102040-6

Court of Appeals Cause No. 383326

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Barbara Werner,
Petitioner,

v.

The State of Washington, the Washington State Patrol, Jeffrey DeVere, Jay Cabezuela, Timothy Winchell, and John Batiste,
Respondents

PETITION FOR REVIEW

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I. Identity of Petitioner

The petitioner is Barbara Werner, absent class member, proposed intervenor-plaintiff, and proposed class representative. Petitioner Werner requests that the Washington Supreme Court accept review of the Court of Appeals decision terminating review designated in Part II of this petition.[1]

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[1] Plaintiff-Appellants Martin, Longoria, Arnold, Nash, Thomas, Foster, Sager, and Gonzalez also originally appealed from the trial court's decision. However, due to the passage of time Petitioner's counsel understands that all of these plaintiffs are either no longer employed by the Washington State Patrol and/or are not members of the uniformed services. As a result, none of the existing plaintiffs/class representative have standing to seek prospective relief on behalf of the certified class. Nor were any of the named plaintiffs/appointed class representatives affected by the challenged Washington State Patrol policy after December 21, 2016, and thus none have a claim for monetary relief. Consequently, only proposed intervenor-plaintiff and proposed class representative Barbara Werner has standing to seek review of the Court of Appeals decision in this case. Despite never having been joined as a named plaintiff in the trial court (because the trial court determined she lacked standing and thus was not an appropriate representative of the certified class) she is an "aggrieved party" who "may seek review by the appellate court." Wash. R. App. P. 3.1 because the affirmance of the trial court's

II. Citation to Court of Appeals Decision

Petitioner Werner requests that the Court review the unpublished opinion of Division III of the Washington Court of Appeals, filed on April 27, 2023, in the matter of *Martin v. Washington* (the "Opinion"). A copy of the Opinion is included in the Appendix, along with the relevant trial court opinion, the relevant statutes, and the scheduling policy of the Washington State Patrol relevant to this petition.

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summary judgment decision has substantially affected her right to pecuniary compensation for the Washington State Patrol's violations of USERRA. *See Sheets v. Benevolent & Protective Ord. of Keglers*, 34 Wash. 2d 851, 855 (1949) (holding persons are "entitled to appeal or sue out a writ of error, whenever it operates prejudicially and directly upon his property or pecuniary rights or interest, or upon his personal rights"); *see also State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (holding absent putative class member had standing to appeal from adverse trial court decision).

III. Issues Presented for Review

1. Statutory paid military leave is a right or benefit protected under USERRA only to the extent of the benefit provided by the underlying paid leave statute. Under RCW § 38.40.060, Washington provides public employees with 21 days of paid military leave each year, which must be charged only for days those employees are scheduled to work. Did the Court of Appeals err in finding RCW § 38.40.060 permits public employers to modify the schedules of employees who take military leave and thus such modifications could not deprive employees of a protected right or benefit?

2. USERRA, 38 U.S.C. § 4316(d), prohibits employers from requiring employees who take military leave to use vacation, annual, or similar leave during a period of military service. The Washington State Patrol maintains a policy under which employees who take more than 15 days of military leave are converted from a four-day-a-week schedule to a five-day-a-week schedule. This manipulation of their schedule thus requires

a servicemember to use additional leave days (annual leave, vacation, unpaid leave, or statutory paid military leave) to cover additional absences. Did the Court of Appeals err in holding that this policy does not force the use of vacation, annual, or similar leave during a period of military service?

3. USERRA, 38 U.S.C. § 4316(a), provides that employees reemployed after service in the uniformed services may not be denied rights and benefits determined by seniority, which includes any benefits which accrue with longevity in employment. Under RCW § 38.40.060, Washington public employers incentivize continued employment by servicemembers by affording them 21 days of paid military leave – an amount which accrues annually and does not vary based on hours worked. Did the Court of Appeals err in holding that this statutory paid military leave benefit was not a benefit determined by seniority?

4. Did the Court of Appeals err in holding that Petitioner Werner lacked standing, was not a member of the

certified class, and thus could not serve as a representative of the class?

IV. Statement of the Case

Statutory Background. Congress has long recognized that when someone puts on a uniform to serve in the military, their country owes them certain obligations in return. One is the assurance that, when they have discharged their duties, they will be able to return to work without being penalized for serving—an obligation, in other words, "to compensate for the disruption of careers and the financial setback [from] military service." 140 Cong. Rec. S7670–71 (June 27, 1994) (statement of Sen. Rockefeller). To make good on this solemn obligation, Congress has repeatedly expanded and strengthened workplace protections in "a long line of federal veterans' rights laws enacted since the Selective Training and Service Act of 1940." *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 174 (7th Cir. 2014). The most recent and comprehensive of these statutes is USERRA, which Congress enacted in 1994 to "strengthen existing employment

rights of veterans of our armed forces." *Id*. at 174–75. In the run-up to USERRA, Congress concluded that the existing statute was too "complex and difficult to understand," 139 Cong. Rec. H2203–02, H2209 (May 4, 1993), and that it was "sometimes ambiguous, thereby allowing for misinterpretations," H.R. Rep. 103–65(I), at 18. These misinterpretations took too narrow a view of the law, thwarting the ability of veterans and reservists to vindicate their rights. Congress felt the need "to restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law," while correcting the misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston).

USERRA seeks to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103–65(I) at 18. Its text identifies three core objectives: (1) "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and

employment which can result from such service," (2) to "provid[e] for the prompt reemployment of such persons upon their completion of such service," and (3) "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a). These statutory objectives have taken on "particular interest" and importance in the years since USERRA's passage "because of the large number of reservists [that were] called up for military duty as a result of the conflicts in Iraq and Afghanistan." *Gordon v. Wawa, Inc.*, 388 F.3d 78, 79–80 (3d Cir. 2004).

The State of Washington has likewise long recognized the importance of the contributions of America's servicemembers, and in 1939 it determined that the "peace, health and safety of the State" were served by providing public employees who serve in the reserve or armed forces of the United States with an allotment of paid military leave. 1939 Wash. Sess. Laws 325, 325-26. Like the federal government, Washington has progressively expanded and strengthened the rights of employees

who serve in the armed forces. Originally the law allowed for only for 15 days of paid military leave per year, which could only be used for military training and which paid only the difference between military pay and the employee's regular wages as a public employee. *Id*. § 1. Today the law provides for 21 days of paid military leave each year, which may be used for active military duty as well as training during which the employee receives their normal pay. RCW § 38.40.060(1), (3).

The Washington legislature has repeatedly amended the paid military leave statute to protect the benefit from encroachment by public employers. Most recently, in 2018, the legislature added language clarifying that when a servicemember's regular shift spans multiple calendar days they are not to be charged leave for the day on which the shift ends. RCW § 38.40.060(4)(b). This amendment overruled a Washington Attorney General opinion that had required public employers to charge employees whose shifts spanned multiple calendar days (say, an 8pm to 8am shift as a firefighter) a day of

leave for each such calendar day. S. B. Rep., HB 2851 at 1 (Wash. 2018). In doing so, the legislature responded to public testimony that "[h]iring veterans who served the country is important and makes our state safer and stronger" and that the "knowledge, skills, and abilities" that they possess make them a "valuable resource to the state." *Id*. at 2.

Similarly, in 2010 the legislature added language clarifying that the 21 days of paid military leave permitted under the statute refer to 21 days on which the employee is scheduled to work. RCW § 38.40.060(4)(a). The amendment addressed concerns from the public regarding "confusion on the parts of human resources officers related to how military leave is charged" which caused "instances in which public employees have been charged with military leave for days they are not normally scheduled to work." H. B. Rep., SHB 2403 at 2 (Wash. 2010). While this Court had previously held that the existing statutory text required employers to charge workdays an employee was absent, not calendar days, against statutory paid

military leave, "many employees" shared "stories regarding how military leave is incorrectly calculated" such that "clarification" was "needed." *Id*.

The Washington State Patrol's Scheduling Policies. It is customary for Washington State Patrol sergeants, troopers, and lieutenants at certain Washington State Patrol districts to work a "4-10" schedule: ten hours a day, four days a week. CP at 543, Declaration of Barbara Annett Werner in support of Motion for Summary Judgment ("Werner Decl.") ¶ 8. Such a schedule is particularly common in field operations, in which most employees work a 4-10 schedule. CP at 573, Excerpts of the transcript of the Rule 30(b)(6) Deposition of Washington State Patrol by Bob Maki ("WSP Rule 30(b)(6) Dep.") at 25:6-10. But under a policy memorialized in Section 2.020 of the Washington State Patrol's Time and Report Manual ("TAR"), employees who take more than 15 working days of leave are forced onto a Monday through Friday, 9 a.m. to 5 p.m. schedule – a five-day workweek. CP at 320-322, Declaration of Bob Maki in support

of Defendants' Motion for Summary Judgment ("Maki Decl."), Ex. A at § 2.020. This includes employees who take more than 15 days of military leave. *Id*. Upon returning to work, such employees are restored to their prior 4-10 schedule. *Id*. According to the Chief Financial Officer of the Washington State Patrol, he implemented this policy to avoid having to pay a shift differential (*e.g.*, a premium for a night shift) to employees who took long term leaves from employment. CP at 317, Maki Decl. ¶ 5.

