100969-1

COA No. 82511-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

KARL KERSTETER, Appellant

vs.

CONCRETE SCHOOL DISTRICT, Respondent

PETITION FOR DISCRETIONARY REVIEW

RAP 13.4(b) - May 27, 2022

Submitted by:

Scott McKay, WSBA No 12746
Attorney for Appellant

Law Offices of Scott McKay
3614 California Ave SW
Seattle, WA 98106
(206) 992-5466

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I. IDENTITY OF PETITIONER

This petitioner is the designated appellant below, Karl Kersteter.

II. DECISION FOR WHICH REVIEW IS REQUESTED

Mr. Kersteter seeks review of the Unpublished Decision that was entered by the Court of Appeals on March 14, 2022. See **Appendix A**.[1]

III. SUMMARY OF WHY REVIEW SHOULD BE GRANTED

A. Introduction

This Court has recognized that Washington maintains a long and proud history of being a leader in the protection of employee rights.[2] This case presents another opportunity for this Court to honor that tradition.

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[1] On April 27, 2022, the Court of Appeals also entered an order denying Mr. Kersteter's motion for reconsideration. A copy of this order is included in Appendix A.

[2] *Drinkwitz v. Alliant Techsystems, Inc*., 140 Wn.2d 291, 300, 996 P.2d 582 (2000).

This petition raises important **issues of first impression** that have never been addressed by any Washington Court concerning the **rights of public employees** under Washington's "misclassification of public employment" statutes, RCW 49.44.160 and RCW 49.44.170. See **Appendix B**.

As shown herein, there are nearly **600,000** workers in Washington who are employed by state and local governments. All of these workers have a direct interest in the outcome of this case.

B. Background to Central Issue of this Case

RCW 49.46.160 prohibits public employers from *"[m]isclassifying employees, or taking other action to avoid providing or continuing to provide employment-based benefits.*" Its companion statute, RCW 49.44.170, implements this prohibition by authorizing misclassified employees to sue their employers.

Although the statutes authorize civil suits for violations of the misclassification statutes, they do not indicate what remedies are available. Are monetary damages available? Or is relief solely

confined to non-monetary forms of relief such as declaratory judgments or injunctions?

No answers have been provided by the Legislature. The statutes are silent on this topic.

C. Central Issue of this Case

Consistent with the foregoing, the central issue presented by this petition is simple and straightforward:

> ***What damages remedies, if any, are available to aggrieved employees under RCW 49.44.170(3)?***

The Court of Appeals and Mr. Kersteter have opposing answers to this question.

According to the Court of Appeals, RCW 49.44.170(3) **does not** allow aggrieved employees to recover monetary damages.

In contrast, Mr. Kersteter takes the **opposite position** and asserts that the statutes **DO** allow aggrieved employees to recover damages for financial losses that were caused by unlawful misclassification, e.g., losses to pension benefits or wages.

D. There are 600,000 Public Employees Whose Rights May be Impacted by the Outcome of this Case

It cannot be disputed that the central issue presented by this case is profoundly important.

According to the U.S. Bureau of Labor Statistics, over 17% of the **current** working population in Washington – nearly 600,000 people – are employed by state and local governments.[3]

Obviously, if the rights of ***future*** public employees are also considered, then the number of workers that could potentially be impacted by the outcome of this case is enormous.

E. Summary of Facts of Case

All of the facts that Mr. Kersteter relies upon are fully supported by testimony and/or documentary evidence in the record.

For 11 years the Concrete School District deliberately took advantage of Mr. Kersteter by knowingly paying him a part-time

[3] U.S. Bureau of Labor Statistics, Employment in Washington. *https://www.bls.gov/eag/eag.wa.htm*. See also online article: How Many People Work for the Government in Washington? *https: //www.thecentersquare.com/washington*

salary for working on a full-time basis as its Transportation Supervisor.

Although the District was fully aware that Mr. Kersteter's position was a full-time job, it steadfastly refused to offer him anything other than part-time contracts. When Mr. Kersteter complained about this, the District always responded the same way: it acknowledged his long hours of work, but claimed that it "could not afford" to pay him as a full-time employee.

Mr. Kersteter never believed the District's excuses. Nonetheless, he grudgingly signed the contracts under protest because he needed the work and money. However, he was always resolved to pursue whatever legal remedies were available to him after he retired.

As he had planned, after he retired Mr. Kersteter filed a lawsuit to recover damages for the losses in benefits and wages that he sustained as a result of being misclassified. His Amended Complaint pleaded three causes of action:

1. A statutory cause of action for misclassification of employment under RCW 49.44.170(3);

2. A statutory cause of action for unlawful withholding of wages under the Wage Payment Act, RCW 49.48; and

3. An equitable cause of action for unjust enrichment as authorized by *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

F. Summary of Why Review Should be Accepted

This petition has been filed because the Court of Appeals has ruled that none of these causes of action have merit, and that all were properly dismissed with prejudice.

As shown herein, there are compelling reasons to conclude that the interpretations adopted by the Court of Appeals were extraordinarily narrow and violated basic rules of statutory construction, including the rule which requires remedial legislation to be liberally construed in favor of employees.

Review should be granted under RAP 13.4(B) review for two principal reasons:

1. A statutory cause of action for misclassification of employment under RCW 49.44.170(3);

2. A statutory cause of action for unlawful withholding of wages under the Wage Payment Act, RCW 49.48; and

3. An equitable cause of action for unjust enrichment as authorized by *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

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Review should be granted under RAP 13.4(B) review for two principal reasons:

1. The decision of the Court of Appeals is in conflict with the decisions of the Supreme Court and published decisions of the Court of Appeals (RAP 13.4(b)(1) and RAP 13.4(b)(2)) and

2. The petition presents an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4).

IV. ISSUES FPRESENTED FOR REVIEW

1. *Is there an implied remedy of damages under RCW 49.44.170(3)? If so:*

   a) *May aggrieved employees recover damages for* ***losses in pension benefits*** *that were caused by unlawful misclassification?*

   b) *May aggrieved employees recover damages for* ***losses in wages*** *that were caused by unlawful misclassification?*

2. *Where a dispute arises between parties to a contract, may a claim for equitable relief be brought where the subject matter of the dispute was never mentioned or covered in the contract?*

V. STATEMENT OF THE CASE

A. Statement of Facts

1. Duties of the Transportation Supervisor

Karl Kersteter worked on a part-time basis as the Concrete School District's Transportation Supervisor for eleven years. **CP**

123. His job duty was to be the part-time supervisor of the District's busing and transportation operations. Id.

2. District Policies of Providing Reduced Salaries and Benefits to Part-Time Employees

The District had a policy of providing part-time employees with smaller salaries than it provided to full-time employees. **CP 141-143**. Likewise, the District provided part-time employees with less benefits that it provided to full-time employees. Id.

3. District Policy of Using "FTE Ratios" to Classify Part-Time Employees

The District assigned a specific "Full Time Equivalency Ratio" ("FTE Ratio") to each part-time employee. **CP 147-148**.

The purpose of FTE ratios was to ensure that part-time employees **did not** receive the same level of benefits that were provided to full-time employees. **CP 143**.

To illustrate, since full-time employees were expected to work a full schedule of eight hours per day, they were classified as "1.0 FTE" employees and as such were entitled to receive 100% of

all benefits offered by the District. Second Cert. Stmt. Karl Kersteter at Paragraphs 7-9 (**CP 143**).

In contrast, a part-time employee who only worked four hours per day would be classified as a ".5 FTE" employee, and would only receive 50% of all benefits offered by the District. Id.

