

NO. 77694-1
(King County Superior Court Case No. 16-2-27488-9 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

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

Plaintiffs-Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER AKA
KING COUNTY PUBLIC HOSPITAL DISTRICT #2,

Defendant-Appellant.

RESPONDENTS' SUPPLEMENTAL BRIEF
RE: *COX V. KROGER*

David E. Breskin, WSBA #10607
Cynthia J. Heidelberg, WSBA #44121
BRESKIN JOHNSON & TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Telephone (206) 652-8660
Counsel for Plaintiffs-Respondents

TABLE OF CONTENTS

I. RESPONSE TO REQUEST FOR SUPPLEMENTAL BRIEF 1

II. ANALYSIS OF *COX*..... 2

 A. The Evergreen CBA Does Not Contain a Clear and Unmistakable Waiver of Judicial Forum 2

 B. The Requirement of a Clear and Unmistakable Waiver of Statutory Claims Applies to Rest and Meal Break Claims 5

 C. The Complaint Controls the Claims in Action, Which are Brought under Washington Law, not the CBA 5

 D. *Cox* Supports that Evergreen’s Appeal Was Untimely 9

III. CONCLUSION..... 10

I. RESPONSE TO REQUEST FOR SUPPLEMENTAL BRIEF

On December 4, 2018, this Court requested that the parties submit supplemental briefing addressing 1) whether, in the context of a motion to compel arbitration, 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*, 2 Wn.App.2d 395, 409 P.3d 1191 (2018), applies to claims for rest and meal breaks based upon Washington statutes and regulations; and 2) if so, what impact does it have on the issues raised on appeal? Plaintiff-Respondent Jeoung Lee hereby responds as follows:

1) Yes, *Cox v. Kroger* applies equally to any kind of statutory claim, including statutory claims related to rest and meals breaks.

2) *Cox v. Kroger* supports the trial court's denial of Appellant Evergreen Hosp. Med. Cntr. ("Evergreen")'s motion to compel arbitration in this case for the following reasons:

First, in our case, like *Cox*, the collective bargaining agreement ("CBA") between Evergreen and the union, the Washington State Nurses' Association ("WSNA"), does not have a clear and unmistakable waiver of the union member's right to bring claims in a judicial forum for violations of the Washington Wage Statute. *Cox*, 2 Wn.App.2d at 404.

Second, in our case, like *Cox*, the CBA's arbitration provision does not make state law claims for violation of state wage and hour regulations

subject to arbitration. *Id.* The arbitration provision is limited to grievances over breach of the CBA.

Third, in our case, like *Cox*, the court looked to the claims stated in the Amended Complaint to determine if the claims were for violation of the terms of the CBA or violations of state law. *Id.* at 401-402. Like in *Cox*, the Amended Complaint here only states a claim for violation of Washington statutory law and not for breach of the CBA.

Fourth, in our case, like *Cox*, the court rejected defendant's assertion that the plaintiff's discovery response – here a discovery response by a putative class member – changed the claims stated in the Complaint for violation of state law to a claim for violation of the CBA by referencing the CBA in the discovery response. *Id.* at 402. In *Cox*, it was plaintiff's answer to defendant's interrogatory that referred to the CBA's wage rates. Here, it was Ms. McFarland's answer to a deposition question referencing the 15 minute rest breaks afforded by the CBA.

II. ANALYSIS OF COX

A. The Evergreen CBA Does Not Contain a Clear and Unmistakable Waiver of Judicial Forum

As discussed in the pleadings to the trial court and in Respondent Lee's Response Brief, the arbitration provision in Evergreen's CBA did not have a clear and unmistakable waiver of the nurse's right to adjudicate

state law unpaid rest and meal break claims in a judicial forum. There is no dispute that the arbitration provision does not mention let alone waive such state law claims. The arbitration provision on its face is limited to grievances and the CBA defines a “grievance” as a dispute over a breach of the CBA, not a violation of state law. CP 529-530. By its clear terms, which Evergreen admits, the CBA’s grievance and arbitration procedures only apply to claims for breach of the CBA, *not* to claims for violations of Washington law. CP 690-93, 702.¹