The Washington State Patrol's policy has a significant impact on the statutory paid leave benefits of employees on a 4-10 schedule who are absent for military service. After 15 consecutive workdays on leave, the Washington State Patrol changes the employee's schedule from a "4-10" to a five day workweek and begins to charge their allotment of military leave more quickly: at a rate of five days a week instead of four days a week. CP at 545, Werner Decl. ¶ 20. When a trooper's paid military leave is exhausted, they must resort to covering their

military absence either with another form of paid leave (such as vacation) or take leave without pay. *Id.* ¶ 25.

Proceedings Below. Plaintiffs filed suit on January 3, 2014, originally alleging violations of USERRA in connection with the Washington State Patrol's failure to apply a statutorily mandated veteran's preference on entrance and promotion exams. CP at 1-31, Class Action Complaint. Defendants moved to dismiss, which motion was denied by the court below. The operative Second Amended Complaint was filed on January 9, 2015, and alleges violations of: (1) 38 U.S.C. § 4311(a)-(b); (2) violation of 38 U.S.C. § 4316(a) and (d); and (3) 42 U.S.C. § 1983 claims. CP at 64-103, Second Amended Complaint.

The trial court certified the claims in this case, including those at issue on this appeal, as a class action. CP at 277-285, Order and Judgment of Final Approval to Settlement Agreement and Plan of Allocation ("Final Approval Order"). And, following extensive negotiation, the parties settled all claims except those brought under 38 U.S.C. § 4316(a) and (d) to the extent that those

claims sought declaratory or injunctive relief or monetary relief for claims arising after December 21, 2016. CP at 277-285, Final Approval Order.

There were two categories of remaining claims. USERRA prohibits employers from requiring a person whose employment is interrupted by services in the uniformed services to "use vacation, annual, or similar leave during such period of service." 38 U.S.C. 4316(d). And it likewise protects the rights of servicemembers to seniority-based benefits while performing military service and upon reemployment. 38 U.S.C. 4316(a). The theory of Petitioner's case is that the Washington State Patrol's TAR § 2.020 policy violates these provisions by requiring employees absent for more than 15 days of military leave to use annual leave, unpaid leave, or paid military leave to cover an additional absence each week and by paying them less for each such day of leave.

Defendants sought summary judgment on the remaining claims. CP at 329-331, Defendants' Motion for Summary

Judgment. Plaintiffs cross-moved for summary judgment, CP at 539-541, Plaintiffs' Cross Motion for Summary Judgment, and moved to substitute absent class member Barbara Werner as a class representative. CP at 488-490, Motion to Substitute Class Representative. The trial court granted Defendants' Motion for Summary Judgment, denied Plaintiffs' Motion for Summary Judgment, and denied Plaintiffs' Motion to Substitute Barbara Werner as Class Representative. CP at 647-658, Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross Motion for Summary Judgment and Denying Plaintiffs' Motion to Substitute Class Representative.

After judgment was entered, Plaintiffs and Ms. Werner timely appealed from the Court's grant of summary judgment to Defendants and denial of Plaintiffs' motion to substitute Ms. Werner as class representative. The Court of Appeals affirmed.

V. Argument

This Court will only take discretionary review of a decision of the Court of Appeals terminating review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Wash. R. App. P. 13.4(a). The Court should grant review of the Opinion for two reasons. First, the Opinion reasoned that the Washington State Patrol's leave policy did not unlawfully deprive Werner and members of the Class of their statutory paid military leave benefits in violation of USERRA in part because in its view RCW 38.40.060 permits employers to modify the days an employee on military leave is scheduled to work while on leave. Opinion at 13-14. This conflicts with a prior decision of the Court of Appeals interpreting this statute, which held that "an employee should not be charged with having taken leave from

his ‘employment’ on days the employee is not required to be on the job.” *Wash. Fed’n of State Emps. v. State Pers. Bd.*, 54 Wn. App. 305, 309, 311 (Wash Ct. App. 1989). Second, the Court should grant review of the Opinion because the right of public employees to their statutory military leave rights is—as the Washington legislature has repeatedly emphasized—an issue in which the public has a substantial interest.

A. The decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.

The Court of Appeals previously heard a case with facts similar to this one and reached the opposite result. The Washington Personnel Board had adopted a rule related to the computation of paid military leave for state employees under which “state employees who engage in active duty military training are charged with taking military leave on any work days in which they engage in such training, as well as non-working days that fall between working days on which the employee participates in the training.” *Washington Fed'n of State Emps. v.*

State Pers. Bd., 54 Wash. App. 305, 307 (1989). So, for example, an employee who worked from Monday to Friday but took military leave from Friday through Monday would be charged with four days of military leave, "even if the employee would not have been required to work at his state job on that weekend." *Id*. The Washington Federation of Employees argued that this rule was contrary to RCW 38.40.060. The Court of Appeals agreed, holding that the statute, "when read in its entirety and construed in a manner consistent with its general purpose, is unambiguous and evidences a clear intent that military leave is to be computed on a *work day* basis." *Id*. at 309 (emphasis in original). It reached this conclusion regarding the meaning and intent of the statute based on its "plain language, which provides that employees of the state of Washington are to be granted military leave '... *from such employment* for a period not exceeding fifteen days ....'" *Id*. (emphasis and ellipses in original) (quoting RCW 38.40.060).

This case raises the same question as *Washington Federation*: does RCW 38.40.060 permit employers to charge

employees on military leave for days that they would otherwise not have worked? While this case is brought under 38 U.S.C. § 4316(a) and (d) rather than state law, statutory paid military leave is a benefit protected by USERRA to the extent of the "full measure of leave due to" servicemembers under the law providing such a benefit. *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003); *see Pucilowski v. Dep't of Justice*, 498 F.3d 1341, 1344-45 (Fed. Cir. 2007). The scope of the underlying paid leave benefit is thus crucial to whether there has in fact been an infringement of a protected benefit.[2] And like

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[2] The Court of Appeals took the view that both *Butterbaugh* and RCW 38.40.060 were "irrelevant" to Petitioner's claims, but addressed them at length regardless. Opinion at 12-15. They are in fact central to Plaintiff's legal theories in this case. *Butterbaugh* addressed similar claims (albeit under another section of USERRA and seeking to vindicate federal rather than state paid military leave benefits). *Butterbaugh*, 336 F.3d at 1334. It stands for two propositions of key importance. First, statutory paid military leave is a benefit of employment protected by USERRA. *Id*. at 1336. And second, whether an employee has been deprived of such a benefit turns on whether or not the

the plaintiffs in *Washington Federation*, here the Class has been deprived of a protected benefit by a public employer requiring them to take paid military leave (or vacation or unpaid leave) on days that they would not have worked had they not been on military leave. But the Court of Appeals held that RCW 38.40.060 permits such an "adjustment" because the Washington State Patrol purports to modify the work schedule of employees who are absent for 15 days of military leave to a 5-10 schedule, and thus such an employee is still "charged military leave 'only for days that he or she is scheduled to work.'" Opinion at 14 (quoting RCW 38.40.060(4)(a)).

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practice is consistent with the underlying paid military leave statute—and whether they received the "full measure of leave due to them" under that statute. *Id*. The interpretation of RCW 38.40.060 and whether the Patrol's scheduling practices are consistent with it is thus a gating question for Petitioner's USERRA claims.

This elevates form over substance and conflicts with the holding of *Washington Federation*. As Petitioner argued to the Court of Appeals, under such an interpretation an employer could achieve the same result forbidden by *Washington Federation* (charging military leave for every calendar day) by merely announcing that employees on leave were all scheduled to work seven days a week. Or an employer could refuse to schedule employees on leave for any work at all, and thus completely evade its military paid leave obligations. These are not speculative, "extreme," or purely "hypothetical" cases as the Court of Appeals asserted. *See* Opinion at 15. The former represents essentially the rule of the Washington Personnel Board that the Court of Appeals rejected in *Washington Federation*. And the latter represents the policy of at least one public employer in Washington. As described in a case cited by the Opinion, the City of Ocean Shores maintains a policy under which at least some employees who go on military leave are then "not scheduled to work." *Bearden v. City of Ocean Shores*, No.

