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NO. 97532-9

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION,

Respondent/Cross-Appellant,

v.

YAKIMA HMA, LLC, d/b/a YAKIMA REGIONAL MEDICAL AND
CARDIAC CENTER

Appellant/Cross-Respondent.

**RESPONDENT/CROSS-APPELLANT WASHINGTON STATE
NURSES ASSOCIATION'S ANSWER TO BRIEF OF AMICI
CURIAE THE WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION AND THE WASHINGTON STATE LABOR
COUNCIL**

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INTRODUCTION

Washington State Nurses Association (WSNA) answers the amicus brief filed by the Washington Employment Lawyers Association (WELA) and the Washington State Labor Council (WSLC) to address two issues in it with which WSNA agrees: 1) that allowing reliance on representative testimony in union associational standing cases promotes the prudential interests of convenience and efficiency and thus meets the third prong of the *Firefighters* test; and 2) that there is no principled reason to hold union representatives to a different standard of proof from class representatives where an employer failed to keep accurate records of hours worked.

As *amici* point out, the trial court found that Yakima HMA, LLC d/b/a Yakima Regional Medical and Cardiac Center (Yakima Regional)

failed to keep accurate records of the hours of work actually performed by the nurses...Yakima Regional bullied the nurses into signing time cards that reflected fewer than the actual number of hours worked in a day... Yakima Regional deliberately kept inaccurate records so as to make it appear the nurses worked fewer hours than they actually did.

CP 2888. Yakima Regional claims that WSNA lacks standing because it relied in part on testimony from some of the affected nurses. Yet it is the employer's illegal falsification of its time records that necessitated WSNA's reliance on representative testimony. "The most elementary conceptions of justice and public policy require that the wrongdoer shall

bear the risk of uncertainty which his own wrong has created.” *Moore v. Health Care Auth.*, 181 Wn.2d 299, 307-08, 332 P.3d 461 (2014) (quoting *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 99, 330 P.2d 1068 (1958)). Were this court to hold that WSNA cannot rely, even in part, on representative testimony to prove damages, this unscrupulous employer will benefit from its own deliberate wrongdoing at the expense of hardworking nurses, and employers will be induced to falsify recordkeeping as a means to avoid liability for rampant wage violations.

ARGUMENT

I. Allowing The Use Of Representative Testimony Here Promotes Prudential Interests Of Convenience And Efficiency And Does Not Require Each Member’s Individual Participation; The Case Thus Satisfies The Third *Firefighters* Test.

As WELA and the WSLC discuss, the third prong of the test for associational standing—that “neither claim asserted nor relief requested requires the participation of the organization’s individual members”—is “judicially self-imposed for ‘administrative convenience and efficiency.’” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 214-215, 45 P.3d 186 (2002) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) and *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557, 116 S. Ct. 1529, 134 L. Ed. 2d 758

(1996)). Departing from federal courts that had not accorded standing to an association to seek monetary damages on its members' behalf, this Court held that prudential considerations of convenience and efficiency allow an association to bring damages claims where the circumstances of the case and the relief requested do not make individual participation of the association's members indispensable. *Id.* at 215. *Amici* have correctly explained that representative evidence is well-established, appropriate, and efficient proof in a wage case that does not require the participation of each injured worker. *Amicus Br.* at 7-10.

This Court in *Firefighters* adopted the rule for the third standing prong that the "ultimate question is 'whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable.'" *Id.* at 215 (quoting *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 770, 14 P.3d 193 (2000), *rev. granted*, 143 Wn.2d 1019, 25 P.3d 1019 (2001)).¹ Thus, "[h]aving concluded that Union is not precluded from bringing this lawsuit on behalf of its members solely because Union sought monetary relief, we must next determine whether, under the facts of this case, the participation of Union's individual members was required." *Id.* at 216.

¹ Allowing an association standing to seek money damages under this standard is "entirely reasonable and ensures fairness in cases where an individual association member's participation is not necessary to prove the damages that are asserted on behalf of the members by the association," and is "practical and sensible." *Id.* at 216.

In other words, associational standing is not appropriate under the third prong of the *Firefighters* test where the individualized nature of the claim or relief renders the members indispensable, such that the only way the suit can be brought is by each injured worker individually. *See id.* at 214-217.² Lower courts of appeal have followed this analysis to hold unions had standing to recover back wages on their members' behalf. *Teamsters Local Union No. 117 v. Dep't of Corr.*, 145 Wn. App. 507, 512, 187 P.3d 754 (2008); *Pugh v. Evergreen Hospital Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013), *rev. denied*, 180 Wn.2d 1007 (2014) (“WSNA need only show that it was prepared to establish damages that did not require participation of the individual members”); *see also Int'l Union of Operating Eng'rs, Local 148 v. Illinois Dep't of Employment Sec.*, 215 Ill.2d 37, 50, 54-56, 828 N.E.2d 1104 (2005) (agreeing with *Firefighters* that preserving scarce judicial resources justifies union's standing to recover money damages where third prong is met).