Citing *Brundridge v. Flor Fed. Servs., Inc.*, 109 Wn. App. 347 (2001), this Court in *Cox* upheld the trial court’s denial of a similar motion to compel arbitration brought by the defendant employer because the CBA did not contain a clear and unmistakable waiver of the right to adjudicate state law claims for violation of the Washington Wage Statute in the King County Superior Court. *Cox*, 2 Wn.App.2d at 404-405. This Court noted in *Cox* that to have an effective waiver of the employee’s right to adjudication of a state wage statute or regulation claim in a judicial forum, the waiver must not only be clear and unmistakable but that the state

¹ See also CP 1147-48, 30(b)(6) deposition of Evergreen:

Q: Has Evergreen ever negotiated with WSNA to include within the grievance definition violations of state law?

A: No.

Q: To your knowledge, has Evergreen ever negotiated with WSNA to waive the WSNA employees’ rights to sue Evergreen over violations of state law?

A: I have no knowledge of that.

statute or regulation under which the plaintiff's claim is brought must be *specifically identified* as subject to arbitration in the CBA's arbitration provision. *Id.* at 405 ("absent any reference to *specific statutes* ... the article 6 CBA wage claims provisions do not support arbitration").

As in *Cox*, the arbitration provision in the CBA here does not identify the specific wage statute and rest/meal break regulations under which Lee's individual claim and the certified Class claim is brought. CP 529-530. As this Court stated in *Cox*, 2 Wn. App. 2d at 404:

The CBAs do not clearly and unmistakably waive the right to a judicial forum for Cox's statutory wage claims. Therefore, the CBA arbitration provision does not encompass Cox's claims and the trial court did not err in denying the motion to compel arbitration.

Similarly, in *Brundridge*, Division III, held, at p. 356, that

In this case, the CBA grievance procedure requires binding arbitration for any disputes "aris[ing] out of the interpretation or application of this AGREEMENT." ... As we shall see below, the pipe fitters' claim for wrongful discharge in violation of public policy does not require interpretation or application of any term in the agreement. Fluor cites no provision in the CBA wherein health and safety or whistleblowing statutes have been explicitly incorporated...Further, this boilerplate arbitration provision is not sufficiently specific: it does not clearly and unmistakably waive the right to a judicial forum for tort claims arising independently of the CBA.

Evergreen does not dispute the fact that the arbitration provision here fails to identify the specific state statute and regulations under which Plaintiff Lee and the Class assert their claims in the Amended Complaint.

Rather, like in *Brundridge*, the CBA here limits grievances to breaches of the terms and conditions of the CBA, and the arbitration provision relates only to grievances, not claims under state law. CP 529-530.

B. The Requirement of a Clear and Unmistakable Waiver of Statutory Claims Applies to Rest and Meal Break Claims

Cox applies equally to any kind of statutory claim, including the statutory claims here related to rest and meals breaks. There is no language or rationale in *Cox* that limits the requirement of a clear and unmistakable waiver to only statutory claims for willful withholding of wages. Indeed, *Brundridge*, on which this Court relied in *Cox*, involved a claim for wrongful discharge in violation of public policy. 109 Wn.App. at 356. And the federal cases that articulate the clear and unmistakable waiver doctrine broadly include all types of “statutorily conferred rights,” including, for example, discrimination claims. *See e.g. Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 73, 80, 119 S.Ct. 391 (1998).

