

FILED
COURT OF APPEALS
DIVISION II

2016 APR 21 PM 1:49

STATE OF WASHINGTON

BY


DEPUTY

No. 47812-9-II

THE COURT OF APPEALS, DIVISION II

State of Washington

DREW OTA, CRAIG GARDNER, ET AL,

PLAINTIFFS

v.

PIERCE COUNTY,

DEFENDANT

APPELLANT'S REPLY BRIEF

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TABLE of CONTENTS

Law and Argument.	1
<i>The Lew v. Seattle School District case is not applicable..</i>	1
<i>The county paid COLA increases, although it failed to properly provide “step” raises.</i>	2
Conclusion	4

TABLE of AUTHORITIES

Washington Cases

Lew v. Seattle School Dist. No. 1, 736 P.2d 690,
47 Wn.App. 575 (Wash.App. Div. 1 1987) 1

APPLICABLE LAW AND ARGUMENT

The Lew v. Seattle School District case is not applicable.

The county relies on *Lew v. Seattle School Dist. No. 1*, 736 P.2d 690, 47 Wn.App. 575 (Wash.App. Div. 1 1987) for the proposition that a collective bargaining grievance process provides the exclusive remedy, or that at least, there is no independent statutory right to file a wage-hour claim, or that the union must be also made a defendant.

The facts of *Lew* are a little sketchy, but the case started with a parental complaint about a school counselor. The school district made investigation and found that appellant's conduct warranted a written admonition and a transfer to a different position. See *Lew*, 47 Wn.App. at 576.

Whatever can be said of *Lew*, it's just not a **wage** claim that was made. Accordingly, the *Lew* plaintiff could not rely upon any independent statutory cause of action. Appellants agree that *absent* the wage-hour statute, the analysis of *Lew* would control, but because of the wage-hour statute, *Lew* is just inapplicable. Neither the union nor county can contract away plaintiff's *statutory* wage claim

because a contract doesn't overrule a statute. If so, things like minimum wage laws could be repealed simply by having a business contract for a wage below minimum wage.

The county paid COLA increases, although it failed to properly provide "step" raises.

At page 7 of its brief, the county misrepresents the "step increase history" of Craig Gardner.

There, the county presents this graph:

	Date	Step Label	Paid
	10/23/06	"Step 1"	Salary #1 (\$19.51)
1 st Anniversary	10/22/07	"Step 2"	Salary #2 (\$21.35)
2 nd Anniversary	10/20/08	"Step 2"	Salary #3 (\$24.21)
3 rd Anniversary	10/19/09	"Step 3"	Salary #4 (\$26.77)
4 th Anniversary	10/18/10	"Step 4"	Salary #5 (\$28.79)
5 th Anniversary	10/17/11	"Step 5"	Salary #6 (\$30.23)
6 th Anniversary	10/15/12	"Step 6"	Salary #7 (\$31.76)

This graph shows that in October of every year, Mr. Gardner got more in the way of hourly pay than he did the year before. That's true because wage increases under the contract were of two different natures. There were COLA raises, and revisions in the "step" wage rates. The COLA raises were honored.

In order to show that Mr. Gardner got his proper annual “step raises,” one would have to examine his hourly rate in a single year, comparing his rate **before** October 23rd of, say, 2010, with his rate **after** October 23rd in 2010. That’s so because he would properly receive “step” raises on his anniversary date. The county hasn’t shown the court a comparison of Mr. Gardner’s before and after October pay in any given year. That’s because the county is trying to trick the court into believing that all the proper contract raises were actually delivered.

If the court compares Mr. Gardner’s rate in January of every year, with his rate in December of the year before, there would be a discernable increase even though in January he should receive **no** “step” increase as his “step” increases would occur on the anniversary dates of his hire, and therefore occur in late October of each year. Yet, without any “step” increase at all, the January rate would exceed the December rate by that year’s COLA increase.