That some members may provide trial testimony or other evidence does not transform the claim or request for relief into one that requires each injured worker to be a party to the suit. *See Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 894, n. 1, 337 P.3d 1076 (2014)

² Individual participation of individual members was not required on the record in *Firefighters* because “the amount of monetary relief requested on behalf of each employee [was] certain, easily ascertainable, and within the knowledge of Airport.” *Id.*

(“We have never held that ‘testimony’ is the equivalent of ‘participation’ for the purposes of the third prong of the standing analysis we adopted in *Firefighters*, and the Court of Appeals has explicitly rejected that argument as ‘without merit.’”) (quoting *Teamsters Local 117*); *Teamsters Local 117*, 145 Wn. App. at 514 (though individual union members will need to be called as witnesses, the “employees are not necessary parties, neither are they indispensable parties.”); *Pugh*, 177 Wn. App. at 366 (“standing is not defeated simply because individual association members may be called as witnesses”). “Denying organizational standing based on the fact members might be called upon to testify would not further the purpose of the third prong.” *Riverview Cmty. Grp.*, 181 Wn.2d at n. 1.

As *amici* correctly explain, wage and hour class actions brought under the Minimum Wage Act (MWA), Wage Rebate Act (WRA), and/or WAC 296-126-092 that rely on representative testimony are an accepted, efficient, and convenient way for class representatives to resolve claims on behalf of a group of workers that arise from a common pattern and practice of statutory wage violations. Amicus Br. at 7-10 (and cases cited therein); *see also, e.g., Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wn.2d 507, 518-19, 415 P.3d 224 (2018); *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011).

Similarly, under the Fair Labor Standards Act (FLSA), wage

claims can be asserted by the Secretary of the U.S. Department of Labor in its representative capacity and in reliance on representative testimony of affected workers to obtain back pay and other damages on behalf of a group of employees affected by wage law violations where the employer failed to keep accurate records of hours worked. *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588-89 (9th Cir. 1988); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-1116 (4th Cir. 1985).³

Affected workers' participation is thus often not needed to prove damages claims for unpaid work and missed breaks in other case types. Consistent with the foregoing authorities, WSNA's reliance on representative testimony in addition to the employer's records to prove damages in a state law breaks case satisfied the third prong of *Fire Fighters. Pugh*, 177 Wn. App. at 368. Division One found that WSNA being prepared to establish damages through representative testimony met the third prong's standard, where the employer failed to keep accurate records, damages may be established by "just and reasonable inference," and that can be established through "representative testimony." *Id.* at 368.

Washington Supreme Court and U.S. Supreme Court cases since

³ In *Brown Grp., supra*, the Court identified other circumstances where damages claims can be properly asserted by representatives, including class actions, bankruptcy trustees, *parens patriae* actions by state governments, executors of decedents' estates, and the EEOC for violations of Title VII of the Civil Rights Act of 1964. 517 U.S. at 557-58.

Pugh have only reinforced *Pugh's* holding that a union can meet the third prong of *Firefighters* in an appropriate wage case even when it relies on representative testimony. *Chavez*, 190 Wn.2d at 519 (“it is possible to assess damages on a class-wide basis using representative testimony”); *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017) (favorably citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1043-45, 194 L.Ed. 2d 124 (2016) (affirming class certification in a donning and doffing case relying on representative testimony); *Riverview Cmty. Grp.*, 181 Wn.2d at 894, n. 1.

Foreclosing union associational standing in wage cases relying on representative testimony would burden the courts with dozens or hundreds of potential identical lawsuits by workers who would need to rely on the same evidence anyway. As *amici* argue, WSNA’s associational standing here promotes interests of convenience and efficiency even though some affected nurses testified about the amount of time nurses were forced to work off the clock and the frequency of missed meal breaks.

II. Litigation Is An Important Tool In A Union’s Toolbox To Protect Its Members’ Rights To Fair Pay And Adequate Rest.

Amici correctly argue that allowing the use of representative evidence in a union associational standing case furthers Washington’s

longstanding policy of protecting workers. It has long been an integral part of WSNA's mission to ensure that nurses across the State of Washington receive the rest breaks and meal periods that they are entitled to under state law and that their members receive fair, accurate wages, including compensation when employers fail to provide nurses with their breaks. *See* RP 958:7-959:7; 1420:9-1421:16; *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012); *Pugh*, 177 Wn. App. 363; *Chavez*, 190 Wn.2d 507 (WSNA as amicus); *Wash. State Nurses Ass'n v. Franciscan Health System d/b/a St. Joseph Medical Ctr.*, Case No. 15-2-08474-2 (Complaint for Damages filed 5/12/15).

