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No. 91742-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE, d/b/a HUMAN SERVICES DEPARTMENT,

Petitioner,

v.

GEORGIANA ARNOLD,

Respondent.

Filed
Washington State Supreme Court

DEC - 8 2015

Ronald R. Carpenter
Clerk

AMICUS CURIAE BRIEF OF WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION

Joe Shaeffer, WSBA # 33273
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

Daniel F. Johnson, WSBA # 27848
Breskin Johnson & Townsend PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652-8660

Attorneys for Amicus Washington
Employment Lawyers Association



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I. INTRODUCTION AND ARGUMENT SUMMARY

This case involves the application of RCW 49.48.030, which mandates an award of reasonable attorney's fees to any employee who successfully recovers wages "in any action." In this case, the City of Seattle demoted a supervisory employee, Georgiana Arnold, for alleged failures in her supervision of others. She challenged that demotion through the City's civil service system, and a hearing officer reinstated her and awarded back pay. The hearing officer denied her request for attorney's fees, relying on a provision in the Seattle Municipal Code (SMC) that allows an employee to be represented by counsel in the civil service process "at his/her own expense."

Ms. Arnold filed an action in Superior Court to recover her fees. The Superior Court granted the City's motion for summary judgment, holding that because the hearing officer did not have authority to award fees, the Superior Court could not do so either. The Court of Appeals, Division I, reversed, holding that (1) "any action" includes civil service appeals and (2) under *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), "it is irrelevant that the commission itself is not authorized to award attorney fees to an employee who recovers wages" in an administrative appeal to the commission. *Arnold v. City of Seattle*, 186 Wn. App. 653, 665, 345 P.3d

1285 (2015). Under RCW 49.48.030, a court may award those fees “in a separate suit brought by the employee solely for the purpose of vindicating the statutory right.” *Id.*

This Court’s decision in *Fire Fighters* resolves entirely the question before the Court. There, this Court held that fees may be recovered in an action in Superior Court even if it is not the same action in which the employee recovered wages. That holding completely obviates the need to look at whether the tribunal in the underlying action had authority to award fees or not. The plain language of RCW 48.48.030 not only authorizes but requires Washington courts to award fees any time an employee recovers wages by judgment in “any action.”

Further, the Washington Constitution prohibits what the City of Seattle has attempted here: to immunize itself from liability for fees that are expressly mandated under a state statute by passing a self-serving local ordinance to the contrary. This Court has never allowed local governments to exempt themselves from laws of general applicability except where the legislature has expressly authorized it.

Finally, the State of Washington’s argument that local governments will be hesitant to discipline employees for fear of exposing themselves to large fee petitions is a speculative scare tactic, not a legal argument. It is more likely that the risk of fee awards will simply

encourage public employers to make well-reasoned and correct disciplinary decisions. It is only where a local government cannot justify its discipline decision to its own hearing officer that it must pay an attorney's fee award. The Court of Appeals' decision should be affirmed.

II. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (“WELA”) is an organization of lawyers licensed to practice law in the State of Washington devoted to protection of employee rights. *See* WELA Mot. (filed concurrently).

III. ARGUMENT

A. **This Court's Decisions in *Hanson* and *Fire Fighters* Control This Case and Obviate Any Need to Determine the Agency's Authority to Grant Fees in the Underlying Action**

Much of the argument before this Court and in the Court of Appeals revolves around the issue of whether the agency in the underlying actions—here, the Seattle Service Commission—had authority to award attorney's fees. Those arguments focus on a series of Court of Appeals decisions which seem to go both ways on the question.¹ But this Court's decisions in *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104

¹ *Cohn v. Dep't of Corrections*, 78 Wn.App. 63, 895 P.2d 897 (1995); *Trachtenberg v. Dep't of Corrections*, 122 Wn.App. 491, 93 P.3d 217 (2004); *McIntyer v. State of Washington*, 135 Wn.App. 594, 141 P.3d 75 (2006).

(1986) and *Fire Fighters* make such analysis unnecessary. These cases held that the nature of the underlying action makes no difference to a Superior Court's authority to award attorney's fees to an employee who has recovered wages by judgment in an action—*any* action—including an action before a civil service board.

