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NO. 68550-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBRA PUGH, AARON BOWMAN and FLOANN BAUTISTA on their own behalf and on behalf of all persons similarly situated,

Plaintiffs/Respondents,

v.

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

Defendant/Appellant,

WASHINGTON STATE NURSES ASSOCIATION,

Intervenor/Appellant.

King County Superior Court No. 10-2-33125-5 SEA,
the Honorable Harry J. McCarthy presiding

BRIEF OF APPELLANT KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, D/B/A EVERGREEN HOSPITAL MEDICAL CENTER

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ORIGINAL

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I. INTRODUCTION

The trial court committed fundamental errors which, if uncorrected, undermine decades of established precedent, including the strong public policy in favor of settlement of disputes.

The court invalidated a settlement agreement between the Washington State Nurses Association ("WSNA") and King County Public Hospital District No. 2 d/b/a Evergreen Hospital Medical Center ("Evergreen" or "District") arising from a separate lawsuit because it determined there was a defense to the WSNA claim. The court ignored basic contract principles that apply to settlements of disputes. If the presence of a meritorious defense establishes a basis to later set aside a settlement, no settlement is secure. The court then proceeded to invalidate 1,157 other settlement agreements because those agreements adopted the terms of the WSNA settlement. The trial court invalidated the settlements at the request of one nurse, Ms. Bautista, who settled, but thought other nurses got too much, while she got too little, when settling potential claims. The trial court should neither have permitted Ms. Bautista to repudiate her agreement, nor invalidate agreements entered into by others. Instead, it should have enforced her agreement and granted summary judgment to the District.

The trial court committed fundamental errors in granting class certification, ignoring both binding precedent and the specific facts presented. Its adoption of a mere pleading standard for class certification represents a stark departure from the requirements of CR 23. The evidence before it clearly established that essential prerequisites to class certification are absent from this case. There is no common answer to Plaintiffs' assertion that they missed rest or meal breaks. CR 23 does not exist to permit plaintiffs to combine similar causes of action with materially different facts. Mr. Bowman's and Ms. Pugh's experience as emergency nurses is not common, either to other Emergency Department nurses or to nurses in other medical departments. Neither they nor Ms. Bautista represents the District's other registered nurses ("RNs"), who have implicitly rejected class participation by settling individually. Ms. Pugh and Mr. Bowman may pursue and attempt to prove their individual rest and meal break cases and Ms. Bautista her meal break case, but the court should have denied class certification.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by granting plaintiffs' motion for partial summary judgment and denying Evergreen's motion for partial summary judgment by order entered on March 14, 2012.

Issues Pertaining to Assignment of Error:

1. Do the provisions of CR 23(e) requiring court approval of class action settlements extend to settlements of non-class litigation?

2. Does a potential dispute over WSNA's standing preclude private settlement of its claims?

3. Did the trial court have authority to invalidate a settlement between the hospital and WSNA, despite WSNA's capacity to enter into the agreement as the exclusive bargaining representative of the RNs?

4. May putative class representative Bautista, who settled all her claims regarding missed breaks (despite dissatisfaction over the settlement because other RNs who had missed no breaks also received settlement checks from the District) and was not misled by the settlement and release she signed, commence an action for class claims because she now believes she might get more money?

5. Should the trial court have invalidated the individual settlements and releases entered into by over 1,100 RNs, particularly without any request from those RNs to do so?

B. The trial court erred by granting plaintiffs' motion for class certification by order entered on March 14, 2012; it should have entered an order denying class certification.

Issues Pertaining to Assignment of Error:

1. Did the trial court's certification of a class based on mere allegations satisfy the rigorous analysis required by CR 23 to assure that all prerequisites of the rule have been satisfied?

2. Where the undisputed evidence showed significant differences in the nature of the medical practices in the District's 26 departments and in the experience of individual RNs within departments regarding whether or how often they "missed" rest and meal breaks, and substantial independence of managers in implementing the District's policy that RNs were to get breaks, did the plaintiffs meet their burden to show that a class proceeding would generate a "common answer" to the claims of missed breaks, or does the record demonstrate that class proceedings are inappropriate?

3. Will common facts regarding missed break claims predominate where some RNs worked entirely off-site with full control over the timing of their breaks; RNs in some, but not all, departments shared duties with non-nursing health professionals; some departments never or rarely had unanticipated patients while others like the Emergency Department had large unscheduled patient loads; and the plaintiffs' own testimony about missed breaks in the Emergency Department was that "day shift" RNs almost always got their breaks?

4. Did the trial court err in certifying the class for alleged missed meal breaks where the evidence demonstrated that at least some of the putative class members waived an uninterrupted meal break, triggering the need for individualized fact-finding on liability?

5. Are three former employees, two from one department, adequate class representatives for current hospital employees, most of whom have already implicitly rejected the course of action the three have taken?

6. Did the plaintiffs demonstrate compliance with all CR 23 prerequisites for the "settlement" subclass?

7. Does the trial court's class definition as "[a]ll registered nurses . . . who . . . were denied rest and/or meal breaks" require the court to determine liability to individual RNs before class membership is known?

III. STATEMENT OF THE CASE

King County Public Hospital District No. 2 operates the 275-bed Evergreen Hospital Medical Center as the cornerstone of its services to residents of King and south Snohomish counties. Its services include medical groups, home care, hospice, and many community health programs, including six satellite clinics. The hospital includes 26 separate, independently-managed medical departments, whose operations are as varied as the medical services performed. The procedures each

department uses to enable RNs to take meal and rest breaks vary significantly, depending on the nature of medical care provided, the size of the nursing staff, and the overlap of RNs' duties with other medical professionals.