C21-5035 BHS, 2022 WL 17532303, at *3 (W.D. Wash. Dec. 8, 2022). Ocean Shores takes the position that it owes no statutory paid leave benefits at all to such employees. *Id*. at *7.[3]

The Court of Appeals did not address the conflict of its reading of the statute with *Washington Federation*, which Petitioner raised in her briefing. Rather, the Court of Appeals conceded these results would be "absurd" but stated only that in its view the Washington State Patrol's policy was in contrast "reasonable." Opinion at 14.[4] But whether the specific policy at

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[3] The Western District of Washington held that Ocean Shores was not "required to schedule [plaintiff] to work while he was on extended military leave" and granted summary judgment to them on the plaintiff's USERRA claims seeking statutory paid leave benefits pursuant to RCW 38.40.060. *Bearden*, 2022 WL 17532303, at *7. That case is now on appeal, and the plaintiff is requesting that the United States Court of Appeals certify the issue regarding the interpretation of RCW 38.40.060 to this Court.

[4] The Court of Appeals also speculated that these "discriminatory end-runs" that would be permitted under its interpretation "might well be actionable under 38 U.S.C. § 4311." Opinion at 14-15.

issue here is reasonable is irrelevant to the prior question of how the statute should be interpreted. And it should not be interpreted in a manner that would frustrate its purpose. *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 42 P.3d 1265, 1268 (2002) (holding statutes protecting employee rights must be liberally construed); *Shoreline Cmty. Coll. Dist. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406 (1992) (holding courts must "view with caution" readings that would narrow statutes with liberal construction mandate). The Court of Appeals substituted its policy judgment for conformity with precedent, the plain language of the statute, and the legislature's intent. This Court should grant review to clarify the interpretation of RCW

This is irrelevant to whether its interpretation of the statute is correct or consistent with *Washington Federation*. And in any event, the non-discrimination provisions 38 U.S.C. § 4311 might provide no remedy where, as here, all employees on any kind of leave exceeding 15 days (not just servicemembers on military leave) are affected by the scheduling policy.

38.40.060 and resolve the conflicting decisions of the Court of Appeals on this issue.

B. The decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court.

Both claims in this case relate to the central issue of the paid military leave benefits to which members of the Washington State Patrol—indeed, all public employees in Washington—are entitled. Three criteria determine whether an issue is of substantial public interest: "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *Matter of McLaughlin*, 100 Wn.2d 832, 838 (1984). The issues raised by this case satisfy all three criteria.

First, the questions presented here are public in nature, not merely private questions of the employment rights of the Class. The legislature determined in 1939 that the "peace, health and safety of the State" were served by providing public employees

who serve in the reserve or armed forces of the United States with an allotment of paid military leave. 1939 Wash. Sess. Laws 325, 325-26. The legislature has progressively strengthened these leave benefits, responding to public testimony that "[h]iring veterans who served the country is important and makes our state safer and stronger" and that the "knowledge, skills, and abilities" that they possess make them a "valuable resource to the state." S. B. Rep., HB 2851 at 2 (Wash. 2018). The specific issues raised here have been the subject of legislative interest: notwithstanding the decision of the Court of Appeals in *Washington Federation*, as of 2010 there was still "confusion on the parts of human resources officers related to how military leave is charged" which caused "instances in which public employees have been charged with military leave for days they are not normally scheduled to work." H. B. Rep., SHB 2403 at 2 (Wash. 2010). "Many employees" shared "stories regarding how military leave is incorrectly calculated" such that "clarification" was "needed." *Id*. The state legislature thus added language

clarifying that the 21 days of paid military leave permitted under the statute refer to 21 days on which the employee is scheduled to work. RCW § 38.40.060(4)(a).

The decision of the Court of Appeals thus implicates the peace, health, and safety of the state by weakening the benefits the legislature has made available to men and women in the uniformed services to induce them to serve as state employees. It creates confusion regarding the same issues that the legislature sought to clarify in 2010. This case thus raises an issue of substantial public interest and review is appropriate.

Second, this case also "presents a prime example of an issue of substantial public interest" because "while affecting parties to this proceeding," it "also has the potential to affect" a large number of non-parties. *State v. Watson*, 155 Wash. 2d 574, 577, (2005). This action challenges only a policy of the Washington State Patrol, but every public employer in Washington and every servicemember employed by the state has an interest in clarification of the benefits owed by the former to

the latter under USERRA and RCW § 38.40.060. An "authoritative determination… will provide future guidance to public officers" who are responsible for the pay and benefits of state employees. *Matter of McLaughlin*, 100 Wn.2d 832, 838 (1984). And this is an issue that is likely to recur. *See id*. This case, *Washington Federation*, the legislative history from the 2010 reform of the paid military leave benefit, and the policies of Ocean Shores, Washington described in a recent federal court case, *Bearden*, 2022 WL 17532303, at *2, all indicate a persistent effort by public employers to avoid their statutory military leave obligations to servicemembers and obligations under USERRA by manipulating the schedules of their employees when they take military leave. Given the substantial public interest in providing clarity around these benefits and protecting the rights of servicemembers, this Court should grant review.

VI. Conclusion

This is a case where the Court of Appeals elevated form over substance to disregard a previous, conflicting decision. And

it relates to an issue of substantial public interest: the benefits offered by the state to encourage men and women in uniform to advance the peace, health, and safety by serving as public employees of the state of Washington. The Court should accordingly grant review of the Opinion for error.

This document contains 4630 words, excluding the parts of the document excluded from the word count by RAP 18.17.

Date: May 30, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085 the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the May 30, 2023, the foregoing was delivered to the following persons in the manner indicated:

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APPENDIX

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3. Time and Activity Report Manual Section 2.020 Work Schedule Indicator

4. 38 U.S.C. § 4316

5. RCW § 38.40.060

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085 the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the May 30, 2023, the foregoing was delivered to the following persons in the manner indicated:

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

CHRISTINA MARTIN, JASON LONGORIA, CHARLES ARNOLD, JOHN SAGER, DARREL NASH, ERIK THOMAS, DARIN FOSTER, and LUIS GONZALEZ on behalf of themselves and all others similarly situated, Appellants, v. THE STATE OF WASHINGTON, THE WASHINGTON STATE PATROL, JEFFREY DEVERE, JAY CABEZUELA, TIMOTHY WINCHELL, and JOHN BATISTE, Respondents.	)	No. 38332-6-III UNPUBLISHED OPINION

SIDDOWAY, J. — At issue on appeal is what remained of a class action proceeding following a substantial settlement in 2017. Claims under 38 U.S.C. § 4316 that were excluded from settlement of the lawsuit brought against the Washington State Patrol (WSP) by current and former WSP employees were dismissed on summary judgment.

A proposed representative of the class appeals the trial court's dismissal of the claims and its denial of the motion to substitute her as class representative. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Two claims remained following the multimillion-dollar settlement of other claims asserted in this class action brought on behalf of hundreds of current and former troopers and higher-ranking officers of the WSP. In addition to being active or former WSP employees, the class members are veterans who were called away from their civilian employment for active duty tours. The two remaining claims arise under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-35 (USERRA). Among the purposes of USERRA are to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers that can result from such service, and to prohibit discrimination against persons because of their service in the uniformed services. 38 U.S.C. § 4301(a)(1), (3).

For service members whose civilian employment is interrupted by a period of service in the uniformed services, 38 U.S.C. § 4316(a) protects their entitlement to "the seniority, and other rights and benefits determined by seniority," that the person had on the commencement of service and would have attained had they remained continuously employed.

38 U.S.C. § 4316(d) permits service members to use paid leave (vacation, annual or similar leave) during their period of uniformed service. It also forbids employers from requiring the use of such leave during that service. Among the paid leave available to

the WSP's employees is 21 days of paid military leave each year that RCW 38.40.060(1) guarantees to public employees.

At issue under the two USERRA provisions is how a WSP time and activity report (TAR) policy is applied to employees who elect to use paid leave once a period of leave exceeds 15 days. The policy—TAR § 2.020—was created by WSP Chief Financial Officer Bob Maki "to ensure all WSP employees are treated equally while on any type of long-term leave." Clerk's Papers (CP) at 316-17 (emphasis omitted). It achieves this by providing that the official WSP workweek is 8 hours a day, 5 days a week, and for employees who are on leave longer than 15 days (other than Family Medical Leave Act leave) the workweek shall be Monday through Friday, 8 a.m. to 5 p.m. In a declaration filed below, Mr. Maki explained:

> 4. The default schedule for all WSP employees is 5 days a week, 8 hours a day. Due to scheduling demands, and to provide employees with flexibility, WSP allows 'alternate schedules,' subject to management approval. Alternate schedules can include, but are not limited to, employees working 4 days a week, 10 hours a day. It can also include employees working night shifts or swing shifts. Many employees on night shifts and swing shifts are entitled to shift differential compensation.
> 5. Before the implementation of TAR § 2.020, employees taking long-term leave that were on night or swing shifts would demand shift differential even when they were taking leave and not working hours which would warrant payment of shift differential. TAR § 2.020 resolved this problem by switching all employees to the default 5 day 8 hour schedule after taking 15 consecutive days of long-term leave.