4. State Laws Providing Reduced Pensions to Part-Time Employees

As a public employee, Mr. Kersteter earned retirement benefits under Plan Three ("PERS 3") of the Washington Public Employment Retirement System. **CP 143**.

All else being equal, PERS 3 provides part-time employees with significantly smaller monthly pension payments than are provided to full-time employees. This is due to the formula used by PERS 3 to calculate monthly benefits. **CP 143**.

Under the PERS 3 formula, the amount of an employee's monthly retirement benefit is directly impacted by his/her "**average final compensation**" over the final 60 months of employment ("AFC"). The formula is:

"*1% x service credit years x AFC = monthly benefit*."

PERS Plan 3 Official Handbook (**CP 150-151**).[4]

In accordance with this formula, the greater an employee's salary during the final 60 months of his/her employment, the greater will be his/her monthly pension benefits.

The converse is also true: the smaller the employee's salary during the final 60 months of his/her employment, the smaller will be his/her monthly pension benefits.

5. District's Use of Part-Time Classifications to Avoid Paying Full-Time Salaries and Benefits

The District deliberately classified Mr. Kersteter as a part-time employee so that he would only receive a **part-time salary**. See Declaration of Barbara Hawkings at Paragraph 3 (**CP 179-180**).

Likewise, the District also deliberately classified Mr. Kersteter as a part-time FTE employee so that it **could avoid providing him full-time benefits**.

[4] The excerpt is authenticated in the Second Certified Statement of Scott McKay at Paragraph 2(a) (**CP 185**).

These reductions are shown by the part-time contracts that Mr. Kersteter signed:

School Year	Hrs Per Day	FTE Ratio	Part-time Salary	Benefit Entitlements
2010	4	0.500	$18,808.00	50.00%
2011	4	0.500	$18,808.00	50.00%
2012	4	0.500	$19,250.00	50.00%
2013	5	0.625	$34,542.00	62.50%
2014	5	0.625	$35,000.00	62.50%
2015	5	0.625	$35,750.00	62.50%
2016	6	0.710	$33,537.00	71.00%
2017	6	0.710	$34,540.00	71.00%

CP 153-168.

6. Repeated Demands by Mr. Kersteter to be Properly Classified

Although Mr. Kersteter repeatedly demanded to be properly classified as a full-time employee, the District's Superintendent, Barbara Hawkings, would always refuse to do so by saying the same thing: she would acknowledge the truth of his complaints, but would nonetheless reject his demands on the ground that the District "could not afford" to classify him as a full-time employee.

Cert. Statement Karl Kersteter at Paragraphs 7-10 (**CP 124-125**). Id.

7. Decision by Kersteter to Delay Legal Action until After Retirement

Although Mr. Kersteter knew he was being treated unfairly, he reluctantly decided to sign the part-time contracts under protest and to not take legal action until after he retired. Cert. Stmt. Karl Kersteter at Paragraphs 12-14 (**CP 126**).

In part, this decision was based upon the fact that Mr. Kersteter needed the work and money. Cert. Stmt. Karl Kersteter at Paragraphs 12-14 (**CP 126**). However, he was also concerned that by pursuing legal action while he was still employed, the District might become angry and take retaliatory action. Id. He therefore decided not to take any action until after he retired. Id. With this plan in mind, he was always careful not to sign any documents or do anything that might be construed as a waiver of this rights. Id at Paragraph 15 (**CP 126-127**).

8. Objective Evidence That the District Knew the Position was Misclassified

In October, 2017, Mr. Kersteter notified the District that he would retire in the middle of the 2017-2018 school year, with his last day of work being December 31, 2017. Cert. Stmt. Karl Kersteter at Paragraph 16 (**CP 127**).

Shortly after Mr. Kersteter served his notice, the District publically advertised the Transportation Supervisor position as a "**full-time**" position. Cert. Stmt. Kathy Lafreniere at Paragraph 2 & Exhibit A thereto (**CP 131, 135**).

A few weeks later, the District formally hired a new Transportation Supervisor, Kathy Lafreniere. Id at Paragraphs 3-4 (**CP 131-132**). Unlike Mr. Kersteter, Ms. Lafreniere was **hired on a full-time basis**. CP 170-173. All this occurred while Mr. Kersteter was still working for the District.[5]

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[5] The District advertised the position in November, 2017, and formally hired Ms. Lafreniere in early December, 2017. Cert. Smt. Kathy Lafreniere, Paragraphs 2, 4 (**CP 131**). Mr. Kersteter did not retire until December 31, 2017. Cert. Stmt. Karl Kersteter at Paragraph 16 (**CP 127**).

As a full-time employee, Ms. Lafreniere was paid at a salary rate that was far in excess of what Mr. Kersteter had ever been paid.

To illustrate, the highest salary amount that had ever been paid to Mr. Kersteter was **$34,500 per year**. Second Cert. Stmt. Karl Kersteter at Paragraph 5 (**CP 142)**. In contrast, Ms. Lafreniere was hired at the much higher annual salary rate of **$54,000 per year**. See Lafreniere Contract, **CP 172-173**.[6]

Ms. Lafreniere's sworn testimony leaves no doubt that the Transportation Supervisor position was a full-time positon, not a part-time position. As she has testified:

> [W]orking between 42 and 45 hours per week was not unusual or unexpected for me, but instead, was "part and parcel" of my job as the District's Transportation Supervisor. It is my opinion that it would be impossible for me, or any other person, to fulfill the duties of that position on a part-time basis, as it clearly was a full-time job.

Cert. Statement Kathy Lafreniere at Paragraphs 10-11 (**CP 133**).

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[6] As shown by her initial contract (**CP 170**), Ms. Lafreniere's was hired to take over as the District's full-time Transportation Supervisor in December, 2017, which was in the middle of the 12 month benefit year. Since only 50% (six months) of the benefit year remained when she was hired, her initial full-time contract (and the FTE specified therein) was adjusted to reflect this fact. For more details, see Footnote 1, Second Certified Statement of Karl Kersteter (**CP 142).**

The District's awareness that the Transportation Supervisor positon was a full-time position is also shown by the actions taken by the District after Ms. Lafreniere resigned to take a higher paying job with the Meridian School District.

After Ms. Lafreniere resigned, the District filled the positon by having **two** existing full-time employees take over and "share" the job by becoming "Co-Transportation Supervisors." See Contracts **CP 174-177**.

Together, these supervisors were jointly responsible for supervising all of the District's transportation operations. See Contracts **CP 174-177**. As was true for Ms. Lafreniere, they were also provided with much higher salaries than had ever been paid to Mr. Kersteter. Thus, one of these "co-supervisors" (Paul Carter) was paid at the rate of $**68,000** per year. **CP 174**. The other "co-supervisor" (Marla Reed) was paid at the rate of **$51,000** per year. **CP 176.**

9. Actual Injuries Sustained by Mr. Kersteter Due to Misclassification

As a result of being misclassified as a part-time employee rather than a full-time employee, Mr. Kersteter sustained financial losses in two main areas:

- Reduced Salary Payments. As a result of being misclassified as a part-time employee, Mr. Kersteter sustained losses in salary wages of approximately $25,500 per year. Second Cert. Stmt. Karl Kersteter at Paragraph 5 (**CP 142**).
- Reduced Monthly Pension Payments. As a result of being misclassified as a part-time employee, Mr. Kersteter also sustained losses to his monthly pension benefits at the rate of $200 per month. Second Cert. Stmt. Karl Kersteter at 14 (**CP 144-145)**.

B. Causes of Action Filed by Kersteter

As he had planned, Mr. Kersteter began pursuing a claim against the District after he retired. Cert. Stmt. Karl Kersteter at Paragraph 17 (**CP 127**).