This case[1] is the second of two lawsuits against the District seeking unpaid wages to RNs regarding alleged missed rest breaks. The first lawsuit was filed by Washington State Nurses Association ("WSNA"), the exclusive bargaining unit for RNs at Evergreen ("the *WSNA* lawsuit").[2] This suit was brought by two former Emergency Department ("ED") RNs, Debra Pugh and Aaron Bowman, who additionally sought unpaid wages for alleged missed or interrupted meal breaks.

WSNA settled its claims through a settlement agreement dated February 10, 2011 ("Settlement Agreement"). CP 831-38. During negotiations with WSNA, District representatives internally estimated possible financial exposure of up to $600,000. The estimate was based, in part, on resolutions of other lawsuits brought by WSNA against hospitals over allegations of missed breaks. CP 50, 209-210. The amount made available to settle the RNs' individual claims was $375,000, less than the District's estimated, potential maximum exposure. After the *WSNA*

[1] King County Superior Court No. 10-2-33125-5 SEA, filed Sept. 17, 2010.

[2] *Wash. State Nurses Ass'n v. King Cty. Pub. Hosp. Dist. No. 2 d/b/a Evergreen Hosp. Med. Ctr.*, King County Superior Court No. 10-2-32896-3 SEA, filed Sept. 15, 2010.

lawsuit was settled and WSNA dismissed its suit under CR 41, Plaintiffs inquired into the District's settlement strategy during a deposition, and discovered the amount of the possible exposure. CP 195, 209, 1139-49.[3]

WSNA kept its members updated on its litigation and the settlement, and held an information session to answer questions about the settlement. CP 57-65, 69-82, 86-89, 891-92. At that meeting, WSNA distributed a "Settlement Information" sheet, detailing the settlement and emphasizing in bold print: "**However, you may refuse the settlement money that Evergreen will offer you and press your own claim for back wages.**" CP 59-60, 82. Ms. Pugh attended the meeting, distributing a handout critical of the Settlement and advising of her lawsuit. CP 60, 84.

WSNA sent a letter to each RN, again describing the settlement and then stating:

> In the next few days, you will receive a letter from Evergreen, along with a check for your portion of the settlement. . . .
>
> You have the option of participating in this settlement, or choosing not to participate in this settlement. If you choose to participate, you must accept the check that Evergreen will send you and release your right to sue Evergreen for failure to provide you with rest breaks. If you want to pursue your own lawsuit, or be a participant in another lawsuit against Evergreen for backpay, you must return the check to Evergreen. . . .

---

[3] Plaintiffs sought to intervene in the *WSNA* lawsuit, but their motion was rendered moot by the dismissal. Plaintiffs appealed WSNA's dismissal in No. 66857-9-I. The briefing was completed and argument scheduled, but after the trial court in this case ruled in their favor, Plaintiffs moved to dismiss their appeal.

CP 60, 89.

The Settlement Agreement provided that the District would prepare checks and releases for individual RNs, who could decide whether or not to settle individual claims for missed breaks. CP 834. The District notified all 1,253 RNs, when submitting its settlement proposal to them, of the existence of this lawsuit. CP 115, 127-28, 1294-95.

Plaintiffs also communicated with the RNs,[4] urging them to reject the District's proposed settlement and to join Plaintiffs' case instead. Plaintiffs sought to "enjoin Evergreen from attempting to [pay the putative class members] in exchange for a release that would bar their participation in this action or undermine this class action." CP 7 (emphasis in original). The trial court denied their motion. CP 93-91. Counsel for Plaintiffs then sent a letter to the RNs, asserting that his firm could recover more for them and explicitly warning that "[y]ou cannot cash [the settlement] check and be a part of the class action lawsuit over missed rest breaks" and "[i]f you want to be a member of the rest break class action, you should return the check back to Evergreen." CP 107-08, 112-13.

The District and 1,157 RNs settled the RNs' individual claims for missed rest breaks. CP 1295. Each settling RN executed a release of "all

[4] The communications included an e-mail from Ms. Pugh using the District's internal email system, describing her lawsuit, providing the contact information for Plaintiffs' counsel and soliciting RNs to contact counsel. CP 21-28, 67. Ms. Bautista remembered the e-mail clearly and agreed with its sentiment. CP 1116-18.

claims" related to missed rest breaks and received a check. CP 1151. Of the 1,253 RNs who received settlement checks, only 19 affirmatively rejected the District's rest break settlement (one of whom later released her claims). CP 1295, 1329.

Similarly, the District settled claims for missed meal breaks. RNs reported hours worked through a software program, LaborWorkx, which allowed RNs to record missed meal breaks. CP 119. Under the District's time and attendance policy, employees are prohibited from "[r]eporting missing meals when they are not missed" and "[c]locking in early or clocking out late for the purpose of accruing incidental overtime." CP 119, 168-69. Managers review electronic timecards, and in limited circumstances, did not approve payment for some recorded missed meal periods. CP 120.[5] After this lawsuit was filed, Evergreen compiled a list of RNs who recorded missed meal breaks but were not paid. Despite good reasons for denying payment on particular occasions, the District decided to pay those RNs and sent settlement checks to each RN on the list, regardless of the reason for the managerial override. CP 120. Each check contained release and settlement language and was mailed with a letter describing this lawsuit and explaining the purpose of the check. CP 120, 172. As of August 2011, 56 of the 69 checks had been endorsed and

[5] Other RNs who recorded missed meal breaks were paid. CP 851, 875, 879, 886, 923, 928, 943, 955, 1010-11, 1015-16.

deposited or cashed. CP 120, 174-75. Only three RNs affirmatively refused to accept the meal break settlement checks – Ms. Pugh, Mr. Bowman, and Marisol Samphire, who later released her claims. CP 115, 120, 166.