> 6. The plain language of TAR § 2.020 shows that it applies to all WSP employees taking any type of long term leave, with the exception of FMLA[1] leave. In fact, employees taking shared leave, approved temporary disability status, or long-term leave without pay change their schedules pursuant to TAR § 2.020 more often than employees taking paid Military Leave.

CP at 317 (emphasis omitted).

When deposed, Mr. Maki testified that troopers work in the WSP's field operations bureau, and he estimated that more than half of them work four 10-hour day schedules rather than five 8-hour day schedules (hereafter sometimes referred to as "four tens" and "five eights" schedules). He rejected the characterization of four 10-hour days as the "customary" schedule, however, because the default five 8-hour day schedule is established by the collective bargaining agreement (CBA) for the WSP Troop Association. CP at 573-74. An employee must get permission from management to work an alternative schedule, such as four 10-hour days, and these requests will only be granted if the alternative schedule meets operational needs and is in the best interest of the agency. WSP management has also reserved the right under the CBA to rescind an alternative schedule at any time upon 30-days' notice.

The contention of the class is that application of TAR § 2.020 violates 38 U.S.C. § 4316(a) and (d) because it "require[s] the employee to exhaust their . . . paid military leave more quickly." *See* Br. of Appellants at 4. The position of the WSP is that

[1] Family Medical Leave Act, 29 U.S.C. ch. 28.

where two differently-scheduled employees report for equivalent uniformed service, the policy better equalizes their paid leave. Were it not for the policy, the paid leave for two employees serving identical uniformed service would be 210 hours' paid leave (21 x 10) for the employee on a four tens schedule and 168 hours' paid leave (21 x 8) for the employee on the five eights schedule. TAR § 2.020 does not eliminate the discrepancy, but it reduces it.

The WSP's accounting witness, Sean Black, produced a report in which he explained that applying TAR § 2.020, the trooper on the four tens schedule receives 150 hours' pay for the first 15 days of military leave and 48 hours' pay for the remaining 6 days. By contrast, the trooper on the five eights schedule receives 120 hours' pay for the first 15 days of leave and 48 hours for the remaining 6 days. Using an assumed rate of pay of $30 per hour, the application of TAR § 2.020 reduces the discrepancy between the veterans' paid leave to $900 more for the trooper working a four tens schedule.

The parties filed cross motions for summary judgment on these remaining claims. The class members—recognizing that Christina Martin and the seven other original class representatives had not suffered an injury under the § 4316 claims—moved for leave to substitute trooper Barbara Werner as class representative.

In a declaration in support of the substitution motion and her standing, Trooper Werner testified that in September 2017, she received year-long orders to active duty at a

time when she was assigned to work a four-day, ten-hour schedule. In early October 2017, she requested military leave pursuant to RCW 38.40.060. Thereafter, she testified, she was paid for military leave at the rate of four 10-hour shifts per week until the 15th day she was absent, when "WSP changed my work schedule to five 8-hour days a week." CP at 544. In November 2018, on her return from active duty, she was returned to her detachment's four day, 10-hour work schedule. She testified that the application of TAR § 2.020, by

> charg[ing] for military leave as though I had a five day, 8-hour work schedule . . . caused my RCW 38.40.060 leave to dwindle at a rate of five days per week of absence, versus 4 days a week for my regularly scheduled work week.
>
> 21. When my RCW 38.40.060 leave balance was prematurely depleted, I was then required to substitute other forms of paid leave (or unpaid leave) to cover military days, or loose [sic] regular pay. This in fact happened, as I was required to take leave without pay starting in November 2, 2017.

CP at 545.

The WSP pointed to evidence that Trooper Werner did not request nor was she required to take consecutive days of paid military leave. It disputed on that basis that her leave was, in her words, "prematurely depleted." It pointed out that after Trooper Werner requested and was approved for a number of days of military leave in October 2017, she requested to use the six remaining days of her leave over a three-month period from November 2, 2017 to February 1, 2018.

The WSP also pointed to discovery revealing that other class members to whom TAR § 2.020 was applied after December 21, 2016, sometimes did not exhaust their military leave and did not necessarily use it right away or continuously. The situations of eight officers affected by TAR § 2.020 were discussed during Mr. Maki's deposition, revealing that four never exhausted their military leave, two others exhausted military leave in only some of the years they were eligible, and some requested to use their military leave intermittently rather than continuously. Br. of Resp'ts at 11-16.

Based on the evidence and argument, the trial court concluded that the statutory right to paid military leave provided by RCW 38.40.060 is a benefit of employment within the meaning of 38 U.S.C. § 4303(2). It held, however, that it is not a benefit based on seniority, which it must be to violate 38 U.S.C. § 4316(a). The court also held that because class members are not and have not been entitled to make their own schedule, no right based on seniority was violated.

As for the class's 38 U.S.C. § 4316(d) claim, the court held that its argument that TAR § 2.020 forced class members to take a fifth, unscheduled workday in a week failed because the fifth day was charged only after the class member's schedule reverted to a five day, 8-hour schedule.

Finally, the court held that Trooper Werner lacked standing because she had suffered no injury; she "was afforded the full twenty-one days of paid leave under

RCW 38.40.060" and "WSP never required the use of leave nor did they refuse Werner or other class members . . . the leave they were legally entitled to." CP at 645.

Trooper Werner appeals.

ANALYSIS

An appellate court reviews a grant or denial of summary judgment de novo. *Washburn v. City of Fed. Way*, 169 Wn. App. 588, 609, 283 P.3d 567 (2012). We perform the same inquiry as the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is appropriate if the record before the trial court "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We must consider all evidence in favor of the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015).

Like the trial court, we view the issue of Trooper Werner's standing and motion to be substituted as class representative as inextricably tied to the motions for summary judgment on the merits. Because class counsel conceded that the eight earlier-appointed class representatives had not been injured by violations of 38 U.S.C. § 4316, the continuing viability of the class action depended on Trooper Werner's ability to demonstrate a claim. A party who lacks standing herself cannot represent a class of

which she is not a party. *Johnston v. Beneficial Mgmt. Corp.*, 85 Wn.2d 637, 645, 538 P.2d 510 (1975).

I. THE WSP'S ALLEGED REFUSAL TO PERMIT OR REQUIRED USE OF VACATION, ANNUAL OR SIMILAR LEAVE

Trooper Werner first argues that the application of TAR § 2.020 violates 38 U.S.C. § 4316(d), which provides:

> Any person whose employment with an employer is interrupted by a period of service in the uniformed services *shall be permitted, upon request . . . to use* during such period of service *any vacation, annual, or similar leave* with pay accrued by the person before the commencement of such service. *No employer may require any such person to use* vacation, annual, or *similar leave* during such period of service.

(Emphasis added.)

Trooper Werner offered no evidence of any occasion when WSP personnel refused to permit a class member to use paid leave or required class members to use paid leave. The gist of her declaration is that when TAR § 2.020 operates following the 15th consecutive day of leave, *the policy* causes a trooper's remaining days of paid leave to entitle them to only 8 hours' pay, rather than 10 hours' pay. Her conclusory characterization is that this "require[s] the employee to exhaust their accrued paid military leave more quickly." Br. of Appellants at 4.

She assigns error on appeal to findings that she was not "required" or "forced" to take leave, characterizing these as "disputed issue[s] of fact." Br. of Appellants at 3. But

these so-called factual disputes are based solely on the conclusion she draws in her declaration. "An affidavit submitted in support of or in response to a motion for summary judgment 'does not raise a genuine issue of fact unless it sets forth *facts evidentiary in nature*, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion.'" *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011) (emphasis added) (quoting *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)). "'[U]ltimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact.'" *Id.* (quoting *Rugg*, 115 Wn. App. at 224).

Facts "evidentiary in nature" were presented in connection with the cross motions for summary judgment. Evidence was presented that class members, including Trooper Werner, do not always use their military leave on continuous days, and it is not uncommon for them to use less than all of their available leave. Evidentiary facts to support Trooper Werner's contentions were lacking: again, she did not present evidence of any occasion when WSP personnel required or forced a class member to use paid leave.

