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NO. 86563-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION, on behalf of certain
employees it represents, and VIVIAN MAE HILL, individually and on
behalf of others similarly situated,

Petitioners,

v.

SACRED HEART MEDICAL CENTER,

Respondent.

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DEC - 7 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
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**AMICUS CURIAE BRIEF OF WASHINGTON STATE
LABOR COUNCIL AND SEIU HEALTHCARE 1199NW
IN SUPPORT OF PETITION FOR REVIEW**

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I. IDENTITY AND INTEREST OF AMICI

Amicus Washington State Labor Council (“State Labor Council”) is the largest and most prominent advocate for the interests of working people in the State of Washington. It represents approximately 550 local and state-wide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members.

Amicus SEIU Healthcare 1199NW is a union that represents approximately 22,000 nurses, healthcare employees, and mental health workers in hospitals, agencies, and clinics statewide. Its members frequently are required to miss rest breaks and meal periods due to inadequate staffing and their responsibility to maintain safe patient care.

Thus, the amici represent employees throughout the state who have a strong interest in the issue presented to this Court for review, namely, the proper remedy for missed rest breaks. This case involves nurses who frequently are compelled to miss breaks in order to care for patients in hospitals and other acute care facilities. The approach taken by the Court of Appeals in this case is inconsistent with a 2002 decision of this Court, which would underpay employees who miss rest breaks, and if left undisturbed, would reward employers who neglect their mandatory duty to provide rest breaks to their employees.

II. STATEMENT OF THE CASE

Briefly stated, petitioners Washington State Nurses Association (“WSNA”) and one of its members (collectively, the “Nurses”) sued on behalf of approximately 1,200 registered nurses employed by respondent Sacred Heart Medical Center (“SHMC”) to recover overtime wages for missed rest breaks. Petitioners’ single claim was brought under the Washington Minimum Wage Act (“MWA”), RCW 49.46, and WAC 296-126-092, which regulation was promulgated by the Washington Department of Labor and Industries (“L&I”) pursuant to its authority under the Industrial Welfare Act (“IWA”), RCW 49.12.091.

There are two sources of the Nurses’ entitlement to rest breaks. Under state law, at WAC 296-128-092(4), all employers must provide 10 minutes of rest break time for every four hours of work. In addition, SHMC had agreed in its collective bargaining agreement (“labor agreement”) with the WSNA to provide 15 minutes of rest break time for each four hours of work. CP 216.

In 2006, a mutually agreed upon arbitrator concluded that SHMC had violated the labor agreement by failing to provide rest breaks and awarded back pay to the nurses. As a consequence of the arbitration award, SHMC instituted a procedure that permitted nurses to record each occasion when a rest break was missed. Upon receipt of the “Missed

Break Request” forms, SHMC paid the affected nurses 15 minutes of “straight time” pay for each missed break reflected on the forms. CP 233, 235. There is no dispute that SMHC paid straight time rates, not overtime, for the missed break time required under the labor agreement.

In late 2007, the WSNA brought this action asserting that SHMC owes the nurses overtime pay pursuant to the MWA on missed 10 minute breaks occurring during weeks in which nurses worked 40 or more hours. See RCW 49.46.130. The trial court agreed, and held, *inter alia*,

While there is a mathematical coincidence that 10 minutes of time at the overtime rate equals 15 minutes of pay, under the collective bargaining agreement SHMC is obligated to pay nurses for the full 15-minute rest break. The five minutes of pay at straight time SHMC pays for the final five minutes of a nurse’s contractual missed rest break does not satisfy its obligation to pay the overtime rate for the first ten minutes of a nurse’s missed rest break.

CP 1556.

Furthermore, the trial court adopted the damages approach proposed by the Nurses’ expert, Dr. Jeffrey Munson. CP 1557-58. According to Dr. Munson, “[f]or each of the missed rest breaks that occurred during a week in which a nurse worked 40 or more hours, I calculated five minutes of that nurse’s rate of pay.” CP 1489, at ¶ 5. In other words, Dr. Munson calculated overtime damages only if the total amount of time worked by a nurse in a given week, inclusive of missed rest breaks, was more than 40 hours. The amount of back pay owed for

each missed rest break was five minutes of each nurse's rate of pay, namely, an amount equal to the unpaid overtime pay on each missed 10 minute break.