One of the RNs who settled her rest break claim and executed a release was Floann Bautista. She settled her claim despite dissatisfaction both with the amount she was offered and because she knew of nurses who had never missed breaks but received money for settling potential claims. CP 1043-46, 1123, 1130. Plaintiffs amended their complaint to add Ms. Bautista as a putative representative of a sub-class, consisting of all RNs who had settled their individual claims. CP 97-105. Ms. Bautista challenged the validity of the WSNA settlement and the individual releases. Because the amended complaint directly challenged the validity of the individual RN settlements and the broader WSNA Settlement Agreement, Evergreen tendered defense of the settlements to WSNA under the indemnity provision of the Settlement Agreement. CP 182. WSNA then intervened. CP 176-88, 226-30.

Plaintiffs asked the court to certify a class of:

> All registered nurses engaged in patient care who have been employed by Evergreen Hospital Medical Center in King County, Washington and who, at any time between September 17, 2007 and the present, were denied rest and/or meal breaks

and a sub-class of:

> All members of the Class who received and cashed a check purporting to waive and resolve their rest break claims with Evergreen.

CP 312.

The District presented undisputed evidence of its uniform policy that RNs are to receive meal and rest breaks, and the wide variations among its 26 departments in the details of meal and rest break implementation. CP 115-18, 904-73, 1009-17, 1053-58. The District presented unrebutted evidence of the unique nature of nursing practice in the ED with its completely unscheduled patients, where two of the three putative class representatives worked. CP 118, 958-62. Even within the ED, Ms. Pugh testified that "[d]ay shift pretty much always gets their breaks." CP 1035. The District also presented detailed declarations describing differences among the medical departments that have a direct impact on whether an RN might miss a break.

Home health RNs work almost entirely away from the District's facilities and have full control over the timing of their breaks. CP 971. They do not "punch the clock." CP 972. Many of the District's medical departments are highly scheduled, unlike the ED. The Cardiovascular Health and Wellness Center ("CWC") has no unscheduled patients. CP 905. Its RNs have offices where they may eat and drink because the

offices are not "treatment areas." CP 906. The duties of RNs in the CWC overlap with other health care professionals; for example, an RN may get break relief not only from other RNs, but also from exercise physiologists in that department. CP 905-06. Radiation Oncology is another outpatient clinical service at the hospital's main campus whose medical practice is entirely divorced from the experiences alleged by Plaintiffs. Radiation Oncology is open from 8 a.m. to 5 p.m., Monday through Friday. Nearly all its work is scheduled. It typically does not schedule patient visits during the noon hour that require an RN to be present. RNs take their morning and afternoon breaks in between scheduled patient appointments. CP 955.

Some departments use a "buddy" system to help ensure that RNs get their breaks. "Buddies" spell each other, providing a specifically identified relief nurse. CP 941. The Family Maternity Center has used the "buddy system" because labor and delivery nurses can perform the duties of post-partum nurses, but the reverse is not so. CP 941-42. Other departments, with different medical practices, use a departmental team approach where all RNs are active in ensuring that anyone needing a break gets it. CP 922, 936, 1010. The ED uses a "team" approach, but Mr. Bowman and Ms. Pugh did not cooperate, refusing to take breaks when

offered, and later complaining that they had been unable to get a break. CP 960-62.

The ED is one of the largest departments in the hospital, with 54 full-time or part-time RNs, and another 20 RNs in the *per diem* pool. *Per diem* RNs fill in on busy days or for last-minute sick calls. CP 960. The ED is staffed based on a projection of 150 patients a day. CP 960. If the census for the day is less than that, RNs are likely to have more flexibility in taking breaks. CP 960. How busy RNs are also depends on the severity of patients' conditions. A seriously ill or injured ("high acuity") patient may have a single RN dedicated to her care, whereas an RN may provide care to seven low acuity patients. CP 959-60. The overall nurse to patient ratio goal is 1:4 when scheduling RNs for a shift. CP 959.

The ED treats the broadest range of ailments and injuries, and its patient load on any given shift is unpredictable. The ebb and flow of the ED means that when things are slow, RNs may attend to personal business, rest, surf the internet, or eat. Their breaks may be broken up on busy shifts. CP 118, 960.

Plaintiffs introduced testimony from RNs in some departments,[6] stating that they had missed breaks. Plaintiffs' own witnesses related different experiences about whether they missed breaks, even within the

[6] Of the Plaintiffs' declarations involving clinic-based RNs, most were from four departments and all appear to be from Evergreen's main hospital campus. CP 1024.

same department. *Compare* CP 710 *with* CP 736; *see also* CP 250, 285, 292-93.

The District also presented testimony from RNs, some of whom worked with Plaintiffs' witnesses in the same department, indicating that those RNs had had no difficulty getting the breaks to which they were entitled. CP 940, 945. The District also presented testimony that one of Plaintiffs' witnesses regularly spent substantial time socializing or attending to personal matters during shifts, while claiming to have missed her breaks. CP 923.

Plaintiffs moved for partial summary judgment to invalidate the WSNA Settlement Agreement, the individual releases and dismiss WSNA from the lawsuit. CP 414-37. The District cross-moved for summary judgment, presenting evidence that putative class representative Bautista knowingly released her rest break claims. CP 1113-37, 1151, 1266-93.

On March 14, 2012, the trial court issued two orders granting Plaintiffs' motion for class certification, granting Plaintiffs' motion for partial summary judgment, and denying Evergreen's cross-motion for partial summary judgment. CP 1330-45. Evergreen filed its notice of discretionary appeal on March 23, 2012, CP 1346-66, and this Court granted discretionary review on August 1, 2012.

IV. SUMMARY OF ARGUMENT

Washington's strong public policy is to encourage private settlements of disputes. Here, the trial court ignored that public policy, foisting a CR 23(e) standard on a non-class action lawsuit, invalidating the settlement between the District and WSNA. It then invalidated 1,157 separate settlements between the District and individual RNs at the request of a single RN who experienced buyer's remorse after knowingly releasing her claims. All settlements involve a compromise of claims and defenses, and the fact that the District paid the RNs less than its estimated potential maximum exposure does not render the individual settlements invalid. The court's ruling conflicts with established precedent and puts at risk all settlements of disputed claims.

