

No. 97201-0

No. 77694-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JEOUNG LEE and SHERRI MCFARLAND on their own behalf and on  
behalf of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY  
PUBLIC HOSPITAL DISTRICT #2,

Appellant,

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King County Superior Court No. 16-2-27488-9 SEA,  
the Honorable Catherine Shaffer presiding

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SUPPLEMENTAL BRIEF OF APPELLANT  
KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,  
D/B/A EVERGREENHEALTH MEDICAL CENTER

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King County Public Hospital District No. 2, d/b/a EvergreenHealth Medical Center, respectfully submits this supplemental brief in response to the Panel's request dated December 4, 2018.

**A. In the context of a motion to compel arbitration, does the requirement that any waiver of an employee's right to a judicial forum for statutory claims must be clear and unmistakable, see *Cox v. Kroger Co.*, 2 Wn. App. 2d 395, 404, 409 P.3d 1191 (2018), apply to claims for meal and rest breaks based upon Washington statutes and regulations?**

The answer to the Panel's first question is no, when a public employer is involved. The statutes and regulations governing public employers' collective bargaining agreements make *Cox v. Kroger Co.* inapplicable to the extent it would require something more than a CBA "that specifically var[ies] from or supersede[s], in part or in total," otherwise applicable rules regarding rest and meal periods. RCW 49.12.187. Determining whether, for example, the Hospital District CBA's provision for a single meal period during 12-hour shifts varies from the otherwise applicable rule that would require a meal period every five hours is an issue of contract interpretation subject to arbitration.<sup>1</sup>

Furthermore, the Public Employee Collective Bargaining Act ("PECBA") expressly adopts the converse of *Cox v. Kroger's* holding

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<sup>1</sup> In fact, the Superior Court held that the CBA's single meal break provision did vary from the regulation in the related, prior litigation between the District and its registered nurses. CP 929-32.

regarding judicial versus non-judicial fora for resolving disputes between public employers and their employees. Under the PECBA, all disputes are presumed subject to arbitration unless the CBA itself “expressly or by clear implication negates that presumption.” *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 414, 924 P.2d 13 (1996). Whether the CBA contains an express or clear negation of the presumption of arbitrability is a question of contract interpretation – subject to arbitration.

*Cox v. Kroger Co.* can also otherwise be distinguished from the case at bar, making its holding inapplicable to the District’s CBA.<sup>2</sup> Plaintiffs’ claims are based on the CBA’s provisions, not the less protective state law provisions, as their testimony demonstrates:

Q. Did you attempt to report a late rest break as missed?

A. Again, as I had said, I asked Jennifer about the timetable for taking breaks ***that was in the union contract***, and that if I didn’t get it within that time, was I allowed to clock out that I did not get it, and she said no.

Q. Do you think that Jennifer Celms is wrong?

A. I think ***if the union contract states that*** they’re required to give you a rest break within a certain period of time, then if they do not give you that, they ought to pay you for it, yes.

CP 589-90 (emphasis added).

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<sup>2</sup> See Section A.4, *infra*.

1. **RCW 49.12.187 requires only that the CBA vary from the generally applicable statutes and regulations governing rest breaks to control.**

Public employers are different in-kind from private employers. Private employers may not depart from generally applicable rest and meal rules by entering into a CBA. Public employers are expressly empowered to do just that. RCW 49.12.187. In 2003, Washington's Legislature brought public employers "within the definition of 'employer' for purposes of industrial welfare regulations." *Frese v. Snohomish Cnty.*, 129 Wn. App. 659, 667-68, 120 P.3d 89 (2005). At the same time, however, the Legislature specifically allowed public employers "to enter into collective bargaining agreements that 'vary from or supersede' the rest and meal period regulations." *Id.* at 668. Under RCW 49.12.187:

Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically ***vary from or supersede, in part or in total,*** rules adopted under this chapter [RCW 49.12] regarding appropriate rest and meal periods.<sup>3</sup>

(Emphasis added)

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<sup>3</sup> See also WAC 296-126-130(8): "Employers do not require a variance in the following cases:... (b) Public employers that have entered into collective bargaining agreements, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods."

The District's CBA with its nurses specifically varies from the general rules governing rest and meal periods. Plaintiffs' assertion that the provisions *do not vary* from the rules demands interpretation of the contract provisions.<sup>4</sup> Under the CBA, the arbitrator is authorized to "interpret existing provisions of [the CBA] as they may apply to the specific facts of the issue in dispute." CP 107, 148, 191.

RCW 49.12.187 functions as an express statutory waiver of rest and meal break claims under WAC 296-126-092 for public employers who enter into a CBA with rest and meal break terms that vary the requirements of the regulation. The statute therefore overrides any inconsistent "clear and unmistakable" waiver requirements from *Cox v. Kroger Co.*, which only apply to private employers. Applying the "clear and unmistakable" waiver holding of *Cox* to public employer CBAs would negate public employers' statutory right under RCW 49.12.187 to reach agreements with their employees to vary from the rest and meal period regulations.

**2. Cox v. Kroger Co.'s "clear and unmistakable waiver" requirement does not apply to public employers with a CBA governed by the PECBA, Chapter 41.56 RCW.**

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<sup>4</sup> Plaintiffs have argued that there is no variance because the issue was not specifically negotiated in the most recent bargaining sessions. This misstates the statute, which simply requires that the CBA provisions for rest and meal periods vary from the regulation. The variance in the District's CBA is long-standing. CP 80, 93, 114.