A majority of the panel for Division III of the Court of Appeals reversed the trial court. *Washington State Nurses Ass'n v. Sacred Heart Medical Center*, 163 Wn. App. 272, 258 P.3d 96 (2011).¹ The Court's decision both misapplies the principles set forth in *Wingert v. Yellow Freight Systems, Inc.* ("*Wingert*"), 146 Wn.2d 841, 50 P.3d 256 (2002), and conflicts with the requirement that employees who are owed additional compensation for time worked must have their back pay calculated on a workweek basis.

III. ARGUMENT

A. Under *Wingert*, A Missed Rest Break Extends The Work Day By Ten Minutes And Must Be Paid Accordingly.

In *Wingert*, this Court held that workers who are required to work through a rest break have an implied cause of action under WAC 296-126-092 to recover back wages for the missed ten minutes of rest even though the rest period had already been paid. This Court reasoned:

Employees who must work through their overtime break are, in effect, providing Yellow Freight with an additional 10 minutes of labor during the first two hours of their overtime assignments. When the employees are not

¹ Judge Brown dissented, stating that she would uphold the award of overtime pay for the missed rest break. She also stated that she would have only reversed the trial court's grant of double damages in that there was "a bona fide dispute regarding the payment of wages." 163 Wn.App. at 280.

provided with the mandated rest period, their workday is extended by 10 minutes. Taking the regulation into account, the employees are entitled to be compensated by Yellow Freight for 2 hours and 10 minutes of work.

146 Wn.2d at 849. The Nurses' claim is based on this principle, namely, that if an employee is required to work through a rest break, she is entitled to be compensated for the missed time because she has provided the employer with 10 additional minutes and her workday has been, in effect, "extended by 10 minutes."²

The Court of Appeals distinguished this holding by pointing to language in *Wingert* that the additional 10 minutes of work time occurred "during the ... first ... hours of their ... assignments." 163 Wn. App. at 281. It held that the pay rate for a missed break must be the rate that was in effect when the break should have occurred. Based on its belief that all missed rest breaks occurred during the Nurses' initial 40 work hours of the week, it concluded that the missed time should be compensated by straight time not at overtime pay.³ Under its approach, if a break is missed during the first 40 hours of a workweek, straight time should be paid; alternatively, if an employee misses her break during overtime hours, overtime rate applies.

² The Court of Appeals incorrectly characterized the Nurses' complaint as being based on "pure MWA grounds." In fact, the Nurses' one cause of action seeks overtime pursuant to *both* the MWA and the rest break regulation, WAC 296-126-092, which is promulgated pursuant to the Industrial Welfare Act, RCW 49.12. CP 28-29.

³ The record does not support the assumption by the Court of Appeals that all missed rest break time by all nurses occurred during the first 40 hours in the work week. The record only reveals that the Nurses' damages expert calculated overtime pay if a nurses' workweek, inclusive of the missed break time, *exceeded* 40 hours. See *e.g.*, CP 1489.

This holding ignores the plain meaning of *Wingert*. *Wingert* teaches that where an employee is required to work through a rest break, she must be compensated as if she worked an *additional* ten minutes because her work day has, in effect, been extended by the length of the missed break.⁴ The fact that all of the missed rest breaks in *Wingert* occurred during the “overtime assignment” was not relevant to that holding and therefore should have no bearing on the outcome of this case.

To hold otherwise would reward the law-breaking employer that fails to live up to its “mandatory obligation” to provide rest breaks and meal periods. See *Pellino v. Brink's Incorporated*, -- Wn. App. --, 2011 WL 531422 at *10 (Nov. 7, 2011). Based on the Appeals Court’s reasoning here, an employer that requires an employee to work through breaks occurring during her first 40 hours of a work week gains an economic advantage over the law-abiding employer that provides break time and pays overtime pay for the additional labor that is required to accomplish the same work. A simple example illustrates why this is so: under the Court of Appeals’ approach, an employee of Employer X who works through one 10 minute break during her 40 hour week is compensated at straight time for the missed 10 minutes. However, an employee of Employer Y who receives all breaks and therefore has to

⁴ There is no dispute a rest break is considered “hours worked” under Washington law. See SHMC Answer, at 6; L&I Policy ES.C.6 at §10 at p. 4 (“Rest periods are considered hours worked”).

work 40 hours and 10 minutes in order to accomplish the same number of tasks is paid at the overtime rate for the final 10 minutes. Thus, Employer X pays less in wages than Employer Y for the same amount of labor output. Such a result is unfair and inconsistent with Washington's strong public policy favoring compliance with our industrial welfare laws. *See* RCW 49.12.010.