In *Fire Fighters*, a union filed a grievance arbitration on behalf of two fire fighters who had been suspended without pay in violation of their union contract. 146 Wn.2d at 32. After a two-day arbitration proceeding, the arbitrator awarded back pay. *Id.* When the City of Everett refused to pay the union's attorney's fees, the union filed a *separate action* in Superior Court to recover attorney's fees pursuant to RCW 49.48.030. *Id.* at 33. The Superior Court granted summary judgment to the City, but the Court of Appeals reversed and remanded for a determination of fees owed to the union. *Id.*

The City argued on appeal and to this Court that fees are only available in the *same action* as the action in which the wages were recovered. *Id.* at 41-42. In other words, because the union had recovered wages in an arbitration action, and did not receive an award of fees in that action, that it was prohibited from filing a separate action in Superior Court to do so. *Id.* This Court rejected that argument, holding that "RCW 49.48.030 does not require that for attorney fees to be awarded in *any*

action, that action must be the ‘same action’ in which wages or salary owed are recovered.” *Id.* at 44 (emphasis in original). This Court based its holding on the plain meaning of the statutory language, determining that fees “need not be awarded in the *same action* as that in which wages or salary owed are recovered.” *Id.* (emphasis in original).

In arriving at this conclusion, this Court distinguished the Court of Appeals’ decision in *Cohn*, which held that, where a civil service commission had no authority to award fees, the superior court could not award fees either. *Id.* at 42 (citing *Cohn*, 78 Wn. App. at 69-70).² In so doing, this Court criticized *Cohn*’s reading of *Hanson*, which, the Court said, “made it clear that the *nature* of the proceeding did not affect the availability of attorney fees to an employee who is successful in recovering wages or salary owed.” *Id.* at 43 (citing *Hanson*, 105 Wn.2d at 872).

The analysis in these cases obviates the need to determine whether the commission had the legal “authority” to award fees. This Court has made clear that the Superior Court has authority to award fees in a

² The Court in *Fire Fighters* distinguished *Cohn* by saying that it involved an appeal from a government agency rather than an arbitration proceeding. 146 Wn. 2d at 42-43. Yet, as noted here, *infra*, *Hanson* had involved a civil service appeal and permitted recovery of fees. The Court should now expressly overrule *Cohn*, because as the Court of Appeals held, there is no meaningful distinction between a grievance arbitration proceeding and a civil service review proceeding. *Arnold*, 186 Wn. App. at 663-64.

separate action, and that the “nature” of the underlying action does not affect availability of fees. The analysis ends there. Nothing in the statute or this Court’s decisions suggests that fee awards are or can be limited if the underlying tribunal lacks authority to award fees. RCW 49.48.030 grants authority to the Superior Courts to award fees any time an employee recovers wages by judgment in “any action.” It is wholly irrelevant whether the underlying tribunal had authority to award those fees.

B. Local Governments Cannot Immunize Themselves From RCW 49.48.030 by Enacting Self-Serving Ordinances that Conflict with the Plain Meaning and Purpose of the Statute

If the Court reaches the question of the Civil Service Commission’s authority to award attorney’s fees, and finds that the SMC does prohibit such an award, then it must address the conflict between that provision and RCW 49.48.030.³

First, it is not clear that a conflict exists. The municipal code provision, SMC 4.04.260(E), provides that “An employee may be represented at a hearing before the Commission by a person of his/her own

³ RCW 49.48.030 reads, in pertinent part:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney’s fees, in an amount to be determined by the court, shall be assessed against said employer or former employer.

choosing *at his/her own expense.*” It is not at all clear that this language prohibits anything, let alone a fee award under RCW 49.48.030. Rather, it appears to be a statement that the City will not pay for an attorney to represent the employee along the way, as is done for criminal defendants.