In her reply brief, Trooper Werner characterizes what TAR § 2.020 "requires" differently: "an employee affected by TAR § 2.020 is being compelled to burn through

their paid military leave benefit both more quickly *and for less compensation*." Reply Br. of Appellants at 6 (emphasis added). There's the rub.

Until TAR § 2.020 operates to adjust an alternate schedule, WSP employees working a four tens schedule who take a day of paid leave have an advantage over employees working a five eights schedule: When the former employees take a day off, they get 10 hours of relief from work with 10 hours' pay, rather than 8 hours relief from work with 8 hours' pay. They get to enjoy this benefit for short-term leaves and even for the first 15 days of long-term leave. TAR § 2.020 only evens the playing field following the 15th day of a long-term leave.

Contrary to Trooper Werner's "premature depletion" charge, the disparity means that during the first 15 days of military leave, the employees on a four tens schedule are able to exhaust their paid military leave *more slowly*. During that period, they are able to preserve their usual weekly income by requesting and using only 4 of their 21 days of statutory leave, which is what Trooper Werner did in October 2017. To preserve *their* usual weekly income, employees on a five eights schedule must request and use up 5 leave days.

After the 15th day, TAR § 2.020 does not make employees on a four tens schedule "burn through [their] military leave days faster"—a leave "day" for them, like their coworkers on a five eights schedule, is still a day. CP at 95. But they are then receiving

less compensation for their leave days. They are now receiving only 100 percent of what an employee on a five eights schedule receives for a leave day. Earlier, they were receiving 125 percent of the amount an employee on a five eights schedule receives for a leave day.

Applying the plain language of 38 U.S.C. § 4316(d), Trooper Werner, on behalf of the class, presented no viable cause of action for a violation of that statute.

We cannot leave discussion of the § 4316(d) claim without addressing Trooper Werner's significant reliance for this claim on *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003) and RCW 38.40.060(1), even though we deem them irrelevant.

Butterbaugh construed a statute not involved in this case: 5 U.S.C. § 6323(a)(1), under which the appellants—correctional officers at a federal prison who were also members of the military reserves—were entitled to 15 days of paid reserve training leave. Their employer, the Department of Justice, had included days on which employees were not scheduled to work (e.g., weekends and holidays) when calculating how much leave an employee took. Accordingly, an employee with a Monday-Friday work week who attended reserve training from one Friday to the next would be charged for eight days of training, even though the employee had only been absent for six workdays. *Butterbaugh*, 336 F.3d at 1333. As a matter of statutory construction, *Butterbaugh* held that "the

'days' that section 6323(a)(1) refers to are *leave* days, not 'training days' or 'reserve duty days,'" so employees should only be charged for the days on which they were scheduled to work. *Id.* at 1337.

Butterbaugh, again, construed a federal law unrelated to this case. And the opinion does not address or provide even the slightest suggestion of how the federal court would have viewed a prison policy that, in the interest of parity, prescribed a standard work schedule for correctional officers during their reserve training: one that would assure them their standard rate of pay, but eliminate distortions that could arise from different "daily" schedules. *Butterbaugh* is irrelevant to this appeal.

RCW 38.40.060(1) provides that public employees "shall be entitled to and shall be granted military leave of absence from such employment for a period not exceeding twenty-one days during each year beginning October 1st and ending the following September 30th in order that the person may report for required military duty, training, or drills . . . ." RCW 38.40.060(4)(a) provides that an employee "shall be charged military leave only for days that he or she is scheduled to work for the state or the county, city, or other political subdivision."

TAR § 2.020 provides in relevant part:

> The official Washington State Patrol workweek begins at 0000 on Sunday and ends at 2359 the following Saturday. Scheduled employees are assigned 8 regular hours per day, 5 days per week. Any alternative

> work schedule must be in conformance with the Civil Service Rules or Bargaining Unit Agreements.
>
> A schedule change can be a monthly or weekly rotation. It can also occur when an employee's schedule changes due to training, military leave, shared leave, approved temporary disability status, long-term leave without pay, required meetings, court appearances, change of assignment, or personnel shortages, etc.
>
> The work schedule for all personnel on military leave, shared leave, approved temporary disability status, or long-term leave without pay longer than 15 working days shall be Monday through Friday, 8 a.m. to 5 p.m., WSI 01, with the exception of those on approved Family Medical Leave Act (FMLA) leave.

CP at 321. The application of TAR § 2.020 to veterans on long-term leave does not conflict with RCW 38.40.060. A WSP employee is charged military leave "only for days that he or she is scheduled to work."

Trooper Werner argues that RCW 38.40.060 cannot be construed to permit an adjustment like that made by TAR § 2.020 because it would "frustrate the purpose" of the statute. Br. of Appellants at 24. She argues that if the WSP converted the schedule of an employee on military leave to seven days a week, or refused to schedule employees on leave for any work at all, it could thereby force the employee to use paid leave days for weekends or could avoid its military paid leave obligation altogether, which would be "absurd result[s]." Br. of Appellants at 25. Those *would* be absurd results. They might well be actionable under 38 U.S.C. § 4311, a nondiscrimination provision under USERRA that is not the basis of a claim by the class.

The fact that two hypothetical, extreme, discriminatory end-runs around the law would fail is not an argument against a reasonable employment policy, however. Nothing in RCW 38.40.060 is frustrated by a policy that allows employees on a four tens schedule to keep their $900-or-so paid leave premium, but reduces, at least, the pay disparity between them and their fellow veterans. *And cf. Bearden v. City of Ocean Shores*, __ F.Supp.3d __, 2022 WL 17532303 at *8 (W.D. Wash. 2022) (a court will not add words to the unambiguous language in RCW 38.40.060(1)).

The trial court properly granted summary judgment to the WSP and denied it to Trooper Werner.

II. THE WSP'S ALLEGED FAILURE TO RECOGNIZE THE CLASS MEMBERS' RIGHT TO A BENEFIT DETERMINED BY SENIORITY

Trooper Werner next argues that the WSP violated her and other class members' rights under 38 U.S.C. § 4316(a), which provides:

> A person who is reemployed under this chapter is entitled to the *seniority and other rights and benefits determined by seniority* that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(Emphasis added.) According to Trooper Werner's briefing, the "right[ ] or benefit" at issue is statutory military leave under RCW 38.40.060. Br. of Appellants at 26-38. She claims to have demonstrated that it is arguably a reward for length of service. *Id.* at

35-38. She characterizes RCW 38.40.060 as "provid[ing] a seniority-based benefit that accrues with longevity in employment." Br. of Appellants at 35.

Even if statutory military leave is a benefit determined by seniority, a claim for violating 38 U.S.C. § 4316(a) would require demonstrating that Trooper Werner and class members have, upon reemployment by the WSP, been denied the benefit. Like the trial court, we conclude that one reason the § 4316(a) claim fails is that, as already discussed, there is no evidence the benefit was denied. Because the parties focused their cross motions on whether statutory military leave is a "benefit[ ] determined by seniority" covered by the statute, we review that issue as well.

> "Seniority" is a defined by USERRA to mean
>
> longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

38 U.S.C. § 4303(12). The United States Supreme Court held in *Alabama Power Co. v. Davis* that a right and benefit is seniority-based if the right (1) "would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer," and (2) if "it is in the nature of a reward for length of service." 431 U.S. 581, 589, 97 S. Ct. 2002, 52 L. Ed. 2d 595 (1977). While *Alabama Power* applied veterans' rights laws predating USERRA, the decision remains controlling. Congress emphasized when enacting USERRA that to the extent consistent with USERRA, the large body of case law that had developed under predecessor veterans' rights laws dating back to the

Selective Training and Services Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, "'remained in full force and effect.'" *Gross v. PPG Indus. Inc.*, 636 F.3d 884, 888 (7th Cir. 2011) (quoting 20 C.F.R. § 1002.2).

In the Supreme Court's first encounter with a predecessor of § 4316(a), it adopted an escalator analogy that courts have consistently referred to as the "escalator principle,"[2] stating that a veteran "'does not step back on the seniority escalator at the point he stepped off'" to serve a tour of duty (or at that time, in a world war); instead, "'He steps back on at the precise point he would have occupied had he kept his position continuously during the war.'" *Alabama Power*, 431 U.S. at 584 (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946)).

In *Alabama Power*, the Supreme Court characterized one axis of analysis for determining whether a benefit is a right of seniority as whether the benefit "is in the nature of a reward for length of service," in which case "it is a 'perquisite of seniority,'" or whether it "is in the nature of short-term compensation for services rendered," in which case "it is not an aspect of seniority." *Id*. at 581, 589. The parties agree that it is that axis of analysis that controls here. *See* Br. of Appellants at 34-35; Br. of Resp'ts at

[2] *E.g.*, *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 175, 84 S. Ct. 595, 11 L. Ed. 2d 590 (1964); *Huhmann v. Fed. Express Corp.*, 874 F.3d 1102, 1108 (9th Cir. 2017); *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 175 (7th Cir. 2014).

