacted at the same time.

The statutory remedies authorized by the PDA are governmental rather than private. Specifically, the PDA empowers the Commission or a court to order the payment of penalties to the public treasury or equitable relief in the form of enjoining a person to prevent the doing of any act prohibited by the chapter or compelling a person to perform a statutorily required act. RCW 42.17.390(3) and (6); RCW 42.17.395(4). Even if a party were to prevail in a *qui tam* action, any monetary sanction assessed by the court would be paid to the state, while the court could order

¹¹ Laws of 1973, ch. 1, § 41.

restitution to a private individual.¹² See: RCW 42.17.400(4). There simply is no cause of action allowed for purely private damages.

The statutory scheme defines when an agency or individual can pursue a remedy as well as what type of remedy that can be ordered. Enforcement is vested in the State (either directly or *qui tam*) and relief available is designed to benefit the public treasury or to provide equitable relief. By doing so, the people clearly intended to deny to the private citizen a solely private right of action and/or a solely private remedy. Thus, this court should find, in response to the second inquiry of the *Bennett* test, that there is no legislative intent, explicitly or implicitly, supporting a private remedy to Respondents.

3. Implying A Private Remedy Is Inconsistent With The PDA

The purpose of the PDA is to benefit the public through promoting full disclosure of the financing of political campaigns and lobbying. RCW 42.17.010(1) and (10). See *State v. Evans Campaign Committee*, 86 Wn.2d 503, 546 P.2d 75 (1972). The last paragraph of RCW 42.17.010

¹² As was argued to, and apparently accepted by Judge Tabor in *PDC v. WEA*, *supra*, where the State (or a *qui tam* plaintiff) has brought and prevailed in an enforcement action, the court has broad remedial powers which may include restitution or other civil remedies. See: RCW 42.17.390. When RCW 42.17.390 and .400 are read together, they provide yet another reason why neither RCW 42.17.760 nor .400 can reasonably be construed as implying a private right of action. RCW 42.17.400 provides comprehensive remedies and expressly limits who may sue for them.

specifically provides:

The provisions of this chapter shall be liberally construed to promote full disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as **to assure continuing public confidence of fairness of elections** and governmental processes, **and so as to assure that the public interest is fully protected** (emphasis added).

The remedies set forth in the PDA illustrate that it would be inconsistent to create a private remedy thereunder. While RCW 42.17.340 creates an unfettered private cause of action related to the public records portion of the PDA, the enforcement sections relating to campaign finance create only a limited private cause of action in RCW 42.17.400(4). Inarguably, if the people or the Legislature had intended to create a solely private cause of action with private remedies with regard to campaign finance violations, they could have done so.¹³ They did not.

¹³ The established enforcement mechanisms found in RCW 42.17.400 protect the integrity of the election process. The PDC has been granted the authority to screen complaints and to choose to pursue the ones that it contends are meritorious. This scheme prevents individual contributors or candidates from pursuing frivolous claims, seeking injunctions and potentially disrupting elections without consequence. Creating an implied private right of action under Chapter 42.17 would open the floodgates for political battles between candidates to be fought in private litigation before the courts. It could thrust the courts in the middle of current election disputes or into the role of overseer of reporting and funding squabbles, *ad nauseum*. Such a conclusion would overtax the judiciary, have enormous political consequences, and be clearly inconsistent with the Washington Supreme Court's reasoning in *Fritz*.

4. Washington Case Law Supports A Finding That No Private Right of Action Exists

In *McCandlish, supra*, Division Three found that there was no private cause of action under state competitive bidding statutes. Using the *Bennett* factors, the court found that: (1) the bidding statute was designed to safeguard the public treasury from the high costs of fraud and/or collusion and as such, a bidder's interest in a fair forum was secondary; (2) reviewing the legislative history, the statute in question was not enacted for the financial benefit of private individuals but rather to standardize and regulate the competitive bidding process in public works contracts; and (3) nothing in the wording of the statute supported the creation of a remedy for disappointed subcontractors, nor would doing so have been consistent with the purpose of the statute.

This court should reach a result similar to that reached by the court in *McCandlish, supra*, since the campaign finance statutory scheme was designed to assure the public confidence in elections and not for private benefit. Nothing in the wording of the statute supports the creation of a remedy for disappointed agency fee payers. To the contrary, the statute creates a limited private cause of action that these Respondents did not pursue. As a result, this court should, as a matter of law, reverse the finding of the court below.

5. Federal Law Similarly Rejects A Private Right of Action

In *Gonzaga University et al. v. Doe*, ___ U.S. ___, 122 S. Ct. 2268, 2002 U.S. LEXIS 4649 (6/20/02), the U.S. Supreme Court reaffirmed a long line of cases holding that a private right of action may not be implied where the statute is silent on the issue. Doe, who had sued Gonzaga University in the superior court alleging that the Family Educational Rights and Privacy Act (FERPA) prohibiting release of student records bestowed individual rights to enforce its provisions, won in the trial court. The Washington Court of Appeals reversed, concluding that FERPA does not create individual rights that could be enforced under §1983. 99 Wn.App. 338, 992 P.2d 545 (Div. III, 2000). The Washington Supreme Court reversed in part, holding that although FERPA does not create a private right of action, its nondisclosure provision did establish rights that could be enforced under §1983. *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 24 P.3d 390 (2001). The U.S. Supreme Court reversed the decision in its entirety, concluding that FERPA creates no federal right enforceable under §1983.

The Court said [2002 LEXIS 4649, *slip op.* at pp. 5-7]:

Section 1983 provides a remedy only for the deprivation of “rights . . . secured by the [Federal] Constitution and laws” of the United States. It is *rights*, not the broader or vaguer “benefits” or “interests” that may be enforced under

the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our §1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under §1983.

We have recognized that whether a statutory violation may be enforced through §1983 “is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute.” *Wilder* [*v. Virginia Hospital Association*, 496 U.S. 498, 522-523], *supra*, at 508, n. 9. But the inquiries overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a federal right*. Thus we have held that “the question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative” where “a statute by its terms grants no private rights to any identifiable class.” *Touche Ross & Co. v. Redington*, 442 U.S. 560, 567. For a statute to create such private rights, its text must be “phrased in terms of the persons benefited.” *Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13.

* * *

Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983. But the initial inquiry - - determining whether a statute confers any right at all - - is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute “confers rights on a particular class of persons” *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

* * *

Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit whether under §1983 or under an implied right of action. [emphasis in original].

Here, as noted above, the drafters of the PDA expressed no intention “to create new individual rights.” The statute provides only for governmental

and quasi-governmental enforcement. As Commissioner Schmidt acknowledged in the *Ruling Granting Review* herein, p. 6.: “RCW 42.17.760 does not protect employees from improper actions of employers or labor organizations. Nor does it regulate when or how agency shop fees are paid to labor organizations.” Pursuant to the U.S. Supreme Court’s ruling in *Gonzaga*, no private right of action can be implied here, where the “statute provides no indication that [the drafters of Initiative 134] intend[ed] to create new individual rights for agency fee payers.

6. Any Decision To Create An Implied Private Right Of Action Must Be Applied Prospectively.

In the *PDC* case , and prior to the filing of the instant action, WEA stipulated that it committed multiple violations of RCW 42.17.760. (CP 56-57; *see also*, fn.1, *supra*). WEA entered into this stipulation primarily to preclude EFF from pursuing a citizen action under RCW 42.17.400(4).¹⁴ Even though WEA prevailed on every issue in the previous citizen action filed by EFF, that suit cost WEA over one million dollars in legal fees.¹⁵ The *PDC* matter was referred the matter to the Attorney General for prosecution.

¹⁴ WEA requests that this Court take judicial notice of the transcript of proceedings before the PDC regarding WEA’s reasons for entering into the Stipulation. The transcript is part of the record in the *PDC* case currently pending before this Court and is reproduced in the Appendix hereto, at pp. 5-7.

¹⁵ *See: State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 999 P.2d 602 (2000); *EFF v. WEA*, ___ Wn.App. ___, 2002 Wn.App. LEXIS 647 (4/19/02, No. 25272-4-II).

Subsequently, EFF attorney Steven O'Ban and Milton Chapell of the National Right to Work Foundation filed this lawsuit on behalf of a class, alleging that WEA violated the private rights of agency fee payers under RCW 42.17.760 and requesting restitution. In entering the Stipulation with the PDC, WEA justifiably relied upon the state of the law at the time. Every indication at that time was that there was no private right of action to enforce RCW 42.17.760 and that a Stipulation regarding the § 400(4) action would preclude any other lawsuit involving these facts.

If this court were to uphold the trial court's finding that RCW 42.17.760 creates a private right of action, such a ruling must be applied prospectively only. Retroactive application will cause the Stipulation to be void. The basic consideration in determining whether such a decision, if any, in *Davenport* should be applied retroactively to void an otherwise valid release or settlement agreement is whether WEA "justifiably relied" on the law as it existed "prior" to *Davenport*. In *Bradbury v. Aetna Cas. & Sur.*, 91 Wn.2d 504, 589 P.2d 785 (1979), the court held that Aetna did not justifiably rely on the pre-existing law because Aetna had reason to know that the law in that area was unsettled.

In the case at bar, however, WEA justifiably relied on the fact that entering into the Stipulation would preclude EFF from funding or pursuing an action against it for violations of RCW 42.17.760. As a result, if this

Court were to affirm the trial court's decision to create an implied private right of action under RCW 42.17.760, it must do so prospectively only.

II. THERE ARE NO VIABLE TORT CLAIMS

A. The Court Erred In Allowing the Conversion Claim to Proceed.

Plaintiffs filed a second claim for conversion alleging that WEA willfully interfered with their paychecks without legal justification, depriving them of their funds in an amount that corresponds to WEA's contributions and expenditures to influence elections or to operate political committees. The court below erred in refusing to dismiss such claim because, as a matter of law, the above-referenced funds belonged to the union.

The Washington Supreme Court has defined the tort of conversion as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Kruger v. Horton*, 106 Wn.2d 738, 743, 725 P.2d 417 (1986) citing *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962). The plaintiff in a conversion action first must prove a right to possess the property converted. *Id.* See also: *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 679, 626 P.2d 30 (1981).

The Respondents herein have no right to possess the funds that they allege to belong to them. WEA has the statutory right to charge fee payers an amount of fees equivalent to the amount of dues charged to members. See RCW 41.59.100. Once WEA receives the funds, the funds belong to the union. Nothing contained in RCW 42.17.760 deprives or limits the union of the right to collect agency fees.¹⁶

A union member may not sue his union for conversion of statutorily authorized union dues. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445 (1995). Murray claimed that the union had converted his dues by taking his prepaid dues and applying them to arbitration costs assessed against the union. The Ninth Circuit held that since the union had lawful possession and lawful title to the dues, no member had ownership rights in the prepaid dues with which the union could interfere. *Id.*

Similarly, here, WEA's right to collect agency fees is based on RCW 41.59.100 which provides, in pertinent part, as follows:

A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, **the employer shall enforce it by deducting from the**

¹⁶ In *State ex rel. PDC v. WEA*, *supra*, Judge Tabor erroneously granted the Plaintiff's Motion for Summary Judgment, in part, holding that RCW 42.17.760 prohibits the union from collecting the amount of agency fees attributable to "contributions and expenditures to influence an election or operate a political committee." The trial was limited to the issue of whether WEA had in fact used agency fees for those prohibited political purposes. WEA's appeal therein challenges the trial court's rulings on summary judgment and at trial based on principles of statutory construction and constitutional interpretation. *See*: Case No. 2826401-II.

salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, **for nonmembers thereof, a fee equivalent to such dues** (emphasis added).

Thus, under Washington law, WEA has lawful possession and lawful title to both dues and agency fees acquired by it in accordance with Washington's labor laws. Nothing in the PDA trumps WEA's lawful entitlement to and ownership of such funds. RCW 42.17.760 is simply a limitation on union spending.¹⁷ It provides:

A labor organization **may not use** agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Since RCW 42.17.760 limits the union's use of fees, but not its right to collect them, the union is, as a matter of law, entitled to collect the fees and holds legal title to them. Respondents have no right to possess the funds. Accordingly, this Court should reverse the decision of the trial court and hold that Respondents have no viable claim of conversion herein.

¹⁷ See: *Ruling Granting Review*, p. 6, wherein Commissioner Schmidt ruled both that "RCW 42.17.760 only regulates the spending of agency shop fees" and that "RCW 42.17.760 appears to be a limitation on how a labor organization can spend agency shop fees, not a limitation on how it collects agency shop fees".

B. Both the Conversion and Fraudulent Concealment Claims Are Subsumed By the Duty of Fair Representation and Should have Been Dismissed.

In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 670 P.2d 246 (1983), African American members of the Seattle Police Guild filed suit against the Guild (their union), alleging that the Guild had breached its duty to fairly represent them by spending mandatory union dues collected from them to finance litigation on behalf of white members of the Guild. The Guild had challenged the use of quotas in the employer's affirmative action program. *Id.* at 354-366. A threshold issue in the Court of Appeals below had been the scope of a union's duty to fairly represent. *Allen v. Seattle Police Guild*, 32 Wn.App. 56, 645 P.2d 1113 (Div. I, 1982). The Court of Appeals considered whether the duty to fairly represent was limited to "negotiating, administering, or enforcing a collective bargaining agreement" or, whether the duty extended further to encompass "internal union practices," including how the union spent money extracted from its members. The Court of Appeals held that the duty did not extend to internal union practices, including, specifically, how the union spent moneys collected from members pursuant to a controlling collective bargaining agreement. *Allen*, 32 Wn. App. at 63-65.

The Washington State Supreme Court reversed and held: (1) as a matter of first impression,¹⁸ that Washington State public sector unions owe a duty of fair representation to their members,¹⁹ and (2) that the duty to fairly represent extends to all union activities arising out of its status as collective bargaining representative, including, specifically, a union's expenditure of money "extracted" from members.

Finally, we believe the importance of the rights involved in the employment arena and the potential for abuse inherent in majority rule require that the doctrine cover a wide range of union activities.

Allen, 100 Wn.2d at 372, 373. *Accord*, *O'Neil*, 499 U.S. at 67 wherein the Court stated: "We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) - that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith' - applies to **all** union activity, including contract negotiation" (emphasis added).

Thus, *Allen* is direct, controlling authority that the standard against which a union's expenditures of moneys is judged is limited to the duty to fairly represent. In holding that the duty to fairly represent is the standard

¹⁸ See *Allen*, 100 Wn.2d at 366, wherein the court stated: "The question of whether a union certified under the provisions of RCW 41.56.080 is required to represent fairly its members has not been decided in this state."

¹⁹ The law is clear that the duty to fairly represent is owed equally to both union members and non-member agency fee payers. See e.g. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903 (1967). For ease of discussion, however, both are referred to herein simply as "members."

to be applied in such circumstances, the Court necessarily has held that no greater duty is owed members in the context of how the union spends moneys collected from members. Consequently, the court below erred in permitting the claims of conversion and fraudulent concealment to proceed.²⁰

The allegations in this case are virtually identical to those presented in *Allen*. In both cases, the duties alleged to have been owed and violated by the union arise solely and exclusively by virtue of the relationship created between the union and the plaintiffs/respondents by the terms of a collective bargaining agreement. Here, the authority to collect agency fees is based on RCW 41.59.100 and the terms of the collective bargaining agreement. In both cases, plaintiffs/respondents allege that the union violated their rights through the manner in which it spent money extracted from them pursuant to the terms of that controlling collective bargaining agreement. *See*: Complaint, at ¶¶ 1-6, 7, 8, 19. As there is no material distinction to be made between the relationship of the unions and plaintiffs/respondents in each case, or between the conduct alleged in each, *Allen* requires that Respondents' common law causes of

²⁰ Commissioner Schmidt ruled that the tort claims, the statute of limitations issue, and the class certification were rulings that "are subsidiary to or interconnected with the implied right of action" issue and should be reviewed by this Court "in conjunction with the finding of an implied right of action". *Ruling*, p. 8.

action be dismissed. The trial court erred in failing to do so.

Federal law is in accord. See e.g., *Marquez v. Screen Actors Guild Inc.*, 525 U.S. 33, 119 S.Ct. 292, (1998); *O'Neil v. Air Line Pilots Assoc. Int'l*, *supra*; *Steelworkers v. Rawson*, 495 U.S. 362, 372, 376, 110 S.Ct. 1904 (1990). In *Rawson*, the families of miners killed in a mine fire brought suit against the miners' union, alleging, in part, that the union was negligent in causing their deaths, because it had failed to enforce a provision in the collective bargaining agreement requiring it to participate in mine safety inspections with the employer. The Court, relying on the long-settled tripartite duty to fairly represent standard, prohibiting arbitrary, discriminatory or bad faith conduct on the part of the union, rejected their state common law negligence claims outright, saying:

It is now well established that, as the exclusive bargaining representative of the employees, . . . the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ibid.* **This duty of fair representation is of major importance, but a breach occurs "only when a union's conduct toward a member of the collective bargaining unit is**

arbitrary, discriminatory, or in bad faith.” *Id.*, at 190. The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today.

Rawson, at 495 U.S. 362, 373-374 (emphasis added); *see also: Womble v. Local Union 73*, 64 Wn. App. 698, 701-702, 826 P.2d 224 (Div. III, 1992); *rev. den’d*, 119 Wn.2d 1018 (1992).

The *Rawson* Court made clear that where a union member plaintiff is alleging a common law tort against his or her union that arises from the parties’ respective status in a collective bargaining relationship, the duty to represent is the sole standard against which the union’s conduct may be judged. It stated [*supra*, at 371]:

As we see it, however, respondents’ tort claim cannot be described as independent of the collective-bargaining agreement. This is not a situation where the Union’s delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society. There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity.

Nor do we understand the Supreme Court of Idaho to have held that any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities. Indeed, the court did not disavow its previous opinion, where it acknowledged that the Union’s representatives

were participating in the inspection process pursuant to the provisions of the collective-bargaining agreement, and that the agreement determined the nature and scope of the Union's duty. If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners.

Clearly, the *Rawson* Court did not hold that the duty to represent is the only standard applicable to a union's conduct in every circumstance. For example, were a union officer to run someone (even a member) over in a cross walk with their car while on union business, the duty to fairly represent clearly would not control, as the alleged harm would not be premised upon the parties' relationship created by the collective bargaining agreement. But where, as here, Respondents have alleged harm based solely upon just such a relationship, their claims are limited to a claim that the union violated its duty to fairly represent, and their common law causes of action should have been dismissed.

III. THE APPROPRIATE STATUTE OF LIMITATIONS IS SIX MONTHS

A. The Six-Month DFR Statute of Limitations Applies

Since, as shown above, Respondents' claims of conversion and fraudulent concealment both arise out of the collective bargaining relationship, they cannot be brought as such. The only available claim for such allegations is one alleging a breach of the duty of fair

representation. And such a claim is limited to the six-month period preceding the filing of Plaintiffs' complaint. Federal law holds, with respect to private sector employees and their labor unions, that since there is no statutory limitation period applicable to duty to fairly represent claims, the appropriate period of limitation to be applied to such claims is the six-month statute of limitations applicable to unfair labor practices under the National Labor Relations Act ("NLRA").

In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983), the Court held that the six-month statute of limitations applicable to unfair labor practices committed by private employers or by private employees' unions under the National Labor Relations Act ("NLRA") was equally applicable to duty to fairly represent actions by members against their unions. Since there is no specific statutory statute of limitations applicable to duty to fairly represent cases under the NLRA, the *DelCostello* Court addressed the question of whether to borrow respective states' various and varying limitation periods for torts or for vacating arbitration awards, or to adopt the statutory six-month limitation for unfair labor practices contained in the NLRA.

The Court adopted the latter, rejecting both the ninety-day state limitations period for vacating arbitration awards urged by the union and

the three to six year contractual limitations period urged by the employees. *Id.*, 462 U.S. at 166. It held that the most appropriate period to adopt would be one that balanced the “national interests in stable bargaining relationships and finality of private settlements and an employee’s interest in setting aside what he views as an unjust settlement under the collective bargaining system.” *Id.*, 462 U.S. 171. The Court continued [*supra*, at 168-69 (deletions and brackets in original, internal citations omitted)]:

“It is important to bear in mind the observations made in the *Steelworkers Trilogy* that ‘the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing . . . machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.’ Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union This system, with its heavy emphasis on grievance, arbitration, and the ‘law of the shop,’ could easily become unworkable if a decision which has given ‘meaning and content’ to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later.

The NLRA does not apply to state public employers, their employees, or their unions, such as the parties involved in the instant

case.²¹ However, the above principles apply with equal force. As with the federal statutory scheme, under Washington state law relating to public employees, there is no statutory period of limitation expressly set forth in RCW Chapter 41 for bringing duty to fairly represent actions against public employees' unions. There are, however, identical six-month statutes of limitation applicable to unfair labor practices by public employers and public employees' unions. *See* RCW 41.59.150 (1);²² 41.56.160 (1).²³

The Washington State Supreme Court repeatedly has held that decisions interpreting the NLRA are persuasive in interpreting similar provisions of Chapters 41.56 and 41.59 RCW. *State v. Board of Trustees*, 93 Wn.2d 60, 67, 605 P.2d 1252 (1980); *Public Employees v. Community College*, 31 Wn. App. 203, 642 P.2d 1248 (1982); (decisions construing the NLRA are persuasive when construing similar

²¹ *See e.g. Jackson v. Temple University of Com. System of Higher Educ.*, 721 F.2d 931, (3rd Cir. 1983); *Children's Village*, 197 NLRB 135, 80 LRRM 1747 (1972).