The trial court's class certification order also conflicts with binding precedent by adopting a mere pleading standard, rather than conducting a rigorous analysis to determine whether Plaintiffs met their burden of establishing all of the requirements of CR 23. The court ignored Plaintiffs' and the District's evidence of widely varying facts among its 26 medical departments, which eliminates the possibility of common facts predominating and a common answer to the question of whether RNs were able to take rest breaks. The court also ignored evidence of significant dissimilarities between Ms. Pugh's and Mr. Bowman's alleged

experiences of missed breaks and those of other RNs, even within the same department, in determining that they were representative of the putative class. The court further ignored the fundamental conflict between Ms. Bautista, as putative class representative of the putative sub-class of RNs who settled their rest break claims, and the RNs who desired the settlement.

V. ARGUMENT

A. Washington strongly favors private resolution of disputes. The court should not have permitted Ms. Bautista to avoid her settlement and mount an attack on the WSNA settlement, nor should the court have invalidated 1,157 RNs' settlements.

Courts enforce settlement agreements because they advance the strong public policy in favor of settling disputes. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). "Public policy strongly favors resolving disputes by extrajudicial means." *Yates v. State Bd. for Cmty. Coll. Educ.*, 54 Wn. App. 170, 176, 773 P.2d 89 (1989). Ms. Bautista settled her claims against the District, fully understanding what she was doing, despite dissatisfaction with the terms. Dissatisfaction with her bargain or a desire not to abide by her agreement is no basis to set aside her settlement. *In re Marriage of Ferree*, 71 Wn. App. 35, 45, 856 P.2d 706 (1993).

1. The trial court erred by grafting class action settlement rules to a non-class action proceeding.

The trial court held that because WSNA filed its lawsuit "under a legal theory of associational standing, any settlement that followed would be maintained under class action rules" and that "court approval of [the Settlement Agreement] was not optional and it should have been obtained as mandated by CR 23(e)." CP 1342-43. The court cited *Pickett v. Holland Am. Line-Westours*, 145 Wn.2d 178, 187-88, 35 P.3d 351 (2001), as authority for this conclusion. CP 1343. It is not.

Pickett was a class action lawsuit in which the court conditionally certified a class under CR 23 for settlement purposes. Under the express language of CR 23(e), court approval of the settlement was required. Unlike *Pickett*, the *WSNA* lawsuit was neither filed nor certified as a class action. There is no legal authority for the trial court's conclusion that court approval was required for the Settlement Agreement. As the court noted, Evergreen and WSNA filed a joint motion to approve the Settlement Agreement in the *WSNA* lawsuit. WSNA and Evergreen did not, however, "believe[ ] court approval of the settlement was necessary." CP 1342. Instead, they made clear that court approval was ***not*** required and that the standards of CR 23(e) were used merely by analogy.

The trial court relied on plaintiffs' assertion that "both WSNA and Evergreen told the . . . Court in the WSNA lawsuit that court approval was required." CP 432. The assertion was patently false – in their joint motion, the District and WSNA explained that "[w]hile there is no legal requirement that the parties obtain approval of the settlement, the parties have jointly agreed to seek court approval." CP 397. The District and WSNA determined that court approval was not needed after a status conference on February 25, 2011, in which Judge Middaugh questioned whether the court had authority to approve the settlement. CP 53. Due to the judge's comments, the District and WSNA presented a stipulated order of dismissal, which the court signed the next day. CP 1139-46.

Court approval of settlements applies only to a narrow category of cases, such as class actions, shareholder derivative suits, and actions against joint tortfeasors. *See, e.g.*, CR 23(e); CR 23.1; RCW 4.22.060; *Leader Nat'l Ins. Co. v. Torres*, 113 Wn.2d 366, 373, 779 P.2d 722 (1989). Otherwise, parties to a lawsuit retain the right to negotiate a settlement of claims free from the interference of non-parties or court supervision of the negotiations.

The Settlement Agreement required court approval only to the extent the parties "deemed" such approval "appropriate and necessary and/or required." CP 837. The express public policy of Washington State is to

encourage settlement, and a settlement can be made before or after a lawsuit is filed. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000); KARL B. TEGLAND, 15 WASH. PRACTICE § 53.1 (2d ed. 2009). The settlement and the stipulated dismissal of the *WSNA* lawsuit were entirely consistent with the State's strong public policy and real world practice. It is irrelevant whether counsel for the District and WSNA initially thought it advisable to seek court approval of the settlement.[7]

2. The trial court erred by invalidating the WSNA Settlement Agreement.

The trial court analyzed WSNA's associational standing to file the *WSNA* lawsuit, determined that WSNA lacked standing, and thus ruled that the Settlement Agreement was invalid. According to the court, "controlling case law" requires standing before a union can reach a settlement with an employer. CP 1341. Neither case cited by the court, *Int'l Ass'n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) or *Teamsters Local Union v. Dep't of Corr.*, 145 Wn. App. 507, 187 P.3d 754 (2008), addresses settlement agreements between a union and employer. The additional case cited by Plaintiffs in their

[7] Court approval of a settlement in a class action is required because settlement binds all members of the class. Here, the WSNA Settlement Agreement was only binding on Evergreen, WSNA, and those RNs who later adopted it.

motion, *Lierboe v. State Farm Mut.*, 350 F.3d 1018 (9th Cir. 2003), was a class action and also does not address settlement agreements.