19 n.2 (agreeing that the second axis, "reasonable certainty the benefit would have accrued," is satisfied).

Trooper Werner does not present evidence that supports her argument that statutory military leave is a seniority-based benefit that accrues with longevity in employment. There is no vesting period. *Cf. Alabama Power*, 431 U.S. at 593 (citing the lengthy vesting period as the "most significant factor" pointing to pension benefits being a reward for length of service). RCW 38.40.060 applies to employees regardless of the length of their employment. *Cf. Coffy v. Republic Steel Corp.*, 447 U.S. 191, 198, 205, 100 S. Ct. 2100, 65 L. Ed. 2d 53 (1980) (length of employment affected supplemental unemployment benefits in three ways: a two years' continuous service requirement, the benefit was based in part on the number of credit units accrued, and it was based on hourly wage achieved). Statutory military leave can be used only for military service or training, and expires annually if unused. *Cf. Moss v. United Airlines*, 20 F.4th 375, 387, (7th Cir. 2021) (fact that sick leave could not be used to augment an employment transition or extend a vacation made it compensation-like, not reward-like). Statutory military leave is just as available to a trooper who leaves the WSP for other public employment in Washington as it is to a trooper who continues in employment with the WSP.

Trooper Werner argues, however, that military leave is "forward looking" because it provides an incentive for becoming employed by the WSP. Reply Br. of Appellants at 3. But providing added compensation for services rendered (beyond wages) is also an incentive for becoming employed. The incentivizing nature of military leave does not answer the question whether it is a benefit determined by seniority. If "forward looking" means only that a benefit is an incentive to becoming employed, then offering additional compensation for services rendered and offering rewards for length of service are *both* forward-looking.

Trooper Werner also argues that statutory military leave is not compensation for services rendered because it is not based on days and hours worked. What is critical for the trooper to demonstrate, however, is that the "benefit[is] determined by seniority," not that it may lack some attributes of compensation for services. 38 U.S.C. § 4316(a). This is especially so because this was a legislatively-adopted benefit, not an employer-adopted one.[3] The terms on which it is available might have been motivated in whole or in part by state concerns unrelated to rewarding longevity or compensating service.

[3] The case law cited by both parties all involves rights and benefits conferred by an employer, and the courts analyze features of the benefits with a view to whether *the employer* was motivated by an intent to further compensate service or reward length of service. Neither party analyzes whether 38 U.S.C. § 4316(a) can or should apply to a legislatively-conferred benefit that might have been motivated by other state concerns. For example, RCW 38.40.060 was enacted in 1939 and was made effective immediately as "necessary for the immediate preservation of the peace, health and safety of [s]tate . . .

The 38 U.S.C. § 4316(a) claim fails for the additional reason that Trooper Werner fails to demonstrate any facts supporting statutory military pay being a benefit determined by seniority. Here again, the trial court properly granted summary judgment to the WSP and denied it to Trooper Werner.

III. AFFIRMANCE OF THE SUMMARY JUDGMENT RULINGS COMPELS AFFIRMANCE OF DENIAL OF THE MOTION TO SUBSTITUTE TROOPER WERNER AS CLASS REPRESENTATIVE

Trooper Werner's remaining assignment of error is the denial of the motion to substitute her as class representative.

It is a requirement of a class action that the claims or defenses of the representative parties are typical of the claims or defenses of the class. CR 23(a)(3). The burden of demonstrating that the requirements of CR 23 are satisfied is borne by the plaintiffs seeking class certification. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003). CR 23(c) provides that orders on whether a class action will be maintained are "conditional, and may be altered or amended before the decision on the merits." CR 23(c)(1). Accordingly, it was appropriate for Trooper Werner and class counsel to seek to substitute her for the eight earlier-appointed representatives who they conceded have no claims under 38 U.S.C. § 4316(a) and (d). Appellate review of a trial court's decision regarding class certification, including a motion to substitute the class

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and for the support of the state government and its existing institutions." LAWS OF 1939, ch. 113, § 2.

representative, is for a manifest abuse of discretion. *Elter v. United Servs. Auto. Ass'n*, 17 Wn. App. 2d 643, 654, 487 P.3d 539 (2021); *Dunlap v. Rauch*, 24 Wash. 620, 625, 64 P. 807 (1901).

As earlier observed, the continuing viability of the class action depended on Trooper Werner's ability to demonstrate claims for violations of 38 U.S.C. § 4316(a) and (d). She demonstrated neither. A party who lacks standing herself cannot represent a class of which she is not a party. *Johnston*, 85 Wn.2d at 645.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

CHRISTINA MARTIN, JASON LONGORIA, CHARLES ARNOLD, JOHN SAGER, DARREL NASH, ERIK THOMAS, DARIN FOSTER, and LUIS GONZALEZ on behalf of themselves and all others similarly situated, Plaintiffs, v. THE STATE OF WASHINGTON, the WASHINGTON STATE PATROL, JEFFREY DEVERE, JAY CABEZUAELA, TIMOTHY WINCHELL, and JOHN BATISTE, Defendants.	NO. 14-2-00016-7 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION TO SUBSTITUTE CLASS REPRESENTATIVE

This matter came before the Court on April 16, 2021, upon both Defendants' and Plaintiffs' motions for summary judgment regarding the sole remaining USERRA claim. The Court heard oral argument of counsel and considered the pleadings on file, including but not limited to:

1. Defendants' Motion for Summary Judgment;
2. Defendants' Memorandum in Support of Motion for Summary Judgment
3. Declaration of Bob Maki;

4. Declaration of Sean Black;
5. Plaintiffs' Response to Defendants' Motion for Summary Judgment;
6. Defendants' Reply Memorandum;
7. Plaintiffs' Cross Motion for Summary Judgment on Plaintiffs' Claim Under USERRA;
8. Plaintiffs' Memorandum in Support of Cross Motion for Summary Judgment on Plaintiffs' Claim Under USERRA;
9. Declaration of Barbara Annett Werner in Support of Plaintiffs' Cross Motion for Summary Judgment;
10. Declaration of Thomas Jarrard in Support of Plaintiffs' Cross Motion for Summary Judgment;
11. Plaintiffs' Motion to Substitute Class Representative;
12. Plaintiffs' Memorandum in Support of Motion To Substitute Class Representative;
13. Declaration of Barbara Annett Werner in Support of Plaintiffs' Motion To Substitute Class Represenative;
14. Defendants' Response Memorandum in Opposition to Plaintiffs' Cross Motion for Summary Judgment;
15. Declaration of Carl P. Warring Re. Cross Motion for Summary Judgment;
16. Defendants' Reply Memorandum; and
17. Plaintiffs' Reply Memorandum.

On June 8, 2021, the Court issued an opinion on Defendants' Motion for Summary Judgment on the Sole Remaining USERRA Claim and it is attached as Ex. A and incorporated herein by reference.

Now, being fully informed, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiffs' Cross Motion for Summary Judgment and further **DENIES** Plaintiffs' Motion To Substitute Class Representative. Plaintiff's sole remaining USERRA claims against Defendants are **DISMISSED** hereby with prejudice.

DATED this 21 day of June, 2021.

THE HONORABLE JUDGE ANNETTE PLESE

Presented by:

ROBERT W. FERGUSON
ATTORNEY GENERAL

CARL P. WARRING, WSBA# 27164
Assistant Attorney General
Attorneys for State of Washington

Approved as to form:

LAW OFFICE OF THOMAS JARRARD, PLLC

Electronically Approved 6/14/21 11:51 a.m.

THOMAS G. JARRARD, WSBA# 39774
Attorney for Plaintiffs'

PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this _____ day of June, 2021, at Spokane, Washington.

NIKKI GAMON

EXHIBIT A

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

CHRISTINA MARTIN, JASON LONGORIA, CHARLES ARNOLD, JOHN SAGER, DARRELL NASH, ERIK THOMAS, DARIN FOSTER, AND LOUIS GONZALEZ on behalf of themselves and all others similarly situated, Plaintiffs, Vs. THE STATE OF WASHINGTON, the WASHINGTON STATE PATROL, JEFFREY DEVERE, JAY CABEZUAELA, TIMOTHY WINCHELL, and JOHN BATISTE, Defendants.	)	NO. 14-2-00016-7 **COURT'S OPINION** on DEFENDANTS' MOTION FOR SJ on SOLE REMAINING USSERRA CLAIM

BACKGROUND

Plaintiffs are currently suing the Washington State Patrol (WSP) and Washington State for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Plaintiffs allege that the Time and Activity Report Manual (TAR) § 2.020 of the WSP employment policy violates 38 U.S.C § 4316 as defined by 38 U.S.C § 4303(2).