²² **RCW 41.59.150 Commission to prevent unfair labor practices--Scope.**

The commission is empowered to prevent any person from engaging in any unfair labor practice as defined in RCW 41.59.140: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

²³ **RCW 41.56.160 Commission to prevent unfair labor practices and issue remedial orders and cease and desist orders.**

(1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

provisions of RCW 41.56 and RCW 41.59); *see also: Vancouver Sch. District v. Service Employees*, 79 Wn. App. 905, 906 P.2d 946 (1995); *City of Bellevue v. International Ass'n. of Fire Fighters, Local 1604*, 119 Wn.2d 373, 383, n.2, 831 P.2d 738 (1992); *Nucleonics Alliance, Local Union 1-369 v. Washington Pub. Power Supply Sys.*, 101 Wn.2d 24, 32-33, 677 P.2d 108 (1984).²⁴ Moreover, the very existence of a duty to fairly represent on the part of Washington state public employees unions is owed to the *Allen* court's recognition and adoption of similar principles developed under federal labor law jurisprudence. *See: Allen*, at 100 Wn.2d, 371-372, and discussion *supra*, at pp. 23-28.

Clearly, the policy considerations relied upon by the *Allen* court in first imposing a duty to fairly represent and by the *DelCostello* court in adopting a limitations period for duty to fairly represent claims equal to that of unfair labor practices, apply with equal force to issues arising under Washington state public labor law, particularly in light of the Washington Legislature's and courts' adoption of decisions involving federal labor law

²⁴ Similarly, RCW 41.59.110(2) provides that federal precedent is to be considered by the Washington Public Employment Relations Commission in its interpretation of Washington public sector labor law issues.

as persuasive authority in deciding state law labor cases.²⁵ Were a longer limitation period to apply, the public sector collective bargaining process would be impacted in precisely the same manner as the federal system. There is no reasoned distinction to be drawn between the federal labor law system and that of Washington State, as the latter is derived directly from the former. Thus, this Court should adopt six months as the appropriate statute of limitations, and rule that all claims against WEA accruing more than six months prior to the filing of the Respondents' complaint are barred.

B. Five Years Is Not The Appropriate Statute of Limitations

Even assuming *arguendo*, a six month statute of limitations does not apply, the five years statute ultimately held applicable by the trial court is inappropriate. In the trial court, Respondents' counsel originally argued that the appropriate statute of limitations would be three years (R.P. 10/12/01, p. 29). At a later hearing, Respondents' counsel confirmed that they were "not pursuing a five year one [statute of limitations]". (C.P. 83). Accordingly, the trial court originally ruled that "it was a three-year statute" (R.P. 12/7/01, p. 9). The court below

²⁵ The trial court herein determined that this issue was more properly determined by appellate courts: "absent an appellate court ruling by [the Washington State Appellate Court, the applicable statute of limitation [is not 6 months, but rather 3 years pursuant to] RCW 4.16.180(2) . . ." (CP 93-94).

subsequently applied a five-year statute of limitations (C.P. 174; R.P. 12/7/01, p. 10).

If this Court were to reject the compelling federal precedent that a six-month statute of limitations applies to cases such as this which implicate the duty of fair representation, there are three possible state statute of limitations provisions that could govern the various claims presented herein. RCW 42.17.410 provides:

Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.

RCW 4.16.080 provides:

Within three years:

- (2) An action for taking personal property;
- (4) An action for relief upon the ground of fraud . .

And finally, RCW 4.16.130 provides:

An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.

As argued above, Appellant believes that the most appropriate statute of limitations is six months and that it is applicable to all of Respondents' claims. If this Court were to rule otherwise, then it should clarify which of the foregoing provisions apply to which claims. It would appear that, absent application of the DFR six-month time limit, the three-year statute

of limitations pursuant to RCW 4.16.080 applies to the conversion and fraudulent misrepresentation claims. But as to Respondents' implied private right of action claim, the two-year, rather than the five-year statute of limitations should apply.

Respondents' implied right of action is not brought pursuant to the statutory provisions of the PDA, for nothing in the PDA expressly provides for or authorizes such an action. Thus, RCW 42.17.410 does not apply. Consequently, to the extent that there is any implied private right of action, it must be considered "an action for relief not hereinbefore provided for", governed by the two-year statute of limitations contained in RCW 4.16.130.

If this Court determines not to dismiss the case in its entirety, it should clearly set forth the applicable time limitations on each of Respondents' remaining claims. Such determination may dispose of some claims, limit others, clarify the scope of any class, and simplify subsequent trial proceedings, if any.

IV. THE NAMED RESPONDENTS SHOULD NOT HAVE BEEN APPROVED AS CLASS REPRESENTATIVES

A. Named Respondents Are Not Representative Of The Class.

The trial court certified the two of the three causes of action herein as a class action and approved the named Respondents as appropriate class

representatives. However, for various reasons, none of the named Respondents is representative of the class that has been certified.

Respondent Gary Davenport is no longer an employee in the educational system.²⁶ Since 1999, he has been a full-time employee of the Seattle Police Department. Consequently, he is not a member of the class defined by Respondents herein.²⁷ Martha Lofgren has never been a regularly employed teacher, having served only as a day-to-day substitute and as shown below, she would not be an adequate class representative. Respondent Walt Pierson retired at the end of this past school year, has received rebates, at least in some years, and was a member of the *Leer* class²⁸ and thus cannot be a member of this class, for reasons set forth below. Respondent Susanna Simpson had been on maternity leave from the Edmonds School District and had neither worked nor paid agency fees for the past two school years.²⁹ Consequently she is not a member of the described class. But even if the trial court had deemed the named respondents to be members of the putative class, as we show below, they should not have been approved as proper class representatives.

²⁶ The facts related to each Respondent are gleaned from their respective depositions, excerpts of which are in the Appendix hereto, at pp. 13-31.

²⁷ This argument is based upon a six-month statute of limitations, which Appellant contends is applicable to the claims herein. Mr. Davenport was no longer working in a school district six months prior to the filing of the complaint herein.

²⁸ See *infra*, pp. 42-43.

²⁹ Like Mr. Davenport, Ms. Simpson was also not working in a school district six months prior to filing of the complaint.

B. The Named Respondents Do Not Meet the Prerequisites For Serving As Class Representatives

Civil Rule 23 sets forth certain criteria that plaintiffs must meet in order to maintain their case as a class action. As we show below, Respondents herein did not and cannot satisfy such prerequisites and thus should not have been permitted to serve as class representatives nor to maintain their case as a class action:

1. Commonality

There are not common questions of law or fact between the named Respondents and the class certified by the trial court. First and foremost, there is a question of law as to whether some of the class representatives “affirmatively authorized” use of their fees for so-called “political expenses”. For example, Respondent Pierson testified in his deposition that he understood how to request a rebate of a portion of his agency fees,³⁰ but simply chose not to do so in those years in which he had not been sent a rebate request card. In some of the years, he did send in a printed form that he had received, requesting a rebate, which he received. He further testified that he had no disagreement with the ballot initiatives

³⁰ Pursuant to the *Hudson* notice sent annually to all agency fee payers, agency fee payers may request a rebate of the nonchargeable portion of the agency fee. Those who request and receive a rebate are called “objectors” or “challengers.” Neither objectors nor challengers should be members of the class certified by the court since their rebate includes but is not limited to an amount proportionate to that spent by the union for “political purposes.”

and levies that he knew WEA had supported. At the other end of the spectrum, Respondent Lofgren feels entitled to a rebate for reasons unrelated to political activities: she believes she is entitled to a rebate because of what she describes as WEA's "homosexual agenda" and its anti-patriotic and anti-Christian positions (App. 22-23).³¹

The chasm between these two respondents is characteristic of the diversity of reasons for employees opting to be agency fee payers. Some are fee payers because they have not been provided with membership enrollment forms. Some undoubtedly have simply forgotten to enroll. The range of possible reasons creates many factual issues that defeat commonality between the named respondents and the class required by CR 23(a)(2).

In *Gilpin v. American Federation of State, County, and Mun. Employees*, 875 F.2d 1310 (7th Cir. 1988), *cert. den'd*, 493 U.S. 917, 110 S.Ct. 278 (1989), the court upheld denial of class certification for just such reasons. Nine nonunion employees had brought suit challenging the adequacy of the *Hudson* notice and the agency fee and sought a class of all nonunion employees. Based upon the diversity of reasons for not

³¹ Appellant has submitted a Supplemental Designation of Record to add to the appellate record the excerpts of the Respondents' depositions that had been before the trial court. Because those documents are not yet included in the record before this court, Appellant has provided them in the Appendix to this brief, at pp. 13-31.

belonging to the union, the court found a potential serious conflict within the class as to those who refuse to join because they are hostile to unions on political or ideological grounds and those who welcome the benefits of union representation but do not want to pay any more than they have to. *See also: Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991); *Pilots v. Air Line Pilots Ass'n.*, 938 F.2d 1123, 1134 (D.C. Cir. 1991). Here, there certainly are serious questions about conflicts between the named respondents and the class that they seek to represent, which should have led the trial court to rule that they were not proper class representatives.

2. Typicality

The claims of these Respondents are not typical to the class as a whole. Two of them (Davenport and Lofgren) were day-to-day substitute teachers whose interests and alleged losses are far different from a regularly employed, full-time employee. Two of them (Davenport and Simpson) are no longer school employees. One of them (Pierson) objected and received rebates. *See: App. pp. 13-31.* Their claims therefore are not typical of the claims of the purported class, as required by CR 23(a)(3).

3. Class Interests

CR 23(a)(4) requires that the “representative parties will fairly and adequately protect the interests of the class.” The trial court should have disqualified the named Respondents as class representatives because none of them could have established that she or he will do so. Gary Davenport could not fairly and adequately represent the interests of the class as he is no longer working in the public school system and has no economic interest in the collective bargaining representation by the Appellant herein. He is a full-time police officer with the Seattle Police Department. (*See*: fn. 31 and App. pp. 13-20). The infinitesimal amount of fees paid by him when he worked as a day-to-day substitute, now that his employment and union allegiances are elsewhere, is not sufficient to ensure that he would be a fair and adequate representative.

The trial court erred in concluding that Martha Lofgren could fairly and adequately represent the purported class because her opposition to agency fees is based on philosophical and fundamentalist religious beliefs that clearly taint her ability to protect the interests of those holding less extreme beliefs, or no philosophical or religious basis at all for seeking a rebate. Ms. Lofgren is a day-to-day substitute teacher who has very different representational issues from those of regular, full- or part-time employees. *See*: App. pp. 21-25.

Similarly, the court below should have found that Susanna Simpson could not be an adequate class representative because she has not worked in the public school system since January 2000 and has no current plans to return. Since she is not employed, she has no economic motivation to represent a class of persons who are currently employed. *See*: App. pp. 26-31. She should not have been found to be a proper class representative.

Finally, the court below erred in accepting the contention that representation by Mssrs. Chapell and O'Ban cured any inadequacy of the named class representatives. Mr. Chapell is a staff attorney with the National Right to Work Foundation, the same organization that the *Gilpin* and *Kidwell* courts described as an impediment to representational adequacy:

[T]he National Right to Work Foundation is not an adequate litigation representative for those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively . . .

Gilpin, 875 F.2d at 1313; *Kidwell*, 946 F.2d at 305.

Like the National Right to Work Foundation, the Evergreen Freedom Foundation which Mr. O'Ban represents and on whose behalf he filed the underlying PDC complaints, has the same ultimate goal – to

decimate WEA's collective power as the representative of 75,000+ public school employees. Neither attorney should have been viewed as representing class interests herein. Quite the contrary, their presence in this litigation hallmarks the internal conflict of interests that should have precluded them from representing the class. *See: Gilpin, supra.*

4. No One From the *Leer* Case Can Represent or Be in the *Davenport* Class

The trial court should have found that Walt Pierson is barred by the settlement agreement in previous class litigation from representing or being a member of this class. *Jeff L. Leer, et al. v. Washington Education Association*, No. C96-1612Z (W.D. Wa. 1996).³² The *Leer* Settlement provides that the Settlement "shall finally and completely resolve **all issues that were or could have been raised in [the] litigation**, as between all plaintiffs and members of the plaintiff classes, on one hand, and all defendants and their affiliated local associations in the State of Washington, on the other" (*See: fn. 31, and App. 46-47*)(emphasis added). Walt Pierson, having resigned his membership in WEA in the 1995/96

³² In *Leer*, a group of teachers, represented by the same law firm representing Respondents here: Ellis, Li & McKinstry, and funded, as here, by the National Right to Work Legal Defense Foundation, sued WEA in federal court. The *Leer* plaintiffs brought the case as a class action, and a class was subsequently certified by Judge Thomas S. Zilly. The case was resolved through a class action settlement approved by the court. *Inter alia*, the court-approved settlement and federal law governs the manner in which WEA handles the collection and rebate of agency fees – the subject matter of this current lawsuit. *See: App. pp. 32-66.*

school year, and remaining as an agency fee payer the 1995/96, 1996/97 and 1997/98 school years, was part of the first *Leer* subclass consisting of “all nonmembers obligated to pay agency fees to defendants at any time during the school years 1994-95 through 1997-98” (*See*: fn. 31, and App. 56-57).

The *Leer* plaintiffs claimed that WEA’s *Hudson* notice and rebate process were inadequate, and although the exact issue of use of fees for alleged improper purposes was not raised therein, it certainly could have been. Indeed, all of the claims raised herein could have been raised in *Leer*. Accordingly, since Mr. Pierson is a member of the *Leer* class, the court below should have held that he is estopped from raising these claims in this litigation and thus could not serve as a class representative.³³ And if this Court permits a class action to proceed, it should exclude from such class all individuals who were, or could have been, in the *Leer* class.

³³ The Settlement Agreement also provides for arbitration as the “sole recourse” for claims of breach (App. p. 48).

CONCLUSION

For the foregoing reasons, WEA respectfully requests that this Court reverse the decision of the trial court and dismiss the case in its entirety.

Dated this 15th day of July, 2002.


JUDITH A. LONNQUIST, WBSA #6421
Attorney for Petitioners/Appellants


HARRIET STRASBERG, WBSA #15890
Attorney for Petitioners/Appellants

APPENDIX

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The Honorable Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State of Washington ex rel. Public
Disclosure Commission,

Plaintiff,

v.

Washington Education Association,

Defendant.

NO. 00-2-01837-9

DECLARATION OF NANCY J.
KRIER

NANCY J. KRIER, upon oath deposes and says:

1. I am an Assistant Attorney General for the State of Washington. I represent the Public Disclosure Commission. The PDC is a state agency overseen by a five-member citizens Commission. The Commission acts as a quasi-judicial body when it adjudicates enforcement matters brought before it. One of those enforcement actions involved the Washington Education Association as a Respondent. The case was brought before the Commission on September 26, 2000.

2. I have read the Defendant WEA's proposed Amended Answer and Affirmative Defenses in the present action, which contains the proposed affirmative defense # 5: "Defendant contends that it did not violate RCW 42.17.760. Confronted with what it believed was a misinterpretation of law by the agency and in the absence of any agency guidelines, in

DECLARATION OF NANCY J. KRIER

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ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

COPY

1 order to access the courts and properly frame the legal issues for court review, Defendant
2 entered into the above-referenced stipulation based on the agency's interpretation."

3 3. I was present at that September 26, 2000 meeting of the Commission where the
4 enforcement matter of "Washington Education Association, case # 01-002" was listed on the
5 agenda as "Acceptance of a stipulation for violations of RCW 42.17.760, for using agency fees
6 to make contributions or expenditures to influence an election without affirmative
7 authorization." The agenda item was addressed by the Commission at that meeting.

8 4. I recall that Assistant Attorney General Stephen Reinmuth read the Stipulation
9 into the record. A copy of that Stipulation is attached to the Complaint filed in this case, and is
10 attached to this declaration as Exhibit B. It is signed by Vicki Rippie, Executive Director,
11 PDC, and Harriet Strasberg, Counsel, WEA. I recall that after further brief discussion with Mr.
12 Reinmuth, WEA attorney Harriet Strasberg came to the table to speak to the Commission. I
13 also recall that another WEA attorney, Aimee Iverson, was present. I requested a copy of the
14 tape of that portion of the meeting, and an excerpt as transcribed by my office is attached to
15 this declaration as Exhibit A. I recall that it was quite clear from the following that the WEA
16 was fully represented by its own legal counsel in the discussion and entry of the Stipulation to
17 the violations of the statute at issue (RCW 42.17.760), and that the Stipulation was fully agreed
18 to by the WEA and accepted by the PDC:

19 o The presentation and comments of Mr. Reinmuth ("It is an actual violation
20 being agreed to.") (Exhibit A, page 2);

21 o The statements of Ms. Strasberg ("We agree not to oppose the staff's
22 recommendation and to stipulate to a violation now, and to let the Office of the Attorney
23 General determine how it wanted to proceed, uh, and so, that's why we engaged in the
24 Stipulation.") (Exhibit A, page 1);

25

DECLARATION OF NANCY J. KRIER

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1 o My comments ("In this case, it looks like the core facts have been stipulated to
2 by the parties...") (Exhibit A, page 2);

3 o Comments of Commissioner Brady ("And so by referring it as a agreed to
4 violation, or, stipulated violation, then what were saying though is that the penalty phase
5 seemed to be agreed to, it is in excess of what we can assess, and they agreed to that.") (Exhibit
6 A, page 3); and,

7 o The Stipulation itself signed by Ms. Strasberg ("3. The Respondent's general
8 fund money was used to make contributions and expenditures to influence an election and to
9 operate a political committee. 4. The Respondent did not have affirmative authorization from
10 agency fee payers to use their money for these purposes.") (Exhibit B, page 1).

11 I recall saying on the record that while I could not presume what action our office
12 would take if the PDC referred the matter, and that our office could consider other facts
13 regarding violations of the statute, having core facts stipulated to by the WEA would make our
14 office's investigation easier. After receiving the Stipulation, the Commission unanimously
15 voted at the meeting to refer this matter for further action by our office, as the attached copy of
16 the Order of Referral states. Exhibit C. The Order of Referral incorporates the Stipulation by
17 reference. The Order also states that the Commission considered that in light of the statutory
18 violations by the WEA, the maximum penalty it could assess under its statutes was inadequate,
19 therefore, it was referring the case to the Attorney General's Office.

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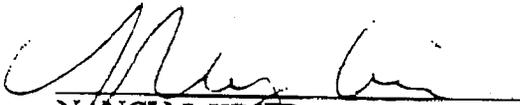
DECLARATION OF NANCY J. KRIER

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1 5. I would be happy to make a copy of this tape available to the court, or request a
 2 transcript be prepared of the entire WEA matter before the Commission on September 26,
 3 2000, upon request.

4 I DECLARE UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE
 5 STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

6 Signed this 0 day of March, 2001 in Olympia, WA.



NANCY J. KRIER
 WSBA # 16558
 Attorney for Plaintiff

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**EXCERPT OF 9-26-00 PDC MEETING
(WEA-PDC Case No. 01-002)**

(Stipulation is read into the record by Assistant Attorney General, Stephen Reinmuth, and brief discussion ensues).

CHAIRMAN CAHILL: Since there is no other commissioner questions, Harriet, would you like to make a statement?

MS. STRASBERG: Yes. I would. Um. For the record, my name is Harriet Strasberg, and I represent the Washington Education Association, and this is Aimee Iverson who is assistant general counsel for the Washington Education Association. I just want to briefly take a minute to explain, um, why WEA agreed to the Stipulation of Violations. We believe that this is a matter of first impression for the staff and the Commission, um, as far as we know, there, there, ah . . . well, there are no rules to determine what compliance with RCW 42.17.760 requires. Until this complaint and investigation, we believed, that as long as there was sufficient revenues, um, so that the political contributions could be made from non-agency fee dollars, there would be no violation of RCW 42.17.760. And since most of our funds are used for purposes unrelated . . . to elections and . . . since most of the funds are used for purposes unrelated to elections and political committees, the way vast majority, like 95%, we believe that our agency fees, funds, were spent appropriately for those other purposes. During the course of this investigation, it became clear that the staff disagreed and believed that WEA would have to segregate its agency fees in order to comply with RCW 42.17.760. Had we know that, we would have done that all along. We consider this to be an accounting issue, a technical violation. There was no intention to violate the statute. We cert . . . WEA certainly has no need or desire to use agency fees for political purposes. Um, rather those funds, um, legally, had to be used for collective bargaining appropriately. Segregation, which of those funds, which we will do in the future, will make this patently obvious. Um, we agreed to the violation for two reason: First, because we consider it to be a technical violation which could have easily been remedied by segregation, and which will be done so in the future, and: Second, as the Commission is probably aware, EFF filed a different 45-day notice against the WEA four years ago, and in that situation the Commission referred part of that case to the Attorney General, in the other part, the larger part of the Complaint, was dismissed. Um. As a result the EFF sued the WEA directly, in Superior Court, and although the WEA prevailed in every aspect of that case, we were forced to spend over a million dollars in defense of that situation . . . in defense of that litigation. Um, so, due to the nature of the 45-day notice and 42.17.400(4), we do not . . . we agree not to oppose the staff's recommendation and to stipulate to a violation now, and to let the Office of the Attorney General determine how it wanted to proceed, uh, and so, that's why we engaged in the Stipulation. We do believe we can remedy the situation in the future, and, um, if the staff wants it another way, or the Commission wants the books, our accounts, dealt with differently, we will do that. So, thank you very much.