The graph showing that Mr. Gardner was paid more in October of every year than he was paid the year before thus shows nothing more than the county honored the COLA provisions, even though it played around with, and did not properly honor the “step” rate provisions. Really, that’s the

county trying to trick the court into believing that the county honored the contract when it did not.

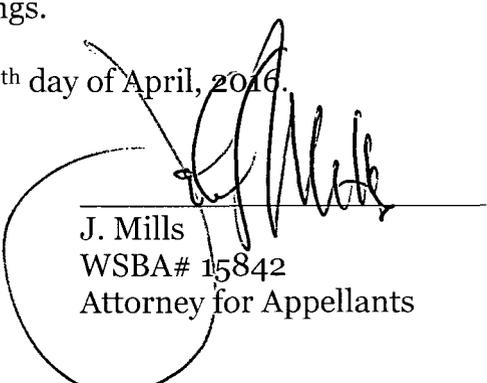
CONCLUSION

The Superior Court is the proper forum for litigating the issues in this case because Washington's wage-hour statutes provide an independent basis granting employees the right to prosecute a civil action in Superior Court. The *Lew* case is not about wages.

Mr. Gardner was paid more each October than the month before because of COLA increases that were honored. That information doesn't defeat a claim that the county failed to pay "Step" wage increases that were bargained for by plaintiffs.

The trial court should be reversed as to its summary dismissal, and the case remanded for a trial for further appropriate proceedings.

DATED this 19th day of April, 2016.

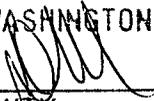


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STATE OF WASHINGTON

BY 
DEPUTY

WASHINGTON STATE COURT OF APPEALS
Division Two

Drew Ota, Craig Gardner, Robert
Desmond, Robert Brink, Alec
Williams,

Plaintiffs,

Vs.

Pierce County, a political
subdivision of the State of
Washington,

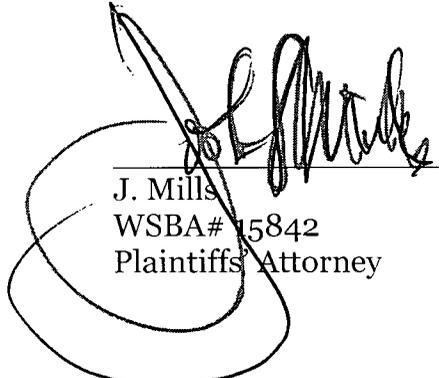
Defendant.

COA No. 47812-9-II

SERVICE DECLARATION (REPLY
BRIEF)

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that on April 21, 2016, I served a true copy of appellant's opening brief on counsel for the appellee by delivering a copy in .pdf format by email to Mr. Scott, counsel for Pierce County. See attached email.

DATED this 21st day of April, 2016.



J. Mills
WSBA# 15842
Plaintiffs Attorney

J. Mills

From: J. Mills <jmills@jmills.pro>
Sent: Thursday, April 21, 2016 12:30 PM
To: 'Debbie Bond'
Subject: FW: Reply Brief and Motion to Extend Time
Attachments: Motion to Extend Time.pdf; Brief as filed.pdf

FYI - Sent off to Drew earlier.

J. Mills, return mail: jmills@jmills.pro, Address: 201 Atrium Court, 705 South 9th Tacoma, WA 98405; phone: (253) 226-6362

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From: J. Mills [<mailto:jmills@jmills.pro>]
Sent: Thursday, April 21, 2016 12:29 PM
To: ascott2@co.pierce.wa.us
Subject: Reply Brief and Motion to Extend Time

Drew –

Attached is a very short Reply, and a motion to extend time for filing, since it's late under the rules.

I dumped it all at the COA today.

Don't know if this really makes much difference. At most, I think it just pre-answers questions that might come up at the oral argument. I suppose, mostly, it signals to the clerks that the briefing is complete, and they can set it for oral argument.

J. Mills, return mail: jmills@jmills.pro, Address: 201 Atrium Court, 705 South 9th Tacoma, WA 98405; phone: (253) 226-6362

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