WSP has a default schedule for their employees, which is a five (5) days a week, eight (8) hours a day. *Decl. of B. Maki.* There are alternative schedules provided to employees that allow flexibility to the troopers while assisting WSP to

meet scheduling demands. One of these alternative schedules is working four (4) days a week, ten (10) hour days with management approval. TAR § 2.020 essentially provides that employees taking over fifteen (15) consecutive days of leave (military, shared, temporary disability, or unpaid long term) are changed to an eight-hour, five day a week (5-8) work schedule. The Plaintiffs in this case are troopers or sergeants who have used paid military leave after December 21, 2016 and assert they are aggrieved.

USERRA is the correct act to bring such claims under. *See RCW 73.16.070.* The allegations brought by Plaintiffs is a claim for a violation of rights under 38 U.S.C § 4316.

Right or Benefit of Employment

RCW 38.40.060 provides public employees in Washington State will receive 21 days of paid military leave per year. 38 U.S.C § 4316 provides individual causes of action for violations of (a)-(e). The Plaintiff's originally filed this action on January 3, 2014. Plaintiff's amended their Complaint on January 9, 2015. After negotiations, the parties ultimately resolved all other issues in May 2017, except their current claim regarding statutory military leave per year under RCW 38.40.060 that accrued on or after December 21, 2016. *Settlement Agreement, pg. 42.*

After their settlement, Plaintiffs' remaining claim falls under § 4316(a) and (d). To establish a claim under (a), Plaintiffs must show that RCW 38.40.060 confers a right or benefit of employment.

As Plaintiffs argue, RCW 38.40.060 confers a benefit of employment. A benefit of employment is defined under 38 U.S.C § 4303(2) as "[a]ny advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of employment."

The paid military leave in question fits within this definition. Plaintiffs cite to authorities to substantiate precedent for this assertion, including *United States v. Missouri, 67 F. Supp. 3d 1047, 1051 (W.D. Mo. 2014)*, which states under 5 U.S.C. § 6323(a) (the federal paid military leave allowance) that paid military leave is a well-established benefit of employment. Plaintiff, also, makes use of 20 C.F.R. 1002.210, providing that USERRA, also, protects rights and benefits protected by statutes such as RCW 38.40.060. Finally, Plaintiffs make use of *White v. United Airlines, Inc., 987 F.3d 616 (7th Cir. 2021)* determining that rights and benefits under the statute should be construed broadly, and that "paid leave is included."

Defendants offering is less convincing. Citing *Crews v. City of Mt. Vernon, 567 F.3d 860 (7th Cir. 2009),* Defendants purport that paid military leave granted by the statute is similar in nature to "[a] scheduling benefit that only applies to military employees." The statute granting military leave is not similar enough to that of an employer enacted policy to substantiate Defendants' argument. Defendants, also, cite to an opinion by the Attorney General of Washington in support of their assertion. The argument relies upon these two authorities and a textual interpretation, which claims RCW 38.40.060 must "accrue" over time. This argument is, also, misplaced as the leave granted by RCW 38.40.060 accrues annually, but is not retained if unused.

Plaintiffs make a stronger case with use of the C.F.R. and similar statutory interpretation for purposes of federal law. Although the RCW is clearly Washington law, it must be evaluated under USERRA to determine if uniformed services members rights were violated. Subsequently, deferring to the C.F.R.'s on relevant law is highly persuasive. Using the Seventh Circuit case, also, lends persuasive credibility to Plaintiff's assertion. *White, 987 F.3d 616.* RCW 38.40.060 should be considered a "benefit or right of employment" for purposes of 38 U.S.C § 4316 claim analysis.

The Court must look at whether WSP violated § 4316(a), which prohibits denying uniformed service members seniority or seniority-based rights and benefits during and after their military leave.

§ 4316(a) Claim

Plaintiffs argued that changing Plaintiffs from a 4-10 to a 5-8 schedule after fifteen consecutive days of leave charges an extra day of leave for which Plaintiffs would not normally work. It is claimed that this purports to both (a) and (d) violations.

First, considering § 4316(a), Plaintiffs insist that there is a violation of a benefit or right. However, this right must be based on seniority to substantiate a claim. The plain text of the statute prohibits denial of "seniority and other rights and benefits determined by seniority." Defendants recognized this requirement and argued that a leave allowance granted by statute is not a seniority-based right or benefit. While Plaintiffs assert that Defendants' "hair-splitting" argument is misaligned, the statute makes clear that those rights or benefits must be seniority based; RCW 38.40.060 is clearly not.

Additionally, Defendants have presented evidence that Troopers or Sergeants are not and have not been entitled to make their own schedule. Thus, there is no right based on seniority that was violated as required by § 4316(a). *See Decl. of Sean Black Ex. A at 1-2; Decl. of Bob Maki Ex. A at 2.* As such, Summary Judgment should be awarded to Defendants on the § 4316(a) claim.

§4316(d) Claim

A § 4316(d) claim rests upon an employer **requiring** uniformed services members **to use paid military leave** or various other forms of leave or requires that the employer refuse the leave request.

Plaintiffs assert that the fifth day of what normally would be a four-day work week would be a required use of military leave for a day that would not normally be worked. This assertion rests upon *Butterbaugh v. Dep't. of Justice, 336 F.3d 1332 (2003)*, which holds that uniformed service member employees cannot be charged paid time off for days that they would not normally be scheduled to work. *Butterbaugh* and the instant matter have similar facts. However, one material fact is distinct: WSP had the sole authority to change the schedules of the sergeants and troopers. Defendants attack this argument claiming a lack of standing, but Plaintiffs' claim may fail as a matter of law, as well.

WSP's authority to alter the schedules of the troopers precludes a claim for being charged extra days under the statute. The purpose of TAR § 2.020 was to alleviate differences in pay between separate schedules. Even after application of TAR § 2.020, individuals on a 4-10 schedule still get more hours than those taking leave on a 5-8 schedule. As WSP holds the scheduling authority, alteration of a schedule to the normal hours do not require use of additional paid military leave. WSP's authority to alter schedules would create an obligation to work that 5-8 schedule if the troopers were to return from leave. Ultimately, this does not constitute a required use of leave, and the §4316(d) claim fails.

Class and Representative Standing

Plaintiffs, also, lack standing under the § 4316(d) claim. Previous members of the class were essentially ejected through Defendants' standing argument, so Plaintiffs attempted to substitute Werner as the new class representative. Plaintiffs claim that Werner fits as a class representative and rely on only a statement in their *Motion to Substitute Representative* and the testimony of Barbara Werner.

Plaintiffs demonstrate that Werner was one of the class members identified in WSP's discovery responses and allege that Werner has suffered loss of military

leave days. One would assume Werner's declaration supports this, but Defendants have no trouble shooting holes in this claim.

Defendants' rebuttal to Plaintiffs' §4316(d) claim is that all named class members, including Barbara Werner, lack standing because they are not aggrieved by TAR § 2.020. This assertion is correct.

Barbara Werner and the other members of the class lack standing. As stated before, the plain language of 38 U.S.C § 4316(d) **requires a refusal** of a request to use paid leave or **a requirement to use paid leave** by the employer. Werner lacks standing because she was afforded the entirety of the twenty-one days of paid military leave and was not required to use other forms of paid leave resulting from the "premature" exhaustion. *Def.'s Reply Memo at 4-5.*

Additionally, Werner had never taken a full week of paid military leave after TAR § 2.020 had taken effect. Subsequently, Werner was not aggrieved because she was never "forced" to take a fifth day off any week nor was she required to use other forms of leave. Werner was afforded the full twenty-one days of paid leave under RCW 38.40.060. WSP never required the use of leave nor did they refuse Werner or other class members, the leave they were legally entitled to.

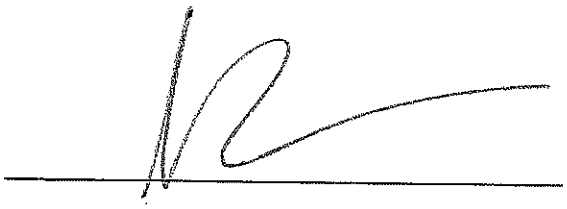
CONCLUSION

In sum, RCW 38.40.060 implies a benefit of employment, but both the § 4316(a) and § 4316(d) claim fail as a matter of law. Plaintiffs lack standing for their (a) and (d) claims since each named class member, including Werner, are not aggrieved by TAR § 2.020.