Mr. Kersteter's Amended Complaint (**CP 13-21**) is attached hereto as **Appendix C**. A will be noted, Mr. Kersteter filed three causes of actions:

1. A *statutory cause of action* for misclassification of employment under RCW 49.44.170(3). See **Appendix C** at paragraphs 1.1(b) and 4.5;

2. A *statutory cause of action* for unlawful withholding of wages under the Wage Payment Act, RCW 49.48. See **Appendix C** at paragraphs 1.1(c) and 4.6; and

3. An *equitable cause of action* for unjust enrichment as authorized by *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008). See **Appendix C** at paragraphs 1.1(a) and 4.2.

C. Dismissal of All Claims by Superior Court

The Superior Court dismissed all claims that had been brought by Mr. Kersteter. Specifically:

- *Statutory Claims:* The Court dismissed all of Mr. Kersteter's statutory claims on the ground that the damages he sought -- i.e., unpaid salary and pension payments -- were "not within the scope" of RCW 49.44.170. **CP 254-256.**

- *Equitable Claim for Unjust Enrichment*: The Court dismissed Mr. Kersteter's claim for unjust enrichment on the ground that the "subject matter" of the claim – i.e., his uncompensated hours of full-time work – was "covered" and "governed" by the terms of his part-time contracts he had signed with the District. **CP 69-70**.

D. Affirmation of Dismissal by Court of Appeals

On March 14, 2022 the Court of Appeals entered an order which affirmed all of the Superior Court's rulings. See **Appendix A.**

E. Special Note Regarding Two Aspects of the Decision

1. Clearly Erroneous Finding that Mr. Kersteter had "Abandoned" His Wage Claims

At page 9 of the decision the Court of Appeals made a factual finding that was clearly erroneous, namely, that when Mr. Kersteter filed his Amended Complaint, he had removed and "abandoned" his wage claims.

This assertion is highly puzzling it clearly was wrong and squarely contradicted by the record.

In point of fact, the Amended Complaint specifically pleaded and preserved wage claims under **both** RCW 49.44.170 and RCW 49.48.010. See **Appendix C** at paragraphs 1.1, 4.5, 4.6.

Equally puzzling is the fact the Court was fully aware that Mr. Kersteter had vigorously pursued his wage claims at all stages of the proceedings before both the Superior Court and the Court of Appeals (including during oral argument before the Court of Appeals),

Indeed, the Court's awareness of this fact is verified by its own written decision. As will be noted, the decision is almost exclusively devoted to discussing – and rejecting – the merits of Mr. Kersteter's arguments concerning lost wages. See **Appendix A**. Given these facts, it is not understood how the Court could have concluded that Mr. Kersteter had abandoned his wage claims.[7]

[7] Mr. Kersteter **does not** assert a right to overtime pay under the MWA. His claim for attorney fees under the WPA exists by and through his statutory claim for lost wages under RCW 49.44.170(3).

2. Puzzling Rulings Concerning the MWA and WPA

Another puzzling aspect of the decision is the Court's apparent ruling that in order to maintain a claim for misclassification of employment under RCW 49.44.170(3), aggrieved employees must **also** file claims under the Minimum Wage Act (RCW 49.46) and the Wage Payment Act (RCW 49.48). See **Appendix A** at page 9.

This ruling is puzzling because neither the MWA nor the WPA are concerned with the topic of misclassification of employment.[8] Given this fact, it is difficult to understand why the Court of Appeals would impose this requirement.

[8] The MWA is solely concerned with enforcing standards **regarding minim rates of pay and overtime pay**. See RCW 49.46.010 et. seq. The WPA is solely concerned with regulating the **types of wage deductions** that can be made at the termination of employment. See RCW 40/48.010 et. seq.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BY THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND COURT OF APPEALS

RAP 13.4(b) states that review may be granted where a decision of the Court of Appeals is in conflict with the decisions of the Supreme Court,[9] or a decision conflicts with a published decision by the Court of Appeals.[10]

1. Review Should be Granted Because the Decision Fails to Implement and Give Effect to Legislative Intent

It is fundamental that Courts must implement and give effect to the intent of the legislature. This is bedrock principle of appellate jurisprudence that the Supreme Court and the Court of Appeals have always followed. See generally: *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *State v. Marjama*, 14 Wn.App. 2d 803, 806, 473 P.3d 1246 (2020).

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[9] RAP 13.4(b)(1)

[10] RAP 13.4(b)(2)

a) The Purpose of the Misclassification Statutes is to Protect Employees from Arbitrary and Unfair Job Classifications

The purpose of RCW 4.44.160 and RCW 49.44.170 is to protect public employees such as Mr. Kersteter against arbitrary and unfair job classifications by employers.

The statutes achieve this purpose by requiring that all job classifications must be **objectively based upon the actual facts of employment.**

As stated in RCW 49.44.170:

> . . . Public employers may determine eligibility rules for their own benefit plans . . . ***so long as the definitions and eligibility rules are objective and applied on a consistent basis. Objective standards,*** such as control over the work and the length of the employment relationship***, should determine whether a person is an employee who is entitled to employee benefits, rather than the arbitrary application of labels*** . . .

(Italics and bolding added). Likewise, RCW 49.44.170(2)(d) states:

> Misclassify" and "misclassification" means to ***incorrectly classify or label*** a long-term public employee as "temporary," "leased," "contract," "seasonal," "intermittent," or "part-time," or to use a

> similar label ***that does not objectively describe the employee's actual work circumstances***.

(Italics added and bolding added).

b) The Injuries Sustained by Mr. Kersteter are the Types of Injuries the Statutes were Designed to Prevent

The facts presented by this case are **exactly** the type of facts that RCW 44.160 and RCW 49.44.170 were designed to address.

As shown by the record:

1. Mr. Kersteter was a "***long term public employee***";[11]

2. His work was "***incorrectly classified***" or "***labeled***" in a way that did " ***not objectively describe actual work circumstances***";[12]

3. The purpose of the classification or label was to "***avoid providing or continuing to provide employment-based benefits***"; [13]and

4. As a result of being misclassified, he sustained significant losses to his "***employment-based benefits***," including losses to his **monthly pension payments** and **wages**.[14]

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[11] See discussion (and citations to the record therein), infra, pp. 7-8.

[12] Id at pp. 12-15.

[13] Id at pp. 10-12.

[14] Id at pp. 16.

c) The Interpretations Adopted by the Court of Appeals Defeat Rather than Implement the Legislative Intent

Rather than carry out and effectuate the legislative intent behind RCW 49.44.160 and RCW 49.44.170, the Court of Appeals adopted **extraordinarily narrow and strict interpretations** of the statutes which frustrate and defeat the legislative intent.

This conclusion is illustrated by the Court's conclusion that monetary damage claims are not "within the scope" of Washington's misclassification statutes.

It is respectfully that it is likely that other panels of the Court of Appeals would have rejected this interpretation. Indeed, it is quite likely that other panels of judges – and possibly this Court – would have reached the **opposite** conclusion and found that Mr. Kersteter's claims fall squarely within the legislative purposes of the misclassification statutes.

The bottom line is that there is a compelling argument to be made that the interpretations adopted by the Court of Appeals are inconsistent with longstanding precedents which require Courts to

carry out and implement the intent of the Legislature. Review should therefore be granted under RAP 13.4(b)((1) and RAP 13.4(b)(2).

2. The Decision Conflicts with the Longstanding Rule that Remedial Statutes Must be Liberally Construed to Achieve the Broadest Possible Coverage

The interpretations adopted by the Court of Appeals also conflict with the settled rule that remedial statutes must be liberally construed in favor of employees.