However, the parties seem to assume that this language purports to limit fee awards, and if that is so, then it conflicts with state law, and under the Washington Constitution, article XI, section 11, it cannot be enforced:

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with general laws.*

(emphasis added). “Unconstitutional conflict occurs when an ordinance permits what is forbidden by state law or prohibits what state law permits.” *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't of Planning & Land Servs.*, 148 Wash. 2d 451, 482, 61 P.3d 1141, 1156-57 (2003).

Here, the Seattle ordinance, as interpreted by the City, prohibits what state law expressly permits, indeed requires—an award of attorney’s fees to employees who recover a judgment for wages. As is well recognized by all parties to this litigation, RCW 49.48.030 is a remedial statute to be liberally construed, and a “liberal construction requires that the coverage of the statute's provisions be liberally construed [in favor of the employee] and that its exceptions be narrowly confined. *Fire Fighters,*

146 Wn.2d at 34. Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash.2d 291, 300, 996 P.2d 582 (2000). On its face, and especially when read liberally, RCW 49.48.030 leaves no room for contrary municipal ordinances. Simply put, Seattle’s ordinance directly conflicts with the plain language of RCW 49.48.030, and would undermine its remedial purpose, because the ordinance seeks to prohibit something the legislature specifically authorized and in fact mandated.

C. The State of Washington’s Suggestion that Employers Will Be Less Likely to Discipline Employees is Irrelevant Speculation.

As mentioned above, the State of Washington as amicus curiae has warned that if municipalities cannot insulate themselves from attorney’s fee awards in civil service appeals, there will be “a chilling effect on employers taking disciplinary actions related to civil service employees.” ACM of Attorney General at 5. It cites no legal or factual authority for this assertion, and the opposite scenario seems equally or more alarming: that without the threat of fee-shifting, employers feel more free to impose discipline even if it cannot be upheld on appeal. The Court is not in the best position to weigh such concerns. *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 57, 929 P.2d 420 (1997) (“When we are unable to determine the public policy merit of a proposed significant change in the

tort law, caution dictates that we defer to the Legislature.”). Regardless, a municipality cannot avoid a mandate of state law by enacting contrary city codes.

IV. CONCLUSION

The state legislature and the courts have firmly established the right of employees to recover attorney’s fees when they successfully obtain a judgment for wages due. A decision of a civil service commission awarding back pay for wrongful demotion is such a judgment. There is no doubt the Superior Court could award Ms. Arnold her attorney’s fees incurred in obtaining that judgment. If the Seattle Municipal Code prohibits recovery of such fees, it contradicts state law and cannot stand. WELA respectfully requests that the Court affirm the judgment of the Court of Appeals in its entirety.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By s/ Daniel F. Johnson _____
Daniel F. Johnson, WSBA # 27848
Joe Shaeffer, WSBA #33273

CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION** with the Clerk of the Court via email. By agreement, I am also serving the following counsel for the parties via email:

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
Email: phil@tal-fitzlaw.com

Judith A. Lonquist, WSBA #6421
Law Offices of Judith A. Lonquist, P.S.
1218 3rd Avenue, Suite 1500
Seattle, WA 98101
Email: lojal@aol.com

Molly Daily, Assistant City Attorney
Seattle City Attorney's Office
Columbia Center
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Email: molly.daily@seattle.gov

Paul J. Lawrence
Gregory J. Wong
Sarah Stewart Washburn
Pacifica Law Group LLP
1191 2nd Avenue, Suite 2000
Seattle, WA 98101
Email:
paul.lawrence@pacificalawgroup.com
Email: greg.wong@pacificalawgroup.com

Also emailed to:
dc.bryan@seattle.gov;
kim.fabel@seattle.gov; and
Danielle.tovar@seattle.gov

Email:

sarah.washburn@pacificalawgroup.com

DATED this 25th day of November, 2015, at Seattle, Washington.

s/ Jamie Telegin
Jamie Telegin, Legal Assistant

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City of Seattle v. Georgiana Arnold
Case No. 91742-6

Daniel F. Johnson
206-652-8660
Bar No. 27848

Jamie Telegin
Legal Assistant
BRESKIN JOHNSON & TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
206.652.8660 Main Phone
206.518.6213 Direct Phone
206.652.8290 Facsimile
Email: admin@bjtlegal.com

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