The trial court ignored WSNA's status as "the sole and exclusive bargaining representative" of the RNs at Evergreen with respect to "wages, hours of work and conditions of employment." CP 629, 669. This status gives WSNA the right to negotiate with Evergreen to resolve a grievance or amend the terms of the collective bargaining agreement. CP 653-55 (§§ 16.1, 16.2, 17.1). Unlike putative class representatives like Ms. Pugh, Mr. Bowman, and Ms. Bautista, WSNA had the right to negotiate the terms and conditions of employment with the hospital district. Standing to sue for damages is a red herring for two reasons. The Settlement Agreement is a *contract* between the WSNA and the District, not court-provided relief. Whether it is enforceable is a question of contract law, not standing. Furthermore, it was not binding on the RNs unless they agreed.

3. The trial court erred by invalidating the individual releases signed by over 90% of the RNs. The releases are valid, either as accords and satisfactions or ratification of the WSNA settlement.

Over 90% of the District's RNs settled their individual claims for amounts that might have been due because of missed breaks by accepting settlement checks and executing releases of claims. When a debtor and

creditor agree to settle a claim by some performance other than that which is claimed due, and the creditor accepts, the substituted performance is full satisfaction of the claim. *Northwest Motors, Ltd. v. James*, 118 Wn.2d 294, 303, 822 P.2d 280 (1992). Accord and satisfaction requires a *bona fide* dispute, an agreement to settle the dispute for a certain sum, and performance of the agreement. *Perez v. Pappas*, 98 Wn.2d 835, 843, 659 P.2d 475 (1983).

If an amount owed is unliquidated or disputed, accord and satisfaction may be implied from surrounding circumstances. *U.S. Bank N.A. v. Whitney*, 119 Wn. App. 339, 350, 81 P.3d 135 (2003). The creditor's acceptance of a check tendered in full payment creates an accord and satisfaction, binding both parties. *Id.*

Accord and satisfaction requires a meeting of the minds, determined by the objectively manifested conduct of the parties. An accord and satisfaction is established when payment is offered in full satisfaction and accompanied by conduct from which the creditor cannot fail to understand that payment is tendered on condition that its acceptance constitutes satisfaction. *U.S. Bank*, 119 Wn. App. at 351; *Ingram v. Sauset*, 121 Wash. 444, 446-47, 209 P. 699 (1922). In *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 410, 36 P.3d 1065 (2001), an accord and satisfaction was formed when the insured deposited a settlement check given in "full

settlement" of his claim and which was accompanied by a letter from the insurance company confirming the settlement.

Ms. Bautista testified that she understood that by signing the check she was settling her claims against the District. CP 1133. The settlement check included a specific statement of settlement. The District tendered the check in final payment and Ms. Bautista deposited it, thereby accepting that payment. *Dep't of Fisheries v. J-Z Sales Corp.*, 25 Wn. App. 671, 680, 610 P.2d 390 (1980). Ms. Bautista assented to the accord when she deposited the District's check.

The trial court acknowledged that the District correctly "state[d] the law concerning the defense of accord and satisfaction," but ruled that the RNs' releases are invalid because the Settlement Agreement is invalid. CP 1344. Even had WSNA lacked authority to enter into its Settlement Agreement, the releases are independent agreements between the RNs and the District. "An accord and satisfaction is a new contract – a contract complete in itself. Its enforceability does not depend on the antecedent agreement." *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 46, 185 P.3d 640 (2008) (internal citation omitted).

Alternatively, RNs who cashed the settlement checks ratified the Settlement Agreement. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done

on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Nat'l Bank of Commerce v. Thomsen*, 80 Wn.2d 406, 413, 495 P.2d 332 (1972). Affirmance is "a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized." *Id.* Each RN who accepted the settlement payment expressly ratified the Settlement Agreement: "By endorsement, depositing and/or cashing of this check the payee acknowledges . . . acceptance of the Settlement Agreement between Evergreen Healthcare and the WSNA." CP 1151.

Ms. Bautista, the putative representative of the subclass, admitted that she read Evergreen's letter and the settlement language on the check, which explained the terms upon which the District offered to settle her missed rest break claims. CP 1124, 1132. She testified she understood that:

- She could decide not to cash the check;
- She could consult an attorney regarding her rights;
- She could consult a WSNA representative regarding any questions she had concerning the settlement; and
- Evergreen would not retaliate if she rejected the check.

CP 1129-32. She signed her check with eyes wide-open to its legal effect:

- She read the release language above her signature before signing;
- She understood the release language; and
- She understood that by signing the check she was reaching a settlement with Evergreen.

CP 1132-33. She admitted that, despite an earlier declaration to the contrary, she was not misled by Evergreen' settlement letter:

> Q: Can you tell me how you believe misled [sic]?
> A. The letter that was accompanying the check? More that I was really disappointed by the settlement. That I was disappointed by the settlement.
> Q: But was there anything inaccurate in the letter that you received from Evergreen?
> A: No, it was well explained, but I just thought it was still, again, unfair.

CP 1134. Dissatisfaction does not render a bargain invalid. *In re Marriage of Ferree*, 71 Wn. App. at 45.

Plaintiffs have asserted that the District misled the RNs to settle their rest break claims because it "admitted" that nearly twice as much was owed to the RNs. There was neither misrepresentation nor admission. First, the supposed "admission" of an amount due was in the context of deposition testimony about the District's mediation with WSNA and its estimated possible maximum financial exposure of $600,000. CP 209-10. Evergreen's representative testified that Evergreen was unable to determine "what amount would be owed to each of the current or former nurses who missed rest breaks." CP 206. Second, there is no evidence the District used its position to induce reliance and mislead the RNs about the potential value of their claims. In fact, the individual RNs were in a better position than Evergreen to assess how many rest breaks they might have missed over the years and what might constitute fair compensation for

those breaks, based on their own subjective considerations. Illustrating this point, Ms. Bautista testified that she believed that she was owed more in back wages than the amount of her check, but she decided to sign it nevertheless. CP 1122-23, 1130.