WSNA's primary mission is to advance the economic and general welfare of nurses in Washington State and those that WSNA represents. RP 1420:7-9. Litigation is one tool, along with many others, that WSNA uses to safeguard its members' ability to provide high quality care in accordance with the legal and ethical standards of the nursing profession by assuring nurses are paid fair wages and receive adequate rest (or pay for missed breaks). RP 1420:5-1421:16; CP 117-119.

WSNA's standing to bring claims for damages for state law wage and hour violations on its members' behalf has been granted by every court to ultimately address the issue.

In 2012, this Court unanimously held WSNA could recover back

pay in an associational standing case for missed break time suffered by its nurse members, holding that under the MWA, nurses were entitled to overtime compensation for the first ten minutes of each mandatory break they missed. *Sacred Heart Med. Ctr.*, 175 Wn.2d at 832. The hospital employer in that case, represented by the same counsel that represents Yakima Regional here, argued at the trial court and on appeal that WSNA lacked associational standing to bring such claims. Opening Br. of Appellant at 27, *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 163 Wn. App. 272, 258 P.3d 96 (2011), 2010 WL 8522189 at *27-29; Ans. to Petition for Review at 11, *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 2011 WL 7627450 at *11. Without addressing standing, this Court unanimously upheld the trial court judgment awarding damages to WSNA for violations of its members' statutory rights to pay for missed rest breaks. *Sacred Heart Med. Ctr.*, 175 Wn.2d at 832, 836.

The next year, Division I of the Court of Appeals held that WSNA had associational standing to sue for back pay for missed rest breaks incurred by its members. *Pugh*, 177 Wn. App. at 368. In so holding, the appeals court rejected the identical arguments asserted by Yakima Regional here.

Despite this Court's repeated enforcement of Washington's wage

laws,⁴ employers continue to flout their state law obligations, requiring WSNA and other labor unions to be vigilant and use litigation where necessary to obtain justice for workers and ensure compliance by employers. WSNA in particular has been a leader in this area.

III. There Is No Principled Reason To Hold Union Representatives To A Different Standard Of Proof From Class Representatives Where An Employer Has Failed To Keep Accurate Records Of All Hours Worked.

WSNA agrees with WELA and WSLC that there is no principled reason to deny union representatives the ability to prove wage violations and damages using representative testimony when the employer has kept inaccurate records of all hours worked, given that the ability for workers to rely on representative testimony in class action wage cases is beyond dispute. Amicus Br. at 9. In both types of cases, disallowing reliance on representative testimony to prove wage violations would incentivize employers to maintain inaccurate records, making workers like the Yakima nurses more susceptible and vulnerable to systematic wage theft.

Unions, just like class representatives in a class action lawsuit, must be able to rely on representative testimony to prove a pattern and practice

⁴ Indeed, this Court has repeatedly recently ensured that employers can be held accountable for wage and missed rest and meal break violations. *Chavez*, 190 Wn.2d at 519; *Hill v. Garda CL Northwest, Inc.*, 191 Wn.2d 553, 424 P.3d 207 (2018); *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 416 P.3d 1205 (2018); *Brady*, 188 Wn.2d 576; *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015); *Sacred Heart Med. Ctr.*, 175 Wn.2d 822. Thus, Washington continues its “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

of wage violations, and associated damages, where the employer has failed to maintain accurate records of all hours worked. Where, as here, representative testimony is appropriate evidence, it should not matter whether it is a class representative or a union representative standing in the shoes of a group of workers subject to illegal wage and/or break practices.

The ability of a plaintiff class to rely on representative testimony to prove liability for wage law violations and damages for that misconduct is well-established. Br. of Resp. at 10-14, 22 (and cases cited therein). In 2018, this Court unanimously held in a state law meal and rest break class action brought by nurses in a hospital that, where a common policy or practice applied to all workers at issue, individual differences between workers are not relevant to determining employer liability and it is possible to assess damages on a class-wide basis via representative testimony. *Chavez*, 190 Wn.2d at 519. The Court of Appeals Division I held in *Pugh* that, where an employer in a unionized workplace fails to keep accurate records of hours worked, *Anderson v. Mt. Clemens* applies, and the union may rely on representative testimony and have standing.

Yakima Regional asks this Court to apply a different standard in a union associational standing case like *Pugh* than applies in a class case like *Chavez*. But, as WELA and WSLC argue, there is no principled reason to do so, and a comparison of *Chavez* and *Pugh* demonstrates why.