This rule has been repeatedly confirmed in a variety of different employment contexts by both the Supreme Court and the Court of Appeals.[15] As the case law makes clear, remedial employment statutes must be liberally construed in order to achieve statutory objectives.[16] It should also be emphasized that the Legislature has explicitly stated that his rule **must** be applied to

[15] *Schilling v. Radio Holdings, Inc*., 136 Wn.2d 152, 159, 961 P.2d 371 (1998); *McGinnity v. AutoNation, Inc*., 149 Wn. App. 277, 284, 202 P.3d 1009 (2009).

[16] *Dep't of Labor & Indus. of Wash. v. Tradesmen Int'l, LLC*, 497 P.3d 353 (Wash. 2021)

cases that have been brought under RCW 49.44.160 and RCW 49.44.170.[17]

Here, the Court of Appeals failed to follow the rule of liberal construction. This failure is demonstrated by the manner in which the Court interpreted the word "*benefits*."

As will be noted, Mr. Kersteter provided the Court with a wide variety of quotes from dictionaries and other external sources, all of which indicated that the word "*benefits*" should be broadly interpreted as referring to **all** forms of earned compensation, **including wages**. See Appendix D.[18]

In contrast, the Court of Appeals ignored these sources, but instead, relied entirely upon a few select sources of its own choosing.

According to the Court, these sources justified the conclusion that *"'wages' can be read to include benefits, but 'benefit' is not*

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[17] . See Code Reviser's Official Notes for RCW 49.44.160, New Section 3, 2002 c 155 *("This act shall be construed liberally for 7 the accomplishment of its purposes*.").

[18]**Appendix D** is an excerpt from the Brief of Appellant, pages p. 29-34.

read to include wages." **Appendix A** at p. 7. Based upon this conclusion, the Court ruled that RCW 49.44.170 **does not** allow misclassified employees to recover damages for lost wages. Id.

It is respectfully submitted that this interpretation directly conflicts with longstanding precedents which require Courts to liberally construe remedial statutes in favor of employees. This provides another reason why review should be granted under RAP 13.4(b)((1) and RAP 13.4(b)(2).

3. The Rulings Concerning Pension Benefits Also Conflict with the Longstanding Precedents of this Court

At page 9 of the decision the Court Appeals held that in order to maintain a claim for damages under RCW 49.44.170, Mr. Kersteter was ***required*** to file additional claims under RCW 49.46 (the Minimum Wage Act) and RCW 49.48 (the Wage Payment Act).[19]

[19] See **Appendix A** at p. 9.

As previously stated, this ruling is puzzling because neither RCW 49.46 nor RCW 49.48 contains **any** provisions that regulate or address the topic of misclassification of employment.

Given this fact, there would not appear to be any logical reason or justification for the Court of Appeals' ruling in this regard. To the contrary, the ruling imposes a meaningless and unnecessary burden upon aggrieved employees who wish to file suits for unlawful job misclassification under RCW 49.44.170(3).

Review of this issue should also be granted under RAP 13.4(b)(1) and RP 13.4(b)(2).

4. The Applicability of the Doctrine of Implied Remedies Should Also be Reviewed

Since RCW 49.44.170(3) created a cause of action but failed to provide a remedy, it was incumbent upon the Court of Appeals to fashion a remedy under the "implied remedies doctrine." *Bennett v. Hardy*, 113 Wn.2d 912, 919-20, 784 P.2d 1258 (1990); *Gerlach v. Cove Apartments, LLC*, 196 Wash.2d 111, 471 P.3d 181 (Wash. 2020).

The implied Remedies Doctrine must be applied where three factors are met:

> The factors are (1) whether the plaintiff is within the class for whose "'especial'" benefit the statute was enacted, (2) whether legislative intent supports creating or denying a remedy, and (3) whether implying a remedy inconsistent with the underlying purpose of the legislation.

Rocha v. King County, 195 Wash.2d 412, 424-425, 460 P.3d 624 (Wash. 2020).

Here, each of the above-referenced criteria were clearly met. Thus, it was incumbent of the Court of Appeals to fashion and appropriate remedy. Its failure to do so also conflicts with the decisions of this Court. See *Bennett v. Hardy*, *supra*; *Gerlach v. Cove Apartments, LLC*, *supra*. Thus, the Court should also accept review of this issue under RAP 13.4(b)(1).

5. The Rulings Regarding Unjust Enrichment also Conflict with Decisions of the Supreme Court

According to the Court of Appeals, since Mr. Kersteter had signed a contract to work for the District on a part-time basis, he was automatically precluded from ever bringing **any** equitable claim that arose from his employment, including a claim for the

uncompensated hours of full-time work that were never addressed or discussed in his contracts. **Appendix A** at pp. 9-11.

Mr. Kersteter fully agrees that if the subject matter of a disputed is covered by a contract, then a party may not bypass or circumvent the contract by filing a suit in equity. This is a fundamental rule of equitable jurisdiction that is not in dispute.

Here, however, the Court has **over-stated and over-applied** this rule. According to the Court, the mere presence of a contract will, by itself, automatically bar any and all equitable suits between the parties. **Appendix A** at pp. 9-11. This is incorrect.

Like other equitable remedies, unjust enrichment is founded upon the ancient principle that "equity will not suffer a wrong without a remedy." *Crafts v. Pitts*, 161 Wash.2d 16, 23, 162 P.3d 382 (2007). Consistent with this principle, **the linchpin for determining whether equitable relief is whether the injured party has "a complete and adequate remedy at law."** *Columbia State Bank v. Lnvicta Law Grp*. PLLC, 402 P.3d 330, 336, 199

Wn.App. 306 (2017**).** In the absence of such a remedy, equitable relief is fully available. Id.

Consistent with the above, the proper inquiry for determining whether equitable relief **was not** whether there was a contract between the parties. Rather, the critical inquiry was whether the **subject matter** of Mr. Kersteter's equitable claim – his uncompensated hours of full-time work – **were covered or governed by the contracts**.

The contracts that Mr. Kersteter signed can be found in the record at **CP 153-168**.

As will be noted by reviewing the contracts, they were solely concerned with scheduling **part-time hours of work** and setting forth the terms under which Mr. Kersteter would receive **part-time pay and benefits**. Nowhere was the topic of **full-time work** ever addressed.

Since the topic of full-time work was never subject to a contract, Mr. Kersteter's suit for equitable relief was entirely appropriate.

VII. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(b)(4) BECAUE THE ISSUES PRESENTED BY THIS PETITION ARE OF SUBSTANTIAL PUBLIC INTEREST

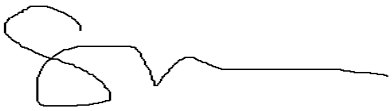
As stated in the introduction to this petition, there are nearly 600,000 public employees in Washington. These employees represent 17% of the working population of this state.

Given these figures, it is clear that regardless of how this Court responds to this petition, the issues presented herein are of substantial public interest. Review should therefore be granted under RAP 13.4(B)(4).

VIII. CONCLUSION

For the reasons explained above, this case presents highly significant issues of public interest. Since there are compelling reasons to conclude that the interpretations of law adopted by the Court of Appeals are contrary to the longstanding precedents of this Court, review should be accepted pursuant to RAP 13.4(b).

Dated this 27th Day of May, 2022 by:

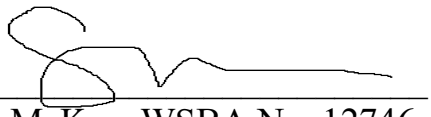


Scott McKay, WSBA No. 12746
Attorney for Appellant

Certification of Word Count

Pursuant to RAP 18.17, I hereby certify that I have used word processing software to conduct a word count and hereby attest that the body of this petition, exclusive of pages excepted in RAP 18.17(b), consists of less than 5,000 words.