The trial court should have granted summary judgment to the District, and enforced the settlement to which Ms. Bautista expressly agreed.

4. The Court should not have invalidated the individual settlements of over 1,100 other RNs because Ms. Bautista failed to show she is representative of the vast majority of RNs.

The trial court invalidated not only Ms. Bautista's own release, but the individual releases of over 1,100 other RNs – without their request – and in the face of declarations from RNs that they wanted to settle their claims under the terms of the agreement with the District. *See, e.g.,* CP 846, 853, 857, 861, 864, 868, 871, 875, 879, 883, 886, 889, 902-03. As discussed below, Part V.B.4, Ms. Bautista's interests are not aligned with other settling RNs. She is not representative of the proposed subclass members. The trial court set aside all 1,157 individual settlements without the request of those individuals or a putative class representative who actually shared their interests.

B. The trial court adopted a mere pleading standard for certifying the class and the sub-class, contrary to CR 23 and controlling precedent. Plaintiffs failed to demonstrate actual compliance with all CR 23 requirements.

1. Certifying a class based on common allegations rather than demonstrated common facts contravenes controlling precedent and CR 23.

Plaintiffs had the burden of demonstrating that each requirement of CR 23 is met. *Miller v. Farmer Bros. Co.,* 115 Wn. App. 815, 820, 64 P.3d 49 (2003). Meeting the burden requires more than mere allegations that certification is warranted. *Weston v. Emerald City Pizza*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007); *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002). A trial court must conduct a "rigorous analysis" ensuring the prerequisites of CR 23 have been satisfied, *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 67, 244 P.3d 32 (2010), which includes considering countervailing evidence submitted by the defendant. *Weston*, 137 Wn. App. at 171-73.

But the trial court granted class certification

> because Plaintiffs ***allege*** a common course of conduct as the basis of their claims. Plaintiffs ***allege*** that the Defendant failed to provide 10-minute rest breaks and 30-minute meal breaks required by Washington law to registered nurses. Plaintiffs ***allege*** that inadequate staffing by Evergreen has resulted in the inability of nurses to take their breaks. Accordingly, the Court CONCLUDES that the requirements of CR 23(a)(2) and (3) are met.

CP 1331 (emphasis added). The trial court did not go beyond Plaintiffs'

allegations. Washington's approach is consistent with the U.S. Supreme Court's analysis in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011), which noted that "Rule 23 does not set forth a mere pleading standard." In *Oda*, this Court rejected the trial court's reasoning that, in evaluating a motion for class certification, "I am to, in effect, take the substantive evidence as it's pleaded, unless it is so unreasonable that it can't be true, or unless there is something directly refuting it." *Oda*, 111 Wn. App. at 93. According to this Court, "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Id.* at 94 (*quoting Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). The trial court's failure to conduct a rigorous analysis is contrary to CR 23. The order granting class certification adopts a mere pleading standard on its face, and is wrong.

2. The trial court erred not only by accepting Plaintiffs' mere allegations as sufficient, but also by disregarding undisputed evidence that commonality is absent.

Although plaintiffs may plead identical claims, that does not mean that the facts underlying the claims are common. The *Wal-Mart* Court denied class certification for causes of action based on illegal employment practices. 131 S. Ct. at 2547, 2550-57. Plaintiffs must identify a "specific

employment practice" that ties together the generalized claims for the large putative class. 131 S. Ct. at 2556. In *Wal-Mart*, even 120 anecdotal affidavits failed to establish that the entire company operated under a general policy that would warrant class certification. Here, there is no dispute that the District's policy is to provide breaks to RNs. The dispute is over how the policy is implemented across its 26 departments and multiple sites.

Plaintiffs alleged wage claims that are identical for putative members of the class, but failed to demonstrate common facts underlying the claims.[8] The facts do not support the allegation. Instead, they refute the existence of common answers, not only to whether missed breaks are common, but also to what might cause a missed break. Ms. Pugh testified that her "problem" with rest breaks did not even extend to other shifts in the ED – negating commonality. CP 1035. Where Plaintiffs' proof does not apply to some operations or to some time periods, or where it is shown not to apply, the Plaintiffs have failed to meet their burden. *Beck v. Boeing Co.*, 203 F.R.D. 459, 464 (W.D. Wash. 2003) (certification of

[8] *Wal-Mart*, 131 S. Ct. at 2551 ("Any competently crafted class complaint literally raises common 'questions.' . . . What matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." (*quoting* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 131-32 (2009)).

nationwide class denied where plaintiffs failed to adduce evidence of similarities across facilities and time periods).

Commonality is refuted by testimony from RNs in other departments too: "RNs in our unit [PACU] nearly always get their rest and lunch breaks," CP 840; "In my unit [CPC] everyone pretty much always gets their rest and meal breaks . . . ," CP 875; "In PCU we pretty regularly get our rest and meal breaks . . . ." CP 879. Plaintiffs alleged that meal breaks were interrupted, but even their submitted evidence showed that RNs' individual decisions directly affected whether their break might be interrupted. CP 706, 713, 718, 721, 736, 739, 755; *see also* CP 944-45, 1101. Employees may waive meal breaks. *Meal and Rest Periods for Nonagricultural Workers Age 18 and Over*, Wash. Dep't of Labor & Indus. Admin. Policy No. ES.C.6 at 4 (Appendix at A-4). Waiver is an individualized determination. For example, RNs, who took their hospital-issued cellular phones to lunch despite the District's policy against doing so and were interrupted by calls have waived the right to an uninterrupted meal period. WAC 296-126-092 requires that employers allow an employee a meal period. Interpreting its similarly-worded statute, California's Supreme Court concluded that an employer is not required to police whether employees do work on their meal break, so long as they have been released from duty. *Brinker Restaurant Corp. v Superior*

Court, 53 Cal. 4th 1004, 1040-41, 273 P.3d 513, 139 Cal. Rptr. 3d 315 (2012).