CHAIRMAN CAHILL: I have a question for our legal counsel. By virtue of us accepting the Stipulation of this case, most normally when do a referral to the Attorney General's Office gets based upon "apparent" violation of a specific statute. By virtue of us stipulating to this, does that create a problem? Because they, we, are saying there is an actual violation?

MS. KRIER: Steve?

MR. REINMUTH: You captured my thought. This is a specific concern I've had. It is an actual violation that is being agreed to. That is my understanding with counsel, and staff negotiated this, and that's my understanding that the staff wanted to have happen. I'll refer to Nancy on (UNINTELLIGIBLE) some kind of referral order. Remind you, that you could find an actual violation issue order regarding that (COUGHING - UNINTELLIGIBLE).

MS. KRIER: What we could probably do is say that the Commission finds the apparent violation, a violation that is effect stipulated to by the parties, and that, and your referring that on.

CHAIRMAN CAHILL: Okay. So, in our motion, for the acceptance of the Stipulation, we could find the apparent violation.

MS. KRIER: Under the statute.

CHAIRMAN CAHILL: Under the statute.

MS. KRIER: They would represent that the parties have stipulated it into it, and then refer it onto the AG's Office. I think we can accomplish both.

COMMISSIONER BRADY: But since they have already stipulated to it, though, what are we referring the AG to do?

MS. KRIER: Well, it makes our investigation a lot quicker.

COMMISSIONER BRADY: . . . Right, and so it's the penalty phase?

MS. KRIER: That's my guess. I'm not . . . I'm not presuming what our office might do.

COMMISSIONER BRADY: (UNINTELLIGIBLE).

COMMISSIONER MARSH: So in essence your asking the Attorney General's Office, here, to complete the investigation, because it's an apparent violation?

MS. KRIER: The way that the referral process works, is when our office gets in a 45-day letter, we refer it the PDC that has the expertise and investigation process, typically when the initial complaints come in. When it comes back to our office, if it does, from you all, with the apparent violation, we get to assess whether or not there are facts to support a violation, or if there are other facts that need to be looked at. In this case, it looks like the core facts have been stipulated to by the parties, so, that's why I said I believe, again, I'm not presuming our office would do it, but it would make any investigation pretty minimal (UNINTELLIGIBLE). . . again, not (UNINTELLIGIBLE) what our office would do.

COMMISSIONER BRADY: And so by referring it as a agreed to violation, or, stipulated violation, then what were saying though is that the penalty phase seemed to be agreed to, it is in excess of what we can assess, and they agreed to that.

END OF EXCERPT.

I, Kim Bresler, certify that I am not a professional transcriber, and that I transcribed the above to the best of my knowledge. A copy of the actual tape will be made available upon request.

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

Dated this 6th day of March, 2001, at Olympia, WA.

By: Kim Bresler
Kim Bresler

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**BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON**

**IN RE THE MATTER OF ENFORCEMENT
ACTION AGAINST**

PDC CASE NO. 01-002

Washington Education Association,

**ORDER OF REFERRAL
TO THE WASHINGTON STATE
ATTORNEY GENERAL'S
OFFICE**

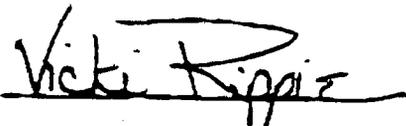
Respondent.

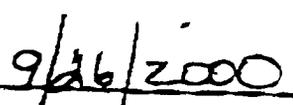
Staff of the Public Disclosure Commission submitted to the Commission a "Stipulation Facts, Violations, and Recommendations" (Stipulation) dated September 25, 2000 in this matter. The Stipulation was signed by Vicki Rippie, PDC Executive Director, and Harriet Strasberg, Counsel, Washington Education Association (WEA). The Commission members considered the Stipulation on September 26, 2000 at a regular meeting. The parties were represented by Assistant Attorney General Stephen Reinmuth (representing Commission Staff), and at Ms. Strasberg (representing the Respondent WEA).

Following the presentation by Mr. Reinmuth of the Stipulation, and considering the comments of Ms. Strasberg, and after due deliberation, the Commission directed the following:

By a vote of 5-0, the Commission found that there are apparent multiple violations of RCW 42.17.760 by the Respondent WEA, as has been acknowledged to by the parties in the Stipulation. The maximum penalty that can be assessed by the Commission is inadequate in light of the apparent violations. Therefore, in lieu of conducting an adjudicative proceeding, the Commission is hereby entering Findings of Fact, Conclusions of Law, and an Order, and considering

1 recommendation of the parties that this matter and Stipulation be referred to the Washington
 2 State Attorney General's Office for further review pursuant to RCW 42.17.395(3), t
 3 Commission hereby refers this case to the pursuant to RCW 42.17.360 and .395, and WAC 39
 4 37-100, and incorporates the Stipulation by reference. To expedite this matter, the Executive
 5 Director is authorized to sign on behalf of the Commission.

6
 7 
 8 Vicki Rippie, Executive Director


 Date Signed

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Copies to be provided to:
 Stephen Reinmuth, PDC Staff Attorney
 Harriet Strasberg, Counsel for Respondent

BEFORE THE PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON

IN THE MATTER OF THE)
ENFORCEMENT ACTION AGAINST)
Washington Education Association)
Respondent.)

CASE NO 01-002

STIPULATION OF FACTS,
VIOLATIONS AND
RECOMMENDATIONS

The Washington Education Association (Respondent) and Public Disclosure Commission Enforcement Staff (Staff) agree to the following:

1. The Respondent is a labor organization.
2. The Respondent deposited into its general fund agency fee money from 4,194 individuals.
3. The Respondent's general fund money was used to make contributions and expenditures to influence an election and to operate a political committee.
4. The Respondent did not have affirmative authorization from agency fee payers to use their money for these purposes.
5. The Respondent contends that the number of 4,194 is over-inclusive in that it includes persons who were members of WEA and did not pay agency fees.
6. Staff contends that when Respondent submitted documents in response to a subpoena, a redacted list of 4,407 agency fee payers was presented. Names of the agency fee payers were redacted and replaced with a unique identification number for each agency fee payer. Of these 4,407 individuals, 213 either filed objections or challenges to their funds being used for 'non-chargeable' expenditures and received a refund of the portion of their fees being used for non-chargeable purposes. The funds from the remaining 4,194 individuals were then transferred from the agency fee escrow account to WEA's general operating fund.

Washington Education Assn.
Stipulation of Facts, Violations and Penalty
Page 2

7. Staff were unable to determine the amount of agency fees used to make the contributions and expenditures referred to in paragraph 3 because WEA's final revenue figures for FY 2000 (September 1, 1999 through August 31, 2000) are not yet available.

Violation

Respondent and Staff agree that Respondent committed multiple violations of RCW 42.17.760.

Recommendation

Staff recommends that this matter be referred to the Office of the Attorney General for further review pursuant to RCW 42.17.395(3). Respondent does not oppose the recommendation by staff.

Respectfully submitted this 25th day of September, 2000.

Vicki Rippie
Vicki Rippie, Executive Director
PDC

Harriet Strasberg
Harriet Strasberg, Counsel
WEA

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Judge Daniel Berschauer
Hearing date: 11/2/01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, And TRACY WOLCOTT,)	
)	NO. 01-2-00519-4
Plaintiffs)	
v.)	
WASHINGTON EDUCATION ASSOCIATION,)	DECLARATION OF JUDITH LONNQUIST
Defendant.)	

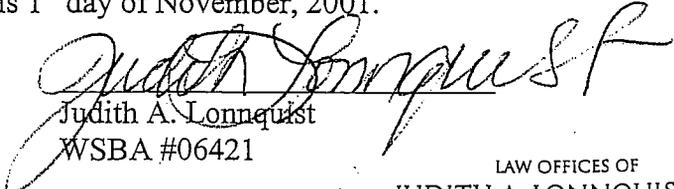
JUDITH A. LONNQUIST, on oath declares as follows:

1. I am one of the attorneys for the Defendant. I make this declaration based on my personal knowledge, and I am competent to testify as to the matters stated herein.

2. Attached hereto are true and correct excerpts from the deposition transcripts of Gary Davenport, Martha Lofgren, and Susanna Simpson. Although the depositions of Walt Pierson and Tracy Wolcott have been taken, the transcripts have not yet been prepared.

I have read the foregoing, believe it to be correct, and certify and declare the same under penalty of perjury of the laws of the State of Washington.

Signed at Seattle, Washington this 1st day of November, 2001.


 Judith A. Lonquist
 WSBA #06421

1 or you feel you can't answer the way they're posed,
 2 if you'll tell me that I'll rephrase them.
 3 A Okay.
 4 Q If you don't tell me that I'll assume that you
 5 understood the question and answered it
 6 accordingly. And you're under oath to tell a
 7 truth. The court reporter is going to write it all
 8 down. You will have the opportunity in the future,
 9 hopefully the near future, to read it and make any
 10 changes you think might be appropriate.
 11 Would you state your home address for the
 12 record, please.
 13 A Home address is 13716 Southeast 256th Place, that's
 14 in Kent, Washington with a zip code of 98042.
 15 Q And I notice you're wearing a police officer's
 16 badge?
 17 A Correct.
 18 Q Are you a police officer?
 19 A Yes.
 20 Q How long have you been a police officer?
 21 A For about a year.
 22 Q With what department?
 23 A Seattle.
 24 Q Do you belong to the guild?
 25 A I do.

1 A We do.
 2 Q How many?
 3 A Three.
 4 Q How old are they?
 5 A We have a three-year-old, a two-year-old and a
 6 two-week-old.
 7 Q And has Carrie ever been employed outside the home?
 8 A Yes.
 9 Q Has she ever been a teacher?
 10 A No.
 11 Q What prompted you to become a police officer?
 12 A I looked it up on the Internet and looked at the
 13 interview -- or the qualifications and decided to.
 14 Q Okay. Tell me about your college education, what
 15 college or colleges did you attend?
 16 A I went to the University of Washington I went to
 17 Antioch University.
 18 Q Did you get a BA from University of Washington?
 19 A Correct.
 20 Q And when did you get that?
 21 A I got that in '97.
 22 Q And what was your major?
 23 A History. I believe it was '97, it's depending on
 24 whether it was the start of '97 school year or '97
 25 in June when I graduated.

1 Q How long have you lived at 13716 Southeast 256th
 2 Place in Kent?
 3 A I believe we moved in there May of '99.
 4 Q And before that where were you living?
 5 A Lived in unincorporated King County in an area of
 6 Skyway.
 7 Q Skyway?
 8 A Correct.
 9 Q And what was the address there?
 10 A 12600 57th Avenue South, that's actually a Seattle
 11 address.
 12 Q How long did you reside at that location?
 13 A Since 1995, in September.
 14 Q Are you married?
 15 A Yes.
 16 Q What's your wife's name?
 17 A Carrie.
 18 Q Spell that, please.
 19 A C-a-r-r-i-e.
 20 Q How long have you and Carrie been married?
 21 A We've been married six years.
 22 Q Thought you were going to give me minutes when you
 23 looked at your watch.
 24 A No.
 25 Q Do you have children?

1 Q All right. And when did you attend Antioch?
 2 A Directly after that, directly following that. So
 3 it would be '97.
 4 Q '98?
 5 A I think it went through January so it might have
 6 gone into '98.
 7 Q And what was the purpose of going to Antioch?
 8 A It was to get a teaching certificate.
 9 Q And I take it you got one?
 10 A Yes.
 11 Q And do you still have it?
 12 A I do.
 13 Q Is it a permanent certificate or provisional?
 14 A I believe it's provisional now.
 15 Q Okay. And does it have any endorsements?
 16 A It has an endorsement in I believe history and
 17 social studies.
 18 Q Is it K-eight or K-12?
 19 A I believe it's --
 20 Q (Interposing) Nine-12?
 21 A I believe it's eight-12. Not eight-12.
 22 Q It's secondary?
 23 A Secondary, is what I believe it is.
 24 Q And do you hold any teaching certificates from any
 25 other state?

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1 A No.
 2 Q What prompted you to go into teaching?
 3 A My father was a teacher.
 4 Q Okay.
 5 A And I enjoy teaching.
 6 Q Where did your father teach?
 7 A Seattle.
 8 Q What did he teach?
 9 A Metal shop or industrial arts.
 10 Q Is he still working as a teacher?
 11 A No.
 12 Q He retired?
 13 A He is retired.
 14 Q Do you know whether your dad was a member of the
 15 education association?
 16 A He was a member.
 17 Q What was your -- what was your first teaching
 18 position?
 19 A I started substitute teaching. That was the
 20 position I guess.
 21 Q In what district?
 22 A Kent.
 23 Q And when did you do that?
 24 A I believe it was 1998, the fall.
 25 Q So the '98-'99 school year?

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1 A I think so.
 2 Q Okay. And when you say sub, you were in the
 3 substitute pool and they would call you when they
 4 needed someone?
 5 A Correct.
 6 Q Okay. Did you have any other employment other
 7 than as a substitute teacher in Kent in the '98-'99
 8 school year?
 9 A Oh -- rephrase that again.
 10 Q Did you have any other employment other than as a
 11 substitute teacher during that school year, the
 12 '98-'99 school year?
 13 A I don't believe so.
 14 Q And do you know how often you worked as a
 15 substitute?
 16 A I don't.
 17 Q Would you say that it was more than half of the
 18 school year?
 19 A Oh, how long that I worked. I worked I believe
 20 until October -- no. The first quarter had ended
 21 and I started on a contract as a teacher.
 22 Q So in the fall of '98 you applied for a teaching
 23 position?
 24 A Correct.
 25 Q With Kent?

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1 A Uh-huh.
 2 Q Is that a yes?
 3 A Yes.
 4 Q And you worked on a substitute contract or on a
 5 day-to-day basis?
 6 A I didn't -- substitute contract, what do you mean
 7 by that?
 8 Q Well, sometimes if you're filling in for a teacher
 9 on maternity leave for example you get a 90-day
 10 contract?
 11 A No, I worked for the most part day-to-day.
 12 Q Okay. And then what happened, did your status
 13 change?
 14 A Yes.
 15 Q And when did that occur?
 16 A That's when -- I think it happened in -- after the
 17 first quarter ended sometime around November.
 18 Q And were you filling in for a regular teacher?
 19 A When I got hired on?
 20 Q Yes.
 21 A No.
 22 Q Well, tell me how that came about.
 23 A Okay. I believe in their projection of numbers at
 24 the start of the year they were low on hiring. And
 25 then they projected and got their real numbers and

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1 needed an extra teacher for certain sections.
 2 Q Okay. So what -- were you hired -- were you given
 3 a contract in November?
 4 A It was a non-continuing contract I believe of a
 5 point six.
 6 Q For the rest of that school year?
 7 A Yes.
 8 Q Teaching what?
 9 A Teaching history or social studies.
 10 Q At the high school level?
 11 A Correct.
 12 Q And then in June of '99 did you know what was
 13 happening the following year?
 14 A Nothing was promised to me.
 15 Q Okay. So for the '99-2000 year were you back in
 16 the sub pool?
 17 A As the start of the year came around in September
 18 or August I was offered another what would be about
 19 a point six or point seven or so contract.
 20 Q Non-continuing?
 21 A Non-continuing.
 22 Q Okay. And were you told that you were a leave
 23 replacement?
 24 A No.
 25 Q Did the contract terminate on Saint Patrick's day?

1 A I don't know.
 2 Q Okay. Do you recall that it terminated before the
 3 end of the school year?
 4 A It did end before the end of the school year.
 5 Q And if I told you that the records from the school
 6 district indicated that your leave replacement
 7 ended March 17 of 2000, would that ring any bells?
 8 A It would be --
 9 Q (Interposing) Somewhere in that area?
 10 A It was at the quarter change.
 11 Q Was that also teaching history and social studies?
 12 A Correct.
 13 Q Was it the same building as the previous year?
 14 A Yes.
 15 Q What building was that?
 16 A Kentwood High School.
 17 Q And then after the end of that quarter did you go
 18 back to being in the sub pool?
 19 A No.
 20 Q Did you stop teaching altogether?
 21 A I did.
 22 Q Did you resign?
 23 A I don't -- no, I don't know if I resigned or -- I
 24 didn't have a contract is what I knew of.
 25 Q When you left at the end of the point six or point

1 seven non-continuing contract term in the spring of
 2 2000, did you ever return to teaching?
 3 A No.
 4 Q Did you tell the Kent School District that you were
 5 no longer interested in being in their substitute
 6 pool?
 7 A Yes.
 8 Q How did you do that?
 9 A I must have contacted HR at the Kent School
 10 District.
 11 Q During the -- you say must have, you don't have any
 12 specific recollection?
 13 A Right.
 14 Q But you think it was an oral?
 15 A I believe I went in to the office and told them
 16 that I wouldn't be in their sub pool any more.
 17 Q All right. And did you in fact do any day-to-day
 18 subbing after the end of your non-continuing
 19 contract period in year 2000?
 20 A Not that I can remember. I don't believe I went
 21 back.
 22 Q Okay. Now, let's -- and you haven't taught
 23 anywhere else other than the time you'd spent in
 24 the Kent School District; is that true?
 25 A No, not in not public school or private.

1 Q Teaching anywhere?
 2 A Just religious.
 3 Q Uh-huh. And did you receive compensation for
 4 teaching?
 5 A No.
 6 Q Like a Sunday school teacher?
 7 A Yeah, Sunday school.
 8 Q And the next gainful employment that you had after
 9 the Kent School District was the Seattle Police
 10 Department?
 11 A Correct.
 12 Q How long did it take you to qualify as a police
 13 officer?
 14 A Do you mean the testing process or the academy
 15 process?
 16 Q Well, from the time you began the process of
 17 applying for a position with the Seattle Police
 18 Department until you actually were on payroll.
 19 A I believe it was seven months.
 20 Q When did you actually start with the Seattle Police
 21 Department?
 22 A I was employed by them in April.
 23 Q April of this year?
 24 A Of 2000.
 25 Q Of 2000. As an officer?