C. The Complaint Controls the Claims in Action, Which are Brought under Washington Law, not the CBA

At the deposition of Emergency Department nurse and class member, Sheri McFarland, Evergreen’s counsel asked if she felt she got her rest break if she did not get a 15 minute break and Ms. McFarland said “no.” Evergreen then sought to deny Plaintiff Lee’s motion to amend the complaint to add Ms. McFarland as an additional class representative,

arguing to the trial court that Ms. McFarland's response at her deposition meant her individual claim was for breach of the CBA's rest break provision requiring a 15 minute rest break and not for violation of the state regulation requiring a 10 minute break. Evergreen argued that because her legal claim was for violation of the CBA, her claim was different than Lee and the class's claim which was for violation of the state regulation requiring a 10 minute rest break. CP 283. The trial court rejected Evergreen's argument and granted Lee's motion to amend. CP 430-433.

Weeks later, Evergreen moved to compel arbitration based on the identical argument that McFarland's deposition response meant that all claims in the lawsuit were now for breach of the CBA and not based on violation of the state rest/meal break regulation. The trial court correctly rejected the argument because the Amended Complaint did not change the claim from one for violation of the state regulation to one for breach of the CBA. *See* 11/3/2017 VRP at 15.

In *Cox*, the defendant made a similar argument in moving to compel arbitration that the plaintiff's answer to a discovery interrogatory referencing the CBA's wage rates meant the plaintiff's claim was now for breach of the CBA and not state law. *See* 2 Wn. App. 2d at 402:

Specifically, as to the Washington law claim, QFC points to an interrogatory answer by Cox referring to claimed damages at a rate of \$12 per hour. Because Cox's standard

rate when working in Washington was less than \$12 per hour, QFC infers that he must be depending on some form of premium wage rate contained in the CBAs.

In *Cox*, this Court reached a similar conclusion in rejecting the defendant employer's assertion, holding that the claims the plaintiff *actually* makes are critical to the analysis², and concluding that the interrogatory answer does not turn his claim into a claim under the CBA. 2 Wn. App. 2d at 402:

But the interrogatory answer does not constitute a binding admission by Cox that his Washington claim depends on the application of a premium wage rate contained in the CBAs. In fact, he denies his claims include any such rates.

Similarly, it was critical to the trial court's analysis in our case that it looked at "the claims actually asserted by" Lee in the first amended complaint. As Lee noted her Opening Brief, the Amended Complaint specifically alleges Evergreen violated the Washington Wage Statute and rest/meal break regulations by not paying ED nurses for missed breaks. The complaint does *not* make any allegation of a breach of the CBA. As the trial court correctly concluded:

[T]his claim has been brought from the get-go under the statute, it was pled initially under the statute, every reiteration of the complaint that the Court has allowed has

² 2 Wn. App. 2d at 400-401 (As a preliminary matter, it is critical to our analysis to understand the claims actually asserted by Cox. The first amended complaint specifically alleges QFC's rounding policy "deprives [hourly] employees of regular and overtime pay they have earned").

been under the statute, none of it has been under the Collective Bargaining Agreement.

11/3/2017 VRP at 15. In our case, the plaintiffs have consistently denied their claims are based on the CBA's required 15 minute rest break and instead have asserted in each Complaint and all pleadings that the rest break claim is based on a violation of the state law required 10 minute break contained in the Washington rest/meal break regulation.

Nor does it matter to the analysis that Evergreen, as a public entity, is permitted to modify the meal and rest break requirements of WAC 296-126-092. First, as discussed in Respondent's briefing, any modification must be specific, express, and narrowly construed.³ The CBA eliminates one of the two meal breaks provided for under the statute for a 12-hour shift and makes rest breaks 15 minutes instead of 10 minutes. *Id.* It does not "specifically vary" WAC 296-126-092 in any other way. And in fact, the CBA provides specifically, at ¶ 7.7 that: "Meal periods and rest periods *shall be administered in accordance with state law* (WAC 296-126-092)." Emphasis added. And in any event, even a CBA-governed provision that is coextensive with a statutory provision does not extinguish employee's rights under the statute unless the waiver is clear and unmistakable. *See Wright*, 525 U.S. at 81 (creating coextensive rights "is

³ *See* RCW 49.12.187; L&I Guidance, E.S.C.6 at 3; *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300-01, 996 P.3d 582 (2000).

not the same as making compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause”). Notably, even the nurses’ union itself brought its rest and meal break claims in 2010 under Washington law, not its CBA with Evergreen. CP 1222.