The District conferred substantial discretion to department managers to implement break policies because of the wide variation in needs in different practice areas. In the surgery department, to help protect sterile operating rooms from contamination risks, breaks and lunches were combined into an hour-long period, and scheduled in between surgeries. CP 931-32. The District's Comprehensive Procedure Center develops its RN schedule the prior day, setting times for breaks in between scheduled medical procedures. CP 1055-56. The manager of the Women's Services Department (obstetrics, gynecology and *post partum* care) developed a form to track breaks on a daily basis to help ensure that RNs got their rest and meal breaks. CP 943, 950-51. In the Cardiovascular Health and Wellness Center, all patient care (primarily exercise classes and monitoring) is scheduled. There are no "drop-in" patients, so the manager is able to schedule downtime when the RNs and other professionals may take breaks. CP 906-08. In the Critical Care Unit (called the ICU in common parlance), there is frequent downtime aside from formal breaks and nurses are free to, and do, read, attend to personal business and eat. CP 922. Even within departments, individual managers tailor break relief implementation to the particular shift. The pre-op and post-op ward is

busier during the day when surgeries are being performed, but slower once the surgeries are done. CP 1010. In addition to relief from the regular RNs on a shift, this department's charge nurse, admitting nurse and manager were available to provide break relief as needed. CP 1009-10.

The make-up of an individual department's staff also affects how managers implement break relief. The District's Acute Rehabilitation Unit primarily uses a "team" approach to provide RNs with their rest breaks, but its staff also includes two "Case Managers." These are RNs whose primary function is not direct patient care, but who provide break relief as needed. CP 927. RN duties in the CWC overlap substantially with exercise physiologists, who can provide break relief. CP 905-06. The CWC manager described a missed break as an "isolated phenomenon." CP 908. The Women's Services Department has RNs trained in Labor & Delivery and mother-baby care. Labor & Delivery RNs can perform the duties of *post-partum* RNs, but the reverse is not true. Admission and triage RNs within the department are available to provide breaks to RNs in direct patient care. CP 972.

The District introduced testimony from a 20-year veteran of the Home Health Department detailing how RNs in that department deliver care and that she had "never found it difficult to get my breaks." CP 970. None of the RNs in the Radiation Oncology Unit has ever reported

missing a rest break. CP 955. Mr. Bowman and Ms. Pugh reported that they were unable to take breaks even on days when the ER's patient load and patient acuity were below average. The manager testified that "there was simply no work load explanation for their asserted inability to take breaks." CP 961.

Inexplicably, the trial court stated that "[t]he parties agree that a substantial number of nurses often missed their rest breaks and meal breaks during the approximate period September 2007–February 2011," "[t]he required rest and meal breaks were frequently missed due to various staffing issues and the daily emergencies that are a normal part of the functioning of any hospital," and despite Evergreen's break policy, "[i]t is . . . undisputed that . . . the actual practice was often in conflict with the legal requirement of providing necessary rest and meal breaks." CP 1336. Mr. Bowman testified he missed breaks even though he was attending to personal matters "on down time when I didn't have any patients or the patients had gone off for tests when I was not involved in any kind of patient care." CP 1029. It appears that the court completely disregarded the evidence.

Wal-Mart addresses both specific requirements for bringing class actions and important judicial policy decisions regarding use of class action litigation to "leverage" individual cases by conflating the common

fact requirement with merely pleading the same causes of action. Class actions are for common facts, not similar causes of action with individualized factual determinations. 131 S. Ct. at 2550-51. Here, the causes of action alleged may be similar, but the essential facts diverge – widely.

This record starkly contrasts with *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684, 267 P.3d 383 (2011), relied on by Plaintiffs, where this Court noted that "the consistency of the class member testimony regarding the policies and practices at Brink's with respect to rest and meal breaks confirms its representative nature." Instead, this case resembles *Oda v. State*, where the plaintiffs' evidence of discrimination in a single department "cannot be assumed to represent a common and typical course of conduct across the entire University because evaluations of merit are localized at the departmental level." *Oda*, 111 Wn. App. at 100. Certification should have been denied.

3. The requirement that common facts predominate under CR 23(b)(3) is an additional and more stringent requirement. Common facts will not predominate among RNs spread across 26 independently-managed departments and multiple locations.

The requirement that common questions of fact and law predominate under CR 23(b)(3) is more stringent that the commonality test under CR 23(a). This often means that the "commonality" inquiry is subsumed in

testing predominance. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20, 65 P.3d 1 (2003). Common facts will not predominate, even on fundamental questions of whether breaks had been missed. This is illustrated by Mr. Bowman's testimony about what he considered a missed break. In determining that he had been denied breaks, he concluded that resting or attending to personal matters do not constitute a break. He specifically disclaimed counting intermittent rest periods in deciding whether he had "missed" a break on any given day. CP 1029-30.

Washington law permits intermittent breaks, so long as they total 10 minutes. Scheduled breaks are not required. WAC 296-126-092(5). The Department of Labor and Industries has further explained what constitutes a "rest period" and an "intermittent rest period." Dep't of Labor & Indus. Admin. Policy No. ES.C.6 at 4-5 (Appendix at A-4 – A-5). An intermittent rest period is an interval "of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion." *Id.* at 5. If a rest period is interrupted, the employee is entitled to the remainder of the rest period time. *Id.*

Ms. Pugh's definition of "unremitting work" includes internet surfing for another job while on the clock. CP 961. Plaintiffs introduced a declaration from Ms. Adimathra that she regularly missed breaks. CP 764-65. The assertion of "missed" breaks was controverted by testimony

that Ms. Adimathra regularly spent significant amounts of time chatting or attending to personal matters during her shift. CP 922-23. An employee may decide how to spend time during her rest breaks.