Both cases involved a hospital employer; both involved claims under WAC 296-126-092 for compensation for nurses for missed breaks; and both involved employers that failed to keep accurate records of all hours worked. Compare *Chavez* at 512 (no way for nurses to track missed rest breaks or missed second meal periods) with *Pugh* at 367-68.

The third prong of the *Firefighters* test and CR 23(b)(3) both require the Court to determine whether individual issues make resolving the case on behalf of a group of workers improper. Under CR 23(b)(3) the inquiry is whether common questions of law or fact predominate over questions affecting only individual members. CR 23(b)(3). The third prong of *Firefighters* is whether the claims asserted or the relief requested requires the participation of the organization's individual members. *Firefighters*, 146 Wn.2d at 214. Both tests essentially ask whether each individual worker needs to come to court to participate in the case.

In the class context, in a wage and hour case in which the employer failed to keep accurate records, the answer is often no. *Supra* at 5-6.⁵ Representative testimony (or other means of filling in the gaps left by inaccurate employer records, such as the video recordings of donning and

⁵ See also *Clark v. Centene Co. of Tex., LP*, 104 F. Supp. 3d 813, 827 (W.D. Tex. 2015) (applying *Anderson* to conclude that testifying nurse plaintiffs met their burden at trial “to show the amount and extent of their work performed as a matter of just and reasonable inference” and that the testifying plaintiffs were “fairly representative of the non-testifying plaintiffs”).

doffing and the expert's time study in *Tyson Foods*, 136 S. Ct. at 1043) can often be used to determine the frequency of missed breaks and/or the amount of off-the-clock time. Individual issues pertaining to damages generally do not preclude class certification. *Chavez*, 190 Wn.2d at 518-19; *Moore*, 181 Wn.2d at 307-08; *Tyson*, 136 S.Ct. at 1044-50.

There is no principled reason to foreclose a union representative like WSNA from bringing a case for back pay for missed breaks (as in *Pugh*) while allowing a class representative to go forward (as in *Chavez*). *See, e.g., Tyson*, 136 S. Ct. at 1046 (the permissibility of representative evidence “turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.”).

Of course, good policy reasons exist for allowing injured workers to rely on representative testimony to prove a pattern and practice of wage violations irrespective of case type. Where an employer has shirked its obligation to maintain accurate records of all hours worked, the employer, not the employee, should bear the burden of that wrongdoing. *Anderson*, 328 U.S. at 687; *Moore*, 181 Wn.2d at 314. It would contravene numerous prior holdings of this court and the courts of appeal to deny workers the ability to come to court to vindicate such rampant wage and hour violations because they do so via their union representative as opposed to

a class representative.

The U.S. Supreme Court rejected an employer's invitation to require union members to pursue common questions solely under CR 23. *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 289, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986). There, the Court noted the advantages of suits by associations to their represented individuals and the judicial system:

While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. 'Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack.' These resources can assist both courts and plaintiffs.

Id. at 289-290 (internal citations omitted) (holding union had standing to challenge labor department policy; suit involved common question of law and remedy did not require each member to be party to the suit). *Accord Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) ("An association...of persons with a common interest can then be the simplest vehicle for undertaking the task, and we see no reason to bar injured persons from this method of seeking a remedy.").

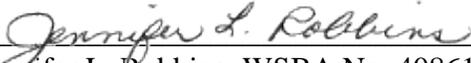
In *Sacred Heart* this court recognized that accepting the employer's argument would incentivize the hospital "to employ fewer nurses for each

shift, relying on those nurses to bear a heavy burden on busy days” and requiring pay would help ensure that employers provide mandatory breaks that promote employee efficiency. *Sacred Heart*, 175 Wn.2d at 832. Similarly, accepting Yakima Regional’s argument here would sanction knowing wage theft, encourage hospitals to work nurses extremely long hours without breaks or full pay, and require those nurses to bear the burden of the hospital’s inadequate staffing and falsifying payroll records.

CONCLUSION

For the foregoing reasons, WSNA agrees with WELA and the WSLC that 1) allowing the use of representative testimony promotes the prudential interests of administrative convenience and efficiency and therefore meets the third prong of the *Firefighters* test for associational standing, and 2) there is no principled reason to hold union representatives to a different standard of proof from class representatives where an employer has failed to keep accurate records of all hours worked.

Respectfully submitted this 29th day of October, 2019.


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DECLARATION OF SERVICE

I Jennifer Woodward, hereby declare under penalty of perjury in accordance with the laws of the State of Washington that on October 29, 2019, I filed the foregoing document with the clerk of the court using the appellate e-filing system, which will provide notification of such filing to all required parties.

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Jennifer Woodward, Paralegal

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