1 A It might have been May.
 2 Q As an officer?
 3 A No, as a cadet.
 4 Q As a cadet?
 5 A Or in the academy, we were not specifically cadets.
 6 Q Okay. So you went through the academy and then you
 7 became a regular rank-and-file police officer?
 8 A Right, sworn officer.
 9 Q Okay. And when did that happen?
 10 A That happened in October.
 11 Q Of 2000, a year ago?
 12 A Yes. Yesterday.
 13 Q A year ago yesterday?
 14 A Correct.
 15 Q But who's counting.
 16 Do you have any intention of returning to
 17 teaching as a compensated career?
 18 A I can't really answer that yes or no as of yet.
 19 Q Okay.
 20 A I wouldn't rule it out.
 21 Q All right.
 22 A But it doesn't -- it's not in the immediate plans.
 23 Q When you first were offered a non-continuing
 24 contract with the Kent School District were you
 25 also offered the opportunity to join the education

1 association?
 2 A Yes.
 3 Q And I take it you declined?
 4 A In declining by not signing?
 5 Q Well, did you join?
 6 A No.
 7 Q And was there a reason why you didn't join?
 8 A I didn't really want to be part of the union.
 9 Q Why?
 10 A I think in talking with some of the people that
 11 were involved in it, our maybe philosophies are
 12 different.
 13 Q Okay. Could you expand on that for me, please?
 14 A I mean, in how in I think the purpose or the intent
 15 of some of the things that go on in a union shop.
 16 Q Let me ask you a few more specific questions then.
 17 You said you talked to people involved in
 18 the association. Who did you talk to?
 19 A I don't know his first name but a Mr. Walker I
 20 believe was the current president of the local
 21 KEA.
 22 Q How did you happen to engage Mr. Walker in
 23 conversation?
 24 A Mr. Walker -- probably the reason why I don't know
 25 his first name or forget it, was one of my former

1 well, I really probably figured I don't need any
 2 protection. I didn't think of my job as a
 3 protection job as a teacher.
 4 Q Okay. Anything else?
 5 A I don't believe so.
 6 Q So it wasn't that you had something philosophical
 7 against joining, you just didn't see the need
 8 personally for it?
 9 A Yeah, I don't see the need personally for it. I
 10 didn't see the need.
 11 Q Was there anything else in the conversation that
 12 you had with Mr. Walker that encouraged you or
 13 discouraged you with respect to joining the
 14 association?
 15 A Not that I can remember.
 16 Q Why then did you join the guild? The Seattle
 17 Police Officers Guild?
 18 A Seattle Police Officers Guild. The guild and its
 19 membership -- let me put it this way, my life
 20 depends on the other officers that are involved in
 21 the guild and we work daily protecting each other.
 22 And I wouldn't want anything to compromise or come
 23 in between that.
 24 Q So do you feel or did you feel prior to joining the
 25 guild that if you didn't join the guild your life

1 teachers.
 2 Q A colleague -- oh, you had taken him as --
 3 A (Interposing) A student.
 4 Q I see, all right, okay.
 5 A And so we had a relationship so we discussed that.
 6 Q Uh-huh. And was this before you began to work for
 7 the Kent School District or after?
 8 A I think it might have been in the hiring process.
 9 Q And did you seek him out or did he seek you out?
 10 A I think he realized that I was applying and because
 11 of our past history of knowing each other we came
 12 in contact, rather than seeking out.
 13 Q Okay. What had he taught you?
 14 A I think it was fourth or fifth grade.
 15 Q So he was an elementary teacher?
 16 A Correct.
 17 Q In the course of discussing, in the course of
 18 conversing with Mr. Walker, did you talk about the
 19 association?
 20 A Yes, I believe so.
 21 Q And what was it in what he said to you that made
 22 you feel that the purpose and intent of the union
 23 was different than your purpose and intent?
 24 A I think he might have talked about the fact that
 25 the union would protect you. And I think I said,

1 would be in jeopardy?
 2 A Not necessarily in jeopardy but it makes it I would
 3 imagine much easier when you have a non-conflict
 4 relationship with other people when it comes down
 5 to a life and death situation.
 6 Q Did your experience in the Kent School District,
 7 the fact that you were not a member of the Kent
 8 Education Association, did that cause you conflict
 9 with your colleagues?
 10 A No.
 11 Q In fact do you know whether people that you taught
 12 with knew whether or not you were a member of the
 13 KEA or not?
 14 A The people in my department did. And I think both
 15 our departments, the social studies and English
 16 department did.
 17 Q But there wasn't any problem, you didn't have any
 18 problem with that?
 19 A There were -- I can't specifically remember but
 20 there were times where you might get the feeling
 21 that somebody might say something about it or had
 22 said something about it to other people.
 23 Q And how did you know that?
 24 A Just by coming in on conversations or something.
 25 Q I see. So the conversations would be Gary is not a

1 member?
 2 A I don't really recall specifics but...
 3 Q Okay. But in any event there wasn't any conflict
 4 about whether or not you were a member?
 5 A No, not arguments or anything like that.
 6 Q You don't feel that any of your colleagues at Kent
 7 High School would have treated you any differently
 8 because of your lack of union membership do you?
 9 A I don't believe so.
 10 Q Okay. Did you talk to your dad at all about
 11 whether or not you should belong to the Kent
 12 Education Association and its affiliates?
 13 A I don't specifically remember but I might have.
 14 Q Okay. Do you remember whether your dad recommended
 15 that you join or recommended that you don't join?
 16 A He -- I don't think he ever recommended anything
 17 about union membership or not.
 18 Q Okay. Now, each year -- in each of the two years
 19 that you were in Kent School District were you
 20 offered the opportunity to join the union?
 21 A I only remember the very first time.
 22 Q The first year. And was it the school district
 23 that offered you that or the union?
 24 A It was in part of our orientation to the school
 25 district but I believe that KEA had a part -- had a

1 A Is that the WEA?
 2 Q Yes. Do you agree with that mission statement?
 3 A I hadn't heard it.
 4 Q But you've now heard it, do you agree with it? The
 5 goal of making public education the best it can be
 6 for students, parents and teachers?
 7 A Do I agree with that as a goal?
 8 Q Yeah.
 9 A I agree with that as a goal.
 10 Q When you decided not to join the Kent Education
 11 Association and its affiliates, did you understand
 12 that if you didn't join you'd be having to pay a
 13 fee in any event?
 14 A The fee for representation?
 15 Q Correct.
 16 A Correct.
 17 Q And was that explained to you in the orientation?
 18 A That if I didn't join I would still have to? I
 19 think I was explained that but I think I was the
 20 only one that didn't join so I don't know if they
 21 made special time right there to explain it to me
 22 or it was explained later.
 23 Q Okay. But in any event at some point early in your
 24 employment you learned that you would have to pay a
 25 fee equal to or close to dues?

1 time where they got to introduce their part of --
 2 their role in the school.
 3 Q And was it Mr. Walker that did that presentation?
 4 A Yes.
 5 Q And Mr. Walker talked generally about the benefits
 6 that being a union member could provide, is that a
 7 fair statement?
 8 A I believe so.
 9 Q Did he talk about what the association did by way
 10 of bargaining and grievance handling and insurance
 11 benefits?
 12 A I don't know exactly.
 13 Q You don't recall?
 14 A I don't recall.
 15 Q Did you receive any handouts at the orientation
 16 with respect to the association?
 17 A I believe -- yeah, I believe I did.
 18 Q Was that a statement of the benefits of joining?
 19 A I think so.
 20 Q Okay.
 21 A Whatever they -- kind of a mission statement so
 22 whatever that entailed, I don't know.
 23 Q Well, actually the mission statement is to make
 24 public education the best that it can be for
 25 teachers, students and parents.

1 A Yeah, I would have to pay a fee to have
 2 representation.
 3 Q Okay. And that would be deducted from your
 4 paycheck?
 5 A Correct.
 6 Q And did you think that was fair?
 7 A Did I think that was fair?
 8 Q Yes.
 9 A Yes.
 10 Q Okay.
 11 (EXHIBIT NO. 1 IS MARKED FOR
 12 IDENTIFICATION)
 13 BY MS. LONNQUIST:
 14 Q Hand you what has been marked as Exhibit 1.
 15 MR. CHAPPELL: There's two pages
 16 there.
 17 MS. LONNQUIST: Correct.
 18 BY MS. LONNQUIST:
 19 Q Have you ever seen that document; Mr. Davenport?
 20 A I don't remember it.
 21 Q Okay. Will you look at the next page? Looks as if
 22 it was a certified letter that you never picked
 23 up.
 24 A It looks like it was unclaimed.
 25 Q Right. So do you recall getting a certificated

1 mail, certified mail slip but you didn't go down to
 2 the post office to get it?
 3 A I don't.
 4 Q Okay. So you have never seen Exhibit 1 before?
 5 A As long as this was the letter that was in this I
 6 don't believe I have.
 7 Q Okay. I will represent to you that in fact this
 8 letter was in this envelope. If you look at the
 9 envelope you'll see right above the \$3.20 there's a
 10 date, April 19 and then if you look at the date on
 11 the letter you'll see it's April 19?
 12 A Okay.
 13 Q Do you recall receiving any other communications
 14 from either the Kent Education Association or the
 15 Washington Education Association during the two
 16 years that you were employed by the Kent School
 17 District?
 18 A I do believe I have received something with either
 19 KEA -- I think KEA more than WEA but I don't recall
 20 a specific item.
 21 Q Okay. Did you ever receive a big packet of
 22 materials from the WEA?
 23 A A big packet from the WEA?
 24 Q Correct.
 25 A Not that I remember. I remember more getting

1 A Yes.
 2 Q You try to vote in every election?
 3 A I try to.
 4 Q Before you vote do you educate yourself as to what
 5 the issues and positions are that you're going to
 6 vote on?
 7 A Yes.
 8 Q Did you -- do you recall a few years ago there was
 9 a ballot proposition related to charter schools?
 10 A I have -- I do remember the charter school issue
 11 coming up on voting, I don't what it -- I don't
 12 know what time frame it's come up.
 13 Q Do you recall whether you voted yes or no on the
 14 charter schools initiative?
 15 A Do you remember what year that was?
 16 Q It was '97 I believe.
 17 A I believe I voted yes.
 18 Q Okay. Do you recall there being a ballot
 19 initiative on vouchers.
 20 A Yes.
 21 Q Do you recall how you voted on that initiative?
 22 A I believe it was yes also.
 23 Q Do you recall more recently that there was a ballot
 24 proposition that would increase teacher salaries to
 25 keep up with the cost-of-living increases?

1 something from the KEA rather than the WEA.
 2 Q What kinds of things do you remember getting from
 3 the KEA?
 4 A I think I still get a newsletter that they send
 5 out. Other than that I don't specifically remember
 6 the documents that they sent.
 7 Q Do you read the newsletter?
 8 A Not on a current basis.
 9 Q When you were teaching did you read it?
 10 A I think I did.
 11 Q Did you get anything out of it?
 12 A You mean in advertisements or just the
 13 information-wise?
 14 Q Information. Right, when you read it. I mean,
 15 obviously there was a reason why you read it, you
 16 thought there would be something in it that you'd
 17 be interested in.
 18 A Right. Right.
 19 Q Was that true?
 20 A Not to my recollection.
 21 Q Okay. So did you keep reading it nonetheless?
 22 A No, I haven't.
 23 Q All right.
 24 Do you consider yourself to be a regular
 25 voter?

1 A Was that last year?
 2 Q Uh-huh. Or the year before.
 3 A I do remember it being a topic, I don't remember it
 4 coming to a vote or how it ran.
 5 Q So you don't remember whether you voted yes or no
 6 on that?
 7 A I don't.
 8 Q How do you feel about across-the-board
 9 cost-of-living increases for teachers? Do you
 10 think that's a good idea or not a good idea?
 11 A Do I think that teachers --
 12 Q (Interposing) Deserve cost-of-living increases?
 13 A Yes.
 14 Q Do you recall the ballot initiative with respect to
 15 class size, seeking to reduce the class size?
 16 A I do not specifically remember that. These were
 17 all topics that were repeated over and over in
 18 education.
 19 Q Uh-huh.
 20 A So I don't remember specifically.
 21 Q You don't remember whether you voted yes or no?
 22 A Right.
 23 Q As a general proposition would you agree that
 24 reducing class size is a good educational policy?
 25 A Yes.

1 Q Did you ever attend meetings of the of the Kent
 2 Education Association?
 3 A I attended our local school meetings that were
 4 held.
 5 Q When you say local school meetings, you mean of the
 6 school board or of the KEA?
 7 A No, our local teachers KEA, those people that were
 8 being represented in our individual school. I
 9 didn't --
 10 Q (Interposing) In the building?
 11 A In our building, correct, for our school.
 12 Q When there was a building council meeting or
 13 something to that effect, would you attend?
 14 A Correct.
 15 Q Okay. And what kinds of things were discussed at
 16 those meetings?
 17 A Usually we talked about things like when the
 18 calendar was going to start, how class periods were
 19 going to be structured, what time we were going to
 20 have to show up to work and when we could leave.
 21 Q Were those issues important to you?
 22 A They weren't terribly important to me.
 23 Q Do you think the union serves a good -- provides a
 24 good service to the members when it negotiates
 25 school calendar and school start time and release

1 time, that sort of thing?
 2 A I would say that would be a good use of the
 3 bargaining services.
 4 Q Okay. How about school levies, do you -- did Kent
 5 run any school levies while you were teaching
 6 there?
 7 A Yes.
 8 Q Were you living in the district too at the time?
 9 A Yes.
 10 Q Did you vote in favor of the levies?
 11 A I don't believe I did.
 12 Q Okay. Why not? You didn't want your taxes to go
 13 up?
 14 A The why-not question? Or the second one?
 15 Q I was leading the witness.
 16 A Right. I voted no I believe because the levies
 17 always go up. And it seems as though we're
 18 promised that we'll do better things if we have
 19 more levies and yet we continue to be promised more
 20 things to have more levies.
 21 Q Have you ever voted for a school levy?
 22 A Yes.
 23 Q When -- how did you get involved in this lawsuit?
 24 A I believe I heard -- or I called the Evergreen
 25 Freedom Foundation.

1 Q How did you know to call the Evergreen Freedom
 2 Foundation?
 3 A I think I heard it on some sort of media
 4 advertisement.
 5 Q On the radio?
 6 A I believe so but I couldn't rule out that it was on
 7 TV.
 8 Q Okay. What was it about the advertisement that
 9 prompted you to call the Evergreen Freedom
 10 Foundation?
 11 A I think -- I can't be sure but I think it mentioned
 12 in it that -- it asked the question if you were a
 13 nonunion member that was still a teacher or
 14 something to that effect, nonshop or -- I can't
 15 specifically remember but it was to that effect.
 16 Q Uh-huh. And so why did you call?
 17 A I fit that qualification. That I was --
 18 Q (Interposing) Is that the only reason, because
 19 somebody over the radio said, will all nonteachers
 20 who are still teaching call this number?
 21 A Oh, they were -- I imagine they were -- they had
 22 some information for us to find out about or what
 23 could be done if we're a nonmember.
 24 Q So it was the fact that you thought there was some
 25 information that would be beneficial to you if you

1 called this number that prompted you to call?
 2 A Uh-huh.
 3 Q Is that a yes?
 4 A Yes.
 5 Q And were you in your car when you heard this?
 6 A I don't know.
 7 Q Did you write the number down or did you have to
 8 look it up later?
 9 A I don't think I ever looked it up so I must have
 10 gotten it from whatever media that I was listening
 11 to.
 12 Q What was the information that you got when you
 13 called the number?
 14 A I think they asked a few questions to see if I fit
 15 into what the advertisement or the media had been
 16 talking about. And from our conversation I think I
 17 did. And I think it was said that they would get
 18 back to me. So I think I left my phone number with
 19 them.
 20 Q Had you ever heard of the Evergreen Freedom
 21 Foundation before this advertisement?
 22 A Through like the Seattle Times, I have read -- I
 23 think I have read articles about their existence.
 24 Q What articles do you recall reading, what were the
 25 topics?

1 A I don't recall specific articles.
 2 Q So when you had heard or read this advertisement
 3 about the Evergreen Freedom Foundation this sort of
 4 rang a bell with you, is that a fair statement?
 5 A Yeah.
 6 Q And you said to yourself, well, I better call them
 7 because they have information for me?
 8 A Yeah.
 9 Q And do you recall to whom you spoke when you
 10 called?
 11 A No, I don't.
 12 Q Male or female?
 13 A I don't recall that.
 14 Q How many conversations did you have with the
 15 Evergreen Freedom Foundation before putting your
 16 name on this lawsuit?
 17 A I can't -- I can't give you a number.
 18 Q Less than five, fewer than five?
 19 A Yes.
 20 Q And do you recall in it -- the contents of any of
 21 those conversations, generally what was said to
 22 you?
 23 A I think what they're -- I think what they -- they
 24 were planning on putting together was just
 25 generally explained.

1 Q Tell me what you understood from that.
 2 A They explained as I had thought was that they were
 3 putting together -- it was -- the idea was going
 4 around that some of the money that was used, or
 5 that was collected, was used in a way that was
 6 different than what had been represented to us.
 7 Q Anything else you recall?
 8 A They asked if -- and now, I don't know which
 9 conversation this was -- they asked if I would be
 10 willing to be part or have myself represented in a
 11 case against the WEA.
 12 Q Okay. Anything else?
 13 A No.
 14 Q When you say that some of the money that had been
 15 collected was used in a way that was different than
 16 what had represented to us, what had been
 17 represented to you about the way the money was to
 18 be spent?
 19 A I think what was represented to me with -- was what
 20 they had told us the union's goal or job was.
 21 Q And that would be Mr. Walker?
 22 A Either that or through other conversations with
 23 just general people.
 24 Q And what was it that was represented as within the
 25 scope of what the union was supposed to use the

1 money for?
 2 A I believed it was for bargaining purposes for our
 3 employment. That's what I was represented as.
 4 Q And this -- the representations were made by
 5 colleagues, fellow teachers?
 6 A I would say colleagues and then referencing back to
 7 Mr. Walker.
 8 Q And do you recall anything specific that Mr. Walker
 9 said the money would be spent for?
 10 A No.
 11 Q And what did this representative of the Evergreen
 12 Freedom Foundation tell you that was different from
 13 spending the money for bargaining purposes?
 14 A I believe they said politics but I don't think they
 15 referenced any sort or any examples.
 16 Q Anything else that is different from what you
 17 understood the money to be spent for?
 18 A No.
 19 Q And did you understand what the representative of
 20 the Evergreen Freedom Foundation meant by politics?
 21 A I understood it to mean politics including
 22 political campaigning such as supporting
 23 individuals.
 24 Q Individual candidates?
 25 A Yes.

1 Q And if you were to learn that your agency fees in
 2 fact don't go to supporting individual candidates,
 3 would that change your feelings about this lawsuit?
 4 A If I were to learn that they didn't go --
 5 Q (Interposing) Did not go to support individual
 6 candidates would that change your feelings about
 7 this lawsuit?
 8 A I don't believe so because it wasn't limited just
 9 to political candidates, that was just one of the
 10 inclusions in politics.
 11 Q What else do you understand -- let me ask it this
 12 way. What else do you understand to be in
 13 politics, in the term politics, with which you
 14 disagree that fees should be spent for or could be
 15 spent for?
 16 A Probably in -- I guess one, representing the people
 17 that are being chosen. And then also two, probably
 18 some of programs that -- educational programs or so
 19 that I might disagree with.
 20 Q What educational programs?
 21 A An educational program I guess if I voted yes on
 22 the vouchers or the charter schools, I would say if
 23 money was used to combat that then that would be
 24 something I guess I would disagree with.
 25 Q Okay. Anything else?

1 A Yes.
 2 Q Would you tell me where you went to college?
 3 A All of them?
 4 Q Sure.
 5 A San Jose State University; University of California
 6 at Berkeley; let's see, San Francisco State
 7 University; University of Washington; Long Beach
 8 City College; Seattle Pacific; and right now South
 9 Seattle Community College.
 10 Q Why so many colleges?
 11 A First I went to San Jose State because that's where
 12 I grew up, two years. Transferred to Berkeley, got
 13 my bachelor's there. Went for a year at San
 14 Francisco State for my teaching credential. Moved
 15 down to Southern California, thought I might try
 16 nursing so I took classes at Long Beach City
 17 College. This is spread out over a long period, 30
 18 years.
 19 Q Okay.
 20 U.W.?
 21 A University of Washington, that was to add a subject
 22 to my teaching credential.
 23 Q What subject?
 24 A English as a second language.
 25 Q Seattle Pacific?

1 A That was -- there was a required class in something
 2 about recognizing children who have been abused.
 3 And I think I took a sign language class through
 4 that university too.
 5 Q ESL?
 6 A Yes. Yes.
 7 Q Okay.
 8 A And the latest --
 9 Q (Interposing) South Seattle Community College?
 10 A I'm taking horticulture classes right now.
 11 Q That has nothing to do with your teaching?
 12 A It could. I can add that as a subject also.
 13 Q What was your major at Berkeley?
 14 A German.
 15 Q And the -- you have a Washington State teaching
 16 certificate?
 17 A Yes.
 18 Q And what are the endorsements on that?
 19 A German and ESL.
 20 Q And is that secondary?
 21 A Yes.
 22 Q Any other teaching certificates other than
 23 Washington?
 24 A An expired California certificate.
 25 Q And were there endorsements on the California

1 certificate?
 2 A Just German.
 3 Q And where are you currently employed?
 4 A I'm employed with Kent School District and the
 5 Auburn School District.
 6 Q When did you move to the state of Washington?
 7 A 1985.
 8 Q And when did you get your teaching credential in
 9 Washington?
 10 A I think it was '94 possibly.
 11 Q When was your first employment in a school district
 12 in the state of Washington?
 13 A '96.
 14 Q So that would be the 1996-97 school year?
 15 A I actually started at the very end of the '95-'96
 16 school year.
 17 Q Okay.
 18 A I think the last day of May I think I started.
 19 Q And where was that employment?
 20 A That was with the Kent School District.
 21 Q And was that as a substitute?
 22 A Yes.
 23 Q And at the time that you filled out papers as an
 24 employee, substitute employee, in Kent School
 25 District were you offered the opportunity to join

1 the Washington Education Association and the Kent
 2 Education Association?
 3 A I don't recall.
 4 Q I take it being the end of May of '96 it wasn't a
 5 very long assignment, is that a fair statement?
 6 A I think I worked four days.
 7 Q Four days, all right. And were you seeking
 8 full-time employment?
 9 A Full-time or part-time.
 10 Q And then did you have to reapply for a position for
 11 the '96-'97 school year?
 12 A No.
 13 Q And where were you employed that year?
 14 A Also in Kent.
 15 Q Exclusively?
 16 A No, in October of that year I also started working
 17 for the Auburn School District.
 18 Q Let's focus on Kent. What kind of employee were
 19 you, a substitute?
 20 A Substitute.
 21 Q Okay. And was this a -- I'm talking about the
 22 '96-'97 school year, was this a substitute pool
 23 assignment or were you a long-term sub?
 24 A The pool, yes.
 25 Q And do you know approximately how many days you

1 worked in the '96-'97 school year for the Kent
 2 School District?
 3 A I can't tell you without my records exactly how
 4 many days.
 5 Q And were you offered an opportunity in the '96-'97
 6 school year to join the Kent Education Association
 7 and its affiliates?
 8 A I believe I was, yes.
 9 Q And tell me about that, how were you offered that
 10 opportunity?
 11 A It must have come in the mail, some form.
 12 Q Do you recall from whom it came? Was it from the
 13 district or the association?
 14 A I don't recall.
 15 Q Do you recall what it was? Was it a letter, was it
 16 a form?
 17 A I don't recall.
 18 Q And in whatever form it was I take it you didn't
 19 exercise the opportunity to join?
 20 A That's correct.
 21 Q Okay. And was there a reason for that?
 22 A Yes.
 23 Q And tell me the reason, please.
 24 A I disagree with the union on moral and political
 25 issues.