D. Cox Supports that Evergreen’s Appeal Was Untimely

Finally, *Cox* supports that Evergreen’s appeal was untimely. In her Response Brief, Lee argued that Evergreen’s appeal of the order denying its motion to compel arbitration was untimely because Evergreen’s argument to compel arbitration was the exact same argument the trial court had rejected weeks earlier in granting Lee’s motion to amend the Complaint. As discussed above, Evergreen had argued in opposition to the motion to amend that McFarland’s deposition response meant the claim was based on a breach of the CBA’s 15 minute breaks and not the 10 minute break required by state law. But Evergreen never appealed that substantive ruling by the trial court that was made more than 30 days before it appealed the order denying its motion to compel arbitration that was based on the *identical* argument.

In *Cox*, this Court held that the defendant employer’s appeal of the trial court’s order denying its motion to compel arbitration was timely, stating in pertinent part, 2 Wn.App. at 409:

Here, QFC filed a notice of appeal of the arbitration order

on December 5, 2016. Cox does not provide any compelling authority to advance his argument that the arbitration motion was an untimely motion for reconsideration The two motions sought different relief and required the court to consider different bodies of law.

But in our case, the motion to compel arbitration was necessarily an untimely motion for reconsideration that was made more than 10 days after the trial had already rejected the *identical* argument that was the lynchpin of the motion to compel arbitration. The two motions at issue did require the trial court to consider the identical facts and the identical body of law, i.e. whether McFarland's deposition response changed the legal claim in the action from a violation of state law to a breach of the CBA. Because Evergreen's motion to compel arbitration necessarily involved asking the trial court to reconsider its prior ruling that McFarland's testimony did not mean that the claims asserted were for breach of the CBA and not for violation of state law, this Court's above reasoning in *Cox* suggests Evergreen's motion to compel arbitration was an untimely request for reconsideration and its appeal of the order denying its motion to compel arbitration was therefore itself untimely.

III. CONCLUSION

Cox further strongly supports affirming the trial court's order here denying Evergreen's motion to compel arbitration.

DATED: December 21, 2018

BRESKIN JOHNSON & TOWNSEND, PLLC

By: s/ Cynthia Heidelberg
David E. Breskin, WSBA #10607
Cynthia J. Heidelberg, WSBA #44121
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652-8660
dbreskin@bjtlegal.com
cheidelberg@bjtlegal.com

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the foregoing document with the Clerk of the Court and caused service on the following counsel of record, in the manner indicated:

Via Email by Agreement

John J. White
Kevin B. Hansen
Rebecca Penn
Livengood Fitzgerald & Alskog PLLC
white@livengoodlaw.com
hansen@livengoodlaw.com
penn@livengoodlaw.com

DATED December 21, 2018, at Seattle, Washington.

s/ Leslie Boston
Leslie Boston, Paralegal

BRESKIN, JOHNSON & TOWNSEND

December 21, 2018 - 12:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77694-1
Appellate Court Case Title: King County Public Hospital, Appellant v. Jeoung Lee, Respondent
Superior Court Case Number: 16-2-27488-9

The following documents have been uploaded:

- 776941_Briefs_20181221125831D1556327_8591.pdf
This File Contains:
Briefs - Respondents - Modifier: Supplemental
The Original File Name was Lee - Supplemental Brief re Cox.pdf

A copy of the uploaded files will be sent to:

- dbreskin@bjtlegal.com
- hansen@livengoodlaw.com
- penn@livengoodlaw.com
- white@livengoodlaw.com

Comments:

Re Cox v Kroger

Sender Name: Cynthia Heidelberg - Email: cheidelberg@bjtlegal.com

Address:

1000 2ND AVE STE 3670

SEATTLE, WA, 98104-1053

Phone: 206-652-8660 - Extension 209

Note: The Filing Id is 20181221125831D1556327