In addition, the Court of Appeals opinion also mistakenly holds that because the claim arises under a regulation promulgated pursuant to the IWA, "neither the language nor the policy reflected by the MWA comes into play." 163 Wn. App. at 282. In *Wingert*, this Court explicitly rejected a similar argument. In that case, the employer argued that the "employees do not have a statutory claim because RCW 49.12.005(5) defines rest break requirements as 'conditions of labor' rather than wages." 146 Wn.2d at 849. This Court rejected the proffered distinction and explained that a failure to provide rest breaks often implicates Washington's wage protection statutes: "as this case exemplifies, a rest period violation can constitute both a condition of labor and a wage violation." *Id.* Thus, the fact that the IWA does itself provide a remedy is immaterial. *Wingert* plainly holds that an adversely affected employee may utilize wage statutes to vindicate her rights to receive full compensation for missed rest breaks.

B. Overtime Pay For Uncompensated Work Must Be Calculated On A Workweek Basis; Damages For A Rest Break Violation Are Not Based On The Pay Rate In Effect For The Work Hour When The Rest Break Should Have Occurred.

The Court of Appeals misapplies the established methodology for calculating overtime pay. The Court of Appeals assumed that all rest breaks at issue here occurred during straight time hours, and that therefore all missed rest break time should be compensated on that basis. This error, if not corrected, will cause employers and courts to underpay employees who are entitled to compensation for missed rest breaks.

The starting place for the analysis is RCW 49.46.130(1) which requires employers pay their employees no less than “one and one-half times the regular rate of pay” for any “work week longer than forty hours.” This language creates a workweek basis for calculating overtime, and means, for example, that it is irrelevant that an employee may have worked more than eight hours in a particular day or more than 80 hours during a two-week period. As stated by L&I in Policy ES.A.8.1 (“Overtime”)⁵, “[a] workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods.” Once the total hours worked in a given workweek is determined, employers must pay 1.5 times the “regular rate” for all such hours worked “in excess of 40 hours.” L&I Policy ES.A.8.2 (“How To Compute Overtime”).

⁵ L&I Policies may be found on the L&I website at <http://www.lni.wa.gov/WorkplaceRights/Rules/Policies/default.asp>

Here, the Nurses missed their rest breaks and, pursuant to *Wingert*, this missed time must be treated as “additional labor” they provided to their employer. As a consequence, the trial court was correct to rely on the methodology of Dr. Munson (the Nurses’ damages expert) who calculated total hours worked for each workweek by adding the number of missed rest break minutes to the recorded work hours. It did not matter, and should not matter, that a missed rest break occurred during the initial 40 hours of work during a workweek, or during an overtime period, *i.e.*, after the employee had already worked more than 40 hours. Under this required calculation method, each ten minute period within a seven day workweek is work time, is interchangeable with all other ten minute increments, and must be treated equally as far as the overtime formula is concerned.

This is no different than if an employee was required to work an additional ten minutes “off the clock” on her first regular work day of a 40 hour workweek. Because this unpaid time pushes the employee’s total work time for the workweek above 40 hours, the employee must receive 10 minutes of pay at the overtime rate. It is irrelevant that the 10 minutes of uncompensated work occurred before the employee’s total hours for the workweek had yet reached 40 hours. Stated otherwise, if the total amount

of “work” *for the entire workweek* exceeds 40 hours, the time above 40 must be paid at one and one-half times the regular rate.

C. The Appeals Court Erroneously Held That The Trial Court Enforced The Labor Agreement.

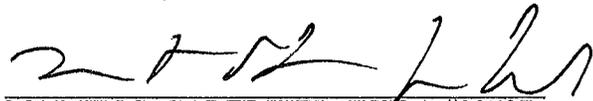
Finally, the amici support the Nurses’ view that the lower court did not enforce the labor agreement when it found that SHMC’s contractual remedy (15 minutes of pay) failed to satisfy its obligation to pay overtime under the MWA. The trial court did nothing more than to find that a collateral payment made pursuant to an arbitration award did not satisfy SHMC’s statutory obligation, and cannot be used to offset that obligation. The trial court did not, as the Appeals Court suggests, interpret and apply that collective bargaining agreement.

IV. CONCLUSION

Pursuant to RAP 13.4(b)(1) and (b)(4), this Court should grant the petition for review. The decision below conflicts with *Wingert* and its flawed methodology for calculating damages for missed rest breaks is an issue of substantial public interest.

RESPECTFULLY SUBMITTED this 22nd day of November, 2011.

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