Dated this 27th Day of May, 2022 by:



Scott McKay, WSBA No. 12746
Attorney for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KARL KERSTETER,

Appellant,

v.

CONCRETE SCHOOL DISTRICT, a governmental entity,

Respondent.

No. 82511-9-I DIVISION

ONE UNPUBLISHED

OPINION

APPELWICK, J. — Kersteter appeals from summary judgment dismissal of his statutory claim that he was misclassified as a part-time employee to avoid payment of employment benefits and his common law claim that his employer was unjustly enriched by the excess hours he worked. We affirm.

FACTS

Karl Kersteter worked for the Concrete School District as the transportation supervisor from 2006 to 2017. Every year Kersteter signed a new contract with Concrete. Each of these contracts indicated his job was less than full-time. But, his written statement indicated that he arrived at work before the buses left, around 5:00 a.m., and he stayed until the last bus returned around 5:00 p.m. He sometimes took a break from 9:15 a.m. to 12:30 p.m., but often missed this break when issues arose requiring his assistance. In this role, Kersteter estimates he worked about 8.75 hours a day, translating to about 43 hours per week, which was more than the hours in his contract.

When meeting about his new contract each year he asked for more time to be included in his contract. He asserted that these were always oral requests, not written. Kersteter's hours were gradually increased from .5 FTE[1] to .71 FTE.[2] Kersteter's highest salary in this position was $34,540 a year. He was enrolled in Washington Public Employment Retirement System (PERS) Plan 3. He asserted that his benefit entitlements were affected by his part-time status, because they were determined based on his part-time classification: at .5 FTE he received 50 percent of his benefits, and at .71 FTE, he received 71 percent of his benefits.

Although Kersteter believed he was working more than a part-time position, he stated that he continued to sign the part-time contracts because he needed to work and there was no place nearby offering similar positions. According to Barbara Hawkings, the former Concrete superintendent, Kersteter requested revisions related to his pay, hours, and FTE, but he never requested full-time hours and never told her that he was working full-time or over the hours in his contract.

Kersteter provided his notice of retirement to Concrete in 2017, with his last day as December 31, 2017. To fill the position mid-year, Concrete reclassified the position as full time and increased the salary to $54,000 per year. Concrete hired Kathy Lafreniere to succeed him as the transportation supervisor.

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[1] "Full-time equivalency" ratios.

[2] The record does not include Kersteter's contracts with Concrete for the period from 2006-2007 to 2009-2010. The record includes his contracts from 2010-2011 through 2017-2018.

Beginning in the 2010-2011 contract his hours were compensated at .5 FTE. That remained the same until the 2013-2014 contract when it increased to .625 FTE. His hours were again increased in the 2016-2017 contract, to .71 FTE. In the 2017-2018 contract, his hours remained at .71 FTE.

Kersteter filed a complaint for unpaid wages under chapter 49.46 RCW, the minimum wage statute, and chapter 49.48 RCW, a statute covering wage payments and collections.[3] Kersteter amended his complaint, removing those claims and instead alleging causes of action for: (1) unjust enrichment and/or in the alternative, quantum meruit; (2) misclassification as a part-time worker under RCW 49.44.170; and (3) attorney fees under the Washington wage payment act, chapter 49.48 RCW.

Concrete filed an answer with affirmative defenses including failure to make a claim of relief and lack of jurisdiction over the claim. Additionally, Concrete asserted that the claims were barred by waiver, laches, res judicata, and failure to mitigate, among other claims. Concrete then moved for summary judgment, arguing that unjust enrichment and quantum meruit do not apply to written contracts. Kersteter followed with a motion for partial summary judgment on Concrete's affirmative defenses.

The court considered both Concrete's summary judgment motion and Kersteter's partial summary judgment motion. It granted Concrete's summary judgment on unjust enrichment and quantum meruit, but denied summary judgment on misclassification. The court granted Kersteter's motion for partial summary judgment and dismissed Concrete's affirmative defenses of lack of jurisdiction, failure to state a claim, exhaustion, and res judicata. It did not dismiss Concrete's affirmative defense of waiver and/or estoppel.

[3] Prior to filing this lawsuit, Kersteter had filed a pro se wage claim with the Department of Labor and Industries and an administrative appeal with the Office of Administrative Hearings. Both were dismissed before filing his complaint.

Concrete filed a second motion for partial summary judgment asking the court to dismiss all Kersteter's salary and pension claims.[4] In support of this summary judgment, Concrete provided former superintendent Hawkings's declaration. Hawkings stated that she classified this role as part-time based on information that other school districts of comparable size, demographics, and location had part-time transportation supervisors.

Kersteter filed a second motion for partial summary judgment. He asked the court to find that RCW 49.44.170 does not require that the employer knowingly misclassified the employee and that the only facts in dispute were whether he was incorrectly classified and the amount of damages. In support of this, Kersteter filed declarations stating that he regularly worked over 40 hours in a week, and that Hawkings verbally agreed that it was unfair that his contracts were for part-time work.

The court granted Concrete's motion. It said the parties stipulated that Kersteter would not receive additional pension benefits if he was classified as full-time. It found that "the only issue was should [Kersteter] have received more money, a higher salary, for the job he agreed to do at the agreed salary." It denied Kersteter's motion in its entirety, and found that his claims of increased salary and pension did not fall under benefits within the scope of RCW 49.44.170. Kersteter

[4] Concrete also raised a statute of limitations defense to all wages before 2015. The court found that Kersteter's claims were subject to the three year statute of limitations under RCW 4.16.080, and all claims arising before June 5, 2015 were dismissed with prejudice. This issue is not raised on appeal.

voluntarily dismissed all remaining claims. The parties agreed to a stipulation and order of dismissal that granted Concrete a final judgment and attorney fees.

Kersteter appeals the orders on competing motions for summary judgment, the order granting the defendant partial summary judgment, and the stipulation and order of dismissal.

DISCUSSION

I. Misclassification of Employees

We review summary judgment de novo, performing the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." Id. "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Id.

Kersteter argues the trial court erred in dismissing his damages claims under RCW 49.44.170. He argues that Concrete deliberately took advantage of him by paying a part-time salary for full-time work. He argues he is entitled to damages in the amount of the difference between his actual salary and what he should have been paid as a full-time employee and associated lost pension benefits. He asserts that these damages are based on his lost wages and are "squarely within the scope of damages that were contemplated by the Legislature" when it enacted RCW 49.44.170.

Concrete argues that RCW 49.44.170 does not apply to wages and Kersteter received the pension benefits he was entitled to receive. The pension benefit is based on a formula of wages and service years. It is not disputed that Kersteter was awarded a full service credit for each month worked. He was paid the full amount of the salary stated in his written contracts. So, any loss of pension benefits necessarily depends on having not been paid the proper amount of wages.

We review questions of statutory interpretation de novo. Associated Press v. Wash. State Legislature, 194 Wn.2d 915, 920, 454 P.3d 93 (2019). Under the rules of statutory interpretation, we must ascertain and carry out the legislature's intent. Id. If the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of the legislature's intent. Id. If the statute is ambiguous, or susceptible to more than one reasonable meaning, it is appropriate to review the legislative history to glean intent. Id.