1 Q What moral and political issues?
 2 A The union has stated that they see homosexuality as
 3 a legitimate alternative lifestyle. I do not agree
 4 with that. They're also against school choice and
 5 vouchers. And I believe they support candidates
 6 that I cannot support.
 7 Q And on what do you base your understanding of the
 8 union's positions?
 9 A I have received or looked at some publication they
 10 put out, I don't recall the name. And I did read
 11 their statement, I don't know what they call it but
 12 it lists outright what they stand for. And the
 13 homosexuality issue was mentioned in there.
 14 Q And was this a document from the Kent Education
 15 Association or from the Washington Education
 16 Association?
 17 A I believe it was from the Washington Education
 18 Association.
 19 Q And when you say you read something that they put
 20 out would that have been like a newspaper or a
 21 letter, do you recall?
 22 A I think it's a magazine format.
 23 Q All right.
 24 So it would have been -- do you recall
 25 whether it was the WEA Action?

1 A I don't recall what it was.
 2 Q And when was the first time that you came to an
 3 impression or understanding about these moral and
 4 political issues as you've described them?
 5 A It was before I read that.
 6 MR. CHAPPELL: I'm sorry, are you
 7 talking about when she came to the understanding of
 8 her own positions or the positions of the union?
 9 MS. LONNQUIST: No, no, the positions
 10 that she's ascribed to the union.
 11 MR. CHAPPELL: She's asking when you
 12 knew about the union's positions.
 13 MS. LONNQUIST: No, I asked her when
 14 she first had an impression about what she
 15 understood to be the union's positions.
 16 MR. CHAPPELL: Okay.
 17 A I think I got this impression in the years '85 to
 18 '94.
 19 BY MS. LONNQUIST:
 20 Q And so the impressions from '85 to '94 when you
 21 weren't teaching --
 22 A (Interposing) Uh-huh.
 23 Q -- where did you draw those conclusions, from what
 24 source?
 25 A From publications and radio programs.

1 Q When you say publications to what do you refer?
 2 A I'm referring to publications put out by Focus on
 3 the Family.
 4 Q And what's that?
 5 A That is a Christian organization.
 6 Q Anything else? Any other publications?
 7 A Probably no other publications.
 8 Q And I think you mentioned radio shows too. To what
 9 do you refer?
 10 A Focus on the Family also has a radio program. And
 11 it wasn't just theirs, there are other Christian
 12 programs.
 13 Q Other Christian radio programs?
 14 A Yes.
 15 Q Did you -- at any time since you've begun teaching
 16 have you done any research to substantiate what you
 17 believe to be the positions of the union on the
 18 items that you mentioned?
 19 A Research?
 20 Q Yes, have you read anything or talked to anybody?
 21 A Other than the publication put out by the WEA I
 22 have not read anything. I have come into contact
 23 with teachers who are very pro-union,
 24 pro-homosexual agenda.
 25 Q When you say pro-homosexual agenda, what do you

1 mean?
 2 A That homosexuality be accepted as normal.
 3 Q Is that all of it?
 4 A Yeah.
 5 Q Okay. And when you substitute taught for the Kent
 6 School District in the '96-'97 school year were you
 7 the only substitute teaching in the areas of German
 8 and ESL?
 9 A No.
 10 Q Were you teaching -- substitute teaching in other
 11 than high school?
 12 A Junior high and high school.
 13 Q And you do have records as to how many days you
 14 actually substituted for the Kent School District?
 15 A Yes.
 16 Q Now, did you -- you said you also worked beginning
 17 in October of '96 for the Auburn School District.
 18 Was that again as a sub in the sub pool?
 19 A Yes.
 20 Q And do you know how many days approximately you
 21 substitute taught in Auburn?
 22 A Not without my records.
 23 Q But you do have records?
 24 A Yes.
 25 Q And again that would have been junior high and

1 Q And have your duties changed in any way with the
 2 Kent School District since 1996? Are you still a
 3 substitute teacher?
 4 A Yes.
 5 Q You still in the sub pool?
 6 A Yes.
 7 Q Was there ever a time when you were a long-term
 8 substitute for either Kent or Auburn?
 9 A No.
 10 Q Okay. So it's always the per diem substitute?
 11 A Yes. Yes.
 12 Q And how are you paid? On what kind of basis are
 13 you paid? Obviously it's a day rate, is that true?
 14 A Yes.
 15 Q And at the end of the month do you get a check from
 16 the Kent School District for how many days you
 17 substituted?
 18 A Automatic deposit.
 19 Q Okay. Automatic deposit?
 20 A Yes.
 21 Q All right. And are there deductions from that
 22 check?
 23 A Yes.
 24 Q Okay. Tell me what those deductions are.
 25 A All the standard government deductions plus the

1 high?
 2 A Yes.
 3 Q Is it -- can you tell me whether you did more
 4 substitute teaching -- more days of substitute
 5 teaching in Kent or Auburn?
 6 A Yes.
 7 Q And what is the answer to that?
 8 A Kent.
 9 Q So do you consider Kent your primary employer?
 10 A As of right now, no. I would say it's equally
 11 divided.
 12 Q Other than substitute teaching in the '96-'97
 13 school year did you work anywhere else?
 14 A No.
 15 Q All right. And is that true to date?
 16 A Yes.
 17 Q Have you held any other employment other than
 18 substitute teaching?
 19 A No.
 20 Q Have you held any substitute teaching or teaching
 21 positions since '96 in other than the Kent or
 22 Auburn School Districts?
 23 A No.
 24 Q Have you applied for any such positions?
 25 A No.

1 union contributions.
 2 Q And approximately what is the amount of the union
 3 contribution?
 4 A I can't tell you exactly.
 5 Q Okay. I take it it varies according to how big
 6 your check is, is that a fair statement?
 7 A Yes.
 8 Q Okay. But sitting here today you can't pinpoint --
 9 A (Interposing) It's...
 10 Q Go ahead.
 11 A Well, it's a set amount per day worked plus
 12 there's -- I think it's like a flat fee that's
 13 deducted after the first what, 10 or 20 days worked
 14 at the beginning of the year also if I recall
 15 right.
 16 Q All right. And do you understand that the wages,
 17 the amount of wages, the wage rate I should say,
 18 and other terms and conditions of employment in the
 19 Kent and Auburn School Districts are negotiated by
 20 the association with the school district?
 21 A Yes.
 22 Q Okay. And that as an employee of the school
 23 district do you feel that you benefit from that
 24 collective bargaining process?
 25 A I'm not sure.

1 Q Okay. And do you believe that it was -- do you
 2 believe that it was appropriate for your bargaining
 3 representative, the Kent Education Association, to
 4 support school levies?
 5 A I don't think I can generalize and say that.
 6 Q It would depend on what the levy is for?
 7 A Yes.
 8 Q Okay. But as a concept you don't -- you don't have
 9 any moral or political opposition to association
 10 supporting an appropriate school levy do you?
 11 A I don't have any opposition to that.
 12 Q Okay. Let's talk for a minute about various
 13 initiatives. Are you -- do you vote on a regular
 14 basis?
 15 A Yes, I do.
 16 Q And that's important to you, to exercise your
 17 franchise?
 18 A Yes.
 19 Q Do you recall Initiative 173?
 20 A Not now.
 21 Q Charter schools?
 22 A Vaguely.
 23 Q Do you know did you vote in that -- for that?
 24 A I probably did.
 25 MR. CHAPPELL: For my help, what year

1 A Generally, yes.
 2 Q You have no plans or intention to remove your
 3 children from the public schools, do you?
 4 A Not at this time.
 5 Q And is that -- is that an -- is that position based
 6 on other than a financial consideration?
 7 A The decision not to remove them now?
 8 Q Correct.
 9 A No, it would be financial at this point.
 10 Q So if you had sufficient funds you'd send them to
 11 private schools?
 12 A Yes.
 13 Q Or parochial schools?
 14 A Yes.
 15 Q Either?
 16 A Yes.
 17 Q Initiative 177 was an initiative that would
 18 establish a voucher system, I heard you say
 19 something about vouchers earlier?
 20 A Yes.
 21 Q You support a voucher system?
 22 A Yes.
 23 Q And that would be for both private and parochial
 24 schools?
 25 A Yes.

1 was that approximately?
 2 MS. LONNQUIST: 1997, I think.
 3 BY MS. LONNQUIST:
 4 Q Did you support -- did you vote yes on the
 5 initiative?
 6 A I believe I did.
 7 Q Okay. Did you contribute money to the political
 8 campaign committee that supported Initiative 173?
 9 A No.
 10 Q Okay. And did you hold a political position or any
 11 kind of position that charter schools would help or
 12 hurt the public education system?
 13 A I did not think of their effect on the public
 14 education system. I'm thinking of the needs and
 15 the welfare of students.
 16 Q So you believe -- I'm sorry, go ahead.
 17 A If it helps students and that happens to hurt
 18 public schools, then so be it. What's more
 19 important, the students or maintaining a public
 20 school system that may not be as good as it could
 21 be.
 22 Q Do you believe that the Auburn School District is a
 23 good school district?
 24 A Generally, yes.
 25 Q Providing a good education for your children?

1 Q I take it you voted in favor of Initiative 177?
 2 A Yes.
 3 Q Do you recall Initiative 732, which was a cost of
 4 living adjustment for public school employees?
 5 A Yes, I do.
 6 Q And you know that one passed?
 7 A Well, I didn't keep track of it much.
 8 Q Did you support that initiative?
 9 A No.
 10 Q Why not?
 11 A I wasn't sure if it was the right thing to do and I
 12 thought until I'm absolutely sure vote no.
 13 Q And when the cost of living adjustment was
 14 implemented for public school employees did you
 15 return the money that you received as a result?
 16 A I didn't see any difference in my paycheck.
 17 Q So the answer is no?
 18 A No, I did not.
 19 Q Proposition 728 was the successful ballot
 20 proposition that reduced class size. Did you
 21 support or oppose that?
 22 A I do not recall.
 23 Q Do you know whether you voted in that election?
 24 A I vote in every election but I don't remember how I
 25 voted in that.

1 Q Do you philosophically or pedagogically support
2 reduction of class size?
3 A Yes.
4 Q Okay.
5 How did you get involved in this lawsuit?
6 A I was asked if I would be interested in being part
7 of it.
8 Q By whom?
9 A I think it was the Evergreen Freedom Foundation.
10 Q And what -- had you had any prior contact with the
11 Evergreen Freedom Foundation?
12 A No.
13 Q So they called you out of the blue?
14 A No.
15 Q Tell me as best you understand how they came to
16 contact you.
17 A I heard an announcement on the radio, something to
18 do with -- or it was an announcement for teachers
19 who were not union members and it applied to me and
20 they gave a phone number and I called.
21 Q Was this on a Christian radio station?
22 A No.
23 Q On what radio program?
24 A The station was KVI 570.
25 Q Do you recall when that was?

1 A No, I don't.
2 Q And I take it the phone number that you called,
3 somebody responded that it was the Evergreen
4 Freedom Foundation?
5 A I believe so, yes.
6 Q Okay. And that's when you were asked if you'd be
7 interested in joining?
8 A Uh-huh.
9 Q Is that a yes?
10 A Yes.
11 Q Okay. And did you have to sign anything?
12 A No.
13 Q Did you have to contribute any money?
14 A Do you mean to the Evergreen Freedom Foundation?
15 Q To the lawsuit?
16 A No.
17 Q Have you contributed money to the Evergreen Freedom
18 Foundation?
19 A No.
20 Q Are you being -- are you receiving any compensation
21 for appearing here today?
22 A No.
23 Q Are you losing a day's work?
24 A Yes.
25 Q You being reimbursed for that?

1 A No.
2 Q Have you ever attended a meeting of either the Kent
3 Education Association or the Auburn Education
4 Association?
5 A No.
6 Q If you learned that neither the WEA nor the Kent or
7 Auburn Education Associations supports political
8 candidates would that change your position about
9 not joining?
10 A No.
11 Q Is there any anything that would prompt you to join
12 a labor union at this point in your career?
13 A If I read a statement by this union that indicated
14 that they had similar values to mine I might join.
15 Q And when you say similar values are you referring
16 to homosexuality?
17 A That would be one.
18 Q All right. What are the others?
19 A Probably something along the lines of acknowledging
20 God and a statement about -- something more
21 patriotic and probably it would have to include
22 something about school choice.
23 Q And when you say school choice what are you
24 referring to?
25 A For parents to be able to decide which school to

1 send their children to.
2 Q Don't parents have that choice now?
3 A No. Well, not within the public school system we
4 don't. And I think we should be allowed to use our
5 contributions, our tax contributions -- we should
6 be allowed to take those to the school of our
7 choice, whether it's a public school or private.
8 Q Have you ever met with the other plaintiffs in this
9 lawsuit?
10 A No.
11 Q Have you ever calculated the -- you understand that
12 the lawsuit seeks reimbursement of certain funds?
13 A Yes.
14 Q Have you ever calculated how much you believe
15 you're owed?
16 A No.
17 Q Did you ever receive any documents from a court, a
18 federal court, in the Leer case?
19 A The which case?
20 Q Leer case.
21 A No.
22 Q Have you ever heard of the Leer case before?
23 A No.
24 Q Do you have any basis for believing that the
25 collective bargaining efforts from the Kent

1 A Okay.

2 Q If you don't tell me I will assume that you

3 understand the question and answer it accordingly.

4 A Okay.

5 Q The court reporter is taking everything we say down

6 so don't answer by shaking your head or going

7 uh-huh, if you'll say yes or no, whatever is

8 appropriate. If any time during your deposition --

9 I don't expect it will take very long -- but if any

10 time you want to take a break just let me know and

11 we can do that as long as there's no question

12 pending before you.

13 A Okay.

14 Q And the same goes for talking with your attorney,

15 you can feel free to talk to your attorney at any

16 time as long as there's no question pending. So if

17 you need to talk to him answer my question and then

18 talk to him, okay?

19 A Okay.

20 Q Would you state and spell both your first and last

21 names for the record, please.

22 A Susanna Simpson, S-u-s-a-n-n-a S-i-m-p-s-o-n.

23 Q Okay. And would you state your address, please,

24 home address for the record?

25 A Home address not mailing?

1 Q Correct.

2 A 2422 82nd Drive Southeast, Everett, Washington

3 98205.

4 Q And do you have a separate mailing address?

5 A Yes.

6 Q And what is that?

7 A P.O. Box 3004, Everett, Washington 98203.

8 Q And how long have you resided at 2422 82nd Drive

9 Southeast?

10 A Almost four years.

11 Q Before that?

12 A The actual address?

13 Q Right, where did you live before that?

14 A Still in the Everett area, 19th Avenue Southeast,

15 was there a short time.

16 Q And you say a short time what do you --

17 A (Interposing) Oh, maybe a year.

18 Q About a year, okay. And before that?

19 A In Mukilteo.

20 Q Do you recall the address?

21 A 11108 Chennault Beach Road, Mukilteo 98275.

22 Q And are you married?

23 A Yes.

24 Q How long have you been married?

25 A Eight years.

1 Q What is your husband's name?

2 A Michael.

3 Q Simpson?

4 A Simpson, yes.

5 Q And is this your first marriage?

6 A Yes.

7 Q Hopefully your only marriage?

8 A Yes.

9 Q And what's your maiden name?

10 A Mesterton.

11 Q Can you spell that, please.

12 A M-e-s-t-e-r-t-o-n.

13 Q Could you tell me what college or university you

14 attended?

15 A All of them?

16 Q Seems to be a trend here, right? Yes, go ahead.

17 A Started out at Edmonds Community College. Then I

18 went to Everett Community College. I went to the

19 University of Washington where I received my

20 bachelor's. And then I went to City University for

21 my master's in teaching.

22 Q And when did you graduate from U.W.?

23 A 1993.

24 Q What was your major?

25 A Psychology.

1 Q When did you get your master's?

2 A 1995.

3 Q And do you have a Washington teaching certificate?

4 A Yes.

5 Q When did you receive that?

6 A Let's see, that would have been June when I

7 graduated, in June of 1995.

8 Q What level or levels of certificate do you have?

9 A It's K through eight endorsed and then a psychology

10 endorsement.

11 Q Is that the only endorsements?

12 A Uh-huh.

13 Q Is that a yes?

14 A Yes.

15 Q Have you ever held a teaching certificate anywhere

16 other than the state of Washington?

17 A No.

18 Q And is it a permanent certificate?

19 A Yes.

20 Q At this point?

21 A Uh-huh.

22 Q Now, if you'll tell me where you have been employed

23 since you received your teaching certificate.

24 A Edmonds School District. The school was Alderwood

25 Middle, I was a sub for one year. And then

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1 Alderwood Middle School was my full-time position.
 2 Q So you were a sub in the '95-'96 school year?
 3 A Yes, also in the Everett School District as a sub.
 4 Q Did you spend more time as a sub in one or the
 5 other districts?
 6 A In Edmonds.
 7 Q And then you applied for a full-time position?
 8 A Uh-huh. Yes.
 9 Q Is that a yes?
 10 A Yes.
 11 Q Okay. And have you held full-time teaching
 12 employment with the Edmonds School District since
 13 the '96-'97 school year?
 14 A Through 2000 -- or actually spring of 2001.
 15 Q So from September of '96 through --
 16 A (Interposing) April.
 17 Q -- April of 2001 you were full-time?
 18 A I was employed full-time. I was on leave,
 19 maternity leave from January of 2000.
 20 Q And then you never returned?
 21 A Correct.
 22 Q So the last time you were actually teaching in the
 23 Edmonds School District was December of 1999?
 24 A Correct.
 25 Q Okay. And what have you been teaching, what grade

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1 level?
 2 A I teach seventh and eighth grade.
 3 Q Any subject?
 4 A Math mostly, social studies a little bit.
 5 Q And since you began substitute teaching -- excuse
 6 me -- in the '95-'96 school year through today have
 7 you had any employment other than teaching in
 8 either the Edmonds or Everett School District?
 9 A No.
 10 Q Okay. When you became a full-time employee of the
 11 Edmonds School District in the '96-'97 school year
 12 were you offered the opportunity to join the
 13 education association?
 14 A Yes.
 15 Q How did that come about?
 16 A I believe it was just in the paperwork that they
 17 gave me when I got the position.
 18 Q Did you do so?
 19 A No, I did not.
 20 Q Why not?
 21 A I didn't go into teaching wanting to be part of a
 22 union. My goal was strictly to teach the kids and
 23 be able to enjoy that and I didn't really want to
 24 have anything to do with the things that the union
 25 does, the political side, the strikes.

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1 Q Has there been a strike in the Edmonds School
 2 District since you joined the staff?
 3 A Yes.
 4 Q And when was that?
 5 A I don't remember the exact date, it was a one-day
 6 walkout.
 7 Q Was it the year you began teaching?
 8 A No.
 9 Q It was later. So when you say you didn't join in
 10 '96-'97 because of strikes, was that just a
 11 general opposition to labor stoppage, work
 12 stoppages?
 13 A Yes, as far as education goes.
 14 Q Uh-huh, okay. Anything else about being a member
 15 of a union other than the political side and
 16 strikes that prompted you not to join?
 17 A No.
 18 Q When you say the political side what are you
 19 referring to?
 20 A I didn't want to be involved in any of the
 21 political things that they may work on or support.
 22 I would prefer to chose myself what I support
 23 politically with my money and time.
 24 Q And what was your understanding about the political
 25 things in which the Edmonds Education Association

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1 was involved?
 2 A Not a ton at the time. It was more just not
 3 wanting to be involved.
 4 Q Not wanting to be involved in general?
 5 A Right.
 6 Q Okay. Did you make any inquiries in '96-'97 about
 7 what kinds of activities the union was engaged in?
 8 A Not specifically that I recall.
 9 Q Then the following year, '97-'98, were you again
 10 offered an opportunity to join the union?
 11 A Yes, I was.
 12 Q And you declined for the same reasons?
 13 A Yes.
 14 Q Is that true for each of the years in which you've
 15 had full-time employment in the Edmonds School
 16 District?
 17 A I don't believe it was ever brought up after that.
 18 Q So the first two years?
 19 A Yes.
 20 Q And then after that --
 21 A (Interposing) Yes.
 22 Q And were you aware that if you weren't a member --
 23 if you didn't join the Edmonds Education
 24 Association and its affiliates that you would be
 25 paying an agency shop fee?