Home Health RNs work on their own, off site, with full control over the timing of their breaks. CP 969-71. Facts related to their claims will not be the same as on-site RNs working with other medical staff.

The availability of intermittent breaks during shifts will require individualized inquiries, and differences in the nature of the medical practices among the 26 departments will also have an impact on whether common facts predominate. Common issues predominate where, for example, the key question is whether a class of employee qualifies for an overtime exemption under the Minimum Wage Act. *Miller v. Farmer Bros. Co.,* 115 Wn. App. at 825-26. Whether RNs in a particular department took full or even intermittent breaks during a particular shift is not amenable to class-wide resolution.

4. The putative "class representatives," all of whom are *former* employees and from only two of Evergreen's 26 medical departments, cannot adequately represent the rest of the putative class members.

The trial court's "finding" that Plaintiffs would adequately represent the putative class members reflects not the required "rigorous analysis," but only a recitation of CR 23(a)(4). CP 1331. Ms. Pugh and Mr.

Bowman worked in the ED (unique among medical departments) and cannot adequately represent the broadly asserted putative class, which would necessarily include numerous nursing disciplines. The facts surrounding their individual claims are not representative of other RNs. Both affirmatively refused to take rest or meal breaks when offered. CP 961. Each has adopted an atypical definition of a break. Unlike most of the class they seek to represent, neither is an Evergreen employee. Neither are representative of Evergreen RNs.

Plaintiffs have failed to show that Ms. Bautista is representative of the subclass. Despite full disclosure of Plaintiffs' lawsuit and the efforts of Plaintiffs and their counsel to dissuade RNs from settling, over 91% of the possible subclass members elected to settle their claims with the District. The RNs have indicated that Ms. Bautista does not represent their interests by already rejecting further litigation.

Furthermore, her interest in setting aside the Settlement Agreement and individual releases directly conflicts with other RNs who settled. Ms. Bautista was dissatisfied with the Settlement Agreement and release because she knew of RNs who did not miss breaks but received more than she. The court's order invalidates their settlements as well. RNs who might be unable to prove potential claims or whose payment under the

Settlement Agreement and individual releases exceeds the amount that could be proved through litigation are adverse to Ms. Bautista's interests.

Putative representatives from one part of a large organization do not presumptively represent workers elsewhere in the organization. As part of Plaintiffs' burden to demonstrate compliance with the rule, the burden was on them to come forward with evidence. *See Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122, 126 (W.D. Wash. 1982) (noting that record contained no evidence of adequacy of representation of employees in other parts of the company, or with different roles).

Employees and non-employees often have different interests, and an individual cannot represent both. *See, e.g., Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 158, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (applicants and current employees have conflicting interests in employment discrimination because of seniority and fringe benefits). Current and former District employees have conflicting interests over retroactive and forward-looking relief. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974) ("Conflicting or antagonistic interests among class members . . . may render a class action an improper vehicle for seeking vindication of a given right."); CP 840-90, 901-03.

5. Defining the class in terms that requires determining liability in order to determine class membership is error.

Plaintiffs "have an obligation to define the class in a way that enables the court to determine whether a particular individual is a class member." *Safran v. United Steelworkers of Am.*, 132 F.R.D. 397, 400-01 (W.D. Pa. 1989). Here, the court defined the class as "[a]ll registered nurses . . . who . . . were denied rest and/or meal breaks." CP 1331. Evergreen disputes the very assertion that any RNs were denied rest and/or meal breaks, but the class definition predetermines Evergreen's liability. "Generally, it is inappropriate to define a class in such a way that class membership cannot be identified until the merits are resolved." *In re: Wal-Mart Wage & Hour Emp't Prac. Litig.*, 156 Lab. Cas. (CCH) P35,445 (D. Nev. 2008); *see also Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63-64 (D. Nev. 1985). An adequate class definition must "(1) specify[ ] a particular group that was harmed during a particular time frame, in a particular location, in a particular way; and (2) facilitat[e] a court's ability to ascertain its membership in some objective manner." *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986) (class could not be certified because the definition "made class members impossible to identify prior to individualized fact-finding and litigation" and thereby

failed "to satisfy one of the basic requirements for a class action under Rule 23").

VI. CONCLUSION

The trial court should be reversed in all respects. Summary judgment should be granted to the District on the validity of the WSNA Settlement Agreement and Ms. Bautista's individual settlement. The summary judgment invalidating the WSNA Settlement Agreement and individual RN releases should be reversed. The order certifying the primary class and the subclass should be reversed and a denial entered in its stead.

Respectfully submitted this 15th day of October, 2012

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on October 15, 2012, I caused service of the foregoing to the following counsel of record:

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Dated: October 15, 2012

Lee Wilson

Lee Wilson

Appendix

ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE: **MEAL AND REST PERIODS FOR NONAGRICULTURAL WORKERS AGE 18 AND OVER**

NUMBER: ES.C.6

REPLACES: ES-026

CHAPTER: **RCW 49.12**
WAC 296-126-092

ISSUED: 1/2/2002
REVISED: 6/24/2005

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1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

Note: **Minor employees** (under 18) and **agricultural workers** are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.

2. Are both private and public employees covered by these meal and rest period regulations?

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. *See Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements.*

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

5. When is a meal period required?

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.

- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.

- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).

- The second 30-minute meal period must given within five hours from the end of the first meal period and for each five hours worked thereafter.

6. When may meal periods be unpaid?

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

7. When must the meal period be paid?

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean than an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

9. What is the rest period requirement?

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

10. What is a rest period?

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

11. When must rest periods be scheduled?

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

12. What are intermittent rest periods?

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

13. How do rest periods apply when employees are required to remain on call during their rest breaks?

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

14. May an employer obtain a variance from required meal and rest periods?

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. *See ES.C.9, Variances.*

15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. *See Administrative Policy ES.A.6 and/or ES.C.1.*