RCW 49.44.170 provides,

> (1) It is an unfair practice for any public employer to:
> (a) Misclassify any employee to avoid providing or continuing to provide employment-based benefits; or
> (b) Include any other language in a contract with an employee that requires the employee to forgo employment-based benefits.
> (2) The definitions in this subsection apply throughout chapter 155, Laws of 2002 unless the context clearly requires otherwise.
> (a) "Employee" means a person who is providing services for compensation to an employer, unless the person is free from the employer's direction and control over the performance of work. This definition shall be interpreted consistent with common law.
> (b) "Employment-based benefits" means any benefits to which employees are entitled under state law or employer policies or collective bargaining agreements applicable to the employee's correct classification.

> (c) "Public employer" means: (i) Any unit of local government including, but not limited to, a county, city, town, municipal corporation, quasi-municipal corporation, or political subdivision; and (ii) the state, state institutions, and state agencies. This definition shall be interpreted consistent with common law.
>
> (d) "Misclassify" and "misclassification" means to incorrectly classify or label a long-term public employee as "temporary," "leased," "contract," "seasonal," "intermittent," or "part-time," or to use a similar label that does not objectively describe the employee's actual work circumstances.
>
> (3) An employee deeming himself or herself harmed in violation of subsection (1) of this section may bring a civil action in a court of competent jurisdiction.

Neither the term "benefit" nor "wage" is defined in the statute. "[W]e may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) (alteration in original). Webster's defines "benefit" as, "a payment or service provided for under an annuity, pension plan, or insurance policy, or government subsidized program." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 204 (2002). It defines "wage" as, "a pledge or payment of usually monetary remuneration by an employer especially for labor or services usually according to contract and on an hourly, daily, or piecework basis and often including bonuses, commission, and amounts paid by the employer for insurance, pension, hospitalization, and other benefits." Id. at 2568. These definitions suggest that "wages" can be read to include benefits, but "benefit" is not read to include wages.

Wages are not mentioned in RCW 49.44.170. Only one section in chapter 49.44 RCW—which covers violations and prohibited practices for employers—mentions wages. In RCW 49.44.050, an employment agent who misstates any material matter relating to wages paid to an employee is guilty of a misdemeanor.

But, even this section does not provide a remedy for unpaid wages. Remedies for wage claims are established elsewhere in Title 49, in chapter 49.46 RCW, chapter 49.48 RCW, chapter 49.52 RCW, and chapter 49.56 RCW.

"Wage" is defined elsewhere in Title 49 to mean "compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director." RCW 49.46.010(7). This definition is also applied in RCW 49.48.082(10). The plain language does not include benefits as part of wages.

We conclude the statute is not ambiguous. The plain meaning of employment-based benefits does not include wages.

Even if we assume the definition of employment based benefits is ambiguous, we would turn to the legislative history and reach the same result. The bill reports confirm the legislative concern about benefits rather than wages in the bill that became this law. In the final bill report, the background section states, "Public employers sometimes provide a lower level of health insurance coverage, retirement plan coverage, sick or annual leave, or other employment-based benefits to persons who are employed on a part-time, temporary, leased, contract, or other contingent basis." FINAL B. REP. ON ENGROSSED SUBSTITUTE S.B. 5264, at 1, 57th Leg., Reg. Sess. 144 (Wash. 2002). Wages are not included in this list.

This statute stemmed in part from the dispute about health care benefits in Mader v. Health Care Auth., 149 Wn.2d 458, 475 n.8, 70 P.3d 931 (2003) ("The 2002 legislature was reacting, in part, to the case before us when it enacted RCW

49.44.160 and .170."). In Mader, community college teachers were not eligible for healthcare over the summer, when they were not teaching courses. Id. at 462. The court grappled over whether the teacher's classification as "part-time" should affect their year-round healthcare coverage. Id. at 475. It wrote, "[T]he legislature indicated that the [Health Care Authority] should not exclude employees from eligibility for comprehensive health care coverage simply because they are labeled "'part-time.'" Id. The litigation addressed only the teachers' health care benefits. There was no consideration of their wages.

We hold that employee-based benefits as used in RCW 49.44.170 do not include wages. Kersteter abandoned all the wage claims under chapters 49.46 and 49.48 RCW when he filed his amended complaint. Any loss of pension benefits was dependent on the wage claim. The trial court properly dismissed his claims under RCW 49.44.170.

II. Unjust Enrichment

Kersteter asks the appellate court to reinstate his unjust enrichment claims, as "the trial court had no basis in law, equity, or fact" for dismissing the claim.[5] First, he argues that his part-time work contracts do not address any claims that would arise around full-time work, and allow for a claim of unjust enrichment. Next, he argues that the trial court erred by concluding that Kersteter's claim for unjust enrichment was barred as a matter of law. Because Kersteter and Concrete had an express contract, no unjust enrichment claim applies.

[5] Below, Kersteter coupled unjust enrichment and quantum meruit claims. However, he does not argue quantum meruit before this court.

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). If a valid express contract exists, the courts will not allow a claim for unjust enrichment. MacDonald v. Hayner, 43 Wn. App. 81, 86, 715 P.2d 519 (1986).

In MacDonald, two attorneys contracted to produce a report within 60 days for a sum not to exceed $10,000. Id. at 82. It took them over six months to complete the work. Id. At one point, they were granted a 30 day extension, with no change in compensation. Id. They claimed that they had a conversation where the other party said they would negotiate the question of further compensation after submission of the report. Id. at 82-83. The attorneys claimed this created an implied contract beyond the express contract they had signed. Id. at 85. The court noted, "A contract implied in law, or 'quasi contract', arises from an implied duty of the parties not based on consent or agreement; it is based on the prevention of unjust enrichment." Id. (quoting Heaton v. Imus, 93 Wn.2d, 249, 252, 608 P.2d 631 (1980)). It held no unjust enrichment existed because "'A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.'" Id. at 85-86 (quoting Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 604, 137 P.2d 97 (1943)). Like in MacDonald, Kersteter had an express contract with Concrete, and cannot raise an unjust

enrichment claim. The trial court properly granted summary judgment on Kersteter's unjust enrichment claims.[6]

III. Attorney Fees

Kersteter requests attorney fees under RCW 49.48.030. Under this statute, "[i]n 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." RCW 49.48.030. Because we affirm the dismissal on all of the claims, Kersteter is not entitled to fees. Concrete does not request attorney fees on appeal.

We affirm.

Lippelwick, J.

WE CONCUR:

Brennan, J.

Mann, C.J.

[6] Because we affirm summary judgment on Concrete's motions, we need not address the denial of Kersteter's motions.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KARL KERSTETER,

Appellant,

v.

CONCRETE SCHOOL DISTRICT, a governmental entity,

Respondent.

No. 82511-9-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Karl Kersteter, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.P.T.
Judge

APPENDIX B

RCW 49.44.160

Public employers—Intent.

The legislature intends that public employers be prohibited from misclassifying employees, or taking other action to avoid providing or continuing to provide employment-based benefits to which employees are entitled under state law or employer policies or collective bargaining agreements applicable to the employee's correct classification.

Chapter 155, Laws of 2002 does not mandate that any public employer provide benefits to actual temporary, seasonal, or part-time employees beyond the benefits to which they are entitled under state law or employer policies or collective bargaining agreements applicable to the employee's correct classification. Public employers may determine eligibility rules for their own benefit plans and may exclude categories of workers such as "temporary" or "seasonal," so long as the definitions and eligibility rules are objective and applied on a consistent basis. Objective standards, such as control over the work and the length of the employment relationship, should determine whether a person is an employee who is entitled to employee benefits, rather than the arbitrary application of labels, such as "temporary" or "contractor." Common law standards should be used to determine whether a person is performing services as an employee, as a contractor, or as part of an agency relationship.

Chapter 155, Laws of 2002 does not modify any statute or policy regarding the employment of: Public employee retirees who are hired for postretirement employment as provided for in chapter 41.26, 41.32, 41.35, or 41.40 RCW or who work as contractors; or enrolled students who receive employment as student employees or as part of their education or financial aid.