1 A That I would still have dues?
 2 Q That some money would be taken out of your check?
 3 A Yes.
 4 Q How did you understand that?
 5 A I understood it to be because I'm still benefitting
 6 from the bargaining, collective bargaining, that I
 7 would still be required to pay a certain amount.
 8 Q Somebody tell you that?
 9 A Yes.
 10 Q And do you recall who that was?
 11 A I believe I pretty much knew that actually just in
 12 general. There was -- Michael Sanford was a
 13 colleague who made that clear.
 14 Q And does he have a position with the association?
 15 A At the time I believe he was a local representative
 16 for our school, I believe, something along those
 17 lines.
 18 Q Like a building representative?
 19 A Correct, yes, I think so.
 20 Q And did you think that was fair that as long you
 21 were benefitting from the work that the union did
 22 on collective bargaining that you should pay some
 23 money towards it?
 24 A Yes.
 25 Q Do you have any current plans to return to

1 teaching?
 2 A I may possibly substitute part-time in the near
 3 future.
 4 Q Have you made application to a school district to
 5 do so?
 6 A No, I have not.
 7 Q But you expect that sometime during the 2001-2002
 8 school year that you will be seeking substitute
 9 employment?
 10 A Possibly.
 11 Q How old is your child?
 12 A He will be two in January.
 13 Q Have you received any mailings from the education
 14 association, either the Edmonds Education
 15 Association or Washington Education Association
 16 encouraging you to join the union?
 17 A I don't recall anything encouraging me to join the
 18 union. Not that I recall.
 19 Q Have you received any communication at all from the
 20 WEA or the EEA?
 21 A Since I was hired?
 22 Q Yes.
 23 A Yes.
 24 Q What kinds of publications have you received?
 25 A One of them is a very large packet that comes every

1 year. I suppose miscellaneous -- with every
 2 paycheck there is kind of a letter from the
 3 superintendent along with things going on, just
 4 general information, news information.
 5 Q About the school district?
 6 A Yes.
 7 Q And does that come from the school district itself?
 8 A You know, I'm not sure.
 9 Q Okay. That's fine. Tell me about the large
 10 packet, it comes in the mail, what do you do with
 11 it?
 12 A I read the front page maybe, scan it, and put it in
 13 a drawer.
 14 Q Still have them?
 15 A I may have one in my files which are packed away.
 16 But I may have one.
 17 Q Have you ever read it from cover to cover?
 18 A No.
 19 Q Why not?
 20 A Because it's very, very large. And it comes at a
 21 time when teachers are especially busy.
 22 Q Comes in October generally?
 23 A Sometime around September, October.
 24 Q And then doesn't another one come in December?
 25 A I'm not sure, I don't remember.

1 Q Has anybody ever explained to you what the packet
 2 is?
 3 A No.
 4 Q So do you have any idea as to whether or not the
 5 packet notifies you that if you want to contact the
 6 WEA you can get some money back?
 7 A I do now. I did not at the time.
 8 Q And how do you come now to that knowledge?
 9 A I was informed by I believe it was somebody -- I
 10 don't recall the name -- from the Evergreen Freedom
 11 Foundation.
 12 Q Jamie Lund?
 13 A I believe that's correct.
 14 Q Have you gotten this large packet this year?
 15 A No.
 16 Q It's coming. Any day now.
 17 And the information that you got from
 18 somebody you believe to be Jamie Lund, or in any
 19 event a man from the Evergreen Freedom Foundation,
 20 how did you come to get that information?
 21 A I had been told by a family member, they had heard
 22 somewhere that you could fill out paperwork and
 23 receive a refund for moneys used for political
 24 purposes if you were a nonmember of the union.
 25 However I believed it was from past years and so I

1 called the Evergreen Freedom Foundation.
 2 Q How did you know where to call?
 3 A The family member had told me.
 4 Q And who is the family member?
 5 A My mother.
 6 Q What's your mom's name?
 7 A Cheryl Mesterton.
 8 Q Did she say how she knew that?
 9 A I don't recall what she said.
 10 Q So did you fill out -- whenever you found out from
 11 your mom and had it verified from the Evergreen
 12 Freedom Foundation, did you then fill out a form
 13 asking for your money back?
 14 A No, it was too late.
 15 Q Who told you it was too late?
 16 A Mr. Lund.
 17 Q Do you recall when you had this conversation with
 18 him?
 19 A I believe it was in the fall of last year. It was
 20 right before the deadline. However, I had been
 21 under the misunderstanding that it was for years
 22 prior. And I hadn't been working so it didn't
 23 apply to me anyway.
 24 Q Ah, okay. Right, because that would have been the
 25 2000-2001 year, last year. You worked until

1 December -- oh, no, that was the previous year.
 2 Never mind. Dates have never been -- never been my
 3 strong suit here. Okay.
 4 So I take it you're planning to ask for a
 5 rebate in the event you begin gainful employment
 6 again in the school district?
 7 A Yes.
 8 Q Was this call that was to the Evergreen Freedom
 9 Foundation that was prompted by your mother's
 10 comment, was that the first time you'd ever
 11 contacted the Evergreen Freedom Foundation?
 12 A Yes.
 13 Q Prior to that time had you received any information
 14 from them?
 15 A No.
 16 Q And how did you come to be involved in this
 17 litigation?
 18 A Mr. Lund told me about it when I explained -- when
 19 I explained my circumstances and what I was asking
 20 for, he explained to me that it was only a
 21 year-by-year refund and then he told me about a
 22 possible case.
 23 Q So this was just one -- the same conversation?
 24 A Yes.
 25 Q In the fall?

1 A Yes.
 2 Q Of 2000?
 3 A Yes.
 4 Q And what did Mr. Lund say to you as best you can
 5 recall?
 6 A I don't recall exactly.
 7 Q That's fine, do your best.
 8 A He said that there were many nonunion members in
 9 school districts who did know that their money was
 10 being used for political purposes and there was a
 11 law passed, which I was familiar with, about using
 12 money in that way from nonmembers, making it
 13 illegal without their consent.
 14 Q Okay. Anything else?
 15 A He told me that they were -- they had several other
 16 people who were in the same situation and that
 17 there would be an attempt at a class action lawsuit
 18 to get -- recover damages.
 19 Q Anything else you recall him saying?
 20 A Not specifically.
 21 Q Now, I believe you said you already knew about this
 22 law; is that correct?
 23 A Yes.
 24 Q What did you know about the law?
 25 A I knew that -- I believe it was passed right around

1 the same time I got a full-time position -- that
 2 you had to sign a consent form of some sort in
 3 order for money from your dues to be used in any
 4 kind of political manner if you were a nonmember.
 5 And I was given something to sign and I chose not
 6 to sign it.
 7 Q You were given something to sign to authorize the
 8 union to use --
 9 A (Interposing) Yes, it may have been --
 10 Q (Interposing) Let me finish my question.
 11 A Sorry.
 12 Q To use your fees, the money that you were having
 13 deducted, for political purposes?
 14 A Yes.
 15 Q Okay. Where did you get that form?
 16 A At my school.
 17 Q Okay. So someone from the school district as
 18 opposed to the education association offered you
 19 that form?
 20 A I'm not sure who. I believe it was one of the
 21 reps.
 22 Q The union reps?
 23 A The union reps at our school.
 24 Q And when you say using money for political
 25 purposes, what are you referring to?

1 A It could be used to support certain candidates or
 2 certain issues or fighting against certain issues
 3 that I may or may not agree with.
 4 Q Is it your understanding that the education
 5 association has been using moneys to support
 6 political candidates?
 7 A I'm not sure if it's directly supporting or if it
 8 is kind of in a roundabout way supporting by
 9 supporting the issues they are bringing to the
 10 table. I'm not positive exactly how it works.
 11 Q And if you learned that the education association
 12 does not use any dues or fees money to support
 13 political candidates, would that change your
 14 position on having your money deducted?
 15 A No. No.
 16 Q Okay. Do you recall there being -- strike that.
 17 Do you as a general rule vote?
 18 A Yes.
 19 Q And before you vote do you educate yourself on the
 20 issues and candidates?
 21 A Yes.
 22 Q How did you go about doing that?
 23 A Through many mediums. Could watch a debate on TV.
 24 I talk it over with co-workers. I may read about
 25 it in the paper or watch some of the news programs

1 Q Even if used to support parochial education?
 2 A I'm in favor of anything that offers choice and
 3 opportunity.
 4 Q Okay. Did you vote in favor of the voucher
 5 initiative?
 6 A Again, I don't recall the exact wording on the
 7 ballot but I would have voted in favor of having
 8 vouchers, yes.
 9 Q Do you recall there being a ballot proposition to
 10 provide for the cost-of-living adjustments to
 11 salaries of teachers in the schools, state schools,
 12 public schools?
 13 A Vaguely.
 14 Q Do you support that?
 15 A I'm sorry, could you repeat it again?
 16 Q Sure. I think it was in 1999 or 2000, there was a
 17 ballot proposition that automatically adjusted the
 18 salaries of classroom teachers based on whether or
 19 not there had been inflation in the cost of
 20 living. Those are called COLAs, cost-of-living
 21 adjustments. As a general rule do you support that
 22 proposition, that teachers' salaries should go up
 23 as inflation goes up?
 24 A Yes, I believe salaries should increase with
 25 inflation.

1 with interviews. Generally you're sent a pamphlet
 2 explaining the issues.
 3 Q And do you consider yourself to be an educated
 4 voter?
 5 A For the most part.
 6 Q Do you recall that there was a ballot proposition
 7 with respect to charter schools?
 8 A Yes.
 9 Q Did you favor or oppose that ballot initiative?
 10 A I don't recall exactly how it was stated so it
 11 would be hard for me to say. I know my opinion on
 12 the subject.
 13 Q What is your opinion on the subject?
 14 A I'm in favor of charter schools.
 15 Q What's the basis for your support of that
 16 proposition?
 17 A It allows choice for parents and kids.
 18 Q Do you recall whether you voted for the charter
 19 schools initiative?
 20 A I voted in favor of charter schools.
 21 Q Okay. And do you recall there being a ballot
 22 proposition with respect to vouchers?
 23 A Yes.
 24 Q What's your position on vouchers?
 25 A I'm in favor of vouchers.

1 Q Okay. And do you recall whether you voted yes on
 2 that proposition?
 3 A I don't recall. I only vaguely recall it for some
 4 reason.
 5 Q Okay. Do you recall that a year or so ago there
 6 was a ballot proposition that reduced class size?
 7 A Again, vaguely.
 8 Q Do you support reduction of class size?
 9 A I would like a smaller class.
 10 Q Why?
 11 A The fewer students you have the more time you can
 12 spend with each one.
 13 Q So do you find -- have you had various class sizes
 14 in the course of your teaching experience?
 15 A Yes.
 16 Q And are you a more effective teacher in a smaller
 17 class?
 18 A Yes, I would say so.
 19 Q Do you recall whether or not you voted yes on the
 20 class-size referendum?
 21 A I don't recall.
 22 Q If you were guessing you'd say probably yes?
 23 A I would have to say I would look at what the
 24 opposite side was, what it was costing before I
 25 would make a decision.

1 Q Have there been school levies run in your school
 2 district?
 3 A Yes.
 4 Q Have you voted yes on the levies?
 5 A I don't live in --
 6 Q (Interposing) Everett?
 7 A Right, I don't live in -- my district where I
 8 live?
 9 Q Correct.
 10 A Oh, I'm sorry.
 11 Q That's all right, the question wasn't well
 12 phrased.
 13 Have you voted in -- for levy propositions
 14 in the Everett School District?
 15 A I'm not sure. I can't -- in the district I live in
 16 I can't recall the issues there.
 17 Q Since you have been employed in the Edmonds School
 18 District have there been levy elections in Edmonds?
 19 A In Edmonds, yes.
 20 Q And were you supportive of -- not necessarily
 21 voting for it or working for it -- but were you
 22 generally supportive of the passage of levies in
 23 the Edmonds School District?
 24 A I didn't pay that much attention.
 25 Q Do you understand what levies are for?

1 A Yes.
 2 Q Okay. Tell me what your understanding is.
 3 A It would be generally increases the property tax to
 4 provide more funding for whatever they are pushing
 5 for that levy, whether it be new buildings, class
 6 size, new teachers.
 7 Q And as a matter of general principle do you support
 8 rehabilitating old school buildings and hiring new
 9 teachers if needed and reducing class size?
 10 A Yes.
 11 Q Do you have any philosophical, moral, religious,
 12 spiritual opposition to labor unions?
 13 A No.
 14 Q Hypothetically if the class-size initiative, which
 15 passed, had the effect of reducing class size in
 16 the Edmonds School District, would you support
 17 that?
 18 A It would depend upon what the cost was.
 19 Q Okay. And if you -- when you return to school as a
 20 teacher in the Edmonds School District you in fact
 21 had a smaller class, would you be appreciative of
 22 that?
 23 A Yes.
 24 Q Okay. Same thing with respect to the
 25 cost-of-living adjustment. If when you ultimately

1 return to teaching in the Edmonds School District
 2 and you found out that because of the
 3 cost-of-living adjustment you've gotten two
 4 increases, two step increases in your salary, would
 5 you be appreciative of that?
 6 A Yes.
 7 Q Okay. Other than agree to be one of the
 8 plaintiffs, the named plaintiffs in this case, and
 9 coming to today's deposition, have you been
 10 required or requested to do anything else?
 11 A No.
 12 Q Okay. Has anyone asked you for money?
 13 A No.
 14 Q So you're not contributing in any way to the
 15 funding of this litigation; is that correct?
 16 A No.
 17 Q Have you ever made a contribution to the Evergreen
 18 Freedom Foundation?
 19 A No.
 20 Q Do you belong to any other -- that's a bad
 21 question, strike that.
 22 Do you belong to any professional
 23 associations?
 24 A No.
 25 Q What kind of work does your husband do?

1 A He manages a print shop.
 2 Q Do you have any family members who are teachers?
 3 A No.
 4 Q First one?
 5 A Yes.
 6 Q What made you aspire to a career as a teacher?
 7 A I like working with kids. It's a satisfying
 8 career.
 9 Q When your -- is it a son or daughter?
 10 A Yes, a son.
 11 Q -- son is of school age you are you planning to
 12 send him to the Everett public schools?
 13 A I haven't made that decision yet.
 14 Q Is there -- have you thought about it at all?
 15 A No. I think -- I'm not sure we'll be living there
 16 when he's school age.
 17 Q All right, let me ask it more generally then. Do
 18 you have any plans to send your son to public
 19 school as opposed to private school or religious
 20 school?
 21 A I have not made a decision yet.
 22 Q Do you think that in your experience as a public
 23 school teacher that the public school system does a
 24 pretty good job of educating children?
 25 A In many cases, yes.

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Judge Daniel Berschauer
Hearing date: November 2, 2001

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
And TRACY WOLCOTT,
Plaintiffs
v.
WASHINGTON EDUCATION ASSOCIATION,
Defendant.

NO. 01-2-00519-4

DECLARATION OF
AIMEE S. IVERSON

AIMEE S. IVERSON, on oath declares as follows:

1. I am one of the attorneys for the Defendant. I make this declaration based on my personal knowledge, and I am competent to testify as to the matters stated herein.
2. Attached hereto as Exhibit A is a true and correct copy of the 2000-01 WEA Membership Enrollment Guide that was produced to Plaintiffs in discovery, bearing identification numbers "WEA-DAV 2343 - 2408".

FILE COPY

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3. Attached hereto as Exhibit B is a true and correct copy of the court-approved Settlement and Stipulation for Settlement in *Leer, et al. v. Washington Education Association*, No. C96-1612Z.

4. Attached hereto as Exhibit C is a true and correct copy of the Notice of Proposed Settlement in *Leer, et al v. Washington Education Association*, No. C96-1612Z.

5. Given the difficulties presented by the transitory and infrequent employment of substitutes in any given district, agency fees are not collected from substitutes in most school districts due to the difficulty of complying with the provisions of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) regarding annual notice of the right of non-members to object to paying the full amount of agency fees. However, agency fees are collected from substitutes in a few districts where the local association has established a system for ensuring the procedural requirements of *Hudson* are met. Kent School District is one of those school districts.

I have read the foregoing, believe it to be correct, and certify and declare the same under penalty of perjury of the laws of the State of Washington.

Signed at Federal Way, Washington this 25th day of October, 2001.


Aimee S. Iverson
WSBA #28610

EXHIBIT B

Hon. Thomas S. Zilly

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFF L. LEER, et al.,)
)
Plaintiffs,)
)
v.)
)
WASHINGTON EDUCATION)
ASSOCIATION, et al.,)
)
Defendants.)

No. C96-1612Z

STIPULATION
FOR SETTLEMENT

This Stipulation is entered into by all plaintiffs and all defendants in this action in order to resolve their dispute without further litigation, and to resolve contentious issues between them so as to obviate similar litigation in the future. It is the intention of the parties that, subject to approval by the Court pursuant to Federal Rule of Civil Procedure 23(e),

EXHIBIT B

1 this Stipulation shall finally and completely resolve all issues
2 that were or could have been raised in this litigation, as
3 between all plaintiffs and members of the plaintiff classes, on
4 one hand, and all defendants and their affiliated local
5 associations in the State of Washington, on the other. To that
6 end, the parties, through their attorneys, in consideration of
7 the mutual promises set forth below, agree as follows.

8
9 1. Agency Fee Rebates. Defendants shall pay to
10 plaintiffs and members of the second (chargeability) subclass
11 [hereinafter "chargeability subclass"], as defined by the
12 Court's Order of July 31, 1998, the lump sum of \$40,000 in full
13 settlement of all claims of plaintiffs and members of the
14 chargeability subclass relating to defendants' agency fees
15 during the school years 1994-95 through 1997-98.

16
17 a. Within 30 days after final approval by the Court
18 of this class action settlement, defendants will make their lump
19 sum payment of \$40,000 to the trust account of Ellis, Li &
20 McKinstry, PLLC, for distribution to plaintiffs and members of
21 the chargeability subclass.

22 b. Plaintiffs' counsel will be responsible for
23 allocation and distribution of the \$40,000 sum among the
24 individual plaintiffs and members of the chargeability class.
25 That allocation will be made according to a formula that, when
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1000 Connecticut Ave., N.W.
Washington, D.C. 20036
12021927-9340

1 the settlement amount is combined with the rebates the feepayer
2 previously received pursuant to defendants' notice-and-objection
3 procedures, will result in the feepayer having made aggregate
4 agency fee payments reduced by the following percentages from
5 the agency fees charged to feepayers who do not object to the
6 use of their fees for nonchargeable purposes:
7

	1994-95	1995-96	1996-97	1997-98
8 NEA	52.7%	48.9%	54.5%	55.5%
9 WEA	35.2%	31.4%	37%	38%
10 UniServ 11 Councils	35.2%	31.4%	37%	38%

12
13 Interest, compounded yearly at the one-year treasury rate, will
14 be added to the amounts so calculated. This formula will be
15 applied only for those years in which the plaintiff or class
16 member objected to and challenged the calculation of defendants'
17 fees. Class members who are not named plaintiffs will receive
18 payments based only on their Washington Education Association
19 ("WEA") and National Education Association ("NEA") agency fees,
20 because the Court declined to certify the class with respect to
21 claims against the UniServ Councils. WEA will provide
22 plaintiffs' counsel with whatever information is reasonably
23 necessary to calculate the amount due to each individual.
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1 c. The parties expressly recognize that the formula
2 described in paragraph 1(b) has been selected solely for the
3 purpose of distributing the lump sum settlement amount in an
4 equitable manner, and that it is not intended to reflect the
5 percentages of union dues that defendants were legally required
6 to rebate to objecting feepayers during the years 1994-98 or
7 will be required to rebate in the future.
8

9 d. Defendants shall under no circumstances have any
10 liability to plaintiffs and the chargeability class beyond the
11 \$40,000 lump sum payment described in this paragraph. Should
12 that amount prove insufficient to cover all of the claims of
13 plaintiffs and class members as calculated under the formula set
14 forth in subparagraph 1(b), plaintiffs' counsel shall use their
15 award of attorneys' fees described in paragraph 8 to make such
16 payments to the trust account of Ellis, Li & McKinstry, PLLC, as
17 may be necessary to fund all such claims. Should any funds
18 remain from the \$40,000 payment after all claims have been
19 satisfied (including payments that, after reasonable efforts,
20 remain unclaimed), such surplus funds shall be divided among
21 plaintiffs and members of the chargeability subclass in
22 proportion to their entitlement under the formula set forth in
23 subparagraph 1(b).
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1 fees stated in the Hudson notice, to all feepayers who object to
2 the use of their fees for nonchargeable purposes, within 30 days
3 (45 days in case of exceptional circumstances) of the deadline
4 for the receipt of such objections, regardless of whether the
5 feepayer also challenges defendants' calculation of the amount
6 of the reduced agency fee. For feepayers who challenge
7 defendants' fee calculation, an additional rebate will be
8 provided within 30 days of the arbitration award (45 days in
9 case of exceptional circumstances) if the arbitrator should
10 order a reduction in the fee defendants seek to collect.

12 c. UniServ Councils, as well as those local
13 associations that in the preceding school year had 850 or more
14 association members, will no longer use a "local presumption."
15 Rather, in order to collect their portion of the agency fees,
16 these Councils and locals will provide, as part of the Hudson
17 notice sent to their feepayers, audited statements/- of the same
18 general type provided by WEA, see Exhibit A - showing the
19 breakdown of expenditures into chargeable and nonchargeable
20 categories, as the basis for the reduced agency fees they
21 assess. (Defendants NEA and WEA will continue to provide such
22 audits.)