Ultimately, Plaintiffs' motion to substitute Barbara Werner is denied. Defendants' motion for summary judgment is granted for both claims under § 4316(a) and (d).

Defendant should submit an order to the Court. If there is no agreement to the language on the order, please contact my judicial assistant for a presentment date.

Dated June 8, 2021



Judge Annette Plese

2.020 Work Schedule Indicator

The Work Schedule Indicator (WSI) is used to determine the number of hours in a work day and the scheduled days off in a work week.

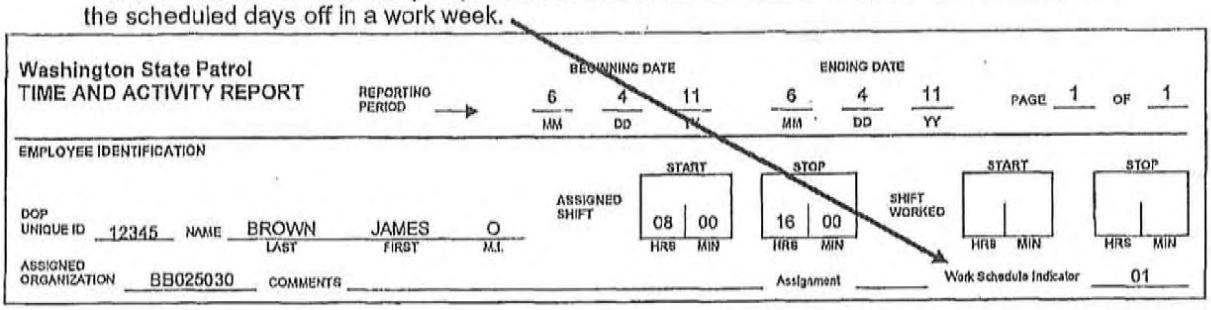


Figure 2-4

The WSI must always be recorded on the TAR.

Record the correct WSI from the list in ***Appendix B***. Use the WSI code that matches the number of hours in your shift and the scheduled days off for your workweek.

The official Washington State Patrol workweek begins at 0000 on Sunday and ends at 2359 the following Saturday. Scheduled employees are assigned 8 regular hours per day, 5 days per week. Any alternative work schedule must be in conformance with the Civil Service Rules or Bargaining Unit Agreements.

A schedule change can be a monthly or weekly rotation. It can also occur when an employee's schedule changes due to training, military leave, shared leave, approved temporary disability status, long-term leave without pay, required meetings, court appearances, change of assignment, or personnel shortages, etc.

The work schedule for all personnel on military leave, shared leave, approved temporary disability status, or long-term leave without pay longer than 15 working days shall be Monday through Friday, 8 a.m. to 5 p.m., WSI 01, with the exception of those on approved Family Medical Leave Act (FMLA) leave.

Personnel on military leave, shared leave, approved temporary disability status, or long-term leave without pay 15 working days or less may be assigned a Monday through Friday, 8 a.m. to 5 p.m. work schedule, with the exception of those on approved FMLA leave.

Employees on military leave longer than 15 working days are strongly encouraged to be placed on Automatic Time Distribution (ATD) with activity code 9031 – Leave Without Pay (LWOP) – Military. When on ATD, only non-LWOP TARs must be completed and submitted.

WSI 15 should be used when the assigned shift or shift worked cannot be coded as a **continuous shift** (Refer to Civil Service Rules or Bargaining Unit Agreements). An example of a *split shift* is found under **Split Shift**, Chapter 3, of this manual. Record actual (total) hours worked in the REG HOURS column (8, 10, 12 hours, etc.).

- *WSI 15 is used when authorized by Civil Service Rules or Bargaining Unit Agreements.*
- *WSI 15 should only be used when no other WSI applies.*
- *WSI 99 should only be used when no other WSI applies and only for those days.*
- *WSI 99 is only valid for members of the WSPTA and WSPLA.*

The supervisor's signature certifies compliance with the agency's requirements and verifies that:

- The employee worked the number of hours he/she is paid for.
- The employee recorded overtime for hours in excess of 40/week when entitled.
- The assigned start and stop time is correct for each day included in the TAR.

☞ *To ensure correct payment of shift premiums, employees who start work before 6:00 a.m. or stop work after 6:00 p.m. must submit a separate TAR for each day with a different actual start and stop time than the previous day.*

When employees switch between WSIs (e.g., from WSI 01 to WSI 08), their supervisor will ensure that the time is recorded properly and:

- Appropriate Regular Days Off (RDOs) are taken.
- Overtime is recorded correctly.
- Regular hours equal 40 for the week.

2.020.000 Flexible-Rotating Schedules

Flexible/rotating schedules are defined as any work schedule that deviates from the 40-hour work week. Examples of Work Schedule Indicators (WSI) used with flex schedules include 16-17, 18-19, and 25-26* (*reserved for Executive Protection Unit use only).

Prior to working this type of schedule:

- The employee must request the schedule change from the Human Resource Division (HRD), as their work week must be modified from the WSP standard of Sunday through Saturday.
- The employee cannot begin the schedule until they receive the IOC from HRD, authorizing the schedule change.
- The employee is not allowed to rotate their flex day (the RDO that they receive for doing this schedule) or change the hours on this day.

United States Code Annotated
Title 38. Veterans' Benefits (Refs & Annos)
Part III. Readjustment and Related Benefits (Refs & Annos)
Chapter 43. Employment and Reemployment Rights of Members of the Uniformed Services (Refs & Annos)
Subchapter II. Employment and Reemployment Rights and Limitations; Prohibitions (Refs & Annos)

38 U.S.C.A. § 4316

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

Effective: November 1, 2000
Currentness

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)(A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.

(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

(e)(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(2) For purposes of section 4312(e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

CREDIT(S)

(Added Pub.L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3160; amended Pub.L. 104-275, Title III, § 311(6), Oct. 9, 1996, 110 Stat. 3335; Pub.L. 106-419, Title III, § 323(b), Nov. 1, 2000, 114 Stat. 1855.)

Notes of Decisions (33)

38 U.S.C.A. § 4316, 38 USCA § 4316

Current through P.L. 118-3. Some statute sections may be more current, see credits for details.

End of Document

West's Revised Code of Washington Annotated
Title 38. Militia and Military Affairs (Refs & Annos)
Chapter 38.40. Miscellaneous Provisions (Refs & Annos)

West's RCWA 38.40.060

38.40.060. Military leave for public employees

Effective: June 7, 2018
Currentness

(1) Every officer and employee of the state or of any county, city, or other political subdivision thereof who is a member of the Washington national guard or of the army, navy, air force, coast guard, or marine corps reserve of the United States, or of any organized reserve or armed forces of the United States shall be entitled to and shall be granted military leave of absence from such employment for a period not exceeding twenty-one days during each year beginning October 1st and ending the following September 30th in order that the person may report for required military duty, training, or drills including those in the national guard under Title 10 U.S.C., Title 32 U.S.C., or state active status.

(2) Such military leave of absence shall be in addition to any vacation or sick leave to which the officer or employee might otherwise be entitled, and shall not involve any loss of efficiency rating, privileges, or pay.

(3) During the period of military leave, the officer or employee shall receive from the state, or the county, city, or other political subdivision, his or her normal pay.

(4)(a) The officer or employee shall be charged military leave only for days that he or she is scheduled to work for the state or the county, city, or other political subdivision.

(b) If the officer or employee is scheduled to work a shift that begins on one calendar day and ends on the next calendar day, the officer or employee shall be charged military leave for only the first calendar day. If the officer or employee is scheduled to work a shift that begins on one calendar day and ends later than the next calendar day, the officer or employee shall be charged military leave for each calendar day except the calendar day on which the shift ends.

Credits
[2018 c 99 § 1, eff. June 7, 2018; 2010 c 91 § 1, eff. June 10, 2010; 2008 c 71 § 5, eff. June 12, 2008; 2001 c 71 § 1; 1991 c 25 § 1; 1989 c 19 § 50; 1957 c 236 § 1; 1939 c 113 § 1.]

OFFICIAL NOTES

Effective date--2001 c 71: “This act takes effect October 1, 2001.” [2001 c 71 § 2.]

Application--1991 c 25: “This act applies to all public employees and officers who reported for active duty or active training duty, under RCW 38.40.060, on or after August 2, 1990.” [1991 c 25 § 2.]

Notes of Decisions (12)

West's RCWA 38.40.060, WA ST 38.40.060
Current with effective legislation through chapter 471 of the 2023 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

End of Document

LAW OFFICE OF THOMAS G. JARRARD

May 30, 2023 - 12:28 PM

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Superior Court Case Number:	14-2-00016-7

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