

FILED
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STATE OF WASHINGTON
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NO. 97201-0

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

(COA No. 77694-1-1)

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

Respondents,

v.

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

Petitioner.

**PLAINTIFF-APPELLEES'
RESPONSE TO BRIEF OF AMICUS CURIAE
ASSOCIATION OF WASHINGTON PUBLIC
HOSPITAL DISTRICTS**

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I. RESPONSE

Plaintiffs/Appellees hereby submit the following short response to the brief of *amicus curiae* Association of Washington Public Hospital Districts (“AWPHD”).

1. This appeal turns on the specific terms of this CBA

Arbitration is a matter of contract and a party cannot be required to submit to arbitration if a party has not agreed to it. *Hill v. Garda*, 179 Wn.2d 47, 53 (2013). That is the fundamental principle upon which the inquiry in this appeal must be focused. This “gateway concern” is entrusted to the courts, not arbitrators. *Id.*

As the Court of Appeals correctly held, what the parties agreed to here is exceedingly narrow. First, the Collective Bargaining Agreement (“CBA”) narrowly defines a grievance as “an alleged breach of the *express* terms and conditions” of the CBA. Opinion (“Op.”) at 5-6 (citing CP 106) (emphasis added). As the Court of Appeals properly concluded, “[t]he terms of this CBA” – which are the terms the parties agreed to – “do not allow an alleged statutory breach to be grieved under this narrow definition,” Op. at 6, nor do the terms of this CBA allow a statutory breach to be arbitrated.

Second, the CBA also narrowly entrusts the arbitrator to determining contractual claims: not statutory claims and not the threshold

question of whether a claim is statutory or contractual. *See* CP 107 (“The arbitrator shall have no authority to add to, subtract from, or otherwise change or modify the provisions of the Agreement, but shall be authorized only to interpret existing provisions of this Agreement as they may apply to the specific facts of the issue in dispute.”).

Third, as the Court of Appeals properly concluded, the CBA on its face does not “clearly and unmistakably” waive union members’ abilities to enforce their statutory rights in a judicial forum. *See 14 Penn Plaza v. Pyett*, 556 U.S. 247, 251, 1239 S.Ct. 1456 (2009). The CBA neither expressly includes the statutory right in the contract nor expressly provides that the grievance and arbitration provision is the sole and exclusive remedy for the statutory violations. *Id.* at 252. Indeed, as *amicus curiae* WSNA points out, in order for there to be such a waiver, the arbitration agreement must expressly grant the arbitrator the authority to decide statutory claims. WSNA brief at 17-18. But as discussed above, the CBA expressly *declines* to give the arbitrator such authority, stating instead that the arbitrator only has authority to decide claims of express violations of the contractual terms.

This unique and narrow CBA means that the only basis for the rest and meal break claims to even arguably be arbitrable in this case would be that they are not in fact statutory claims, but instead are contractual claims.

But as the Court of Appeals properly found, and both *amici* WSNA and WELA articulately outlined in their briefs, the CBA did not “specifically,” clearly, and unmistakably modify the statutory rest and meal break provisions, as required under RCW 49.12.187. Rather, the rest and meal break language in the CBA § 7.7 is coterminous with and does not *specifically* and *expressly* vary from or supersede the language of the statute. Instead, CBA § 7.7 explicitly states the opposite, that “meal and rest periods shall be administered in accordance with state law (WAC 296-129-092).” CP 93. As the Court of Appeals found, the 15-minute rest break reflects “compliance with” not variance from a required 10-minute rest break. Op. at 7. And the reference to “an unpaid meal period” does not explicitly rule out a second meal. Rather, RNs could also be provided a second, on-duty paid meal break or could individually waive a second unpaid meal break.

But regardless, the fourth way in which the CBA is limited makes this issue irrelevant. Under the plain terms of the CBA, only the nurses’ union WSNA, not Evergreen and not the RNs themselves, can compel arbitration. CP 107. And even then, WSNA’s right to compel arbitration is optional, not mandatory. *Id.* Both Evergreen itself, in deposition, and WSNA, in its amicus brief, have confirmed this. *See* CP 1254-55; WSNA brief at 14-15. Going back to the fundamental principle of arbitration, a

party cannot be required to submit to arbitration if that party has not agreed to it. *Garda, supra*. Here, RNs have not agreed to it.

2. AWPHD's amicus brief does not look to the CBA's terms

In its brief, *amicus curiae* AWPHD outlines various public policy concerns related to rest and meal breaks and the general principles supporting arbitration in a vacuum, rather than in reference to the specific terms of *this CBA* and the specific agreements that *these parties* and WSNA made in the CBA. Such a general discussion in a vacuum is not helpful to this Court in resolving the questions in this appeal because, as discussed above, arbitration is a matter of contract and the question is what these particular parties agreed to with the specific language in this specific CBA.

Where it references the specific provisions of the CBA and argues that the CBA modified the statutory rest and meal break requirements, *amicus curiae* AWPHD, like Evergreen, attempts to *imply* terms in the CBA. *Amicus curiae* AWPHD, like Evergreen, asks this Court to rewrite the terms of a contract between WSNA and Evergreen.

This Court should decline to do so and should affirm the Court of Appeals' decision that the CBA did not modify or waive the RNs' statutory rights, did not unmistakably waive their rights to pursue their statutory rest and meal break rights in a judicial forum, that only WSNA

can compel arbitration, and that Evergreen waived any right to compel arbitration.

3. AWPHD's focus on second meal breaks is irrelevant to the issue here

Amicus curiae AWPHD asks this Court to resolve additional issues of fact and public policy that are not directly raised in this case or in this appeal and that the Court need not address here. AWPHD references a number of public policy concerns and issues regarding staffing and second meal breaks and urges this Court to hold that 1) under RCW 49.12.187, a public entity can modify or supersede the rest and meal break requirements by eliminating them altogether and going below the statutory floor; and 2) that here, Evergreen expressly modified the statutory requirement of a second meal break on a twelve-hour shift. As to the latter issue, as stated above, the CBA's rest and meal break statute does *not* expressly eliminate a second meal break. But more importantly, neither issue is raised in this case or necessary for this Court to decide, because Plaintiff – as she stated in the proceedings below and to the trial court – is only making claims related to a *first meal break* and whether that meal break was taken, timely, and/or interrupted. This Court should decline AWPHD's suggestion that the Court decide a novel issue that was not raised or briefed below and that is not directly at issue in this appeal or this case.

II. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

DATED: January 31, 2019

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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 via the Washington State Appellate Courts' Portal which caused service on all counsel of record.

DATED this 6th day of December, 2019, at Seattle, Washington.

s/Rachael Tamngin
Rachael Tamngin, Legal Assistant

BRESKIN, JOHNSON & TOWNSEND

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