24 d. Local associations with fewer than 850
25 association members in the preceding school year may, at their
26

1 option, continue to use a local presumption as set out in this
2 subparagraph. Such locals will, in order to collect their
3 portion of the agency fees, submit as part of the Hudson notice
4 sent to their feepayers a declaration from a local officer,
5 accompanied by a summary of the local's expenditures, broken
6 down into chargeable and nonchargeable categories, explaining
7 the expenditures and showing the chargeable percentage of local
8 dues based on those expenditures. The declarations attached
9 hereto as Exhibits B and C may serve as rough models for the
10 type of information that should be included in such
11 declarations. It is recognized that the level of detail of
12 expenditures shown by these declarations and summaries will be
13 lower for smaller locals than for larger ones. Local
14 associations making use of the local presumption as described in
15 this subparagraph may collect a reduced agency fee from
16 objecting feepayers based on a chargeable percentage of local
17 dues that is the lesser of (i) the chargeable percentage shown
18 on the local's declaration, or (ii) WEA's chargeable percentage.
19
20

21 3. Future Calculation of Chargeable Activities. Subject
22 to the transition provisions of paragraph 4, and until such time
23 as there may be a significant change in the law of the kind that
24 would support a motion for relief from an injunction under Rule
25 60(b)(5) of the Federal Rules of Civil Procedure, WEA and the
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1 UniServ Councils will use, and WEA will direct its local
2 affiliates to use, as the basis for keeping time records
3 ("Weekly Activity Reports"), and as a guide for making other
4 determinations involved in calculating the portion of their dues
5 that is chargeable to objecting feepayers, the Category Codes
6 for chargeable, nonchargeable, and allocated activities attached
7 hereto as Exhibit D. Those activities marked as "allocated"
8 will be allocated between chargeable and nonchargeable pursuant
9 to the entity's overall chargeable percentage or the relevant
10 divisional or unit percentage. Changes may be made to these
11 Category Codes in the future to the extent necessary to maintain
12 the clarity of their present meaning in the light of new
13 circumstances or subsequently arising ambiguities, but any such
14 changes will be made only in a manner consistent with the letter
15 and spirit of the agreed-upon Codes of Exhibit D. NEA may
16 continue to use its own chargeability categories, in
17 substantially the form of the current version attached hereto as
18 Exhibit E. In order to take account of any differences between
19 NEA's categories and the WEA categories agreed to herein
20 (Exhibit D), NEA will reduce the chargeable percentage on which
21 its reduced agency fee for objecting feepayers in the State of
22 Washington is based by at least three percentage points from the
23 chargeable percentage, as adjusted for purposes of NEA's Hudson
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Washington, D.C. 20036
(202) 833-9340

1 notice to agency fee-payers in Washington, calculated using NEA's
2 chargeability categories.

3 4. Transition Provisions. The parties recognize that
4 practical considerations make full implementation of the
5 measures set forth in paragraphs 2 and 3 impossible for the
6 1998-99 school year. They agree, therefore, that those measures
7 will take full effect beginning with the 1999-2000 school year
8 (except as set forth in paragraph 4(b)), and that paragraphs 2
9 and 3 will be partially implemented and the transition measures
10 set out in subparagraph 4(a) applied for the 1998-99 school
11 year.
12

13 a. Defendants will implement, and WEA will direct
14 its local affiliates to implement, the following permanent and
15 transition measures for the 1998-99 school year:
16

17 (i) Those persons who keep Weekly Activity
18 Reports will begin to use the new Category Codes of Exhibit D as
19 soon as feasible. All Weekly Activity Reports that have been
20 prepared using the old codes since September 1, 1998, will be
21 re-done, using the new codes, as soon as possible. WEA, all
22 UniServ Councils, and those locals that expect to be subject to
23 the requirements of paragraph 2(c) in 1999-2000 will during
24 1998-99 conduct the requisite audits of their 1997-98
25

1 expenditures, in accordance with the provisions of paragraph
2 4(b).

3 (ii) The measures set out in paragraphs 2(a) and
4 2(b) will be fully implemented.

5 (iii) Notwithstanding the provisions of paragraph
6 2(c), all UniServ Councils and local associations will be
7 permitted to use the local presumption, as set out in paragraph
8 2(d), for 1998-99. The Hudson notices sent to feepayers in
9 those UniServ Councils and local associations that participated
10 in WEA's agency fee arbitration for 1997-98 will include the
11 declarations and financial statements that those Councils and
12 locals used as evidence in that arbitration; and the Hudson
13 notices sent to feepayers in Soundview and Summit UniServ
14 Councils will also include such financial summaries of those
15 Councils' 1996-97 expenditures. Because of the time constraints
16 involved in preparation of the 1998-99 Hudson notice, data in
17 support of the local presumption for this year will not be
18 required for other Councils and locals.

19 (iv) WEA's reduced agency fee for 1998-99, which
20 pursuant to paragraphs 2(a) and 4(a)(ii) above will be based on
21 WEA's 1996-97 expenditures, will be 72 percent of WEA's regular
22 dues (i.e., five percentage points less than the chargeable
23 percentage awarded WEA in its fee arbitration for 1997-98). All
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1 UniServ Councils and those local associations that in the
2 preceding school year had 850 or more association members will
3 be allowed to collect a 1998-99 agency fee of 80 percent of
4 their dues. All other local associations will be allowed to
5 collect a 1998-99 agency fee of 72 percent of their dues. NEA's
6 fee for 1998-99 will be calculated as set forth in paragraph 3.
7

8 (v) Because the expenditures on which the 1998-99
9 reduced agency fees will be based will be the same 1996-97
10 expenditures that have already been the subject of the
11 arbitration for the 1997-98 fees, the parties agree that, to the
12 extent any arbitration is necessary with respect to the 1998-99
13 fees, the arbitrator's role will be limited to ensuring that the
14 terms of this stipulation, in particular paragraph 4(a)(iv),
15 have been correctly applied.
16

17 b. Because the 1999-2000 reduced agency fees of WEA,
18 the UniServ Councils, and their local affiliates will be based
19 on expenditures for 1997-98, during which year Weekly Activity
20 Reports have already been completed using the old Category Codes
21 (attached hereto as Exhibit F), WEA and the UniServ Councils
22 will adjust, and WEA will direct its local affiliates to adjust,
23 their 1999-2000 fee calculations by (i) treating all time
24 entries placed under the old Category Codes 12, 18, 29, and 30
25 as nonchargeable; (ii) treating two-thirds of the time entries
26

1 placed under the old Category Codes 23 and 24 as chargeable and
2 one-third as nonchargeable; and (iii) treating two-thirds of the
3 time entries placed under the old Category Codes 25 and 26 as
4 chargeable and allocating the other one-third between chargeable
5 and nonchargeable pursuant to the entity's overall chargeable
6 percentage or the relevant divisional or unit percentage. In
7 all other respects time entries will be treated as specified on
8 the old Category Codes (Exhibit F). WEA and the UniServ
9 Councils will, however, use the new Category Codes (Exhibit D)
10 as the basis for making chargeability determinations regarding
11 program expenditures, and WEA will direct its local associations
12 to do the same.
13

14 5. Binding Effect.

15 a. The terms of this Stipulation, if approved by the
16 Court, shall be binding upon the named plaintiffs, all other
17 members of the plaintiff classes certified by the Court's Order
18 of April 30, 1997 (as clarified by Order of July 31, 1998), all
19 defendants, all other local associations and UniServ councils
20 that become parties to this Stipulation pursuant to paragraph
21 5(b), and on their respective heirs, successors, assigns, and
22 agents. This Stipulation shall fully and finally resolve all
23 claims that were or could have been asserted by any plaintiff or
24 class member with respect to defendants' agency fees for the
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1 school years 1994-95 through 1997-98, and shall determine the
2 procedures and methods of calculation to be used in the future
3 to fix, assess, and collect the agency fees of defendants and
4 their local affiliates in the State of Washington. Any dispute
5 arising over compliance with this Stipulation, including the
6 amounts of agency fees assessed pursuant to the procedures set
7 out herein, and including the question of whether there has been
8 a "significant change in the law" as that term is used in
9 paragraphs 2, 3 and 5, shall be resolved through the dispute-
10 resolution provisions of paragraph 6; provided that nothing in
11 this paragraph is intended to relieve defendants of their
12 obligation under Chicago Teachers Union v. Hudson, 475 U.S. 292
13 (1986), to provide for a reasonably prompt decision by an
14 impartial decisionmaker of feepayers' challenges to the amount
15 of the agency fee. Such impartial decisionmaker shall be bound
16 by the terms of this Stipulation as well as other applicable
17 law.
18
19

20 b. Any local association or UniServ Council
21 affiliated with WEA that is not a party to this litigation
22 shall be permitted, at its option, to become a party to this
23 Stipulation by mailing to Counsel for Plaintiffs and to the WEA
24 General Counsel a letter, signed by an officer authorized to
25 bind the association, stating its intent to become a party to
26
27

1 this Stipulation. The terms of this Stipulation shall be
2 binding on any such local or Council as of the date of mailing
3 of such statement of intent, and the dispute-resolution
4 provisions of paragraph 6 shall apply with respect to all of the
5 local's or Council's actions subsequent to that date; provided
6 that any local or Council that becomes a party to the
7 Stipulation on or before December 31, 1998, shall be deemed to
8 have been a party as of the effective date of this Stipulation.
9

10 6. Dispute-Resolution Procedures. Should any person
11 bound by this Stipulation believe that it has been breached by
12 another party, his or her sole recourse shall be in accordance
13 with the terms of this paragraph.

14 a. A person who claims this Stipulation has been
15 breached shall first provide to the party alleged to have
16 breached the Stipulation, with copies to the WEA General Counsel
17 and to Counsel for Plaintiffs, written notice of the nature of
18 the alleged breach and the basis for that allegation, and shall
19 allow that party at least 45 days to cure the alleged breach.
20 If, following that period, the dispute has not been
21 satisfactorily resolved, the person alleging breach of the
22 Stipulation may request binding arbitration of the dispute,
23 under the terms of subparagraph 6(b), by providing written
24 notice to the party alleged to have breached the agreement.
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1 b. Should there be no agreement on an arbitrator
2 within ten days of the date on which notice was provided under
3 subparagraph 6(a), either party may submit the dispute to
4 JAMS/ENDISPUTE, or its successor, for resolution pursuant to its
5 Rules and Procedures for Employment Disputes, as modified
6 herein. The parties will cooperate with JAMS/ENDISPUTE and with
7 one another in selecting an arbitrator from JAMS/ENDISPUTE's
8 panel of neutrals, and in scheduling the arbitration
9 proceedings. Should it be necessary for the parties to be
10 provided with a list of arbitrators by the JAMS/ENDISPUTE case
11 administrator, that list shall consist of at least three retired
12 or former judges. If the parties cannot mutually agree upon the
13 arbitrator, then the arbitrator that is selected must have had
14 judicial experience. The arbitrator's concise written statement
15 of reasons for the award will be considered part of the award
16 and admissible in any judicial proceeding to enforce or vacate
17 the award. The arbitration proceedings, including the hearing,
18 the award, and the written explanation of the award, will not be
19 considered confidential.

22 c. Any arbitration award rendered under subparagraph
23 6(b) shall be reviewable only under the terms of the Federal
24 Arbitration Act, 9 U.S.C. §§ 1 et seq.

26 7. No Inference of Liability; Limited Scope of Agreement.

1 a. The parties expressly recognize that they are
2 enteriñg into this agreement as a compromise of disputed claims,
3 solely in order to avoid the considerable expense that would be
4 entailed in pursuing this litigation to completion, and to
5 minimize the possibility of future litigation. In particular,
6 the parties agree that the execution and implementation of this
7 agreement shall not give rise to any inference whatever that
8 defendants have violated any constitutional or other right of
9 plaintiffs, or that the changes defendants have agreed to make
10 were constitutionally required.
11

12 b. The parties do not intend that any of the terms
13 of this agreement are to be followed in jurisdictions or
14 bargaining units not covered by this Stipulation - including but
15 not limited to NEA in its actions outside the State of
16 Washington, and NEA affiliates in other states. Nor are such
17 terms to serve as an acknowledgement in any respect, express or
18 implied, that in other jurisdictions or units such terms are to
19 be followed by the parties, their counsel, affiliates, parents,
20 or related organizations. This agreement does not constitute an
21 acknowledgement by the parties or their counsel that the
22 provisions agreed to herein either comply with or are required
23 by the United States Constitution.
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1 8. Attorneys' Fees and Costs. Within 30 days of final
2 approval by the Court of the class action settlement outlined
3 herein, defendants will pay to the National Right to Work Legal
4 Defense Foundation, Inc., the sum of \$82,500 in full settlement
5 of any and all claims by plaintiffs, class members, and their
6 counsel for attorneys' fees and costs in this action.

7
8 9. Rule 23 Approval. The parties will take the following
9 measures to obtain final Court approval of the settlement
10 outlined in this Stipulation.

11 a. On or before September 15, 1998, the parties will
12 jointly request the Court to: (i) preliminarily approve this
13 Stipulation for Settlement; (ii) approve a Notice of Proposed
14 Settlement of Class Action Lawsuit, which the parties will
15 jointly submit, advising class members of the terms of this
16 proposed settlement and of the procedures through which they
17 may, within 30 days of the date of mailing, file objections to
18 the proposed settlement; (iii) order that the Notice be mailed,
19 within 15 days of the Court's order, to the last known addresses
20 of all members of the two subclasses certified by the Court's
21 Order of April 30, 1997 (and clarified by Order of July 31,
22 1998); and (iv) schedule a hearing to consider any objections
23 filed by class members, at least 15 days after the deadline for
24 filing such objections.
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1 Stipulation.

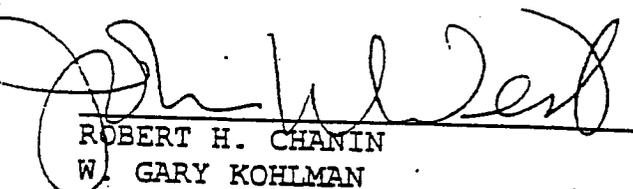
2 I2. Execution of the Stipulation. This Stipulation shall
3 be executed by the attorneys for the plaintiffs and the class,
4 and by the attorneys for the defendants, who warrant that they
5 have the authority to bind their respective clients.

6 Agreed to this 15th day of September, 1998.

7
8
9 FOR PLAINTIFFS:

FOR DEFENDANTS:

10
11 
12 MILTON L. CHAPPELA
13 MARK J. BEUTLER
14 National Right to Work Legal
15 Defense Foundation, Inc.
16 8001 Braddock Road, Suite 600
17 Springfield, VA 22160
18 (703) 321-8510

19 
20 ROBERT H. CHANIN
21 W. GARY KOHLMAN
22 JOHN M. WEST
23 Bredhoff & Kaiser, P.L.L.C.
24 1000 Connecticut Avenue, N.W.
25 Suite 1300
26 Washington, D.C. 20036
27 (202) 833-9340

16 
17 STEVEN T. O'BAN, WSBA #17265
18 Ellis, Li & McKinstry, PLLC
19 999 Third Avenue, #3700
20 Seattle, WA 98104
21 (206) 682-0565

22 
23 KATHY O'TOOLE, WSBA #14194
24 WEA Office of General Counsel
25 33434 8th Avenue S.
26 Federal Way, WA 98003
27 (253) 946-4730

28 Counsel for Plaintiffs

28 
MICHAEL J. GAWLEY, WSBA
#22110
1509 Queen Anne Ave. N., #303
Seattle, WA 98109
(206) 283-4001

Counsel for Defendants

EXHIBIT C

Hon. THOMAS S. ZILLY
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFF L. LEER, et al.,

Plaintiffs,

v.

WASHINGTON EDUCATION
ASSOCIATION, et al.,

Defendants,

No. C96-1612Z

NOTICE OF PROPOSED SETTLEMENT
OF CLASS ACTION LAWSUIT AND
HEARING ON PROPOSED SETTLEMENT

To: ALL NONMEMBER PUBLIC SCHOOL DISTRICT EMPLOYEES WHO AT ANY TIME FROM SEPTEMBER 1, 1994 THROUGH THE 1997-98 SCHOOL YEAR WERE REPRESENTED EXCLUSIVELY FOR PURPOSES OF COLLECTIVE BARGAINING BY THE WEA OR ANY OF ITS AFFILIATES AND WERE SUBJECT TO DEMANDS FOR OR COLLECTIONS OF AGENCY FEES FOR THE WEA AND ANY OF ITS AFFILIATES

YOU ARE HEREBY NOTIFIED THAT A HEARING IS SCHEDULED FOR _____, 1998, AT _____ M. BEFORE THE HONORABLE THOMAS S. ZILLY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, IN COURTROOM ____, UNITED STATES COURTHOUSE, 1010 5TH AVENUE, SEATTLE, WASHINGTON, FOR CONSIDERATION OF THE FAIRNESS OF A PROPOSED SETTLEMENT IN THIS MATTER.

EXHIBIT C

1 I. *NATURE AND BACKGROUND OF THIS LAWSUIT*

2 This litigation was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, by certain
3 public school employees who are not members of, but are represented for purposes of collective
4 bargaining, by a local affiliate of the Washington Education Association ("WEA"). Defendants are the
5 WEA, the National Education Association ("NEA"), 21 UniServ Councils, and four local associations
6 affiliated with WEA.

7 Under Washington law and applicable collective bargaining agreements, defendants are entitled
8 to charge nonmembers such as plaintiffs an "agency fee" to cover the costs of the collective bargaining
9 services defendants are required to provide to all members of the bargaining units they represent. The
10 First and Fourteenth Amendments to the United States Constitution impose certain limitations on the
11 fees that may be collected and require certain procedures in connection with the collection of such fees.
12 In this litigation, plaintiffs allege that during the school years 1994-95 through 1997-98 defendants
13 charged fees in excess of what is constitutionally permitted, in that they included charges for activities
14 that are constitutionally nonchargeable because they are not sufficiently related to collective bargaining,
15 or as to which defendants could not meet their burden of proving chargeability. These claims are
16 referred to herein as plaintiffs' "chargeability" claims. Plaintiffs also contend that defendants did not
17 adhere to certain constitutionally required procedures in connection with the notice they are required to
18 send annually to agency fee payers. Specifically, plaintiffs claim that the fee payers were not given
19 detailed disclosure, verified by an independent auditor, of the expenditures of the UniServ Councils and
20 local associations. This claim is referred to herein as plaintiffs' "notice" claim.

21 Defendants have denied plaintiffs' allegations and have asserted that their agency fees and the
22 procedures through which they are collected have been fully consistent with the constitutional
23 requirements. The Court has not yet ruled on any of these claims plaintiffs advance.

24 On April 30, 1997, the Court determined that this lawsuit could proceed as a class action on
25 behalf of two subclasses of plaintiffs. The first subclass ("notice subclass") consists of "all nonmembers
26 obligated to pay agency fees" to defendants at any time during the school years 1994-95 through 1997-

1 98. The "notice" claim described above is advanced on behalf of the members of this subclass.
2 Plaintiffs' complaint seeks, on behalf of the notice subclass, declaratory and injunctive relief (requiring
3 defendants to change their practices in the future), as well as an award of nominal damages.

4 The second subclass ("chargeability subclass"), as defined by the Court's order of July 31, 1998,
5 consists of those members of the notice subclass who, during any of the four years at issue, also
6 "objected to, and challenged the calculation of, the WEA determined fee by selecting 'option 3' as
7 described in the Notice sent to nonmember employees by the WEA." The "chargeability" claims,
8 described above, are advanced on behalf of this subclass. The Court allowed these claims to be pursued
9 on a class action basis only against defendants WEA and NEA. Plaintiffs' complaint seeks, on behalf
10 of the chargeability subclass, declaratory and injunctive relief, as well as repayment to class members
11 of that portion of their agency fees alleged to have been unlawfully collected during the school years
12 1994-95 through 1997-98.

13 Plaintiffs' complaint also seeks an award of attorneys' fees and other costs of litigation.

14 After extensive discovery and other pretrial proceedings, the plaintiffs and defendants have
15 agreed to a settlement of all the claims advanced in this litigation. That proposed settlement is subject
16 to the approval of the Court.