[2002 c 155 § 1.]

NOTES:

Construction—2002 c 155: "This act shall be construed liberally for the accomplishment of its purposes." [2002 c 155 § 3.]

Severability—2002 c 155: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2002 c 155 § 4.]

RCW 49.44.170

Public employers—Unfair practices—Definitions—Remedies.

(1) It is an unfair practice for any public employer to:

(a) Misclassify any employee to avoid providing or continuing to provide employment-based benefits; or

(b) Include any other language in a contract with an employee that requires the employee to forgo employment-based benefits.

(2) The definitions in this subsection apply throughout chapter 155, Laws of 2002 unless the context clearly requires otherwise.

(a) "Employee" means a person who is providing services for compensation to an employer, unless the person is free from the employer's direction and control over the performance of work. This definition shall be interpreted consistent with common law.

(b) "Employment-based benefits" means any benefits to which employees are entitled under state law or employer policies or collective bargaining agreements applicable to the employee's correct classification.

(c) "Public employer" means: (i) Any unit of local government including, but not limited to, a county, city, town, municipal corporation, quasi-municipal corporation, or political subdivision; and (ii) the state, state institutions, and state agencies. This definition shall be interpreted consistent with common law.

(d) "Misclassify" and "misclassification" means to incorrectly classify or label a long-term public employee as "temporary," "leased," "contract," "seasonal," "intermittent," or "part-time," or to use a similar label that does not objectively describe the employee's actual work circumstances.

(3) An employee deeming himself or herself harmed in violation of subsection (1) of this section may bring a civil action in a court of competent jurisdiction.

[**2002 c 155 § 2**.]

NOTES:

Construction—Severability—2002 c 155: See notes following RCW **49.44.160**.

APPENDIX C

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

KARL KERSTETER, a former employee of Defendant,

Plaintiff,

vs.

CONCRETE SCHOOL DISTRICT, a governmental entity,

Defendant

No. 18-2- 00701-29

FIRST AMENDED COMPLAINT FOR DAMAGES

[CR 19(b) – Proposed]

I.

NATURE OF ACTION

1.1 This is an action to recover:

a) Wages and compensation for unpaid hours of work and services that Plaintiff provided to Defendant, said action being authorized under the common law action for "Unjust Enrichment" and/or in the alternative, under the common law action for "Quantum Meruit," as those actions have been defined and described by the Washington Supreme Court in *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008);

b) Damages for the value of employment benefits that Plaintiff was unlawfully deprived of due to his misclassification as a "part-time" employee, as authorized by the Employee Misclassification Statute, RCW 49.44.170;

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3614 California Ave SW, Seattle 98116
(206) 992-5466

c) Attorney fees, costs of suit and other assessments, as authorized under the Washington Wage Payment Act ("WPA"), RCW 49.48.

II.

PARTIES, JURISDICTION AND VENUE

2.1 Plaintiff Karl Kersteter is a married man who resides in Skagit County, Washington.

2.2 Between 2012 and January, 2018, Plaintiff was employed as Defendant's "Transportation Supervisor."

2.3 Plaintiff's job duties as Transportation Supervisor included, but were not limited to, performing management or administrative functions regarding the transportation of students to and from schools.

2.4 Defendant Concrete School District is a local governmental entity that operates public schools in Skagit County, Washington.

2.5. Under the facts alleged herein, this Court has jurisdiction over the subject matter and the parties.

2.6 Pursuant to RCW 4.12.025(1), venue of this action properly lies in Skagit County because Defendant currently transacts business and maintains offices in Skagit County.

III.

FACTS UPON WHICH CLAIMS ARE BASED

3.1 All facts alleged in **Section II** of this complaint are hereby incorporated into this Section.

Written Employment Contracts for Part-Time Work

3.2 For each year he was employed by Defendant, Plaintiff worked under a written

employment contract. Each contract was effective from July 1 of each year to June 30 of the following year.

3.3 Each contract was drafted by Defendant, and signed by both Plaintiff and the Superintendent of the Concrete School District, Barbara Hawkings.

Explicit Contract Terms

3.4 Except as noted herein, the terms of each written contract was substantially the same. For each year, the contract terms were as follows:

a) **Explicit Agreement that Employment was to be Part-Time**. Each contract explicitly stated that the Transportation Supervisor position was a part-time position. Specifically:

1. The contracts that were signed in 2017 and 2016 called for the position to be a "**part-time .71**" position;
2. The contracts that were as signed in 2015, 2014 and 2013 called for the position to be a "**part-time .625**" position;
3. The contract that were signed in 2012, 2011 and 2010 called for the position be a "**part-time .5**" position.

b) **Explicit Agreement that Plaintiff Would Work a Part-Time Schedule**. Each contract explicitly stated that Plaintiff would work a part-time schedule of days and hours. Specifically:

1. The contracts that were signed in 2017 and 2016 contemplated that Plaintiff would work "**204 days for (6) hours per day**."
2. The contracts where were signed in 2015, 2014 and 2013 contemplated that Plaintiff would "**204 days for (5) hours per day**."

3. The contracts where were signed in 2012, 2011 and 2010 contemplated that Plaintiff would **"204 days for (4) hours per day."**

c) **Explicit Agreement that Plaintiff Would Receive a Part-Time Salary**. Each contract explicitly stated Plaintiff would be paid a part-time salary. Specifically:

1. The contract that was signed in 2017 stated that Plaintiff would receive a **".71" salary of $34,540**;
2. The contract that was signed in 2016 stated that Plaintiff would receive a **".71" salary of $33,537**;
3. The contract that was signed in 2015 stated that Plaintiff would receive a **".625" salary of $35,750**;
4. The contract that was signed in 2014 stated that Plaintiff would receive a **".625" salary of $35,000**;
5. The contract that was signed in 2013 stated that Plaintiff would receive a **".625" salary of $34,54**;
6. The contract that was signed in 2012 stated that Plaintiff would receive a **".5" salary of $19,250**.

d) **Explicit Agreement That Benefits Would be Provided on a Part-Time basis**. Each contract explicitly stated that benefits would be paid to Plaintiff at a part-time ratio. Specifically:

1. The contracts that were signed in 2017 and 2016 called for benefits to be paid on a ".71 FTE";
2. The contracts where were singed in 2015, 2014 and 2013 called for benefits to be paid on a ".625 FTE";

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3. The contracts where were signed in 2012, 2011 and 2010 called for benefits to be paid on a ".5 FTE".

Plaintiff's Actual Work Schedule

3.5 For all weeks in which Defendant's schools were open and in session, Plaintiff regularly followed the same daily schedule.

a) Supervision of Morning Bus Runs. On each regular school day, Plaintiff would arrive at his school district office and go on duty at 5 a.m., and then would continue to work and be on duty until the last morning bus returned to the yard at 9:15 a.m. Except for unusual circumstances such as scheduled late starts, inclement weather, or the need for Plaintiff to drive a school bus, Plaintiff's morning shift lasted approximately 4.25 hours.

b) Supervision of Afternoon Bus Runs. To supervise afternoon bus runs, Plaintiff would return to his office at 12:30 p.m. and would go on duty and continue to work until the last afternoon bus returned to the yard at 5 p.m. Except for unusual circumstances such as scheduled early dismissals, inclement weather, or the need for Plaintiff to drive a school bus, Plaintiff's work time in supervising morning bus runs took approximately 4.5 hours.

3.6 Consistent with the allegations set forth in Paragraph 3.5, above, on most days in which school was in session, Plaintiff worked 8.75 hours per day. This translates to 43.75 hours per week.