In *Cox*, the Court relied on *Brundridge v. Fluor Fed. Servs.*, 109 Wn. App. 347, 355, 36 P.3d 389 (2001) and held that a CBA does not encompass statutory wage claims under Chapter 49.52 RCW unless the employee clearly and unmistakably waives the right to a judicial forum. In both *Cox* and *Brundridge*, the employers were private entities. In contrast, the District is a public entity, and the PECBA adopts the opposite presumption for public employers. Absent a clear and unmistakable carve-out from the general requirement of arbitration, employees' disputes with their public employer are subject to arbitration. *Peninsula School Dist.*, 130 Wn.2d at 414. The District's CBA *does* include an express carve-out from arbitration for discrimination claims. CP 126.<sup>5</sup> There is no carve out for disputes over meal and rest periods.

The PECBA prevails over conflicting statutes and regulations, and is "liberally construe[d] . . . to accomplish its purpose." *Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d

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<sup>5</sup> That section of the CBA provides:

5.1 Equal Opportunity. The Employer and the Association agree that conditions of employment shall be consistent with applicable state and federal laws regarding nondiscrimination. If a charge based on an alleged violation of this section is filed with a federal, state or local agency, the charge shall be handled exclusively through that agency and not through the grievance procedure of this Agreement.

158 (1992); RCW 41.56.905. It provides an express waiver of a judicial forum for employee statutory claims on matters covered in the CBA.

The CBA designates the Washington State Nurses Association (“WSNA”) “as the sole and exclusive bargaining representative for all . . . registered nurses . . . .” CP 165. Plaintiffs’ claims for injunctive relief would supplant the CBA. CP 6 (§§ 29, 30(d)); CP 439-40 (§§ 31, 34(f)). A judicial proceeding is contrary to WSNA’s role as the exclusive bargaining representative as well as undermining the purpose of the PECBA:

The purpose of the PECBA is “to promote the continued improvement of the relationship between public employers and their employees,” by regulating the “right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.” RCW 41.56.010.

*SEIU 775 v. Dep’t of Soc. & Health Servs.*, 198 Wn. App. 745, 753, 396 P.3d 369, *rev. denied*, 189 Wn.2d 1011 (2017).

**3. Determination of any waiver of arbitration rights is an issue of contract interpretation subject to arbitration.**

Both plaintiffs claim that the District has underpaid them at wage rates that arise only under the CBA, CP 94-95, 134-35, 177-78, not statutory minimum wage rates. A grievance is defined in the CBA as “an alleged breach of the express terms and conditions of the Agreement.” CP 190. Their claims regarding rest and meal periods are expressly governed

by the CBA. Section 7.7 and Addendum 2 set forth the specific terms of employee rest and meal breaks. CP 93, 114, 133, 155, 176, 198. The employees rely on language in Section 7.7 that “[m]eal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092)” to assert that the CBA does not vary from the rest and meal period regulation. Whether this negates the express variance language in the same section and in Addendum 2 is a matter of contract interpretation, which is subject to arbitration. On its face, this is a contract claim.

When a claim is governed on its face by the contract, “an order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Peninsula Sch. Dist.*, 130 Wn.2d at 413-14 (*quoting Council of Cnty. & City Emps. v. Spokane Cnty.*, 32 Wn. App. 422, 424-25, 647 P.2d 1058 (1982)). This varies from the *Cox v. Kroger Co.* rule applicable to private employers. Here, there is nothing in the CBA which could, “with positive assurance,” divest the parties of their contractual right to arbitration. “There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.” *Id.* Therefore, even if there were a question of arbitrability, the

presumption is that arbitration should be granted because there is no express or clear implication otherwise.

**4. *Cox v. Kroger Co.* is otherwise distinguishable.**

Even if *Cox*'s holding applied generally to the District as a public employer, it would not apply to the present case, which is factually dissimilar to *Cox* in material ways. In *Cox*, the Court found that the CBA's waiver was not clear and unmistakable because: (1) the grievance procedure did not identify any specific statutes or make general reference to statutory wage claims; (2) the wage claim provision did not contain its own arbitration clause or reference to the general arbitration clause; (3) the wage provision set a different deadline for filing a wage claim than a claim under the general arbitration clause; (4) other provisions expressly referenced the general arbitration clause, illustrating a clear intent to apply the arbitration procedures to such provisions; and (5) the wage claim provision failed to identify any specific statutes covered by the CBA.

In contrast, Section 7.7 of the District CBA cites to WAC 296-126-092.<sup>6</sup> Unlike *Cox*, there is no separate deadline or process for filing a wage claim under the CBA. Also unlike *Cox*, there are no CBA provisions with separate express references to the general arbitration

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<sup>6</sup> Again, this regulation is overridden by the PECBA and RCW 49.12.187, which govern public employer CBAs and allow for CBA terms and other agreements that vary from or supersede the regulation.

clause. Finally, unlike *Cox*, the District's CBA indicates that the grievance procedure, including arbitration, applies to all claims unless expressly identified. CP 169 (Section 5.1). The express carve-out of discrimination claims indicates that all other grievances, including those based on rest and meal breaks, shall be handled exclusively through the CBA's general grievance process.

**B. If the “clear and unmistakable waiver” requirement applies to meal and rest breaks based on Washington statutes and regulations, what impact does it have on the issues raised on appeal?**

The answer to the Panel's second question is “none.” The statutes applicable to public employers, together with the District's CBA, constitute clear and unmistakable waivers, if that test applies to public employers. *Cox v. Kroger Co.* has no application to the present case.

Respectfully submitted this 21<sup>st</sup> day of December, 2018

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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 21, 2018, I caused service of the foregoing to the following counsel of record:

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**Dated:** December 21, 2018

/s/ Holly McGinley  
Holly McGinley, Legal Assistant

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## Transmittal Information

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