17 **II. PURPOSE OF THE NOTICE AND FAIRNESS HEARING**

18 YOU ARE BELIEVED TO BE A MEMBER OF ONE OR BOTH OF THE SUBCLASSES DESCRIBED ABOVE.
19 YOU ARE HEREBY NOTIFIED THAT: (1) THE PROPOSED SETTLEMENT HAS BEEN SUBMITTED TO THE
20 COURT FOR ITS APPROVAL; (2) IF THIS SETTLEMENT IS APPROVED BY THE COURT, YOU WILL OBTAIN
21 ONLY THE RELIEF PROVIDED IN THIS SETTLEMENT, AND YOU WILL HAVE NO FURTHER CLAIM AGAINST
22 DEFENDANTS FOR ANY MATTER WITH REGARD TO DEFENDANTS' AGENCY FEES, NOTICES, AND
23 PROCEDURES, EXCEPT ANY CLAIMS THAT YOU MIGHT HAVE BASED SOLELY UPON RELIGIOUS
24 OBJECTIONS TO AGENCY FEES AND ANY CLAIMS WHICH MAY ARISE DUE TO FAILURE OF A DEFENDANT
25 TO COMPLY WITH THE TERMS OF THE SETTLEMENT AGREEMENT; AND (3) YOU, AND ANY OTHER
26 PERSONS IN THE SUBCLASSES, HAVE THE RIGHT TO OBJECT TO THE PROPOSED SETTLEMENT BY

1 FOLLOWING THE PROCEDURE OUTLINED IN PART V OF THIS NOTICE.

2 This Notice does not express any opinion by the Court as to the merits of any claims or defense
3 asserted by any party in this litigation. It is sent only to inform you about this litigation and the terms
4 of the proposed settlement, so that you may make appropriate decisions with respect to that proposal

5 At the fairness hearing any member of the subclasses may appear and object to the proposed
6 settlement and to the dismissal with prejudice of the claims asserted against the defendants in this
7 litigation. HOWEVER, NO PERSON SHALL BE HEARD AT THE HEARING, AND NO PAPERS OR BRIEFS
8 SHALL BE CONSIDERED, UNLESS THE PROCEDURES SET FORTH IN PART V OF THIS NOTICE HAVE BEEN
9 FOLLOWED. YOU SHOULD READ THAT PART CAREFULLY. Class members who do not make objections
10 in the required manner shall have waived all objections. IF YOU ARE SATISFIED WITH THE PROPOSED
11 SETTLEMENT, YOU DO NOT NEED TO TAKE ANY FURTHER ACTION, AND YOU DO NOT NEED TO APPEAR
12 AT THE HEARING.

13 **III. THE PROPOSED SETTLEMENT**

14 It has been proposed by the attorneys for the plaintiffs and subclasses and the attorneys for the
15 defendants that this lawsuit be settled by the entry of an Order Approving Class Settlement and Final
16 Judgment, which, if approved, would be entered by the Court and incorporate a Stipulation for
17 Settlement executed by those attorneys. The Stipulation for Settlement and this Notice do not constitute
18 an admission of liability by defendants.

19 If you are a member of either subclass, and if the proposed settlement is approved by the Court,
20 you will receive such benefits as you qualify for under the terms of the settlement, and you will be
21 forever barred from asserting any other rights with respect to the matters which are the subject of this
22 litigation, and the action will be dismissed with prejudice as to all members of the subclasses. If the
23 proposed settlement is not approved, the Stipulation for Settlement will be deemed withdrawn and the
24 lawsuit will continue as if it had not been made.

25 Counsel for the plaintiffs and the subclasses have investigated the facts and circumstances
26 underlying the issues raised by the pleadings in this action, and the applicable law, have conducted

1 extensive discovery, and recommend the proposed settlement as fair, reasonable, adequate, and in th
2 best interest of the members of the subclasses in view of: 1) the prior rulings of the Supreme Court o
3 the United States and the United States Court of Appeals for the Ninth Circuit; 2) the risks and costs of
4 further protracted litigation, including a trial and possible additional appeals; 3) considerable changes
5 in the agency fee notice and procedures that will accrue to the notice subclass members under the terms
6 of the proposed settlement; 4) the refunds, and favorable changes in chargeability categories and
7 probable reductions of future agency fees, which will accrue to the chargeability subclass members under
8 the terms of the proposed settlement; and 5) the favorable changes in notice procedures, chargeability
9 categories, and total sum of the proposed settlement compared to the potential total recovery from
10 defendants if the case were litigated to a conclusion.

11 The terms of the settlement are set forth in the Stipulation for Settlement signed by the attorneys
12 for the subclasses and for defendants. A summary of those terms follows.

13 **IV. SUMMARY OF PROPOSED SETTLEMENT**

14 The proposed settlement requires the defendants to make a rebate payment to plaintiffs and
15 members of the chargeability subclass and to make certain changes in their procedures for calculating
16 and assessing agency fees and providing notice to fee payers. It also establishes a dispute-resolution
17 procedure for resolving any disputes over compliance with the settlement agreement, and awards
18 attorneys' fees to plaintiffs' counsel. The essential provisions of the settlement agreement are as
19 follows:

20 **A. Rebates of Agency Fees Paid Between September 1, 1994 and August 31, 1998.**

21 This section applies only to plaintiffs and members of the chargeability subclass. Defendants shall
22 pay to plaintiffs and members of the chargeability subclass the lump sum of \$40,000 in full settlement
23 of all claims of plaintiffs and members of the chargeability subclass relating to defendants' agency fees
24 during the school years 1994-95 through 1997-98. This payment will be allocated among the individual
25 plaintiffs and members of the chargeability subclass according to a formula that, when the settlement
26 amount is combined with the rebates the fee payer previously received pursuant to defendants' notice-

1 and-objection procedures, will result in the feepayer having made aggregate agency fee payme
2 reduced by the following percentages from the agency fees charged to feepayers who do not object to
3 the use of their fees for nonchargeable purposes:

	1994-95	1995-96	1996-97	1997-98
NEA	52.7%	48.9%	54.5%	55.5%
WEA	35.2%	31.4%	37%	38%
UniServ Councils [if applicable]	35.2%	31.4%	37%	38%

7 Interest, compounded yearly at the one-year treasury rate, will be added to the amounts so calculated.
8 This formula will be applied only for those years in which the plaintiff or class member objected to and
9 challenged the calculation of defendants' fees. Class members who are not named plaintiffs will receive
10 payments based only on their WEA and NEA agency fees, because the Court declined to certify the class
11 with respect to claims against the UniServ Councils.

12 This allocation formula was selected solely for the purpose of distributing the lump sum
13 settlement amount in an equitable manner, and is not intended to reflect the percentages of union dues
14 that defendants were legally required to rebate to objecting feepayers during the years 1994-98 or will
15 be required to rebate in the future.

16 **For members of the chargeability subclass, other than plaintiffs, there is included with this**
17 **Notice an individual statement of the basis for the settlement check you would receive under the**
18 **proposed settlement, specifying the school year(s) for which you are entitled to an additional refund**
19 **according to WEA's records. IF YOU CONTEST THE BASIS OF THE REFUND STATED IN YOUR**
20 **INDIVIDUAL STATEMENT, YOU MUST IN WRITING SO NOTIFY THE COUNSEL FOR PLAINTIFFS LISTED IN**
21 **PART V OF THIS NOTICE; IF YOU DO NOT CONTEST THE STATEMENT WITHIN FIFTEEN (15) DAYS FROM**
22 **THE POSTMARK OF MAILING OF THIS NOTICE, THE STATEMENT SHALL BE DEEMED CORRECT. If the**
23 **basis for your settlement check is disputed, counsel for plaintiffs and counsel for defendants shall make**
24 **every reasonable effort to adjust the dispute(s).**

25 *B. Future Calculation and Assessment of Agency Fees.*

26 The settlement agreement requires defendants to make certain changes in their procedures for

1 calculating agency fees and for administering the agency fee process. WEA will also direct its affiliate
2 that are not parties to the litigation to make these changes.

3 Defendants will now provide agency fee rebates, of the difference between full association dues
4 and the reduced agency fee stated in the annual agency fee notice ("Hudson notice"), to all fee payers
5 who object to the use of their fees for nonchargeable purposes, generally within 30 days of the deadline
6 for the receipt of such objections. Defendants' annual fee calculation will, for all purposes, be based on
7 expenditure data from the school year two years before.

8 Defendants' previous practice of using a "local presumption" for the UniServ Councils and local
9 associations, under which those entities' chargeable percentages were presumed to be at least as high
10 as WEA's, since they did not provide detailed financial disclosures verified by an independent auditor,
11 will be permitted to continue with respect to local associations with fewer than 850 members, except that
12 those associations will be required to provide, as part of their Hudson notice, certain data setting forth
13 the association's chargeable and nonchargeable expenditures. The chargeable percentage these local
14 associations will be permitted to use in calculating their agency fee will be no higher than the WEA's
15 chargeable percentage. UniServ Councils and local associations with 850 or more members will no
16 longer use a local presumption, but rather will provide audited financial statements of their chargeable
17 and nonchargeable expenditures as part of the Hudson notice, in the same manner as does WEA.

18 All defendants except NEA will use, as the basis for keeping time records and as a guide for
19 making other chargeability determinations, the category codes for chargeable, nonchargeable, and
20 allocated activities attached hereto as Exhibit A. NEA will continue to use its own chargeability
21 categories and, to take account of any differences between those categories and WEA's, will reduce the
22 chargeable percentage on which its agency fee is based by at least three percentage points from the
23 chargeable percentage, as adjusted for purposes of WEA's Hudson notice to Washington fee payers,
24 calculated using the NEA categories.

25 Because practical considerations make full implementation of these provisions impossible for
26 the school years 1998-99 and (to a lesser extent) 1999-2000, the settlement agreement provides transition

1 measures for those two years. For 1998-99, the agency fees for WEA and locals with less than 8
2 members will be based on a chargeable percentage of 72% (i.e., five percentage points less than WEA's
3 chargeable percentage for 1997-98), while larger locals and UniServ Councils will be permitted to use
4 a chargeable percentage of 80%. All UniServ Councils and local associations, regardless of size, will
5 be permitted to use a local presumption in 1998-99, but certain Councils and locals for which financial
6 statements and declarations substantiating the presumption are readily available will include such
7 information in the Hudson notice. For 1999-2000, the agreement provides for certain adjustments to
8 time records that have been kept using old chargeability codes, but in all other respect there will be full
9 implementation of the settlement provisions.

10 *C. Future Dispute Resolution Procedures.*

11 Any dispute arising over compliance with the Stipulation for Settlement, including the amounts
12 of agency fees assessed pursuant to the procedures set out therein, shall be resolved through the dispute-
13 resolution provisions explained below. However, defendants will continue to provide for a reasonably
14 prompt decision by an impartial decisionmaker of fee-payers' challenges to the amount of the agency fee.
15 Such impartial decisionmaker shall be bound by the terms of the Stipulation for Settlement as well as
16 other applicable law.

17 A person who claims the Stipulation for Settlement has been breached shall first provide to the
18 party alleged to have breached the Stipulation, with copies to the WEA General Counsel and to Counsel
19 for Plaintiffs, written notice of the nature of the alleged breach and the basis for that allegation, and shall
20 allow that party at least 45 days to cure the alleged breach. If, following that period, the dispute has not
21 been satisfactorily resolved, the person alleging breach of the Stipulation for Settlement may request
22 binding arbitration of the dispute. Either party may submit the dispute to JAMS/ENDISPUTE, or its
23 successor, for resolution pursuant to its Rules and Procedures for Employment Disputes, as modified
24 herein. Should it be necessary for the parties to be provided with a list of arbitrators by the
25 JAMS/ENDISPUTE case administrator, that list shall consist of at least three retired or former judges
26 from which the parties will select the arbitrator. The arbitrator's concise written statement of reasons

1 for the award will be considered part of the award and admissible in any judicial proceeding to enfo:
2 or vacate the award. The arbitration proceedings, including the hearing, the award, and the writ
3 explanation of the award, will not be considered confidential. Any arbitration award rendered shall
4 reviewable only under the terms of the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

5 *D. Other Provisions.*

6 The settlement agreement permits UniServ Councils and local associations affiliated with WE,
7 that are not parties to this litigation to become parties to the Stipulation for Settlement, at their optio

8 The agreement provides that its execution and implementation is not to give rise to any inferenc:
9 that defendants' are liable for constitutional violations; rather, the agreement is entered into solely in
10 order to avoid the considerable expense of continued litigation.

11 Defendants will pay the attorneys for the subclasses \$82,500 in full settlement of all claims by
12 plaintiffs, class members, and their counsel for attorneys' fees and costs in this action.

13 The terms of the Stipulation for Settlement, if approved by the Court, shall be binding upon the
14 named plaintiffs, all other members of the plaintiff classes, all defendants, all other local associations
15 and UniServ councils that become parties to the Stipulation, and on their respective heirs, successors,
16 assigns, and agents. The Stipulation for Settlement shall fully and finally resolve all claims that were
17 or could have been asserted by any plaintiff or class member with respect to defendants' agency fees for
18 the school years 1994-95 through 1997-98, and shall determine the procedures and methods of
19 calculation to be used in the future to fix, assess, and collect the agency fees of defendants and their local
20 affiliates in the State of Washington.

21 Within 45 days of final approval by the Court of the class action settlement, the parties shall
22 jointly ask the Court to issue a final judgment dismissing this lawsuit, in its entirety, with prejudice.

23 **V. HEARING REGARDING PROPOSED SETTLEMENT AND PROCEDURE FOR**
24 **OBJECTING TO PROPOSED SETTLEMENT**

25 IF YOU ARE SATISFIED WITH THE PROPOSED SETTLEMENT, YOU DO NOT NEED TO TAKE ANY
26 FURTHER ACTION, AND YOU DO NOT NEED TO APPEAR AT THE HEARING.

1 IF YOU OBJECT TO THE PROPOSED SETTLEMENT FOR ANY REASON OTHER THAN AS A MEMBER
2 OF THE CHARGEABILITY SUBCLASS YOU CONTEND THAT THE BASIS FOR YOUR SETTLEMENT CHECK
3 LISTED IN THE ENCLOSED INDIVIDUAL STATEMENT IS INCORRECT, YOU SHOULD TAKE THE FOLLOWING
4 STEPS. (FOLLOW THE PROCEDURE IN PART IV(A) OF THIS NOTICE IF YOU CONTEND THAT THE BASIS
5 FOR YOUR SETTLEMENT CHECK IS INCORRECT.)

6 1. You should send to the Clerk of the United States District Court for the Western District
7 of Washington, 215 U.S. Courthouse, 1010 5th Avenue, Seattle, WA 98104, with copies to counsel
8 for both parties as listed below: (a) a written statement advising if you plan to address the Court at the
9 settlement hearing; (b) a written statement of your objections; and (c) any other papers which you want
10 to submit to the Court, including any legal briefs or memoranda. YOUR OBJECTIONS AND SUPPORTING
11 PAPERS MUST BE RECEIVED BY THE CLERK ON OR BEFORE _____, 1998. You should allow
12 sufficient time for delivery of anything sent to the Clerk; you bear the responsibility for any delay in
13 delivery or nondelivery. You may make your objections personally or through your own attorney. The
14 attorneys for the parties to whom copies of all objections and supporting papers should be sent are:

15 MILTON L. CHAPPELL
16 National Right to Work Legal
17 Defense Foundation, Inc.
18 8001 Braddock Rd., Suite 600
19 Springfield, VA 22160

20 JOHN M. WEST
21 Bredhoff & Kaiser, P.L.L.C.
22 1000 Connecticut Ave., N.W.
23 Suite 1300
24 Washington, DC 20036

25 Counsel for Plaintiffs and the Class

26 Counsel for Defendants

1 2. If you have taken the first step above in a timely manner, you have the right to address
2 the Court, either personally or through your own attorney, at the hearing on _____, 1998,
3 at ____:____.m., before the Honorable Thomas S. Zilly, Judge of the United States District Court for the
4 Western District of Washington, in Courtroom ____, United States Courthouse, 1010 5th Avenue,
5 Seattle, Washington.

6 If you do not follow these procedures for objecting to the proposed settlement, you will be
7 presumed to agree that it is fair, reasonable, and adequate. If the Court approves the proposed
8 settlement, you will be forever barred from bringing any further claim against defendants with respect

1 to the matters raised or that could have been raised in this action.

2 **VI OBTAINING ADDITIONAL INFORMATION AND CORRECTION OF ADDRESS**

3 The above summaries of this litigation and the terms of the proposed settlement are not a
4 complete statement of the history of this litigation or of the Stipulation for Settlement. For a more
5 complete description of the matters involved in the litigation, you are referred to the papers on file under
6 the caption *Jeff L. Leer, et al., v. Washington Education Association, et al.*, Civil Action No. C96-1612Z,
7 which may be inspected during regular business hours at the office of the Clerk of the United States
8 District Court for the Western District of Washington, 215 U.S. Courthouse, 1010 5th Avenue, Seattle,
9 WA 98104. A complete copy of the Stipulation for Settlement can be obtained from class counsel
10 whose name and address is listed in part V of this Notice, or by calling (800) 336-3600.

11 Do NOT contact the Court, Clerk's Office, counsel for the defendants or the defendants, if you
12 have any questions about this matter. Any questions about the proposed settlement or this Notice, should
13 be directed in writing to Milton L. Chappell, lead counsel for the plaintiffs and the subclasses, whose
14 address is listed in part V of this Notice. You may, of course, seek the advice and guidance of your own
15 attorney.

16 If this Notice reached you at an address other than the address printed on the envelope and you
17 believe that you are a member of the chargeability subclass, please send your present correct address to
18 class counsel whose name and address is listed in part V of this Notice. If you later change your address,
19 you should also immediately notify this attorney. Correction of addresses of members of the
20 chargeability subclass is necessary to ensure that settlement checks are received if the Court approves
21 the proposed settlement.

22 BY ORDER OF THE COURT

23 **BRUCE RIFKIN**

24 _____
25 CLERK OF THE COURT
26 UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON

DATED: Sept 23rd, 1998

Category Code Descriptions

Chargeable Activities

(If uncertain, err toward categorizing as nonchargeable.)

Description

- 1. Activities related to collective bargaining, contract administration and enforcement, including grievance processing and arbitration, working conditions, employee rights and job security, and research related to any chargeable activity.
- Preparation for strikes and activities undertaken in connection with lawful strikes.
- Revitalizing locals and members; maintenance of membership; organizational development. Does not include activities that serve only the purpose of recruiting new members, persuading existing members to retain their association membership, or organizing nonmember employees.
- Instructional and professional development.
- Association conventions and governance meetings.
- Training and meetings related to chargeable activities. If a portion of an otherwise chargeable training or meeting is devoted to nonchargeable matters, separate out the nonchargeable time and put it in Code 98, or if separation is not feasible, put the entire training or meeting in Code 63.
- Communicating information to members or fee payers related to any chargeable activity.
- Activities supporting chargeable activities or needed to maintain Association as an entity.
- Scholarships and awards (if available to fee payers or their children).
- General office work related to chargeable activities. See instructions for Code 26.

Allocated Activities

Code Description

- 61. Leaves, holidays, office closures.
- 62. Staff meetings.
- 63. General office work, trainings or meetings that cannot readily be separated into chargeable and nonchargeable components.

Nonchargeable Activities

Code Description

- 96. Donations.
- 98. Other nonchargeable activities:
 - Support of nonchargeable activities.
 - Lobbying, including lobbying state agencies.
 - Meetings and trainings (or portions thereof) not related to chargeable activities.
 - External public relations.
 - Internal communications regarding nonchargeable activities.
 - Litigation or research not related to Association's duty as exclusive bargaining agent or organizational maintenance.
 - Political or ideological activities supporting or opposing a particular candidate or party or initiative; activities to influence an election; activities related to levies, taxes, school funding, state or federal policy.
 - Organizing and recruiting non-members, and administrative or legal proceedings related to same; unit clarifications or representation elections; defending against efforts by other unions to represent units now represented by the Association.
 - Insurance protection and other member benefits not available to agency fee payers.
 - Student WEA, WEA-R.
 - Operation of political committee.
 - Voter registration.
 - Activities related to unlawful strikes. Put preparation for strikes, whether lawful or unlawful, in category 11.
 - General office work not related to chargeable activities.

FILED
COURT OF APPEALS
DIVISION II

02 JUL 19 PM 12:34

STATE OF WASHINGTON

BY _____

COURT OF APPEALS OF THE STATE OF WASHINGTON DEPUTY
DIVISION II

WASHINGTON EDUCATION
ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA
LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY
WOLCOT,

Respondents,
individually and on
behalf of all other
nonmembers similarly
situated.

NO. 28375-1-II

CERTIFICATE OF
SERVICE

I hereby certify that I served a true and correct copy of **OPENING
BRIEF ON BEHALF OF APPELLANT, WASHINGTON
EDUCATION ASSOCIATION and CERTIFICATE OF SERVICE**
on the following:

Steven O'Ban, Esq.
Ellis Li & McKinstry
601 Union Street, Ste 4900
Seattle, WA 98101

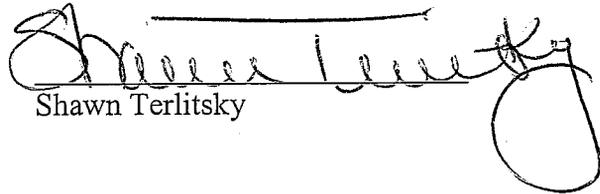
Via U.S. Mail

Jeanne Brown, Esq.
P.O. Box 552
Olympia, WA 98507

Via U. S. Mail

Milton Chappell, Esq. *Via U.S. Mail*
National Right to Work Legal Defense Foundation
8001 Braddock Road, Ste 600
Springfield, VA 22160

Dated this 15th day of July, 2002.


Shawn Terlitsky