Knowledge of Defendant as to Plaintiff's Actual Hours of Work

3.7 Throughout Plaintiff's employment, it was well known by teachers, administrators and other employees of Defendant that Plaintiff was regularly working a full-

time schedule, and not a part-time schedule. It was also well known by teachers, administrators and other employees of Defendant that Plaintiff was regularly working in excess of 40 hours per week. Persons who were fully aware of these facts included Defendant's Superintendent, Barbara Hawkings.

Knowing and Deliberate Refusal of Defendant to Provide Additional Salary

3.8 Notwithstanding Defendant's knowledge that Plaintiff was regularly working in excess of 40 hours per week when performing the duties of Transportation Supervisor, Defendant failed to provide Plaintiff with a full salary for such work. Instead, it only provided him with a part-time salary.

IV.

CAUSES OF ACTION

4.1 All allegations set forth in **Sections II and III** of this complaint are hereby re-alleged and incorporated into this section by reference. Based upon those allegations, Plaintiff brings the following causes of action:

First Causes of Action: <u>Unjust Enrichment</u> & <u>Quantum Meruit</u>

4.2 Plaintiff brings two alternate causes of action, each of which are based upon the Washington Supreme Court's description of causes of action for Unjust Enrichment and Quantum Meruit. See *Young v. Young*, 164 Wn.2d 477, 488, 191 P.3d 1258 (2008).

4.3 Unjust **<u>Enrichment</u>**. Under the facts alleged in Sections II and III herein, all elements are met for the recovery of damages under the doctrine of Unjust Enrichment. Specifically:

1. Defendant was fully aware that it was receiving valuable benefits from Plaintiff in the form of many hours of unpaid work and service performed by

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3614 California Ave SW, Seattle 98116
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Plaintiff;

2. Defendant was fully aware that these unpaid hours were being were being provided at the sole expense of plaintiff, and not being paid for; and
3. The circumstances make it unjust for the defendant to retain the benefit without payment.

4.4 Quantum **Meruit**. Under the facts alleged in Sections II and III herein, all elements are met for the recovery of damages under the doctrine of Quantum Meruit. Specifically:

1. Defendant had requested Plaintiff to perform work;
2. Plaintiff never waived his demand for payment and ultimately expected to be paid for his unpaid work, and
3. Defendant knew, or should have known, that Plaintiff expected payment for the work.

Second Cause of Action: Misclassification of Plaintiff as a Part-time Employee

4.5. RCW 49.44.170. Under the facts alleged in Sections II and III herein, all elements are met for the recovery of the value of unpaid benefits under the Employee Misclassification Statute, RCW 49.44.170. Specifically:

1. To avoid providing Plaintiff with full-time employment-based benefits, Defendant incorrectly misclassified and labeled Plaintiff as a "part-time" employee when in actual fact, he as a full-time employee.
2. Such misclassification and labeling as a "part-time" employee did not objectively describe Plaintiff's actual work circumstances, within the meaning of RCW 49.44.170(1)(a) and RCW 49.44.170(2)(d).

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3614 California Ave SW, Seattle 98116
(206) 992-5466

3. Said facts authorize a civil cause of action by plaintiff under RCW 49.44.170(3).

Third Cause of Action: Violation of WPA

4.6 Defendant's failure to pay full salary compensation and benefits, as alleged in **Sections III and IV** constituted a violation of the WPA because, after the termination of Plaintiff's employment, Defendant failed to pay Plaintiff with all wages or benefits that had been earned or were due "on account of employment," within the meaning of RCW 49.48.010.

V.

PRAYER FOR RELIEF

Plaintiff prays for judgment against Defendant in an amount that exceeds $10,000, before any award for attorney fees, interest or costs. Specifically, plaintiff prays for a judgment against defendant to include:

1. Damages under the doctrine of Unjust Enrichment in the form of compensation for the reasonable value of the unpaid work and services that were provided to Defendant;

2. In the alternative, damages under the doctrine of Quantum Meruit in the form of compensation for the reasonable value of the unpaid work and services that were provided to Defendant;

3. Damages under the Employee Misclassification Statute, RCW 49.44.170 in the form of the value of benefits that Plaintiff was unlawfully deprived of due to Defendant's misclassification of him as a "part-time" employee;

4. Attorney fees as provided by the WPA or any other statute or chapter of RCW, including RCW 49.44;

5. Pre-judgment and post judgment interest as provided by Washington law;

6. For all such other relief that may be available at law or equity.

DATED this 26 day of MARCH 2010

LAW OFFICE OF SCOTT MCKAY
3614 California Ave SW, Seattle 98116
(206) 992-5466

Scott McKay, WSBA No. 12746
Attorney for Karl Kersteter, Plaintiff

LAW OFFICE OF SCOTT MCKAY
3614 California Ave SW, Seattle 98116
(206) 992-5466

APPENDIX D

another person. This definition clearly encompasses salary payments and pension payments:

Online Dictionaries

- Dictionary.com (defining "benefit" as "*a payment or gift, as one made to help someone or given by an employer, an insurance company, or a public agency*";[22]

- Oxford Lexico Dictionary (defining "benefit" as "a*n advantage or profit gained from something*";[23]

- Merriam-Webster Online Dictionary (defining "*income*" as a "*gain or recurrent benefit usually measured in money that derives from capitol or labor*").[24]

Case Law

- *Chem. Bank v. Wash. Pub. Power Supply Sys*., 102 Wn.2d 874, 910, 691 P.2d 524 (1984) (Quoting Restatement definition of "benefits" as referring to "*an interest in money, land, chattels, or choses in action*.");

- *Johnson v. Tradewell Stores, Inc*. 95 Wn.2d 739, 743, 630 P.2d 441 (1981) (Stating that in the context of industrial insurance statutes, "benefits" should be interpreted as referring to "*to payment or compensation paid*" or "*amounts of money received*.");

- *Arup Labs., Inc. v. State*, 12 Wn. App. 2d. 269, 457 P.3d 492, 499, (2020) (Adopting Black's Law Dictionary definition of "benefit" as "*[T]he advantage or privilege something gives; the helpful or useful effect something has*.").

[22] *https://www.dictionary.com/browse/benefit*

[23] *https://www.lexico.com/en/definition/benefit*

[24] *https://www.merriam-webster.com/dictionary/income*

Statutes

- RCW 50.04.040 (Defining "unemployment benefits" as "*the compensation payable to an individual*.");
- RCW 74.04.300 (Referring to public assistance payments as "*cash benefits*.");
- RCW 7.68.034 (Referring to cash payments to crime victims as "*benefits*");
- RCW 11.107.060(1)(b) (Defining "governmental benefits" as "*financial aid or services from a state, federal, or other public agency.*").

C. Salary Payments and Pension Payments are "*Employment-Based Benefits*" within the Meaning of RCW 49.44.17(2)(b)

As previously shown, "employment-based benefits" refers to any benefits that an employee would be entitled to receive under his/her "correct classification." 49.44.17(2)(b). The phrase includes all entitlements earned by the employee, including entitlements earned "*under state law or employer policies.*" Id.

Here, Mr. Kersteter's salary and pension payments easily meet this definition:

- *Salary Payments*. If Mr. Kersteter had been correctly classified as full-time employee, then under the District's compensation policies he would have received a much higher salary. See discussion (and facts cited therein), *supra*, p. 9. Clearly, the definition of "employment-based benefits" is met.

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May 27, 2022 - 4:08 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Karl Kersteter, Appellant v. Concrete School District, Respondent (825119)

The following documents have been uploaded:

- PRV_Petition_for_Review_20220527160734SC076252_3221.pdf
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